

Italy, Supreme Court of Cassation, Criminal Section, VI section, 49548/2019, supreme instance, 3/12/2019, no. 49548

Member State

 Italy

Topic

Rule of law (fair trial)

Deciding Court Original Language

Corte Suprema di Cassazione, sezione penale, VI sezione

Deciding Court English translation

Supreme Court of Cassation

Registration N

49548/2019

Date Decision

31 October 2019

ECLI (if available)

ECLI:IT:CASS:2019:49548PEN

National Follow Up Of (when relevant)

Not a direct follow up

EU legal sources and CJEU jurisprudence

- Article 47 CFR
 - Framework decision 2002/584/JHA
 - Commission's reasoned proposal under Article 7(1) TEU of 20/12/2017
 - CJEU judgment in *LM* (C-216/18)
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ECtHR Jurisprudence

- Article 6 ECHR
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Subject Matter

Application before the Court of Cassation by a Polish citizen to quash the decision of the Court of Appeal of Milan to execute the EAW against him because of his risk of a breach of the right to a fair trial in case of surrender to Poland. The Court of Cassation found the plea unfounded as the Court of Appeal correctly applied the CJEU judgment in *LM*.

Legal issue(s)

Rule of law (fair trial)

Violation of the fundamental right to an independent and impartial judge granted by Article 47 of the Charter and Article 6 ECHR of a person subject to an EAW issued by Poland because of the rule of law deficiencies in that Member State.

Request for expedited/PPU procedures

No

Interim Relief

No

National Law Sources

- Articles 1, 2, 9, 13, 17, 21, 22 of Law no 69/2005
 - Articles 156, 293, 616 of the Code of Criminal Procedure (c.p.p)
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Facts of the case

The applicant, a Polish citizen, appealed before the Court of Cassation the decision of the Court of Appeal of Milan to execute the EAW against him and send him back to Poland. The EAW was issued for multiple crimes of fraud, forgery, theft, embezzlement and robbery committed in Poland in years 2003- 2005 and the surrender was made subject to the condition that the person surrendered, after being heard, would have been returned to Italy to serve sentence there.

The most interesting pleas are the third and the fourth ones, since the applicant claimed that the Court of Appeal failed to recognize that, if returned to Poland, he would risk a breach of his right to a fair trial due to the recent judicial reforms in that country. He claimed the infringement of Articles 3, 4 and 6, and 47 of the ECHR, as the Court of Appeal denied the risk to be subjected to an unfair trial, although the Polish judicial system was under the attention of the European Commission and the CJEU, especially in light of the *LM* judgment of 25 July 2018 and the Commission's reasoned proposal of 20/12/2017. Consequently, as a fourth plea the applicant claimed that the Court of Appeal failed to suspend the execution of the EAW in order to request additional information from the issuing judicial authority in order to assess the risk of violations of the right to a fair trial.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

The Court of Cassation found the appeal inadmissible.

The first plea was unfounded because, according to a settled case-law, the lack of a judge's signature on the application for a precautionary injunction is neither a cause of invalidity, nor it makes the EAW not executable.

As regards the third and fourth pleas, the Court of Cassation held that the Court of Appeal correctly applied the CJEU judgment in *LM*. Recalling the operative part of the *LM* judgment, it stated that judicial authority of the executing State cannot deny surrender under an EAW solely on the basis of generic allegations concerning generalised shortcomings in the judicial system of the issuing State. Rather, it must verify whether there are substantial grounds for believing that, if surrendered to that State, the person in respect of whom the EAW was issued will run a risk of breach of the fundamental right to a fair trial. In the present case, there were no concrete grounds for believing that the applicant would run such a risk if he was returned to Poland, in view of the common nature of the offences and the absence of any allegation of concrete circumstances which could justify the mere suspicion of the persecutory nature of the criminal investigation against the applicant. Moreover, there was no need to request additional information since the applicant did not present any reference to factual circumstances as a basis for proving the risk of being subjected to an unfair trial. Thus, the Court of Appeal correctly applied the principle set out in *LM*.

Relation of the case to the EU Charter

The Charter was only invoked by the applicant (Article 47) but not referred to by the Court in the judgment.

Relation between the EU Charter and ECHR

The ECHR was only invoked by the applicant (Article 6) but not referred to by the Court in the judgment.

Use of Judicial Interaction technique(s)

The national court applies the CJEU standard developed in *LM* as regards the execution of an EAW. The Court of Cassation correctly summarised the main points of the CJEU judgments in *LM* and stressed that it is not enough for the applicant to quote the *LM* judgment in order to trigger the scrutiny of national court of the existence of systemic deficiencies in the issuing Member State.

No preliminary reference nor disapplication of national law involved.

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

Not applicable

Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

The Court of Cassation summarised and supported the CJEU judgments in *LM* (see above).

The Supreme Court of Cassation supported and upheld the judgment of the appellate court (Court of Appeal of Milan).

No constitutional review involved

Strategic use of judicial interaction technique (purpose aimed by the national court)

The Court of Cassation limited itself to assess whether EU law, as interpreted by the CJEU, was correctly interpreted and applied by the Court of Appeal.

Impact on Legislation / Policy

No impact on national legislation

Notes on the national implementation of the preliminary ruling by the referring court

Not applicable

Connected national caselaw / templates

Supreme Court of Cassation, Criminal Section, VI section, 29/11/2018, no. 54220

(Link to) full text

<http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snpn&id=./20191205/s>

History of the case: (please note the chronological order of the summarised/referred national judgments.)

1. Judgment by the Court of Appeal of Milan of 31/10/2018 on the execution of the EAW
 2. Judgment of the Court of Cassation no. 49548 of 3/12/2019 declaring the applicant's appeal inadmissible
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