Corte costituzionale

JUDGMENT NO. 143 OF 2008

FRANCO BILE, PRESIDENT

GIOVANNI MARIA FLICK, AUTHOR OF THE JUDGMENT

JUDGMENT No. 143 YEAR 2008

In this case the Court considered the constitutionality of the national legislation implementing Council Framework Decision 2002/584/JHZ of 13 June 2002 on the European Arrest Warrant insofar as it did not provide that the pre-trial detention in a foreign country executing a European arrest warrant was to be taken into account also for the purposes of calculating the procedural effects of periods in pre-trial custody. The Court drew a distinction between the European arrest warrant regime and traditional extradition proceedings, stating that the former was based on direct relations between the relevant court authorities, rather than on the inter-governmental level. Therefore, "any imbalance between the guarantees regarding the duration of preventive custody related to the place – whether in Italy or abroad – in which the custody occurs is on a constitutional level all the more intolerable", and the Court accordingly declared the contested legislation unconstitutional.

THE CONSTITUTIONAL COURT

Composed of: President: Franco BILE; Judges: Giovanni Maria FLICK, Francesco AMIRANTE, 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,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 33 of law No. 69 of 22 April 2005 (Provisions to bring internal law into line with the Council Framework Decision 2002/584/JHZ of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States), commenced pursuant to the referral order of 27 November 2006 by the judge for the preliminary hearing of the *Tribunale di Bari* in the criminal proceedings pending against C.C.H.E., registered as No. 380 in the Register of

Orders 2007 and published in the *Official Journal of the Republic* No. 21, first special series 2007.

Having heard the Judge Rapporteur Giovanni Maria Flick in chambers on 2 April 2008.

The facts of the case

By the order mentioned in the headnote, the judge for the preliminary hearing of the *Tribunale di Bari* raised, with reference to Article 3 of the Constitution, the question of the constitutionality of Article 33 of law No. 69 of 22 April 2005, No. 69 (Provisions to bring internal law into line with the Council Framework Decision 2002/584/JHZ of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States), insofar as it provides that the pre-trial detention in a foreign country executing a European arrest warrant shall be taken into account also for the purposes of the calculation of the time limits provided for under Article 303 (1), (2) and (3) of the Code of Criminal Procedure.

The referring judge states that he was called upon to initiate summary criminal proceedings against a person born in Chile who – pursuant to a pre-trial detention order issued by the judge for preliminary inquiries at the same court – had been captured in Spain, executing a European arrest warrant, on 15 June 2005 and surrendered to Italy on 15 July 2005.

The referring judge also states that – by application filed on 30 August 2006 – the accused claimed that the maximum time limit for the pre-trial detention stage provided for under Article 303(1)(a)(3) of the Code of Criminal Procedure (time limit of one year, in relation to the offences charged) had expired, specifying as the relevant start date the day on which he was captured in Spain.

The referring judge notes however that this particular case is not regulated by Article 722 of the Code of Criminal Procedure. This provision stipulates the effects of pre-trial detention in a foreign country following a request for extradition presented by the state, providing – in the text in force pursuant to this court's judgment No. 253 of 2004 – that such custody shall be taken into account not only for the purposes of the overall duration, calculated pursuant to Article 303(4) of the Code of Criminal Procedure, but

also for the purposes of the calculation of the time limits set out in sub-sections 1, 2 and 3 of the same Article.

The case before the court is, on the other hand, argued to be regulated exclusively by Article 33 of law No. 69 of 2005, which provides that "the period of pre-trial detention in a foreign country executing a European arrest warrant shall be taken into account under the terms of and for the purposes of Articles 303(4) 304 and 657 of the Code of Criminal Procedure". This provision in fact makes more specific provision compared to the general rule contained in Article 722 of the Code of Criminal Procedure, which makes comprehensive provision governing the aggregation of pre-trial detention in a foreign country: this legislation partially overlaps with that contained in Article 722 of the the Code, as in force prior to judgment No. 253 of 2004, though it is in part broader than the latter insofar as it also refers to Article 657 of the Code of Criminal Procedure, governing the aggregation of pre-trial detention executing a European arrest warrant. This provision is therefore not subject to "exogenous supplementation" pursuant to Article 722 of the Code of Criminal Procedure.

Nor moreover can it be argued – within the ambit of an eventual "corrective" interpretation – that the contested legislation is the result of a mere "oversight" by Parliament of this court's decision, not long before the entry into force of law No. 69 of 2005, which contained the ruling, mentioned above, relating to Article 722 of the Code of Criminal Procedure. The national provision in fact appears to be related to Article 26(1) of Council Framework Decision 2005/584/GAI of 13 June 2002 – which the law in question was enacted in order to implement – insofar as it refers to the "all periods of detention arising from the execution of a European arrest warrant". In literal terms, this formula is principally recalls the national law institution of the maximum "overall" length of pre-trial detention pursuant to Article 303(4) of the Code of Criminal Procedure. Therefore, the court should not endorse the view that the framework decision authorises – in the broad terms indicated above – an expansive reading of the corresponding national legislation, thereby allowing the courts to take into account pre-trial detention in a foreign country also for the purposes of the time limits for the relevant stage of proceedings.

From this viewpoint however – according to the referring judge – the contested provision irredeemably breaches Article 3 of the Constitution.

In the first place, the provisions contained in Article 722 Code of Criminal Procedure – as in force pursuant to the effects of this court's judgment No. 253 of 2004 – could well operate as a *tertium comparationis*: this would make it possible to argue that Article 33 of law No. 69 of 2005 does not comply with the principle contained in Article 3 of the Constitution, insofar as it does not provide for the possibility of taking pre-trial detention in a foreign country into account also for the purposes of the establishment of the time limits for the relevant stage of proceedings, as Article 722 Code of Criminal Procedure already provides in relation to extradition from abroad.

Secondly, the arguments underlying the ruling that Article 722 of the Code of Procedure was unconstitutional – arguments related to the "equivalence between pre-trial detention abroad […] and pre-trial detention in Italy", which the referring judge adopts, reproducing in their entirety the reasons given in judgment No. 253 of 2004 – in any case also apply to the contested provision, since it cannot be concluded that "the Community origin" of the provision is sufficient to justify different treatment.

Finally, the question is certainly relevant in the proceedings before the referring judge, since – were the court also to take into account also the period of pre-trial detention passed in Spain – the accused, who is still in custody, would be released in view of the expiry, on 14 June 2006, of the maximum time limit for detention which applies to the stage of proceedings prior to that in progress (one year).

Conclusions on points of law

1. – The judge for the preliminary hearing of the *Tribunale di Bari* questions the constitutionality of Article 33 of law No. 69 of 22 April 2005 (Provisions to bring internal law into line with the Council Framework Decision 2002/584/JHZ of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States), insofar as it does not provide that the pre-trial detention in a foreign country executing a European arrest warrant shall be taken into account also for the purposes of the calculation of the time limits provided for under Article 303 (1), (2) and (3) of the Code of Criminal Procedure.

In the opinion of the referring judge, the contested provision violates Article 3 of the Constitution: both because it lays down rules which unjustifiably differ, *in parte qua*, from those contained in Article 722 of the Code of Criminal Procedure – in the text in force pursuant to this court's judgment No. 253 of 2004 – with regard to the aggregation of pre-trial detention abroad, pursuant to a request for extradition presented by the state; and also, and in any case, for the same reasons underlying this court's ruling that Article 722 was unconstitutional.

2. – The question is well founded.

2.1. – By judgment No. 253 of 2004, this court struck down as unconstitutional, due to violation of Article 3 of the Constitution, Article 722 Code of Criminal Procedure – as amended by Article 10 of decree-law no. 306 of 8 June 1992, concerted into law, with amendments, by law No. 356 of 7 August 1992 – insofar as it provided that any period of pre-trial detention passed abroad, pursuant to a request for extradition presented by the state, should be taken into account only for the purposes of the overall duration specified in Article 303(4) of the Code (without prejudice to the provisions contained in Article 304(4), which subsequently became sub-section 6), and not also for the purposes of the duration of the time limits for the relevant stage of proceedings provided for under Article 303(1), (2) and (3).

This court held that Article 722 of the Code of Criminal Procedure thereby created a clear disparity in treatment between accused persons detained abroad awaiting extradition and accused persons in pre-trial detention in Italy. It is not sufficient to aver as justification for this difference in treatment either the argument – adopted in relation to decree-law No. 306 of 1992 – "that the stages prior to the extradition procedure do not fall within the power of the Italian state", nor the view – contained in the case law of the Court of Cassation, and supporting the claim that the discrimination is reasonable – that, in the case at issue, the duration of the detention is not due to the inertia of the Italian courts, but is the result of a situation intentionally brought about by the person under investigation, who fled or otherwise moved abroad.

2.2. – The provision contested before this court − Article 33 of law No. 69 of 2005 (issued in order to bring internal law into line with Council Framework Decision 2002/584/JHZ of 13 June 2002 on the European Arrest Warrant and the surrender

procedures between Member States) – provides that periods of pre-trial detention abroad, executing a European arrest warrant, shall be taken into account only for the purposes of Articles 303(4), 304 and 657 of the Code of Criminal Procedure. Accordingly, in the same manner as for Article 722 Code of Criminal Procedure in the text examined by the Court, this precludes − in unequivocal terms which are not open to different interpretative solutions − the relevance of the said detention period for the purposes of establishing the maximum duration of the time limits for the relevant stage of proceedings.

The *ratio decidendi* of the aforementioned judgment No. 253 of 2004 applies *a fortiori* to the case before the court.

Whilst detention abroad and pre-trial detention in Italy have been held to be equivalent for the purposes of extradition, this must all the more so apply in relation to an instrument − such as the European arrest warrant − which 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. This means that any imbalance between the guarantees regarding the duration of preventive custody related to the place – whether in Italy or abroad – in which the custody occurs is on a constitutional level all the more intolerable. In fact, since in the case before the court the relevant offence for the purposes of the arrest and the resulting detention is the same, and since the surrender procedure does not operate on an inter-state level, but rather between judicial authorities, it follows that the duration of the pre-trial detention must also be governed in an identical manner, thereby drawing the "time-scale for the surrender" within the "time-scale for the trial".

In essence, the situation of the addressee of the restrictive measure, pursuant to a European arrest warrant, cannot – in relation to the guarantees relating to the maximum length of the deprivation of personal freedom – be less favourable either compared to that of persons under investigation and subject to a pre-trial measure in Italy, or – no less – to that of persons awaiting extradition, since no justification for a different and less favourable treatment of the individual in question has been provided.

The Court therefore finds that Article 33 of law No. 69 of 2005 is unconstitutional insofar as it does not provide that pre-trial detention in a foreign country, executing a European arrest warrant, shall be taken into account also for the purposes of the calculation of the time limits provided for under Article 303(1), (2) and (3) of the Code of Criminal Procedure.

on those grounds

THE CONSTITUTIONAL COURT

declares that Article 33 of law No. 69 of 22 April 2005 (Provisions to bring internal law into line with the Council Framework Decision 2002/584/JHZ 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 the pre-trial detention in a foreign country, executing a European arrest warrant, shall be taken into account also for the purposes of the calculation of the time limits provided for under Article 303(1), (2) and (3) of the Code of Criminal Procedure.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 7 May 2008.

Signed:

Franco BILE, President

Giovanni Maria FLICK, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 16 May 2008.

The Director of the Registry

Signed: DI PAOLA