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Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

10 August 2017 (*)

(Reference for a preliminary ruling — Urgent preliminary ruling procedure — Police and judicial cooperation in criminal matters — European arrest warrant — Framework Decision 2002/584/JHA — Surrender procedures between Member States — Conditions for execution — Reasons for optional non-execution — Article 4a(1) introduced by Framework Decision 2009/299/JHA — Arrest warrant issued for the purpose of executing a custodial sentence or a detention order — ‘Trial resulting in the decision’ — Person concerned having appeared in person at first instance — Appeal proceedings involving a re-examination of the substance of the case — Arrest warrant providing no information making it possible to check whether the rights of the defence of the person convicted were upheld during the appeal proceedings)

In Case C-270/17 PPU,

REQUEST for a preliminary ruling under Article 267 TFEU from the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands), made by decision of 18 May 2017, received at the Court on the same date, in the proceedings relating to the execution of a European arrest warrant issued against

Tadas Tupikas,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, M. Berger, A. Borg Barthet, E. Levits and F. Biltgen (Rapporteur), Judges,

Advocate General: M. Bobek,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 July 2017,
after considering the observations submitted on behalf of:

- Mr Tupikas, by B. Kuppens, advocaat,
- the Openbaar Ministerie, by K. van der Schaft and U.E.A. Weitzel, acting as Agents,
- the Netherlands Government, by M. Noort and M Bulterman, acting as Agents,
- Ireland, by J. Quaney, acting as Agent, assisted by C. Noctor, BL,
- the Lithuanian Government, by K. Dieninis, acting as Agent,
- the European Commission, by R. Troosters and S. Grünheid, acting as Agents.

after hearing the Opinion of the Advocate General at the sitting on 26 July 2017,
gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4a(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) ('Framework Decision 2002/584').

2 The request has been made in connection with the execution in the Netherlands of a European arrest warrant issued by the Klaipėdos apygardos teismas (Regional Court, Klaipėda, Lithuania) against Mr Tadas Tupikas with a view to executing a custodial sentence in Lithuania.

Legal context

International law

ECHR

3 Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), which is entitled 'Right to a fair trial', provides:

'1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by

an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

European Union law

The Charter

4 Articles 47 and 48 of the Charter of Fundamental Rights of the European Union ('the Charter') form part of title VI thereof, entitled 'Justice'.

5 Under Article 47 of the Charter, entitled 'Right to an effective remedy and to a fair trial':

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

...’

6 The Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17; ‘the Explanations relating to the Charter’) state that the second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the ECHR.

7 The Explanations relating to the Charter further state, with respect to Article 47, that ‘[i]n Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law as stated by the Court in [the judgment of 23 April 1986, *Les Verts v Parliament* (294/83, EU:C:1986:166)]. Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.’

8 Article 48 of the Charter, entitled ‘Presumption of innocence and right of defence’, provides:

‘1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.

2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.’

9 The Explanations relating to the Charter state in that regard:

‘Article 48 is the same as Article 6(2) and (3) of the ECHR, ...

...

In accordance with Article 52(3), this right has the same meaning and scope as the right guaranteed by the ECHR.’

10 Article 51 of the Charter, entitled ‘Field of application’, provides in paragraph 1 thereof:

‘The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law...’

11 Article 52 of the Charter, entitled ‘Scope and interpretation of rights and principles’, provides:

‘1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are

necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

...

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

...

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.’

Framework Decisions 2002/584 and 2009/299

12 Recitals 1, 5, 6, 8, 10 and 12 of Framework Decision 2002/584 are worded as follows:

‘(1) According to the Conclusions of the Tampere European Council of 15 and 16 October 1999, and in particular point 35 thereof, the formal extradition procedure should be abolished among the Member States in respect of persons who are fleeing from justice after having been finally sentenced and extradition procedures should be speeded up in respect of persons suspected of having committed an offence.

...

(5) ... The introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. ...

(6) The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the «cornerstone» of judicial cooperation.

...

(8) Decisions on the execution of the European arrest warrant must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender.

...

(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) [EU, now after amendment, Article 2 TEU], determined by the Council pursuant to Article 7(1) [EU, now after amendment, Article 7(2) TEU] with the consequences set out in Article [7(2) EU].

...

(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 [EU] and reflected in the Charter ..., in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

...'

13 Article 1 of that Framework Decision, entitled 'Definition of the European arrest warrant and obligation to execute it', provides:

'1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

3. This Framework Decision shall not have the effect of amending the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU].'

14 Articles 3, 4 and 4a of that Framework Decision set out the grounds for mandatory and optional non-execution of the European arrest warrant.

15 Framework Decision 2009/299 sets out the grounds on the basis of which the executing judicial authority of a Member State may refuse to execute a European arrest warrant where the person concerned did not appear in person at his trial. Recitals 1, 2, 4 to 8, 14 and 15 state:

(1) The right of an accused person to appear in person at the trial is included in the right to a fair trial provided for in Article 6 of the [ECHR], as interpreted by the European Court of Human Rights. [That] Court has also declared that the right of the accused person to appear in person at the trial is not absolute and that under certain conditions the accused person may, of his or her own free will, expressly or tacitly but unequivocally, waive that right.

(2) The various Framework Decisions implementing the principle of mutual recognition of final judicial decisions do not deal consistently with the issue of decisions rendered following a trial at which the person concerned did not appear in person. This diversity could complicate the work of the practitioner and hamper judicial cooperation.

...

(4) It is therefore necessary to provide clear and common grounds for non-recognition of decisions rendered following a trial at which the person concerned did not appear in person. This Framework Decision is aimed at refining the definition of such common grounds allowing the executing authority to execute the decision despite the absence of the person at the trial, while fully respecting the person's right of defence. This Framework Decision is not designed to regulate the forms and methods, including procedural requirements, that are used to achieve the results specified in this Framework Decision, which are a matter for the national laws of the Member States.

(5) Such changes require amendment of the existing Framework Decisions implementing the principle of mutual recognition of final judicial decisions. The new provisions should also serve as a basis for future instruments in this field.

(6) The provisions of this Framework Decision amending other Framework Decisions set conditions under which the recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused. These are alternative conditions; when one of the conditions is satisfied, the issuing authority, by completing the corresponding section of the European arrest warrant or of the relevant certificate under the other Framework Decisions, gives the assurance that the requirements have been or will be met, which should be sufficient for the purpose of the execution of the decision on the basis of the principle of mutual recognition.

(7) The recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused if either he or she was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or if he or she actually received, by other means, official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial. In this context, it is understood that the person should have received such information «in due time», meaning sufficiently in time to allow him or her to participate in the trial and to effectively exercise his or her right of defence.

(8) The right to a fair trial of an accused person is guaranteed by the [ECHR], as interpreted by the European Court of Human Rights. This right includes the right of the person concerned to appear in person at the trial. In order to exercise this right, the person concerned needs to be aware of the scheduled trial. Under this Framework Decision, the person's awareness of the trial should be ensured by each Member State in accordance with its national law, it being understood that this must comply with the requirements of that Convention. In accordance with the case law of the European Court of Human Rights, when considering whether the way in which the information is provided is sufficient to ensure the person's awareness of the trial, particular attention could, where appropriate, also be paid to the diligence exercised by the person concerned in order to receive information addressed to him or her.

...

(14) This Framework Decision is limited to refining the definition of grounds for non-recognition in instruments implementing the principle of mutual recognition. Therefore, provisions such as those relating to the right to a retrial have a scope which is limited to the definition of these grounds for non-recognition. They are not designed to harmonise national legislation. This Framework Decision is without prejudice to future instruments of the European Union designed to approximate the laws of the Member States in the field of criminal law.

(15) The grounds for non-recognition are optional. However, the discretion of Member States for transposing these grounds into national law is particularly governed by the right to a fair trial, while taking into account the overall objective of this Framework Decision to enhance the procedural rights of persons and to facilitate judicial cooperation in criminal matters ...'

16 According to Article 1 of Framework Decision 2009/299, entitled 'Objectives and scope':

'1. The objectives of this Framework Decision are to enhance the procedural rights of persons subject to criminal proceedings, to facilitate judicial cooperation in criminal matters and, in particular, to improve mutual recognition of judicial decisions between Member States.

2. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty, including the right of defence of persons subject to criminal proceedings, and any obligations incumbent upon judicial authorities in this respect shall remain unaffected.

3. This Framework Decision establishes common rules for the recognition and/or execution of judicial decisions in one Member State (the executing Member State) issued by another Member State (the issuing Member State) following proceedings at which the person concerned was not present ...'

17 Article 4a of Framework Decision 2002/584 was inserted by Article 2 of Framework Decision 2009/299 and is entitled ‘Decisions rendered following a trial at which the person did not appear in person’. Article 4a(1) is worded as follows:

‘The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:

(a) in due time:

(i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial,

and

(ii) was informed that a decision may be handed down if he or she does not appear for the trial;

or

(b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;

or

(c) after being served with the decision and being expressly informed of the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed:

(i) expressly stated that he or she does not contest the decision;

or

(ii) did not request a retrial or appeal within the applicable time frame;

or

(d) was not personally served with the decision but:

(i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed;

and

(ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant.’

18 Article 8(1) of Framework Decision 2002/584 is worded as follows:

‘The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex:

- (a) the identity and nationality of the requested person;
- (b) the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority;
- (c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2;
- (d) the nature and legal classification of the offence, particularly in respect of Article 2;
- (e) a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;
- (f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;
- (g) if possible, other consequences of the offence.’

19 Article 15 of that Framework Decision, headed ‘Surrender decision’, provides:

‘1. The executing judicial authority shall decide, within the time limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.

2. If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in Article 17.

3. The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.’

20 Under Article 17 of that Framework Decision:

‘1. A European arrest warrant shall be dealt with and executed as a matter of urgency.

2. In cases where the requested person consents to his surrender, the final decision on the execution of the European arrest warrant should be taken within a period of 10 days after consent has been given.

3. In other cases, the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person.

4. Where in specific cases the European arrest warrant cannot be executed within the time limits laid down in paragraphs 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days.

...’

21 A form setting out a uniform template for a European arrest warrant is set out in the Annex to that Framework Decision.

Netherlands law

22 The Overleveringswet (Law on surrender) of 29 April 2004 (Stb. 2004, No 195, ‘the OLW’) transposes Framework Decision 2002/584 into Netherlands law.

23 Article 12 of the OLG is worded as follows:

‘Surrender will not be allowed if the European arrest warrant was issued for the purpose of enforcing a sentence if the suspect did not appear in person at the court hearing resulting in the judgment, unless the European arrest warrant states, in accordance with the procedural requirements of the issuing Member State:

(a) that the suspect was, in due time, either summoned in person and thereby informed of the scheduled date and place of the court hearing which resulted in the sentence, or by other means actually received official information of the scheduled date and place of that court hearing in such a manner that it was unequivocally established that he or she was aware of the scheduled court hearing and was informed that a sentence may be handed down if he or she does not appear for the court hearing; or

(b) that the suspect, being aware of the scheduled court hearing, had given a mandate to a lawyer, who was either appointed by the suspect or by the State, to defend him or her

at the court hearing, and that that lawyer did indeed defend the suspect at the court hearing; or

(c) that the suspect, after being served with the judgment and being expressly informed about the right to a retrial, or an appeal, in which the suspect has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed:

(1) expressly stated that he or she does not contest the decision;

(2) did not request a retrial or appeal within the applicable time frame; or

(d) that the suspect was not personally served with the sentence but:

(1) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed;

(2) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant.'

24 Annex 2 to the OLW, entitled 'Template for the European Arrest Warrant ...' corresponds to the annex of Framework Decision 2002/584.

The dispute in the main proceedings and the question referred for a preliminary ruling

25 It appears from the order for reference that, on 22 February 2017, an application for the execution of a European arrest warrant issued on 14 February 2017 by the Klaipėdos apygardos teismas (Regional Court, Klaipėda, Lithuania) was made before the referring court, the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands), by the officier van justitie bij de Rechtbank (Public Prosecutor's Office) ('the arrest warrant at issue').

26 That European arrest warrant seeks the arrest and surrender of Mr Tupikas, a Lithuanian national with no fixed abode or place of residence in the Netherlands, for the purpose of carrying out in Lithuania a sentence of imprisonment of one year and four months.

27 In that regard, the European arrest warrant mentions the existence of an enforceable judgment, pronounced by the Klaipėdos miesto apylinkės teismas (District Court, Klaipėda, Lithuania) on 26 August 2016, sentencing Mr Tupikas to that term of imprisonment in relation to a total of two offences under Lithuanian law. That European Arrest Warrant further states that Mr. Tupikas appealed against that judgment and that, by decision of 8 December 2016, the Klaipėdos apygardos teismas (Regional Court,

Klaipėda) dismissed the appeal, with the result that the appeal proceedings did not lead to the sentence pronounced at first instance against Mr Tupikas being amended.

28 It is common ground that Mr Tupikas appeared in person at the trial at first instance.

29 However, the European arrest warrant does not contain any information concerning the appeal proceedings, in particular as regards the issue whether the requested person appeared before the Klaipėdos apygardos teismas (Regional Court, Klaipėda) and, if not, whether, in regard to the appeal proceedings, the requirements of one of subparagraphs (a) to (d) of Article 4a(1) of Framework Decision 2002/584 have been complied with.

30 The national court therefore asks whether, in a case such as that at issue in the main proceedings, that Framework Decision applies only to proceedings at first instance or also to appeal proceedings.

31 In the first situation, that court takes the view that it cannot in the present case refuse to execute the European arrest warrant, since the person concerned appeared in person before the court at first instance.

32 In contrast, in the second situation, it would be necessary to ask the issuing judicial authority for additional information on the appeal proceedings before deciding on the surrender of Mr Tupikas.

33 The referring court takes the view that there are several factors which argue in favour of the interpretation that Article 4a(1) of Framework Decision 2002/584 applies equally to the appeal proceedings, since the substance of the case is re-examined as part of those proceedings.

34 That Court relies in that regard on the wording of subparagraphs (c) and (d) of Article 4a(1) of the Framework Decision, which refers in particular to ‘a retrial, or an appeal ... which allows the merits of the case, including fresh evidence, to be re-examined’.

35 In the view of the referring court, it follows from that wording that that provision refers to the situation in which the criminal court has ruled on the merits of the case, in that it ruled on the guilt of the person concerned in relation to the alleged infringement and, where appropriate, imposed a penalty on him for the offence committed. On the other hand, that is not the case where the judge merely ruled on questions of law, such as in an appeal in cassation.

36 The referring court adds that the wording of Article 4a(1) of Framework Decision 2002/584 does not restrict the scope of that provision to the proceedings at first instance, subparagraphs (c) and (d) thereof expressly referring both to a ‘retrial’ and an ‘appeal’.

37 Moreover, such an interpretation of Article 4a(1) of that Framework Decision is corroborated by the objective pursued by that provision, which, as already held by the Court in paragraph 43 of the judgment of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107), and in paragraph 37 of the judgment of 24 May 2016, *Dworzecki* (C-108/16 PPU, EU:C:2016:346) is to enable the executing judicial authority to allow surrender, despite the fact that the requested person was not present at the trial resulting in their conviction, while fully respecting that person’s rights of defence.

38 The referring court states that the rights of the defence are part of the right to a fair trial within the meaning of Article 6 of the ECHR and Article 47 of the Charter, with the result that once a Member State has established an appeal procedure, it is required to ensure that the person concerned enjoys, within the framework of that procedure, the fundamental guarantees laid down in those provisions. Thus, although the person concerned has the right to waive his rights of defence, the fact remains that, as the European Court of Human Rights has held, the criminal court which is called upon once more to rule on the guilt of the person concerned may not issue a ruling without a direct assessment of the evidence presented in person by the accused who wishes to prove that he did not commit the purportedly criminal act. In such a case, the mere fact that the person concerned was able to exercise his rights of defence at first instance is, therefore, insufficient for it to be concluded that the requirements laid down in Article 6 ECHR and Article 47 of the Charter have been met.

39 The referring court notes, however, that such an interpretation is not shared by a number of other Member States. It could therefore be argued that, once it has been established that the rights of the defence of the person concerned were fully upheld in the proceedings at first instance, the principle of mutual trust requires it to be held that the authorities of the issuing Member State have not disregarded the fundamental rights recognised by EU law in the context of other possible proceedings. Nevertheless, the Court has not yet ruled in that regard.

40 It was in those circumstances that the Rechtbank Amsterdam (District Court, Amsterdam) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Are appeal proceedings

- in which there has been an examination of the merits and
- which resulted in the passing of a (new) sentence on the person concerned and/or the confirmation of the sentence handed down at first instance,
- where the [European arrest warrant] concerns the execution of that sentence,

the “trial resulting in the decision” as referred to in Article 4a(1) of Framework Decision [2002/584]?’

The urgent procedure

41 The referring court has requested that the present reference for a preliminary ruling be dealt with under the urgent preliminary ruling procedure provided for in Article 107 of the Rules of Procedure of the Court.

42 In support of its application, that court relies on the fact that Mr Tupikas is currently in custody in the Netherlands, pending a decision on the further course to take concerning the execution of the European arrest warrant issued against him by the competent authorities of the Republic of Lithuania.

43 The referring court further states that it cannot take a decision in that regard until the Court has given a ruling on the present reference for a preliminary ruling. The Court's answer to the question raised therefore has a direct and decisive impact on the length of Mr Tupikas's detention in the Netherlands with a view to his possible surrender by way of execution of the European arrest warrant.

44 It should be stated, first of all, that the present reference for a preliminary ruling concerns the interpretation of Framework Decision 2002/584, which comes within the sectors covered by Title V of Part Three of the TFEU on the area of freedom, security and justice. Consequently, the reference may be dealt with under the urgent preliminary ruling procedure.

45 Secondly, as regards the criterion relating to urgency, it is necessary, in accordance with the settled case-law of the Court, to take into account the fact that the person concerned in the case in the main proceedings is currently deprived of his liberty and that the question as to whether he may continue to be held in custody depends on the outcome of the dispute in the main proceedings (see, in particular, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paragraph 21 and the case-law cited). Moreover, the situation of the person concerned must be assessed as it stood at the time when consideration was given to whether the reference should be dealt with under the urgent procedure (see, inter alia, judgment of 24 May 2016, *Dworzecki*, C-108/16 PPU, EU:C:2016:346, paragraph 22 and the case-law cited).

46 In the present case, it is common ground that, on that date, Mr Tupikas was deprived of his liberty. Moreover, his continued detention depends on the outcome of the main proceedings, the detention measure against him having been ordered, according to the referring court, in the context of the execution of the European arrest warrant in question.

47 In those circumstances, on 8 June 2017 the Fifth Chamber of the Court, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decided to accede to the referring court's request that the present reference for a preliminary ruling be dealt with under the urgent preliminary ruling procedure.

Consideration of the question referred

48 By its question, the referring court seeks, in essence, to determine the scope of the concept of ‘trial resulting in the decision’ within the meaning of Article 4a(1) of Framework Decision 2002/584, in the situation in which a number of judicial decisions have been handed down in the Member State which issued the European arrest warrant, at least one of which was issued without the person appearing in person at the trial. In particular, the referring court asks whether, in such a case, it is the appeal proceedings which must be regarded as decisive for the purposes of the application of that provision.

49 As a preliminary point, it should be borne in mind that, according to the Court’s settled case-law, Framework Decision 2002/584 is based on the principle of mutual recognition, which itself, as a ‘cornerstone’ of judicial cooperation, as is apparent from recital 6 of that Framework Decision, is based on the mutual trust between Member States with a view to achieving the objective set for the Union to become an area of freedom, security and justice (see, to that effect, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paragraphs 25 to 28 and the case-law cited).

50 To that end, Article 1(2) of the Framework Decision lays down the rule that Member States are required to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of that Framework Decision. Except in exceptional circumstances, the executing judicial authorities may therefore refuse to execute such a warrant only in the exhaustively listed cases of non-execution provided for by Framework Decision 2002/584 and the execution of the European Arrest Warrant may be made subject only to one of the conditions listed exhaustively therein. Accordingly, while the execution of the European arrest warrant constitutes the rule, the refusal to execute is intended to be an exception which must be interpreted strictly (see judgment of 29 June 2017, *Popławski*, C-579/15, EU:C:2017:503, paragraph 19 and the case-law cited).

51 Thus, the Framework Decision explicitly states, on the one hand, the grounds for mandatory (Article 3) and optional (Articles 4 and 4a) non-execution of the European arrest warrant, as well as, on the other, the guarantees to be provided by the issuing Member State in particular cases (Article 5).

52 As regards, in particular, the case in which the European arrest warrant relates to the execution of a sentence imposed in absentia, the initial version of Article 5(1) of Framework Decision 2002/584 provided that the Member State of execution could, in that case, make the surrender of the person concerned subject to the condition that the opportunity for a retrial in the presence of that person is guaranteed in the issuing Member State.

53 That provision was repealed by Framework Decision 2009/299 and replaced, in Framework Decision 2002/584, by a new Article 4a which restricts the possibility of refusing to execute the European arrest warrant by listing, in a precise and uniform manner, the conditions under which the recognition and enforcement of a decision rendered following a trial in which the person concerned did not appear in person may

not be refused (see, to that effect, judgment of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, paragraph 41).

54 As is apparent from the very wording of Article 4a(1) of Framework Decision 2002/584, the executing judicial authority is entitled to refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant indicates that the conditions set out, respectively, in subparagraphs (a) to (d) of that provision are met.

55 It follows that the executing judicial authority is obliged to execute a European arrest warrant, notwithstanding the absence of the person concerned at the trial resulting in the decision, where one of the situations referred to in Article 4a(1)(a), (b), (c) or (d) of that Framework Decision is verified.

56 In that regard, Article 4a(1)(a) and (b) of Framework Decision 2002/584 provides that, where the person convicted in absentia was aware, in due time, of the scheduled trial and was informed that a decision could be handed down if he did not appear at the trial or, being aware of the scheduled trial, gave a mandate to a legal counsellor to defend him at the trial, the executing judicial authority is required to surrender that person.

57 Moreover, Article 4a(1)(c) and (d) of that Framework Decision sets out the situations in which the executing judicial authority is required to execute the European arrest warrant, even though the person concerned is entitled to a retrial, because the arrest warrant indicates either that the person concerned has not requested a retrial or that he will be expressly informed of his right to a re-examination.

58 As the Court has already held, Article 4a(1) of Framework Decision 2002/584 seeks to guarantee a high level of protection and to allow the executing judicial authority to surrender the person concerned despite that person's failure to attend the trial which led to his conviction, while fully respecting his rights of defence (see judgment of 24 May 2016, *Dworzecki*, C-108/16 PPU, EU:C:2016:346, paragraph 37).

59 In other words, the principles of mutual trust and recognition on which that Framework Decision is based must not in any way undermine the fundamental rights guaranteed to the persons concerned.

60 It must be borne in mind that, in accordance with the Court's settled case-law, the rules of secondary legislation of the Union must be interpreted and applied in compliance with fundamental rights (see, inter alia, judgment of 16 February 2017, *C. K. and Others*, C-578/16 PPU, EU:C:2017:127, paragraph 59), an integral part of which is respect for the rights of the defence, flowing from the right to a fair trial, enshrined in Articles 47 and 48 of the Charter and in Article 6 of the ECHR.

61 Thus, Article 1(3) of Framework Decision 2002/584 provides that ‘it shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU]’.

62 Article 1(1) of Framework Decision 2009/299 states in that regard that the objectives it pursues are ‘to enhance the procedural rights of persons subject to criminal proceedings ... and ... to improve mutual recognition of judicial decisions between Member States’. Article 1(2) of that Framework Decision, which incorporates the content of Article 1(3) of Framework Decision 2002/584, expressly refers to the need to guarantee the right of the defence of persons subject to criminal proceedings and recalls the duty of Member States’ judicial authorities to ensure respect for fundamental rights.

63 Consequently, Framework Decision 2002/584 must be interpreted in such a way as to ensure compliance with the requirements of respect for the fundamental rights of the persons concerned, without, however, calling into question the effectiveness of the system of judicial cooperation between the Member States of which the European Arrest Warrant, as provided for by the Union legislature, is one of the key elements.

64 The Court will interpret, in the light of those considerations, the concept of a ‘trial resulting in the decision’, within the meaning of Article 4a(1) of Framework Decision 2002/584, in the context of the situation referred to in paragraph 48 of the present judgment.

65 In that regard, it should be noted, first of all, that, according to the Court’s settled case-law, it follows from the need for uniform application of EU law and from the principle of equality that the wording of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of the provision and the objective pursued by the legislation in question (see judgment of 24 May 2016, *Dworzecki*, C-108/16 PPU, EU:C:2016:346, paragraph 28 and the case-law cited).

66 Although it is true that Framework Decision 2002/584, and in particular Article 4a(1) thereof, contains a number of express references to the law of the Member States, none of those references concerns the concept of a ‘trial resulting in the decision’ within the meaning of that provision.

67 In those circumstances, it must be held that that expression, which is the subject of the present question referred for a preliminary ruling, must be regarded as an autonomous concept of EU law and interpreted uniformly throughout the European Union, irrespective of classifications in the Member States.

68 That interpretation is also borne out by the origins of Framework Decision 2009/299. As is apparent from recitals 2 and 4 thereof, the EU legislature, having noted that the lack of uniform regulation of questions linked with decisions handed down following a trial in which the person concerned did not appear in person could, in

particular, hamper judicial cooperation, considered it necessary to provide clear and common grounds for non-recognition of decisions rendered following a trial in which the person concerned had not appeared in person, but without regulating the forms and methods, including procedural requirements, which are a matter for the laws of the Member States, that are used to achieve the results specified in that framework decision (see judgment of 24 May 2016, *Dworzecki*, C-108/16 PPU, EU:C:2016:346, paragraph 31).

69 Secondly, it must be stated that the wording of Article 4a(1) of Framework Decision 2002/584 does not, of itself, make it possible to define more precisely the concept of ‘trial resulting in the decision’ set out therein. That term is neither defined nor otherwise specified there and the title of that article merely refers to ‘decisions rendered following a trial at which the person did not appear in person’.

70 In those circumstances, the scope of the concept in question must be determined by placing it in context. To that end, the other provisions of that Framework Decision, including Article 4a(1), should, thirdly, be taken into consideration.

71 In that regard, it should be pointed out that although Article 8(1)(c) of Framework Decision 2002/584 uses the terms ‘enforceable judgment’ or ‘any other enforceable judicial decision having the same effect’ and although such enforceability is decisive in determining the time from which a European arrest warrant may be issued, that enforceability is of lesser relevance under Article 4a(1) of that Framework Decision. However, it is appropriate to pay attention to the ‘final’ nature of the ‘decision’ or ‘judgment’ for the purposes of interpreting Article 4a(1), as is apparent from other relevant, convergent provisions of the Framework Decision.

72 Thus, Article 3(2) and Article 8(f) of Framework Decision 2002/584 use the phrase ‘final judgment’ which has imposed a penalty. Article 2(1) thereof refers to ‘sentences’, while Article 4(3) of that Framework Decision uses the term ‘final judgment’ and Article 4(5) refers to a ‘person [who] has been finally judged’.

73 The same is true of several recitals of Framework Decisions 2002/584 and 2009/299. Thus, the term ‘finally sentenced’ is used in recital 1 of Framework Decision 2002/584, whereas recitals 2 and 5 of Framework Decision 2009/299 use the term ‘final judicial decisions’.

74 It must therefore be held that the concept of ‘trial resulting in the decision’, within the meaning of Article 4a(1) of Framework Decision 2002/584, must be understood as referring to the proceeding that led to the judicial decision which finally sentenced the person whose surrender is sought in connection with the execution of a European Arrest Warrant.

75 Such an interpretation of the concept of ‘decision’ is also consistent with that of ‘trial which led to [the] conviction’ which the Court had already adopted in paragraph 37

of its judgment of 24 May 2016, *Dworzecki* (C-108/16 PPU, EU:C:2016:346), for the purposes of the interpretation of Article 4a(1) of Framework Decision 2002/584.

76 Moreover, although the final sentencing decision may, in certain cases, be indissociable from the enforceable criminal decision, that aspect is still governed by the various national procedural rules, in particular where several decisions have been taken at the end of successive proceedings.

77 Thus, where, as in the case in the main proceedings, the issuing Member State has instituted a two-tier system of jurisdiction, with the result that the procedure in criminal matters involves several instances and may give rise to successive judicial decisions, it is important to establish, fourthly, which of these must be regarded as containing the final sentence within the meaning of paragraph 74 of the present judgment.

78 As is clear from the case-law of the European Court of Human Rights, the term ‘conviction’ within the meaning of the ECHR refers to both a finding of guilt after it has been established in accordance with the law that there has been an offence, and the imposition of a penalty or other measure involving deprivation of liberty (see, to that effect, ECtHR, 21 October 2013, *Del Río Prada v. Spain*, CE:ECHR:2013:1021JUD004275009, § 123, and the case-law cited).

79 Moreover, the European Court of Human Rights has held on several occasions that, where appeal proceedings are provided for, they must comply with the requirements flowing from Article 6 of the ECHR, in particular where the remedy available against the decision given at first instance is a full appeal, the second-instance court having jurisdiction to re-examine the case, by assessing the merits of the accusations in fact and in law, and thus to determine the guilt or innocence of the person concerned on the basis of the evidence presented (see, to that effect, judgments of the ECtHR of 26 May 1988, *Ekbatani v. Sweden*, CE:ECHR:1988:0526JUD001056383, § 24 and 32; 26 October 2000, *Kudła v. Poland*, CE:ECHR:1988:0526JUD001056383, § 122; 18 October 2006, *Hermi v. Italy*, CE:ECHR:2006:1018JUD001811402, § 64 and 65; 25 April 2013, *Zahirović v. Croatia*, CE:ECHR:2013:0425JUD005859011, § 56; and of 14 February 2017, *Hokkeling v. Netherlands*, CE:ECHR:2017:0214JUD003074912, § 56 and 58).

80 It is also clear from that case-law of the European Court of Human Rights that where two instances are provided for, the fact that the person concerned was actually able to exercise his rights of defence at first instance does not automatically lead to the conclusion that he necessarily enjoyed the guarantees laid down in Article 6 of the ECHR if the appeal proceedings took place in his absence (see, to that effect, judgment of 14 February 2014, *Hokkeling v. Netherlands*, CE:ECHR:2017:0214JUD003074912, § 57, 58 and 61).

81 Consequently, in the event that proceedings have taken place at several instances which have given rise to successive decisions, at least one of which was given in absentia, it is appropriate to understand by ‘trial resulting in the decision’, within the meaning of Article 4a(1) of Framework Decision 2002/584, the instance which led to the

last of those decisions, provided that the court at issue made a final ruling on the guilt of the person concerned and imposed a penalty on him, such as a custodial sentence, following an assessment, in fact and in law, of the incriminating and exculpatory evidence, including, where appropriate, the taking account of the individual situation of the person concerned.

82 That interpretation is fully in line with the requirements of respect for the rights of the defence which Article 4a of Framework Decision 2002/584 precisely seeks to uphold, as is apparent from paragraphs 58 and 59 of the present judgment.

83 It is the judicial decision finally disposing of the case on the merits, in the sense that there are no further avenues of ordinary appeal available, which is decisive for the person concerned, since it directly affects his personal situation with regard to the finding of guilt and, where appropriate, the determination of the custodial sentence to be served.

84 Accordingly, it is at that procedural stage that the person concerned must be able to fully exercise his rights of defence in order to assert his point of view in an effective manner and thereby to influence the final decision which could lead to the loss of his personal freedom. The outcome of that procedure is irrelevant in that context.

85 In those circumstances, even assuming that the rights of the defence have not been fully respected at first instance, such a breach may validly be remedied in the course of the second-instance proceedings, provided that the latter proceedings provide all the guarantees with respect to the requirements of a fair trial.

86 In other words, when the person concerned appeared before the judge responsible for a fresh assessment of the merits of the case, but not at first instance, the provisions of Article 4a of Framework Decision 2002/584 do not apply. Conversely, the executing judicial authority must carry out the checks provided for in that article when the person concerned was present at first instance, but not in the proceedings concerned with a fresh assessment of the merits of the case.

87 The interpretation of the concept of ‘trial resulting in the decision’ set out in paragraph 81 to 84 of the present judgment is, moreover, such as to best ensure the objective pursued by that Framework Decision, which is to facilitate and accelerate judicial cooperation between Member States on the basis of the principles of trust and mutual recognition, since it focuses on the procedural phase which, following a fresh assessment of the substance of the case, is decisive for the sentencing of the person concerned.

88 By contrast, if it was necessary to hold that a decision prior to such a final decision was also capable of leading to the application of Article 4a of Framework Decision 2002/584, such an interpretation would inevitably prolong or even seriously impede the surrender procedure.

89 Furthermore, as is apparent from paragraph 57 of the Opinion of the Advocate General, the reading of point (d) of the form setting out a uniform template for a European arrest warrant annexed to Framework Decision 2002/584 confirms that the information which must be provided by the issuing judicial authority in it relates only to the last procedural step during which the merits of the case were examined.

90 With regard, more specifically, to a case such as that at issue in the main proceedings, in which the trial took place at two successive instances, namely a first instance followed by appeal proceedings, it is the instance which led to the decision on appeal which is therefore solely relevant for the purposes of Article 4a(1) of Framework Decision 2002/584, provided that those proceedings led to the final decision which is no longer subject to an ordinary appeal and which, accordingly, finally disposes of the case on the merits.

91 Consequently, in a case such as that in the main proceedings, it is in relation to appeal proceedings of that kind that (i) the issuing judicial authority must provide the information referred to in Article 8(1) of Framework Decision 2002/584, and (ii) the executing judicial authority is empowered, in accordance with Article 15(2) of that Framework Decision, to request additional information which it considers necessary to enable it to take a decision on the surrender of the person concerned.

92 As regards, more specifically, the executing judicial authority's obligations, it must be borne in mind that the binding nature of the framework decisions entails, on the part of the authorities of the Member States, and in particular national courts, an obligation to interpret national law in conformity with those decisions (see judgments of 16 June 2005, *Pupino*, C-105/03, EU:C:2005:386, paragraph 34, and of 29 June 2017, *Popławski*, C-579/15, EU:C:2017:503, paragraph 31).

93 When applying Article 4a(1) of the Framework Decision, the executing judicial authority must, where the person concerned has not appeared in person in the proceedings leading to the decision which has finally disposed of the matter on the merits and, accordingly, ruled on his conviction, verify whether the situation before it corresponds to one of those described under (a) to (d) of that provision.

94 That verification must be carried out on the basis of the indications set out in both the European arrest warrant and any supplementary or additional information obtained or provided in accordance with Article 15(2) and (3) of Framework Decision 2002/584.

95 If it were to become apparent that the situation before it corresponds to one of those described in Article 4a(1)(a) to (d) of Framework Decision 2002/584, the executing judicial authority is required to execute the European arrest warrant and to authorise the surrender of the person sought, as is apparent from paragraphs 50 and 55 of the present judgment.

96 Moreover, since Article 4a of Framework Decision 2002/584 provides for an optional ground for non-execution of the European arrest warrant, and as the cases

described in paragraph 1(a) to (d) of that Article were conceived as exceptions to that optional ground for non-recognition, the Court has already held that the executing judicial authority may, even after it has found that those cases do not cover the situation of the person who is the subject of the European Arrest Warrant, take into account other circumstances that enable it to ensure that the surrender of the person concerned does not entail a breach of his rights of defence (see, to that effect, judgment of 24 May 2016, *Dworzecki*, C-108/16 PPU, EU:C:2016:346, paragraphs 50 and 51).

97 Thus, Framework Decision 2002/584 does not prevent the executing judicial authority from ensuring that the rights of the person concerned are upheld by taking due consideration of all the circumstances characterising the case before it, including the information which it may itself obtain, provided that compliance with the deadlines laid down in Article 17 of that Framework Decision is not called into question.

98 In the light of all of the foregoing, the answer to the question referred is that, where the issuing Member State has provided for a criminal procedure involving several degrees of jurisdiction which may thus give rise to successive judicial decisions, at least one of which has been handed down in absentia, the concept of ‘trial resulting in the decision’, within the meaning of Article 4a(1) of the Framework Decision, must be interpreted as relating only to the instance at the end of which the decision is handed down which finally rules on the guilt of the person concerned and imposes a penalty on him, such as a custodial sentence, following a re-examination, in fact and in law, of the merits of the case.

99 An appeal proceeding, such as that at issue in the main proceedings, in principle falls within that concept. It is nonetheless up to the referring court to satisfy itself that it has the characteristics set out above.

Costs

100 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Where the issuing Member State has provided for a criminal procedure involving several degrees of jurisdiction which may thus give rise to successive judicial decisions, at least one of which has been handed down in absentia, the concept of ‘trial resulting in the decision’, within the meaning of Article 4a(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as relating only to the instance at the end of which the decision is handed down which finally rules on the guilt of the person concerned and imposes a

penalty on him, such as a custodial sentence, following a re-examination, in fact and in law, of the merits of the case.

An appeal proceeding, such as that at issue in the main proceedings, in principle falls within that concept. It is nonetheless up to the referring court to satisfy itself that it has the characteristics set out above.

[Signatures]

* Language of the case: Dutch.
