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Mutual trust through the looking glass: The protection of children's fundamental rights in EU return proceedings

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Abstract

The principle of mutual trust underpins EU proceedings for the return of the child following abduction. On such a basis, the courts of the Member State of refuge shall trust the courts of the Member State where the child was habitually resident immediately before the abduction being willing and capable to protect the EU fundamental rights of the child concerned. Therefore, they should not refrain from enforcing a certified judgment requiring the immediate return of the child, even in situations where there is a clear risk that the return is contrary to that child's best interests. The purpose of this article is to demonstrate that there is a necessity – in the field of EU proceedings for the return of the child following abduction – to move beyond absolute trust, in order to ensure adequate protection of the children concerned.

Key words

Area of freedom; security and justice; Brussels IIa bis; mutual trust; best interests of the child; EU fundamental rights

Resumen

El principio de confianza mutua sustenta los procedimientos de la UE para la restitución del menor tras la sustracción. Sobre esta base, los órganos jurisdiccionales del Estado miembro de refugio deben confiar en que los órganos jurisdiccionales del Estado miembro en el que el menor tenía su residencia habitual inmediatamente antes de la sustracción están dispuestos y son capaces de proteger los derechos fundamentales de la UE del menor en cuestión. Por lo tanto, no deben abstenerse de ejecutar una resolución

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certificada que exija la restitución inmediata del menor, incluso en situaciones en las que exista un riesgo claro de que la restitución sea contraria al interés superior de ese menor. El objetivo de este artículo es demostrar que es necesario –en el ámbito de los procedimientos de la UE para la restitución del menor tras una sustracción– ir más allá de la confianza absoluta, con el fin de garantizar una protección adecuada de los menores afectados.

Palabras clave

Área de Libertad; seguridad y justicia; Bruselas IIa bis; confianza mutua; interés superior del menor; derechos fundamentales de la UE

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1. Introduction

For the past seventeen years, EU cross-border child abduction has been regulated by Council Regulation (EC) No 2201/2003 (2013) (hereinafter, "Brussels IIa" or the "Regulation"). This Regulation preserves the Convention on the Civil Aspects of International Child Abduction (1980) (hereinafter, the "1980 Hague Convention") and simultaneously complements it with more stringent and directly applicable EU rules (Recital 17 of the Regulation) which seek to ensure that the national courts of the Member State in which the child was habitually resident immediately before the abduction, retain the jurisdiction, and the power to decide, over a return application (McEleavy 2015. In this perspective, the national courts of the Member State of refuge are required to play the role of "facilitators" (Bartolini 2019), ready to enforce, in every single instance, a certified judgment requiring the immediate return of the child to Member State where they were habitually resident immediately before the abduction. No exceptions allowed (Article 42 of the Regulation).

The ECJ has constantly legitimized this system by providing an idyllic vision of the functioning of the EU proceedings for the return of the child (hereinafter, the "EU return proceedings"). EU return proceedings need to be based on automaticity and speed. This serves the purpose of effectively deterring EU cross-border child abduction and ensuring that the child concerned will be immediately returned (*Inga Rinau* (2008), para. 52) (hereinafter, "Rinau") to where they will be able to restore their daily life, shattered by the abduction, and re-establish direct contact, and hopefully restore their personal relationship, with the left-behind parent in accordance with Article 24 § 3 of the Charter (Charter of Fundamental Rights of the European Union, 2012) (*Joseba Andoni Aguirre Zarraga v Simone Pelz* (2010), para. 40) (hereinafter, "Zarraga"). This will, in turn, ensure the protection of their best interests from further harm.

In an attempt to ensure the effectiveness of the EU return proceedings, the ECJ has asked the national courts of Member State of refuge to *blindly* rely on the principle of mutual trust and automatically enforce a certified judgment, even in situations where there is a real risk that the courts of the Member State where the child was habitually resident immediately before the abduction, have issued that certified judgment without respecting the EU rights of the child as enshrined in Article 24 of the Charter (Bartolini 2019).

This article aims to discuss how such a rigid application of the principle of mutual trust, in the context of EU return proceedings, has had a negative impact on the overall protection of children entangled in EU return proceedings. The article calls on the ECJ to shift its approach from an automatic prioritisation of the return policy into a more child-centred approach. As the principle of the best interests of the child is an absolute principle that concedes no restriction, it is argued that the national courts of the Member State of refuge should be allowed to derogate from the mutual trust presumption and oppose the enforcement of a certified judgment, where there is a real risk of a breach of the principle of the best interests of the child. Indeed, the national courts of the Member State of refuge should be able to fulfil their judicial protective function vis-à-vis the child concerned, and their obligation arising from Article 24 § 2 of the Charter, to take into primary consideration the best interests of the child concerned before enforcing any decision concerning them (and act accordingly).

This article is divided into five further sections. Section two considers the function of the EU return proceedings and highlights how competences are divided between the courts of the Member State where the child was habitually resident immediately before the abduction, and the courts of the Member State of refuge. Section three sets out the starting premise of the article, which is that there is a parallel between the enforcement of a certified judgment requiring the return of the child, the execution of an European Arrest Warrant in the context of the 2002/584/JHA: Council Framework Decision (2002) (hereinafter, the "EAW FD"), requiring the surrender of a person for the purposes of conducting a criminal prosecution or executing a custodial sentence, and/or the transfer of an asylum seeker to the Member State responsible, to process an asylum application in the context the Regulation (EU) No 604/2013 (2013) (hereinafter, the "Dublin Regulation"). They all establish a system based on automaticity and speed, and the implementation of that system has a direct impact upon the EU fundamental rights of the person concerned. Therefore, the ECJ case law concerning the limitations to the principle of mutual trust, based on EU fundamental rights, in the context of the EAW FD and the Dublin Regulation, should, by analogy, be extended to the context of EU return proceedings. Section four looks at the evolution of the approach of the ECJ vis-à-vis the principle of mutual trust in the context of both the EAW FD and the Dublin Regulation. It highlights three main points that may serve as a point of departure for discussing on what basis a derogation from mutual trust should be allowed in the context of EU return proceedings. Section five argues that the principle of the best interests of the child as an absolute principle is equivalent to core human rights. Therefore, national courts of the Member State of refuge should be allowed to lift the mutual trust presumption where there is a real risk of a breach of that principle. It is further argued that in order to respect the specificity of EU return proceedings and the EU fundamental rights of the child, the principle of the best interests of the child should be conceived as a set of substantial procedural safeguards built around Article 47 of the Charter, concerning the right to an effective remedy. Section six looks at the main changes brought forward by Council Regulation (EU) 2019/1111 (2019) (hereinafter, the "recast Regulation"). Indeed, the system brought forward by Brussels IIa triggered the rebellion of the courts of the Member State of refuge, and their discontent was manifested through the refusal to enforce certified judgments, even in spite of clear judgments by the ECJ requiring them to do so (Beaumont *et al.* 2016). This ultimately pushed to EU legislature to revise the rules underpinning EU return proceedings, in a way in which the responsibilities between the courts of the Member state where the child was habitually resident immediately before the abduction and those of refuge, are more balanced. This led to the adoption of the recast Regulation, which became applicable as of 1 August 2022. Finally, a brief conclusion emphasizes that a new relationship between the principle of mutual trust and the EU return mechanism is necessary for ensuring an adequate system of EU summary return proceedings, that perceives the best interests of the child as the primary consideration.

2. In a nutshell: EU proceedings for the return of the child under Brussels IIa

EU return proceedings are based on the premise that the best interests of the child are inevitably and seriously harmed, where a parent unilaterally decides, in breach of the existing custody rights, to retain or remove the child away from the Member State where

they were habitually resident, immediately before the abduction. Therefore, a return procedure based on automaticity and speed is both justified and necessary to guarantee that the child is put back "in the environment with which [he/she] is most familiar and, thereby, to restore the continuity of the child's living conditions and the conditions in which the child can develop" (*OL v PQ* (2017), para 61) (hereinafter, "OL").

It is Article 11 of Brussels IIa that governs the rules of jurisdiction in EU cross-border cases. The peculiarity of that Article is that it simultaneously keeps, and modifies, the 1980 Hague Convention. Recital 17 of the Regulation states that "[i]n cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention of 25 October 1980 would continue to apply as complemented by the provisions of this Regulation, in particular Article 11".

The Regulation automatically prevails over the Convention in so far as there is an overlap between the matters covered by the two instruments (Art. 60 (e) of the Regulation). The ECJ draws inspiration from that Convention and does its best to interpret concepts that are found in both instruments in a uniform manner, in order to ensure that they are "demarcated from each other" (*A* (2009), Opinion of the Advocate General, para. 23). However, as President Lenaerts (2013, p. 1304) has pointed out, if such exercise eventually leads to a collision with the objectives pursued by the EU, "then the ECJ will have no choice but to take a different approach".

It is noteworthy that the ECJ has provided quite an extensive reading of EU competence in matters pertaining to EU cross-border child abduction. This can be said to be "[b]ecause of the overlap and the close connection between the provisions of Regulation 2201/2003 and those of the Convention, in particular between Article 11 of the Regulation and Chapter III of the Convention, the provisions of the Convention may have an effect on the meaning, scope and effectiveness of the rules laid down in Regulation No 2201/2003" (Opinion on the accession of third States to the 1980 Hague Convention (2014), para. 85). Therefore, the EU shall have an exclusive external competence in relation to EU cross-border child abduction matters that even encompass "the acceptance of accession of third countries to international fora, regardless of whether or not the EU itself is a member" (Govaere 2015, p. 1306).

In essence, Article 11 of the Regulation preserves the Convention's summary proceedings but it complements it with more stringent rules. This essentially gives the national courts of the Member State in which the child was habitually resident immediately before the abduction, the power to have the final say on return applications (McEleavy 2015, p. 372).

EU return proceedings are based on a clear division of competences between the courts of the Member State where the child was habitually resident immediately before the abduction, and the courts of the Member State of refuge.

The courts of the Member State where the child was habitually resident immediately before the abduction are competent to solve parental responsibility matters. They have, and shall retain, jurisdiction, according to Article 10 of the Regulation, unless the child concerned has acquired habitual residence in another Member State, and in addition, one of the alternative conditions contained in Article 10 § a and b of the Regulation is fulfilled. It follows that jurisdiction in EU cross-border child abduction cases cannot be

easily transferred from the courts of the Member State where the child was habitually resident immediately before the abduction to the courts of the Member State of refuge, even if the child concerned has acquired habitual residence in the latter Member State (*Doris Povse v Maura Alpago* (2010), para. 44) (hereinafter, "Povse"). This is because the courts of the Member State where the child was previously habitually resident are considered to be the best placed to solve matters regarding the merits of parental responsibility (Zarraga, para. 46). Therefore, the conditions enshrined in Article 10 must be interpreted strictly (Povse, para. 45). This would, in turn, ensure the attainment of the Regulation's main objective, namely the deterrence of EU cross-border child abduction and the immediate return of the child (Devers 2004, Lenaerts 2013).

The courts of the Member State of refuge are competent to deal with matters of return. Following an application for the return of the child, the courts of the Member State of refuge have a mandatory six-weeks to make a decision over that application (Art.11§ 3 of the Regulation). Those courts have an obligation to hear the child concerned, if it is appropriate considering that child's age and maturity, and take into account their view, before making a decision (Art. 11 § 2 of the Regulation). They may refuse to return a child on the basis of the 1980 Hague Convention in light of additional requirements. In particular, the courts of the Member State of refuge can *only* rely on Article 13 § b of the 1980 Hague Convention to oppose the return of the child if "the grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation" and the arrangements made to secure the protection of that child after their return are inadequate. Furthermore, a judgement of non-return can only be issued if the person requesting the return has been given an opportunity to be heard (Art. 11 § 5 of the Regulation). Within a month from the judgment of non-return, the courts of the Member State of refuge must transmit a copy of that judgment, along with other relevant documents, to the court of Central Authority in the Member State where the child was habitually resident right before the abduction (Art. 11 § 6 of the Regulation).

However, even if the courts of the Member State of refuge issued a judgment of non-return on the basis of Article 13 of the 1980 Hague Convention "any subsequent judgment which requires the return of the child issued by a court having jurisdiction (…) shall be enforceable in accordance with Section 4 of Chapter III (…) in order to secure the return of the child" (Art. 11 § 8 of the Regulation). Article 11 § 8 of the Regulation provides an automatic shift of jurisdiction from the courts of the Member State of refuge to the courts of the Member State where the child was habitually resident right before the abduction (Lazic 2015, p. 149). This is also known as the "overriding mechanism" or the "second chance procedure" (Kruger and Samyn 2016, p. 158).

Following a non-return order on the basis of Article 13 of the 1980 Hague Convention, the national courts of the Member State in which the child was habitually resident immediately before the abduction may issue a certified judgment requiring the immediate return of the child (Kruger and Samyn 2016, pp. 158–159). There are no time limits for those courts to issue a certified judgment, which causes confusion and additional stress to the family unit, especially the child concerned (Kruger and Samyn 2016, p. 159). Before issuing a certified judgment, however, the national courts where the child was habitually resident right before the abduction must, pursuant to Article 42 § 2

of the Regulation, give the parent, and the child unless it is considered inappropriate to his/her age, the opportunity to be heard and take into consideration the reasons for and the evidence underlying the non-return order (Zarraga, para. 52). As a result, the ECJ emphasised that the issue of the return of the child will be examined twice, thereby ensuring that a certified judgment "*is more soundly based and that the interests of the child have increased protection*" (Povse, para. 60).

Certified judgments are immediately enforceable (Art. 42 § 1 of the Regulation) and enjoy procedural autonomy (Rinau, para. 63) even if custody proceedings are still pending before the courts of Member State where the child was habitually resident immediately before the abduction (Povse, para. 53). Therefore, a declaration of enforceability is unnecessary and there is no possibility of opposing its recognition. The ECJ also made it clear that any issues regarding the illegality of a certified judgment can only be raised before the national courts of the Member State in which the child was habitually resident immediately before the abduction, during the legal proceedings relating to parental responsibility (Povse, para. 74 and Zarraga, para. 51).

Consequently, the national courts of the Member State in which the child was habitually resident immediately before the abduction always retain the power to decide on a request for return. No exceptions are allowed. The ECJ is of the view that the national courts of the Member State of refuge should, nevertheless, feel reassured as the mutual trust presumption ensures that the national courts of the Member State in which the child was habitually resident immediately before the abduction are able and willing to provide equivalent protection of the child's fundamental rights, and will require the return of the child only if it is in their best interests (Zarraga, paras. 59–61). However, the capacity and the willingness of the national courts of the Member State in which the child was habitually resident right before the abduction to ensure an equivalent protection of the child's fundamental rights has not always been verified in practice (Beaumont *et al.* 2016).

3. The starting premise: Mutual recognition, mutual trust and forced transfer of persons within the EU

The principle of mutual trust is based on the premise that all Member States share and recognise the same common values upon which the EU is founded (Art. 2 of the TEU). This implies and justifies the presumption that all Member States will respect those values when implementing EU law. On such a basis, this principle requires, particularly with regards to the Area of Freedom, Security and Justice (hereinafter, the "AFSJ"), the Member States to presume that effective judicial protection of EU rights and, above all, equivalent protection of EU fundamental rights will be ensured by the other Member States (Opinion 2/13 (2014), para. 191). This further entails that Member States cannot ask for a higher level of national protection of fundamental rights from another Member State than that provided by EU law, and cannot review – save in exceptional circumstances – whether or not another Member State has, in a specific case, effectively ensured the protection of EU fundamental rights (Opinion 2/13 (2014), para. 192).

An area without internal borders, where persons can move freely and securely, requires the Member States – despite their legal diversities – to mutually recognise the extraterritorial effect of judicial decisions from other Member States and to enforce them.

This can only be possible if Member States trust each other sufficiently. The principle of mutual trust serves as a basis for mutual recognition. In other words, the courts of the Member State where recognition and enforcement are sought should trust that the courts of the Member State which adopted that decision were able to ensure effective judicial protection of the person concerned by the decision and, above all, his/her EU fundamental rights (Opinion 2/13, para. 192). This presumption will give them the green light to recognise and enforce the decision concerned without too much fuss.

In the context of Brussels IIa, the application of the principle of mutual recognition essentially relies on the presumption of a high level of trust between the family justice systems of the Member States. In essence, the judicial authorities of each Member State must trust not only their family law system, but also that of the other Member States. Furthermore, they have to trust the family law in force in other Member States and the interpretative endeavours of the judicial authorities of those Member States. This is the case even if the outcome of the decision would be different if its own law were applied, or their interpretation of the law was followed. In order to alleviate the burden of trusting each other, national courts directly, or through the Central Authorities, are expected to engage in a transnational dialogue and cooperate strictly with each other, in order to guarantee effective judicial protection. Only by doing so will the free movement of family judgments and the proper functioning of the AFSJ be ensured (Lenaerts 2013).

As the ECJ pointed out (Rinau, para. 50), the Regulation "is based on the idea that the recognition and enforcement of judgments in a Member State must be based on the principle of mutual trust and the grounds for non-recognition must be kept to the minimum required". In particular, national courts may refuse to recognise judgments relating to parental responsibility, only on the grounds expressed in Article 23 of the Regulation. Those grounds of non-recognition, however, do not apply to proceedings concerning the non-return of a child. In this context, both the principles of mutual trust and mutual recognition are stretched to their limits: the court of the Member State of refuge is always expected to trust that the court of the Member State where the child was habitually resident immediately before the abduction has issued a certified judgment only after having carefully verified that the return is really in the child best interests. On the basis of this trust will they recognise and immediately enforce that judgment. Such a strict system is justified by the necessity to deter EU cross-border child abduction and ensure the immediate return of the child (Rinau, para. 52).

The issue that arises is whether those courts are required to automatically enforce a coercive decision requiring the transfer of a child from the Member State of refuge to the Member State where the child was habitually resident right before the abduction, even in situations where there is a real risk that that transfer would breach the fundamental rights of the child concerned. These include rights as enshrined in Article 24 of the Charter, most notably the right of the child to be heard (provided that this is appropriate with their age and maturity) (Art. 24 § 1 of the Charter) and the right to have their best interests considered (and protected) every time a decision that concerns them has to be adopted (Art. 24 § 2 of the Charter). Would the existence of such a risk entitle the courts of the Member State of refuge to rebut the principle of mutual trust and eventually suspend – in case such a risk subsists – the return of the child to the Member State where

they were habitually resident right before the abduction, in order to protect the child's fundamental rights?

As is well documented, the same question, namely to what extent "mutual trust" can be applied, has been vigorously raised by legal doctrine and the judiciary increasingly in the context of the EAW FD and the Dublin Regulation (Lenaerts 2017, Xanthopoulou 2018, Mitsilegas 2019).

It is this author's view that there is a parallel between the enforcement of a certified judgment requiring the return of the child, and the execution of a European Arrest Warrant (hereinafter, "EAW"), requiring the surrender of a person for the purposes of conducting a criminal prosecution or executing a custodial sentence, and/or the transfer of an asylum seeker to the Member State responsible for processing an asylum application. Indeed, although the EAW FD and the Dublin Regulation are very different legal instruments, they share two main features with EU return proceedings: they all establish a system based on automaticity and speed with the view of swiftly enforcing coercive decisions for the cross-border transfer of individuals and the implementation of that system has a direct impact upon the EU fundamental rights of the person concerned.

In the field of EU criminal law, the EAW FD is the "cornerstone" of judicial cooperation in criminal matters and aims to replace the system of extradition in inter-State cooperation in criminal matters with a system of surrender that is exclusively managed by national judicial authorities (*Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* (2016), para. 79). By doing so, it intends to prevent criminals' "safe havens" in the EU and ensure the free movement of EU citizens and businesses (Mancano 2019, p. 73). Accordingly, the system that governs the surrender between judicial authorities of persons convicted of crimes for the purpose of executing sentences, or of persons suspected of having committed a criminal offence for the purpose of conducting prosecutions, is based on the principle of mutual recognition of judicial decisions. That principle implies that "the Member States are in principle obliged to act upon an EAW" (Art. 1 § 2 EAW FD). Therefore, the judicial authorities of the executing Member State can only refuse to execute such an EAW in cases of obligatory non-execution exclusively listed in Article 3, or of optional non-execution according to Articles 4 and 4a of the EAW FD. In addition, the executing judicial authority may make the execution of an EAW subject only to one of the conditions exhaustively listed in Article 5 EAW FD.

The responsibility to protect the EU fundamental rights of the person requested by EAW rests (quasi) exclusively with the judicial authorities of the issuing Member State and the executing judicial authority plays the role of "facilitator" ready to execute an EAW without asking too many questions (Mitsilegas 2019, pp. 422–423). After all, the principle of mutual trust ensures that all Member States are willing and able to ensure the equivalent fundamental rights protection to the person concerned, by a judicial decision. The question as to whether the execution of an EAW can be refused on the grounds of a serious risk of violations of EU fundamental rights has been raised in several instances (Mitsilegas 2019, pp. 422–423). It has ultimately obliged the ECJ to revisit the automaticity aspect of the principle of mutual trust and to create some space for the executing judicial authorities to perform their judicial protective function vis-à-vis the individual concerned by an EAW. This will be discussed further in the next section.

In the field of EU asylum law, the Dublin Regulation is at the very core of the Common European Asylum System (Deruiter and Vermeulen 2016, p. 736). It establishes a system of automatic cooperation between Member States based on negative mutual trust (Guild 2004). It sets out the criteria and mechanism for determining the Member State responsible for processing asylum applications, with the aim of rationalising the treatment of asylum claims and avoiding blockages in the system as a result of applicants for international protection making multiple claims in several Member States *(N.S. v Secretary of State for the Home Department and M.E. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* (2011), para. 79 (hereinafter, "N.S. and M.E."). Against this background, it requires that every application lodged in the Dublin area is to be processed by only one responsible Member State. That Member State will be identified on the basis of a hierarchy of "objective criteria" (Recital 5 of the Dublin Regulation) namely, family considerations, recent possession of visa or residence permit in a Member State, whether the applicant has entered the territory of the EU regularly or irregularly (Articles 7 to 15 of the Dublin Regulation).

The occurrence of one of the Dublin criteria creates an obligation upon the Member State responsible for taking charge of applicants for international protection and to recognise the refusal of another Member State to process their application. In a nutshell, when an asylum seeker arrives in the territory of a Member State, which has no primary responsibility under the Dublin criteria, that Member State may decide but only on a discretionary basis to examine their application (Article 17 of the Dublin Regulation). Once waived such a possibility, that Member Stare will have to send the asylum seeker back to the Member State responsible for dealing with their application which in principle is the Member State of first entry (Guild 2004). Transfers must take place speedily and almost automatically, on the presumption that the receiving Member State is able and willing to provide equivalent fundamental rights protection to applicants for international protection as the sending state. This specifically entails a presumption that all Member States are safe countries for applicants for international protection (Brouwer 2013). Therefore, little space at that point is left to the national authorities of the receiving Member State to look into the individual situation and fundamental rights of that applicants for international protection (Mitsilegas 2019).

As in the context of judicial cooperation in criminal matters, the automatic transfer of applicants for international protection to the Member State of first entry has raised serious fundamental rights concerns. It has ultimately prompted the ECJ to start re-defining the relationship between the principle of mutual trust and EU fundamental rights (Lenaerts 2017, Xanthoupoulou 2018, Mitsilegas 2019). This will be explained further in the next section.

Against this background, it is argued that the principles arising from the ECJ case law concerning the limitations to the principle of mutual trust, based on EU fundamental rights, in the context of the EAW FD and the Dublin Regulation, should be transposed and further adapted to the specificities of EU return proceedings.

4. Revisiting automatic trust in the context of the Dublin Regulation and the EAW FD

For a long period of time, the ECJ did not challenge the mutual trust presumption. This triggered a forceful debate against the ECJ's total adherence to the principle of mutual trust, which translated into a continuing prioritisation of effectiveness of EU law over the protection of individuals (Xanthopoulou 2018, Mitsilegas 2019, Wendel 2019, Rizcallah 2019).

It is in the context of the Dublin Regulation that the ECJ initially placed a limitation on the presumption of EU fundamental rights compliance. This paradigm change to the operation of the principle mutual trust was directly inspired by the European Court of Human Rights (hereinafter, the "ECtHR") ruling of 21 January 2011 in *M.S.S. v Belgium and Greece* (2011) in which it held that both the receiving (Greece) and the sending Member State (Belgium) had breached the European Convention of Human Rights (hereinafter, the "ECHR") by allowing the automatic transfer of an asylum seeker to a Member State that had been experiencing systemic deficiencies in its asylum procedure and reception system.

Following these findings, the ECJ in N.S. and M.E. ruled that Article 4 of the Charter, which enshrines the prohibition of torture and inhuman or degrading treatment, precluded the transfer of an asylum seeker in a Member State in which there are substantial grounds for believing that there are systemic flaws in its asylum procedure and reception system (this finding was later consolidated in the Article 3 (2) of the Dublin Regulation). Therefore, the principle of mutual trust, although it is "the raison d'être of the EU and the creation of an area of freedom, security and justice" (N.S. and M.E., para. 104) should not be *blindly* applied when it would jeopardise the fundamental rights of the individual concerned (Brouwer 2013). The ECJ, by explicitly limiting the mutual trust presumption, marked a significant first step for a change in the system of transnational cooperation between Member States. However, it left three main questions unanswered. First, whether the approach in N.S. and M.E. could be extended horizontally to other AFSJ's fields. Second, whether a limitation to the principle of mutual trust could also be triggered on the basis of an individualised examination of the impact of a decision on the individual concerned, regardless of a finding of a generalised systemic deficiency. Third, whether cases not involving a challenge to Article 4 of the Charter could also trigger a limitation to the principle of mutual trust. The ECJ later dealt with those questions essentially resetting the parameters of mutual trust in the context of the AFSJ.

It is in Aranyosi and Căldăraru that the ECJ extended the approach in N.S. and M.E.to the EAW FD, by ruling that the execution of an EAW must be postponed if there is a real risk of inhuman or degrading treatment in the detention conditions of the issuing Member State. In this "*eagerly awaited decision*" (Niblock 2016), the ECJ further provided a detailed analysis on how the executing authority must proceed when assessing the existence of a risk of inhuman and degrading treatment. It established a two-stage test. First, if the executing authority has evidence of a real risk of inhuman and degrading treatment of individuals detained in the issuing Member State, it is required to assess whether or not that risk exists (Aranyosi and Căldăraru, para. 88). In this regard, the executing authority has to rely "on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State

and that demonstrate that are deficiencies, which may be systematic or generalised, or which may affect certain groups of people, or which may affect certain place of detention" (Aranyosi and Căldăraru, para. 89). Sources may include judgments of international courts, such as the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by the Council of Europe or United Nations bodies (Aranyosi and Căldăraru, para. 89). Second, along with the general assessment of the risk, the executing authorities must carry out a further assessment of whether there are substantial grounds to believe that, following their surrender to the issuing Member State, the person concerned by an EAW will run a risk of inhuman or degrading treatment because of the conditions of his detention envisaged by the issuing Member State (Aranyosi and Căldăraru, para. 92). For the risk assessment, the cooperation of the issuing authority is central, especially as it should provide supplementary information, if requested by the executing national authority (Aranyosi and Căldăraru, para. 95). In *Dumitru-Tudor Dorabantu* (2019) (hereinafter, "Dorabantu") the ECJ further clarified that when conducting the test, the executing authority shall not limit themselves to "*review of obvious inadequacies*", but "*must request from the issuing authority the information that deems necessary*" (Dorabantu, para. 85). If a risk of inhuman and degrading treatment is found to exist, the executing authority must suspend the surrender of the addressee of an EAW (Aranyosi and Căldăraru, para. 92). However, the EAW is not abandoned (Aranyosi and Căldăraru, para. 99). Only if the risk subsists, the executing authority must decide whether the surrender procedure should be brought to an end (Aranyosi and Căldăraru, para. 103).

With Aranyosi and Căldăraru the ECJ sought to strike a balance between, on the one hand, the effectiveness of the principles of mutual trust and mutual recognition, and on the other hand, the protection of EU fundamental rights (Willems 2019). The ECJ did not allow a refusal to execute an EAW on the sole basis of systemic deficiencies and opted for the postponement of the EAW (Willems 2019). At the same time, the ECJ introduced an "individual assessment" criteria that essentially aims at giving back to the executing national authorities some *space* to look into the specific circumstances of a case and perform their judicial protective function vis-à-vis the individual concerned, finally moving beyond a formalist and detached approach vis-à-vis fundamental rights violations.

It is in *C.K. and Others v Republika Slovenija* (2017) (hereinafter, "C.K.") that the ECJ was challenged to move beyond the requirement of systemic deficiencies and extend the "individual assessment" criteria to the context of the Dublin Regulation. This case involved a situation where a transfer of an asylum seeker was claimed to be in breach of Article 4 of the Charter, even though there were no serious grounds for believing that there are systemic deficiencies in the asylum procedure and the reception conditions of the Member State of first entry. The asylum seeker concerned was suffering from serious mental illness and their transfer would have led to a significant and irreversible deterioration in their health. Departing from *Shamso Abdullahi v Bundesasylamt* (2013), where it held that prohibitions on transfers were not admissible below the threshold systemic deficiencies, the ECJ concluded that it cannot be ruled out that the transfer of an asylum seeker "may, in itself, result, for the person concerned, in a real risk of inhuman and degrading treatment within the meaning of Article 4 of the Charter, irrespective of the quality of the reception and the care available in the Member State

responsible for examining his application" (C.K., para. 73). Later in *Abubacarr Jawo v Bundesrepublik Deutschland* (2019) (hereinafter, "Jawo") the ECJ followed the same approach. The case concerned the question as to whether exposing an asylum seeker to a risk of becoming homeless and reducing to destitution in a life on the margin of society would trigger Article 4 of the Charter and thus the suspension of their transfer to the Member State responsible under the Dublin Regulation. Although such a risk does not entail extreme material poverty falling within the meaning of Article 4 of the Charter (Jawo, para. 93), the ECJ concluded that "it cannot be entirely ruled out that an applicant for international protection may be able to demonstrate the existence of exceptional circumstances that are unique to him and mean that, in the event of transfer to the Member State normally responsible for processing his application for international protection, he would find himself, because of his particular vulnerability, irrespective of his wishes and personal choices, in a situation of extreme material poverty" (Jawo, para. 95).

In reaching those conclusions, the ECJ applied, by analogy, the two-stage test developed in Aranyosi and Căldăraru. The national authorities have to make sure that the transfer of applicants for international protection will not expose them to a real risk of inhuman or degrading treatment. It has to be guaranteed that the application of the Dublin Regulation and the principle of mutual trust "will not result, at any stage and in any form, in a serious risk of infringements of Article 4 of the Charter" (Jawo, para. 89). Consequently, those authorities have to eliminate on the basis of objective evidence of the real risk that the transfer would produce any serious doubts concerning the impact of such a transfer on the person concerned. In this regard, cooperation between the sending and the receiving Member State is essential, in order to find suitable solutions and ensure a safe transfer. However, if the real risk cannot be eliminated, the transfer should be suspended. Along with the general assessment of the risk, the sending Member State – on the basis of the evidence brought forward by the applicant concerned – must carry out a further assessment of whether there are substantial grounds for believing that he/she would be exposed, in the event of their transfer, to a real risk of suffering treatment contrary to Article 4 of the Charter (Jawo, para. 97).

Particular emphasis should be placed on the fact that in C.K. and Jawo the ECJ not only clearly moved away from the requirement of "systemic deficiencies", but it also horizontally extended the two-stage test to the Dublin Regulation, albeit with some differences. In particular, in the context of judicial cooperation in criminal matters the national authorities have to carry out a more stringent test in order to avoid the risk of impunity. Arguably, the ECJ with these two landmark rulings opened up the possibility for establishing, as Mitsilegas pointed out, "a benchmark of fundamental rights protection in the evolving paradigm of interstate cooperation based in mutual trust" (Mitsilegas 2019, p. 431).

It is in *LM* (2018) that the ECJ recognised that the principles of mutual recognition and mutual trust may also be lifted in cases that pose a real threat to EU fundamental rights that are not absolute. Until that ruling, the ECJ had built its discourse on the possible derogations from the principle of mutual trust around cases that challenge Article 4 of the Charter, which "enshrines one of the fundamental values of the Union and its

Member States and is absolute in that that value is closely linked to respect for human dignity, the subject of Article 1 of the Charter" (Aranyosi and Căldăraru, para. 85).

LM, concerned the question of the fundamental rights compatibility of the execution of an EAW to Poland, where threats to the rule of law were very real (LM, para. 22). The ECJ made clear that judicial independence "forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded" (LM, para. 48). Therefore, a real risk of a breach of the fundamental right to a fair trial, guaranteed by Article 47 (2) of the Charter, may trigger a suspension of the mutual trust presumption. The ECJ used, by analogy, its approach in Aranyosi and Căldăraru, and held that when a person requested by an EAW claims that there systemic or generalised deficiencies in the issuing Member State that may affect the independence of the judiciary, and in turn infringe their right to a fair trial, the executing national authority must carry out an assessment of such risk (LM, para. 59). It will do that on the basis of the two-stage test created in Aranyosi and Căldăraru. First, the executing national authority must assess whether such a right may be infringed, because the systemic and generalised deficiency of the legal system of the issuing Member State has affected the independence of the national courts. This assessment should be based on material that is objective, reliable, specific and properly updated (LM, para. 61). The ECJ made clear that the executing national authority cannot skip this stage of the test, unless the European Council determines that in Poland there is a persistent and serious breach of Article 2 TEU. Only if a real risk of a breach of the essence of the fundamental right to a fair trial is found to exist, can the executing national authority trigger the second stage of the test, namely the individual assessment. It has to verify "specifically and precisely" whether "*in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender, the person concerned will run that risk*" (LM, para. 68). In particular, it has to look into the personal situation of the individual concerned as well as the nature of the offence and the factual context that forms the basis of the EAW (LM, para. 75). Again, the ECJ underlines that national judicial authorities must engage in a fruitful dialogue that would allow the executing national authority to assess the existence of such a risk (LM, para. 77).

More recently in *L and P* (2020) the ECJ developed on the principle determining evidence of systemic deficiencies concerning judicial independence in Poland when executing an EAW. In particular, the District Court of Amsterdam had serious concerns that the right to a fair trial of two polish citizens would be put at risk if they were tried by a polish court. The ECJ clarified that systemic or generalised deficiencies, however serious, do not automatically entail that all Polish courts not being independent thus not falling under the "issuing judicial authority" concept. Indeed, generalised deficiencies do not necessarily affect every decision adopted by polish courts. The only way to automatically suspend the EAW mechanism is via Article 7 TEU (L and P, para. 59).

The ECJ then went through the two-step test. Concerning the first step, the executing authority must determine whether there is "objective, reliable, specific and properly updated material indicating that there is a real risk of breach of the fundamental right to a fair trial on account of the systemic deficiencies" (L and P, para. 54). With regards to

the second step, the national authority "must determine specifically and precisely to what extent those deficiencies are liable to have an impact at the level of the courts of that Member State which have jurisdiction over the proceedings to which the requested person will be subject and whether, having regard to his or her personal situation, to the nature of the offence for which he or she is being prosecuted and the factual context in which that arrest warrant was issued" (L and P, para. 55).

The ECJ concluded that the execution of an EAW issued by a Polish judicial authority must be refused only if, following the two-stage test, the executing authority reach the conclusion that the risk of breach of the right to a fair trial due to systemic deficiencies is liable to have an impact on the proceedings of the person subject to the EAW, having specific regard to individualised criteria (L and P, para. 69).

Finally, in *X and Y v Openbaar Ministerie* (2022) (hereinafter, "X and Y"), the ECJ further developed on the criteria to be applied by the executing authorities in the assessment of the risk of a breach of the right of a fair trial in the issuing Member State. In the context of the first step, the ECJ pointed out that the executing authority must carry out an examination on the basis of objective, reliable, specific and properly updated factors. The fact that a judicial appointing body, such as the Polish National Council of the Judiciary (hereinafter, "KRS") is composed of members of the executive or legislature does not *per se* justify a refusal to surrender (X and Y, para. 76). *A contrario*, information in a reasoned proposal addressed by the European Commission to the Council pursuant to Article 7 (1) TEU, resolutions of the Polish Supreme Court and the relevant case law of the ECJ and the ECtHR are qualified factors to be taken into account to justify such a refusal (X and Y, para. 78).

Concerning the second step of the test, the ECJ made clear that the person with respect to whom an EAW has been issued has to provide specific evidence to suggest that systemic or generalised deficiencies in the judicial system of the issuing Member State has a tangible impact i on the handling of his/her criminal case or are liable, in the event of a surrender, to have such an influence (X and Y, para. 83). In this sense, the executing judicial authority must take into account of the information regarding the composition of the panel of judges who heard the criminal case or any other circumstance relevant to the assessment of the independence and impartiality of that panel. The fact that one or various judges hearing the case have been appointed by a body such as the KRS is not *enough* to justify the refusal (X and Y, para. 98).

These landmarks rulings mark a new phase in the relationship between mutual trust and EU fundamental rights in the AFSJ. As President Lenaerts pointed out "*mutual trust must be earned*" by the Member State of origin by ensuring effective compliance with EU fundamental rights (Lenaerts 2017, p. 840). For the purpose of this article, three main points arising from this jurisprudence should be emphasised. First, the cross-fertilisation between the EAW FD and Dublin Regulation rulings should ensure that the principles arising from that jurisprudence extend to the whole of the AFSJ (Bay Larsen 2012 p. 152, Willems 2019, p. 481) and most notably the EU return proceedings. Given the constitutional nature of the principle of mutual trust (Lenaerts 2017) a transversal application of those principles will allow the ECJ to establish a horizontal benchmark for EU fundamental rights protection that pervades the AFSJ. Second, the ECJ, by extending the scope of fundamental rights scrutiny from the absolute rights such as that contained

in Article 4 of the Charter, to Article 47 (2) of the Charter, it has opened the gate *at least* to other cases that challenge judicial protection more broadly (Willems 2019). Third, the ECJ further reaffirms the importance of the cooperation and dialogue between national authorities for ensuring effective protection of EU fundamental rights.

5. Still automatic trust in the context of EU proceedings for the return of the child

In contrast to the context of the EAW FD and Dublin Regulation, the ECJ has never challenged the principle of mutual trust in EU return proceedings. Instead, it has been very careful to base the legality of the system of allocation of responsibility between the courts of the Member State where the child was habitually resident immediately before the abduction, and the courts of the Member State of refuge, under Article 11 of the Regulation (Povse, para. 44). Whilst the former court carries the primary responsibility to assess the best interests of the individual child and to ensure that their fundamental rights are effectively protected throughout the EU return proceedings, the latter court executes its obligation to protect the best interests of the child by making the certified judgment immediately enforceable (Bartolini 2019, p. 13). The ECJ is of the view that by maintaining a clear division of competence between these courts, and ensuring the immediate return of the child to the Member State where he/she was habitually resident prior the abduction, the right of the child to maintain a regular personal relationship with both parents, pursuant Article 24 § 3 of the Charter, will be more effectively protected. The ECJ has consistently emphasised that in EU cross-border child abduction matters it is often the case that the parent who has unlawfully removed or retained the child refuses any contact between the estranged parent and the child (Povse, para. 64). Therefore, there is an innate necessity to ensure the immediate return of the child to the Member State where they were habitually resident right before the abduction, otherwise the parent/child relationship would be irreparably affected, thereby producing a disproportionate interference with Article 24 § 3 of the Charter (Bartolini 2018). As the ECJ pointed out in *Jasna Detiček v Maurizio Sgueglia* (2009) (hereinafter, "Detiček"), this situation will cause serious psychological damage to the child concerned which is clearly against their best interests.

As previously argued (Bartolini 2019), in order to avoid a breach of Article 24 § 3 of the Charter, the ECJ has constantly deployed the urgent preliminary ruling procedure (hereinafter, the "PPU"). Pursuant to Article 107 § a of its Rules of Procedure, the PPU has been used in order to ensure an effective and quick treatment of the preliminary requests by the referring court(s) pursuant Article 267 TFEU concerning EU cross-border child abduction, with the minimum of delay. This is because "[t]he use of the ordinary procedure (…) might cause serious, and perhaps irreparable harm to the [parent/child] relationship (…) and also further jeopardise [the] integration [of the child] into his family and social environment in the event of any return to [their place where they were habitually resident immediately before the abduction]"(Zarraga, para. 40).

Arguably, the ECJ is of the view that a combined use of the PPU and a rigid interpretation of the rules pertaining to EU return proceedings, would contribute to putting an end to the continuation of an unendurable situation in which a child has been deprived of regular contact with the left-behind parent and bring them back to a state of

normality within a short space of time. Consequently, this allows the courts of the Member State where the child was habitually resident immediately before the abduction to *better treat* parental responsibility issues (Bartolini 2018). This approach will in turn be beneficial for the best interests of the child.

Against this background, the ECJ has been inflexible: the national courts of the Member State in which the child was habitually resident immediately before the abduction are the best placed to protect the best interests of the child, thereby the national courts of the Member State of refuge must trust that those courts have issued a certified judgment only after having carefully assessed how the child's rights and interests will be affected by their decision, and verified that the return is really in their best interests, in compliance with Article 24 § 2 of the Charter (Bartolini 2019). Therefore, the courts of the Member State of refuge must enforce that certified judgment without any fuss. This trust should extend to situations where the certificate has been issued, without the child being heard by the courts of the Member State where the child was habitually resident right before the abduction, even if hearing that child's view was both appropriate and necessary (Zarraga). This would also be the case where the child concerned has resolutely expressed their opposition vis-à-vis their return before the courts of the Member State of refuge (Detiček). In the ECJ's view, this trust should further encompass situations where the return will mean that the child will be placed in a children's home (Povse) and for the abducting parent to risk criminal proceedings (Zarraga).

What arises is that mutual trust operates in EU proceedings for the return of the child in a way which leaves the courts of the Member State of refuge with no other option than to *blindly* enforce a certified judgment in every single instance. It is not disputed that expecting the courts of the Member State of refuge to conduct an in-depth analysis of the entire family situation in order to check whether or not a certified judgment requiring the return of the child is in line with the best interests of the child in each case, would mean the end of the EU proceedings for the return of the child. Indeed, as the 1980 Hague Convention, the EU return proceedings are summary proceedings where the assessment of the best interests of each child is left to the courts of the Member State where the child was habitually resident right before the abduction during the course of parental responsibility proceedings. However, as the ECtHR pointed out in paragraph 75 of *M.K. v Greece* (2018), the return of the child cannot be *automatically* or *mechanically* ordered as this would be in contrast to the best interests of the child concerned.

Consequently, it is argued that the ECJ should provide to the courts of the Member State of refuge the *space* to rebut, under exceptional circumstances, the principles of mutual trust and mutual recognition (Bartolini 2019).

With regards to the issue as to what exceptional circumstances should trigger a derogation from the principle of mutual trust, the ECJ ruling in Zarraga provides useful insights and guidance in this respect. In this case, the ECJ was asked whether the court of the Member State of refuge could oppose the enforcement of a certificate on the grounds that the court of the Member State where the child was habitually resident prior to the abduction did not comply with the conditions enshrined in Article 42 § 2 of the Regulation, because it had not given the child concerned the opportunity to be heard. It made clear that it is not for the courts of the Member State of refuge to review the legality of a certificate issued under Article 42 § 2 of the Regulation. This, however, does not

mean that the fundamental rights of the child are deprived of judicial protection. This is because, on the basis of the principle of mutual trust, it is presumed that the courts of the Member State where the child was habitually resident immediately before the abduction are able and willing to provide equivalent protection of those rights. Those courts are compelled to consider the fundamental rights of the child before issuing a certificate. However, they enjoy a margin of appreciation vis-à-vis the appropriateness of granting the child concerned a hearing, as to do so may cause harm to their psychological health. Hearing a child concerned by a certified judgment, therefore, is not an absolute obligation. Its appropriateness must be assessed on a case-by-case basis. A hearing should only take place if it is considered to be in the best interests of the child pursuant to Article 24 § 2 of the Charter. When a hearing is considered appropriate, it is the responsibility of the courts of the Member State where the child was habitually resident immediately before the abduction to ensure that the child has a genuine and effective opportunity to freely express their opinions (Zarraga, para. 64).

The ECJ did not delve further into the reasons underpinning the non-derogation from the principle of mutual trust. Arguably, the ECJ considered that Article 24 § 1 of the Charter does not fall within the scope of those EU fundamental rights, such as Articles 4 and 47 § 2 of the Charter, which may trigger a derogation from the mutual trust presumption. At the same time, no suggestion was advanced by the referring court of a systemic or general deficiency, vis-à-vis effective protection of Article 24 § 1 of the Charter, in the judicial system of the Member State where the child was habitually resident immediately before the abduction.

However, as previously argued (Bartolini 2019) the principle of mutual trust could have been challenged on the basis of a real risk of a breach of Article 24 § 2 of the Charter. Indeed, the breach of the child's right to be heard was the direct consequence of the court of the Member State where the child was habitually resident immediately before the abduction not having taken due regard of the best interests of that child throughout the process leading up to the adoption of the certified judgment. Firstly, that court had initially considered whether it would be in the best interests of the child concerned to hear their views and to obtain a fresh expert report before issuing the certified judgment (Zarraga, para. 22). Second, that court, although informed about the child's situation, specifically their resolute opposition to returning to the Member State where they were habitually resident immediately before the abduction (Zarraga, para. 22) it *opted* not to find any suitable alternatives for hearing their views, such as holding the hearing in the Member State of refuge with the cooperation of the competent authority of that Member State, or hearing the child via a video conference (as requested by the mother of the child concerned) (Zarraga, para. 28). Third, that court ultimately issued a certificate containing a false statement in which it was affirmed that the child was heard (Zarraga, para. 36).

It should be reiterated that the Explanatory Note of Article 24 of the Charter explicitly mentions that Article 24 § 2 of the Charter shares the same rationale as Article 3 § 1 of the United Nation Child Rights Convention (hereinafter, the "UNCRC"). The rationale is that the principle of the best interests of the child should inform *every* decision concerning a child (UNCRC, General Comment No 5). No exceptions are allowed. That principle is intended to work in three concurrent ways: first, as a procedural rule; second, an interpretative device; and third, a substantive right (UNCRC, General Comment No

5, para. 12). As a procedural rule, the principle of the best interests of the child requires the national courts to assess, from the child's perspective, the impact their decision will have on the child's wellbeing. As an interpretative device, it compels the national courts to ensure that if a provision is open to more than one interpretation, they will retain the one that most effectively serves the best interests of the child. Finally, as a substantive right, it creates an enforceable right for the child to have that principle applied every time a decision affecting them has to be adopted (UNCRC, General Comment No 5, para. 6).

In this context, the ECJ could have considered that the principle of the best interests of the child, as with Article 4 of the Charter, is strictly related to the respect for human dignity, as enshrined in Article 1 of the Charter, and aims to ensure respect for the child's dignity in the way in which decisions concerning them are taken and enforced (Bartolini 2019). Therefore, as an absolute principle, it cannot concede any restrictions, even in EU return proceedings. On this basis, the ECJ could have advanced that although the courts of the Member State where the child was habitually resident immediately before the abduction have the leeway to determine what is the best solution for the child, the way in which they reach the decision to issue a certified judgment may be subject, under specific conditions, to supervision.

Arguably, a certified judgment reflects the best interests of the child when the courts of the Member State where the child was habitually resident immediately before the abduction have carefully assessed the reasons underpinning the non-return decision, and whether or not return is still in the best interests of the child concerned, having reached that decision in full respect of the procedural safeguard underpinning the summary return proceedings.

Furthermore, the ECJ could have left behind the condition of systemic deficiencies, as it ultimately did in C.K., on the basis that it would have undermined the very essence of the principle of the best interests of the child. It could have additionally allowed the court of the Member State of refuge, due to the existing serious risk of a breach of Article 24 § 2 of the Charter, to look into the specificities of the case. It could also have established an obligation for the national courts involved in the return proceedings, to engage in a constructive dialogue with the view of reducing the existing risks, and should no effective solution be found, it could permit the court of the Member State of refuge to lift the mutual trust presumption and refuse to recognise the certified judgment.

It is the view of the author that Zarraga is a missed opportunity. However, this does not exclude the possibility that the ECJ may in the future insert the principle of the best interests of the child within the scope of "exceptional circumstances" and further provide the courts of the Member State of refuge with the possibility to lift the presumption of mutual trust where there is a real risk that enforcing a certified judgment would seriously affect the best interests of the child concerned. This approach would also allow those courts to perform their judicial protective function fully vis-à-vis the child concerned and act in line with Article 24 § 2 of the Charter.

Were the ECJ to adopt such an approach, the main challenge it would face is to shape a concept of the best interests of the child tailored for the EU return proceedings in order to establish specific conditions under which the mutual trust presumption may be lifted.

In particular, it would need to take into account both the specificity of those proceedings and the need to ensure effective protection of the child concerned. This could be achieved by conceiving the child's best interests as being composed of a set of substantial procedural safeguards based on Article 47 of the Charter, enshrining the right to an effective remedy.

Those substantial procedural safeguards should include the obligation for national courts involved in EU proceedings for the return of the child to engage in a fruitful dialogue, exchange all relevant information about situations that might endanger the well-being of the child concerned and, when necessary, cooperate in order to find a suitable solution. For instance, in a situation similar to Zarraga, this obligation should translate into the courts finding alternative ways for the child to express their views on their return, notably via a video conference under the supervision of the representatives of the national courts of the Member State of refuge. Further, those substantial procedural safeguards should entail an obligation for both the courts of the Member State of refuge and the courts of the Member State where the child was habitually resident immediately before the abduction, to clearly motivate every decision taken throughout the proceedings. In particular, whilst the former should clearly state in their non-return orders the reasons why they believe that there is an actual risk that return would expose the child to physical or psychological harm, and that the arrangements made to secure the protection of the child after their return are inadequate, the latter should address in their certified judgments, in a clear and reasoned manner, why they dismissed the reasons brought forward by the courts of the Member State of refuge and are of the view that return is actually safe, paying particular attention to the objections of the child to return, the reports from specialists, and the problems that the mother's return would entail for her, such as whether she could be exposed to a risk of criminal sanctions (Bartolini 2019).

Allowing a derogation from the principle of mutual trust and mutual recognition in this manner, preventing a real breach of Article 24 § 2 of the Charter, would avoid situations where an EU fundamental right of the child was de facto breached by the negligence of the court of the Member State where the child was habitually resident immediately before the abduction. In response to the claim that allowing the courts of the Member State of refuge to assess the risk and, eventually, engage in a fruitful dialogue with the courts of the Member State where they were habitually resident prior the abduction, will thwart the policy objective to ensure a fast-track return of the child, it is argued that giving back some space to the courts of the Member State of refuge, to perform their judicial protective function, will reinforce the legitimacy of EU proceedings for the return of the child.

Finally, allowing a derogation from mutual trust would not necessarily entail a breach of Article 24 § 3 of the Charter. As the ECJ itself recently pointed out, "it would be possible to safeguard this right within the framework of proceedings on the substance of the rights of custody" (OL, para. 66). Arguably, Article 24 § 3 of the Charter is not automatically infringed if the child is not physically returned to their place of habitual residence, as long as the courts of the Member State where the child is present ensure visiting rights for the left-behind parent while waiting for a final judgment on the custody of the child.

6. The way ahead: EU cross-border child abduction under Brussels IIa recast

The absence of any express exceptions in the Regulation allowing the national courts of the Member State of refuge to oppose the enforcement of a certified judgment, coupled with an automatic application of the principle of mutual trust, inevitably triggered the rebellion of those courts against a system that *de jure* and *de facto* deprived them of the possibility to fully perform their judicial protective function vis-à-vis the child. The prioritisation of the return policy over the protection of the child seemed very onerous and unreasonable (Bartolini 2019). Their discontent was clearly manifested via the refusal to enforce certified judgments, even in spite of a clear judgment by the ECJ requiring them to do so (Beaumont *et al.* 2016).

In response, the Commission considered it necessary to consider a substantial reform of the Regulation and started rethinking how to reshape the rules underpinning EU proceedings for the return of the child, in order to ensure the right balance between effectiveness and protection (Musseva 2020). In the process leading up to the adoption of the recast Regulation, the Commission proposed to introduce a public policy exception, upon which the courts of the Member State of refuge could refuse the enforcement of a certified judgment. This would be possible in two cases: first, where "the child now being of sufficient age and maturity objects to such an extent that the enforcement would be manifestly incompatible with the best interests of the child"; and where "other circumstances have changed to such an extent since the decision was given that its enforcement would now be manifestly incompatible with the best interests of the child" (Article 40 § 2 of the proposed text). Such a proposal clearly aimed to ensure that the courts of the Member State of refuge could perform their judicial protective function in full compliance with Article 24 § 2 of the Charter. It further provided the ECJ with the leeway to create a concept of the best interests of the child specifically tailored to the EU proceedings for the return of the child, upon which a derogation from the principles mutual trust and mutual recognition could be allowed in specific circumstances.

Unfortunately, this proposal did not make it through the legislative process. Nevertheless, the recast Regulation sets out new stringent provisions governing EU cross-border child abduction, aiming to rebalance the responsibilities between the courts of the Member States where the child was habitually resident immediately before the abduction and of refuge.

First, Article 27 § 5 of the recast Regulation gives back to the courts of the Member State of refuge the power to issue "provisional, including protective, measures in accordance with Article 15 of this Regulation in order to protect the child from the grave risk referred to in point (b) of Art. 13(1) of the 1980 Hague Convention, provided that the examining and taking of such measures would not unduly delay the return proceedings" (Article 27 § 5 of the recast Regulation). Second, where the courts of the Member State of refuge refuse the return of the child on the basis of either Article 13 § 1 or Article 13 § 2 of the 1980 Hague Convention, they are required to issue *motu proprio* a certificate (Article 29 § 2 of the recast Regulation). Further, in cases where they are aware that proceedings on the substance of the rights of custody have been opened before the courts of the Member State where the child was habitually resident immediately before the abduction, they should transmit to the court of that Member State, within one month of the date of the decision of non-return, a copy of the decision, the certificate, and, where appropriate, a

transcript, summary or minutes of the hearings before the court and any other documents it considers relevant (Article 29 § 3 of the recast Regulation).

Third, a party may, upon notification of non-return decision and within a time limit of three months, seize the courts of the Member State where the child was habitually resident right before the abduction, to examine the substance of the rights of custody (Article 29 § 5 of the recast Regulation). Four, Article 29 § 6 of the Recast Regulation provides that "[n]otwithstanding a decision on non-return (...), any decision on the substance of rights of custody resulting from proceedings (...) which entails the return of the child shall be enforceable (...)". This means that a decision on the custody of the child is a prerequisite for issuing of a certified judgment. In addition, the courts of the Member State where the child was habitually resident prior the abduction, have to comply with the following before issuing a certified judgment: they have to take into account the reasons for and the facts underlying the non-return decision (Article 47 § 4 of the recast Regulation); they have to fulfil the conditions contained in Article 47 § 3 of the recast Regulation. The certificate can only be rectified or withdrawn before the courts upon an application or *motu proprio* and is compliant with the law of the Member State where the child was habitually resident immediately before the abduction (Article 48 of the Recast regulation). The courts of the Member State of refuge are required to enforce such a certified judgment unless it is irreconcilable with a later decision relating to parental responsibility concerning the same child (Article 50 of the recast Regulation).

The recast Regulation does not provide for a fundamental rights exception that could be used by the courts of the Member State of refuge as a basis to refuse the enforcement of a certified judgment from the period commencing at the time of the first provisional decision on rights of custody and ending with the final decision. The insertion of such an exception would have proved that mutual recognition cannot operate within the EU proceedings for the return of the child against the fundamental rights of the child concerned, and most notably of Article 24 (2) of the Charter. In the absence of such an express exception, the role of the ECJ will be crucial in defining the contours of the new relationship between mutual trust and the children's fundamental rights. As a EU fundamental rights guarantor, the ECJ has the responsibility to ensure that the best interests of the child are protected throughout all stages of the summary proceedings. In this regard, as previously emphasised, the construction of an EU-wide concept of the best interests of the child specifically tailored to the summary EU return proceedings would be essential.

7. Concluding remarks

This article has observed that the mutual trust presumption in the context of EU return proceedings is still regarded as rigid. The courts of the Member State of refuge cannot challenge the presumption that the courts of the Member State in which the child was habitually resident immediately before the abduction complied with the fundamental rights obligations of the child concerned. This means that those courts are left with no other option, according to Article 11 § 8 of Brussels IIa, but to automatically and speedily enforce a certified judgment, even in situations where there is a real risk that the courts of the Member State where the child was habitually resident immediately before the abduction have issued that certified judgment without having taken into due regard the best interests of the child concerned. The article has argued that although those courts

have the leeway to determine what is the best solution for the child, the way in which they reach the decision to issue a certified judgment may be subject, under specific conditions, to supervision. This article has further maintained that the ECJ should conceive the best interests of the child in EU return proceedings as the primary consideration and establish as a set of substantial procedural safeguards. It should also allow the courts of the Member State of refuge to look in the specificity of the case and eventually lift the mutual trust presumption, in situations where the courts of the Member State where the child was habitually resident immediately before the abduction issued a certificate without having respected those safeguards. In June 2019, the EU legislature adopted the recast Regulation, which sets out new stringent provisions governing EU cross-border child abduction, aiming to rebalance the responsibilities between the courts of the Member States where the child was habitually resident immediately before the abduction and of refuge. In this regard, the ECJ will, sooner or later, be called upon to redefine the relationship between mutual trust and children's fundamental rights, and will hopefully include within the scope of "exceptional circumstances" a real risk of a breach of Article 24 § 2 of the Charter.

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