

Case C-700/21**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:

O.G.

Intervener:

Presidente del Consiglio dei Ministri

Subject matter of the main proceedings

Action to determine the constitutionality of Article 18-bis(1)(c) of legge del 22 aprile 2005, n. 69 (Law No 69 of 22 April 2005), in the version in force at the time of the facts of the present case, brought by the Corte d'appello di Bologna (Court of Appeal, Bologna, Italy) before the referring court in the context of the execution of a European arrest warrant ('the EAW') issued against a third-country national with permanent residence in Italy.

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

Compatibility of the Italian legislation regulating grounds for optional non-execution of an EAW – in so far as that legislation prevents the executing judicial authorities from refusing the surrender of third-country nationals residing or staying in Italy – with Article 4(6) of Framework Decision 2002/584/JHA, read in conjunction with Article 1(3) of that decision and Article 7 of the Charter of Fundamental Rights of the European Union.

Questions referred for a preliminary ruling

(a) Does Article 4(6) of Council [Framework Decision] 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, interpreted in the light of Article 1(3) of that decision and Article 7 of the Charter of Fundamental Rights of the European Union, preclude legislation, such as the Italian legislation, that – in the context of a European arrest warrant procedure for the purpose of executing a custodial sentence or detention order – absolutely and automatically precludes the executing judicial authorities from refusing to surrender third-country nationals staying or residing in Italian territory, irrespective of the links those individuals have with that territory?

(b) If the answer to the first question is in the affirmative, what criteria and assumptions are used to establish that such links are to be regarded as so significant as to require the executing judicial authority to refuse surrender?

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 ('the Framework Decision'), in particular Articles 4(6), 1(3) and 5(3) thereof

Charter of Fundamental Rights of the European Union ('the Charter'), Article 7

Provisions of international law relied on

European Convention on Human Rights ('the ECHR'), Article 8

International Covenant on Civil and Political Rights, Article 17(1)

Provisions of national law relied on

Costituzione (Italian Constitution), Articles 2, 3, 11, 27, third paragraph, and 117, first paragraph.

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

- Article 18-bis(1)(c), as introduced by Article 6(5)(b) of legge del 4 ottobre 2019, n. 117 (Law No 117 of 4 October 2019), whereby the Italian judicial authority executing an EAW may refuse surrender – for the purpose of

executing a custodial sentence or detention order imposed by the issuing State – of a requested person who is an Italian national or a national of another Member State of the European Union, who is lawfully and effectively staying in or a resident of Italy, provided that the executing State orders that the custodial sentence or detention order be executed in Italy;

- Article 19(1)(c), in the version in force at the time of the facts of the present case, whereby, if the person covered by the EAW is a national of or resident in Italy, the surrender of that person – for the purposes of conducting a criminal prosecution – is subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him or her in the issuing Member State.

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant, a Moldovan national with permanent residence in Italy, was definitively convicted and sentenced in Romania to five years' imprisonment for tax evasion and misappropriation of funds due for payment of income tax and VAT, committed in the capacity of director of a limited company between September 2003 and April 2004. On 13 February 2012, the Judecătoria Braşov (Court of First Instance, Braşov, Romania) issued an EAW against the applicant, for the purpose of executing the custodial sentence.
- 2 By judgment of 7 July 2020, the Bologna Court of Appeal ('the Court of Appeal') ordered that the applicant be surrendered to the issuing judicial authority.
- 3 On appeal by the party concerned, the Corte di cassazione (Supreme Court of Cassation) set aside the judgment on 16 September 2020 and referred the case back to the lower court, asking the Court of Appeal to consider the appropriateness of raising questions as to the constitutionality of Article 18-bis(1)(c) of Law No 69/2005 on various grounds.
- 4 By judgment of 27 October 2020, the Court of Appeal – after having found that the applicant had provided adequate evidence of his stable family and employment situation in Italy, where he lives with a woman resident in Italy with whom he has fathered a son, now 12 years of age – raised the above questions of constitutionality before the referring court.

The essential arguments of the Bologna Court of Appeal, the trial court in the main proceedings

- 5 The Court of Appeal has doubts as to the constitutionality of Article 18-bis(1)(c) of Law No 69/2005, in so far as it limits the applicability of that ground for optional non-execution of an EAW to Italian nationals or nationals of other Member States, if they are lawfully and effectively staying in or residents of Italy,

thus excluding nationals of third countries, who may not be able to serve the sentence imposed in the issuing State in Italy, even if they are lawfully and effectively staying or resident in Italy and have established significant and stable links in that State.

- 6 The abovementioned article, which transposes Article 4(6) of the Framework Decision into Italian law, thus unduly restricts the scope of the latter article, which applies, rather, to anyone residing or staying in the executing State.
- 7 This is contrary to the objective of social reintegration of offenders on which Articles 4(6) and 5(3) of the Framework Decision are based. Indeed, social reintegration must be guaranteed for all offenders without distinction on grounds of nationality. The requirement to execute the custodial sentence abroad could also be contrary to the rehabilitation function of the sentence, as laid down in the third paragraph of Article 27 of the Constitution, in respect of a convicted person who has strong family and social ties in Italy, as well as to that person's right to private and family life.
- 8 In that regard, the Court of Appeal asserts that, although the decision to transpose into national law the grounds for optional non-execution of the EAW provided for in Article 4 of the Framework Decision falls within the discretion of the Member States, if the Member States decide to do so, they are obliged to respect the content of that provision, and have no possibility of changing its scope according to the nationality of the person or the duration of that person's stay in the executing State.
- 9 The Court of Appeal also considers it unreasonable to apply different treatment to third-country nationals on the basis of Article 18-bis(1)(c) of Law No 69/2005 (execution of an EAW for the purpose of executing the custodial sentence), on the one hand, and Article 19(1)(c) of that law (execution of an EAW for the purpose of conducting a criminal prosecution), on the other. Indeed, while the former provision excludes applicability of the ground for optional non-execution of surrender to third-country nationals, even if resident in Italy, the latter provision applies also to such nationals, who are entitled to serve in Italy any sentence imposed by the issuing State as a result of a trial.
- 10 In conclusion, the failure to include third-country nationals in the scope of Article 18-bis(1)(c) of Law No 69/2005 conflicts with Articles 2, 3, 11, 27, third paragraph, and 117, first paragraph, of the Constitution, read in conjunction with Article 4(6) of the Framework Decision and Article 7 of the Charter, Article 8 of the ECHR and Article 17(1) of the International Covenant on Civil and Political Rights.

The essential arguments of the parties in the main proceedings

- 11 The Presidente del Consiglio dei Ministri (President of the Council of Ministers), as intervener, requests that the questions of constitutionality be declared inadmissible or unfounded.
- 12 In the intervener's view, the possibility of invoking the ground for refusal in question and of laying emphasis on the fact that a national of an EU Member State is resident in Italy, as opposed to third-country nationals, is closely linked to the series of rights and freedoms deriving from EU citizenship. That ground for refusal, based on the status of EU citizen, therefore applies only to nationals of the Member States, as is also apparent from the preparatory work on the Framework Decision.
- 13 The Framework Decision should also be interpreted in the light of the general principle of mutual recognition of judgments, which requires that a refusal to execute an EAW be regarded as an exception to the general rule of the execution of EAWs, the scope of which cannot be limited by Article 4(6) of the Framework Decision, as interpreted by the Court of Appeal (see judgments of 6 October 2009, *Wolzenburg*, C-123/08, and of 13 December 2018, *Sut*, C-514/17, paragraph 28). Member States cannot, therefore, extend the grounds for refusal to execute an EAW beyond those set out in the Framework Decision.
- 14 Article 18-bis(1)(c) of Law No 69/2005 therefore correctly transposed Article 4(6) of the Framework Decision.
- 15 The intervener also refers to the judgment of 2 April 2020, *Ruska Federacija*, C-897/19, in which the Court reiterated that the prohibition on discrimination on grounds of nationality laid down in Article 18 of the Treaty on the Functioning of the European Union (TFEU) does not apply to a difference in treatment between nationals of Member States and those of third States, and that Article 21 TFEU, which grants the right to move and reside freely within the territory of the Member States, does not concern third-country nationals.
- 16 The intervener further asserts that the social reintegration of the offender is not the objective specifically pursued by Framework Decision 2002/584. This is pursued by Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union ('Framework Decision 2008/909/JHA').
- 17 With regard to the different treatment of third-country nationals on the basis of Article 18-bis(1)(c) of Law No 69/2005, on the one hand, and Article 19(1)(c) of that law, on the other, this is not unreasonable, since the purpose of a procedural arrest warrant is different and is intended to reduce the need for proceedings *in absentia*.

- 18 In any case, the concept of residence laid down by the provisions of EU law in question and by those of Italian law referred to above should be interpreted as including only Italian nationals and nationals of the other Member States of the European Union who are lawfully and effectively resident in Italy, so that the scope of those provisions coincides.

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

- 19 The referring court stresses the importance of the questions of constitutionality referred to it by the Court of Appeal, which, if upheld, could result in a refusal to surrender the applicant to the issuing State and, consequently, the execution of his custodial sentence in Italy. If those questions were held to be unfounded, however, the Court of Appeal would be required to order the applicant's surrender.
- 20 The referring court notes, first, that after the order of the Court of Appeal was handed down, Article 18-bis of Law No 69/2005 was amended by Article 15(1) of decreto legislativo del 2 febbraio 2010, n. 10 (Legislative Decree No 10 of 2 February 2010; 'Legislative Decree No 10/2010'). With regard to the option of refusing to surrender a national of another EU Member State who is lawfully and effectively staying in or a resident of Italy, the new Article 18-bis(2) of Law No 69/2005, which replaces the formerly applicable Article 18-bis(1)(c), added the requirement whereby that national must lawfully and effectively stay in or be a resident of Italy for at least five years. Nothing changes for third-country nationals.
- 21 Article 19(1)(c) of Law No 69/2005 was also amended by Legislative Decree No 10/2010. Article 19, which applies in the case of an EAW for the purpose of conducting a criminal prosecution – which previously required that the surrender of Italian nationals, nationals of other Member States or third-country nationals residing or staying in Italy be subject to the condition that the person be returned to Italy, if convicted, to serve the sentence – now states, in point (b) of paragraph 1, that surrender is subject to that condition only in respect of Italian nationals and nationals of other EU Member States who have been lawfully and effectively resident in Italy for at least five years.
- 22 In any event, the legislation in force prior to the abovementioned amendments must be applied *ratione temporis* to the main proceedings.
- 23 As to the Court of Appeal's argument in paragraph 8 above, the referring court asserts that that argument cannot be supported and, referring to the *Wolzenburg* judgment cited above (in particular, paragraphs 58, 59 and 62), states that the Court of Justice has already recognised as legitimate certain limitations on the grounds of refusal introduced by the Member States. It states that, however, where national transposing legislation has regulated the optional ground for refusal provided for in Article 4(6) of the Framework Decision in a manner that is not consistent with the fundamental principles and rights of EU law, also referred to in

recital 12 and in Article 1(3) of the Framework Decision, that transposing legislation is contrary to Article 4(6) of the Framework Decision.

- 24 The referring court holds that the questions described, relating to the interpretation of Article 4(6) of the Framework Decision, cover an aspect not yet addressed by the case-law of the Court of Justice, namely the relationship between that provision and the protection of the fundamental rights of a third-country national subject to an EAW. It is, therefore, necessary to determine whether – and if so under what conditions – a third-country national residing or staying in the executing State has a fundamental right not to be expelled from the territory of the executing State for the purpose of executing a custodial sentence or detention order in the issuing State.
- 25 Moreover, since the matter of EAWs is entirely harmonised by the Framework Decision itself, the level of protection of the fundamental rights that may place limits on the duty of mutual recognition of judicial decisions of other Member States is necessarily that resulting from the Charter and from Article 6 of the Treaty on European Union. Conversely, in fully harmonised sectors, Member States are precluded from requiring 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).
- 26 After having noted the autonomous concepts of persons ‘resident’ and ‘staying’ in the executing State, as defined by the Court of Justice in the judgment of 17 July 2008, *Kozłowski*, C-66/08, the referring court states that the questions being asked in this case present new elements in relation to the case-law of the Court of Justice on the EAW developed in the abovementioned cases in *Kozłowski* and *Wolzenburg* and in the judgment of 5 September 2012, *Lopes da Silva Jorge*, C-42/11.
- 27 The referring court also notes that it had already declared the Italian legislation transposing the Framework Decision to be constitutionally unlawful in so far as it did not provide for the refusal to surrender not only an Italian national but also a national of another Member State of the European Union who was staying or resided lawfully and effectively in Italian territory, for the purposes of executing a custodial sentence.
- 28 In terms of the social reintegration of the offender, the referring court notes that ‘the ground for optional non-execution stated in Article 4(6) of the Framework Decision has in particular the objective of enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person’s chances of reintegrating into society when the sentence imposed on him expires’ (*Kozłowski*, *Wolzenburg* and *Lopes da Silva Jorge* judgments) and also cites recital 9 of Framework Decision 2008/909/JHA, which is also applicable to third-country nationals, whereby ‘enforcement of the sentence in the executing

State should enhance the possibility of social rehabilitation of the sentenced person. In the context of satisfying itself that the enforcement of the sentence by the executing State will serve the purpose of facilitating the social rehabilitation of the sentenced person, the competent authority of the issuing State should take into account such elements as, for example, the person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State.'

- 29 The Court of Justice has recently highlighted the link between that framework decision and Framework Decision 2002/584/JHA, stating that 'the coordination provided for by the EU legislature between Framework Decision 2002/584 and Framework Decision 2008/909 must contribute to achieving the objective of facilitating the social rehabilitation of the person concerned. Moreover, such rehabilitation is in the interest not only of the convicted person but also of the European Union in general' (judgment of 11 March 2020, *SF*, C-314/18, paragraph 51).
- 30 The referring court also notes that other EU legal instruments provide for protection of the interest of a third-country national who resides or stays lawfully and effectively in a Member State not to be expelled from that State, such as Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (in particular Article 12(4)) or Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (in particular Article 17).
- 31 Lastly, the referring court refers to the case-law of the European Court of Human Rights ('the ECtHR') in relation to Article 8 of the ECHR. The ECtHR, increasingly emphasising the social reintegration of offenders as one of the functions of the sentence (judgments of 9 July 2013, *Vinter v. United Kingdom*, § 115; of 30 June 2015, *Khoroshenko v. Russia*, § 121; and of 26 April 2016, *Murray v. Netherlands*, § 102), has held that imprisonment at a great distance from the sentenced person's family residence may result in a violation of Article 8 ECHR, because of the consequent difficulty for the prisoner and his or her family members in maintaining regular and frequent contact, which is also important in terms of the social reintegration aims of the sentence (judgment of 7 March 2017, *Polyakova and Others v. Russia*, § 88). In that latter judgment, the ECtHR also held that those principles are confirmed in the Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules, adopted on 11 January 2006. Article 17.1 of those rules, in particular, states that prisoners shall be allocated, as far as possible, to prisons close to their homes or places of social rehabilitation. The case-law of the ECtHR also stresses the need, in decisions that entail the expulsion of an alien from the territory of a State, for a fair balance to be struck in all cases between the reasons underlying such an expulsion and the conflicting reasons for protecting the right of the person concerned, based on Article 8 of the ECHR, not to be expelled from the place where he or she has the most significant part of his or her social, employment, family and emotional ties, in particular where the alien is married or has children

in the territory of the State from which he or she is to be expelled, and a fortiori if he or she was born or brought up in that State but has not acquired its nationality (judgments of 2 August 2001, *Boultif v. Switzerland*, § 48; of 18 October 2006, *Üner v. Netherlands*, § 57; of 23 June 2008, *Maslov v. Austria*, § 68 to § 76; of 19 May 2016, *Kolonja v. Greece*, § 48; and of 24 November 2020, *Unuane v. United Kingdom*, § 72).

- 32 Since the present case, although concerning a person not currently subject to a custodial measure, raises questions of interpretation relating to central aspects of the application of the EAW procedure, and because the interpretation requested may have general consequences both for the authorities called upon to cooperate on the EAW procedure and for the rights of requested persons, the referring court asks the Court of Justice to deal with these questions referred for a preliminary ruling under an expedited procedure pursuant to Article 105 of the Rules of Procedure of the Court of Justice.

WORKING DOCUMENT