



INSIGHT

THE ULTIMATE (BUT NOT THE ONLY) REMEDY  
FOR SECURING FUNDAMENTAL RIGHTS  
IN THE EAW SYSTEM?  
SOME REFLECTIONS ON *PUIG GORDI* AND *E. D. L.*

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ABSTRACT: This *Insight* offers a combined reading of the ECJ rulings in *Puig Gordi* and *E. D. L.*, with a view to investigating their impact on the theorisation and place of the *Aranyosi and Căldăraru* test in the EAW framework. Notwithstanding multiple calls for overcoming that twofold assessment, the Court has strenuously upheld the test's structure in subsequent case-law. Against this background, the *Puig Gordi* and *E. D. L.* rulings give further insight into the ECJ's approach towards securing fundamental rights in the EAW system. On the one hand, the Court in *Puig Gordi* has halted any aspiration to modify the *Aranyosi and Căldăraru* test; on the other hand, the *E. D. L.* ruling clarified that the test does not constitute the only avenue to protect the defendant's fundamental rights. In this light, the *Insight* shows that the *Aranyosi and Căldăraru* test shall be construed as the ultimate remedy to that aim. Executing authorities shall undergo the two-step assessment only if the EAW Framework Decision does not afford any alternative legal avenue to avoid serious risks of violation of the defendant's fundamental rights. This approach is likely to project the fundamental rights discourse in the EAW context to a new dimension. The ECJ's explicit refusal to modify the *Aranyosi and Căldăraru* test may dissuade further calls in that direction. Conversely, the ECJ reasoning discloses that the EAW Framework Decision may afford valuable and underestimated alternatives to the two-step test, whose potential still needs to be explored.

KEYWORDS: European Arrest Warrant – mutual trust – fundamental rights protection – *Aranyosi and Căldăraru* – right to a fair trial – right to health.

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## I. DOES THE *ARANYOSI* AND *CALDARARU* TEST REPRESENT THE SOLE AND UNCHANGING SOLUTION TO FUNDAMENTAL RIGHTS ISSUES IN THE EAW SYSTEM?

The Court of Justice (“ECJ”) rulings in *Puig Gordi*<sup>1</sup> and *E. D. L.*<sup>2</sup> represent a remarkable development in the European Arrest Warrant (hereinafter, “EAW”) framework. Following a long judicial saga, these preliminary references provided the Luxembourg Court with the occasion to revisit its approach towards fundamental rights protection in surrender procedures by clarifying – maybe once for all – the role and place of the *Aranyosi and Căldăraru* test.

This latter aims to assess if a risk of violating fundamental rights may warrant refusal of surrender. In particular, insofar as the executing authority determines the existence of deficiencies – whether systemic, generalised or affecting certain groups of people or certain places of detention – concerning fundamental rights protection in the issuing Member State, the warrant cannot be executed if there are “substantial grounds to believe that the individual [...] will be exposed [...] to a real risk of inhuman or degrading treatment [...] in the event of his surrender”.<sup>3</sup>

Although the test was designed to accommodate the effectiveness of the EAW system *vis-à-vis* the prohibition of inhuman and degrading treatment,<sup>4</sup> it was then adapted to other fundamental rights issues, with particular emphasis on the right to a fair trial.<sup>5</sup> Expanding the scope of the test beyond cases involving a risk of inhuman and degrading treatment gave new impetus to the debate on the role and potential of the two-step test in the broader landscape of fundamental rights protection. In that context, up to this point the Court has strenuously upheld the *Aranyosi and Căldăraru* test in subsequent case-law.<sup>6</sup> Nevertheless, the rigidity of the Court’s approach towards the protection of fundamental rights has given rise to some concern. In particular, the erosion of the rule of law in some Member States led some referring jurisdictions to question whether the test can be overstepped or at least modified. However, in *L.M.*<sup>7</sup> this question received a

<sup>1</sup> Case C-158/21 *Puig Gordi and Others* ECLI:EU:C:2023:57.

<sup>2</sup> Case C-699/21 *E. D. L. (Motif de refus fondé sur la maladie)* ECLI:EU:C:2023:295.

<sup>3</sup> Joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* ECLI:EU:C:2016:198 para. 104.

<sup>4</sup> On the evolution of the ECJ case-law on the matter, among many, see A Martufi ‘Prison Conditions and Judicial Cooperation in the EU –What Future for the European Arrest Warrant?’ (2021) *European Criminal Law Review* 188.

<sup>5</sup> Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* ECLI:EU:C:2018:586, para 79; Joined Cases C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)* ECLI:EU:C:2020:1033, para 61; Joined Cases C-562/21 PPU and C-563/21 PPU *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)* ECLI:EU:C:2022:100; Case C-480/21 *Minister for Justice and Equality (Tribunal établi par la loi dans l'État membre d'émission – II)* ECLI:EU:C:2022:592.

<sup>6</sup> E Xanthopoulou ‘Mutual trust and rights in EU criminal and asylum law: three phases of evolution and the uncharted territory beyond blind trust’ (2018) *CMLRev* 489, 498.

<sup>7</sup> 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’ (2022) *CMLRev* 113, 115.

negative answer from the Court, and the same approach has been further reiterated in *X and Y*,<sup>8</sup> as well as *W O and J L*.<sup>9</sup>

Against this background, the *Puig Gordi* and *E. D. L.* rulings inaugurated a noteworthy shift in the ECJ approach. On the one hand, the Court in *Puig Gordi* has once again upheld the structure of the *Aranyosi and Căldăraru* test (section II). On the other hand, the *E. D. L.* judgment shows that this test does not constitute the only legal avenue to address fundamental rights issues in the EAW system (section III). The implications of the two preliminary rulings are assessed herein, with a view to providing a systematisation of the Court's renewed approach (section IV) and a way forward for future debate on the matter (section V).

## II. THE *ARANYOSI AND CALDARARU* TEST REMAINS UNCHANGED: THE ECJ RULING IN *PUIG GORDI*

### II.1. FACTS OF THE CASE AND PRELIMINARY QUESTIONS

Between October and November 2019, the Supreme Court of Spain issued three distinct EAWs, seeking the surrender of three former members of the Catalan Regional Government: Carles Puigdemont Casamajó, Antoni Comín Oliveres and Lluís Puig Gordi.<sup>10</sup> They all previously fled to Belgium to avoid criminal charges of sedition and embezzlement in connection to the events following the 2017 Catalan independence referendum.

Surrender procedures in Belgium against Mr. Puigdemont Casamajó and Mr. Comín Oliveres were suspended as they became Members of the European Parliament.<sup>11</sup> Moreover, in August 2020 the Brussels Court of First Instance refused to surrender Lluís Puig Gordi. For what concerned the surrender of Mr. Puig Gordi, the executing judicial authority concluded that the Spanish Supreme Court lacked jurisdiction to hear his case.<sup>12</sup> This stance was upheld in January 2021, as the Belgian Court of Appeal affirmed that Mr. Puig Gordi's surrender would violate his fundamental rights.<sup>13</sup>

In reaction to the refusal to execute the EAW, the issuing judicial authority referred several preliminary questions to the ECJ. Firstly, the Spanish Supreme Court asked whether the executing authority can refuse the execution of the warrant by questioning the jurisdiction of the issuing court as an additional ground for refusal or, alternatively, by interpreting the notion of "issuing judicial authority" under art. 6(1) of Framework Decision 2002/584/JHA (hereinafter "EAW Framework Decision").<sup>14</sup> Secondly, the referring

<sup>8</sup> *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)* cit.

<sup>9</sup> *Minister for Justice and Equality (Tribunal établi par la loi dans l'État membre d'émission - II)* cit.

<sup>10</sup> *Puig Gordi and Others* cit. para. 10.

<sup>11</sup> *Ibidem* para. 12.

<sup>12</sup> *Ibidem* para. 14.

<sup>13</sup> *Ibidem* para. 16.

<sup>14</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

court asked under which conditions surrender may be refused on the grounds of a violation of the defendant's fundamental rights stemming from the alleged lack of jurisdiction of the issuing authority. Finally, the referring court asked whether new warrants could be issued against the same person if the ECJ affirmed that the EAW Framework Decision prevents the refusal of surrender on the grounds previously mentioned.

## II.2. THE COURT'S REASONING

Mr. Puig Gordi and other defendants in the main proceedings pleaded the inadmissibility of the preliminary reference. The issuing judicial authority had raised the questions at issue, but only the executing one is tasked with the recognition and execution of the EAW. Therefore, according to the defendants, they were plainly irrelevant to the criminal proceedings pending before the Supreme Court of Spain.<sup>15</sup> The ECJ, however, came to a different conclusion. The judgment rendered on 31 January 2023 stressed that the referring court seeks to ascertain “whether it may issue a new European arrest warrant against Mr. Puig Gordi after the refusal of execution of a previous European arrest warrant”.<sup>16</sup> Consequently, the questions meet the requirement of relevance and, therefore, they are admissible.

On the merits, the Court developed quite an extensive argumentation which, for the sake of concision, may be summarised here in three key points.

First, the ECJ confirmed that the executing judicial authority cannot refuse the execution of an EAW by relying on grounds not foreseen in the Framework Decision.<sup>17</sup> In fact, a different conclusion may “undermine the uniform application of Framework Decision 2002/584, by making its application subject to rules of national law”.<sup>18</sup>

Should a serious risk of violation of the defendant's fundamental rights arise, the executing judicial authority may exceptionally refrain from executing the warrant by undergoing the *Aranyosi and Căldăraru* test. It follows that the executing judicial authority cannot rely only on an alleged lack of jurisdiction of the Supreme Court of Spain.<sup>19</sup> Neither can the executing authority review the issuing court's jurisdiction by interpreting the concept of “judicial authority” enshrined in art. 6(1) of the EAW Framework Decision. While that provision allows for an assessment of whether a judicial authority has issued the warrant, the same

<sup>15</sup> *Puig Gordi and Others* cit. paras 43-44. In particular, the defendants tried to differentiate the circumstances of the present case from the ones underpinning the ECJ ruling in Case C-268/17 *AY (Mandat d'arrêt – Témoin)* ECLI:EU:C:2018:602. In this latter judgment, the Court admitted the possibility for the EAW issuing judicial authority to refer preliminary questions under art. 267 TFEU. However, according to the defendants, the questions referred to the Court in *AY* related to a substantive issue – the interpretation of *ne bis in idem* – “which was of interest both to the issuing judicial authority and to the executing judicial authority” (*Puig Gordi and Others* cit. para. 44).

<sup>16</sup> *Puig Gordi and Others* cit. para. 52.

<sup>17</sup> *Ibidem* para. 73.

<sup>18</sup> *Ibidem* para. 75.

<sup>19</sup> *Ibidem* para. 79.

court cannot evaluate whether that authority has jurisdiction according to the law of the issuing Member State.<sup>20</sup> Therefore, any lack of jurisdiction of the issuing authority may prevent surrender only if it causes a serious risk of violating the defendant's fundamental rights, with particular reference to the right to a fair trial under art. 47 of the Charter.<sup>21</sup>

Secondly, the ECJ clarified under which conditions such a serious risk may be established. The Court recalled that the principle of mutual trust – on which the EAW system is based – is “founded on the premise that the criminal courts of the other Member States [...] meet the requirements inherent in the fundamental right to a fair trial enshrined in the second paragraph of Article 47 of the Charter”.<sup>22</sup> Should the executing authority be provided with evidence running counter to this presumption, it shall undergo a two-step assessment to verify whether surrender may be exceptionally refused based on art. 1(3) of Framework Decision 2002/584/JHA.<sup>23</sup> Therefore, the executing judicial authority shall first examine whether there is “objective, reliable, specific and properly updated information to demonstrate that there is a real risk of infringement, in the issuing Member State, of the fundamental right to a fair trial [...] on account of systemic or generalised deficiencies in that Member State or deficiencies affecting an objectively identifiable group of persons to which the person concerned belongs (emphasis added)”.<sup>24</sup>

In the case examined, the first requirement of the test would be satisfied only if the defendant had no effective legal remedy to complain about the (lack of) jurisdiction of the trial court in the issuing Member State's judicial system.<sup>25</sup> In fact, the provision of similar remedies may in principle rule out the risk of the defendant being tried by a court deprived of jurisdiction.<sup>26</sup> This assessment is a necessary precondition for considering the individual risk run by the defendant. Therefore, the first assessment of the *Aranyosi and Căldăraru* test is unavoidable: the principle of mutual trust prevents the executing judicial authority from refusing the execution of the warrant in the absence of deficiencies which are systemic, generalised, or affecting the right to a fair trial of an objectively

<sup>20</sup> *Ibidem* para. 85.

<sup>21</sup> The Court had previously followed a similar approach while interpreting the notion of “issuing judicial authority” for the purposes of the EAW Framework Decision. In particular, the ECJ has recognised that the power of Member States to designate issuing judicial authorities does not imply the possibility for them to interpret that concept at the domestic level (Joined Cases C-508/18 and C-82/19 PPU *OG (Parquet de Lübeck)* ECLI:EU:C:2019:456 para. 48; Case C-452/16 PPU *Poltorak* ECLI:EU:C:2016:858 paras 30-31; Case C-477/16 PPU *Kovalkovas* ECLI:EU:C:2016:861 paras 31-32). Conversely, “that term requires, throughout the European Union, an autonomous and uniform interpretation” (*OG (Parquet de Lübeck)* cit. para. 49; *Poltorak* cit. para. 32, *Kovalkovas* cit. para. 33). See A Rosanò ‘If You Are a Judicial Authority and You Know It, Raise Your Hands – Case Note on C-452/16 PPU, *Poltorak*, C-453/16 PPU, *Özçelik*, C-477/16 PPU, *Kovalkovas*’ (2017) *European Criminal Law Review* 89.

<sup>22</sup> *Puig Gordi and Others* cit. para. 95.

<sup>23</sup> *Ibidem* para. 97.

<sup>24</sup> *Ibidem* para. 102.

<sup>25</sup> *Ibidem* para. 103.

<sup>26</sup> *Ibidem* para. 112.

identifiable group of persons. This finding is coherent with the well-known affirmation of the ECJ in Opinion 2/13, according to which mutual trust may be overcome only in exceptional circumstances.<sup>27</sup> Crucially, the opposite conclusion would pave the way to thoroughly examining the guarantees of fair trial in the issuing Member State at the stage of execution, in contrast with the principle of mutual trust.<sup>28</sup>

Should similar deficiencies be established, the executing judicial authority shall then assess whether “there are substantial grounds for believing that [...] the court which is likely to be called upon to hear the proceedings [...] manifestly lacks jurisdiction for that purpose”.<sup>29</sup> In that regard, the ECJ clarifies that the executing judicial authority can only reach such a conclusion by asking for additional information from the issuing court under art. 15(2) of the EAW Framework Decision.<sup>30</sup> At the same time, the executing authority is prevented from requesting information without sufficient evidence of systemic or generalised deficiencies.<sup>31</sup>

Finally, should the executing authority refuse the execution of an EAW, the Framework Decision does not prevent the requesting court from issuing a subsequent warrant against the same person. In particular, a new EAW may be necessary if the previous refusal of surrender is contrary to EU law.<sup>32</sup> At the same time, the requesting authority shall refrain from issuing a new warrant in the absence of any change in circumstances from the previous refusal, as it would violate the defendant's right to a fair trial under art. 47 of the Charter. Moreover, the issuing authority must also assess whether a new surrender request would be proportionate.<sup>33</sup>

### III. THE *ARANYOSI AND CALDARARU* TEST IS NOT THE ONLY ANSWER TO FUNDAMENTAL RIGHTS ISSUES IN THE EAW SYSTEM: THE ECJ RULING IN *E. D. L.*

#### III.1. FACTS OF THE CASE AND PRELIMINARY QUESTION

In September 2019, the Municipal Court of Zadar issued an EAW against E. D. L., at the time living in Italy, for conducting criminal proceedings against him in Croatia. The Court of Appeal of Milan, the competent executing judicial authority, found E. D. L. unsuitable for prison

<sup>27</sup> *Ibidem* para. 117.

<sup>28</sup> *Ibidem* para. 115.

<sup>29</sup> *Ibidem* para. 119.

<sup>30</sup> *Ibidem* para. 134. As underlined in literature, it appears that this requirement fits well into the qualification of refusal of surrender as an exception, as reliance on this possibility by the executing authority shall be well informed (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, C-158/21, EU:C:2023:57’ (2023) *Maastricht Journal of European and Comparative Law* 1, 12).

<sup>31</sup> *Puig Gordi and Others* cit. para. 135.

<sup>32</sup> *Ibidem* para. 141.

<sup>33</sup> *Ibidem* para. 144.

life. In particular, an individual assessment by a psychiatrist confirmed the existence of a psychotic disorder requiring treatment with medication and psychotherapy. Based on this report, the Court of Appeal found that the execution of the arrest warrant would cease E. D. L.'s treatment and deteriorate his health. Against this background, the Court noted that Law No 69/2005, transposing the EAW Framework Decision in the Italian legal order, does not provide for the refusal of surrender on health grounds. In this context, the Court of Appeal referred the case to the Constitutional Court for a preliminary assessment of the domestic provisions' compliance with the Italian Constitution.

The Italian Constitutional Court decided to suspend the proceedings and refer the question to the ECJ for a preliminary reference on two grounds. First, according to the Italian Constitutional Court, the question referred was not only a matter of constitutionality but primarily of interpretation of EU law. Second, while art. 23(4) of the Framework Decision allows for the postponement of surrender on grounds of health risks, the referring court raised doubts about this provision's capability to address the situation of E. D. L., characterised by a chronic illness of indefinite duration.<sup>34</sup> Third, the Constitutional Court acknowledged that previous ECJ case-law on potential violations of fundamental rights in surrender procedures concerned risks flowing from systemic and generalised deficiencies in the issuing Member State. The referring court is, therefore, uncertain whether and to what extent the principles developed so far in the ECJ case-law must be extended by analogy to the case at stake. More specifically, the Italian Constitutional Court sought to ascertain whether art. 1(3) of the Framework Decision should "be interpreted as meaning that, where it considers that the surrender of a person suffering from a serious chronic and potentially irreversible disease may expose that person to the risk of suffering serious harm to his or her health, the executing judicial authority must request that the issuing judicial authority provide information [allowing] the existence of such a risk to be ruled out, and must refuse to surrender the person in question if it does not obtain assurances to that effect within a reasonable period of time".<sup>35</sup>

### III.2. THE COURT'S REASONING

To frame the issue, the ECJ recalled the exceptional nature of refusing surrender under the EAW Framework Decision. This possibility must be interpreted strictly according to the grounds enlisted in the Framework Decision. Applying this general premise to the case at stake, the Court pointed out that no ground of refusal based on illness is provided in the Framework Decision. Conversely, mutual trust under the EAW system entails a presumption that all Member States afford adequate care and treatment for illness issues.<sup>36</sup>

<sup>34</sup> *E. D. L. (Motif de refus fondé sur la maladie)* cit. para. 14.

<sup>35</sup> *Ibidem* 20.

<sup>36</sup> *Ibidem* para. 35.

Against this background, the Court widened the scope of its assessment and clarified that art. 1(3) of the Framework Decision alone is not the sole EU law provision to be considered in the case at stake.<sup>37</sup> Indeed, the Court referred to art. 23(4) of the Framework Decision, which provides for the postponement of surrender in exceptional circumstances entailing the endangerment of the life or health of the requested person.<sup>38</sup> In exercising its discretionary assessment, the executing authority must abide by art. 4 of the Charter, which prohibits risks of inhuman and degrading treatment reaching “a minimum level of severity exceeding the unavoidable level of suffering inherent in detention”.<sup>39</sup>

Therefore, should the executing judicial authority dispose of substantial and established grounds for believing that the surrender of seriously ill requested persons would expose them to a real risk of a significant reduction in their life expectancy or of a rapid, significant and irreversible deterioration in their state of health, that authority is required to postpone the surrender under art. 23(4) of the Framework Decision in conjunction with art. 4 Charter.<sup>40</sup> In cases of postponement, the executing judicial authority must ask the issuing authority to provide it with the necessary information to ensure that criminal proceedings on which the European arrest warrant is based will be conducted or that conditions of detention are such as to rule out the risk of inhuman or degrading treatment.<sup>41</sup> This finding is remarkable since art. 23(4) of the Framework Decision does not expressly provide for seeking information from the issuing judicial authority. Moreover, art. 15(2) therein enshrines that possibility only to “decide on surrender”. The Court’s conclusion on this point appears to adhere to the reasoning of Advocate General Campos Sánchez-Bordona, according to which nothing would prevent information exchange under art. 15(2) of the Framework Decision even when deciding on the postponement of surrender. Information is crucial in this regard, as the executing judicial authority shall apply art. 23(4) of the Framework Decision “in full knowledge of the facts”.<sup>42</sup> At this point, a dual course of action unfolds. If those risks can be ruled out by guarantees provided by the issuing judicial authority, the EAW must be executed. Should the executing judicial authority ascertain that the surrender faces the risk of inhumane or degrading treatment and that said risk could not be ruled out within a reasonable time, the execution of the EAW shall be refused.<sup>43</sup>

<sup>37</sup> *Ibidem* para. 29.

<sup>38</sup> *Ibidem* para. 36.

<sup>39</sup> *Ibidem* para. 40.

<sup>40</sup> *Ibidem* para. 42.

<sup>41</sup> *Ibidem* para. 47.

<sup>42</sup> C-699/21 E. D. L. (*Motif de refus fondé sur la maladie*) ECLI:EU:C:2022:955, opinion of AG Campos Sánchez-Bordona, para. 89.

<sup>43</sup> E. D. L. (*Motif de refus fondé sur la maladie*) cit. paras 51-53.



#### IV. COMMENTARY: TOWARDS A RENEWED UNDERSTANDING OF THE *ARANYOSI AND CALDARARU* TEST

Two cases, two distinct fundamental rights issues, two different approaches followed by the Court. This is in itself a novelty: on previous occasions, the ECJ had regularly resorted to the *Aranyosi and Căldăraru* test to assess whether a prejudice for the defendant's fundamental rights may justify the non-execution of an EAW.<sup>44</sup> As outlined in the literature, this shift in case-law leaves open a number of interrogatives concerning, in particular, the consistency of the ECJ jurisprudence on the limits of mutual trust.<sup>45</sup> Therefore, it appears appropriate to discuss the reasons underlying the ECJ reasoning. The following analysis will offer a combined reading of the *Puig Gordi* and *E. D. L.* rulings, unfolding a renewed understanding of the two-step test's place in the EAW system.

##### IV.1. TWO CASES, TWO APPROACHES: WHY?

The Court's ruling in *E. D. L.* demonstrated that the *Aranyosi and Căldăraru* test does not represent the only legal avenue to address fundamental rights issues. For the first time, art. 23(4) of the Framework Decision has been considered by the ECJ as a valuable legal basis to postpone and, if fundamental rights risks persist, refuse the surrender.<sup>46</sup> The Court itself gives no direct explanation for its stance, whereas some hints can be derived from the Opinion of Advocate General Campos Sánchez-Bordona.<sup>47</sup>

It appears that the differences between the two approaches followed by the Court primarily derive from the specific circumstances of the two cases. The Court's reasoning is adapted to the risks suffered by the defendant. As Advocate General Campos Sánchez-Bordona underlined, "the so-called 'two-stage examination' has a very specific origin and works in the context for which it was devised."<sup>48</sup> The *Aranyosi and Căldăraru* test has been applied so far in cases of inadequate detention conditions and lack of judicial independence, where the risk to the rights of the requested person derives "from general circumstances which are ideally impossible" in a given Member State.<sup>49</sup>

<sup>44</sup> See *supra* para. 1.

<sup>45</sup> In this regard, see C Rizcallah 'Arrêt « E. D. L. » : mandat d'arrêt européen et risque pour l'état de santé, la confiance mutuelle recadrée en faveur de la dignité humaine' (2023) *Journal des Tribunaux – Droit Européen* 294, 297.

<sup>46</sup> In a 2010 preliminary reference (Case C-105/10 *Gataev and Gataeva*), the Finnish *Korkein oikeus* demanded clarification from the Court regarding the purpose of art. 23(4) of the EAW Framework Decision, but a month later withdrew the application and no other cases were brought before the Court until *E. D. L.* In literature, see L van der Meulen 'Leaving the two-step test behind? The Court of Justice expands fundamental rights protection for the seriously ill under the EAW in C-699/21' (26 April 2023) *EU Law Live* eulawlive.com.

<sup>47</sup> *E. D. L.* (*Motif de refus fondé sur la maladie*), opinion of AG Campos Sánchez-Bordona, cit.

<sup>48</sup> *Ibidem* para. 39.

<sup>49</sup> *Ibidem*.

The risk of violating the right to a fair trial at stake in *Puig Gordi* falls precisely within this latter category, to the extent that the Court's reasoning is very clear in affirming the necessity of both test steps. On the contrary, in the case of *E. D. L.*, the health risk for the person being surrendered does not stem from a situation that arose due to widespread deficiencies.<sup>50</sup> That case featured a "risk of a significant reduction in [the defendant's] life expectancy or of a rapid, significant and irreversible deterioration in his or her state of health"<sup>51</sup> because a specific illness could not be properly treated in the Member State that issued the EAW.<sup>52</sup> Therefore, an analysis of the issuing Member State's health system – as part of the first step of the *Aranyosi and Căldăraru* test – seems not only unnecessary in the situation at stake but also inappropriate.<sup>53</sup>

Following this consideration, art. 23(4) of the Framework Decision does provide for a legal arrangement adapted to the issues featuring the *E. D. L.* case. In fact, this ground allows for the postponement of surrender and, according to the ruling under analysis, also provides for the suspension of the EAW. Therefore, relying on art. 23(4) appears to be a valid way out of the so-called "judicially created law" exercise of the Court, an approach that characterised the emergence of the *Aranyosi and Căldăraru* test. In this line of reasoning, the Court sought to advance a legal alternative already codified in the Framework Decision – thus "modulat[ing] the meaning and scope of Article 23(4)"<sup>54</sup> – rather than to frame a new test.

#### IV.2. THE ULTIMATE (BUT NOT THE ONLY) REMEDY FOR SECURING FUNDAMENTAL RIGHTS

The difference in the approach featuring the Court's rulings in *Puig Gordi* and *E. D. L.* is insightful, as it refines the place of fundamental rights protection under the EAW system. In fact, following the landmark ruling in *Aranyosi and Căldăraru* and subsequent case-law,<sup>55</sup> the two-step test has fully catalysed the attention of scholars in the field.<sup>56</sup> In this regard, a

<sup>50</sup> For a different point of view on the matter, see V Salese 'La tutela dei diritti fondamentali e l'operatività dei motivi di non-esecuzione del MAE alla luce della recente giurisprudenza della Corte di giustizia' (2023) Quaderni AISDUE 71, 84

<sup>51</sup> *E. D. L.* (*Motif de refus fondé sur la maladie*) cit. para. 42.

<sup>52</sup> *E. D. L.* (*Motif de refus fondé sur la maladie*), opinion of AG Campos Sánchez-Bordona, cit. para. 41.

<sup>53</sup> *Ibidem* para. 49.

<sup>54</sup> *Ibidem* para. 73.

<sup>55</sup> Most notably (and not exhaustively), see: Case C-220/18PPU *Generalstaatsanwaltschaft (Conditions of detention in Hungary)* ECLI:EU:C:2018:589; Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* ECLI:EU:C:2018:586; Case C-128/18 *Dorobantu* ECLI:EU:C:2019:857; Joined Cases C-562/21 PPU and C-563/21 PPU *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)* ECLI:EU:C:2022:100.

<sup>56</sup> Among extensive scholarship, see: S Montaldo 'On a Collision Course! Mutual Recognition, Mutual Trust and the Protection of Fundamental Rights in the Recent Case-Law of the Court of Justice' (2016) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu); V Mitsilegas 'The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice' (2015) *New Journal of European Criminal Law* 457; G Anagnostaras 'Mutual Confidence Is Not Blind Trust! Fundamental Rights Protection and the

substantial consensus has emerged on considering that any issue related to the protection of the defendant's fundamental rights should be assessed through the lenses of art. 1(3) of the EAW Framework Decision as interpreted by the Court in *Aranyosi and Căldăraru*. In that context, calls for overcoming this test and loosening the rather high threshold for rebutting the mutual trust presumption have flourished in the last few years.<sup>57</sup>

Against this background, the judgment in *Puig Gordi* seems to have definitively halted these calls.<sup>58</sup> In fact, the ECJ ruling is quite explicit in affirming that both requirements composing the test shall be fulfilled for exceptionally refusing the execution of an EAW. At the same time, the Court's judgment in *E. D. L.* has shed light on the actual scope of the obligation to respect fundamental rights stemming from art. 1(3) of the EAW Framework Decision, which is not exhausted by the two-step test. In fact, the Framework Decision provides alternative – and thus far underestimated – grounds capable of adequately addressing risks to protect the defendant's fundamental rights. That is the case of art. 23(4), which allows the executing judicial authority to exceptionally postpone the surrender “for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health”. As underlined by Advocate General Campos Sanchez-Bordona in his Opinion, should a similar situation arise in the main proceedings, there is no need to seek a rebuttal of the mutual trust presumption by resorting to the *Aranyosi and Căldăraru* test.<sup>59</sup> Conversely, postponing surrender under art. 23(4) of the Framework Decision provides a suitable alternative for protecting the defendant's rights.<sup>60</sup> Therefore, fundamental rights issues in surrender proceedings shall not necessarily be addressed through the *Aranyosi and Căldăraru* test.

The combination of the Court's reasoning in *Puig Gordi* and *E. D. L.* appears to have paved the way for a renewed understanding of the double-step test's place in the EAW system. Should fundamental rights concerns run counter to the mutual trust presumption underpinning the EAW system, the executing judicial authority must undergo the two-step assessment defined by the ECJ in *Aranyosi and Căldăraru*. In that context, the strict consequential relationship between the first and second steps has been upheld by the Court in *Puig Gordi*. There is no room for the executing judicial authority to assess the individual risk suffered by the defendant if no generalised or systemic deficiencies have

Execution of the European Arrest Warrant: *Aranyosi and Căldăraru*' (2016) CMLRev 1675; S Gáspár-Szilágyi 'Joined Cases *Aranyosi and Caldaru*: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant' (2016) 24 EurJCrimeCrLcrj 197.

<sup>57</sup> In particular, several scholars have pledged to overcome the two-step assessment in connection with fundamental rights issues deriving from the rule of law backsliding in Poland and Hungary (in that regard, see P Bárd and W van Ballegooij 'Judicial independence as a precondition for mutual trust? The CJEU in *Minister for Justice and Equality v. LM*' (2018) *New Journal of European Criminal Law* 353).

<sup>58</sup> In this line of reasoning, see L van der Meulen 'Leaving the two-step test behind?' cit.

<sup>59</sup> *E. D. L. (Motif de refus fondé sur la maladie)*, opinion of AG Campos Sánchez-Bordona, cit. para. 49.

<sup>60</sup> *Ibidem* para. 73.

been identified. Symmetrically, no warrant may be refused on the sole basis of systemic or generalised deficiencies for the protection of the defendant's fundamental rights.

At the same time, this test shall be applied only insofar as the grounds for refusal or postponement of surrender codified in the Framework Decision are incapable of appropriately addressing the fundamental rights issue under analysis. Should the grounds for refusal laid down in arts 3, 4 and 4a of the Framework Decision not apply to the case at stake, the protection of fundamental rights as prescribed by art. 1(3) of the EAW Framework Decision requires the executing judicial authority to "seek, where possible, a materially equivalent solution using the legislative elements laid down by the legislature itself".<sup>61</sup> In this line of reasoning, provisions such as art. 23(4) of the EAW Framework Decision may well be relied on to secure the defendant's fundamental rights without challenging the limits of mutual trust under the *Aranyosi and Căldăraru* test.

Should the Framework Decision not offer an appropriate legal pathway, the only available solution for the executing judicial authority is to assess whether surrender may be refused by recourse to the two-step test. From that perspective, rebutting the mutual trust presumption through the *Aranyosi and Căldăraru* test may be framed as a means of last resort, the ultimate remedy for securing the defendant's fundamental rights. The ultimate, but not the only one: that is the main takeaway from the two judgments examined. The ECJ appears to dilute the emphasis previously put on this test, by showing that the Framework Decision affords alternative and less disruptive arrangements for securing individual rights. Should the Court follow this path in future rulings, this approach may ultimately foster a deeper comprehension of the EAW Framework Decision's potentialities which – as the *E. D. L.* case shows – still need to be explored to their full extent.

## V. CONCLUSIONS

The limits of mutual recognition and mutual trust *vis-à-vis* fundamental rights protection in the EAW system have given rise to a lively debate in scholarship and case-law. Following the well-renowned *Aranyosi and Căldăraru* ruling, calls for overcoming the two-step test represented the mainstream of discussion in this context. Against this background, the ECJ rulings in *Puig Gordi* and *E. D. L.* project this discourse into a new dimension. On the one hand, the Court appears to have brought any aspiration to modify the *Aranyosi and Căldăraru* test to an end; on the other hand, it disclosed that this test does not constitute the only avenue to ensuring fundamental rights protection in the EAW system. The obligation enshrined in art. 1(3) of the Framework Decision may well be secured by relying on provisions already codified in the Framework Decision – such as, in the case of a risk for the defendant's health, art. 23(4) therein. In this perspective, challenging the limits of mutual trust under the two-step test shall be seen as the ultimate remedy, to be applied

<sup>61</sup> *Ibidem* para. 72.

only in the absence of other possible avenues for avoiding violations of the defendant's fundamental rights.

The path inaugurated by the Court will likely shift the discourse on fundamental rights protection in the EAW system. Clearly enough, the *Aranyosi and Căldăraru* test will still play a vital role in this context, as the complex issues deriving from its application in concrete cases are far from being definitively settled. At the same time, the potential of provisions codified in the Framework Decision still needs to be fully explored. Against the explicit refusal of the Court to reform the two-step test, the search for different pathways in the Framework Decision capable of avoiding violation of fundamental rights in case of surrender now emerges as the central issue. There is still a long way to go to explore the potentialities of the EAW Framework Decision fully, and further reflection on this topic is pivotal. In the meantime, this brief and non-exhaustive contribution is intended to set the stage for future discussion.

