Corte costituzionale

JUDGMENT NO. 227 OF 2010

Francesco AMIRANTE, President

Giuseppe TESAURO, Author of the Judgment

JUDGMENT NO. 227 YEAR 2010

In this case the Court considered various references from the Court of Cassation concerning the legislation implementing the Council Framework Decision on the European arrest warrant concerning the difference in treatment between Italians and foreign nationals (the former could not be surrendered to a requesting Member State, whereas the latter could be, even if stably and continuously resident in Italy). Upholding the challenge and striking down the legislation as unconstitutional, the Court held that "by using the exclusive criterion of citizenship, and excluding any check as to the existence of an actual and stable link with the executing Member State, the contested provision ultimately violates not only wording but also and above all the rationale of the provision of European Union law which it should have correctly implemented" since there was no reasonable justification for that measure and it was not proportional.

THE CONSTITUTIONAL COURT

composed of: President: – Francesco AMIRANTE; Judges: – Ugo DE SIERVO, – Paolo MADDALENA, – Alfio FINOCCHIARO, – Alfonso QUARANTA, – Franco GALLO, – Luigi MAZZELLA, – Gaetano SILVESTRI, – Sabino CASSESE, – Maria Rita SAULLE, – Giuseppe TESAURO, – Paolo Maria NAPOLITANO, – Giuseppe FRIGO, – Alessandro CRISCUOLO, – Paolo GROSSI,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 18(1)(r) and 19(1)(c) of Law no. 69 of 22 April 2005 (Provisions to bring internal 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) initiated by the Court of Cassation by referral orders of 27 August, 4 September, 28 October and 11 November 2009, respectively registered as nos. 298 and 305 in the Register of Orders 2009 and as nos. 10 and 45 in the Register of Orders 2010 and published in the Official Journal of

the Italian Republic nos. 50 and 52, first special series 2009 and nos. 5 and 9, first special series 2010.

Considering the entry of an appearance by M.K.P. and the intervention by the President of the Council of Ministers;

having heard the Judge Rapporteur Giuseppe Tesauro in the public hearing of 11 May 2010 and in chambers on 12 May 2010;

having heard Counsel Antonio Fiorella for M.K.P. and the *Avvocato dello Stato* Maurizio Fiorilli for the President of the Council of Ministers.

The facts of the case

1.– By referral order of 27 August 2009 (no. 298 of 2009), the Court of Cassation raised, with reference to Articles 3, 27(3) and 117(1) of the Constitution, a question concerning the constitutionality of Article 18(1)(r) of Law no. 69 of 22 April 2005 (Provisions to bring internal 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), insofar as it provides that "if the European arrest warrant has been issued for the purposes of enforcing a sentence or a security measure resulting in the deprivation of individual freedom", the court of appeal may order that this sentence or security measure be enforced in Italy in accordance with internal law only "if the person sought is an Italian national".

1.1.– The lower court states that on 6 July 2006 the Rzeszow District Court (Poland) issued a European arrest warrant against a Polish national, M.K.P., enforcing a definitive judgment of 19 November 2003 sentencing him to a term of imprisonment of 3 years and 6 months issued by the Debica District Court (Poland) for aiding and abetting two robberies committed on 11 January 2003 and 15 January 2003 by violence against the person, the use of fire arms and an Oxyhydrogen flame, and the removal of money and other property from two shops in Debica (Poland), offences provided for and punished under Articles 280, 157 and 11 of the Polish Criminal Code.

The sentenced person must still serve his sentence of 3 years, 1 month and 22 days' imprisonment and, according the referral order, the case file states that he is effectively resident in Italy and has also established the principal base of his emotional interests here.

By judgment of 19 June 2009, the Rome Court of Appeal had ordered that the aforementioned individual be handed over to the competent requesting Polish authorities for the purposes of the enforcement of his sentence, holding that – in providing that "if the European arrest warrant has been issued for the purpose of the enforcement of a sentence or a security measure resulting in the deprivation of individual freedom", its enforcement in Italy in accordance with internal law may be ordered only "if the person sought is an Italian national" – Article 18(1)(r) of Law no. 69 of 2005 precludes that right to foreigners resident in Italy, as has also been held by the Court of Cassation.

M.K.P. appealed to the Court of Cassation against this judgment, arguing that the court had erred in law in failing to apply Article 19(1)(c) of Law no. 69 of 2005, although the prerequisites had been met, and objecting to the failure to give reasons regarding the effective and continuous nature of his residence in Italy. The appellant moreover referred to the opinion of the Advocate General of the Court of Justice of the European Communities delivered on 24 March 2009 in Case C–123/08 [2009] ECR I-9621, initiated by the Rechtbank of Amsterdam concerning the interpretation of Council Framework Decision no. 2002/584/JHA of 13 June 2002, "Council Framework Decision on the European arrest warrant and the surrender procedures between Member States" (hereafter, referred to as the Framework Decision) which stated that, "under Article 4(6) of the Framework Decision", a national of another Member State who is staying or resident in the executing Member State, within the meaning of that provision, is to be treated in the same way as a national of that State in so far as he must be able to benefit from "a non-surrender decision and therefore from the possibility of serving his sentence in that State", and therefore requested that the proceedings be stayed pending the judgment of the ECJ.

1.2.– The Court of Cassation observes that in providing that the person who is the subject of the arrest warrant may serve the sentence in our country if he is an Italian

national, Article 18(1)(r) reproduces Article 4(6) of the Framework Decision and refers to a series of judgments of that court precluding the applicability of that provision, through interpretation, to foreigners resident in Italy, and observing that the said Framework Decision grants to Member States of the European Union the mere ability to extend that rule to the latter, if it applies in respect of its own nationals.

According to the referring court, the objection whereby the appellant averred that 19(1)(c) of Law no. 69 of 2005 does not apply to this case is groundless. In fact, this rule provides that "if the person subject to the European arrest warrant for the purposes of a criminal prosecution is an Italian national or is resident in Italy, surrender shall be subject to the requirement that after the person has been heard, he shall be sent to the executing Member State in order to serve any sentence or the security measure resulting in the deprivation of individual freedom that may have been issued against him in the issuing Member State". Therefore, the provision unequivocally provides that "only 'the person to be tried' (a national of or resident in the State), and in respect of whom criminal proceedings are in progress", may invoke "conditional surrender". This means that, according to an interpretation that is informed by constitutional law or arrived at by analogy, this procedure cannot be applied to the different case involving an arrest warrant issued for the purposes of the enforcement of a custodial sentence issued by irrevocable conviction.

1.3.– In view of the above, the lower court questions the constitutionality of Article 18(1)(r), with reference to Articles 3, 27(3) and 117(1) of the Constitution insofar as it does not provide that foreigners also resident in Italy may also serve their sentence there.

Regarding the question of relevance, the lower court observes that "it appears that [the appellant] has provided the necessary proof, in accordance with the standards required under the case law of this Court, of his actual establishment and habitual residence" (citing verbatim) in Italy.

In its opinion, the concept of "resident" should be "determined in such a manner as to be conducive to the equal treatment of resident foreigners and nationals under Article 4(6) of the Framework Decision". Therefore, "the existence, which is not disputed in this case, of a 'real and not occasional rooting' of the foreigner in Italy", where the latter

had proven that he has "established the principal and non-occasional (though not necessarily exclusive) basis of his emotional, professional or economic interests here on a continuous basis and with sufficient geographical stability" in accordance with a choice that is indicative of a desire to reside stably in Italy for a significant period of time is significant in this case. Therefore, the appellant is claimed to "be entitled to have his claim accepted" in the event that the question is considered to be well founded.

1.3.1.– As regards the non manifest groundlessness of the question, the referring court recalls the judgments of the Court of Cassation holding that the contested provision applies exclusively to Italian nationals, and asserting that it cannot be applied to foreign nationals who stay or reside in Italy even through interpretation. In fact, the Framework Decision merely grants the right to the Member States of the European Union to extend any guarantees that may be granted to its own nationals also to foreign nationals resident in their territory, in accordance with a crime policy choice that falls to the discretion of national parliaments, and which cannot be objected to on the grounds of unreasonableness. The ECJ's judgment of 17 July 2008 in *Kozlowsky* Case C-66/08 [2008] ECR I-6041 is claimed not to have impinged upon this right, having only provided an interpretation of the concept of residence referred to under Article 4(6) of the said Framework Decision.

Due to the clear and unequivocal reading of Article 18(1)(r) and a comparison with Article 19(1)(c) of Law no. 69 of 2005, a different less restrictive interpretation to that offered in the contested judgment is not possible. Indeed, even the Court of Justice has asserted that the national courts must interpret national law in the light of the wording and purpose of the Framework Decision, subject to the limits permitted under the wording of the latter (judgment of 16 June 2005 in *Pupino* Case C-105/03 [2005] ECR I-5285).

The referring court accordingly summarises the arguments made by the Advocate General to the Court of Justice in support of the view that Article 4(6) of the Framework Decision grants national parliaments the right to specify that the judicial authorities may refuse to surrender in accordance with a European arrest warrant concerning the enforcement of a sentence issued against a national or resident of that State, but does not permit them to differentiate between the situation of the former and that of the latter.

Indeed, the ability to specify that the sentence may be served in the State that receives the request does not amount to a privilege for the latter's nationals which may or may not be extended to mere residents, since it is necessary in order to guarantee the "re-socialisation of the sentenced person" by maintaining his family and social ties, thereby permitting his correct rehabilitation after the enforcement of the sentence in accordance with a principle that does not tolerate distinctions between nationals and residents.

In its opinion, identical reasons underlie Article 5(4) of the Framework Decision (concerning arrest warrants for the purpose of prosecution) which, insofar as relevant here, treats nationals and residents equally and prevents national parliaments from discriminating between them. Therefore, the legislation laid down by the contested provision, which draws that distinction, is claimed not to be justified, also since Article 19(1)(c) of Law no. 69 of 2005 on the European arrest warrant "for the purposes of prosecution" treats the latter identically to the former.

The referring court argues that the "principle of the individual tailoring of the regime governing the (future) enforcement" of the sentence does not tolerate any distinction between Italian nationals and foreigners resident in the territory of the State. This is because it is aimed at "expanding opportunities for the incorporation the sentenced person into the relational, social and emotional – but also economic and housing – context that is most conducive to the development of the socialising and rehabilitative potential of the sentence imposed (or to be imposed) by the issuing State. However, [as stressed by the Advocate General at the Court of Justice in the opinion referred to above], the enforcing State, the State of which the person to be surrendered is a national or resident, as well as the other States of the European Union may draw direct and immediate benefit from its positive operation".

The purpose of Articles 4(6) and 5(3) of the Framework Decision is consistent with the principle of the rehabilitative goal of the sentence laid down under Article 27(3) of the Constitution, with the result that the legislation enacted by the contested provision also violates that principle.

With regard to another aspect, since the case under examination involves a national of a Member State of the European Union, Article 18(1)(r) of Law no. 69 of 2005 is claimed to breach the principle of non-discrimination established under Article 12 of the

Treaty of 15 March 1957 (Treaty establishing the European Community), as in force from 1 February 2003 until 30 November 2009, according to which every person holding the nationality of a Member State is also a European citizen (Article 17(1)) and has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the EC Treaty and the measures adopted to give it effect (Article 18(1)).

Therefore, the contested provision is claimed to violate Article 117(1) of the Constitution, since the "limitations resulting from Community law" and Article 27(3) of the Constitution have not been complied with.

1.3.2.– In the alternative, in the event that the objections relating to the aforementioned constitutional principles are deemed to be groundless, the lower court claims that Article 18(1)(r) of Law no. 69 of 2005 violates Article 3 of the Constitution.

In its opinion, the difference between the legislation respectively enacted under that provision and Article 19(1)(c) of the Law lacks reasonable justification; on the contrary, in cases falling under the former provision, the enforcement of the sentence in Italy permits the sentenced person to maintain his family and social relations as far as possible, whilst in those falling under the latter, the person who is the subject of the arrest warrant must be surrendered to the State of the issuing authority and may only be returned to Italy in order to serve the sentence after those relations have become more tenuous. Therefore, in cases falling under Article 19(1)(c), the enforcement of the penalty in the issuing State is claimed to be less harmful than in cases falling under the contested provision.

2.– M. K. P., the appellant in the main proceedings, entered an appearance in the proceedings before the Court, requesting that the question be accepted.

The party avers in support of the relevance of the question that it has been determined in the proceedings before the lower court that he is "actually and stably [resident] in Italy with his immediate family", and therefore a declaration that the contested provision is unconstitutional would permit him to serve the sentence in Italy, with the result that the objections are relevant.

M.K.P. accordingly endorses the arguments made in the referral order, which he essentially reiterates in arguing that Article 18(1)(r) of Law no. 69 of 2005 violates

Article 27(3) of the Constitution which, according to the case law of this Court – to which he refers – prohibits the provision of procedures for the enforcement of sentences that "may substantially cancel out personal relations, situations and contexts or which otherwise unreasonably hinder their continuation, insofar as compatible with the enforcement of the sentence and the ongoing respect for the proportionality principle". By contrast, this result is actually achieved by the contested provision which, once foreign nationals have been surrendered to the authorities of the State that issued the arrest warrant, also precludes "eligibility for the alternative measures provided for under Italian criminal law" which "according to the legislation are accompanied by suspended sentences and exemptions from punishment", "which may permit them to maintain – again, insofar as compatible with the purposes of the penalty – the ties that bind him to the place where they are stably resident", notwithstanding the fact that they are resident in Italy.

Article 18(1)(r) unreasonably prevents an "effective recovery" of the foreign national, which is also possible due to the "vicinity of the sentenced person to his existential framework" – as a "criterion expressly mentioned under criminal law when regulating the allocation of and transfers between different prisons" (Articles 12 and 42 of Law no. 354 of 26 July 1975) – thereby preventing him from receiving the benefits provided for under Italian criminal law which could enable him to establish employment relationships capable of supporting his family, and thereby preventing the penalty – in breach of the proportionality principle – from imposing punishment in excess of that which is strictly necessary.

According to the party, "the uprooting effect" caused by the provision also breaches the inviolable right to family unity provided for under Articles 2, 29 and 30 of the Constitution, and the right to respect for family unity enshrined under Article 8 of the European Convention on Human Rights (ECHR), ratified by Law 4 no. 848 of August 1955.

In its opinion, the contested provision unreasonably enacts different rules for arrest warrants concerning sentences and those issued for the purpose of prosecution, providing on the contrary – contrary Article 3 of the Constitution, which it therefore

violates – that it may be justified to prevent foreign nationals from serving their sentences in Italy.

Article 18(1)(r) is also claimed to violate the guarantee of free movement and freedom of residence vested in the citizens of the countries of the European Union, in breach of Articles 12, 18 and 49 of the EC Treaty, provisions which "relate principally to the institution of Union citizenship", which has taken on greater significance following the Treaty of Lisbon given its inclusion in Article 9, at the start of Title II, containing "Provisions on democratic principles". At present the right of free movement is solemnly proclaimed in the preamble to the Treaty on European Union, explained in Article 3(2), and regulated in detail under Articles 26(2) and 45 *et seq* of the Treaty on the Functioning of the European Union.

In support of the allegation that Community law has been violated, the appellant accordingly refers to the judgment of the Court of Justice of 6 October 2009 in Case C-123/08 [2009] ECR I-9621, according to which "[t]he Member States cannot, in the context of the implementation of a framework decision adopted on the basis of the EU Treaty, infringe Community law, in particular the provisions of the EC Treaty relating to the freedom accorded to every citizen of the Union to move and reside freely within the territory of the Member States" and the discretion granted to the Member States in regulating the limits on the surrender of the person who is the subject of an arrest warrant may not be exercised in an unreasonable and discriminatory manner and must be inspired by the goal of "increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires".

The contested provision is claimed to violate freedom of movement and freedom of residence as established under Community law and the prohibition on discrimination based on nationality. The violation of the right to reside in the territory of the State appears to be even more clear when the foreign national has been resident in Italy for a long time, taking account of the provisions of Article 9(1)(d) of Law no. 91 of 5 February 1992 (New provisions on citizenship), which provide that Italian citizenship may be granted "to a national of a Member State of the European Community who has been legally resident in the territory of the Republic for at least four years".

The right of a citizen of a Member State of the European Union to establish himself in another State of the Union and to reside there indefinitely is also governed by Directive no. 2004/38/EC of 29 April 2004 (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC), which provides that "[c]itizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States" and that "Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence" (second [sic., should read "first"] and third recitals). The twentieth recital accordingly provides that "all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals in areas covered by the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law", a principle with which Articles 24 and 27 of the Directive comply, which respectively establish the principle of equal treatment and provide that freedom of movement may only be restricted on grounds of public policy, public security or public health, which are expressly identified.

This Directive was implemented by Italian Legislative Decree no. 30 of 6 February 2007 (Implementation of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States), which regulated the restrictions on the right of entry and residence in Article 20, laying down provisions confirming the principle whereby the existence of criminal convictions does not in itself justify the adoption of a measure, as is by contrast provided for under the contested provision.

Finally, according to the party, it cannot be concluded that Article 18(1)(r) has the purpose of fully implementing cooperation between the Member States, which is also achieved by the recognition of judgments issued in each of them given that, under the current state of legislation, this does not apply in cases in which the judgment concerns

an Italian national, which the contested provision does not take account of that limit in cases involving foreign nationals resident in Italy.

3.– The President of the Council of Ministers intervened in the proceedings, represented by the *Avvocatura Generale dello Stato*, requesting that the question be ruled groundless.

In his opinion, the referring court did not explain the reasons why the situation of an Italian national may for our present purposes be regarded as equivalent to that of a foreign national resident in Italy, and the question raised "is grounded in a contradictory manner on the denial of the discretionary power" of the national parliament to treat these situations differently.

The State representative cites the fifth, seventh and eight recitals to the preamble of Framework Decision no. 2002/584/JHA, arguing that the objective of that measure is to abolish extradition procedures between the Member States, replacing them with a surrender system between judicial authorities, which therefore appears to be based on the principle of the mutual recognition of decisions in criminal matters, which lies at the base of judicial cooperation between these States.

The intervener cites Article 1 of the Framework Decision and Articles 2 and 3, concerning the prerequisites for admissibility of the enforcement of a European arrest warrant; he observes that Article 4(6) provides that "if the European arrest warrant 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", whilst Article 5(3) provides that "where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be 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 in the issuing Member State"; he summarises the legislation enacted by Articles 11, 15 and 17 on the rights of the person who is the subject of a European arrest warrant and the procedures governing surrender and enforcement.

In view of the above, the State representative points out that the judgment of the Court of Justice of 17 July 2008 in *Kozlowski*, Case C-66/08, asserted that Article 4(6) of the Framework Decision must be interpreted as meaning that a person sought is actually resident in the Member State in which the arrest warrant is to be executed or is 'staying' there when, following a stable period of presence in that State, he has acquired connections with that State which are of a similar degree to those resulting from residence, since the concepts of "residence" and "staying" must be regarded as identical for all States of the European Union.

The judgment is claimed to confirm that the Framework Decision does not treat nationals as equivalent to those who are staying or resident in the country, and that the reference parameter on the basis of which the arrest warrant should not be executed is claimed to consist in the level of integration of the person who is the subject of the arrest warrant within the State where it is to be enforced.

The intervener accordingly quotes large excerpts from the judgment of the Court of Justice of 6 October 2009 in Case C-123/08, *Wolzenburg*, which held that Article 4(6) of the Framework Decision grants national legislatures the ability to regulate the situation of nationals differently to that of foreign nationals who are resident within the territory of the State. This right has manifested itself through Articles 18 and 19 of Law no. 69 of 2005, which the State representative limits himself to transcribing, asserting that these provisions "constitute the prerequisite for the evaluation of the choices made regarding the surrender of a person who is the subject of a European arrest warrant", without submitting any further arguments.

Regarding the challenges relating to Articles 3 and 27(3) of the Constitution, the intervener observes that Article 4(6) of the Framework Decision regulates cases in which the surrender of a person who is the subject of the arrest warrant may be refused, laying down provisions inspired by the goal of favouring the social reintegration of the sentenced person, taking account of the ties that he has within a given State. However, in his opinion, this goal does not according to the Court of Justice prevent the national legislature from limiting the situations that fall under Article 4(6), with the result that the faults objected to by the Court of Cassation amount to "a challenge to the exercise of the power to transpose" [EU legislation]. The situation of nationals and of foreigners

who are resident in the State are claimed to be different and the fact that the sentenced person has left the State of which he is a national and in which he should serve the sentence is "significant in determining his social personality"; his surrender "to his natural judge" would permit the latter to "assess the conduct of the guilty person and to impose on him the sentence which, on the basis of his natural system of criminal law, permits his social recovery by gaining an awareness of the values violated". The decision to surrender the person who is the subject of an arrest warrant is a "consequence of an overall valuation, carried out in accordance with pre-determined principles, of the offence and its 'evaluation' by the requesting legal system". Moreover, the reformation of the sentenced person should occur "in relation not to an abstract society, but to the society of which he is a member", i.e. of the country of which he is a citizen.

"Citizenship", "residence" and "staying" set out the area of discretion reserved to the Member States which, on the basis of these, may assess whether the conviction will compromise their chosen crime policies; the reason for any refusal to surrender "clearly lies in Italy's interest in ensuring that the re-education of the sentenced person occur with reference to Italian society, even if the social value infringed is not shared by Italian society".

Ultimately, the State representative concludes, "the reason why Italian nationals are not surrendered in order to serve a sentence imposed by the natural judge of the offence clearly lies in the social harm caused by the conduct of a national who evades the responsibility incurred in committing an offence in the requesting State, whilst for "residents", the social harm caused by their conduct has nothing to do with their personality and with the reasons that led them to exercise the right of establishment as a means of furthering this", with the result that the question is groundless.

4.– By three referral orders of 4 September 2009 (no. 305 of 2009), 28 October 2009 (no. 10 of 2010) and 11 November 2009 (no. 45 of 2010) issued in three different proceedings, the Court of Cassation raised a question concerning the constitutionality of Article 18(1)(r) of Law no. 69 of 22 April 2005 (Provisions to bring internal 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) with reference to

Articles 3, 27(3) and 117(1) of the Constitution insofar as it provides that, "if the European arrest warrant has been issued for the purposes of enforcing a sentence or a security measure resulting in the deprivation of individual freedom", the court of appeal may order that this sentence or security measure be enforced in Italy in accordance with internal law only "if the person sought is an Italian national".

4.1.– The first referral order (no. 305 of 2009) states that M.C.N., a Romanian citizen, was arrested in Italy on 11 June 2009 following the issue of a European arrest warrant against him by the Strehaia District Court (Romania) on 12 March 2009, enforcing the judgment issued by that court on 1 March 2005, which became irrevocable on 6 October, sentencing him to a term of imprisonment of three years for the offence of manslaughter provided for and punished under Article 178 of the Romanian Criminal Code, which was committed in May 2004. This judgment also ordered the revocation of the conditional suspension of the sentence granted by the Drobetsa Turno District Court, by judgment of 14 October 2002, convicting him of the offence of fraud, provided for and punished under Articles 208 and 209 of the Romanian Criminal Code.

By judgment of 7 August 2009, the Brescia Court of Appeal ordered the surrender of M.C.N. to the Strehaia District Court pursuant to Law no. 69 of 2005, ruling that Article 18(1)(r) of that law was inapplicable.

M.C.N. appealed against this judgment to the Court of Cassation, arguing that it erred in law in holding that this provision was not applicable, and averring the failure to give reasons and/or the manifestly illogical nature of the reasons given and the violation of the law insofar as it precluded the applicability of Article 19(1)(c) of Law no. 69 of 2005.

4.2.– The second referral order (no. 10 of 2010) observes that a European arrest warrant was issued against P.S., a Polish national resident in Italy, by the Katowice District Court on 4 November 2008, enforcing the definitive judgment issued by the same court on 18 December 2003 sentencing him to a term of imprisonment of three years for the offence of the aggravated robbery of a minor, committed on 2 January 2003 in Jaworzno (Poland).

By judgment of 12 August 2009, the Ancona Court of Appeal ordered the surrender of P.S. to the requesting authority pursuant to Law no. 69 of 2005, holding that Article 18(1)(r) of that Law was inapplicable.

P.S. appealed against that judgment to the Court of Cassation, arguing that it had erred in applying the provisions on the European arrest warrant and that it violated Article 5 of the Framework Decision no. 2002/584/JHA, in consideration of the difference in treatment between Union citizens and the substantive violation of the foreign national's right to serve the definitive sentence in the State in which he has established the centre of his interests, at his own free choice in accordance with the principle of free movement.

4.3.– The third referral order (no. 45 of 2010) states that a European arrest warrant was issued against A.S., a Romanian national, on 27 March 2007, enforcing the irrevocable judgment issued by the Husi District Court on 24 June 2004 for the offence of driving under the influence of alcohol committed in that city on 6 August 2003; by judgment of 14 September 2009, the Turin Court of Appeal ordered his surrender to the requesting authority.

P.S. appealed against this judgment to the Court of Cassation, arguing that it violated Article 7 of Law no. 69 of 2005 since, at the time of the offence, the conduct with which he was charged was punished in Italy as an administrative offence, with a less severe penalty than that imposed by the Romanian court, and averring in any case that "the same offence today in Italy would 'already have been covered by the sentence reduction scheme [*indulto*]'"; in any case, had the sentence been imposed by an Italian court, punishment could no longer be imposed under the statute of limitations and, in any case, the Court of Appeal should have verified whether the statute of limitations had already applied in Romania.

At the hearing in chambers, the appellant requested that he be allowed to serve the sentence in Italy.

4.4.– In view of the above, the referral orders question the constitutionality of 18(1)(r) of Law no. 69 of 2005, with reference to Articles 3, 27(3) and 117(1) of the Constitution, insofar as it provides that the person who is the subject of a European arrest warrant issued "for the purposes of enforcing a sentence or a security measure

resulting in the deprivation of individual freedom" may serve the sentence in Italy only if "he is an Italian national".

According to the lower courts, the question is relevant since the appellants have provided the necessary evidence of their "concrete rootedness in the country" and that they stay in Italy on a stable and ordinary basis, with the result that they would be entitled for their requests to be accepted if the contested provision were ruled unconstitutional.

The referring courts accordingly argue that the claim is not manifestly groundless with respect to the principles invoked reiterating, almost verbatim, the arguments made in the Court of Cassation's referral order of 27 August 2009 summarised above, including vis-à-vis the inability to resolve the doubt as to the provision's constitutionality through an interpretation informed by the Constitution.

5.– In the proceedings initiated by referral order no. 10 of 2010, by note received by this Court on 28 December 2009, the Court of Cassation transmitted the request of 15 December 2009 submitted by P.S. to the Ancona Court of Appeal in which he states that he no longer objects to his surrender to the Polish judicial authorities since his 16 month old daughter, cohabiting partner and entire family live in that State, and "declares that he wishes to withdraw forthwith from any hearing before the Constitutional Court" concerning the question of constitutionality indicated above.

By note of 17 February 2010, the Court of Cassation transmitted the statement of the withdrawal of the appeal made by P.S. on 28 January 2010 in which he requests that his surrender to the Polish judicial authorities be authorised.

6.– The President of the Council of Ministers intervened in all of the proceedings before this Court, represented by the *Avvocatura Generale dello Stato* who, in various submissions with substantially identical content, requested that the question be ruled groundless, and reproduced in support the arguments made in his intervention relating to the proceedings initiated by referral order no. 298 of 2009, summarised above.

Conclusions on points of law

1.– Four referral orders (nos. 298 and 305 of 2009 and nos. 10 and 45 of 2010) have been placed before this court for examination – the first discussed in the public hearing of 11 May 2010 and the others in the hearing in chambers on 12 May – by which the Court of Cassation raised a question concerning the constitutionality of Article 18(1)(r) of Law no. 69 of 22 April 2005 (Provisions to bring internal 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), insofar as it provides that "if the European arrest warrant has been issued for the purposes of enforcing a sentence or a security measure resulting in the deprivation of individual freedom", the Court of Appeal may refuse to execute the arrest warrant and order that the sentence or the security measure be enforced in Italy in accordance with national law, only "if the person sought is an Italian national".

1.1.– Due to the identical nature of the questions raised and the arguments used, it is ordered that the cases be joined for the purposes of their joint management and one single judgment.

2.– The referring courts argue in the first place that Article 117(1) of the Constitution has been violated since the provision of EU law which substantiates the constitutional principle – namely Article 4(6) of Council Framework Decision no. 2002/584/JHA of 13 June 2002, "Council Framework Decision on the European arrest warrant and the surrender procedures between Member States" (hereafter referred to as the "Framework Decision") – grants the national legislature the right to require that the judicial authorities refuse to surrender a person who has been convicted in order to serve the custodial sentence in the issuing State if that person is a national of the executing State, or resides or stays there, but does not permit the refusal to apply to nationals alone, as is by contrast provided for under the contested provision of the Italian Law implementing the Framework Decision.

2.1.– Moreover, in consequence, in incorrectly implementing the corresponding provision of the Framework Decision, the provision under examination also violated the principle of non-discrimination on the grounds of nationality (Article 12 of the EC Treaty, as in force until 30 November 2009, thereafter Article 18 TFEU, Treaty on the Functioning of the European Union), since it denied outright the possibility for citizens

of other Member States of the Union to be incarcerated in Italy, whilst by contrast permitting this for Italian nationals.

2.2.– In the alternative, the referring court considers that the possibility of serving the sentence in the State of which the person who is the subject of a European arrest warrant (hereafter, EAW) is a national or in which he resides or stays is intended to guarantee the "re-socialisation of the sentenced person" by maintaining his family and social ties, for the purpose of facilitating his correct rehabilitation after the sentence has been enforced, thereby implementing the rehabilitative goal of the sentence enshrined under Article 27(3) of the Constitution. It follows that this constitutional principle, which does not permit any discrimination between Italian nationals and the nationals of other Member States of the Union in this regard, has also been violated.

2.3.– In the alternative, should the challenges relating to the aforementioned constitutional principles be considered groundless, the referring courts argue that the contested provision also violates Article 3 of the Constitution, since there is no reasonable justification for the difference in treatment provided for thereunder compared to Article 19(1)(c) of Law no. 69 of 2005. This latter provision applies to cases involving an EAW issued for the purpose of pursuing a criminal trial and treats nationals and residents in an identical manner in subjecting the surrender of both to specific conditions.

2.4.– Regarding the question of relevance, the lower courts specify that the persons who are the subject of an EAW for the purposes of the enforcement of the sentence are legally resident in Italy, since they have provided evidence of their "concrete rootedness in the country" and the "ordinary nature of their stay" – in short, of a "real and not occasional rooting" in Italy, having identified it as the principal base of their interests. The referring courts accordingly argue that, if the suspected unconstitutionality of the contested provision is confirmed, these subjects will have the right for their surrender to be refused and to serve the custodial sentence in Italy.

3.– As a preliminary matter, with regard to the proceedings relating to referral order no. 10 of 2010, it should be pointed out that the withdrawal of the appeal intimated by the Court of Cassation by note of 17 February 2010 cannot have any effect on the constitutionality proceedings, since once these have "started following a referral order

by the lower court, they cannot be influenced by later events concerning the relationship at issue in the proceedings that gave rise to the referral", in accordance with Article 18 of the supplementary rules on proceedings before the Constitutional Court in the text approved on 7 October 2008 (with reference to the identical rule previously contained in Article 22: judgment no. 244 of 2005, and orders no. 270 of 2003 and no. 383 of 2002).

3.1.– Again as a preliminary matter, it must be noted that the principles and issues of constitutional law relied on by the private party who entered an appearance in the proceedings before this Court initiated by referral order no. 298 of 2009, which are different from those relied on by the referring court, cannot constitute the object of this decision. According to the settled case law of this Court, the object of interlocutory proceedings before the constitutional court is in fact limited to the rules and principles specified, even implicitly, in the referral orders and any additional questions or issues of constitutional law raised by the parties in excess of the limits set in the former cannot be taken into account, irrespective of whether they were averred but not adopted by the lower court or were subsequently intended to expand or amend the contents of these orders (judgments no. 50 of 2010, no. 236, no. 56 of 2009 and no. 130 of 2008).

4. – On the merits, the question relating to the violation of Article 117(1) of the Constitution is well founded.

5.– The main challenge made in the four referral orders objects to a contrast between a provision of European Union law and a national provision implementing the former which cannot be remedied through interpretation.

The Union law concerned is Framework Decision no. 584 of 2002 on the EAW, under which the Member States replaced in their mutual relations the extradition procedure provided for under various international conventions with a simplified system involving, insofar as is of interest here, the surrender by a Member State (the executing State) to another (the issuing State) of individuals for prosecution or, following conviction, to serve a custodial sentence: this case concerns the latter situation. The fifth recital to the Framework Decision explains that the creation of an area of freedom, security and justice requires the abolition of extradition between Member States and its replacement with a system of surrender between judicial authorities. The tenth recital specifies that the Framework Decision is based on a "high level of confidence between

Member States", on the presumption of the homogeneous nature of legal systems and the equivalent guarantee of fundamental rights.

In short, the introduction of the new simplified system governing the surrender of convicted or accused persons makes it possible to eliminate the complexity and potential delays inherent within the legislation on extradition. This court has held in this regard that "the European arrest warrant … is based on the principle of the immediate and reciprocal recognition of court orders. In fact, this institution – in contrast to extradition – is not premised on any inter-governmental relationship, but is premised on direct relations between the various court authorities of the Member States, introducing a new simplified surrender system for convicted or suspected persons" (judgment no. 143 of 2008).

Ultimately, the EAW system gives rise to a simplified and direct relationship between judicial authorities aimed at permitting the free movement of judgments concerning arrest warrants in relation to a criminal trial or the enforcement of a custodial sentence. The objective was later also enshrined in Council Framework Decision no. 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". This decision entered into force on 5 December 2008, whilst the deadline for its transposition by the Member States is 5 December 2011 (Article 29(1)).

Framework Decision no. 584 of 2002 on the EAW is a decision made at a time when, in accordance with the Maastricht and the Amsterdam Treaties, jurisdiction was created for the European Union over police and judicial cooperation in criminal matters (so-called third pillar), exercised according to procedures (intergovernmental method) and legislative instruments that were at least formally different from those used under Community law. In particular, the Council was to adopt a Framework Decision to harmonise the legislative and regulatory provisions of the Member States in this area on the initiative of one or more Member States or the Commission. The decision was binding on the Member States "as to the result to be achieved but shall leave to the national authorities the choice of form and methods" (Article 34 EU Treaty), using a formula repeating that which had always been used for directives. On the Union side,

the Framework Decision required unanimity in the Council, and therefore of the Member States; on the internal side, it required that the necessary action be taken in order for it to be implemented fully, given the express lack of direct applicability and effect.

The Court of Justice of the European Communities (now the Court of Justice of the European Union) has clarified the effects of the Framework Decision. In particular, the Luxembourg court asserted, first, the obligation to interpret national law in accordance with the wording and purpose of the Framework Decision, starting from the recognition of the binding nature of the decision as to the result, analogous to that of a directive, and therefore achieving partial harmonisation (judgment of 16 June 2005 in Case C-105/03, *Pupino* [2005] ECR I-5285). On subsequent occasions, the same court confirmed the validity of the Framework Decision on the EAW (judgment of 3 May 2007 in Case C-303/05, *Advocaten voor de Wereld* [2007] ECR I-3633) and, following a reference for a preliminary ruling by the national courts, provided its interpretation of the provision on the refusal to surrender and the concepts of residence and "staying", asserting that the individuals not eligible to benefit from a refusal to surrender for the purposes of the enforcement of the sentence may invoke the harm resulting from the contrast between national provisions and the provisions of the Framework Decision (judgments of 6 October 2009 in Case C-123/08, *Wolzenburg* [2009] ECR I-9621 and of 17 July 2008 in Case C-66/08, *Kozlowsky* [2008] ECR I-6041).

With the Treaty of Lisbon, which entered into force on 1 December 2009 and which had previously been ratified in Italy by Law no. 130 of 2 August 2008 (Ratification and implementation of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community and certain related acts, by final act, protocols and declarations signed in Lisbon on 13 December 2007), judicial cooperation in criminal matters no longer falls under jurisdiction exercised on an intergovernmental basis, but is regulated by Chapter 4, Title V of the Treaty on the Functioning of the European Union (Article 82 *et seq*), and therefore falls under jurisdiction exercised according to the ordinary, and different, Community method; the act used to legislation in this area is the directive, adopted according to ordinary legislative procedures (Article 82 TFEU).

6.– The Framework Decision on the EAW was implemented under Italian law by Law no. 69 of 22 April 2005.

Article 18 provides for a range of situations in which surrender must be refused; paragraph 1(r) is the provision that sought to implement Article 4(6) of the Framework Decision. The question of constitutionality currently before this Court is the limitation of the refusal solely to Italian nationals.

7.– The referring courts have invoked the principle laid down by Article 117(1) of the Constitution, applying moreover the principles contained in the case law of the Constitutional Court in relation to the overall relationship between the Italian legal system and the law of the European Union as asserted and restated under Article 11 of the Constitution. According to the settled case law of this Court, a question of constitutionality is to be "scrutinised having regard also to principles of constitutional law that are not formally invoked […] if the relevant act clearly refers to them, even implicitly […], by reference to the principles enunciated by them" (see *inter alia* judgments no. 170 of 2008, no. 26 of 2003, no. 69 del 1999 and no. 99 del 1997).

Right since the first occasions on which it has been requested to define the relationship between national law and Community law, this Court has identified the "secure foundation" of Article 11 of the Constitution (in particular, judgments no. 232 del 1975 and no. 183 of 1973, although previously also judgments no. 98 of 1965 and no. 14 of 1964). It was according to this principle, which was included – not insignificantly and not without consequences – amongst the fundamental principles of the Charter, that the European Communities, now the European Union, have been charged with exercising legislative jurisdiction in certain areas instead of the Member States, subject to the limits of the principle of conferral. And it is again pursuant to Article 11 of the Constitution that this Court acknowledged the power and duty of the ordinary courts, and on an earlier level of the administration, to apply Community legislation with direct effect immediately in place of national provisions in contrast with the former which cannot be remedied through interpretation, or to refer a question to the Constitutional Court concerning the violation of that constitutional principle in the event of a contrast with community provisions without direct effect (judgments no. 284 of 2007 and no. 170 of 1984). Finally, due to the limitations on sovereignty permitted

under Article 11 of the Constitution, this Court has acknowledged the scope and various implications of the predominance of Community law even over constitutional law (judgment no. 126 of 1996), holding that the sole limit on this would be in cases in which Community law contrasted with the fundamental principles of the constitutional architecture of the State or the inviolable rights of the person (judgment no. 170 of 1984).

As far as Article 117(1) of the Constitution is concerned, in the version amended by Title Five, Part Two of the Constitution, this Court has specified its scope, holding that this provision filled the gap left by the lack of constitutional coverage for international treaty provisions, including the Rome Convention on Human Rights and Fundamental Freedoms (ECHR), which fell outwith the scope of Article 10(1) of the Constitution (judgments no. 348 and 349 of 2007). Article 117(1) of the Constitution therefore expressly confirmed in part what had already been the position under Article 11 of the Constitution, namely the duty of the State and regional legislatures to respect the limits resulting from Community law. However, the limit on the exercise of legislative powers imposed by Article 117(1) of the Constitution is only one of the relevant aspects of the relationship between internal law and European Union law – a relationship which, considered overall and as delineated by this Court over the course of recent decades, still has a "secure foundation" in Article 11 of the Constitution. Indeed, all of the consequences resulting from the limitations on sovereignty which only Article 11 of the Constitution allows, in both substantive and procedural terms, for the administration and the courts, in addition to the limitations on the legislature and the relative international responsibility of the State, have remained in place even after the reform. In particular, as regards any breach with the Constitution, in contrast to the position for international treaty law (including the ECHR: judgments no. 348 and no. 349 of 2007), the guarantee remains that the exercise of the legislative powers delegated to the European Union is subject to the sole limit of compliance with the fundamental principles of the constitutional architecture of the State and that the greatest protection of the inalienable rights of the person be ensured (judgments no. 102 of 2008, no. 284 of 2007and no. 169 of 2006).

7.1.– In the case under examination, the referring courts have correctly held, in the first place, that the contested provision contrasts with the Framework Decision, and have explained why an interpretation in accordance with the Constitution is not possible. The reasons given on this point are plausible, since numerous decisions of the Court of Cassation itself have confirmed the existence of a "living law", i.e. uniform and settled case law, regarding the applicability to these cases and the of Article 18(1)(r), including in particular the fact that this provision does not apply to foreign nationals resident or "staying" in Italy. Moreover, this interpretation is supported both by the wording of the provision as well as the *travaux preparatoires*, which expressed the specific intention to preclude a refusal to surrender the nationals of other EU countries for EAW *in executivis* – an exclusion which was the object of a specific amendment.

It follows first and foremost that the contrast between the implementing legislation and the Framework Decision, which cannot be remedied through interpretation, could not be resolved through by the ordinary courts setting aside the national provision, since the legislation concerned was a European Union provision without direct effect, and therefore had to be submitted for constitutional review by this Court. Secondly, the national acts implementing a Framework Decision with a legal basis in the TEU, and in particular in the former third pillar relating to judicial cooperation in criminal matters, are not subject to any review as to their compatibility with the relevant originating provisions of the EC Treaty, now the TFEU, which in turn supplement the constitutional principles – laid down by Articles 11 and 117(1) of the Constitution – which refer to those provisions.

In this case in fact, in addition to the Framework Decision on the EAW, Article 12 of the EC Treaty, now Article 18 of the TFEU, which prohibits all discrimination on the grounds of nationality within the scope of application of the Treaty is of significance. It is also correct to refer the case to the Constitutional Court on this basis, since the contrast between the provision and the principle of non-discrimination laid down by Article 12 of the EC Treaty is not always in itself sufficient to permit any conflicting internal legislation to be "set aside" by the ordinary courts. Indeed, as is also clear from the case law of the Court of Justice, although the prohibition under examination is in

principle directly applicable and effective, it does not have an absolute scope such that any national provision which formally contrasts with it must under all circumstances be deemed to be incompatible with it. In fact, the Member State legislature is permitted to impose limits on the equal treatment of its own nationals and the nationals of other Member States, provided that these are proportional and adequate, such as for example in the case before this Court, the provision of a reasonable time limit on the prerequisite of residence applicable to the national of a Member State different from the executing Member State (ECJ, *Wolzenburg* judgment). However, this is not all: the ordinary courts are also prevented from setting aside domestic legislation that is theoretically incompatible by the fact that this case relates to the criminal law and a foreign measure ordering that an individual be deprived of his personal freedom for the purposes of the enforcement of the sentence in Italy could not be implemented on the strength of a provision of Union law which does not correspond to a valid internal implementing provision (judgment no. 28 of 2010, point 5).

The possibility that the national provision may be unlawful due to the incorrect implementation of the Framework Decision therefore subsists in cases in which, according to the case law of this Court, the ordinary courts do not have the power to "set aside" the former, but rather the power-duty to make an interlocutory reference to the Constitutional Court concerning the violation of Articles 11 and 117(1) of the Constitution, as supplemented by the relevant originating provision of EU law where, as in this case, it is impossible to resolve the said contrast according to the ordinary interpretative instruments permitted under Italian law.

8.– The question of constitutionality must therefore be scrutinised in the light of the principles referred to above and the case law of the Court of Justice concerning the interpretation of the Framework Decision. In this regard in fact, it is significant that the judgments of the Court of Justice require the national court to follow the interpretation provided by it, both following references for a preliminary ruling as well as during infringement proceedings (judgments no. 168 of 1991, no. 389 of 1989 and no. 113 of 1985).

The Court of Justice considered the specific issue of the refusal to surrender falling under Article 4(6) of the Framework Decision in the *Wolzenburg* judgment, the

Advocate General's Opinion in which was examined in the referral order from the Court of Cassation, as well as the *Kozlowski* judgment, both referred to above. The first case stresses that the ground for refusal contained in Article 4(6) of the Framework Decision seeks, as does Article 5(3) thereof, to make it possible to grant particular importance to the possibility of expanding opportunities for the social rehabilitation of the person sought once he has served the sentence to which he was convicted (paragraphs 62 and 67); moreover, with this specific intention the Member State is entitled to limit the refusal to the "persons who have demonstrated a certain degree of integration in the society of that Member State" (paragraph 67). On the other hand, this is one of the main objectives (" facilitating the social rehabilitation of the sentenced person") of the system of judicial cooperation in criminal matters, based on the mutual recognition announced by the European Council of Tampere in 1999, and also restated in Article 3 of Framework Decision no. 909 of 2008, referred to above.

If this is the rationale of the provision from the Framework Decision as interpreted by the Court of Justice, it is easy to infer that the criterion for identifying the social, family, working and other context within which the re-socialisation of the sentenced person during and after detention proves to be easiest and most natural is not so much solely citizenship, but stable residence, the principal location of interests, family ties, children's education and any other aspect that it is capable of establishing the existence of that "real and not occasional rooting of the foreigner in Italy" which constitutes the factual prerequisite underpinning the referral orders. By using the exclusive criterion of citizenship, and excluding any check as to the existence of an actual and stable link with the executing Member State, the contested provision ultimately violates not only wording but also and above all the rationale of the provision of European Union law which it should have correctly implemented.

The Member States certainly had the right to decide whether or not to provide for a refusal to surrender (a "certain margin of discretion" as is stated in this regard in the *Wolzenburg* judgment of the Court of Justice), since the situation referred to under Article 4(6) at issue here is not one of the situations in which refusal is mandatory according to the Framework Decision. However, once the choice has been made to provide for a refusal, it was necessary to respect the prohibition on discrimination on the

grounds of nationality enshrined in Article 12 of the EC Treaty (Article 18 of the TFEU, starting from the entry into force of the reforming Treaty of Lisbon), which is moreover complied with in full by Article 4(6) of the Framework Decision, which expressly provides: "if the European arrest warrant 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" [italics added, sic.]. The prohibition on discrimination on the grounds of nationality does permit different treatment between the nationals of one Member State of the Union and those of another Member State. However, the difference in treatment must have a legitimate and reasonable justification, and be subject to a rigorous proportionality test as to the objective pursued. In particular, a requirement for residence for a continuous period of five years for non-nationals was held by the Court of Justice not to go beyond what is necessary to attain the objective of ensuring reintegration into the executing Member State (*Wolzenburg* judgment, paragraph 73). However, in contrast to the Dutch law transposing the Framework Decision on the EAW, which was at issue in the above case, the provision contested here does not restrict the equal treatment of nationals of another Member State of the Union with Italian nationals with regard, for example, to the duration of the residence *aut similia*, but precludes at root the possibility that the national of another Member State may benefit from the refusal to surrender, and accordingly the enforcement of the sentence in Italy. This amounts to subjective discrimination against the citizen of another Member State of the Union on the grounds that he is a foreign national which, absent a reasonable justification, is not proportional.

It should be specified in this regard that the concepts of residence and "staying" used by the Framework Decision, as well as for other purposes by the Italian implementing law, are Community concepts that must be interpreted in a self-standing and uniform manner, due to the requirement and goal of uniform application underlying the Framework Decision. Indeed, in the *Kozlowski* judgment referred to above, the Court of Justice did not refrain from providing its interpretation to the national court, and provided it with indications that are useful also on a more general level. In particular, it identified the concept of "residence" as actual residence in the executing

State, and the concept of "staying" as a stable presence of a certain duration in that State which makes it possible to acquire links with that State "which are of a similar degree to those resulting from residence" (paragraph 46). For example, and insofar as is of significance here, the ECJ stressed the requirement that the national court make an overall assessment of various objective factors characterising the situation of that person, including, in particular, the length, nature and conditions of his presence and the family and economic connections which that person has with the executing Member State (paragraphs 48 and 54). And it stressed the requirement that, if the foreign national is resident or stays in the executing State, the court also assess the existence of a legitimate interest of the sentenced person which would justify the sentence being enforced in that State (paragraph 44). Finally, the Court of Justice specified the circumstances which, whilst not being decisive in themselves, may be properly assessed for the purposes of the decision on surrender, such as for example an uninterrupted stay or the failure to comply with the legislation on entry into and residence in the executing State (paragraph 50).

9. – In the light of the above findings, Article 18(1)(r) of the Law implementing the Framework Decision on the EAW must be declared unconstitutional insofar as it does not provide for the refusal to surrender also the national of another Member State of the EU who lawfully and effectively resides or stays in Italy, for the purposes of the enforcement of a custodial sentence in Italy in accordance with national law.

It is therefore for the courts to ascertain whether the requirement of lawful and effective residence or staying is met, following an overall evaluation of the defining features of the individual's situation such as, *inter alia*, the length, nature and conditions of his presence in Italy as well as the family and economic ties that he has in our country, in accordance with the interpretation provided by the Court of Justice of the European Union. It shall then be for Parliament to assess whether it is appropriate to specify the conditions governing the applicability of a refusal to surrender to non-nationals for the purposes of the enforcement of the sentence in Italy, in accordance with the relevant originating provisions of EU law, as interpreted by the Court of Justice.

Since the provisions have been ruled unconstitutional with reference to Articles 11 and 117(1) of the Constitution, the questions raised with reference to Articles 3 and 27(3) of the Constitution are moot.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

declares that Article 18(1)(r) of Law no. 69 of 22 April 2005 (Provisions to bring internal 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) is unconstitutional insofar as it does not provide that nationals of another Member State of the European Union who are lawfully and effectively resident or staying in Italy should also not be surrendered, in order to enforce the custodial sentence in Italy in accordance with national law.

Decided in Rome at the seat of the Constitutional Court, , *Palazzo della Consulta*, on 21 June 2010.

Signed:

Francesco AMIRANTE, President

Giuseppe TESAURO, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 24 June 2010.

The Director of the Registry

Signed: DI PAOLA