OPINION OF ADVOCATE GENERAL

BOT

delivered on 24 March 2009 [1]

1. In this case the Court of Justice is again asked to rule on the scope of Article 4(6) of Council Framework Decision 2002/584/JHA, [2] which provides for a ground for optional non-execution of a European arrest warrant.

2. Under that provision, the judicial authority of the executing Member State [3] may refuse to execute such a warrant issued for the purposes of execution of a custodial sentence where the requested person 'is staying in, or is a national or a resident of the executing Member State' and that State itself undertakes to execute that sentence.

3. The Rechtbank (District Court) Amsterdam (Netherlands) [4] seeks to ascertain the extent to which that ground for non-execution may apply to a German national who is the subject of an arrest warrant issued by the Federal Republic of Germany for the purposes of execution of a prison sentence and who has worked, since June 2005, in the Netherlands, where he lives with his wife.

4. That court is also faced with the fact that the person concerned is not in possession of a residence permit of indefinite duration for the Netherlands and that, under Netherlands law, he cannot benefit from that ground for non-execution because the rule that the surrender of a Netherlands national for the purposes of execution of a sentence must be refused applies only to the nationals of other Member States who are in possession of such a residence permit.

5. That court therefore seeks to ascertain, first, what is the required period of residence in the executing Member State of a person who is the subject of a European arrest warrant for that person to be regarded as staying or resident in that State for the purposes of Article 4(6) of the framework decision.

1 — Original language: French.

2 — Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1, 'the framework decision').

3 — 'The executing judicial authority'.

4 — In accordance with the declaration made by the Kingdom of the Netherlands under Article 35 EU, that court may make a reference to the Court of Justice for a preliminary ruling on the interpretation of an act adopted in the context of police and judicial cooperation in criminal matters, such as the framework decision [information concerning the date of entry into force of the Treaty of Amsterdam] (OJ 1999 L 114, p. 56).

6. Secondly, it asks whether application of the ground for non-execution laid down in that provision may be made subject to supplementary administrative requirements, such as possession of a residence permit of indefinite duration.

7. Thirdly, the national court asks whether the principle of non-discrimination precludes national legislation according to which the rule providing that the surrender of a national of that State must be refused where surrender is requested for the purposes of execution of a sentence is extended only to nationals of other Member States who are in possession of a residence permit of indefinite duration.

8. Those three questions are very similar to those which, in a different context, were referred to the Court in the case which gave rise to the judgment in *Kozłowski*, [5] which was delivered after this request for a preliminary ruling was received.

9. In that judgment, the Court defined the concepts of 'staying' and of 'resident' in the executing Member State for the purposes of Article 6(4) of the framework decision. It also provided guidance on the second matter, concerning whether it is possible to make application of the ground for non-execution laid down in that provision subject to administrative requirements, such as a national residence permit. However, it did not rule on the last issue, relating to whether national legislation which prohibits the surrender of a national of the State in question and not that of a national of another Member State complies with the principle of non-discrimination.

10. This case requires the Court to clarify and to supplement the answers given in *Kozłowski*, cited above, as regards the scope of Article 4(6) of the framework decision.

11. With regard to the first question from the national court, I propose that the Court should rule that, in the concept of 'resident' and the concept of 'staying', the decisive condition is whether the person who is the subject of the European arrest warrant has sufficient connections with the executing Member State to give grounds for concluding that execution of the sentence in that State would increase that person's chances of reintegration. I will conclude that the period of residence in that State constitutes one of the relevant factors which the competent court must take into consideration in order to determine whether that condition has been met.

5 — Case C-66/08 [2008] ECR I-6041.

12. As regards the second matter raised, I propose that the Court's answer should be that application of the ground for non-execution set out in Article 4(6) of the framework decision cannot be made subject to supplementary administrative requirements, such as possession of a residence permit of indefinite duration.

13. Lastly, in response to the third matter raised by the national court, I propose that the Court should rule that the national legislation at issue is contrary to the principle of non-discrimination laid down in Article 12 EC.

14. Before explaining my analysis in detail, I consider it useful to set out below the essential principles which are referred to subsequently and which guided my reasoning:

— the European arrest warrant procedure introduced by the framework decision replaced, as between Member States, the extradition procedure, which is retained in cooperation relations with third States and in those between the Member States where, exceptionally, the European arrest warrant procedure is not applicable, in particular for reasons relating to the temporal scope of the framework decision;

— the provisions of Article 4(6) of the framework decision require examination of issues which in actual fact relate to substantive criminal law, inasmuch as their application is directly related to the concept of reintegration of the sentenced person. Since the modern tendency of criminal law in all the Member States is to regard reintegration as one of the fundamental purposes of sentencing, in accordance with the principle that a penalty, which includes the arrangements for executing it, is be tailored to the individual, each decision must be taken having regard to the circumstances specific to each sentenced person's individual situation;

— as regards a sentence or a comparable measure, such as a 'detention order', both its execution and imposition concern the freedom of the individual. Therefore, the rules intrinsic to the judicial system, the guarantor in all Member States of respect for that freedom, must be safeguarded, in particular with regard to the necessary discretion which a court must enjoy in order effectively to implement the principles which it has been given the responsibility to apply.

I — Community law

A — *The relevant provisions of the framework decision*

15. The purpose of the framework decision is to abolish, between the Member States, the formal extradition procedure provided for by the various conventions to which those States are party and to replace it by a system of surrender between judicial authorities. [6] The fifth recital in the preamble to that framework decision states in that regard:

'The objective set for the [European] Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, 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. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.'

16. The framework decision is founded on the principle of mutual recognition of judicial decisions in criminal matters, which is the 'cornerstone' of judicial cooperation, [7] and on the 'high level of confidence' between the Member States. [8]

17. Article 1 of the framework decision is entitled 'Definition of the European arrest warrant and obligation to execute it'. 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.

6 — First and fifth recitals in the preamble to the framework decision.

7 — Sixth recital in the preamble to the framework decision.

8 — Tenth recital in the preamble to the framework decision.

3. 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 on European Union.'

18. Where a European arrest warrant is issued for the purposes of execution of a custodial sentence or detention order it must, under Article 2 of the framework decision, relate to a sentence of at least four months.

19. Article 2 of the framework decision sets out a list of 32 offences for which, if they are punishable in the issuing Member State by a custodial sentence for a maximum period of at least three years, the European arrest warrant must be executed even where the acts in question are not penalised in the executing Member State. For other offences, the executing Member State may make the surrender of a person who is the subject of a European arrest warrant subject to the condition of their double criminality.

20. Articles 3 and 4 of the framework decision contain, respectively, the grounds for mandatory non-execution and the grounds for optional non-execution of the European arrest warrant. Article 4(6) of that framework decision provides:

'The executing judicial authority may refuse to execute the European arrest warrant:

…

if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law.'

21. That ground for optional non-execution is supplemented by Article 5(3) of the framework decision, which is applicable where the European arrest warrant is issued for the purposes of prosecution. Under that provision, the surrender of the person who is the subject of such a European arrest warrant may be subject to the condition that that person, where he is a national or resident of the executing Member State, is returned to that State after being heard in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.

B — *The scope of those provisions of the framework decision according to the Court in* Kozłowski

22. The following factual and legal circumstances provide the background to *Kozłowski*, cited above.

23. The German judicial authorities received an application for the surrender of Mr Kozłowski, a Polish national, under a European arrest warrant issued by a Polish court for the purposes of execution of a prison sentence of five months delivered in a final judgment.

24. Mr Kozłowski was imprisoned in Stuttgart (Germany), where he was serving a custodial sentence of three years and six months, which had been imposed on him by the German courts for a number of fraud offences committed in Germany.

25. He was single and childless. He had little or even no command of the German language. He entered Germany in February 2005 and had resided there until his arrest, which took place on 10 May 2006, with some interruptions, in particular during the Christmas holidays. He had occasionally worked there in the building sector. He objected to his surrender to the Polish judicial authorities and wished to remain in Germany after he was freed.

26. In German law, Article 4(6) of the framework decision has been transposed into different provisions depending on whether the person concerned is a German national or a foreign national.

27. With regard to German nationals, their extradition for the purposes of execution of a sentence is possible only where the defendant consents to such extradition. [9] With regard to foreign nationals whose habitual residence is in Germany, irrespective of whether they are nationals of another Member State or of a non-member State, their extradition for the purposes of execution of a sentence may be refused where the person concerned does not consent to his surrender and where his interest which deserves protection prevails over the execution of the sentence on national territory. [10]

28. That legislation follows a decision of the Bundesverfassungsgericht (Federal Constitutional Court) (Germany), delivered on 18 July 2005, which declared that the previous law was unconstitutional on the ground that it was a disproportionate violation of the funda-

9 — Paragraph 80(3) of the Law on international mutual legal assistance in criminal matters (Gesetz über die internationale Rechtshilfe in Strafsachen) of 23 December 1982, as amended by the Law on the European arrest warrant (Europäisches Haftbefehlsgesetz) of 20 July 2006 (BGBl. 2006 I, p. 1721).

10 — Paragraph 83b (2) of the Law on international mutual legal assistance in criminal matters.

mental right of every German national not to be extradited. [11]

29. The Oberlandesgericht (Higher Regional Court) (Germany) was faced with the following two questions. On the one hand, it had to determine whether Mr Kozłowski was staying or resident in Germany for the purposes of Article 4(6) of the framework decision. More specifically, it raised the question of the conclusions to be drawn for the purposes of that assessment, first, from the interruptions to Mr Kozłowski's residence in Germany in 2005 and 2006, secondly, from the fact that more than three months after he entered Germany, Mr Kozłowski was not carrying on an activity there and earned his living essentially by committing crimes, so that the lawfulness of his residence in Germany seemed uncertain, and, thirdly, from the fact that Mr Kozłowski was in detention.

30. On the other hand, the Oberlandesgericht raised the question of whether the German law transposing Article 4(6) of the framework decision is compatible with the principle of non-discrimination. In particular, it sought a ruling from the Court on whether, and to what extent, it was possible to draw a distinction between German nationals and foreign nationals who are citizens of the Union.

11 — Paragraph 16(2) of the Basic Law of the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) provides:
'No German national may be extradited to a foreign country. The law may provide otherwise for extraditions to a Member State of the European Union or to an international court of justice provided that the rule of law is upheld.'

31. The Oberlandesgericht therefore referred the following two questions to the Court of Justice:

'(1) Do the following facts preclude the assumption that a person is a "resident" of or is "staying" in a Member State in the sense of Article 4(6) of the [framework decision]:

(a) his stay in the Member State has not been uninterrupted;

b) his stay there does not comply with the national legislation on residence of foreign nationals;

(c) he commits crimes there systematically for financial gain; and/or

(d) he is in detention there serving a custodial sentence?

(2) Is transposition of Article 4(6) of the framework decision in such a way that the extradition of a national of the … [executing] Member State against his will for the purpose of execution of sentence is always impermissible, whereas extradition of nationals of other Member States against their will can be authorised at the discretion of the authorities, compatible with Union law, in particular with the principle of non-discrimination and with Union citizenship under Article 6(1) EU, read in conjunction with Article 12 EC and Article 17 EC et seq., and if so, are those principles at least to be taken into account in the exercise of that discretion?'

32. In *Kozłowski* the Court answered only the first question. It ruled that:

'Article 4(6) of the [framework decision] is to be interpreted as meaning that:

— a requested person is "resident" in the executing Member State when he has established his actual place of residence there and he is "staying" there when, following a stable period of presence in that State, he has acquired connections with that State which are of a similar degree to those resulting from residence;

— in order to ascertain whether there are connections between the requested person and the executing Member State which lead to the conclusion that that person is covered by the term "staying" within the meaning of Article 4(6), it is for the executing judicial authority to make an overall assessment of various objective factors characterising the situation of that person, including, in particular, the length, nature and conditions of his presence and the family and economic connections which that person has with the executing Member State.'

33. It based that answer on the following grounds:

— the meaning and scope of the terms 'staying' and 'resident' are not defined in the framework decision;

— the term 'staying' cannot be interpreted in a broad way which would imply that the executing judicial authority could refuse to execute a European arrest warrant

merely on the ground that the requested person is temporarily located on the territory of the executing Member State. However, it equally cannot be interpreted as meaning that a requested person who has been staying there for a certain period of time is not in any circumstances capable of having established connections with that State which could enable him to invoke that ground for optional non-execution;

— the term 'staying' is therefore relevant for determining the scope of Article 4(6) of the framework decision;

— the terms 'staying' and 'resident' must be defined uniformly within the Union and the Member States may not give them a broader meaning than that which derives from that definition;

— in a specific situation, in order to establish whether the ground for non-execution provided for in Article 4(6) of the framework decision applies, the executing judicial authority must, initially, ascertain only whether the person is a national of, or resident or staying in that State, and, if that is the case, it must, secondly, assess whether there is a legitimate interest which would justify the sentence imposed in the issuing Member State being executed on the territory of the executing Member State;

— in that regard, Article 4(6) of the framework decision has in particular the objective of enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegration;

— accordingly, the terms 'resident' and 'staying' cover, respectively, the situations in which the person who is the subject of a European arrest warrant has either established his actual place of residence in the executing Member State or has acquired, following a stable period of presence in that State, certain connections with that State which are of a similar degree to those resulting from residence;

— in order to determine whether, in a specific situation, a person has established such connections, it is necessary to make an overall assessment of various objective factors characterising the situation of that person, which include, in particular, the length, nature and conditions of his presence and the family and economic connections which he has with the executing Member State;

— in the context of that overall assessment, one of those factors cannot, in itself, have a conclusive effect;

— as regards the circumstances put forward by the national court, the fact that the requested person's stay in the executing Member State has not been uninterrupted and the fact that his stay there does not comply with the national legislation on residence of foreign nationals do not, in themselves, preclude the possibility that that person is 'staying' in that State, but may still be relevant, and

— the fact that the person concerned systematically commits crimes in the executing Member State and the fact that he is in detention there are not relevant for the purposes of assessing whether that person is 'staying' in that State, but they may be relevant, if that person is staying there, for assessing whether there is a legitimate ground for non-execution.

34. When applied to Mr Kozłowski's specific situation, those criteria led the Court to hold, first, that he was not resident in Germany and, secondly, that he was not staying there either, in view of the length, nature and conditions of his stay as well as the absence of any family ties and the weakness of his economic connections with that State.

II — Factual and legal background to the reference for a preliminary ruling

A — *The situation of the requested person*

35. Mr Wolzenburg was sentenced by several German courts to serve a custodial sentence of one year and nine months for a number of offences, in particular the importation of marijuana into Germany.

36. On 13 July 2006, the Public Prosecutor's Office at Aachen (Germany) issued a European arrest warrant against Mr Wolzenburg for the purpose of execution of that sentence, which it sent on 3 August 2006.

37. Mr Wolzenburg entered the Netherlands at the beginning of June 2005. He has been residing there since 16 June 2005 in an apartment in Venlo, under a letting agreement in his name and that of his wife. He was registered on the Venlo municipal registers. At the hearing of 30 November 2007, he stated

that his wife, also a German national, was pregnant.

38. Mr Wolzenburg was employed in the Netherlands between 2005 and 2007. He was assigned a tax and social insurance number on 24 July 2005. He provided proof that he had medical insurance for the period between 1 January 2006 and 31 December 2008.

39. On 20 September 2006, he reported to the Immigration and Naturalisation Department to register as a citizen of the Union. The national court states that he derives a right of residence from Community law and that, in the light of the offences for which he had been sentenced, he should not forfeit his right of residence in the Netherlands.

40. It also states that the acts relating to the introduction of marijuana into Germany were committed partly in the Netherlands, with the result that the person concerned could also have been prosecuted in that Member State.

B — *Netherlands law*

41. Article 4(6) of the framework decision was implemented in the Netherlands by Article 6 of the Law on the surrender of persons (Overleveringswet) ('OLW') of 29 April 2004, [12] which provides:

'1. The surrender of a Netherlands national may be permitted provided that he is sought for the purposes of a criminal investigation against him and that, in the view of the executing judicial authority, it is guaranteed that, if he is sentenced to an unconditional custodial sentence in the issuing Member State in relation to acts for which surrender may be permitted, he may serve that sentence in the Netherlands.

2. The surrender of a Netherlands national shall not be permitted if that surrender is sought for the purposes of execution of a custodial sentence imposed on him by final judicial decision.

3. Where surrender is refused solely on the ground of paragraph 2, the public prosecutor shall notify the issuing judicial authority that it is willing to execute the judgment in accordance with the procedure laid down in

12 — *Staatsblad* 2004, No 195, as last amended ('the OLW').

Article 11 of the Convention on the Transfer of Sentenced Persons of 21 March 1983 (Trb. 1983, 74) or on the basis of another applicable convention.

…

5. Paragraphs 1 to 4 shall also apply to a foreign national in possession of a residence permit of indefinite duration in so far as he may be prosecuted in the Netherlands for the offences on which the European arrest warrant is based and in so far as he can be expected not to forfeit his right of residence in the Netherlands as a result of any sentence or measure which may be imposed on him after surrender.'

III — The questions referred

42. The national court states that the provisions of Article 6(5) of the OLW are applicable where the European arrest warrant has been issued for the purposes of execution of a sentence, so that the surrender must be refused where the conditions laid down in those provisions are met, in accordance with Article 6(2) of the OLW.

43. It also states that the purpose of those provisions is to facilitate the sentenced person's reintegration, by allowing him to serve his sentence as near as possible to the social environment into which he is to be reintegrated.

44. The national court points out, however, that under Article 6(5) of the OLW, nationals of another Member State who have a right of residence in the Netherlands under Article 18 EC but who are not in possession of a permanent permit of indefinite duration are excluded from the benefit of that provision of the OLW.

45. The national court states that the award of that permanent residence permit is subject to the twofold condition of having resided for an uninterrupted period of five years in the Netherlands and of payment of a fee of EUR 201.

46. The national court takes the view that the fact that it is impossible for nationals of another Member State who are not in possession of such a residence permit to benefit from the ground for non-surrender laid down in Article 6(5) of the OLW affects their rights as citizens of the Union.

47. Having pointed out that, according to *Pupino*,[13] the national court is required to interpret its national legislation in accordance with the framework decision, within the limits of the principle of interpretation *contra legem*, the Rechtbank Amsterdam decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Should persons who are staying in or are residents of the executing Member State, as referred to in Article 4(6) of the framework decision, be taken to [include] persons who do not have the nationality of the executing Member State, but … have the nationality of another Member State and are lawfully resident in the executing Member State pursuant to Article 18(1) EC, regardless of the duration of that lawful residence?

(2) (a) If the answer to question 1 is negative, should the terms referred to in that question be interpreted as meaning that they concern persons who do not have the nationality of the executing Member State, but … have the nationality of another Member State and, prior to their arrest under a European arrest warrant, have been lawfully resident in the executing Member State pursuant to Article 18(1) EC for at least a certain period?

(b) If the answer to question 2a is affirmative, what requirements must lawful residence meet?

(3) If the answer to question 2a is affirmative, may the executing Member State lay down, in addition to a requirement concerning the duration of lawful residence, supplementary administrative requirements, such as possession of a residence permit of indefinite duration?

(4) Does a national measure specifying the conditions under which a European arrest warrant issued with a view to the enforcement of a custodial sentence is rejected by the [executing judicial authority] come within the (material) scope of the EC Treaty?

13 — Case C-105/03 [2005] ECR I-5285.

(5) Given that:

— Article 6(2) and (5) of the OLW lays down rules affording persons who do not have Netherlands nationality, but are in possession of a permanent Netherlands residence permit, equal treatment with Netherlands nationals

and

— those rules require refusal to surrender such classes of persons if the European Arrest Warrant concerns the enforcement of a final custodial sentence,

does Article 6(2) and (5) of the OLW result in discrimination prohibited by Article 12 EC, in that the aforementioned equal treatment does not apply equally to nationals of other Member States with a right of residence under Article 18(1) EC who will not forfeit that right of residence as a result of the imposition on them of an irreversible custodial sentence, but who are not in possession of a Netherlands residence permit of indefinite duration?'

IV — Analysis

48. The questions referred by the national court cover three issues, which I will examine in turn. They are concerned with ascertaining, first, the required period of residence of the requested person in the executing Member State in order for that person to be 'staying' or 'resident' in that State for the purposes of Article 4(6) of the framework decision, secondly, whether application of the ground for non-execution laid down in that provision may be made subject to administrative conditions, such as the possession of a residence permit of indefinite duration and, thirdly, whether the principle of non-discrimination laid down in Article 12 EC precludes legislation of a Member State under which the surrender of nationals of that State must always be refused while that of nationals of other Member States may be refused only if they are in possession of a residence permit of indefinite duration.

A — *The period of residence in the executing Member State*

49. By its first and second questions the national court essentially asks what is the required period of residence of the requested person in the executing Member State in order for that person to be regarded as staying or resident in that State for the purposes of Article 4(6) of the framework decision.

50. The answer to that question is, to my mind, quite readily inferred from *Kozłowski*. In that judgment, the Court ruled that a person is resident in the executing Member State when he has established his actual place of residence there and he is staying there when, following a stable period of presence in that Member State, he has acquired connections with that State which are of a similar degree to those resulting from residence.

51. The Court stated that, in order to determine whether, in a specific situation, a person has established such connections, an overall assessment should be made of various objective factors characterising the situation of that person, including, in particular, the length, nature and conditions of his presence in the executing Member State and the family and economic connections which that person has with it.

52. The Court came to that conclusion on the basis that the concepts of 'staying' and 'resident' are not defined in the framework decision and that they must be defined uniformly within the Union and not broadly, regard being had to the objectives pursued through Article 4(6) of the framework decision, including, in particular, that of increasing the requested person's chances of reintegrating.

53. For the purposes of this case, it is therefore possible to draw the following conclusions from those considerations.

54. First, the period of residence of the requested person in the executing Member State is one of the factors which must be taken into consideration in order to determine whether that person has sufficient connections with that State. That analysis applies both to the concept of 'resident' and that of 'staying', as shown by the definition of the latter concept, according to which a person is staying in the executing Member State where, following a stable period of presence in that State, he has acquired connections with it which are of a similar degree to those resulting from residence.

55. Secondly, that residence must be for a 'period', [14] that is to say a significant period to demonstrate that, having regard to the requested person's overall situation, he has a genuine connection with the executing Member State.

56. It follows that a person cannot be regarded as staying or resident in the executing Member State, for the purposes of Article 4(6) of the framework decision, irrespective of the period of his residence in that State. Indeed, in the same way that it is not sufficient for the requested person to be temporarily located on the territory of the executing Member State in order to be regarded as staying there, [15] it is not sufficient that he has had his actual or principal residence there for only a very short period of time without yet having other connections with that State, such as a professional activity or the presence of family members.

57. However, it is also clear from the term 'period' used in *Kozłowski* that nor is it necessary for the requested person to have resided in that State for a specific uninterrupted period, five years for example, as is required by Article 16 of Directive 2004/38/EC of the European Parliament and of the Council [16] in order to qualify for a right of permanent residence. As the concepts of 'resident' and of 'staying' must be interpreted uniformly within the Union, a Member State cannot require a mandatory period of lawful residence. Netherlands law, in so far as it effectively makes the non-surrender of a national of another Member State subject to the condition that that national must have been staying in the Netherlands for an uninterrupted period of five years, is, in my view, contrary to the framework decision.

58. The question whether the requested person's period of residence in the executing Member State is sufficient for him to benefit from the ground for non-execution laid down in Article 4(6) of the framework decision therefore forms part of a specific assessment of that period which takes into consideration all the other relevant objective factors which characterise that person's situation.

59. More specifically, the Court set out the method of analysis to be followed by the executing judicial authority in order to determine whether that ground for non-execution must apply. That authority must, initially, ascertain only whether the requested person is a national of that State, is resident there or staying there, and then, if that is the

14 — *Kozłowski*, paragraph 46.

15 — Ibid., paragraph 36.

16 — Directive of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

case, assess whether there is a legitimate interest which would justify the sentence imposed in the issuing Member State being executed on the territory of the executing Member State. [17] From that perspective, reintegration of the requested person constitutes only one of those legitimate interests.

60. I am not convinced by that interpretation of Article 4(6) of the framework decision.

61. First, I cannot see, in the light of the conditions laid down in that article and the scheme of the framework decision, what other legitimate interest could be pursued through that provision. Furthermore, it should be pointed out that Article 4(6) of the framework decision provides for an exception to the principle of surrender laid down in Article 1(2) thereof, with the result that it cannot be interpreted broadly, as the Court pointed out with regard to the concept of 'staying'. [18]

62. Secondly, that method of analysis for the purpose of implementing Article 4(6) of the framework decision does not appear to comply with the method of interpreting a concept referred to in a Community act, according to which, where that concept is not defined in that act and that act does not refer to the law of Member States, the concept must be defined having regard to its context and the objective it pursues. [19] Indeed, it is in the light of the objective pursued by the Community provision at issue that the concepts which determine its application must be assessed in each individual case.

63. I therefore take the view that in each specific situation, the executing judicial authority, in order to determine whether the requested person is 'staying' or 'resident' in the executing Member State for the purposes of Article 4(6) of the framework decision, must examine whether that person has connections with that State which appear to make execution of the sentence in that State necessary in order to facilitate his reintegration. It is in the light of that objective that the meaning of those concepts was defined by the Court in *Kozłowski* and must be assessed in each specific case.

64. The place where a person who must serve a custodial sentence or detention is staying or residing is relevant to his reintegration, because the purpose of that reintegration is to enable that person to regain his place in society, that is to say in the family, social and professional environment in which he lived before execution of his sentence and to which he is likely to return when his sentence has been served.

17 — *Kozłowski*, paragraph 44.
18 — Ibid., paragraph 36.
19 — Ibid., paragraph 42.

65. Accordingly, in their recommendations on prison rules, [20] the Member States of the Council of Europe expressed the desire that imprisonment should be organised, as far as possible, under conditions which enable a detainee to maintain and strengthen ties with his family. Imprisonment must also give that detainee the impression that he is not excluded from society. Lastly, detention must help the person concerned to obtain or return to employment when he has served the sentence, by means of a pre-release regime arranged within the penal establishment or by means of conditional release under supervision. [21]

66. The implementation of those recommendations therefore requires that execution of the custodial sentence or detention order should disrupt the detainee's connections with his family and his social and professional environment as little as possible.

67. It is in the light of those considerations that the executing judicial authority must assess, in any specific situation, whether the requested person is 'staying' or 'resident' in the executing Member State for the purposes of Article 4(6) of the framework decision.

68. It follows that that person may, in my view, be regarded as resident in the executing Member State for the purposes of Article 4(6) of the framework decision, although he has been staying there for only a short period of time, if he nevertheless has other sufficiently strong connections with that State, such as having his principal residence, living with his family and exercising a professional or trade activity in that State.

69. As regards Mr Wolzenburg's situation, I take the view that he may be regarded as resident in the Netherlands for the purposes of Article 4(6) of the framework decision, since, at the time when the Netherlands authorities received the European arrest warrant relating to him, he had established his principal residence in that State for just over a year, he lived there with his wife and he was exercising a professional or trade activity in the Netherlands.

70. In the light of the foregoing, I propose that the answer should be that the period of residence in the executing Member State of a requested person under a European arrest warrant, for the purpose of determining whether the requested person is staying or resident in that State within the meaning of Article 4(6) of the framework decision, must be sufficient to establish that, in the light of the other objective factors which characterise that

20 — See, in particular Recommendaiton No R (87) 3 of the Committee of Ministers to Member States on the European Prison Rules, adopted on 12 February 1987 and replaced by Recommendation Rec(2006)2, adopted on 11 January 2006. See, also, the Convention of the Council of Europe on the Transfer of Sentenced Persons of 21 March 1983. The socialising function is also referred to in the European Parliament Resolution on respect for human rights in the European Union (1997) (OJ 1999 C 98, p. 279), in which that institution recalled that prison sentences were intended both to be corrective measures and to have a social rehabilitation function, and that, in this sense, what was sought was the human and social reintegration of the prisoner (paragraph 78).

21 — Recommendations No R(87)3 (paragraphs 65(c), 70.1 and 88) and Rec(2006)2 (paragraphs 24, 103 and 107).

person's specific situation, he has connections with that State which give grounds for concluding that execution of his prison sentence in the executing Member State is likely to facilitate his reintegration.

B — *Whether it is possible to make application of the ground for non-execution set out in Article 4(6) of the framework decision subject to supplementary administrative requirements, such as the possession of a residence permit of indefinite duration*

71. By its third question, the national court asks, in essence, whether Article 4(6) of the framework decision must be interpreted as meaning that application of the ground for non-execution provided for in that provision may be made subject to supplementary administrative conditions, such as the possession of a residence permit of indefinite duration.

72. *Kozłowski* already provides guidance on the answer to be given to that question. In that judgment, the Court ruled on whether a requested person may be regarded as 'staying' or 'resident' in the executing Member State where his stay there does not comply with the national legislation on the entry and residence of foreign nationals. The Oberlandesgericht Stuttgart asked that question because Mr Kozłowski, more than three months after his entry into Germany, was not carrying on any activity there and earned his living essentially by committing crimes. [22]

73. According to the Court, that circumstance does not in itself prevent a requested person from being regarded as staying in the executing Member State, but it may be a relevant factor in assessing whether that condition is met.

74. It follows from those factors that, in order to answer the question under consideration and as the national court itself points out, it is necessary to start from the fact that a national of another Member State derives his right of residence in the executing Member State from Article 18 EC or, where appropriate, from the exercise of an economic activity pursuant to a freedom of movement provided for by the EC Treaty, and that that right may be called into question by that State only under conditions which are consistent with Community law.

75. Thus, according to Article 17(1) EC, every person holding the nationality of a Member State is a citizen of the Union and, under Article 18(1) EC, every citizen of the Union is to have the right to move and reside freely within the territory of the Member States,

22 — It should be recalled that, under Article 7(1)(b) of Directive 2004/38, a Member State is entitled to make the residence of Union citizens on its territory for a period of longer than three months subject to the condition that those citizens have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State.

subject to the limitations and conditions laid down by the EC Treaty and the measures adopted to give it effect. It is also common ground that status as a citizen of the Union is the basic status of every national of a Member State and that the right of such a national, guaranteed by the EC Treaty, to carry on an economic activity in the Member State of his choosing, in a self-employed capacity or as an employed person, entails the corollary right of residence in that State.

76. As the national court itself points out, that right of residence is not made subject to administrative conditions such as the possession of a residence permit of indefinite duration. Such a condition is included in neither the conditions laid down in the EC Treaty nor those contained in Directive 2004/38, unlike the requirement concerning the availability of sufficient resources for a period of residence longer than three months and the obligation not to represent a threat to the host Member State's public policy and public security, which were at issue in *Kozłowski*.

77. Similarly, nor is the possession of a residence permit of indefinite duration included among the conditions for application of the ground for non-execution provided for in Article 4(6) of the framework decision.

78. It follows that failure to possess a residence permit of indefinite duration cannot preclude application of that ground for non-execution, nor even constitute a relevant factor which may be taken into consideration when that ground is applied.

79. In the light of those considerations, I propose that the answer to the third question should be that Article 4(6) of the framework decision must be interpreted as meaning that application of the ground for non-execution provided for in that provision cannot be made subject to supplementary administrative conditions, such as possession of a residence permit of indefinite duration.

80. For the sake of completeness, I would point out that Netherlands law also makes application of that ground for non-execution subject to two further conditions. It must also, first, be possible to prosecute the requested person in the Netherlands for the acts on which the European arrest warrant is based and, secondly, be foreseeable that he will not forfeit his right of residence in the Netherlands as a result of any sentence or detention order imposed on him after his surrender.

81. The national court did not ask the Court whether such conditions were compatible with the framework decision, since it found that they were fulfilled in this case. Nevertheless, I would point out that the first of those conditions, according to which it must be possible to prosecute the requested person in the Netherlands for the acts which led to the sentence on which the European arrest

warrant is based, is, in my view, not compatible with the framework decision.

82. First, the only conditions for application laid down by Article 4(6) of that framework decision are, first, that the requested person is a national of the executing Member State, is staying there or is a resident there and, secondly, that that State undertakes to execute the sentence or detention order in accordance with its domestic law. Moreover, the Court, as we have seen, held that the concepts of 'staying' and 'resident' must be interpreted uniformly in all the Member States. I consider it to follow from that analysis of the concepts determining application of the ground for non-execution provided for in Article 4(6) of the framework decision that a Member State cannot make it subject to a supplementary condition not provided for in that provision.

83. Secondly, the supplementary condition at issue cannot be justified by the objective pursued through Article 4(6) of the framework decision, relating to the reintegration of the requested person. There is, in principle, no link between the place where an offence is committed and the place where a person's interests are centred and where his detention therefore has the greatest chance of facilitating his reintegration.

84. As regards the second condition, namely that the requested person must not lose his right to reside in the executing Member State, it seems to be consistent with the framework decision inasmuch as the objective of reintegration pursued through Article 4(6) implicitly presupposes that the requested person may continue to reside in that State and inasmuch as a Union citizen's right of residence in a Member State of which he is not a national is not unconditional.

85. I would simply point out that if, following the commission of an offence in a Member State, it is possible to deprive a citizen of the Union of his right to reside in that State, deprivation of that right may be the consequence only of an expulsion decision adopted in accordance with the very restrictive conditions provided for in Articles 27 to 33 of Directive 2004/38.

86. Such a decision may therefore be taken only in exceptional circumstances, namely where the conduct of the individual concerned represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Furthermore, before taking an expulsion decision on grounds of public policy or public security, the host Member State must take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into that State and the extent of his/her links with the country of origin.

C — *Intermediate conclusion*

87. In the light of the foregoing considerations, it should be possible for a requested person in the situation of Mr Wolzenburg to be regarded as staying or resident in the Netherlands for the purpose of Article 4(6) of the framework decision and accordingly for him to benefit from the ground for non-execution provided for in that provision.

88. As is clear from *Pupino* and as the national court pointed out, it is for the national courts, in accordance with the principle of 'conforming interpretation', to interpret their domestic law as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues. [23] However, that obligation ceases where domestic law cannot be interpreted in a way which is compatible with the framework decision, since the principle of conforming interpretation cannot serve as the basis for an interpretation *contra legem*. [24]

89. However, in *Pfeiffer and Others*, [25] the Court set out the extent to which that obstacle could be overcome as a result of the principle of equivalence. According to the Court, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive concerned. [26] That interpretation of the scope of the principle of conforming interpretation may be applied in the case of a framework decision.

90. In this case, the national court did not state whether and to what extent the interpretative methods recognised by its national law enable it to resolve the conflict between Article 6 of the OLW and Article 4(6) of the framework decision, so as to allow a person in Mr Wolzenburg's situation to be the subject of a non-surrender decision and to serve his sentence in the Netherlands.

91. It has not stated how the fourth and fifth questions, seeking to ascertain whether the national legislation at issue is contrary to the principle of non-discrimination set out in Article 12 EC, are relevant in that regard. Nevertheless, it is conceivable that, because of the interpretative methods in its national law, the possibility of the national court achieving the result sought by the framework decision depends on the answer to that question. Accordingly, the fourth and fifth questions, the admissibility of which is not in dispute, cannot be regarded as manifestly irrelevant to

23 — *Pupino*, paragraph 43.
24 — Ibid., paragraph 47.
25 — Joined Cases C-397/01 to C-403/01 [2004] ECR I-8835.
26 — Paragraph 116.

the resolution of the main proceedings, with the result that I propose that the Court should examine them.

D — *Whether the rules at issue are compatible with the principle of non-discrimination*

92. By its fourth and fifth questions, the national court seeks to ascertain whether its national legislation is compatible with Article 12 EC, which prohibits any discrimination on grounds of nationality within the scope of application of the EC Treaty.

93. It therefore asks, in essence, whether Article 12 EC, read in conjunction with Article 4(6) of the framework decision, precludes legislation of a Member State which provides that the surrender of its own nationals in execution of a European arrest warrant must be refused, while the surrender of nationals of other Member States who are staying or resident in the executing Member State within the meaning of that provision of the framework decision may be refused only if they are in possession of a residence permit of indefinite duration.

94. Several Member States which intervened in this case ask the Court to answer that question in the negative for various reasons which may be summarised as follows.

95. First, according to the Danish, German and Austrian Governments, Article 4 of the framework decision confers on the Member States the right to decide that surrender may be refused in the cases provided for in that provision, but those States are not required to transpose those cases into national law. They thus enjoy a broad margin of discretion when they decide to implement the ground for non-execution provided for in Article 4(6), with the result that they are entitled to make its application as regards their own nationals and those of the other Member States subject to different conditions.

96. Secondly, the Netherlands Government takes the view that such legislation cannot be assessed in the light of Article 12 EC because it falls not within the EC Treaty, but within the field of police and judicial cooperation in criminal matters. Moreover, Mr Wolzenburg's circumstances are not covered by the EC Treaty, since he was arrested on 1 August 2006 on the basis of an alert in the context of the Schengen Information System for the purposes of execution of a custodial sentence.

97. Thirdly, a Member State is entitled to prohibit the surrender of its own nationals. According to the Austrian Government, that

prohibition complies with Articles 4(6) and 5(3) of the framework decision, which entail an irrebuttable presumption that there is a close relationship between the nationals of the executing Member State and that State.

98. Furthermore, the prohibition of extradition by a State of its own nationals is set out in Article 3 of Protocol No 4. [27] It is also a fundamental principle applied in other measures adopted under Title VI of the EU Treaty, relating to police and judicial cooperation in criminal matters. [28]

99. Similarly, in several judgments, the Court has accepted that a Member State may take different measures as regards its nationals and those of the other Member States, provided that that difference in treatment is objectively justified. [29] National legislation under which, as in this case, the surrender of nationals of the Member State in question is refused and that refusal is extended only to the nationals of other Member States who are in possession of a residence permit of indefinite duration is objectively justified, since those two categories of Union citizens have a closer link with the executing Member State.

100. Moreover, by adopting Article 5(3) of the framework decision, the Union legislature decided that citizens of the Union who are resident in the executing Member State must not be treated in the same way as those who stay in that State without being resident there.

1. The Member States' option not to transpose Article 4(6) of the framework decision and their margin of discretion in the case of transposition

101. For the following two reasons, I consider that the different treatment provided for by the national legislation at issue is not justified by the margin of discretion available to the Member States in transposing Article 4(6) of the framework decision.

102. In my view, the implementation in domestic law of the ground for non-execution provided for in Article 4(6) of the framework decision is not left to the discretion of the Member States, but is obligatory. In the

27 — Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, of 16 September 1963, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, as amended by Protocol No 11 ('Protocol No 4').

28 — The Danish Government refers, in particular, to Article 5 of Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 1).

29 — The Danish Government cites Case C-29/95 *Pastoors and Trans-Cap* [1997] ECR I-285 and Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257.

alternative, even if that transposition is not obligatory, a Member State cannot adopt a measure which discriminates on grounds of nationality.

103. On the first point, as the Court held in *Kozłowski* the objective of the ground for non-execution provided for in Article 4(6) of the framework decision is to facilitate the reintegration of the sentenced person. In so far as that person, if he is a citizen of the Union, has the right to move and reside throughout the territory of the Member States, the success of his reintegration is the concern not only of the executing Member State, but also of all the other Member States and the persons who live there.

104. The same applies to the nationals of non-member countries. Those nationals, because of the removal of internal border controls in the Schengen Area, may move freely within that area. They may also move and reside throughout the Union as family members of a national of a Member State.

105. It follows that the opening of borders has made the Member States jointly responsible for combating crime. That is actually why it became necessary to create a European criminal law-enforcement area, in order that the freedoms of movement are not exercised to the detriment of public security.

106. Accordingly, the transposition of Article 4(6) of the framework decision into the law of each Member State is, to my mind, required in order that application of the European arrest warrant does not adversely affect the reintegration of the sentenced person and, consequently, the legitimate interest of all the Member States in preventing crime, which the ground for non-execution set out in that provision seeks to safeguard.

107. That is why I, like the Commission, take the view that the opening words of Article 4(6) of the framework decision, that is to say '[t]he executing judicial authority may refuse to execute the European arrest warrant', must be construed as meaning that it must be possible under domestic law for the executing judicial authority to oppose surrender where the conditions set out in that provision are fulfilled. That analysis is confirmed, in my view, by Council Framework Decision 2008/909/JHA,[30] which seeks to facilitate the execution of custodial sentences in the State in which such execution is likely to increase the requested person's chances of reintegration.

30 — Framework Decision of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ 2008 L 327, p. 27).

108. On the second point, even if the Member States are free to choose whether or not to transpose Article 4(6) of the framework decision, if they do, they cannot disregard the principle of non-discrimination.

2. Application of the principle of non-discrimination

109. It is true that the framework decision was adopted on the basis of the EU Treaty and not on the basis of the EC Treaty. It is also true that nationality law still falls within the sovereign powers of the Member States and that it is not the objective of Community law to abolish all differences of treatment in the law of a Member State between the nationals of that State and other citizens of the Union. The duties and rights which reciprocally link a Member State to each of its nationals are not intended to be systematically applied to every national of the other Member States. [31]

110. However, it cannot be inferred from that premiss that provisions adopted by a Member State in order to implement a measure under the EU Treaty are not subject to any judicial review of their legality in the light of the principle of non-discrimination.

111. After all, on the one hand, it is clear from the case-law that persons who have exercised a freedom of movement guaranteed by the EC Treaty are entitled to rely on Article 12 EC. The exercise of a freedom of movement constitutes the connecting factor to Community law required for application of that article. [32] It is therefore possible to examine whether a Member State's legislation is compatible with that article where the legislation in question applies to a person who has exercised a freedom of movement, even if that legislation concerns a reserved area of competence. [33]

112. Thus, in *Cowan* the Court held that a British national, attacked in France during a tourist visit, was entitled to rely on the principle of non-discrimination as against the French law on compensation for victims of an offence, even though the latter was a rule of criminal procedure in domestic law. Similarly, in *Garcia Avello* it was held that Spanish children lawfully resident in Belgium as citizens of the Union could rely on the same principle as against Belgian rules governing their surname.

113. Those judgments form part of the settled case-law according to which, in exercising its reserved competences, a

31 — The particular link between each Member State and its own nationals has also been referred to in Article 17(1) EC, according to which citizenship of the Union is to complement and not replace national citizenship.

32 — See, inter alia, Case 186/87 *Cowan* [1989] ECR 195, paragraph 19, and Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 29. See, by contrary inference, Case C-427/06 *Bartsch* [2008] ECR I-7245, paragraph 25.

33 — See, with regard to the rules of criminal procedure, *Cowan* and, as regards the rules governing a person's surname, *Garcia Avello*.

Member State cannot undermine the rules of the EC Treaty, [34] including the prohibition of any discrimination on grounds of nationality set out in Article 12 EC. That case-law should apply, a fortiori, where a Member State implements a legal measure of the Union, such as a framework decision, as is confirmed by Article 47 EU, pursuant to which nothing in the EU Treaty is to affect the rules of the EC Treaty.

114. It follows that Mr Wolzenburg, who is in the Netherlands following the exercise of the freedoms of movement conferred by the EC Treaty, as a citizen of the Union or an economic operator, is entitled to rely on Article 12 EC as against the Netherlands legislation determining the conditions under which he may benefit from the ground for non-execution provided for in Article 4(6) of the framework decision.

115. On the other hand, a Member State cannot, in the context of implementing a framework decision, undermine the principle of non-discrimination as a fundamental principle enshrined, inter alia, in Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 ('the ECHR'), and in Article 21 of the Charter of Fundamental Rights of the European Union, proclaimed at Nice on 7 December 2000. [35]

116. Indeed, the Court has consistently held that the Member States, when they implement Union law, are required to respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law. [36]

117. The conditions under which a Member State implements the ground for non-execution provided for in Article 4(6) of the framework decision therefore cannot escape judicial review as to their compatibility with the principle of non-discrimination.

3. Whether any discrimination exists

118. It is common ground that the Netherlands legislation at issue establishes a differ-

34 — See, in particular, in matters of direct taxation, Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 40, and, in matters of public security, Case C-285/98 *Kreil* [2000] ECR I-69, paragraphs 15 and 16.

35 — OJ 2000 C 364, p. 1. It should be recalled that Article 21(2) of that charter provides that '[w]ithin the scope of application of the [EC] Treaty ... and of the [EU] Treaty ..., and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited'.

36 — Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 45 and case-law cited.

ence in treatment on grounds of nationality. Indeed, as the Commission points out, while Netherlands nationals necessarily and unconditionally benefit from the ground for non-execution, other Member States' nationals who are staying or resident in the Netherlands, within the meaning of Article 4(6) of the framework decision, are covered by that ground only if they meet supplementary administrative conditions.

119. According to the case-law, the principle of non-discrimination requires that comparable situations must not be treated differently unless such treatment is objectively justified. [37] The difference in treatment at issue must also be necessary and proportionate to the aim pursued. [38]

120. Several Member States have argued that they are entitled as a matter of course to exclude the surrender of their nationals and that, to that extent, the situation of the latter and that of the nationals of other Member States in the context of implementation of Article 4(6) of the framework decision are not comparable. I do not agree with that analysis for the following reasons.

121. First, I do not believe that the absolute impossibility of surrendering nationals of the executing Member State is compatible with the framework decision.

122. On the one hand, I would point out that status as a national of the executing Member State is referred to in Article 4(6) of the framework decision in the same way as the status of 'staying' or of 'residing' in that State, which may result in a non-surrender decision only following an assessment of the requested person's particular situation, carried out on a case-by-case basis by the executing judicial authority.

123. On the other hand, the ground for non-execution set out in Article 4(6) of the framework decision has the objective of increasing the requested person's chances of reintegration. By referring to status as a national of the executing Member State in that provision, the Union legislature has presumed that that status constitutes a presumption that there are connections between the requested person and the executing Member State, which lead to the conclusion that serving the sentence in that State was likely to assist such reintegration.

124. However, I do not consider that a Member State may regard that presumption as irrebuttable. Evidence of that is to be found in the very wide range of human situations facing a Member State's judicial authorities every day. For example, it is possible to

37 — Ibid., paragraph 56 and case-law cited.
38 — *Pastoors and Trans-Cap*, paragraph 26.

imagine the case of a Netherlands national living for many years in a Member State other than the Kingdom of the Netherlands, in which he has a family and employment, and which he left solely to avoid execution of a sentence delivered against him in the first State. In such a situation, it is, in my view, possible to establish an irrebuttable presumption that reintegration of the person concerned will necessarily be better ensured by execution of the sentence in the Netherlands.

125. That is why I take the view that the objective of reintegration, pursued through Article 4(6) of the framework decision, cannot be achieved without making the arrangements for executing the sentence specific to the individual concerned, which presupposes that the court is able to exercise its jurisdiction to the full and has completely unfettered discretion. That objective cannot, to my mind, justify a Member State's depriving the competent judicial authority of all discretion where a European arrest warrant relates to a national of the State in question. The judicial authority should therefore be able to grant a surrender application where, as in the aforementioned example, the person concerned has no other connections with the executing Member State apart from nationality of it.

126. Secondly, it would seem to me that the absolute impossibility of surrendering the nationals of the executing Member State is not compatible with the structure and objectives of the framework decision.

127. The non-extradition, by a State, of its nationals constitutes a traditional principle of extradition law. It is recognised by the European Convention on Extradition, signed by the Member States of the Council of Europe at Paris on 13 December 1957, which provides, in Article 6(1)(a), that a Contracting Party has the right to refuse extradition of its nationals.

128. The origins of the principle of non-extradition of a State's own nationals lie in the sovereignty of States over their nationals, in the reciprocal obligations which link them and in the lack of confidence in other States' legal systems. Accordingly, the grounds which are relied on as justification for that principle include, inter alia, the duty of the State to protect its nationals from the application of a foreign penal system, with whose procedure and language they are unfamiliar and in the context of which they may have difficulty defending themselves. [39]

129. The framework decision clearly signals the abandonment of that principle as between the Member States. The framework decision has the express objective, as is clear from its recitals and articles, in particular from Article 31, of abolishing, between the Member States, the extradition procedure and of replacing it with a system of surrender, in the context of which the executing judicial

39 — Deen-Racsmány, Z., and Blekxtoon, R., 'The Decline of the Nationality Exception in European Extradition?', *European Journal of Crime, Criminal Law and Criminal Justice,* vol. 13/3, p. 317 to 363, Koninklijke Brill NV, Netherlands, 2005.

authority can oppose that surrender only by means of a reasoned decision on one of the special grounds for non-execution exhaustively listed in Articles 3 and 4 of the framework decision.

130. The framework decision is founded on the principle of mutual recognition. The European arrest warrant, as stated in the sixth recital in the preamble to that framework decision, is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council, which was held at Tampere on 15 and 16 October 1999, referred to as the 'cornerstone' of judicial cooperation.

131. Under that principle, where a decision is taken by a judicial authority in accordance with the law of the Member State concerned, that decision has full and direct effect throughout the Union, with the result that the competent authorities of any other Member State must provide their assistance in executing it as if it originated from a judicial authority of their own State. [40] The scope of a judicial decision is therefore no longer limited to the territory of the issuing Member State, but now extends throughout the Union.

132. It follows that, where the judicial authority of a Member State requests the surrender of a person, either pursuant to a final sentence, or because that person is the subject of criminal proceedings, its decision must be recognised and executed automatically, in all the Member States, and there are no possible grounds for non-execution other than those provided for by the framework decision. In other words, by agreeing to create the European judicial area and, in particular, the system of the European arrest warrant on the basis of the principle of mutual recognition, the Member States have surrendered their sovereign power to shield their own nationals from the investigations and penalties of other Member States' judicial authorities.

133. That surrender was made possible because, as is stated in the 10th recital in the preamble to the framework decision, '[t]he mechanism of the European arrest warrant is based on a high level of confidence between Member States'.

134. That confidence is first expressed in the Member States' surrender of their right to bring criminal proceedings, contained in the *ne bis in idem* principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement, [41] pursuant to

40 — See, in that regard, Communication from the Commission to the Council and the European Parliament of 26 July 2000 on the mutual recognition of final decisions in criminal matters (COM(2000) 495 final, in particular p. 8).

41 — Convention of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19), signed at Schengen on 19 June 1990.

which a person whose trial has been finally disposed of in one Member State cannot be the subject of new criminal proceedings for the same acts in another Member State.

135. As the Court pointed out in *Gözütok and Brügge*, [42] that principle necessarily implies that, regardless of the way in which the penalty is imposed, the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied. [43]

136. That confidence stems from several factors. First, all the Member States demonstrated, when establishing the European Communities or acceding thereto, that they were States based on the rule of law, which observe fundamental rights, as provided for by the ECHR and, since 7 December 2000, by the Charter of Fundamental Rights of the European Union. Moreover, quite apart from the ratification of that convention and the proclamation of that charter, all the Member States share a sophisticated concept of the State based on the rule of law, as the Commission pointed out in point 1 of the reasons for its proposal for a framework decision. [44]

42 — Joined Cases C-187/01 and C-385/01 [2003] ECR I-1345.

43 — Paragraph 33.

44 — Proposal for a Council Framework Decision of 25 September 2001 on the European arrest warrant and the surrender procedures between the Member States (COM(2001) 522 final).

137. In spite of the absence, to date, of extensive harmonisation of substantive and procedural criminal law within the Union, the Member States have thus been able to convince one another that the conditions under which their nationals are prosecuted and tried in the other Member States observe the rights of those nationals and will allow the latter properly to defend themselves, notwithstanding any language difficulties and lack of procedural familiarity.

138. Secondly, the confidence which each Member State and its nationals must have in the justice systems of the other Member States seems to be a logical and inevitable outcome of creating the single market and European citizenship.

139. After all, each Member State is obliged, in accordance with the freedoms of movement established by the EC Treaty, to allow the nationals of the other Member States to carry on in their territory an economic activity, in a self-employed capacity or as an employed person, under the same conditions as its own nationals.

140. A further step was accomplished with the creation of Union citizenship, since each Member State is also required to receive within its territory the nationals of other Member States who wish to reside there, if those nationals have, at least during the first five years, sufficient resources and social security cover. It must also allow them to

participate in local and European Parliament elections. Finally, it must extend the protection of its diplomatic or consular services to each citizen of the Union who is in a third country, if the protection afforded by the Member State of which the person concerned is a national is lacking.

141. Creation of the single market and Union citizenship have therefore progressively required the Member States to treat the nationals of the other Member States in the same way as their own nationals in an increasingly wider sphere of economic, social and political life. They also enable every citizen to go to live or work in the Member State of his choosing within the Union, like any other national of that State.

142. It therefore seemed an opportune moment to supplement that legal creation with equal treatment before the courts. In other words, since a Union citizen now has, in every Member State, largely the same rights as those of that State's nationals, it is fair that he should also be subject to the same obligations in criminal matters. That means that, if he commits an offence in the host Member State, he should be prosecuted and tried there before the courts of that State, in the same way as nationals of the State in question, and that he should serve his sentence there, unless its execution in his own State is likely to increase his chances of reintegration.

143. Abandonment of the principle of non-extradition of a State's own nationals in the framework decision is also confirmed, if necessary, by the transitional provisions provided for in Article 33 of the framework decision for the benefit of the Republic of Austria, authorising that Member State to retain that principle for the time necessary to amend its constitution and, at the latest, until 31 December 2008.

144. It is true that Article 5 of Framework Decision 2002/946 adopted after the framework decision, expressly refers to the case in which a Member State, under its national law, 'does not extradite its own nationals' and provides that, in that case, a person suspected of having committed the offence referred to by that measure in another Member State must be prosecuted in the Member State of which he is a national, in accordance with the system provided for in Article 6 of the European Convention on Extradition of 13 December 1957. However, those provisions, laid down in a measure whose objective is to improve the prevention of a specific offence, must not determine how the framework decision is to be interpreted.

145. Finally, I do not consider the surrender by a Member State of one of its nationals in execution of a European arrest warrant to be contrary to fundamental rights and, in particular, to Article 3(1) of Protocol No 4, pursuant to which no one is to be expelled from the territory of the State of which he is a national.

146. On the one hand, surrender to the judicial authorities of another Member State cannot be regarded as expulsion within the meaning of that provision.

147. On the other hand, abandonment of the principle of non-extradition of a State's own nationals, established by the framework decision, does not deprive the executing judicial authorities of all means of protecting the person concerned if, in extraordinary circumstances, an application for surrender is liable to infringe his fundamental rights.

148. Accordingly, although it is true that the validity of the framework decision, like that of all secondary legislation, depends on whether it is compatible with fundamental rights [45] and that the Member States are also required to observe those rights when implementing it, as is the case with any other measure of Community law, the Council of the European Union took care to specify, in Article 1(3) of the framework decision, that the surrender obligation imposed thereby must in no way infringe the fundamental rights and principles enshrined in Article 6 EU.

149. The executing judicial authority therefore could, in a particular case and as an exception, refuse to execute a European arrest warrant when, as is stated in the 12th recital in the preamble to the framework decision, there were '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'.

150. Moreover, it is necessary to recall that, if a Member State adopts substantive or procedural criminal provisions which infringe the principles enshrined in Article 6 EU, the Council may suspend implementation of the framework decision pursuant to Article 7 EU, as stated in the 10th recital in the preamble to the framework decision.

151. The affirmation of those various safeguards in the framework decision, which in itself creates no rights since those safeguards already form an integral part of the Community legal order, shows the extent to which the Union legislature desired that the innovations contained in that framework decision in relation to the traditional extradition system, such as abandonment of the principle of non-extradition of a State's own nationals, should not entail a reduction in the protection of fundamental rights.

45 — Furthermore, the compatibility of the framework decision with the principles set out in Article 6 EU, as regards abolition of the double criminality condition for the 32 offences referred to in Article 2 of that framework decision, was confirmed by the Court in a reference for a preliminary ruling concerning an assessment as to validity in *Advocaten voor de Wereld*.

152. Accordingly, the Member States cannot, without undermining the effectiveness of the framework decision, take decisions in their domestic law which, in one way or another, would have the effect of reintroducing an automatic exception in favour of their nationals.

153. In any event, even if it were possible to interpret Article 4(6) of the framework decision as meaning that a Member State is entitled automatically to exclude the surrender of its nationals, such an interpretation would not justify the difference in treatment contained in the Netherlands provision at issue.

154. Under Article 4(6) of the framework decision, a national of another Member State who is staying or resident in the executing Member State, within the meaning of that provision, is to be treated in the same way as a national of that State in so far as he must be able to benefit from a non-surrender decision and therefore from the possibility of serving his sentence in that State.

155. The effect of excluding such a national from the scope of that provision is that a requested person must serve his sentence in the issuing Member State, regardless of the duration of that sentence and the distance between the executing Member State and the issuing Member State.

156. Such a solution could therefore make it impossible in practice or very difficult for the sentenced person and his relatives to maintain contact, through visits at the place of detention, and for that person to carry on a professional or trade activity, in the context, for example, of an arrangement for executing the sentence on a semi-custodial basis.

157. Such a difference in treatment is manifestly disproportionate in the light of any difference there may be between the situation of the nationals of the executing Member State and that of those of the other Member States staying or resident in the first State, within the meaning of Article 4(6) of the framework decision, if that provision is interpreted in accordance with the Netherlands Government's position.

158. Accordingly, the Netherlands legislation at issue is, in my view, contrary to the principle of non-discrimination.

159. It is in the light of those considerations that I propose that the Court should rule that Article 12 EC, read in conjunction with Article 4(6) of the framework decision, precludes legislation of a Member State which provides that the surrender of its own nationals in execution of a European arrest warrant must be refused, whereas the surrender of other Member States' nationals who are staying or resident in the executing

Member State, within the meaning of that provision of the framework decision, may be refused only if they are in possession of a residence permit of indefinite duration.

V — Conclusion

160. In the light of the foregoing considerations, I propose that the questions referred by the Rechtbank Amsterdam for a preliminary ruling should be answered as follows:

(1) The period of residence in the executing Member State of a requested person under a European arrest warrant, for the purpose of determining whether the requested person is staying or resident in that State within the meaning of Article 4(6) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, must be sufficient to establish that, in the light of the other objective factors which characterise that person's specific situation, he has connections with that State which give grounds for concluding that execution of his prison sentence in that State is likely to facilitate his reintegration.

(2) Article 4(6) of Framework Decision 2002/584 must be interpreted as meaning that application of the ground for non-execution provided for in that provision cannot be made subject to supplementary administrative conditions, such as possession of a residence permit of indefinite duration.

(3) Article 12 EC, read in conjunction with Article 4(6) of Framework Decision 2002/584, precludes legislation of a Member State which provides that the surrender of its own nationals in execution of a European arrest warrant must be refused, whereas the surrender of other Member States' nationals who are staying or resident in the executing Member State, within the meaning of that provision of Framework Decision 2002/584, may be refused only if they are in possession of a permanent residence permit of indefinite duration.