

**Case C-699/21****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

22 November 2021

**Referring court:**

Corte costituzionale (Italy)

**Date of the decision to refer:**

18 November 2021

**Applicant:**

E.D.L.

**Intervener:**

Presidente del Consiglio dei Ministri

**Subject matter of the main proceedings**

The main proceedings concern questions of the constitutionality of Articles 18 and 18-bis of legge n. 69 del 2005 (Law No 69 of 2005) raised by the Corte d'appello di Milano (Court of Appeal, Milan, Italy) in criminal proceedings against E.D.L., in so far as those articles do not include a ground for refusing surrender under European arrest warrant ('EAW') procedures, based on chronic and indefinite illness entailing the risk of exceptionally severe consequences for the person whose surrender is sought.

**Subject matter and legal basis of the request for a preliminary ruling**

The request for a preliminary ruling under Article 267 TFEU relates to the interpretation of Article 1(3) of Council Framework Decision 2002/584/JHA on the European arrest warrant, examined in the light of Articles 3, 4 and 35 of the Charter of Fundamental Rights of the European Union ('the Charter of Fundamental Rights').

### **Question referred for a preliminary ruling**

Must Article 1(3) of Council Framework Decision 2002/584/JHA on the European arrest warrant, examined in the light of Articles 3, 4 and 35 of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that, where it considers that the surrender of a person suffering from a serious chronic and potentially irreversible disease may expose that person to the risk of suffering serious harm to his or her health, the executing judicial authority must request that the issuing judicial authority provide information enabling the existence of such a risk to be ruled out, and must refuse to surrender the person in question if it does not obtain assurances to that effect within a reasonable period of time?

### **Provisions of EU law relied on**

Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, in particular Articles 1(3), 3, 4, 4a, 15 and 23(4) thereof

Charter of Fundamental Rights of the European Union, in particular Articles 3, 4, 35, 47, 51(1) and 52(4) thereof

TEU: Articles 6 and 19

### **Provisions of national law relied on**

Costituzione (Italian Constitution): Articles 2, 3, 32 and 111

Codice di procedura penale (Italian Code of Criminal Procedure): Articles 705(2)(c-bis) and 275(4-bis)

Decreto del Presidente della Repubblica 9 ottobre 1990, n. 309, *Testo unico delle leggi in materia di disciplina degli stupefacenti e sostanze psicotrope, prevenzione, cura e riabilitazione dei relativi stati di tossicodipendenza* (Presidential Decree No 309 of 9 October 1990, Consolidated text of laws on the regulation of narcotic drugs and psychotropic substances, and prevention, treatment and rehabilitation of drug dependence)

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

- Articles 2, 18 and 18-bis;

- Article 1(1), in the version in force before the intervention of decreto legislativo n. 10 del 2021 (Legislative Decree No 10/2021): ‘This law implements, in national law, the provisions of Council Framework Decision 2002/584/JHA of 13 June 2002 (‘the Framework Decision’) on the European arrest warrant and the surrender procedures between Member States of the European Union in so far as such provisions are not incompatible with the highest principles of the Constitution governing fundamental rights, and the rights of liberty and due process of law’;

- Article 23(3): ‘When there are humanitarian or serious reasons to believe that surrender would endanger the life or health of the person concerned, the President of the Court of Appeal, or the judge delegated by him or her, may by reasoned order suspend the execution of the surrender measure, giving immediate notice to the Minister for Justice’

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

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 On 9 September 2019, the Općinski sud u Zadru (Municipal Court, Zadar, Croatia) issued a European arrest warrant for the purpose of prosecuting E.D.L., who was charged with the offence of possession with intent to distribute and the sale of drugs, committed on Croatian territory in 2014.
- 2 Before the Milan Court of Appeal, the court with jurisdiction for the surrender procedure, the lawyers acting for the person whose surrender is sought submitted medical documentation attesting to major psychiatric disorders, some of which related to past abuse of narcotics. The Court of Appeal ordered that E.D.L. undergo a psychiatric examination, which revealed the presence of a psychotic disorder requiring treatment. The examination report also pointed to a high suicide risk associated with possible imprisonment and concluded that the person concerned would not be able to cope with prison life.
- 3 On the basis of that report, the Milan Court of Appeal held that the transfer of the person concerned to Croatia in execution of the European arrest warrant (EAW) would halt the possibility of treatment, resulting in a worsening of his general medical condition and a genuine risk to his health.

- 4 However, the court noted that the obligation to execute an EAW is limited only by the grounds for refusal exhaustively listed in Articles 18 and 18-bis of Law No 69/2005, whereas there is no general ground for refusal based on the need to avoid infringements of the fundamental rights of the person whose surrender is sought, such as the right to health. The Milan Court of Appeal therefore stayed the proceedings and brought an action to determine constitutionality before the Corte costituzionale (Constitutional Court, Italy).

### **The essential arguments of the trial court in the main proceedings**

- 5 According to the Milan Court of Appeal, the legislation in question infringes the right to health, which is protected by Articles 2 and 32 of the Constitution. That legislation also infringes the principle of equality laid down in Article 3 of the Constitution in that persons on whom an EAW has been served are treated more unfavourably compared to persons subject to an extradition request. Article 705(2)(c-bis) of the Code of Criminal Procedure expressly states that extradition will be refused if reasons of health or age create a risk of exceptionally serious consequences for the person whose extradition is sought.
- 6 Lastly, the failure to legislate a ground for refusal based on the medical condition of the person concerned is contrary to the principle of the reasonable duration of proceedings laid down in Article 111 of the Constitution, since in such cases, because of the measure suspending execution issued following the judgment ordering surrender, the applicable rules would result in procedural paralysis that would last indefinitely.

### **Principal arguments of the parties to the main proceedings**

- 7 The Presidente del Consiglio dei Ministri (President of the Council of Ministers) ('the intervener') intervened in the proceedings before the Constitutional Court, requesting that the questions of constitutionality be declared inadmissible or, in any event, unfounded.
- 8 The intervener asserts, first, that the possibility of suspending the surrender, guaranteed by Article 23(3) of Law No 69/2005 fundamentally prevents any infringement of the right to health of the person on whom the EAW has been served. The intervener then observes that the psychiatric report ordered by the Milan Court of Appeal does not show that the psychiatric conditions from which the person concerned is suffering are irreversible, and neither does it provide specific evidence able to confirm the suicide risk.
- 9 In any case, in the view of the intervener, the Court of Appeal could have followed the procedure indicated by the Court of Justice of the European Union in its case-law in this specific case. The Court of Appeal should also have enquired as to the forms of supervision and therapeutic and psychological assistance that could be provided by the State issuing the arrest warrant in the event of surrender.

- 10 According to the intervener, the implementation of the procedure introduced by the Court of Justice since the judgment in *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU) also means that the objections relating to the reasonable duration of the surrender procedure and the alleged infringement of the principle of equal treatment are without foundation.

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

- 11 First, the Constitutional Court – the referring court – stresses above all that neither Article 18 nor Article 18-bis of Law No 69/2005 provides that the surrender of a person must or may be refused if it would expose that person to an exceptionally serious risk to his or her health. In the view of the Constitutional Court, that applies both to those articles as worded before the amendment introduced by Legislative Decree No 10/2021, and to the same articles in their current wording.
- 12 The court notes that the questions of constitutionality concern not only the compatibility of the contested provisions with the Italian Constitution but also involve – first and foremost – the interpretation of EU law (in particular Articles 3, 4 and 4a of Framework Decision 2002/584/JHA), which is specifically implemented by the national law.
- 13 In the referring court’s view, it is necessary, first of all, to ask whether the danger of serious damage to the health of the person concerned resulting from that person being surrendered to the judicial authority of the issuing State can be adequately dealt with by suspending the surrender under Article 23(3) of Law No 69/2005, which transposes Article 23(4) of Framework Decision 2002/584/JHA into Italian law. According to the provisions of the Framework Decision, which must be used as the basis for interpreting the Italian provision, the ‘exceptional’ postponement of surrender seems to be permitted in relation to situations of a purely temporary nature that would make the immediate surrender of the person concerned contrary to human dignity.
- 14 Conversely, the remedy of suspending surrender cannot be considered appropriate in the case of serious chronic medical conditions of an indefinite nature such as those afflicting the person concerned in the present case. In such a case, even if it has already been authorised by the court of appeal, the postponement of execution of the European arrest warrant would be likely to last indefinitely. This would ultimately deprive the surrender measure of any practical effect and might thus prevent the issuing State from prosecuting the person concerned or enforcing the sentence against that person, as the case may be. Lastly, continued postponements based on chronic health reasons would keep the person concerned in a situation of constant uncertainty as to his or her fate, which would conflict with the need to guarantee a reasonable duration in all proceedings that could affect his or her personal freedom.
- 15 The referring court then asks whether the general provisions laid down in Articles 1 and 2 of Law No 69/2005, in the wording applicable in the main

proceedings, which applied before the amendments made by Legislative Decree No 10/2021, authorise the Italian judicial authority not to order surrender even in cases that differ from those referred to in Articles 18 and 18-bis of that law, where such surrender might, in any event, expose the person concerned to the risk of infringement of a fundamental right recognised by the Italian Constitution or by EU law. According to the referring court, such an interpretation cannot be supported.

- 16 Moreover, neither the former text of Articles 1 and 2 of Law No 69/2005 nor the current text of Article 2 of that law expressly clarifies whether the individual judicial authority responsible for the surrender procedure is required to verify – in each specific case – whether the execution of a European arrest warrant issued by the judicial authority of another Member State might result in the infringement of one of the (national and European) rights or principles by which it is bound under Law No 69/2005.
- 17 The general principle whereby Framework Decision 2002/584/JHA, and consequently the associated implementing provisions within each Member State, must respect the fundamental rights enshrined in Article 6 TEU is explicitly stated both in recital 12 and in Article 1(3) of that decision. Moreover, that principle underlies the entire legal order of the European Union (Article 51(1) of the Charter of Fundamental Rights).
- 18 As held by the Court of Justice, Member States are, however, precluded from making the implementation of EU law in areas subject to full harmonisation conditional on compliance with purely national standards of protection of fundamental rights, where this could compromise the primacy, unity and effectiveness of EU law (judgments of 26 February 2013, *Fransson*, C-617/10, paragraph 29, and of 26 February 2013, *Melloni*, C-399/11, paragraph 60). The fundamental rights that must be respected by the Framework Decision are, essentially, those recognised by EU law and consequently by all Member States when implementing EU law: fundamental rights as they result from the constitutional traditions common to the Member States (Article 6(3) TEU and Article 52(4) of the Charter of Fundamental Rights).
- 19 It follows that it is for EU law, in the first place, to lay down the standards of protection of fundamental rights that must be complied with to guarantee the legitimacy of the rules governing the European arrest warrant and its actual execution at national level, since this is a matter subject to full harmonisation. The fact that Articles 3, 4 and 4a of the Framework Decision lay down possible grounds for refusing surrender aims to ensure that the actual implementation of the rules governing the European arrest warrant procedure respects the fundamental rights of the individual.
- 20 At the same time, those rules are designed to ensure the uniform and effective application of the legislation governing the European arrest warrant, which is based on the premiss of mutual trust between the Member States as regards

respect for fundamental rights by each. Those requirements for uniform and effective application mean that, in general, the judicial authority in the executing Member State is precluded from refusing to surrender the person concerned in cases other than those required or permitted in the Framework Decision, on the basis of purely national standards of protection – not shared at European level – of the fundamental rights of the person whose surrender is sought (judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, paragraph 80).

- 21 Consequently, it would be manifestly contrary to that principle if the national law were to be interpreted as giving the executing judicial authority the power to refuse to surrender the person concerned in a case other than those provided for by law in accordance with the provisions of the Framework Decision, on the basis of general provisions such as those contained in Articles 1 and 2 of Law No 69/2005.
- 22 This applies even if, in the view of the competent court, the execution of the European arrest warrant would, in the specific case, lead to a result in conflict with the highest principles of the constitution or with the inviolable rights of the person, since it is for the Constitutional Court alone to verify the compatibility of EU law – or of national law implementing EU law – with those highest principles and inviolable rights.
- 23 Moreover, EU law itself could not tolerate the execution of a European arrest warrant that resulted in a breach of the fundamental rights of the person concerned recognised by the Charter of Fundamental Rights and by Article 6(3) TEU.
- 24 The case-law of the Court of Justice has recently intervened several times to establish – by way of interpretation – procedures capable of reconciling the requirements of mutual recognition and enforcement of judicial decisions in criminal matters with respect for the fundamental rights of the person concerned, specifically in order to prevent the implementation of the Framework Decision on the European Arrest Warrant from giving rise in a specific case to infringements of the fundamental rights of the person whose surrender is sought, in situations where the Framework Decision does not expressly lay down grounds for refusing surrender.
- 25 This is the case, in particular, in relation to the risk that the execution of a European arrest warrant might expose the person concerned to conditions involving inhuman and degrading detention in the issuing Member State as a result of systemic or generalised deficiencies or which may affect certain groups of people, or certain places of detention (judgments in *Aranyosi*, as cited; of 25 July 2018, Case C-220/18 PPU, *ML*; and of 15 October 2019, Case C-128/18, *Dorobantu*), and the risk of being subject to proceedings which do not respect the guarantees laid down in Article 47 of the Charter of Fundamental Rights, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary (judgments of 25 July 2018,

Case C-216/18 PPU, *LM*, and of 17 December 2020, Joined Cases C-354/20 PPU and C-412/20 PPU, *L and P*).

- 26 The purpose of the aforementioned procedures, which are based on a dialogue between the judicial authorities of the executing State and those of the issuing State pursuant to Article 15(2) of the Framework Decision, is to enable the executing judicial authorities to ensure, in a specific case, that the surrender of the person concerned will not expose that person to possible infringements of his or her fundamental rights. Only if, as a result of that dialogue, it is not possible to obtain such an assurance, may the executing judicial authority decide not to execute the European arrest warrant, thus refusing surrender in a case not expressly authorised by the Framework Decision.
- 27 Those judgments of the Court of Justice have thus introduced mechanisms into EU law to guarantee the protection of the fundamental rights of persons subject to a European arrest warrant within the framework of a system of common rules binding on all Member States.
- 28 It is necessary, however, to ask whether the principles laid down by the Court of Justice in those judgments must also be extended, by analogy, to cases in which the medical condition of the individual whose surrender is sought is likely to deteriorate significantly in the event of surrender, with particular reference to the obligation for direct dialogue between the judicial authorities of the issuing State and those of the executing State and to the possibility for the latter to terminate the surrender procedure if the existence of a risk of infringement of the fundamental rights of the person concerned cannot be ruled out within a reasonable period of time.
- 29 The need for uniformity and effectiveness in the application of European arrest warrants within the legal area of the European Union means that the answer to that question must be reserved for the Court of Justice as the pre-eminent interpreter of EU law (Article 19(1) TEU).
- 30 The referring court sets out arguments in favour of extending the principles laid down by the Court of Justice in the abovementioned judgments to the present case. In particular, in the Italian legal system, Article 32(1) of the Constitution protects health as a ‘fundamental right of the individual’. On the basis of that right, the public authorities not only have a duty to refrain from harmful conduct but also have a positive obligation to guarantee that individuals are provided with the medical treatment essential for protecting their health. That right is also fully recognised for persons in prison, whether they have been convicted or remanded in custody. Specifically to protect that right, Italian criminal procedural law excludes, in principle, the possibility of ordering or maintaining pre-trial detention of a person suffering from a ‘particularly serious illness, as a result of which that person’s health condition is incompatible with detention and, in any case, such as would not allow adequate treatment in cases of detention in prison’ (Article 275(4-bis), Code of Criminal Procedure). Moreover, the rules governing



defendants who are drug or alcohol addicts enrolled in therapeutic programmes provide, in principle, for the replacement of pre-trial detention by a less severe measure for those undergoing or intending to undergo a programme of recovery from addiction.

- 31 There can also be no doubt that health is a fundamental human right under EU law (Articles 3 and 35 of the Charter of Fundamental Rights). That right must also be recognised in full for those accused of committing a criminal offence.
- 32 Furthermore, if the surrender of the person concerned to the State issuing a European arrest warrant were to expose him or her to a serious risk of severe harmful consequences for his or her health, this would also represent an infringement of Article 4 of the Charter of Fundamental Rights, which enshrines the right of a person – which cannot be offset against any other counterinterest, given its absolute nature (judgment in *Aranyosi*, paragraph 85) – not to be subjected to inhuman or degrading treatment, in accordance also with Article 3 of the European Convention on Human Rights (ECHR) (judgments of the European Court of Human Rights of 16 April 2013, *Aswat v. United Kingdom*; of 1 October 2019, *Savran v. Denmark*; and of 13 December 2016, *Paposhvili v. Belgium*). The same principle was also upheld by the Court of Justice itself in a judgment concerning the European asylum system (judgment of 16 February 2017, Case C-578/16 PPU, *C.K. and Others v Republika Slovenija*, paragraphs 37 and 68).
- 33 On the other hand, the need to protect the fundamental rights of the requested person must be reconciled with the interest in prosecuting suspected offenders, establishing their liability and, if they are found guilty, ensuring that they are punished. That interest cannot be regarded as lying solely with the State issuing the EAW, since the Framework Decision presupposes a common commitment by the Member States to ‘combat the impunity of a requested person who is present in a territory other than that in which he or she has allegedly committed an offence’ (Joined Cases C-354/20 PPU and C-412/20 PPU, paragraph 62). Protecting the fundamental right to health, although essential, cannot lead to solutions that result in systematic impunity for serious crimes.
- 34 However, neither can the issuing State be left with the sole option of bringing proceedings *in absentia* against the person concerned. On the one hand, not all Member States allow trials *in absentia* and, on the other hand, such a solution would be detrimental to the person concerned, who would be deprived of the possibility of defending him or herself effectively in a trial potentially leading to a conviction enforceable against him or her.
- 35 According to the referring court, by analogy with the position taken by the Court of Justice in the above-mentioned judgments, a direct dialogue between the judicial authorities of the issuing State and the executing State could enable them to identify solutions that would make it possible, in the specific case, to put the person concerned on trial in the issuing State, guaranteeing that person full rights of defence, and at the same time avoid exposing him or her to the risk of serious

damage to his or her health, for example by placing that person in a suitable facility in the issuing State during the trial. Only if that dialogue does not succeed in finding a suitable solution within a reasonable period of time should the executing judicial authority be allowed to refuse surrender.

Lastly, the referring court requests that the reference for a preliminary ruling be determined through an expedited procedure pursuant to Article 105 of the Rules of Procedure of the Court of Justice. In the view of the referring court, the case in question, although it originates in proceedings concerning a person who is not currently subject to any supervision measure, raises questions of interpretation relating to central aspects of the operation of the EAW and the interpretation sought is likely to have a general effect, both for the authorities called upon to cooperate in the context of the EAW and for the rights of persons whose surrender is sought.

WORKING DOCUMENT