

## Italy, Court of Cassation, 15143/2022, supreme instance, 10/04/2022

Member State

 Italy

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Topic

Mutual trust

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Sector

Judicial Interaction Techniques; European Arrest Warrant; role of national higher courts; Use of the Preliminary Reference Procedure

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Deciding Court Original Language

Corte di Cassazione, VI sez. penale

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Deciding Court English translation

Court of Cassation, VI criminal section

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Registration N

15143/2022

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Date Decision

19/4/2022

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ECLI (if available)

N/A

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National Follow Up Of (when relevant)

The order was at the origin of the CJEU judgment in C?261/22, GN

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EU legal sources and CJEU jurisprudence

Article 6 TEU, Articles 4, 7, 24, 51 and 52 of the Charter; Framework Decision 2002/584

C-399/11, Melloni; C-561/19, Consorzio Italian Management; C-404/15 and C-659/15 PPU, Aranyosi and Căldăraru; C-562/21 PPU and C-563/21, X and Y; C-354/20 PPU and C-412/20 PPU, L and P; C-367/16, Piotrowski; C-648/11, MA and others

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### ECtHR Jurisprudence

Judgment of 17/04/2018, Pirozzi v. Belgium; Judgment of 9/07/2019, Romeo Castano v. Belgium; Judgment of 26/11/2013, X v. Latvia; Judgment of 24/03/2016, Korneykova and Korneykov v. Ukraine; Judgment of 24/11/2020, Unuane v. United Kingdom; Judgment of 17/10/2019, G.B. and others v. Turkey; Judgment of 7/12/2017, S. F. and others v. Bulgaria

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### Subject Matter

Appeal before the Court of Cassation of the decision of the Court of Appeal of Bologna to deny execution of a EAW issued by Belgium against a mother of two children where her surrender is incompatible with her right to respect for private and family life as well as with the best interests of her children. The Court of Cassation referred a preliminary request to the Court of Justice on the interpretation of Article 1(2) and (3) of the EAW Framework Decision read in the light of Article 7 and Article 24(2) and (3) of the Charter.

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### Legal issue(s)

Interpretation of the EAW Framework Decision in light of fundamental rights under the Charter; possibility to deny execution of an EAW against a mother in cases of serious risk of violation of Articles 7 and 24 of the Charter; test to be performed by the judicial authority executing the EAW.

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### Request for expedited/PPU procedures

YES The Court of Cassation requested the CJEU to review the case under the expedited procedure because the case affected the fundamental rights of a pregnant woman and her young child and there was the need to put an end to the remaining uncertainty regarding the future custody of that child. Moreover, the referring court considered that the questions referred raised issues which are common to a large number of cases pending before the courts of the Member States. The Court of Justice refused the request for the expedited procedure because the woman concerned was released immediately after the judgment of 15 October 2021 of the Court of Appeal of Bologna and there was no proof of a risk in respect of the custody of her children. Furthermore, the Court of Justice considered that the fact that a large number of persons are potentially concerned by the questions referred is not a reason that establishes exceptional urgency.

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### Interim Relief

No interim relief asked

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### National Law Sources

### Facts of the case

EAW issued by Belgium against a Nigerian woman, GN, for the execution of five-year prison sentence for the crimes of human trafficking and facilitation of illegal immigration. At the time of her arrest in Bologna, GN was with her minor son born in Italy, and living with her, and pregnant with a second child. The Court of Appeal requested to the issuing judicial authority information on the execution of sentences for parents cohabiting with minor children, the prison treatment to which GN would be subjected and the measures that would be taken for the son. In the absence of a response from the Belgian authorities, the Court of Appeal refused to surrender GN and ordered her release. Indeed, it was not sure that the Belgian legal order would guarantee detention arrangements comparable to those of Italy, protect GN's right not to be deprived of her relationship with her children and ensure that the children would receive the necessary maternal and family assistance guaranteed by Articles 3 and 31 of the Italian Constitution, Article 3 of the Convention on the Rights of the Child and Article 24 of the EU Charter. The prosecutor and GN appealed against this judgment before the Court of Cassation.

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### Reasoning (role of the Charter or other EU, ECHR related legal basis)

The Court of Cassation firstly noted that in the past the Law No 69/2005 expressly referred, as a ground for refusing to execute an EAW, to the situation where the person who is the subject of that warrant is a pregnant woman or the mother of children under three years of age living with her. Yet, those provision were repealed by the Legislative Decree No 10 of 2021 in order to bring the Italian legislation into line with the EAW Framework Decision, which no longer makes reference to that situation as one of the grounds for mandatory or optional non-execution of the EAW. However, the Court of Cassation considered that the repeal of the compulsory ground for refusal to surrender does not in itself suffice to deem permissible the execution of the EAW to the requesting authority of the mother of children less than three years of age and cohabiting with her. Such a surrender could amount to a violation of fundamental rights if it is ordered without prior verification that the issuing State recognizes modes of detention comparable to those guaranteed by the Italian system, such as to exclude that GN may be subjected to conditions incompatible with the protection of the mother's condition and the interests of the child. In particular, if the Belgian system does not contemplate forms of protection of the children's right not to be deprived of their mother, there will be a violation of the fundamental rights provided for by both the Italian Constitution and the ECHR. Yet, recalling the order of the Italian Constitutional Court (n 216 of 2021) requesting the preliminary reference to the Court of Justice which originated the case EDL (C-699/21), the Court of Cassation noted that the existence of common standard of protection of fundamental rights defined at the EU level requires the preliminary interpretation of EU law. The Court of Cassation was aware that the EAW Framework Decision does not include an express ground for denying surrender of a mother cohabiting with minor children, with the result that in such a scenario the surrender would seem unconditionally due. However, it considered such an unconditional obligation to surrender objectively in tension not only with the national standard, but also with the European standard of protection of the right to respect for the private and family life of the mother and the fundamental rights of the minor child to be found in Articles 7 and 24 of the Charter. The Court of Cassation referred to the protection of fundamental rights enshrined in Article 1(3) of the EAW Framework Decision. It noted that the Court of Justice has frequently interpreted the EAW by combining the implementation of the principle of mutual recognition with the protection of fundamental rights, as in the judgments relating to the non-execution of the EAW in case of the risk of violation of Articles 4 and 47 of the Charter. It also referred to the ECtHR case

law on the relationship between the EU principle of mutual recognition and the protection of fundamental rights. In the case at issue, the Court of Cassation mentioned as relevant the fundamental rights granted by Article 7 and 24(3) of the Charter. It also referred to Article 3 of the UN Convention on the Rights of the Child, the interpretation of the “best interest of the child” provided by the Court of Justice in *Piotrowski and MA and others*, and Article 8 ECHR as interpreted by the Strasbourg Court in its case law concerning children with jailed mothers. Accordingly, the Court of Cassation decided to refer two preliminary requests to the Court of Justice concerning refusal to execute the EAW against a person in the situation of GN: “(1) Must Article 1(2) and (3) and Articles 3 and 4 of Framework Decision 2002/584 be interpreted as meaning that they do not permit the executing judicial authority to refuse or in any case defer the surrender of 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 compatible with Articles 7 and 24(3) of the Charter, also considering the case-law of the ECtHR in relation to Article 8 ECHR and the constitutional traditions common to the Member States, in so far as they require the surrender of the mother, thus severing ties with minor children living with her without considering the best interest of the child?”.

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### Relation of the case to the EU Charter

The Court of Cassation invoked Articles 7, 24(2) and 24(3) of the Charter as a legally binding parameter for interpreting the EAW Framework Decision. In this respect, the Court of Cassation referred to the obligations to respect fundamental rights under Article 1(3) of the EAW Framework Decision and the more general duty of the EU legislator to comply with the Charter under its Article 51(1). In particular, it considered that an unconditional obligation to surrender a person in the situation of GN would sacrifice the EU standard of protection of the right to respect for the private and family life of the mother under Article 7 of the Charter and the fundamental rights of the minor child enshrined in Article 24 of the Charter. It suggested that the EAW should be interpreted in light of those Charter provisions as requiring the executing judicial authority to postpone surrender of a mother in the situation of GN to a moment where such a surrender would be more respectful of the best interest of the child.

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### Relation between the EU Charter and ECHR

The Court of Cassation cited Article 8 ECHR as corresponding to Article 7 of the Charter and recalls that, in light of Article 52(3) of the Charter, the former shall act as a minimum level of protection. Then, the Court of Cassation referred the case law of the ECtHR on Article 8 ECHR and acknowledging that it is particularly problematic to determine whether infants and young children can remain in prison with their mothers. In particular, it quoted the judgment in *X v. Latvia and Korneykova and Korneykov v. Ukraine* where the ECtHR noted that the United Nations Rules for the Treatment of Women Prisoners state that decisions to allow children to remain with their mothers in prison shall be based on the best interests of the children. It also referred to *Unuane v. United Kingdom* where the ECtHR found the right to private and family life violated by the deportation order issued against the applicant as the national authorities had failed to balance the nature and gravity of the offence committed by him against the best interests of his minor child. Furthermore, the Court of Cassation quoted the ECtHR case law on the EU principle of mutual recognition. In particular, it referred to the *Pirozzi v Belgium* judgment where the ECtHR held that, in the context of the execution of an EAW, the mutual recognition mechanism should not be automatically and mechanically applied to the detriment of fundamental rights. It also cited Article 2 ECHR and the ECtHR judgment in *Romeo Castaño v Belgium* to stress that the execution of the EAW, while falling under the procedural obligations to cooperate deriving from Article 2 ECHR, nevertheless finds a limitation in the risk, based on serious grounds, of the violation of the

fundamental rights of the concerned person.

Finally, the Court of Cassation quoted the ECtHR judgments in *Korneykova and Korneykov v. Ukraine*, *G.B. and others v. Turkey*, and *S.F. and others v. Bulgaria* to acknowledge that the failure to take measures to protect minors in jail with their mothers, due to their extreme vulnerability, may, constitute an inhuman and degrading treatment in violation of Article 3 ECHR.

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#### Use of Judicial Interaction technique(s)

Preliminary reference, mutual recognition.

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#### Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

Among the reasons that the Court of Cassation considered relevant grounds for requesting a preliminary reference to the Court of Justice there was the need to clarify the common interpretation of Union law on the matter at issue. In this respect, it refers to a 2012 British judgment where the UK Supreme Court refused to surrender mothers in execution of a EAW on the grounds that the interference with the right to family life enshrined in Article 8 ECHR cannot be deemed proportionate unless the best interests of the child, according to the UN Convention on the Rights of the Child and the EU Charter, have received primary consideration (judgment of the UK Supreme Court of 20/06/2012 *HH and PH v. Deputy Public Prosecutor of Genoa and FK v. Polish Judicial Authority*).

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#### Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

The Court of Cassation engaged with an assessment of the order of the Court of Appeal of Bologna which was at the origin of the appeal before it. It also mentions a case of the Italian Constitutional Court about the relationship between fundamental rights and the EAW (Order 216/2021) and dual preliminary (judgments of the Italian Constitutional Court no 20/2019, 63/2019; 269/2017; and Orders 24/2017 and 117/2019). In this latter respect, the Court of Cassation opted for the preliminary request to the Court of Justice because of the need to clarify, as a matter of priority, the standard of protection offered by EU law as regards the right to private and family life and the best interest of the child. Furthermore, the Court of Cassation considered that, in the silence of national law implementing the EAW Framework Decision (Law No. 69 of 2005), an interpretation of the Court of Justice on the regime of the surrender of mothers cohabiting with minor children could protect the fundamental rights at stake without the need for any declaration of unconstitutionality of provisions of the implementing law. Furthermore, the Court of Cassation engaged with an assessment of case law of both the CJEU and the ECtHR, judgments. First it referred to the CJEU judgment in *Melloni* (C-399/11) in relation to the principle precluding Member States from making the implementation of EU law in areas subject to full harmonization conditional on compliance with purely national standards of protection of fundamental rights, where this could compromise the primacy, unity and effectiveness of EU law. Second, it quoted the CJEU judgment in *Consorzio Italian Management* (C-561/19) to recall the duty of last instance courts to raise preliminary question before the Court of Justice under Article 267(3) TFEU.

Third, the Court of Cassation referred to the CJEU judgments in *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU), *X and Y* (C-562/21 PPU and C-563/21) and *L and P* (C-354/20 PPU and C-412/20 PPU) in order to stress that in several occasions the Court of Justice has reconciled the exigence for the implementation of the principle of mutual recognition at the basis of the EAW with the protection of fundamental rights.

Fourthly, the Court of Cassation quotes the CJEU judgment in *Piotrowski* (C-367/16), where the Court of Justice, while allowing for surrender, under the EAW, of minors who have reached the age of criminal responsibility in the executing Member State, held that the authorities of that State shall satisfy themselves that such minors enjoy specific procedural rights guaranteed in national criminal proceedings in order to ensure that the best interests of a child are always a primary consideration, in accordance with Article 24(2) of the Charter. In such a context, the Court of Cassation found “striking” that the parameter of the best interest of the child, which must inform the choices of execution of the EAW with respect to an accused or convicted child, would not assume relevance for younger minors who live with their mother, subject of an EAW, and who are extraneous to any criminal charges.

Finally, Court of Cassation refers to the CJEU judgment in *MA and others* (C-648/11) to stress that the pre-eminence of the best interests of the child has been affirmed by the Court of Justice also in the context of EU asylum law, and in particular the Dublin II Regulation, which is also an instrument based on the principles of mutual recognition and mutual trust.

For the quotation of the judgments of the ECtHR see point 5.4.

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#### Strategic use of judicial interaction technique (purpose aimed by the national court)

The scope pursued by the Court of Cassation when using judicial interaction techniques was to solve conflicts of judicial interpretation involving fundamental rights enshrined in the Italian Constitution, the EU Charter and the ECHR. In particular, the Court of Cassation sought an interpretative solution that would reconcile the duty to surrender under the EAW with Charter rights that would avoid a judicial review for the constitutionality that could lead to a conflict between the national legislation transposing the EAW with the individual rights protected by the Italian Constitution. It indeed argued in favor of the postponement of surrender of a mother in the situation of GN to a moment where such a surrender would be more respectful of the best interest of the child. It also held that the preliminary reference to the Court of Justice is made “in the spirit of loyal cooperation between national and European courts in the definition of common levels of protection of fundamental rights”. The preliminary reference is necessary to establish whether or not the surrender, in the execution of an EAW, of a mother of a minor child cohabiting with her is in compliance with the fundamental rights guaranteed by the Charter.

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#### Impact on Legislation / Policy

N/A

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#### Notes on the national implementation of the preliminary ruling by the referring court

Not yet applicable

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#### Did the national court quote case law of the CJEU/ECtHR (in particular cases not already referred to by the CJEU in its decision) or the Explanations?

The Court of Cassation quotes case law of both the CJEU and ECtHR. See points 5.3, 5.4 and 6.3.

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#### Did the national court quote soft law instruments, such as GRECO Reports, Venice Commission, CEPEJ Reports, or CCEJ Reports?

The Court of Cassation quoted the acknowledgment by the Council of Europe anti-torture Committee (CPT) that prisons are not an adequate environment for young children and the separation from the mothers is not desirable. Furthermore, the Court of Cassation quoted the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for



[Did the national court take into account national case law on fundamental rights?](#)

The Court of Cassation referred to its own case law on the protection of fundamental rights. In particular, it quoted its case law according to which the repeal of the compulsory ground for refusal to surrender in the Italian legislation does not in itself allow for the execution of an EAW against a mother of children less than three years of age and cohabiting with her (Judgments of the VI Section no n. 25333/2021, 22124/2021). Furthermore, the Court of Cassation referred to the Order 216/2021 of the Italian Constitutional Court where that Court made the reference for preliminary ruling to the Court of Justice that was at the origin of the EDL judgment.

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[If the court that issued the preliminary reference is not a last instance court, and the “follow up” was appealed before a higher court, include the information](#)

The court that issued the preliminary reference is a last instance court

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[Was there a consensus among national courts on how to implement the CJEU's preliminary ruling; and were there divergences between the judiciary and other state powers regarding the implementation of the preliminary ruling?](#)

N/A

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[Impact on national case law from the same Member State or other Member States](#)

N/A

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[Connected national caselaw / templates](#)

Court of Cassation, VI criminal section judgment no 51798/2023

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[Other](#)

N/A

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[\(Link to\) full text](#)

Unofficial link to the text of the case (official publication not yet available):

<http://www.marinacastellaneta.it/blog/wp-content/uploads/2022/04/15143.pdf>

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