

Case C-168/21**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:**

16 March 2021

Referring court:

Cour de cassation (France)

Date of the decision to refer:

26 January 2021

Appellant in the appeal on a point of law:

Procureur général près la cour d'appel d'Angers

I. Subject matter and details of the appeal:

- 1 By judgment of 9 October 2009, the Corte di appello di Genova (Court of Appeal, Genoa, Italy) imposed custodial sentences on KL for four offences committed during protests against the G8 summit.
- 2 The most severe custodial sentence (10 years) was handed down for the offence of 'devastazione e saccheggio' (devastation and looting) (Article 419 of the Codice penale; Italian Penal Code), consisting of seven acts resulting from the same criminal action, namely:
 - 1) damage to urban landscaping and public property;
 - 2) damage to and looting of a construction site;
 - 3) destruction of premises belonging to the 'Credito Italiano' credit institution;
 - 4) destruction by fire of a Fiat Uno vehicle;
 - 5) destruction by fire of premises belonging to the 'Carige' credit institution;
 - 6) destruction by fire of a Fiat Brava vehicle;

- 7) destruction and looting of a supermarket.
- 3 The Corte suprema di cassazione (Supreme Court of Cassation, Italy) dismissed KL's appeal.
- 4 On 6 June 2016, the Italian judicial authorities issued a European arrest warrant against KL for the enforcement of the custodial sentences.
- 5 By judgment of 4 November 2020, the Chambre de l'instruction d'Angers (Indictment Division of the Court of Appeal, Angers, France), in essence, refused to surrender KL to the Italian authorities to execute the European arrest warrant inasmuch as it had been issued for the enforcement of the 10-year custodial sentence handed down for devastation and looting.
- 6 The Indictment Division found that two of the acts underlying the offence were not capable of constituting an offence in France, namely, the destruction of the Credito Italiano premises (act no. 3) and the destruction by fire of the Fiat Brava vehicle (act no. 6).
- 7 In the first place, KL was simply located in the vicinity of the financial institution while other persons in the same group committed acts of destruction and, in the second place, as regards the destruction and burning of the vehicle, KL was merely seen 'near the car', holding a stick.
- 8 The Indictment Division concluded that, in relation to those two acts, the condition of double criminality was not met, due to the lack of personal participation by KL in a material act that would constitute an offence under French law.
- 9 As the seven acts were considered by the Italian court to form one indivisible whole, the condition of double criminality required that all of the indivisible acts punished under the heading of devastation and looting by Article 419 of the Italian Penal Code be dismissed.
- 10 The procureur général d'Angers (Principal Public Prosecutor at the Court of Appeal, Angers) brought an appeal against that judgment on a point of law.

II. EU law:

Charter of Fundamental Rights of the European Union

- 11 Article 49, entitled 'Principles of legality and proportionality of criminal offences and penalties' provides:

' ...

3. The severity of penalties must not be disproportionate to the criminal offence.'

Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)

12 Article 2, entitled 'Scope of the European arrest warrant' provides:

' ...

4. For offences other than those covered by paragraph 2, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described.'

13 Article 4, entitled 'Grounds for optional non-execution of the European arrest warrant' provides:

'The executing judicial authority may refuse to execute the European arrest warrant:

1) if, in one of the cases referred to in Article 2(4), the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State; ...'

III. The appeal brought by the Principal Public Prosecutor at the Court of Appeal, Angers:

14 The Principal Public Prosecutor considers that, even though the Indictment Division considered that the two offences of the destruction of the Credito Italiano building and the destruction and burning of the Fiat Brava were not made out, its remit was merely to verify that the sentence pronounced did not exceed the maximum penalty incurred for offences involving double criminality.

15 In that regard, the avocat général près la Cour de cassation (Advocate General at the Court of Cassation, France) adds, first, that the fact that at least one of the seven acts with which KL was charged under the offence of devastation and looting is not punishable under French criminal law does not necessarily mean that the condition of double criminality is not met in relation to that offence. He takes the view that KL could have incurred criminal liability in France for damage or theft in respect of the five other acts with which he was charged under the heading of devastation and looting and it is not disputed that those acts are sufficient to constitute that offence under Italian law.

16 Secondly, the Advocate General submits that the Indictment Division's reasoning, based on the indivisible nature of the acts charged under the offence of devastation and looting, led it to analyse the circumstances in which that offence should be regarded by Italian law as being established, which exceeded its remit in reviewing double criminality.

- 17 Lastly, the Advocate General points out that a refusal to surrender the person in question in order for the sentence pronounced for devastation and looting to be enforced leads to that person going unpunished for all of the acts included in the sentence, even though it is undisputed that a surrender would have been possible and a punishment justified for the majority of those acts.
- 18 In that regard, the Advocate General relies on the case-law of the Court of Cassation, according to which the surrender of a person requested under a European arrest warrant may be ordered where a single sentence has been pronounced for at least one of the offences meeting the conditions set out in Articles 695-12 and 695-23 of the Code de procédure pénale (French Code of Criminal Procedure) (in the chapter on the European arrest warrant) and where it does not exceed the maximum penalty incurred for offences capable of giving rise to a surrender.
- 19 The Advocate General submits that the same solution should also apply to a sentence for a single offence made of up several material acts some of which are not capable of giving rise to a surrender.

IV. Analysis by the Court of Cassation:

- 20 The appeal raises questions concerning the condition of double criminality and the application by the executing State of the principle of proportionality.

The condition of double criminality

- 21 Article 2(4) of Framework Decision 2002/584/JHA allows the executing State, in the case of offences other than those covered by the list of 32 offences in Article 2(2) thereof, to make surrender subject to the condition that the acts for which the European arrest warrant was issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described.
- 22 At the same time, Article 4 of the same Framework Decision, relating to the grounds for optional non-execution of the European arrest warrant, gives the executing judicial authority, in paragraph 1 thereof, the power to refuse to execute the European arrest warrant when the condition of double criminality is not met.
- 23 It follows from the case-law of the Court of Justice (judgment of 11 January 2017, *Grundza*, C-289/15, EU:C:2017:4, paragraph 38) that, when assessing double criminality, the competent authority of the executing State is required to verify whether the factual elements underlying the offence, as reflected in the judgment handed down by the competent authority of the issuing State, would also, per se, be subject to a criminal penalty in the executing State if they were present in that State.

- 24 The Court of Justice stated that, as the condition of double criminality is an exception to the general rule of recognition of judgments and enforcement of sentences, the scope of the grounds for refusing to recognise a judgment or enforce a sentence, on the basis of lack of double criminality, as provided for in Article 9(1)(d) of Framework Decision 2008/909, must be interpreted strictly in order to limit cases of non-recognition and non-enforcement (judgment of 11 January 2017, *Grundza*, C-289/15, EU:C:2017:4, paragraph 46).
- 25 Lastly, the Court of Justice stated that there does not have to be an exact match between the constituent elements of the offence, as defined in the law of the issuing State and the executing State, respectively, or between the name given to or the classification of the offence under the national law of the respective States (judgment of 11 January 2017, *Grundza*, C-289/15, EU:C:2017:4, paragraph 35).
- 26 In the present case, KL was sentenced to 10 years in prison for devastation and looting for having committed a series of seven acts of damage, destruction or looting. The Indictment Division of the Court of Appeal, Angers, found that two of those acts could not constitute criminal offences under French law. However, it found that five of the acts of damage or destruction could constitute criminal offences in France under 'vol avec dégradation et en réunion' (theft accompanied by damage and involving multiple offenders).
- 27 In Italian law, the offence of devastation and looting refers to multiple, mass acts of destruction and damage that not only result in losses for the owners of the property in question but also cause a breach of the public peace by threatening the normal course of civilian life.
- 28 Under French criminal law, endangering the public peace by the mass destruction of movable or immovable property is not specifically an offence. Destruction or damage, theft accompanied by damage, whether or not involving multiple offenders, that leads to losses for the owners of the property, are the only offences.
- 29 The question therefore arises as to whether the breach of the public peace attributed to KL by the Court of Appeal, Genoa and the Supreme Court of Cassation, Italy as being an essential element of the offence of devastation and looting is relevant when assessing the condition of double criminality.
- 30 Although there does not have to be an exact match between the constituent elements of the offence under Italian law and under French law, a breach of the public peace nonetheless appears to be an essential element of the offence of devastation and looting.
- 31 It follows that, in that situation, the application of the principle of double criminality is not so obvious as to leave no scope for any reasonable doubt.
- 32 In that regard the Court of Cassation will refer to the Court of Justice the first two questions set out below.

Assessment of the proportionality of a European arrest warrant by the executing Member State

- 33 If the principle of double criminality does not prevent a surrender, the question then arises as to the proportionality of the sentence for which the surrender is sought, taking into account only those acts in respect of which the condition of double criminality is met.
- 34 It follows from the case-law of the Court of Justice that the principle of mutual recognition, which underpins Framework Decision 2002/584/JHA, means that, in accordance with Article 1(2) thereof, the Member States are in principle obliged to act upon a European arrest warrant (judgment of 6 October 2009, *Wolzenburg*, C-123/08, EU:C:2009:616, paragraph 57).
- 35 Member States may refuse to execute such a warrant only in the cases of non-execution provided for in Articles 3, 4 and 4a of the Framework Decision and may make its execution subject only to the conditions defined in Article 5 thereof (judgment of 16 July 2015, *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraph 36).
- 36 In that regard, it must be noted that the Framework Decision on the European arrest warrant does not contain any provision allowing the executing Member State to refuse to surrender the person in question on the ground that the sentence pronounced by the issuing State seems disproportionate in the light of the acts for which the surrender is incurred.
- 37 Therefore, even if the executing Member State considers that there are serious difficulties concerning the proportionality of the European arrest warrant, it cannot refuse, on that ground, to order the surrender of the person requested for the enforcement of the sentence pronounced by the issuing Member State.
- 38 Although, in principle, it is the responsibility of the issuing State to verify the proportionality of the European arrest warrant prior to its issue, in keeping with the principle of mutual recognition, that verification cannot prevent a failure to observe the principle of proportionality when, as in the present case, the arrest warrant was issued for the enforcement of a sentence imposed for a single offence made up of several acts only some of which constitute an offence under the law of the executing Member State.
- 39 In such a situation, the sentence pronounced by the issuing State will be enforced in full even though surrender is precluded for some of the acts covered by that sentence.
- 40 Consequently, even if the warrant may have been proportionate at the time of its issue, it may not necessarily be so at the time of its execution.
- 41 It follows from Article 1(3), when read in conjunction with recital 12, of the Framework Decision on the European arrest warrant, that the fundamental rights

and fundamental legal principles reflected in the Charter must be respected in the context of the European arrest warrant.

- 42 In that regard, Article 49(3) of the Charter sets out the principle that the severity of penalties must not be disproportionate to the offence.
- 43 In that regard the Court of Cassation will refer the third question to the Court of Justice for a preliminary ruling.

V. Request for expedited procedure:

- 44 Given that the interpretation sought is likely to have general consequences both for the authorities required to cooperate in the matter of the European arrest warrant and for the rights of the requested person, who remains in a situation of uncertainty, and given that the executing judicial authority has an obligation to rule on the request for surrender before it in the best possible conditions, so that it may comply as quickly as possible with the obligations imposed on it by Framework Decision 2002/584/JHA and the restriction on liberty (judicial review) of which KL is the subject in the present proceedings, it is appropriate to request the use of the expedited procedure provided for in Article 23a of the Statute of the Court of Justice of the European Union and Article 105 et seq. of the Rules of Procedure of the Court of Justice.

VI. The questions referred:

- 45 The Court of Cassation refers the following questions for a preliminary ruling:
1. Must Articles 2(4) and 4(1) of Framework Decision 2002/584 be interpreted as meaning that the condition of double criminality is met in a situation, such as that at issue in the main proceedings, in which surrender is sought for acts which, in the issuing State, have been categorised as devastation and looting and which consist of acts of devastation and looting such as to cause a breach of the public peace when, in the executing State, there are criminal offences of theft accompanied by damage or offences of causing destruction or damage that do not require that element of a breach of the public peace?
 2. In the event that the first question is answered in the affirmative, must Articles 2(4) and 4(1) of Framework Decision 2002/584 be interpreted as meaning that the courts in the executing State may refuse to execute a European arrest warrant issued for the enforcement of a sentence where they find that the judicial authorities in the issuing State imposed that sentence on the person concerned for the commission of a single offence covering various acts and where only some of those acts constitute a criminal offence in the executing State? Does a distinction need to be made depending on whether or not the trial court in the issuing State considered those various acts to be divisible or indivisible?

3. Does Article 49(3) of the Charter of Fundamental Rights require the judicial authorities in the executing Member State to refuse to execute a European arrest warrant where, first, that warrant was issued in order to enforce a single sentence imposed for a single offence and, second, where, given that some of the acts for which that sentence was imposed do not constitute an offence under the law of the executing Member State, a surrender can only be ordered in relation to some of those acts?

WORKING DOCUMENT