

Case C-208/23**Summary of the request for a preliminary ruling pursuant to article 98 (1) of the Rules of Procedure of the Court of Justice****Date lodged:**

30 March 2023

Referring court:

Corte suprema di cassazione (Italy)

Date of the decision to refer:

22 March 2023

Appellant:

AX

Subject matter of the main proceedings

Appeal against the judgment of the Corte d'appello di Roma (Court of Appeal, Rome), ordering the surrender of AX to the German judicial authority pursuant to the European arrest warrant ("EAW") issued by the Hamburg court. According to the appellant, since she is pregnant and mother of a daughter under three years of age, her surrender could not have been permitted by the Italian judicial authority unless additional information had first been obtained to verify that the requesting State had put in place all the forms of protection necessary for the detention of the requested person.

Subject matter and legal basis of the request

The question arises as to whether it is possible to infer from Article 1 (1) and (2) and Articles 3 and 4 of Framework Decision 2002/584/JHA ('the Framework Decision') an obligation on the part of the executing judicial authority to refuse or, in any event, defer, the surrender of a pregnant woman or a mother who has minor children living with her.

The court then asks, on the basis of the answer given to the first question, whether those articles of the Framework Decision are compatible with Articles 3, 4, 7, 24 and 35 of the Charter of Fundamental Rights of the European Union, also

considering the case-law of the European Court of Human Rights and the constitutional traditions common to the Member States.

Questions referred for a preliminary ruling

1) Must Article 1(2) and (3) of Framework Decision 2002/584/JHA on the European arrest warrant be interpreted as meaning that the executing judicial authority must refuse or, in any event, defer the surrender of a pregnant woman or a mother who has minor children living with her?

2) If the answer to the first question is in the affirmative, are Article 1(2) and (3) and Articles 3 and 4 of Framework Decision 2002/584/JHA compatible with Articles 3, 7, 4, 24 and 35 of the Charter of Fundamental Rights of the European Union, taking account also the case-law of the European Court of Human Rights and the constitutional traditions common to the Member States, in so far as they require the surrender of the pregnant woman or the mother, thus severing ties with the minor children living with her without considering the *‘best interest of the child’*?

Provisions of European Union law relied on

Articles 3, 4, 7, 24 and 35 of the Charter of Fundamental Rights of the European Union (‘the Charter’)

Article 1 (2) and (3) and Articles 3 and 4 of Framework Decision 2002/584/JHA (the “Framework Decision”)

European Parliament resolution of 26 May 1989 on the situation of women and children in prison

European Parliament resolution of 13 March 2008 on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life

European Parliament resolution of 15 December 2011 on detention conditions in the EU

European Parliament resolution of 27 November 2014 on the 25th anniversary of the UN Convention on the Rights of the Child

European Parliament resolution of 5 October 2017 on prison systems and conditions

Recommendations of the Committee of Ministers of the Council of Europe, including recommendations: R (87) 3 and R (2006) 2, on the European Prison Rules; R (2000) 1469, on mothers and babies in prison; R (2018) 5, concerning children with imprisoned parents

Provisions of international law relied on

Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “ECHR”)

Article 3 of the UN Convention on the Rights of the Child

Provisions of national law relied on

Legge 22 aprile 2005, n. 69, Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d’arresto europeo e alle procedure di consegna tra Stati membri (Law No 69 of 22 April 2005, Provisions to bring national law into line with Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (“Law No 69/2005”):

- in its original wording, Article 18(s) laid down that the Court of Appeal was required to refuse surrender if the person whose surrender was requested was a pregnant woman or a mother of children under three years of age living with her, except in the case of exceptionally serious reasons justifying detention;

- article 2, in its current wording, states that the execution of an EAW may not, under any circumstances, entail a breach of the supreme principles of the Constitution of the Italian State or of the inalienable rights of the person recognised by the Constitution, of the fundamental rights and fundamental legal principles enshrined in Article 6 TEU or of the fundamental rights guaranteed by the ECHR.

Decreto legislativo 2 febbraio 2021, n. 10, Disposizioni per il compiuto adeguamento della normativa nazionale alle disposizioni della decisione quadro 2002/584/GAI, relativa al mandato d’arresto europeo e alle procedure di consegna tra stati membri, in attuazione delle delega di cui all’articolo 6 della legge 4 ottobre 2019, n. 117 (Legislative Decree No 10 of 2 February 2021, Provisions to ensure the full adaptation of national legislation to the provisions of Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, pursuant to the delegation provided for in Article 6 of Law No 117 of 4 October 2019 (“Legislative Decree No 10/2021”)

- article 14 replaced the text of article 18 of the aforementioned Law No 69/2005, removing all grounds for mandatory refusal of surrender not also provided for in the Framework Decision.

The current text thus lays down that “the court of appeal shall refuse surrender in the following cases:

- (a) if the offence charged in the European arrest warrant is extinguished by amnesty under Italian law (...);
- (b) if the requested person has been convicted of the same acts in Italy by an irrevocable criminal judgment or penalty order, or the charge has been dismissed and is no longer subject to appeal, or has been convicted in another Member State of the European Union by a final judgment (...);
- (c) if the person who is the subject of the European arrest warrant was under 14 years of age when the offence was committed”.

As things stand at present, therefore, the Italian legislation implementing the European arrest warrant no longer establishes a ground for refusal relating to the surrender of pregnant women or mothers with children under three years of age.

Succinct presentation of the facts and procedure in the main proceedings

- 1 Issuing an arrest warrant on 22 February 2022, the Hamburg court requested the surrender of AX for aggravated theft committed on 1 June 2019 in Hamburg.
- 2 AX is currently pregnant and is already the mother of a child under three years of age who lives with her in prison. She has therefore requested that the surrender be refused on that ground.
- 3 The Court of Appeal, Rome rejected the complaints advanced by the appellant and, in the judgment of 29 September 2022, ordered her surrender to the German judicial authority in so far as the current Italian legislation implementing the European arrest warrant no longer establishes a ground for refusal relating to the surrender of pregnant women or mothers with children under three years of age living them.
- 4 Before the Corte di cassazione (Supreme Court of Cassation), the referring court, the appellant seeks to have that judgment set aside, on the ground that, since she is pregnant and mother of a child under three years of age, her surrender to the German judicial authority, without prior verification of the detention conditions guaranteed in the issuing State, is contrary to a number of principles and provisions of domestic, EU and international law.
- 5 In the proceedings before the referring court, the appellant also requested, in the alternative, that the proceedings be suspended pending a ruling by the Court of Justice of the European Union in Case C-261/22, concerning a similar question referred for a preliminary ruling by the Supreme Court of Cassation. That request for suspension was rejected on the ground that it is not expressly provided for in the European arrest warrant system and is not compatible with the strict time constraints set out therein. That measure would also deprive the appellant of the opportunity to submit observations to the Court of Justice, undermining the right to judicial protection of her fundamental rights before the competent bodies.

The essential arguments of the parties in the main proceedings

- 6 As her only ground of appeal, the appellant requests that the judgment under appeal be set aside and asserts a breach of Articles 2 and 16 of Law No 69/2005, several articles of the Italian Constitution, Article 3 of the Convention on the Rights of the Child, Article 8 of the ECHR and Articles 7 and 24 of the Charter of Fundamental Rights of the European Union.
- 7 The Court of Appeal, Rome erred in ordering merely the surrender of the appellant, relying on the repeal of the ground for refusal relating to the pregnancy of the requested person. On the other hand, this surrender could not have been authorised unless the additional information, referred to in Article 16 of Law No 69/2005, had first been obtained in order to verify that the requesting State had put in place all the forms of protection necessary for the detention in question.
- 8 The appellant also points out that, even after the repeal of the ground for refusal provided for in the original wording of Article 1(s) of Law No 69/2005, the case-law of the Supreme Court of Cassation confirmed that pregnancy constitutes an obstacle to surrender.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 9 The referring court observes that Law No 69/2005, which is the legislation transposing the Framework Decision into domestic law, initially provided in Article 18(s) that the surrender of a woman who was pregnant or had children under three years of age living with her must be refused. That ground for refusal is not provided for in the Framework Decision.
- 10 In order to bring the Italian implementing legislation more into line with the Framework Decision, Legislative Decree No 10/2021, in particular Article 14 of that decree, repealed all domestic provisions that did not comply with the Framework Decision, including the ground for refusal relating to the surrender of a pregnant woman or a mother with children under three years of age living with her.
- 11 The referring court points out, however, that, according to certain judgments of the Supreme Court of Cassation itself, even though that ground for refusal has been repealed, that does not mean, per se, that such a surrender is permissible, since it could, in any event, infringe a person's fundamental rights if it were ordered without prior verification, by the requesting judicial authority, that detention arrangements and forms of protection for children comparable to those guaranteed by Italian law are recognised in the issuing State.
- 12 Otherwise, fundamental rights under both the Italian Constitution and the ECHR would be infringed and, consequently, surrender would have to be refused under Article 2 of Law No 69/2005, a provision that was also clarified by the Corte

costituzionale (Constitutional Court, Italy) in its order referring a question for a preliminary ruling to the Court of Justice in Case C-699/21.

- 13 In that order, the Constitutional Court held that it would be manifestly contrary to the primacy, unity and effectiveness of EU law to permit ‘an interpretation of national law that recognises that the executing judicial authority has the power to refuse to surrender the person concerned except in the mandatory cases provided for by the law in accordance with the provisions of the Framework Decision, on the basis of provisions of a general nature such as those contained in Articles 1 and 2 of Law No 69 of 2005 prior to the amendments made by Legislative Decree No 10/2021, or such as Article 2 of that law in the wording currently in force’.
- 14 The Constitutional Court has also held that ‘Member States are precluded from making the implementation of EU law in areas subject to full harmonisation conditional on compliance with purely national standards of protection of fundamental rights, where this could compromise the primacy, unity and effectiveness of EU law (Court of Justice of the European Union, judgments of 26 February 2013, C 617/10, Fransson, [paragraph] 29, and of 26 February 2013, C- 399/11, Melloni, [paragraph] 60). Rather, the fundamental rights that the Framework Decision is required to respect under Article 1(3) thereof are those recognised by EU law and, consequently, by all the Member States when they implement EU law: fundamental rights that, moreover, are primarily defined by the constitutional traditions common to the Member States (Article 6(3) TEU and Article 52(4) [of the Charter]).’
- 15 The referring court agrees with that interpretation and considers it necessary to refer the matter to the Court of Justice for a preliminary ruling in order for it to clarify the common standard of protection defined in that regard by EU law and, consequently, to determine whether EU law may be interpreted as meaning that the surrender, in execution of an EAW, of either a pregnant woman or a mother of minor children living with her is or is not consistent with the fundamental rights guaranteed by EU law, in particular by the Charter, in the light also of the constitutional traditions common to the Member States, which are also referred to in Article 52(4) of the Charter. A response from the Court of Justice would allow a uniform interpretation of EU law on this point.
- 16 The referring court recalls, for example, decisions of the Supreme Court of the United Kingdom refusing the surrender of mothers in execution of an EAW.
- 17 That court also refers to various judgments by the Court of Justice: in the judgment in case C-399/11, Melloni, the Court of Justice held, in essence, that the Framework Decision has regulated the matter of limitations on surrender exhaustively and, therefore, it is not possible to impose further restrictions on the execution of a warrant, either by means of national transposition rules or by means of the interpretation of national courts; in the judgment in cases C-404/15 and C-659/15 PPU, Aranyosi and Căldăraru, and in the judgments in cases C-562/21 PPU and C-563/21, X and Y, and C-354/20 PPU and C-412/20 PPU, L

and P, the Court of Justice interpreted the rules on EAW by reconciling the implementation of the principle of mutual recognition with the protection of fundamental rights; in the judgment in case C-367/16, Piotrowski, the Court of Justice, while considering the surrender, in execution of an EAW, of minors who reach the age threshold for criminal responsibility as defined by national law, to be compatible with EU law, nevertheless highlighted the need for procedural guarantees that ensure that ‘the best interests of a child who is the subject of a European arrest warrant are always a primary consideration, in accordance with Article 24(2) of the Charter’. With reference to the latter judgment, the referring court states that the criterion of the best interests of the child, on which the decisions to be made in terms of executing an EAW in respect of an accused or convicted child must be based, should logically also apply to children of a much younger age who live with their mother, who is the subject of an EAW, and who are not the subject of a criminal charge.

- 18 The European Court of Human Rights (“ECtHR”) has also stated that, in the context of the execution of an EAW by an EU Member State, the mutual recognition mechanism should not be automatically and slavishly applied to the detriment of fundamental rights (ECtHR, 17 April 2018, Pirozzi v. Belgium, §§ 57-64) and that the execution of an EAW is limited by the risk, based on ‘serious grounds’, of a violation of the fundamental rights of the requested person (ECtHR, 9 July 2019, Romeo Castano v. Belgium, §§ 79, 92).
- 19 Because the Framework Decision does not establish a ground for refusal to surrender a mother living with children under three years of age, the surrender would seem to be unconditionally required. However, that unconditional obligation to surrender seems to run counter not only to the national standard but also to the European standard of protection of fundamental rights, such as the right to respect for the private and family life of the mother, but also and above all of the minor child.
- 20 In that regard, the referring court points out that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has recognised that prisons do not provide an appropriate environment for infants and children and that the enforced separation of mothers and infants is highly undesirable.
- 21 That court also notes that the ECtHR has observed that according to the United Nations Rules for the Treatment of Women Prisoners, decisions to allow children to remain with their mothers in prison are based on the best interests of the children (ECtHR, 26/11/2013, X v. Latvia, § 95; 24 March 2016, Korneykova and Korneykov v. Ukraine, § 129).
- 22 Recently, the ECtHR also held that an order deporting a Nigerian citizen from the United Kingdom violated his right to private and family life because the nature and gravity of the offence committed was not balanced against the best interests of

his minor child (ECtHR, 24 November 2020, *Unuane v. the United Kingdom*, §§ 86-90).

- 23 According to the referring court, since the forced separation of a mother and her minor children living with her, in execution of an EAW, may have very serious consequences for those children, the protection of motherhood and the protection of the best interests of the child may require the surrender of the pregnant mother living with the child to be postponed to a time when it is more in the child's interests or to allow the child to be surrendered, with the mother, only after verification of the detention conditions guaranteed in the requesting State.
- 24 According to the World Health Organisation Recommendations of 6 October 2010, the transfer of infants and children, with their mothers, imposes an obligation on the authorities to adequately ensure the health and well-being of the child (ECtHR, 24 March 2016, *Korneykova and Korneykov v. Ukraine*, § 131) and a failure to take measures, given the extreme vulnerability of the child, may amount to inhuman and degrading treatment, within the meaning of Article 3 ECHR, of the mother and child (ECtHR, 24 March 2016, *Korneykova and Korneykov v. Ukraine*, §§ 140-148; 17 October 2019, *G.B. and Others v. Turkey*, §§ 101-117 and 151; 7 December 2017, *S.F. and Others v. Bulgaria*, 2017, §§ 84-93).
- 25 According to the referring court, the unconditional execution of the surrender of a pregnant woman, pursuant to the EAW, may, in practice, run counter to the standard of protection afforded to mothers and also adversely affect the health of the requested person and the infant.
- 26 The detention of a pregnant woman must guarantee the standards laid down in the various resolutions of the European Parliament and in the recommendations of the Committee of Ministers of the Council of Europe cited above.
- 27 According to the referring court, it is therefore necessary to prompt the intervention of the Court of justice in order to clarify whether, in the context of the European arrest warrant established by the Framework Decision, the surrender of a pregnant woman is unconditionally necessary or whether it is subject to prior verification of her state of health and whether this is compatible with the detention conditions guaranteed by the requesting Member State.
- 28 The referring court concludes by stating that, in its view, the complex questions of interpretation raised cannot be resolved by temporarily deferring, as permitted by Article 23(4) of the Framework Decision, the surrender already determined 'on serious humanitarian grounds', seeing that this form of suspension of the execution of the EAW, in so far as it is left, on a case-by-case basis, to the discretion of the judicial authority of the executing State, is not an appropriate means of ensuring the protection of fundamental rights.
- 29 Finally, the referring court requests that the present case be dealt with under an expedited procedure in accordance with Article 107 of the Rules of Procedure of

the Court, since the decision in question affects the fundamental rights of a pregnant woman and of a very young child living alone with her, and is necessary in order to avoid the uncertainty that currently surrounds her surrender.

WORKING DOCUMENT