

Tribunal of Bolzano, Review Division, Order July 28th 2005.

N. 44/05 Review Register

Tribunal of Bolzano
Review Division

The Tribunal of Bolzano, sitting in chambers, composed by the following judges:

Dr. Edoardo Mori, President

Dr. Claudia Montagnoli, Judge

Dr. Eliana Marchesini, Judge

passed the following

ORDER

Seen the application made by T. A., under police investigation in Austria for possession of drugs, decided as follows.

On July 14th 2005 T. A., residing in Province of Bolzano, university student without previous convictions, was arrested by the Carabinieri in execution of an European Arrest Warrant put into the Schengen Information System by the Innsbruck Court, which is proceeding against him for having carried 10 kg haschisch from Austria to Italy at the beginning of 2003.

The Deputy President of the Court of Appeal, deciding alone, confirmed the arrest and remanded him in custody.

The person under investigation applies now before this Tribunal asking the repeal of the custody on several grounds.

In order to decide this case it is necessary to understand perfectly the system created by the Statute April 22nd 2005 n. 69 which enacted the related Framework Decision of the European Council.

It is a difficult and tortuous Statute which tried, without success, to reconcile (with our system) the rules of countries in which the rights of the accused are sometimes lower of the ones of the Italian citizen of fifty years ago (lack of quick procedures of review of the arrest, lack of court appointed defender and of legal aid, few instances of judgment, inquisitorial processes, etc.) and where the punishment is imposed with degree of strictness unknown in our system and inconsistent with our constitutional principles (which guarantee does exist that serving a sentence abroad would help the rehabilitation of the convict? Shouldn't have been obvious to provide that each convicted serves the sentence in his own country, among his people speaking his language, in order to be

reintegrated into the society of that country when he gets out of the prison?).

And it could not succeed, as already acknowledged by the German Constitutional Court, because, attending to our Constitutional Court, the constitutional guarantees cannot be infringed or set aside by the European rules.

Instead of stating the indisputable principle that the treatment of crime must be as uniform as possible in all the European countries, we accepted that a State can decide, for instance, to punish harsher the trafficking of marijuana than that of heroin and therefore an Italian citizen can be sent to that State to serve 4 years in prison for having sold a joint there, while in Italy he would have suffered only a nominal punishment.

There is therefore no section of the Statute which is not affected by a suspect of severe unconstitutionality both due to the violation of primary rights of the Italian citizen and due to the vagueness of many rules, which did not consider that the same expressions can have a very different meaning in another legal system; a rule affecting the personal freedom of the citizen should possess quite a different legal precision (some examples: there is no definition of weapon, drug, cultural heritage, dangerous waste, even though such notions vary from legal system to legal system; there is no distinction between public prosecutable offences and offences which are prosecutable only privately, therefore one can be indicted for a fraud committed abroad that in Italy would not be prosecutable because the victim did not file a charge).

It seems then thoroughly illogical to put on the same level the extradition of the foreigner and the extradition of the Italian citizen: it is evident that the case of the Austrian citizen who must be surrendered to Austria (and therefore comes back to his home country, with his language, with his lawyers, with known procedures) it is completely different from the case of the Italian citizen who must be sent to a foreign country with the following curtailed defence capability.

Illogical alike is to have based the whole regulation on the oversimplified argument that “if someone goes abroad to commit a crime it is his own business” because one can be indicted abroad as simply participant in a crime, without having been abroad at all, maybe due to an unclear confession.

Nevertheless it is not necessary to raise issues of unconstitutionality, asked for by the defence, because they are not relevant for the decision.

The standard procedure provided for by this Statute which leads to the surrender of an Italian citizen to a foreign State to be judged or to serve a sentence is the following:

- The Foreign State issues the EAW using a standard form; the warrant must be signed by the relevant judicial authority and must be grounded (art. 6). If the warrant does not contain all the needed informations the Italian judicial authority must request them urgently from the requesting authority (art. 6.2. and art. 16). To the EAW must be attached a description of the facts committed, including their time and place and legal definition, and a reference to the evidence thereabouts (art. 5.3. and 5.4.). If the foreign authority does not provide the additional informations required the EAW is dismissed.

- The EAW is forwarded to the President of the relevant Court of Appeal who, in case, takes care of obtaining the necessary additional informations. The Court of Appeal can then issue a custody order if there is a risk of flee of the person to be surrendered (art. 9.4.). Therefore a custody order is not necessarily issued and as a consequence the EAW is really only a surrender request. In that case why should someone be automatically arrested when he would have the right to wait quietly at home for the surrender decision?

- The provisions of the code of criminal procedure must be observed, if applicable, except for art 273.1. and 273.1bis. c.p.p. (that is to say, the existence of a severe circumstantial evidence is left out of consideration, and such an evaluation is left to the foreign judge before even having heard the defences of the accused!), and except for art. 274.1. lett. A and C c.p.p. (that is to say, the Italian judge cannot evaluate the existence of a risk of tampering with evidence and of a risk of reiteration of crime and the custody is ordered only to insure the execution of a hypothetical future punishment; that is to say, a suspect, who is presumed innocent attending to the Constitution, is arrested only because he does not live in the proceeding country!), and except for art. 280 c.p.p. (which provides minimal amount of prospective punishment under which a custody order is not issuable in Italy, but it is well issuable an EAW!).

It seems logical to infer that art. 274 lett. B c.p.p. should be applied as a whole and therefore a custody order cannot be issued in case the prospective punishment will not exceed two years (but there are already different views thereabouts!).

- In case a pre-trial custody is not ordered, rules on extradition will be applied (art. 9.7. l. 69(05 and art. 719 c.p.p.).

- The decision on the surrender is taken by the Court of Appeal in a chamber proceeding (art. 10.4.; it is expressed in an equivocal way, but the jurisdiction of the whole Court and not of the sole President is implied in systematical reasons as made clear by art. 9.4.)

The procedure can also be fast tracked through the direct arrest made by the Italian police:

- The foreign authority inserts the warrant in the Schengen information system (SIS);
- the police arrests the person to be surrendered and, within 24 hours, places him at the disposal of the President of the Court of Appeal of the place of arrest;
- The police informs the Ministry of Justice, who urgently asks the requesting State to send the warrant and the relevant documents provided for in art. 6.
- within 48 hours the President of the Court interrogates the person to be surrendered with a procedure similar to the one provided for in case of arrest flagrante delicto.
- if there is no reason to set free the arrested person, the President (art. 13) confirms the

arrest with an order attending to articles 9 and 10. The rule shall be interpreted in the sense that the order must be taken by the whole court because of the literal meaning of art. 9 and because it is logical that it cannot be granted a lesser guarantee when someone is arrested by the police.

- the confirmation loses effect if the european arrest warrant is not delivered within ten days (art. 3; it would be logical to infer that the warrant shall come complete of all the attachments provided for by the Statute needed to evaluate the request in all its aspects).

- the Court of Appeal can ask for further informations in relation to the ones contained in the warrant and its attachments (art. 16; this rule corroborate the interpretation that the decision shall be taken by the whole court, not by the sole president).

- surrender can be refused in several cases provided for in art. 18; for example if there is some exempting cause or if the same fact is prosecuted in Italy. It is clear that under such circumstances a custody order cannot be issued.

Summarized in this way the guidelines of the proceedings, we can turn to consider the case to be decided today by this Review Tribunal.

It is to be stressed soon that the Statute 22 April 2005 n. 69 provided for an autonomous procedure to apply against “the decisions on the surrender of the requested person” (art. 22), that is to say the appeal to the Supreme Court which decides, even on the merits, in 15 days.

The wording used by the legislator puzzles because it is difficult to understand whether he wanted to give the Supreme Court even the jurisdiction on the review of the custodial order or simply the evaluation of the final decision on the surrender.

From the parliamentary debates seems that the legislator wanted to grant the Supreme Court every kind of decision, but the fact is that the wording of the statute is clear in limiting the jurisdiction of the Supreme Court to the decision on the surrender. Moreover the rule must be interpreted in a way consistent with the Constitution, in order to avoid unfair treatments, unfairness which would be evident in case of an exclusion of the jurisdiction of the Review Tribunal because the time limit for the decision of the Supreme Court is longer (15 days) than the time limit for the decision of the Review Tribunal (10 days) without any logical reason. Furthermore a different interpretation would deprive the suspect of a judicial instance with an unfair treatment for sure not admissible; on the contrary, in such cases in which the State gives up to protect its own citizen there should be more judicial guarantees, not less.

The Jurisprudence criticized the legislator for having confused the execution of the warrant with the surrender, but this means to blame the legislator for a further fault that he does not deserve because he respected at least a certain criterion. At least, for instance, he put art. 22 after the articles 18-20 dealing with the surrender and not with the arrest and the related pre-trial detention.

It is as well worth to remember the clear recall made by art. 9 to the rules contained in

Title I, Book IV of the Criminal Procedure Code, to be applied in each case as far as they do not clash with the Statute on the EAW; and it is really difficult to see why the rules on the Review Tribunal could not be applied. If they would not be applied, no other rule could be, except for merely formal rules concerning matters of detail.

There is therefore jurisdiction of the Review Tribunal about the evaluation of the legitimacy of the applied pre-trial detention; and indeed:

- 1) The pre-trial detention was confirmed by a single judge and not by the whole Court.
- 2) There is no stated ground on the risk of flee of the suspect, but only a style clause, with no concrete circumstance, meaning that everyone can escape as though the confirmation would be a due automatism.

It is worth to clarify that the risk of flee of the Italian citizen must be evaluated and grounded not in relation to the requesting State, in which the foreigner has no duty to come back, but to the homeland in which the requested person actually is. And thereabouts must be taken into account that the requested person would hardly go abroad knowing that there is a pending EAW consenting to catch him in every European State. Among others in our system the pre-trial detention for a risk of flee was provided for in order to avoid the dangerous situations in which dangerous criminals remain fugitive and not at all to facilitate the execution of the punishment. In the EAW indeed, since there is no consideration of the risk of tampering with evidence and with the risk of reiteration of crime, the arrest based on the risk of flee have the only function to put the suspect in the hands of a justice with less guarantees of the Italian one, which hopes therefore to obtain easy confessions or which does not even conceive a judgment without a suspect in chain before a judge to expiate a punishment before the sentence. It is therefore clear that the grounding of the risk of flee must be particularly detailed and cannot be an empty formality.

- 3) There is no motivation about the need to apply the most severe measure of the detention in jail.
- 4) There was even no request of the due attachments to the EAW, but the court merely examined the form contained in the SIS system, there was therefore no check whatsoever on the existence of the conditions provided for in the statute.
- 5) Since the import of hashisch happened from Austria to Italy the suspect committed in Italy the crime of import of drugs and it was therefore necessary to get informations about the possible pending prosecution of the suspect in Italy, case in which the EAW would be not executable (it seems even that the Italian accomplice was already judged).

In addition, for thoroughness, if even the jurisdiction on the pre-trial detention before the extradition would be of the Supreme Court, in this case the detention would have been grounded on a title issued by a judge without jurisdiction (single judge instead of whole court) and therefore to be considered *tamquam non esset*. Therefore the application concerns not the order itself, but the situation of fact concerning a detainee

without legal title, the evaluation of which cannot be denied to the Review Tribunal on the ground of a systematic general principle.

ON THOSE GROUNDS

repeals the pre-trial custody.

Orders to send the acts to the public prosecutor by this Tribunal in order to evaluate the prosecution of the crime of import of drugs in Italy allegedly committed by T.A.

Bolzano, 29 July 2005.

The President
Edoardo Mori