DECISION NO. 217 YEAR 2021

The Bologna Court of Appeal was called upon to decide whether to execute a European arrest warrant (EAW) issued by a Romanian judicial authority against a third-country national so that he can serve a five-year prison term in Romania. The person involved has been residing in Italy for over ten years and is now settled here on a stable basis. Following this request, the Court of Appeal asked the Constitutional Court to declare the national legislation on the EAW unconstitutional, insofar as it does not envisage the refusal to surrender a third-country national legitimately and effectively resident in our country, in the light of Italy's commitment to execute the sentence in question.

The Constitutional Court notes that the European Framework Decision is phrased in such a way as to leave Member States free to refuse to surrender third-country nationals who have settled on their national territory. It also observes that the Italian legislation transposing the Framework Decision establishes that surrender may be denied only with regard to Italian citizens or those of another Member State who have been legally and effectively residing in Italy for at least five years, while it makes no such provision for third-country nationals.

Thus, the question arises as to whether the unconditional duty to surrender third-country nationals residing in Italy on a stable and legitimate basis breaches their right to private and family life protected by both Article 2 of the Constitution and Article 8 of the European Convention on Human Rights, as well as under Article 7 of the Charter of Fundamental Rights of the European Union.

The question has to be resolved, in principle, at EU level.

Therefore, the Court has decided to refer the question to the CJEU, asking whether legislation such as that of Italy, which automatically and absolutely precludes refusal to surrender third-country nationals living or legally resident within its borders, is compatible with the fundamental right to private and family life of the individual concerned. Should it be deemed incompatible, the Court asks the CJEU to specify the criteria and grounds for deeming the personal ties of a person living or resident in Italy to be of such significance as to deny surrender.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

ORDER

within proceedings concerning the constitutionality of Article 18-bis(1)(c) of Law No 69 of 22 April 2005 (Provisions to bring domestic law into line with Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant (EAW) and the surrender procedures between Member States), as introduced by Article 6, paragraph 5, letter *b*), of Law No. 117 of 4 October 2019 (Delegation to the Government for the transposition of European directives and the implementation of other acts of the European Union – European Delegation Act 2018), initiated by the Bologna Court of Appeal, First Criminal Division, in criminal proceedings against O. G., with the referral order of 27 October 2020, registered as Case No. 42 in the 2021 Register of Referral Orders and published in the *Official Journal of the Republic* No. 15, first special series, 2021.

Having regard to the intervention filed by the President of the Council of Ministers;

After hearing Judge Rapporteur Francesco Viganò in the Council Chamber of 20 October 2021;

After deliberation in chambers on 21 October 2021.

The facts of the case

1.– By judgment of 27 October 2020, the First Criminal Division of the Bologna Court of Appeal raised questions as to the constitutionality of Article 18-bis(1)(c) of Law No. 69 of 22 April 2005 (Provisions to bring domestic 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), as introduced by Article 6(5)(b) of Law No. 117 of 4 October 2019.

This provision is challenged "in so far as it does not provide the option of refusing to surrender nationals of non-EU Member States lawfully and effectively resident or staying in Italy, even when the Court of Appeal orders that the sentence or security measure imposed on them by the judicial authority of an EU Member State in Italy be served in accordance with its domestic law".

The referring court takes the view that this omission is contrary to Article 11 and paragraph 1 of Article 117 of the Constitution, in relation to Article 4(6) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, Article 7 of the Charter of Fundamental Rights of the European Union, 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 concern the execution of an EAW to enforce a sentence handed down on 13 February 2012 by the Judecătoria Brașov (Court of First Instance, Brașov, Romania) against the applicant O. G., a Moldovan national with permanent links to Italy through his family and employment. According to the information provided by the referring court, O. G. was sentenced in a final judgment in Romania to five years' imprisonment for the offences of tax evasion and misappropriation of sums due for the payment of income tax and VAT committed in his capacity as director of a limited liability company between September 2003 and April 2004.

In an initial judgment filed on 7 July 2020, the Court of Appeal ordered that O. G. be surrendered to the issuing judicial authority.

On 16 September 2020, on appeal by the person concerned, the Court of Cassation set aside this judgement, asking the Court of Appeal to consider the appropriateness of raising questions as to the constitutionality of Article 18-bis of Law No. 69 of 2005 on various grounds, also referring to its Order No. 10371 of 4 February 2020, in which it had already submitted several questions on the constitutionality of the same regulation to this Court.

In the order that gave rise to the present proceedings, the Bologna Court of Appeal ("the Court of Appeal"), noting that the defence of the person concerned "had adequately provided evidence of [his] stable family and employment situation in Italy", raised the questions of constitutionality referred to above.

[omitted]

Conclusions on points of law

1.– With the order indicated in the headnote, the First Criminal Division of the Bologna Court of Appeal raised issues of the constitutional legitimacy of Article 18-bis(1)(c) of Law No 69 of 2005, as transposed by Article 68(5)(b) of Law No 117 of 2019, insofar as it does not envisage the refusal to surrender a third-country national legitimately

and effectively resident in Italy for the purpose of executing a sentence issued against him or her, even if Italian authorities commit themselves to execute that sentence.

[omitted]

According to the referring court, the lack of provision of the possibility to refuse surrender in such a case is incompatible with:

– Articles 11 and 117(1) of the Constitution in relation to Article 4(6) of Framework Decision 2002/584/JHA. The latter provision has allegedly been incorrectly transposed by the Italian legislator, who has unduly restricted the possibility, provided for in general terms by that provision of the Framework Decision, of refusing to surrender a person staying or residing in Italy solely when he or she is an Italian citizen or a national of another Member State, thus excluding cases where the person in question is a third-country national;

– Article 27(3) of the Constitution, since the impossibility of serving a sentence in Italy allegedly undermines the re-educational purpose of sentencing convicted nationals of non-EU countries permanently resident in Italy;

– Articles 2 and, again, 117(1) of the Constitution (relating to Article 8 ECHR and Article 17(1) ICCP), as well as Article 11 of the Constitution (relating to Article 7 CFREU), since the impossibility of serving a sentence in Italy allegedly violates the right to family life of convicted third-country nationals permanently resident in Italy;

– Article 3 of the Constitution, given the unreasonable difference in treatment between that of a third-country national permanently resident in Italy who has been served an arrest warrant leading to a custodial sentence or detention order but who cannot benefit from the denial of surrender, serving a sentence handed down in the issuing State in Italy under Article 18-bis of Law No. 69 of 2005, and a national of a non-member State, also resident in Italy but served with an arrest warrant issued for the purposes of prosecution, who would instead have the right to serve the sentence imposed by the issuing State in Italy according to Article 19(1)(c) of the same law.

2.– Before examining these questions, it must first of all be mentioned that Article 18-bis of Law No. 69 of 2005 was amended after the referral order was issued by Article 15(1) of Legislative Decree No. 10 of February 2, 2021 (Provisions to bring nation law into line with the Council Framework Decision 2002/584/JHA on 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).

2.1.– In the version in force at the time of the referral order, the disputed provision allowed the Court 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 a national of another Member State of the European Union, who is lawfully and effectively staying in or a resident of Italy, provided that the Court of Appeal orders that the penalty or detention order be executed in Italy in accordance with its domestic law".

2.2.– In the wording resulting from by Legislative Decree No. 10 of 2021, currently in force, the newly formulated Article 18(2)(b) reads: "When a European Arrest Warrant was issued for the purpose of executing a custodial sentence or detention order, the Court of Appeal may refuse to surrender the requested person if he or she is an Italian citizen or a citizen of another Member State of the European Union who has been lawfully and effectively residing or staying in Italy for at least five years, provided that it orders that the sentence or detention order be executed in Italy in accordance with its domestic law".

2.3.– A comparison of the two texts of Article 18-*bis* shows that the Court of

Appeal, when ordering the execution of the sentence or security measure in Italy:

– could, and still can, refuse to surrender an Italian citizen;

– could, under the previous regime, refuse to surrender a *national of another Member State* simply because he or she had "legitimately and effectively" resided or stayed in Italy, whereas it can now deny surrender only if the requested person has "legitimately and effectively resided or stayed in Italy *for at least five years*";

– could not and still cannot refuse to hand over a *third-country national* residing or staying in Italy.

3.– It must also be pointed out that Article 17 of Legislative Decree No. 10 of 2021 also amended Article 19 of Law No. 69 of 2005, which the referring court invokes as the *tertium comparationis* relating to its claim that Article 3 of the Italian Constitution is contravened.

3.1.– In the text in force at the time of the referral order, Article 19 of Law No. 69 of 2005 stated that, "Execution by the Italian judicial authority of the European Arrest Warrant is subject, in the cases listed below, to the following conditions: [...] *c*) if the person requested under the European Arrest Warrant for prosecution is a national of, or resident in, Italy, surrender is subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve any custodial sentence or detention order pronounced against him or her in the issuing Member State".

3.2.– In the current text, amended by Legislative Decree No. 10 of 2021, Article 19 of Law No. 69 of 2005 states that, "In the cases listed below, execution of the European Arrest Warrant by the Italian judicial authority is subject to the following conditions: [...] *b*) if the European Arrest Warrant has been issued for the purpose of prosecuting an Italian national or a national of another Member State of the European Union who has been lawfully and effectively resident in Italy for at least five years, the warrant shall be executed on the condition that after trial, the person concerned be returned to Italy in order to serve any sentence or security measure involving deprivation of liberty handed down against him or her in the issuing Member State".

3.3.– Comparing the relevant parts of the two versions of Article 19 of Law No. 69 of 2005, it emerges that the Italian Court of Appeal

– under the law previously in force, had to subject the surrender of Italian nationals and all persons residing in Italy (with no distinction between nationals of other Member States and nationals of third countries, and regardless of the duration of residence), to the condition that the person be returned to Italy to serve his or her sentence in the event of conviction;

– must now make surrender conditional only with regard to Italian nationals and nationals of another Member State who has been "lawfully and effectively resident in Italy for at least five years".

[omitted]

6.– Reserving the decision on the preliminary objections raised by the *Avvocatura Generale dello Stato* and the question concerning Article 3 of the Constitution to the final ruling, the Court observes that the basis for the remaining objections of the referring court is the alleged violation of the right to private and family life that would arise from executing an EAW to enforce a sentence against a third-country national permanently residing in Italy. From this point of view, the same objections – formally concerning the previous version of Article 18-*bis*, applicable at the time of the main proceedings – could be brought against the current wording of Article 18-*bis*. This too provides no possibility of denying the surrender of a third-country national permanently resident in Italy.

6.1.– According to the referring court, the lack of any such provision goes against the constitutional and supranational norms (the latter relevant in the Italian constitutional system under Article 117(1) of the Italian Constitution and, as regards EU law, Article 11 of the Italian Constitution) enshrining the right to private and family life, as well as Article 2 of the Italian Constitution, which recognises the inviolable rights of the person, including the right in question (Judgment No. 202 of 2013), and Articles 7 CFREU, 8 ECHR, and 17(1) ICCPR.

6.2.– According to the referring court, Italian law also conflicts with Article 4(6) of Framework Decision 2002/584/JHA, implemented by Article 18-bis of Law 69/2005, making it incompatible with Articles 11 and 117(1), of the Italian Constitution.

In reality, the referral order insists, in fact, on an argument that is not in itself persuasive, namely the assumption that when the law of a Member State allows surrender to be refused under Article 4(6) of the Framework Decision, it is obliged to reproduce that provision in its entirety without altering its scope of application. According to the referring court, such Member State should therefore extend the possibility of refusal to anyone residing or staying within its borders, regardless of the nationality of the person concerned or the duration of residence in the executing State. This assumption is contradicted by the case law of the Court of Justice itself, which has already recognised the legitimacy of certain limitations on the corresponding ground for refusal in the legislation of the Member States, including – with regard to a national of another Member State – the condition that the requested person has lived legally and continuously in the executing State for at least five years (Court of Justice, Grand Chamber, Judgment of 6 October 2009 in Case C-123/08 *Wolzenburg*, paragraphs 54-74).

However, there is no doubt that Article 4(6) of the Framework Decision is to be interpreted in accordance with the fundamental principles and rights that must be observed if any act of European Union law is to be valid, as the Framework Decision itself reiterates in recital 12 and Article 1(3). Therefore, if the national law on execution of the EAW envisages the optional ground for surrender referred to in Article 4(6) of the Framework Decision in a manner inconsistent with these fundamental principles and rights – such as the right to private and family life – it will also be inconsistent with Article 4(6) of the Framework Decision itself, read in the light of its Article 1(3).

6.3.– Lastly, concern to protect the personal and family ties of a foreigner settled in Italy underpins the other objection, regarding the alleged infringement of the principle that one of the purposes of sentencing is rehabilitation, as enshrined in the Italian legal system by Article 27(3) of the Constitution. This allegation is based, in fact, on the consideration that serving a sentence abroad would not fully achieve the rehabilitation of a convicted person settled in Italy with strong social and family ties here.

7.– Essentially, the referring court is asking whether the need to protect the fundamental right of a third-country national to preserve personal and family ties established in Italy requires the Italian judicial authority to be granted the power, not provided for in the challenged legislation, to deny the execution of an arrest warrant relating to a custodial sentence or detention order, at the same time undertaking to execute it in Italy in accordance with Article 4(6) of the Framework Decision.

The Court considers that this question must be answered at the level of EU law. The Court of Justice has already clarified that the provisions of the Framework Decision on the arrest warrant that contain no express reference to the law of the Member States "must normally be given an autonomous and uniform interpretation throughout the Union" (Court of Justice, Grand Chamber, Judgment of 17 July 2008 in Case C-66/08 *Kozłowski*,

paragraph 42). The Court of Justice must be asked to pronounce on the uniform interpretation of the provision in the European Union legal area as the questions of constitutionality raised by the referring court principally concern the interpretation of Article 4(6) of the Framework Decision, on a point which – as will be explained in greater detail below – has not yet been clarified by the Court of Justice.

Moreover, as the questions raised by the referring court concern the relationship between refusal to surrender under Article 4(6) of the Framework Decision and the protection of the fundamental rights of the person concerned, there is also a second reason for seeking the intervention of the Court of Justice. Since the subject matter of the EAW has been fully harmonised by the Framework Decision itself, the level of protection that may place limits on the duty of mutual recognition of judicial decisions of other Member States is that resulting from the Charter of Fundamental Rights and Article 6 of the Treaty on European Union (TEU). In areas subject to full harmonisation, on the other hand, Member States may not make implementation conditional on compliance with purely national standards to protect fundamental rights, if doing so might undermine the primacy, unity, and effectiveness of EU law (Court of Justice of the European Union, Grand Chamber, Judgments of 26 February 2013 in Case C-617/10 *Fransson*, paragraph 29, and in Case C-399/11 *Melloni*, paragraph 60).

It is therefore necessary to ask the Court of Justice, in its capacity as the primary interpreter of European Union law (Article 19(1) TEU), whether Article 4(6) of Framework Decision 2002/584/JHA, interpreted in the light of Article 1(3) of the same Decision, and Article 7 CFREU, precludes legislation, such as that of Italy, which categorically and automatically leaves third-country nationals staying or residing on Italy outside the scope of the grounds for refusal of surrender governed by that provision, even when third-country nationals have stable and deep-rooted social and family ties with the executing State. If the answer is in the affirmative, it is furthermore necessary to ask what are the criteria and grounds for establishing that such ties are of such significance as to require the executing judicial authority to refuse surrender.

8.–. In a framework of constructive and sincere cooperation between the different systems of protection (Judgment No. 269 of 2017; Orders No. 182 of 2020 and No. 117 of 2019, as well as – also regarding the European Arrest Warrant – Order No. 216 of 2021), this Court makes the following observations.

8.1.– Article 4(6) of Framework Decision 2002/584/JHA establishes a ground for refusal expressly defined as ‘optional’, and it falls within the discretion of the Member States to transpose it either entirely or only partially into national law. The Court of Justice has pointed out that “a national legislature which, by virtue of the options afforded it by Article 4 of the Framework Decision, chooses to limit the situations in which its executing judicial authority may refuse to surrender a requested person merely reinforces the system of surrender introduced by that Framework Decision to the advantage of an area of freedom, security and justice. Indeed, by limiting the situations in which the executing judicial authority may refuse to execute an EAW, such legislation only facilitates the surrender of requested persons, in accordance with the principle of mutual recognition set out in Article 1(2) of Framework Decision 2002/584, which constitutes the essential rule introduced by that decision” (Wolzenburg, paragraphs 58 and 59). It follows, as already mentioned, that according to the Court of Justice it cannot be ruled out that “the Member States, when implementing that Framework Decision, [may limit], in a manner consistent with the essential rule stated in Article 1(2) thereof, the situations

in which it is possible to refuse to surrender a person who falls within the scope of Article 4(6) thereof" (Wolzenburg, paragraph 62).

However, it is undoubtedly the case that the execution of an EAW may never entail the infringement of the fundamental rights of the person concerned (Article 1(3) and recital 12 of the Framework Decision) or the fundamental principles of EU law protected by Article 6 TEU.

It is therefore necessary to establish whether, and if so under what circumstances, a third-country national resident or staying in the executing State has a fundamental right not to be surrendered to serve a sentence or a detention order in the issuing State.

8.2.– In the opinion of this Court, the question raises some new issues relating to the case law of the Court of Justice on the European Arrest Warrant.

8.2.1.– The *Kozłowski* judgment led to the formulation of an "autonomous and uniform" definition (paragraph 42), valid for the entire legal area of the Union, of the concepts of "residing" and "staying" in an executing State, determining that the former concept refers to a situation where a person has established his or her actual residence there and that the latter refers to the situation in which that person has "established his actual place of residence in the executing Member State or has acquired, following a stable period of presence in that State, certain connections with that State which are of a similar degree to those resulting from residence" (paragraph 46). Moreover, although the case at issue in the main proceedings concerned a national of a Member State other than the executing State, the definitions set out in *Kozłowski* are likely to apply to third-country nationals.

However, the perspective of the *Kozłowski* judgment was the opposite of what today's proceedings seek to address. In *Kozłowski*, the referring court asked whether Article 4(6) of the Framework Decision allowed the executing judicial authority to refuse to execute an arrest warrant issued in respect of a foreign national who had not yet established significant links in the executing State or was, in any case, residing there illegally, intent on committing offences in that country, or in custody there following conviction. In its answer, the Court of Justice ruled out that the term "staying" could be interpreted so broadly as to authorise the executing judicial authority to refuse surrender, derogating from the principle of mutual recognition of judicial decisions, "merely on the ground that the requested person is temporarily located on the territory of the executing Member State" (paragraph 36).

The current question concerns national legislation transposing Article 4(6) of the Framework Decision, which categorically and automatically excludes third-country nationals staying or residing in Italy from a possible application of the ground for denial contained in that provision. This prevents the executing judicial authority refusing to extradite them even if they have already established significant and stable links on the territory of the executing State.

8.2.2.– Neither was this issue addressed in the later *Wolzenburg* judgment, mentioned above, which focused solely on the position of nationals of other Member States, to whom the principle of non-discrimination on the grounds of nationality applies, based at the time on Article 12(1) of the Treaty establishing the European Community, now incorporated into Article 18 of the Treaty on the Functioning of the European Union (TFEU).

8.2.3.– The subsequent *Lopes da Silva Jorge* Judgment also focuses on the position of a national of another Member State residing or staying on the territory of the executing State. Article 4(6) of the Framework Decision does not allow the executing State to exclude him or her categorically and automatically from the scope of the national

provision transposing the relevant ground for refusal, regardless of his ties with the territory of that State (Court of Justice, Grand Chamber, Judgment of 5 September 2012 in Case C-42/11 *Lopes da Silva Jorge*).

8.2.4.– Based, in particular, on the findings in *Kozłowski* and *Wolzenburg*, and in the light of the principle of non-discrimination on grounds of nationality set out in Article 18 TFEU, in Judgment No. 227 of 2010 this Court declared unconstitutional the version of the Italian legislation transposing the Framework Decision on the European Arrest Warrant unconstitutional in so far as it did not permit refusal to surrender not only Italian citizens but also nationals of another Member State lawfully and effectively resident or staying in Italy for the purposes of serving a custodial sentence in this country.

The effect of the ruling was, therefore, to place the legal treatment of Italian citizens and that of nationals of another Member State lawfully and effectively residing in Italy on an equal footing. However, the question of whether and, if so, to what extent, refusal to surrender should also extend to a third-country national lawfully and effectively resident or staying in Italy remains unresolved, also in the case law of this Court, as the principle of non-discrimination based on nationality cannot be invoked (Court of Justice, Grand Chamber, Judgment of 2 April 2020, in Case C-897/19 PPU, *Ruska Federacija*, paragraph 40).

8.3.– It should also be noted that ever since the *Kozłowski* judgment, the Court of Justice has consistently emphasised that "the ground for optional non-execution […] has in particular the objective of enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires" (*Kozłowski*, paragraph 45; Wolzenburg, paragraph 62; and Lopes Da Silva Jorge, paragraph 32).

Recital 9 of the subsequent Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union states: "Enforcement of the sentence in the executing State should enhance the possibility of social rehabilitation of the sentenced person. In the context of satisfying itself that the enforcement of the sentence by the executing State will serve the purpose of facilitating the social rehabilitation of the sentenced person, the competent authority of the issuing State should take into account such elements as, for example, the person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State".

Framework Decision 2008/909/JHA not only applies to nationals of EU Member States but also to third-country nationals. Recital 7, in particular, also appears to refer to the latter, identifying the State in which the offender "lives and has been legally residing continuously for at least five years and will retain a permanent right of residence there" as the one where enforcement of the sentence is most likely to lead to his or her social rehabilitation.

The link between the rationale of Framework Decision 2008/909 and the grounds for refusal set out in Framework Decision 2002/584/JHA on the European Arrest Warrant, relying on the circumstance that the person concerned resides in the territory of the executing State, was recently stressed by the Court of Justice itself. It specified that, "Thus, the coordination provided for by the EU legislature between Framework Decision 2002/584 and Framework Decision 2008/909 must contribute to achieving the objective of facilitating the social rehabilitation of the person concerned. Moreover, such

rehabilitation is in the interest not only of the convicted person but also of the European Union in general (see, to that effect, judgments of 23 November 2010, Tsakouridis, C-145/09, EU: C:2010:708, paragraph 50, and of 17 April 2018, B and Vomero, C-316/16 and C-424/16, EU: C:2018:256, paragraph 75)" (Court of Justice, Judgment of 11 March 2020, in Case C-314/18, SF, paragraph 51).

Neither the refusal to surrender permitted by Article 4(6) of Framework Decision 2002/584/JHA nor the condition regarding surrender under Article 5(3) are contrary to the principle of mutual recognition of judicial decisions or to the rationale underlying the entire system of the EAW, which is to "to combat the impunity of a requested person who is present in a territory other than that in which he or she has allegedly committed an offence" (Court of Justice, Judgment of 17 December 2020 in Joined Cases C-354/20 PPU and C-412/20 PPU, L and P, paragraph 62, and other precedents cited there). In both cases, the executing State undertakes to recognise and enforce the sentence imposed by the issuing State, thus ensuring that it is both effective and beneficial for the rehabilitation of the convicted person in the interest of both the offender and the Union as a whole.

8.4.– The interest of third-country nationals residing or staying legally in a Member State not to be uprooted is protected in EU law, and this protection goes far beyond the enforcement of sentences or security measures. Indeed, the strength of this protection is directly proportional to the degree to which the person is rooted in the State of residence or stay.

The protection is at its strongest with regard to third-country nationals who hold resident permits under Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. They may be expelled only after the authorities of the Member State have examined the individual circumstances of the person concerned. In doing so, they are required to balance the danger the person poses to public order and public security against a number of other factors, including the degree to which he or she has links to the territory of that State (Article 12(4) of the Directive).

There are similar protections regarding expulsion decisions against third-country nationals holding residence permits under Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (according to Article 17 of the Directive, Member States are required to take "due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State" when adopting an expulsion measure).

8.5.– Similar indications can be found in European Court of Human Rights case law on Article 8 ECHR, which establishes the minimum level of protection that must be guaranteed in connection with the corresponding right according to Article 7 of the Charter under Article 52(3) CFREU.

Firstly, ECtHR case law – which increasingly sees the reintegration of offenders into society as one of the functions of sentencing (European Court of Human Rights, Grand Chamber, Judgment of 26 April 2016, *Murray v the Netherlands*, paragraph 102; Grand Chamber, Judgment of 30 June 2015, *Khoroshenko v Russia*, paragraph 121; Grand Chamber, 9 July 2013, *Vinter v the United Kingdom*, paragraph 115) – holds that imprisonment at a great distance from the offender's family home may result in a violation of Article 8 ECHR because of the consequent difficulty for the prisoner and his or her family members in maintaining regular and frequent contact, which is also important in terms of the social integration aims of the sentence (European Court of Human Rights, Judgment of 7 March 2017, *Polyakova and Others v Russia*, paragraph

88). In that judgment, the ECtHR also held that these principles are confirmed in the Recommendation of the Committee of Ministers to Member States on the European Prison Rules, adopted on 11 January 2006. According to Article 17(1) of the Recommendation, prisoners should be allocated, as far as possible, to prisons close to their homes or places of social rehabilitation.

Secondly, the settled case law of the ECtHR stresses the constant need, in decisions entailing the expulsion of an alien from the territory of a State, to strike a fair balance between the reasons for expulsion – including, in particular, the alien having committed criminal offences – and the right of the person concerned, under Article 8 ECHR, not to be expelled from the place where he or she has the most significant part of his social, work and family relationships, especially when he or she is married or has children in the State from which he is to be expelled, all the more so if he or she was born or brought up in that State albeit but has not acquired its nationality (see, for example, on the expulsion of foreigners, Third Chamber, 24 November 2020, *Unuane v United Kingdom*, paragraph 72; First Chamber, Judgment of 19 May 2016, *Kolonja v Greece*, paragraph 48; Grand Chamber, Judgment of 23 June 2008, *Maslov v Austria*, paragraphs 68-76; Grand Chamber, Judgment of 18 October 2006, *Üner v the Netherlands*, paragraph 57; Second Chamber, 2 August 2001, *Boultif v Switzerland*, paragraph 48).

9.– Therefore, this Court stays the proceedings and, pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU), asks the Court of Justice of the European Union:

a) whether Article 4(6) of Council [Framework Decision] 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, interpreted in the light of Article 1(3) of the Framework Decision and Article 7 CFREU, must be interpreted as precluding legislation, such as that of Italy, which – in the context of an EAW procedure for the execution of a sentence or a detention order – categorically and automatically prevents the executing judicial authorities from refusing to surrender third-country nationals staying or residing on its territory, regardless of the links they have with it;

b) in the event that the answer to the first question is in the affirmative, on the basis of what criteria and grounds must such links be regarded as so significant as to require the executing judicial authority to refuse surrender.

Lastly, since the present case, although arising from proceedings concerning a person not currently subject to a custodial measure, raises questions of interpretation relating to central aspects of the application of the EAW procedure, and because the interpretation requested may have general consequences both for the authorities called upon to cooperate on the European Arrest Warrant and the rights of requested persons, this Court asks the Court of Justice for a preliminary ruling under an expedited procedure pursuant to Article 105 of the Rules of Procedure of the Court of Justice.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

1) *Orders* that the following reference be made for a preliminary ruling to the Court of Justice of the European Union pursuant to and for the purposes of Article 267 of the Treaty on the Functioning of the European Union (TFEU):

a) Does Article 4(6) of Council [Framework Decision] 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, interpreted in the light of Article 1(3) of that decision and Article 7 of the Charter of Fundamental Rights of the European Union, preclude legislation, such as the Italian

legislation, that – in the context of an EAW procedure for the purpose of executing a custodial sentence or detention order – absolutely and automatically precludes the executing judicial authorities from refusing to surrender third-country nationals staying or residing in Italian territory, irrespective of the links those individuals have with that territory?;

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

2) *asks* that the question be decided under an expedited procedure;

3) *stays* the proceedings pending a decision on the aforementioned reference for a preliminary ruling;

4). *orders* that a copy of this order be transferred along with the case file to the Registry of the Court of Justice of the European Union.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 21 October 2021.

Signed:

Giancarlo CORAGGIO, President

Francesco VIGANÒ, Author of the Judgment