

## JUDGMENT NO 178 YEAR 2023

The Italian provision which automatically and unconditionally prevents all third-country nationals staying or residing in Italy from benefiting from the grounds for optional non-execution of a European arrest warrant (EAW), which are available to Italian and EU nationals, is unconstitutional.

The Bologna Court of Appeal asked the Constitutional Court to rule on the constitutionality of said provision, which established, inter alia, that Italian courts may deny surrender “if an EAW has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is an Italian national or a national of another EU Member State who is legally and actually residing or staying in Italy, provided that the court of appeal directs that the sentence or detention order be executed in Italy in accordance with Italian law”. According to the referring Court of Appeal, the limitation of this ground for refusal to Italian and EU nationals was contrary to the right to private and family life (Articles 2 of the Italian Constitution and 8 ECHR) as well as the constitutional requirement of the rehabilitative purpose of criminal sentences (Article 27(3) of the Italian Constitution).

By its [Order No 217/2021](#), the Constitutional Court requested a preliminary ruling from the Court of Justice of the European Union (CJEU), asking two questions. The first was whether Article 4(6) of Framework Decision 2002/584, interpreted in the light of Article 1(3) of the Framework Decision and Article 7 of the European Charter of Human Rights, precludes legislation such as the Italian law, which – in an EAW procedure for executing a custodial sentence or detention order – absolutely and automatically prevents executing judicial authorities from refusing to surrender third-country nationals staying or residing in Italy, irrespective of their links with that country. The second was, if the answer to the first questions was affirmative, what criteria and conditions must be applied to establish that such links are so significant as to require the executing judicial authorities to refuse surrender. The Court of Justice answered these questions in its [O.G. judgment of 6 June 2023](#). According to the Court of Justice, a provision like the one challenged in the main proceedings contrasts with the principle of equality before the law enshrined in Article 20 of the Charter and with Article 4(6) of the Framework Decision, read in conjunction with the Charter provision. Article 4(6) of the Framework Decision must therefore be interpreted as meaning that, “in order to assess whether it is appropriate to refuse to execute a European arrest warrant issued against a third-country national who is staying or resident in the territory of the executing Member State, the executing judicial authority must make an overall assessment of all the specific elements that characterise that national’s situation which are capable of showing that there are, between that person and the executing Member State, connections demonstrating that he or she is sufficiently integrated into that State such that the execution in that Member State of the custodial sentence or detention order pronounced against that person in the issuing Member State will contribute to increasing the chances of social rehabilitation. Those elements include the family, linguistic, cultural, social or economic links that the third-country national has with the executing Member State as well as the nature, duration and conditions of his or her stay in that Member State”.

In the light of this judgment, the Constitutional Court declared the challenged provision incompatible with Articles 11 and 117(1) of the Constitution, read in conjunction with Article 4(6) of Framework Decision 2002/584 as interpreted by the Court of Justice of the European Union. The provision was also held to be in contrast

with Article 27(3) of the Italian Constitution since it precluded any third-country national from serving their custodial sentence in Italy regardless of their degree of integration in Italy, thereby impairing their chances of social rehabilitation after serving the sentence.

Accordingly, the Court held that the provision was unconstitutional to the extent that it did not allow Italian judicial authorities to refuse the surrender of third-country nationals legally and actually residing or staying in Italy and sufficiently integrated into Italian society in accordance with the criteria set out by the CJEU in its *O.G.* judgment.

Taking into account that a recent amendment of the Italian law on the EAW has restricted the benefit of this ground for refusal to Italian and EU nationals who have been legally and continuously resident in Italy for at least five years, and having considered that this limitation is compatible with EU law, the Court held that the same limitation should apply to third-country nationals.

[omitted]

#### THE CONSTITUTIONAL COURT

[omitted]

gives the following

#### JUDGMENT

in proceedings concerning the constitutionality of Article 18-*bis* of Law No 69 of 22 April 2005 (Provisions to transpose Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States) [...] initiated by the First Criminal Division of the Bologna Court of Appeal (*Corte d'appello di Bologna, sezione prima penale*) in criminal proceedings against O.G., by referral order of 27 October 2020, registered as No 42 of the 2021 Register of Referral Orders and published in the *Official Journal of the Italian Republic*, number 15, first special series 2021, scheduled for discussion in chambers on 5 July 2023.

*Considering* the statement in intervention by the President of the Council of Ministers;

*after hearing* Judge Rapporteur Francesco Viganò at the public hearing of 6 July 2023;

*after deliberation* in chambers on 6 July 2023.

#### *The facts of the case*

1.– By referral order of 27 October 2020, the First Criminal Division of the Bologna Court of Appeal raised questions as to the constitutionality of Article 18-*bis* of Law No 69 of 22 April 2005 (Provisions to transpose Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States) [...].

The provision is challenged “to the extent that it does not provide the option of refusing to surrender third-country nationals legally and actually residing or staying in Italy, provided that the courts of appeal order that the custodial sentences imposed on them by the judicial authority of an EU Member State be served in Italy in accordance with its domestic law”.

The referring court takes the view that this omission is contrary to Articles 11 and 117(1) of the Constitution in relation to Article 4(6) of Framework Decision 2002/584/JHA, Article 7 of the Charter of Fundamental Rights of the European Union (CFREU), Article 8 of the European Convention on Human Rights (ECHR), Article 17(1) of the International Covenant on Civil and Political Rights (ICCPR), and Articles 2, 3 and 27(3) of the Constitution.

1.1.– The main proceedings, of which this Court has already given account in its Order No 217/2021, concern the execution of a European arrest warrant (EAW) issued to enforce a sentence on 13 February 2012 by the Court of First Instance of Braşov (Romania) against O.G., a Moldovan citizen with permanent links to Italy through his family and employment. According to the referring court, O.G. was sentenced by final judgment in Romania to five years’ imprisonment for tax evasion and misappropriation of sums due for payment of income tax and VAT, which he committed in his capacity as director of a limited liability company between September 2003 and April 2004.

[omitted]

*Conclusions on points of law*

[omitted]

4.– The questions concerning Articles 11 and 117(1) in relation to Article 4(6) of Framework Decision 2002/584/JHA and Article 27(3) of the Constitution are well-founded.

4.1.– Article 4(6) of Framework Decision 2002/584/JHA establishes a ground for optional non-execution of the European arrest warrant where it has been issued “for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State, and that State undertakes to execute the sentence or detention order in accordance with its domestic law”.

4.2.– In the text in force at the time of the main proceedings, the challenged Article 18-*bis*(1)(c) of Law No 69/2005 allowed courts of appeal to deny surrender “when the European arrest warrant was issued for the purpose of executing a custodial sentence or detention order if the requested person is *an Italian national or an EU citizen* who is legally and actually residing or staying in Italy, provided that the courts of appeal direct that the custodial sentence or detention order be served in Italy in accordance with its domestic law”.

Thus, the challenged provision allowed courts of appeal to refuse to surrender only Italian citizens or EU citizens residing or staying in Italy, thereby implicitly – but unequivocally – excluding third-country nationals, even if they were legally and actually residing or staying in Italy.

4.3.– According to the referring court, this exclusion, effected by the Italian legislature when transposing Article 4(6) of the Framework Decision, unduly restricted its scope of application, consequently infringing Articles 11 and 117(1) of the Constitution.

Moreover, by preventing third-country nationals already permanently residing or staying in Italy from serving their custodial sentence in Italy, the challenged provision allegedly undermined the rehabilitative purpose of the sentence enshrined in Article 27(3) of the Italian Constitution as well as the right to private and family life of the person concerned protected by Articles 7 CFREU, 8 ECHR, and 17(1) ICCPR, all of which are binding in the Italian legal order under Article 117(1) of the Constitution (and also, with regard to Article 7 CFREU, under Article 11 of the Constitution).

4.4.– In its Order No 217/2021, this Court, essentially sharing the view of the referring court, asked the Court of Justice of the European Union, whether applying rules such as those contained in the challenged provision, which absolutely and automatically preclude the executing judicial authorities from surrendering third-country nationals who reside or are staying within its territory, regardless of the links they have with it, was compatible with Article 4(6) of Framework Decision 2002/584/JHA – interpreted in the light of Article 1(3) of the Framework Decision and Article 7 of the CFREU.

In Order No 217/2021, this Court remarked more specifically that, according to

Court of Justice case law, Article 4(6) of Framework Decision 2002/584/JHA is intended to increase the opportunities for social rehabilitation in the territory with which the offender already has significant ties. This aim also underpins the rules laid down by Council Framework Decision 2008/909/JHA on mutual recognition of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty, which apply to EU citizens and third-country nationals alike (point 8.3. of the *Conclusions on points of law*).

Moreover, this Court observed that the surrender of a person firmly rooted in the executing State to another State to serve a custodial sentence may infringe their right to private and family life, which is specifically protected by Article 7 CFREU and Article 8 ECHR, both safeguarding a person's interest to preserve their family and social ties established in the State where they habitually reside or stay. This is also in line with ECtHR case law, according to which detention at a great distance from an offender's family residence may constitute a breach of Article 8 ECHR due to the difficulty detainees and their family members face, in such a situation, in maintaining regular and frequent contact, which is also essential for the purpose of social rehabilitation of the former (paragraphs 8.4. and 8.5. of the *Conclusions on points of law*).

Lastly, in Order No 217/2021, this Court asked the Court of Justice to specify – provided it considered Article 4(6) of Framework Decision 2002/584/JHA to be incompatible with laws such as those challenged by the referring court – the criteria to be applied in establishing that the third-country national's ties with Italy are so significant as to require the executing judicial authority to deny surrender.

4.5.– In the *O.G.* judgment of 6 June 2023 [...], the Court of Justice first of all recalled that the margin of appreciation available to the Member States in transposing the grounds for optional non-execution of surrender set out in Article 4 – including the ground referred to in paragraph 6 – of Framework Decision 2002/584/JHA is constrained by the need to respect the fundamental rights of the requested person, as is apparent from Article 1(3) of the Framework Decision.

The Court of Justice also remarked that these fundamental rights include respect for the principle of equality before the law, protected by Article 20 CFREU, which applies equally to citizens and non-nationals of an EU Member State. In the same way, this principle, like Article 3 of the Constitution, requires “that similar situations must not be treated differently and that different situations must not be treated in the same manner, unless such different treatment is objectively justified” (paragraph 42 of the judgment).

Since, as has already been remarked in several previous judgments, the ground for optional non-execution set out in Article 4(6) of the Framework Decision is intended to increase the chances of the requested person's social rehabilitation once the custodial sentence has been served, the Court of Justice observed that EU citizens and third-country nationals who “are integrated to a certain extent” in the executing State are “in a comparable situation” as regards the possibilities of reintegration in that State (paragraphs 49 and 50).

According to the Court of Justice, it follows that a rule of a Member State treating its own nationals, those of other Member States and third-country nationals differently, by absolutely and automatically denying the latter the benefit of the ground for optional non-execution of the arrest warrant provided for by Article 4(6), is incompatible with EU law. Indeed, such a rule precludes the competent judicial authority from assessing on a case-by-case basis whether the requested third-country national is staying or residing in the territory under its jurisdiction and whether – this being the case – their connections with it are sufficient to increase the chances of their rehabilitation if the sentence is served in the same State (paragraphs 56 and 57 and operative part).

Responding to the second question raised by this Court, the Court of Justice observed that the executing judicial authority will have to assess the factors indicated in Recital No 9 of Framework Decision 2008/909/JHA on the mutual recognition of judgments in criminal matters imposing custodial sentences. In particular, it will have to assess “the attachment of that person to the executing Member State, and whether that Member State is the centre of his or her family life and his or her interests, taking into account, *inter alia*, his or her family, linguistic, cultural, social or economic links to that State” (paragraph 62), considering the aspiration for the offender to “maintain regular and frequent contact with his or her family and persons close to him or her” with a view to rehabilitation (paragraph 64).

The Court of Justice therefore concluded that “Article 4(6) of Framework Decision 2002/584 must be interpreted as meaning that, in order to assess whether it is appropriate to refuse to execute the European arrest warrant issued against a third-country national who is staying or residing in the territory of the executing Member State, the executing judicial authority must make an overall assessment of all the specific elements that characterise that national’s situation which are capable of showing that there are, between that person and the executing Member State, connections demonstrating that he or she is sufficiently integrated into that State such that the execution in that Member State of the custodial sentence or detention order pronounced against that person in the issuing Member State will contribute to increasing the chances of social rehabilitation after that sentence or detention order has been executed. Those elements include the family, linguistic, cultural, social or economic links that the third-country national has with the executing Member State as well as the nature, duration and conditions of his or her stay in that Member State” (paragraph 68 and operative part).

4.6.– The ruling by the Court of Justice confirms the incompatibility of the challenged provisions with both European Union law and the Italian Constitution.

The Court of Justice held that the absolute and automatic exclusion of a third-country national from the benefit of the refusal to surrender for the execution of a custodial sentence or a detention order subject to an undertaking to execute that sentence or detention order in Italy – a benefit enjoyed, on the other hand, by both Italian nationals and, under certain conditions, nationals of other Member States – is incompatible with the principle of equality before the law enshrined in Article 20 CFREU. Thus, it is also incompatible with Article 4(6) of Framework Decision 2002/584/JHA, read in the light of its Article 1(3), which reaffirms the obligation to respect “fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union” when implementing it.

It immediately follows that the challenged provisions are contrary to Articles 11 and 117(1) of the Constitution in relation to Article 4(6) of Framework Decision 2002/584/JHA.

Moreover, this legislation contrasts with the rehabilitative purpose of sentencing established by Article 27(3) of the Constitution – to which the Court of Justice itself refers, remarking that the social reintegration of the offender is the underlying rationale for optional non-execution envisaged in Article 4(6) of Framework Decision 2002/584/JHA, specifically transposed into Italian law by Article 18-*bis*(1)(c) of Law No 69/2005. The execution abroad of a custodial sentence or a detention order imposed on a person with strong family and close social connections in Italy may seriously hinder their social reintegration once the sentence or the order have been served, a goal that such measures and penalties must strive for by constitutional mandate (regarding the necessary objective of reintegration underlying both custodial sentences and detention orders, see Judgment No 22/2022, point 5.2. of the *Conclusions on points of law*).

In the light of the finding of incompatibility between the challenged provision and Articles 11, 117(1) and 27(3) of the Constitution, no examination of the further complaints is necessary.

5. – Based on the findings of the Court of Justice, the ascertained violations must be remedied by empowering executing judicial authorities – i.e., in the Italian legal system, the courts of appeal with jurisdiction under Article 5 of Law No 69/2005 – to assess (a) whether requested third-country nationals actually (and lawfully) reside or stay in Italy, and (b) whether they are “sufficiently integrated” (*O.G.* judgment, paragraphs 61 and 68) in Italy. If so, custodial sentences or detention orders imposed upon them will have to be executed in Italy, in order to enhance their prospects of rehabilitation.

The assessment of whether their integration is sufficient must also take into account the criteria outlined by the Court of Justice in paragraph 68 of the *O.G.* judgment and reiterated in the operative part: namely, the “family, linguistic, cultural, social or economic links” that the third-country national has with Italy, and the nature, duration and conditions of their stay in Italy.

An essential factor to consider in this assessment is whether the requested person is a long-term resident under Directive 2003/109/EC and Article 9 of Legislative Decree No 286 of 25 July 1998 (Consolidated Law on immigration and rules on the status of foreigners). This status is described in the *O.G.* judgment as “a genuine instrument for the integration of long-term residents into [the] society in which they live”, thus constituting “a strong indication of sufficient connections having been established by the requested person with the executing Member State in order to justify a refusal to execute a European arrest warrant” (paragraph 67).

In conclusion, Article 18-*bis*(1)(c) of Law No 69/2005, as transposed by Article 6(5)(b) of Law No 117/2019, must be declared unconstitutional to the extent that it does not allow courts of appeal to deny the surrender of third-country nationals legally and actually residing or staying in Italy and sufficiently integrated in Italy in the meaning specified here, provided that the courts of appeal establish that the custodial sentences or detention orders are to be executed in Italy.

6.– [...] The challenged provision was amended by Legislative Decree No 10/2021. Its normative content has now been merged into paragraph 2 of Article 18-*bis*, which explicitly states that “when a European Arrest Warrant has been issued for the execution of a custodial sentence or a detention order involving the deprivation of personal liberty, courts of appeal may deny surrender of requested persons if they are Italian citizens or citizens of another Member State of the European Union who have been legally and actually staying in Italian territory for at least five years, provided that they ensure that the sentences or detention orders are executed in Italy in accordance with its domestic law”.

From the constitutional point of view, this provision contains, on the one hand, the same flaw that vitiated Article 18-*bis*(1)(c) of Law No 69/2005, since it does not allow the executing judicial authority to refuse to surrender a third-country national legally and actually residing in Italy. Therefore, this new provision must also be declared unconstitutional under Article 27 of Law No 87 of 11 March 1953 (Rules on the Constitution and functioning of the Constitutional Court).

On the other hand, the provision currently in force allows courts of appeal to deny surrender of requested persons who are nationals of another EU Member State for the execution of custodial sentences or detention orders only when they have been legally and actually residing or staying in Italy “for at least five years”.

In this regard, it should be noted that, according to the case law of the Court of Justice, a Member State may subject the possibility of refusing to surrender a citizen of

another Member State for the purposes of execution of custodial sentences or detention orders to the condition that they have resided lawfully and continuously for at least five years in the executing State (*Wolzenburg*, paragraph 74).

The *O.G.* judgment has now clarified that a Member State may establish a similar condition for refusing to surrender a third-country national, provided that this “does not go beyond what is necessary to ensure that the requested person is integrated to a certain degree in the executing Member State” (paragraph 52).

The requirement that EU citizens and third-country nationals be treated equally, on which the entire *O.G.* judgment hinges, certainly prohibits the latter from receiving more favourable treatment than that (lawfully) reserved for citizens of another Member State by the national legislature.

Consequently, the declared unconstitutionality of the new wording of Article 18-*bis* must be limited to cases where a requested third-country national has been legally and actually residing in Italy for at least five years.

Therefore, pursuant to Article 27 of Law No 87/1953, Article 18-*bis*(2) of Law No 69/2005 as transposed by Legislative Decree No 10/2021 must be declared unconstitutional to the extent that it does not enable a court of appeal to refuse to surrender a requested person who is a third-country national and has legally and actually resided or stayed in Italy for at least five years and is sufficiently integrated in Italy, within the meaning specified above, provided that the court of appeal orders that the custodial sentence or detention order is executed in Italy.

ON THESE GROUNDS  
THE CONSTITUTIONAL COURT

1) *declares* that Article 18-*bis*(1)(c) of Law No 69 of 22 April 2005 (Provisions to transpose Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States) as amended by Article 6(5)(b) of Law No 117 of 4 October 2019 (Delegation to the Government to transpose European directives and implement other acts of the European Union – European Delegation Act 2018) is unconstitutional to the extent that it does not enable courts of appeal to refuse to surrender third-country nationals who have legally and actually resided or stayed in Italy and are sufficiently integrated in Italy, within the meaning specified in the grounds, provided that the courts of appeal order that the custodial sentences or detention orders are executed in Italy;

2) *declares*, pursuant to Article 27 of Law No 87 of 11 March 1953 (Rules on the Constitution and functioning of the Constitutional Court), that Article 18-*bis*(2) of Law No 69/2005, in the wording transposed by Legislative Decree No 10/2021 (Provisions to transpose Council Framework Decision 2002/584/JHA concerning the European arrest warrant and the surrender procedures between Member States, introducing the delegation referred to in Article 6 of Law No 117 of 4 October 2019), is unconstitutional to the extent that it does not enable courts of appeal to refuse to surrender requested persons who are third-country nationals and have legally and actually resided or stayed in Italy for at least five years and are sufficiently integrated in Italy, within the meaning specified in the grounds, provided that the court of appeal order that the custodial sentences or detention orders are executed in Italy.

Decided in Rome, at the seat of the Constitutional Court, Palazzo della Consulta, on 6 July 2023.

Signed:

Silvana SCIARRA, President

Francesco VIGANÒ, Judge Rapporteur