

Italy, Supreme Court of Cassation, Criminal Section, VI section, 15924/2020, supreme instance, 21/05/2020, no. 15924

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

15924/2020

Date Decision

21 May 2020

ECLI (if available)

ECLI:IT:CASS:2020:15924PEN

National Follow Up Of (when relevant)

Not a direct follow up

EU legal sources and CJEU jurisprudence

- Article 2 TEU
- Article 7 TEU
- Article 47 CFR
- Articles 1(3) and 26 Framework Decision 2002/584/JHA
- Commission's reasoned proposal under Article 7(1) TEU of 20/12/2017

CJEU cases:

- Judgment in *LM*, C-216/18
 - Judgment in *Commission v. Poland (Independence of the Supreme Court)*, C-619/18
 - Order in *Commission v. Poland (Disciplinary Chamber of the Supreme Court)*, C-791/19 R
-

ECtHR Jurisprudence

- Article 3 ECHR
 - Article 4 ECHR
 - Article 6 ECHR
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Subject Matter

Application before the Court of Cassation by a Polish citizen against the decision of the Court of Appeal of Venice to execute the EAW against him because of the risk of a breach of his right to a fair trial in case of surrender to Poland. The Court of Cassation declared the plea founded as it deemed necessary for the Court of Appeal to take into account the new judicial reforms adopted in Poland after the *LM* judgment.

Legal issue(s)

Rule of law (fair trial)

Violation of the fundamental right a fair trial granted by Article 47 of the Charter 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(3), 17(4), 18(h)(t)(q), 33 of Law no. 69/2005 (Law implementing the EAW Framework Decision)
 - Articles 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 Venice to execute an EAW against him and send him back to Poland. The EAW was issued by Poland for the purpose of prosecuting the applicant for conspiracy to commit tax offences and money laundering.

The applicant made four pleas. Firstly, he claimed the violation of Articles 17(4), 18(t) of Law no. 69/2005 because the Polish precautionary measure and the EAW lacked adequate motivation. Secondly, he claimed the violation of Article 33 of Law no. 69/2005 and Article 26 of the EAW Framework Decision because he had already served in full the period of pre-trial detention for which his surrender was requested. Thirdly, the applicant claimed the violation of Articles 3, 4 and 6 ECHR, Article 47 CFR and Article 26 of the EAW Framework Decision. According to the applicant, the Court of Appeal did not correctly applied the CJEU decision in *LM*, as it did not take into account the most recent judicial reforms in Poland, which, also on the basis of the documents of the Venice Commission, resulted in a risk for the applicant of a violation of being subject to a non-fair trial due to the lack of an impartial judge. This risk had already been presented before the Court of Appeal by pointing out that the Polish authorities had obtained information about the applicant through the interception of his lawyer. Finally, the generic and non-individualised information on detention conditions the applicant will be subject to in Poland presented violated Article 18(h) of Law no. 69/2005 and, in any case, represented a situation contrary to the standards set by the ECtHR as regards the minimum living space to be reserved to prisoners.

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

The Court of Cassation uphold the application and annulled the judgment of the Court of Appeal. While the second and fourth claim were rejected, the first and third ones were well founded.

As regards the lack of motivation, the Court of Appeal did not explain how the circumstantial elements set forth in the precautionary request of the Polish judicial authority were considered

seriously indicative of the crime contested. Thus, the shortcomings of the verification required by Article 17(4) of Law no. 69/2005 entails a further examination of this point by the Court of Appeal.

For what concerns the risk of breach of the right to a fair trial, after having summarised the key findings of the *LM* judgment, the Court of Cassation recalled that the 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. It also relied on its own judgment in case 49548/2019. In the present case, the Court of Appeal found that the applicant did not have attached specific elements proving the risk of being subject to unfair trial in Poland. However, the Court of Cassation stressed that, since the *LM* ruling, the situation in Poland with regard to respect for the rule of law has further deteriorated due to a series of judicial reforms, as confirmed by the various interventions of EU institutions to protect that principle. The national court expressly quotes the CJEU judgment in *Commission v. Poland* (C-619/18) and the order in C-791/19, as well as the two most recent rule of law infringement procedures launched by the Commission against Poland. It also expressed particular concerns over the judicial reform entered into force on 14 February 2020 and referred to the Commission's argument in launching the infringement procedure to stress the impairment of judicial independence. It then concluded that, in light of the above new elements arisen after the judgment of appeal and the action itself, the matter needed to be re-examined by Court of Appeal, which the Court of Cassation cannot replace in the appreciation of new elements. However, it stressed that it is first of all for the applicant to attach specific and concrete information highlighting the impact of the recent legislation adopted in Poland on his criminal proceedings. As regards the alleged use of conversations between the applicant and his client, the Court of Cassation found that the answer given by the Court of Appeal does not appear illogical, given that the elements used by the investigators had not been plausibly obtained from conversations between them, but rather from brief information issued by the plaintiff's partner and by his lawyer.

Finally, it is interesting to note that, for what concerns the last claim, the Court of Cassation concluded that it was not necessary to request individualised information on prison conditions in Poland, since it deemed sufficient the general information emerging from the report of the Council of Europe's Committee for the Prevention of Torture of 25 July 2018, which defined the material conditions of police custody as acceptable.

Relation of the case to the EU Charter

The Court of Cassation referred to Article 47 Charter in relation to the analysis of the standard developed in the *LM* judgment as a legally binding parameter which must be complied with when executing an EAW. However, it did not examine the content of that fundamental right, nor it assessed the violation thereof, but only relies on the application of the case law of the CJEU.

Relation between the EU Charter and ECHR

As regards the right to a fair trial, the Court of Cassation did not rely on the ECHR or the ECtHR case law. However, it relied on Article 3 ECHR in evaluating the detention conditions in Poland.

Use of Judicial Interaction technique(s)

The national court applied 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 applied the standards thereof.

The Court of Cassation expressly stated that it did not send a preliminary reference to the CJEU because it “does not consider it necessary, for the purposes of the decision on the arrest warrant in question”. It then recalled that, in line with the *LM* judgment, as long as the implementation of the EAW mechanism is not suspended under Article 7(2) TEU, the possibility of denial of surrender must be acknowledged only in exceptional circumstances where there are serious and substantiated grounds for believing that the person who is the subject to the EAW, if surrendered, would risk a violation of fundamental rights.

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 widely summarised and applied the CJEU judgment in *LM* and also relied on the CJEU decisions in cases C-619/18 and C-791/19 R (see above).

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

The Court of Cassation referred to the CJEU case law, the infringement actions of the Commission and the Polish legislation to stress that the rule of law situation in Poland has worsened since the *LM* judgment and, more recently, since the judgment of the Court of Appeal. The reliance on those elements was thus key in annulling the decision of the Court of Appeal and requesting a more careful analysis of the rule of law conditions in that country in order to correctly apply the double standard developed by the CJEU in *LM*.

Impact on Legislation / Policy

No impact on national legislation/policy

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

Not applicable

Impact on national case law from the same Member State or other Member States

Although the case is not a direct follow up of a CJEU judgment, it directly applies the *LM* doctrine. For the first time ever, the Court of Cassation annulled a judgment of a Court of Appeal asking a more careful exam of the rule of law conditions in Poland in relation to a possible breach of the right to a fair trial of the applicant. This judgment differs from its previous ones on the matter (no. 54220/2018 and no. 49548/2019), where the Court of Cassation considered that there were no factual circumstances proving the risk of being subjected to an unfair trial. Those previous judgments date back to 2018 and 2019. The approach of the Court of Cassation has however changed after the most recent infringement actions against Poland and also the Polish legislation entered into force on 14 February 2020, which are expressly referred to in this case as a serious source of concern.

Connected national caselaw / templates

See the template “Supreme Court of Cassation, Criminal Section, VI section, 3/12/2019, no. 49548” (directly quoted in the judgment)

See also the template “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=snpen&id=./20200526/s>

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

1. Judgment by the Court of Appeal of Venice of 05/02/2020 on the execution of the EAW
 2. Judgment of the Court of Cassation no. 15924 of 21/05/2020 annulling the judgment of the Court of Appeal
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