

European Communities

EUROPEAN PARLIAMENT

Working Documents

1984-1985

28 November 1984

423.02

DOCUMENT 2-1105/84

R E P O R T

drawn up on behalf of the Committee on
Legal Affairs and Citizens' Rights

on the request for the waiver of Mr Enzo TORTORA's
parliamentary immunity

Rapporteur: Mr Georges DONNEZ

PE 93.291/fin.

Or. Fr

By letter of 13 September 1984, the President of the European Parliament referred to the Committee on Legal Affairs and Citizens' Rights, pursuant to Rule 5(2) of the Rules of Procedure, a request for the waiver of Mr Enzo Tortora's parliamentary immunity.

On 18 September 1984, the Committee on Legal Affairs and Citizens' Rights appointed Mr Donnez rapporteur.

At its meeting of 15 and 16 October 1984, the Committee on Legal Affairs and Citizens' Rights heard Mr Tortora pursuant to Rule 5(2) of the Rules of Procedure; at the same meeting, the Committee on Legal Affairs and Citizens' Rights had an exchange of views on the reasons for and against the waiver of immunity.

At its meeting of 21 and 22 November 1984, the Committee on Legal Affairs and Citizens' Rights considered the draft report and adopted the proposal for a decision by 20 votes with one abstention.

Present: Mrs Vayssade, chairman; Mr Evrigenis, vice-chairman; Mr Donnez, vice-chairman and rapporteur; Mr Gazis, vice-chairman; Mr Barzanti, Mr Chambeiron, Mr CiccioMessere (deputizing for Mr Tortora), Mrs Fontaine, Mr Hoon, Mr Huckfield (deputizing for Mr Vetter), Mr Mavros, Mr Musso (deputizing for Mr de La Malène), Mr Normanton (deputizing for Lord O'Hagan), Mr Petronio, Mr Pordea, Mr Price, Mr Prout, Mr Schön (deputizing for Mr Malangré), Mr Schwalba-Hoth, Mr Selva, Mr von Stauffenberg and Mr Zagari.

The report was tabled on 26 November 1984.

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ANNEX Article 68 of the Constitution of the Italian Republic

The Committee on Legal Affairs and Citizens' Rights hereby submits to the European Parliament the following proposal for a decision, together with explanatory statement:

PROPOSAL FOR A DECISION

on a request for the waiver of Mr Enzo Tortora's parliamentary immunity

The European Parliament,

- having received a request forwarded by the Minister of Justice of the Italian Republic dated 11 August 1984 for the waiver of Mr Tortora's immunity from criminal proceedings, excluding any waiver of immunity from arrest,
 - having regard to Article 10 of the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 and to Article 4(2) of the Act of 20 September 1976 concerning the election of representatives of the Assembly by direct universal suffrage,
 - having regard to the judgment of the Court of Justice of the European Communities of 12 May 1964 (1),
 - having regard to Article 68 of the Italian Constitution,
 - having regard to Rule 5 of the Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs and Citizens' Rights (Doc. 2-1105/84),
1. Authorises the Naples Public Prosecutor to bring criminal proceedings against Mr Tortora on the charges set out in the request for the waiver of immunity to the exclusion of any waiver of immunity from arrest or loss of personal liberty;

(1) CJEC, 12 May 1964 (Wagner v Fohrmann and Krier, Case 101/63, [1964] ECR 195.

2. Instructs its President immediately to forward this decision and the report of its committee to the appropriate authority of the Italian Republic.

EXPLANATORY STATEMENTI. THE FACTS

1. The request for the waiver of Mr Enzo Tortora's parliamentary immunity sent to the European Parliament by the Naples Public Prosecutor refers to the order for committal for trial made by the Naples examining magistrate. The request indicates that, following statements made during the preliminary inquiry from persons who, with one exception, had severed their ties with the Nuova Camorra Organizzata (1), Mr Tortora is charged with the following offences:

'A. the offence laid down in Article 416(a) (I), (III), (IV), (VIII) and Article 112 No. 1 of the Penal Code on the grounds that, in Naples, the province and on a considerable part of the national territory up until May 1983 and persistently, together and in complicity with other persons who have not been identified, are in the course of being identified or have already been ordered to be committed for trial for the same offence, he belonged to a Camorrist organization called the Nuova Camorra Organizzata (N.C.O.) consisting of persons at liberty or in prison in continuous contact with one another. This organization is based on a rigidly hierarchical structure, fixed practices with regard to the recruitment of members, precise allocation of tasks and strict adherence to rules drawn from the dictates of the traditional Camorra and provides for forms of mutual assistance for individual members and their families. It takes advantage of the effect of intimidation created by the ties of membership, the subjugation of its victims and the conspiracy of silence amongst its members. It provides individual members with arms and explosives. Its specific objects are to commit offences against persons and property, gun-running and drug-trafficking throughout a large part of the national territory, and to obtain control of business undertakings, in particular licences, permits and contracts, and of the public services, financed by the proceeds of its unlawful activities.

(1) known as the "N.C.O"

B. the offence laid down in Articles 71 and 74 No. 2 of Law No. 685 of 22 December 1975 - paragraph 81 of the Penal Code on the grounds that, in Naples in 1980 and subsequently, pursuing the same criminal intent by several acts, he acquired, or at any rate received and thus was in illegal possession of, narcotics (cocaine) which he sold to third persons in Milan from 1976 to 1978 and therefore as a member of the criminal organization called the 'N.C.O.'

2. The Naples Public Prosecutor requests, pursuant to Article 10 of the Protocol on the Privileges and Immunities of the European Communities, that the European Parliament should exercise its right to waive Mr Tortora's parliamentary immunity.

II. PARLIAMENTARY IMMUNITY OF MEMBERS OF THE EUROPEAN PARLIAMENT: TEXTS AND PRINCIPLES

3. Article 10 of the Protocol on the Privileges and Immunities of the European Communities(1) annexed to the Treaty establishing a single Council and a single Commission of the European Communities(2), which restates the provisions of Article 9 of each of the protocols annexed to the Treaties establishing the ECSC, the EEC and the EAEC, states:

'During the sessions of the Assembly, its Members shall enjoy:

(a) in the territory of their own State, the immunities accorded to members of their parliament;

(1)Article 9 of that protocol should also be noted. It states: 'Members of the Assembly shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties'.

(2)To which reference is made in Article 4(2) of the Act of 20 September 1976 concerning the election of the representatives of the Assembly by direct universal suffrage.

(b) in the territory of any other Member State, immunity from any measure of detention and from legal proceedings.

Immunity shall likewise apply to members while they are travelling to and from the place of meeting of the Assembly.

Immunity cannot be claimed when a member is found in the act of committing an offence and shall not prevent the Assembly from exercising its right to waive the immunity of one of its members.'

4. Since the charges made against Mr Tortora, an MEP of Italian nationality, are alleged to have been committed on Italian territory, he enjoys the immunities accorded to Members of the Italian Parliament under Article 68 of the Italian Constitution(1).

5. The procedure within the European Parliament is governed by Rule 5 of the Rules of Procedure(2).

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(1) Article 68 of the Italian Constitution is annexed.

(2) Rule 5 reads as follows:

'1. Any request addressed to the President by the appropriate authority of a Member State that the immunity of a Member be waived shall be communicated to Parliament in plenary sitting and referred to the appropriate committee.

2. The committee shall consider such a request without delay but shall not go into the merits of the case. It shall hear the Member concerned at his request. If he is in custody, he may have himself represented by another Member.

3. Should a Member be arrested or prosecuted after having been found in the act of committing an offence, any other Member may request that the proceedings be suspended or that he be released.

4. The report of the committee shall be placed at the head of the agenda of the first sitting following the day on which it was tabled.

Discussion shall be confined to the reasons for or against the waiver of immunity.

5. The President shall immediately communicate Parliament's decision to the appropriate authority of the Member State concerned.'

6. During its first electoral period, the European Parliament decided on eight requests for the waiver of the parliamentary immunity of its members; the proceedings in Parliament - in accordance with the proposals submitted by the Legal Affairs Committee - established a number of general principles on which there was widespread agreement during the first discussions within the Committee on Legal Affairs and Citizens' Rights set up in the second electoral period.

7. It seems useful to describe in this report, which is the first submitted to the European Parliament during the second electoral period, certain of those principles (in particular those which are applicable to Mr Tortora's case), whilst stressing the need to ensure that decisions taken on the waiver of parliamentary immunity of members have a firm legal basis and are not affected by various considerations relating in particular to the political party to which the member in question belongs or even his nationality.

A. Purpose of parliamentary immunity

Parliamentary immunity is not a member's personal privilege but a guarantee of the independence of Parliament and its members in relation to other authorities.

B. Legal ineffectiveness of a renunciation of immunity

Having been consulted by the President of Parliament on certain matters of principle relating to the waiver of parliamentary immunity, the Legal Affairs Committee, at its meeting of 27 March 1980, concluded that the renunciation by a member of his parliamentary immunity had no legal effect and notified its finding to the President of Parliament (1). At its meeting of 17 April 1980, the enlarged Bureau adopted the opinion of the Legal Affairs Committee, which has since followed that principle in its decisions.

Parliament's decision in the case now under consideration should not therefore be affected by the desire expressed on many occasions by Mr Tortora to have his parliamentary immunity waived so as to be able to appear before the court having jurisdiction.

(1) See Minutes (PE 64.548, p. 6) and Notice to Members No. 6/80 (PE 64.630)

C. Temporal limit on immunity

The Court of Justice has been called upon to interpret the words "during the sessions of the Assembly" contained in Article 10 of the Protocol on the Privileges and Immunities of the European Communities (judgment of 12 May 1984 in Case 101/63, Wagner v Fohrmann and Krier, (1964) ECR 195).

This judgment states that the European Parliament holds an annual session during which (and also during the periods of adjournment of the session) its Members enjoy the immunity provided for in the above Protocol (1).

It follows, moreover, from the very purpose of parliamentary immunity that it operates throughout the whole of a Member's term of office and is effective as against the commencement of proceedings, preparatory enquiries, measures for the execution of pre-existing judgments, appeals or applications for judgments to be set aside; in this case there can be no question of Mr Tortora's immunity being challenged on the grounds that the facts in question occurred before he became a Member of Parliament.

Immunity ceases at the end of the Member's term of office.

D. Independent nature of European Parliamentary immunity compared with national parliamentary immunity

The fact that subparagraph (a) of the first paragraph of Article 10 of the Protocol refers to the immunities accorded to members of national parliaments has not prevented the European Parliament from creating its own rules, as it were, a body of case law; these rules, which stem from decisions taken on requests for the waiver of parliamentary immunity, tend to forge a coherent concept of European parliamentary immunity which would in principle be independent of the divergent customs of the national parliaments: otherwise, the differences between members of the same parliament because of their nationality would be accentuated.

(1) This judgment is not affected by Article 10(3) of the Act of 20 September 1976, which, without prejudice to Article 22 of the ECSC Treaty, Article 139 of the EEC Treaty and Article 109 of the EAEC Treaty, fixes the date when the Assembly meets without requiring to be convened following a general election.

8. The application of these principles has given rise to a constant factor in Parliament's decisions which has become a fundamental criterion for the consideration of the action to be taken on each request for the waiver of immunity: in all cases in which the acts of which a European Parliamentarian is accused form part of his political activities, immunity is not waived. Other considerations have been added to this criterion, relating in particular to:

- the fumus persecutionis, in other words the presumption that the criminal proceedings are based on an intention to prejudice the Member's political activities (anonymous information at the basis of the preliminary investigation, belatedness of the request in relation to the acts of which the Member is accused);
- the particularly odious nature of the acts of which the Member is accused.

III. JUSTIFICATION FOR THE PROPOSAL FOR A DECISION

9. The charges brought against Mr Tortora relate to alleged facts which are not of a political nature; the request which has been made to Parliament is certainly not intended to prejudice Mr Tortora's political activities since the criminal proceedings were instituted before he began any political activity.

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10. As for the subject matter of the request for waiver of immunity, the Committee on Legal Affairs and Citizens' Rights has examined Article 68 of the Italian constitution, the provisions of which are applicable pursuant to the reference made in subparagraph (a) of the first paragraph of Article 10 of the Protocol on the Privileges and Immunities of the European Communities.

This provision makes a distinction between authorization to subject a Member to criminal proceedings, on the one hand, and authorization to arrest or deprive him of his personal liberty, on the other.

In addition, the practice of the Italian Chamber of Deputies clearly establishes the difference between these two authorizations which are clearly differentiated in the requests for the waiver of immunity of members of the Italian parliament.

11. The Committee on Legal Affairs and Citizens' Rights has noted that the Naples Public Prosecutor is only requesting the waiver of Mr Tortora's parliamentary immunity from criminal proceedings; the latter was, at the date on which he was elected to the European Parliament, deprived of his personal liberty.

IV. CONCLUSION

12. In these circumstances, having considered the reasons for and against waiving immunity, in accordance with the second subparagraph of Rule 5(4) of the Rules of Procedure, the Committee on Legal Affairs and Citizens' Rights recommends that Parliament should waive Mr Tortora's parliamentary immunity, restricting that waiver to cover solely criminal proceedings brought against him not involving any restriction on his personal liberty.

Article 68 of the Constitution of the Italian Republic

Proceedings may not be brought against Members of Parliament for opinions expressed or votes cast in the performance of their duties.

No Member of Parliament may, without the authorization of the Chamber to which he belongs, be subjected to criminal proceedings; nor may he be arrested or otherwise deprived of his personal liberty, or served with a search warrant in person or in his home unless he is caught in the act of committing an offence for which an order of arrest is compulsory.

A similar authorization is required to arrest or detain a Member of Parliament in the enforcement of a judgment even if it is final.