

**Case C-40/24 [Derterti] <sup>i</sup>****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:**

23 January 2024

**Referring court:**

Corte suprema di cassazione (Italy)

**Date of the decision to refer:**

19 December 2023

**Applicant:**

GE

**Subject matter of the main proceedings**

Surrender of the applicant to France by the Italian authorities, pursuant to a European arrest warrant issued for the purpose of executing a sentence, although in France he was tried ‘in absentia’, without having been informed of the trial and without having enjoyed the right to a technical defence, that is to say, the right to appoint and be assisted by a lawyer.

**Subject matter and legal basis of the request**

Under Article 267 TFEU and Article 105 of the Rules of Procedure of the Court of Justice, the interpretation, inter alia, of Article 6 TEU and Article 4a of Framework Decision 2002/584/JHA, is sought, with regard, in particular, to the rights of defence of the accused person in a criminal trial held ‘in absentia’.

**Questions referred for a preliminary ruling**

1) Must Article 6 of the Treaty on European Union be interpreted as meaning that the right of the accused to technical defence in a criminal trial is included

<sup>i</sup> The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

among the rights enshrined in the Charter of Fundamental Rights of the European Union of 7 December 2000 and the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and resulting from the constitutional traditions common to the Member States of the European Union, which that Article 6 recognises as general principles of EU law, and with which Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, requires compliance?

2) If so, can the right of the accused person to technical defence in a criminal trial nevertheless be regarded as respected where the judgment imposing a sentence was handed down against an accused person who was absent and not assisted by a lawyer, either of his own choosing or appointed by the court hearing the action, although subject to the right of that accused person, once surrendered, to obtain a retrial with the safeguards for the rights of defence?

3) Consequently, must Article 4a of Council Framework Decision 2002/584/JHA, inserted by Council Framework Decision 2009/299/JHA of 26 February 2009, be interpreted as meaning that the requested State of surrender has the power to refuse to execute a European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person concerned did not appear in person at the trial resulting in the decision, even if the conditions laid down in paragraph (1)(d) of that Article 4a are satisfied, but the person concerned was not assisted by a lawyer, appointed by him or by the court hearing the action of its own motion.

### **Provisions of European Union law and case-law relied on**

Treaty on European Union ('TEU'): Article 6.

Charter of Fundamental Rights of the European Union ('the Charter'): Articles 47, 48 and 52.

Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty: recitals 4, 12, 19, 27 and 54, and Articles 1, 2, 3, 8 and 9.

Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 ('the Framework Decision'): recital 12, Article 1(3) and Article 4a(1).

European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'): Article 6(3)(c).

Judgments of the Court of Justice of the European Union ('the Court') of 31 January 2023, *Gordi*, C-158/21; 26 February 2013, *Melloni*, C-399/11; 23 March 2023, *LU and PH*, C-514/21 and 515/21; 10 August 2017, *Zdziaszek*, C-271/17; and 12 March 2020, *VW*, C-659/18.

Judgment of the European Court of Human Rights ('the ECtHR') of 13 February 2001, *Krombach v. France*, no. 29731/96.

### **Provisions of national law and case-law relied on**

Paragraph 2 of Article 24 of the Costituzione della Repubblica italiana (Constitution of the Italian Republic): 'Defence is an inviolable right at every stage and instance of legal proceedings'.

Article 2 of Legge n. 69 (Law No 69) of 22 April 2005, as amended by legge n. 10 (Law No 10) of 2 February 2021 ('the EAW Law'): 'The execution of the European arrest warrant may not, under any circumstances, entail a breach of the overriding principles of the constitutional order of the State or of the inalienable rights of the individual recognised by the Constitution, of the fundamental rights and the fundamental legal principles enshrined in Article 6 TEU or of the fundamental rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms ...' Furthermore, under Article 6(1-bis)(d) of that law, in the case of a requested person for the purposes of executing a judgment imposing a sentence handed down following a trial 'in absentia', surrender is nevertheless permissible if, although the person concerned has not been personally served with the decision, he or she will be personally served with it without delay after the surrender in the issuing Member State and will be expressly informed of the right to obtain a new and complete re-examination on the merits of his or her position, with the possibility of producing new evidence and obtaining the reversal of that decision in accordance with the instruments provided for that purpose by the national law of the requesting State.

Judgments of the Corte costituzionale (Constitutional Court): No 190 of 1970, No 55 of 1971, No 255 of 1974, No 172 of 1976, No 125 of 1979, No 188 of 1980, and No 144 of 1995.

Judgments of the Suprema Corte di cassazione (Supreme Court of Cassation): judgments of the Sesta Sezione (Sixth Chamber) No 5400 of 30 January 2008, *Salkanovic*, and No 14721 of 7 May 2020, *Spahiu*.

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

- 1 By judgment of 12 October 2017, which became enforceable, the Tribunal d'Auxerre (District Court, Auxerre, France), following a criminal trial held in the absence of the accused person and in the absence of a defence lawyer, pursuant to Articles 379-2 and 379-6 of the French Code of Criminal Procedure, sentenced

GE, an Albanian national, for offences of unlawful importation, sale and purchase of narcotics. For the purpose of executing the sentence, on 6 September 2021 the French Republic issued a European arrest warrant with a view to obtaining the surrender of GE, who is in Italy.

- 2 The Corte di appello di Firenze (Court of Appeal, Florence) declared that the conditions for the surrender of the Albanian national GE to the French Republic were satisfied. The arrest warrant indicated that, under French law, the sentenced person may, after surrender, lodge an objection against the judgment within ten days of its service. The Court of Appeal thus held that the requirement laid down in Article 6 of the EAW Law, which allows surrender where the requested person, although not having had notice of the decision taken following a trial which took place in his absence, will receive that notice after surrender and will be expressly informed of the right to a complete re-examination of his position, had been met.
- 3 GE brought an appeal against the judgment of the Court of Appeal, Florence, before the Corte di cassazione (Court of Cassation, Italy), the referring court.

#### **The essential arguments of the parties in the main proceedings**

- 4 GE claims that there has been an infringement of Article 2 of the EAW Law, in that he was tried in absentia, without having received a summons to appear in court, without the assistance of a lawyer and on a general indictment, which resulted in infringing the right to technical defence and the right that both sides be heard in the formation of evidence, which is necessary for a fair trial.
- 5 As regards the argument of the Court of Appeal that the judgment handed down in absentia is in any event revocable at the request of the sentenced person after he becomes aware of it, GE replies that the surrender was requested not in order to hold a trial but to execute a sentence, for which more stringent safeguards apply. Moreover, as regards the argument of the Court of Appeal that the absence of a lawyer is justified by the possibility of self-defence, he replies that, for the purpose of the latter, the lawful summons of the accused person before the court and his presence at trial are still necessary.

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

- 6 In the past, in many similar cases, the Court of Cassation held that the arrest warrant issued by the French judicial authorities on the basis of a judgment imposing a sentence handed down in absentia, without safeguards of both sides being heard and of defence, was in any event in conformity with the principles of a fair trial, in so far as French law guarantees to the sentenced person the possibility of requesting, by means of an opposition, a new trial in accordance with the principle that both sides be heard and the rights of defence; however, the Court of Cassation itself, the referring court, takes the view that that approach should now be re-examined.

- 7 According to the case-law of the Constitutional Court, the right of defence, protected by Article 24 of the Constitution, consists essentially in guaranteeing that both sides be heard and the presence of a lawyer in all types of proceedings. In that sense, the reference to ‘every stage and instance of legal proceedings’, even though it does not necessarily mean that both sides being heard and the presence of the lawyer must be guaranteed at all times and in every procedural step, nevertheless requires it to be ascertained, in relation to the importance of the individual step, whether the absence of the lawyer results, by the effects to which it gives rise, in an actual infringement of the constitutional right to defend oneself at trial. The right of defence is inalienable and the mandatory nature of the appointment of a lawyer assigned officially is intended to protect fundamental human values and constitutional principles.
- 8 Article 2 of the EAW Law with the 2001 amendment lost the express reference to respect for the rights of defence as a prerequisite for the execution of the European arrest warrant. However, the referring court considers, on the basis of the case-law of the Constitutional Court cited above, that the right of technical defence is one of the ‘inalienable rights of the person recognised by the Constitution’, the ‘fundamental rights’ referred to in Article 6 TEU, and the rights guaranteed by the ECHR, infringement of which requires, under Article 2 of the EAW Law, the Italian State to refuse to execute the European arrest warrant. The national law must therefore be interpreted not only in the light of the Constitution but also of EU law which it implements. Furthermore, as the Constitutional Court recalled, the fundamental rights, to which the Framework Decision is bound under recital 12 and Article 3(1) thereof, are those recognised by EU law, and the common constitutional traditions of the Member States contribute to their definition. It is therefore for EU law to establish the levels of protection of fundamental rights to which the rules on the European arrest warrant are subject, since it is a harmonised matter. Thus, according to the Constitutional Court, in order to ensure the uniform application of the European arrest warrant, Member States cannot refuse surrender except in cases expressly provided for in the Framework Decision.
- 9 Article 4a of the Framework Decision (added by the 2009 amendment), in accordance with the case-law of the Court, according to which execution of the European arrest warrant constitutes the rule, whereas refusal to execute is an exception and must be interpreted strictly (see judgment in *Gordi*, paragraph 68), provides that the judicial authority may refuse to execute a European arrest warrant issued on the basis of a decision rendered following a trial, if the person concerned ‘did not appear in person at the trial resulting in the decision’, unless that warrant contains one of the indications referred to in points (a) to (d) of that article, that is to say: (a) the person was summoned in person and informed of the trial which resulted in the decision and that a decision may be handed down if he or she does not appear for the trial; or (b) the person, being aware of the date of the trial, was assisted at the trial by a legal counsellor appointed by him or her or assigned officially; or (c) after being served with the decision and being informed about the right to a retrial or an appeal, expressly stated that he or she does not

contest the decision or did not request a retrial or appeal within the applicable time frame; or (d) was not personally served with the decision but will be served with it after the surrender and will be expressly informed of his or her right to a retrial or an appeal and will be informed of the time frame within which he or she has to request such a retrial or appeal. In such cases, according to the settled case-law of the Court, the execution of the European arrest warrant does not adversely affect the rights of the person concerned to defence and, more generally, to a fair trial, as enshrined in Articles 47 and 48 of the Charter (see, for example, *Melloni*, paragraphs 44 and 53, and *LU and PH*, paragraphs 47 to 50, 72, and 73). However, according to the referring court, that article does not contain any express provision for a situation in which the ‘trial resulting in the decision’, in respect of the accused person who was absent, in default or never duly summoned, took place without that person ever having been assisted by a lawyer, appointed by that person or assigned officially. Such a situation should therefore be examined in the light of general principles.

- 10 The referring court observes, first of all, that the trial held in respect of GE is undoubtedly a ‘trial resulting in the decision’ within the meaning of Article 4a, that is to say, a proceeding which, following an examination of the merits of the case, finally determined guilt and sentenced the person whose surrender is requested (see judgment in *Zdziaszek*, paragraph 82). The judicial decision sentencing the requested person in absentia must be regarded as a ‘decision’ within the meaning of Article 4a where its adoption was decisive for the issuance of the European arrest warrant (judgment in *LU and PH*, paragraph 67).
- 11 As regards the substance, it recalls that the objective of harmonisation of the conditions of execution of arrest warrants issued for the purposes of executing decisions rendered in the absence of the accused person, implemented by the Framework Decision, is to ‘enhance the procedural rights of persons subject to criminal proceedings’ (judgment in *Melloni*, paragraph 51), by seeking to ‘guarantee a high level of protection and to allow the [...] surrender [of] the person concerned [...] while fully respecting his or her rights of defence’ (judgment in *LU and PH*, paragraph 50).
- 12 Furthermore, fundamental rights form an integral part of the rights of the defence, which derive from the right to a fair trial enshrined in Articles 47 and 48 of the Charter, so that the Court must interpret Article 4a in a manner consistent with those articles, which correspond to Article 6 of the ECHR. Consequently, Articles 47 and 48 of the Charter must be interpreted in such a way as to ensure a level of protection equal to that guaranteed by that latter Article 6, as interpreted by the ECtHR (judgment in *LU and PH*, paragraph 51).
- 13 The Court, called upon to rule on the interpretation of Directive 2013/48/EU, specified that the right of access to a lawyer cannot be derogated from because a suspect or accused person has failed to appear following a summons to appear (judgment in *VW*).

- 14 The ECtHR has held that, although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned by the court if need be, is one of the fundamental features of a fair trial; that a person charged with a criminal offence does not lose that benefit merely on account of not being present at the proceeding; and, lastly, that even if the legislature may discourage unjustified absences, it cannot penalise them by derogating from the right to assistance of a lawyer (*Krombach v. France*).
- 15 On that basis, according to the referring court, the guarantee of the possibility of setting aside the judgment imposing a sentence, as a result of a retrial or – as in the case of French law – of an appeal against it following the surrender of the requested person in such a way as to fully guarantee the right of defence, is not such as to remedy in full the infringement of that right where the trial was held in the absence of the accused person and without that person being assisted by a lawyer.
- 16 Even in the abovementioned cases of a retrial or an appeal, the accused person remains exposed to the effects of the rules of procedural law of the State which requests his or her surrender as regards the usability of evidence already acquired, at least as regards evidence which, by its nature, cannot be taken again. That could be remedied only by providing for the absolute non-usability of evidence acquired in the trial in which the accused person was not defended or, at the very least, by an undertaking by the State issuing the European arrest warrant not to use that evidence for the new decision, which France did not do with regard to GE.
- 17 Thus, in a situation such as that in which GE finds himself, an individual, as a result of a European arrest warrant issued against him, is subjected to restrictions on his personal liberty following a judgment imposing a sentence handed down without his having been in a position to be defended, even by a lawyer assigned officially, not having been informed of his trial or not having been able to or not having wished to appoint a lawyer, without, however, waiving the right to do so, and that restriction is not justified by precautionary requirements.
- 18 Such a situation, according to the referring court, gives rise to serious doubts as to compatibility with the right of the defence, which is instrumental in the protection of the broader right of personal liberty.
- 19 It is requested that the present reference for a preliminary ruling be decided under an expedited procedure in so far as the present case concerns a person who is not detained but who is nevertheless subject to coercive personal supervision measures (obligation to stay in a particular city and obligation to report to the police), concerns a European arrest warrant, which, under Article 17(1) of the Framework Decision, ‘shall be dealt with and executed as a matter of urgency’, and the questions of interpretation raised in the present case have general consequences, both for the competent authorities and for the rights of the requested persons.