VIEW OF ADVOCATE GENERAL BOT

delivered on 28 April 2008 [1]

1. In the present case, the Court is asked to rule for the first time on the scope of Article 4(6) of Council Framework Decision 2002/584/JHA, [2] which provides for an optional ground for refusing to execute a European arrest warrant.

2. Under that provision, the judicial authority of the executing Member State ('the executing judicial authority') has the option not to execute a European arrest warrant issued for the purposes of the execution of a custodial sentence, where the requested person is a national of the executing Member State, or is staying in or is a resident of that State, on condition that the executing Member State undertakes to execute the sentence itself.

3. Pursuant to the declaration made by the Federal Republic of Germany in accordance with Article 35(2) EU, the Oberlandesgericht Stuttgart (Higher Regional Court, Stuttgart) (Germany) may seek a preliminary ruling from the Court of Justice on a question concerning the interpretation of an act adopted in the context of police and judicial cooperation in criminal matters, [3] such as the Framework Decision. The Oberlandesgericht wishes to know to what extent the ground for non-execution provided for in Article 4(6) of the Framework Decision can apply to a Polish national — Mr Kozłowski — who is the subject of an arrest warrant issued by the Republic of Poland for the purposes of the execution of a sentence of imprisonment and who is currently in custody in Germany where he is serving a prison sentence of three years and six months.

4. The referring court asks, more precisely, to what extent Mr Kozłowski can be regarded as staying in or being a resident of Germany in the light of the following circumstances: he has not lived there continuously; he is not living there in compliance with the national legislation governing the right of foreign nationals to enter and remain in the country; he has systematically committed crimes there; and, finally, he is in custody there.

5. The referring court also raises a question as to the implications of the fact that the person concerned has not consented to the execution of the European arrest warrant and that, under German law, a German national who objects to the execution of such an arrest warrant cannot be surrendered against his will to the judicial authorities of another Member State.

1 — Original language: French.

2 — Council 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 — Information concerning the date of entry into force of the Treaty of Amsterdam (OJ 1999 L 114, p. 56).

6. The Oberlandesgericht asked the Court to deal with this case under the urgent preliminary ruling procedure, provided for under Article 23a of the Statute of the Court and Article 104b of its Rules of Procedure, on the ground that Mr Kozłowski, whose prison sentence in Germany is due to end on 10 November 2009, is entitled to be released as from 10 September 2008.

7. The Court did not agree to that request on the ground that it arrived at the Court before 1 March 2008, the date of entry into force of the provisions concerning the urgent preliminary rulings procedure. On the other hand, it decided to deal with the case under the accelerated procedure, provided for in Article 104a of the Rules of Procedure.

8. Pursuant to the fifth paragraph of Article 104a of the Rules of Procedure, under the accelerated procedure the Court is to rule 'after hearing the Advocate General'. However, because the questions asked by the national court are new and because of their importance for the legal system of the Federal Republic of Germany, it appears to me necessary to present in writing the reasoning underlying the answers that I plan to propose to the Court.

9. In this View, I am going to propose that the Court should rule, first, that legislation of a Member State under which a national of that State may not be surrendered against his will to the judicial authorities of another Member State, in execution of a European arrest warrant issued for the purposes of the execution of a custodial sentence, is contrary to the Framework Decision. I shall go on to infer from this that such legislation cannot preclude the execution, by the competent German judicial authority, of the European arrest warrant issued by the Republic of Poland against Mr Kozłowski.

10. Secondly, I shall examine the meaning of the expressions 'staying in' and 'a resident of' as used in Article 4(6) of the Framework Decision. I shall propose to the Court that it should rule that a person is staying or residing in the executing Member State, within the meaning of that provision, if that is where the centre of his main interests lies, so that execution of the sentence in that Member State appears necessary in order to facilitate his reintegration. I shall state that, for the purposes of assessing whether that condition is satisfied, the executing judicial authority must examine all the facts relevant to the individual situation of the person concerned.

11. I shall then set out the reasons for which, in my opinion, the fact that the person who is the subject of the European arrest warrant ('the requested person') has interrupted his stay in the executing Member State and that he is in custody there do not constitute decisive or relevant criteria for the purposes of assessing whether he is staying in that State, or is a resident of that State, within the meaning of Article 4(6) of the Framework Decision.

12. I shall suggest, finally, that the fact that the person concerned is living in the executing Member State in breach of the legislation of that State governing the right of foreign nationals to enter and remain in the country and the fact that he systematically commits crimes there do not preclude him from having the status of a person who is staying in that State or who is a resident of that State, if that person is a citizen of the European Union, unless he has been the subject of an expulsion decision adopted in conformity with Community law.

I — The legal context

A — *The Framework Decision*

13. The aim of the Framework Decision is to abolish, as between the Member States, the formal extradition procedure provided for under the various Conventions to which those States are parties and to replace it with a system of surrender as between judicial authorities. [4] The Framework Decision is based on the principle of mutual recognition of judicial decisions in criminal matters, which constitutes the 'cornerstone' of judicial cooperation. [5] The European arrest warrant mechanism established by the Framework Decision is based on a 'high degree of confidence' between the Member States. [6]

14. 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.

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.'

15. Where a European arrest warrant is issued for the purposes of executing a custodial sentence or detention order, the sentence involved must, under Article 2 of the Framework Decision, be of at least four months' duration.

4 — First and fifth recitals in the preamble to the Framework Decision.

5 — Sixth recital in the preamble to the Framework Decision.

6 — Tenth recital in the preamble to the Framework Decision.

16. Article 2 of the Framework Decision also lists 32 offences, in respect of 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 if the facts in question are not punishable in the executing Member State. In the case of other offences, the executing Member State can make the surrender of the person requested conditional upon dual criminality.

17. Articles 3 and 4 of the Framework Decision lay down, respectively, the grounds for mandatory non-execution of the European arrest warrant and the grounds for optional non-execution. Article 4(6) of the Framework Decision states:

'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.'

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

19. The Framework Decision also sets out the rights of the requested person. Under Article 11 of the Framework Decision, that person must be informed by the executing judicial authority, for example, that he has the possibility of consenting to his surrender to the judicial authority of the issuing Member State ('the issuing judicial authority').

20. That consent must be given before the executing judicial authority, in such a way as to show that it has been given voluntarily, and the person concerned has the right to be assisted by legal counsel and, where appropriate, by an interpreter. Such consent is formally recorded and, in principle, may not be revoked. [7]

7 — Articles 11 and 13 of the Framework Decision.

21. Under Article 15 of the Framework Decision, the executing judicial authority is to decide, within the time-limits and in accordance with the conditions defined in the Framework Decision, whether the person is to be surrendered. Under that provision, if the executing judicial authority finds the information communicated by the issuing Member State insufficient, it may ask it to provide supplementary information as a matter of urgency.

22. Article 17 of the Framework Decision lays down the time-limits and procedures for the decision to execute the European arrest warrant. It provides:

'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.

…'

23. The requested person is to be surrendered as soon as possible to the issuing judicial authority and no later than 10 days after the final decision on the execution of the European arrest warrant. However, if the person concerned has already been sentenced for an act other than that referred to in the European arrest warrant, the executing judicial authority may postpone the surrender so that the person may serve his sentence in the executing Member State. [8]

B — *National law*

24. Article 4(6) of the Framework Decision has been transposed into German law by means of provisions which vary according to whether the person concerned is a German national or a foreign national.

25. The situation of German nationals is governed by 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. [9] That provision reads as follows:

8 — Articles 23 and 24 of the Framework Decision.

9 — BGBl. 2006 I, p. 1721 ('the IRG').

'The extradition of a German national for the purposes of execution of sentence is permitted only if the requested person consents (such being minuted by the judge) after being informed of his rights …'

26. The situation of foreign nationals, whether nationals of another Member State or of a third State, is governed by Paragraph 83b(2) of the IRG. This provides:

'Authorisation to extradite a foreign national who has his habitual residence in Germany may in addition be refused, if

…

(b) in the case of extradition for the purposes of execution of sentence, he does not consent to such extradition after being informed of his rights (such being minuted by the judge) and if he has an interest in execution of the sentence in Germany that deserves protection and predominates …'

27. The national court points out that those provisions, in so far as they favour German nationals and make no distinction with regard to foreign nationals between nationals of other Member States and those of third States, were adopted following a judgment of the Bundesverfassungsgericht (Federal Constitutional Court) (Germany) of 18 July 2005, declaring the earlier law to be unconstitutional on the ground that it infringed, in a disproportionate manner, the fundamental right of every German not to be extradited. [10]

28. At a procedural level, the referring court states that the decision to execute a European arrest warrant issued against a foreign national is taken, where the person does not consent to his surrender, by the Generalstaatsanwaltschaft [11] and that that decision is subject to review by the Oberlandesgericht.

II — The facts

29. A request for the surrender of Mr Kozłowski was submitted to the German judicial authorities pursuant to a European arrest warrant issued on 18 April 2007 by the

10 — Article 16(2) of the Basic Law of the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) provides:'No German 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, provided that the rule of law is observed.'

11 — Office of public prosecutor based at the appellate court having jurisdiction.

Regional Court, Bydgoszcz (Poland), for the purposes of the execution of a five-month prison sentence imposed by a judgment which has become final.

30. Mr Kozłowski did not consent to his surrender. The Generalstaatsanwaltschaft Stuttgart, the executing judicial authority, informed him on 18 June 2007 that it did not intend to invoke any ground for non-execution. According to that authority, Mr Kozłowski's habitual residence was not in Germany and his regular visits to that Member State had the sole purpose of adding the amounts earned from the committing of crimes to the limited unemployment benefits received in Poland and to the material assistance provided by his parents. The Generalstaatsanwaltschaft also considered that it was not for it to engage on its own initiative in the meticulous and time-consuming investigation of where, when, with whom and for what purpose the requested person had stayed. It had therefore applied to the Oberlandesgericht to allow execution of the European arrest warrant.

31. Mr Kozlowski is currently being held in Stuttgart prison (Germany), serving a sentence of imprisonment of three years and six months, imposed by the Amtsgericht Stuttgart pursuant to two judgments of 27 July 2006 and 25 January 2007 for numerous fraud offences committed in Germany.

32. The referring court states that, according to the judgments convicting Mr Kozłowski, he is unmarried and childless. He has little or even no knowledge of German and has been an alcoholic since 2002. He grew up in Poland. Following his schooling, he trained as a chef and worked as such until the end of 2003. For approximately one year Mr Kozłowski drew unemployment benefit of roughly EUR 100 per month. His last place of residence in Poland was Sosno, in Województwo kujawsko pomorskie (Kujawsko-Pomorskie Province).

33. According to the judgment of 27 July 2006, Mr Kozłowski went to Germany in February 2005 in order to take up work. He was employed on an occasional basis on building sites and stayed in Germany until his arrest on 10 May 2006, with one interruption over the Christmas holiday period.

34. On the other hand, according to the judgment of 25 January 2007, the defendant had visited Germany on numerous occasions since January 2005 but had otherwise been looked after by his parents' family. At his hearing, he stated that he had intended to go to Germany to find work there in order to pay the lawyers' fees for the case in which the European arrest warrant had been issued. He also stated that he had fallen into bad company and wished to remain in Germany following his release.

III — The reference for a preliminary ruling

35. The Oberlandesgericht points out that it is confronted with the following two questions. First, it has to determine whether Mr Kozłowski's habitual residence was in German territory and whether it is still situated there. If that question were to be answered in the negative, it would allow execution of the European arrest warrant, since all the other conditions required under German law in that regard are satisfied. If, on the other hand, the question were to be answered affirmatively, the Oberlandesgericht would have to set aside the decision of the Generalstaatsanwaltschaft not to invoke the grounds for non-execution, since it is the lack of habitual residence in Germany which underlies that decision.

36. More precisely, the Oberlandesgericht asks what implications are to be inferred for the purposes of that assessment from the following circumstances:

— the interruptions of Mr Kozłowski's stay in Germany during the 2005 Christmas holidays, possibly even in June 2005, and in February and March 2006;

— the fact that Mr Kozłowski, more than three months after his entry to Germany, did not carry out any paid work there and earned his living essentially by committing crimes, meaning that the lawfulness of his stay in Germany was unclear, and

— the fact that Mr Kozłowski is in custody.

37. Secondly, the referring court asks whether the German law transposing Article 4(6) of the Framework Decision is compatible with the principle of non-discrimination. In particular, it would like the Court to rule on the question whether — and, if so, to what extent — it is possible to make a distinction between German nationals and foreign nationals who are citizens of the European Union.

38. It is in view of the foregoing that the Oberlandesgericht asks the Court the following two questions:

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

(a) his stay in the Member State [of execution] 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 Articles 12 EC and 17 EC et seq., and, if so, are those principles at least to be taken into account in the exercise of that discretion?'

IV — Analysis

39. I propose that the Court consider, first, the second question referred by the national court. Consideration of the questions referred for a preliminary ruling in this order is justified, in my opinion, by the fact that, were the Court to hold in response to the second question that the principle of non-discrimination precludes the surrender against his will of a national of a Member State other than the Federal Republic of Germany, given that the lack of consent by a German national rules out such surrender, the first question would not call for a reply.

A — *The second question referred for a preliminary ruling*

40. By its second question, the national court is asking the Court to rule on the conformity with Community law of the difference in treatment provided for by German legislation between German nationals and nationals of other Member States, regarding the effect of the lack of consent of the requested person.

41. It asks this question because, under Paragraph 80(3) of the IRG, a European arrest warrant concerning a German national may not be executed if that person does not

consent to his surrender whereas, under Paragraph 83b of the IRG, the lack of consent of a national of another Member State can justify a refusal only if execution of the custodial sentence in the territory of the Federal Republic is justified by an interest that deserves protection.

42. In order to answer that question it is necessary, first, to examine the compatibility with Community law of a provision of national legislation such as Paragraph 80(3) of the IRG. It must therefore be determined whether Article 4(6) of the Framework Decision must be interpreted as precluding legislation of a Member State under which the execution of a European arrest warrant issued for the purposes of execution of a custodial sentence is ruled out if that arrest warrant concerns one of its nationals and he does not consent to his surrender.

43. It is only if such legislation is compatible with the Framework Decision that the question arises whether a national of another Member State can also rely on it pursuant to the principle of non-discrimination.

44. According to the German government, Paragraph 80(3) of the IRG is compatible with Article 4(6) of the Framework Decision under which, it will be recalled, the executing judicial authority may refuse execution of a European arrest warrant issued for the purposes of execution of a sentence if the person concerned is a national or resident of the executing Member State.

45. According to that government, that provision of the Framework Decision allows Member States to provide for a specific ground of non-execution based on nationality. The German Government also refers to Article 5(3) of the Framework Decision, which applies where the European arrest warrant was issued for the purposes of prosecution and which provides that, where the person concerned is a national or resident of the executing Member State, the judicial authority of that State may make surrender subject to the condition that the person be returned to that State in order to serve there the sentence passed against him in the issuing Member State.

46. The German Government maintains that that exception in favour of the nationals of a Member State is based on the special and reciprocal relations which bind a citizen to his State, as a result of which that citizen may never be excluded from the national community. Furthermore, the Federal Republic of Germany has a particular interest in the rehabilitation of its nationals, which is served by execution of the sentence in Germany. That is why Paragraph 80(3) of the IRG abolishes any discretion where a German national does not consent to his surrender.

47. I do not agree with that analysis. It is true that the terms in which Article 4(6) of the Framework Decision is framed could lead it

to be understood in the way favoured by the German Government. However, that provision is not unambiguous. It can be equally well understood as meaning that the Member States must leave it to their judicial authorities to decide, in each case, whether to refuse execution of a European arrest issued for the purposes of execution of a sentence where it concerns one of their nationals. That provision begins, in fact, with the words '[t]he executing judicial authority may refuse to execute the European arrest warrant'.

48. I am therefore of the opinion, in accordance with settled case-law, that Article 4(6) of the Framework Decision should be interpreted, for the purposes of the question under consideration, in the light of the scheme of which that provision forms part and of the objectives pursued by that scheme and by the Framework Decision. [12]

49. Upon examining that scheme and those objectives, I consider that the German Government's argument runs contrary to both for the following reasons. First, under the scheme provided for by the Framework Decision, the lack of consent on the part of the requested person may not, as such, justify a decision not to execute the warrant. Secondly, a refusal can be based on Article 4(6) of the Framework Decision only if it becomes apparent that execution of the sentence in the executing Member State is necessary in order to facilitate the reintegration of that person. Finally, the German Government's argument impairs the effectiveness of the Framework Decision because it amounts to reintroducing, to a certain extent, the principle of non-extradition of nationals which the European Union legislature wished by means of the Framework Decision to renounce.

50. I shall therefore examine each of those points in turn. I shall go on to conclude that, in accordance with the principles of primacy and of conforming interpretation, the national court must not take Paragraph 80(3) of the IRG into account, which means that that provision cannot preclude Mr Kozłowski's surrender.

1. The lack of consent of the requested person may not, as such, justify a decision not to execute that warrant

51. It can be confirmed on the basis of an examination of the scheme established by the Framework Decision that the European arrest warrant is intended to achieve the enforced transfer of a person from one Member State to another.

52. According to that scheme, the Member States are obliged to execute any European arrest warrant, as is made clear, in the French version, by the use of the present indicative

12 — See, for a recent application by the Court sitting in Grand Chamber formation, Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 110 and the case-law cited.

in the clause '[l]es États membres exécutent tout mandat d'arrêt européen' in Article 1(2) of the Framework Decision. [13]

53. It also follows from the scheme of the Framework Decision that execution can be refused only by decision of the executing judicial authority, based specifically on one of the grounds for non-execution exhaustively listed in Articles 3 and 4 of the Framework Decision. It must be held that lack of consent on the part of the requested person is not one of the grounds for mandatory or optional non-execution stated, respectively, in those two provisions.

54. The possibility of consenting or not to surrender is one of the rights conferred by Article 11 of the Framework Decision on the requested person. However, the only legal consequence of that position, which is laid down expressly in the Framework Decision, concerns the period within which the final decision on the execution of the European arrest warrant must be taken by the executing judicial authority.

55. Thus, under Article 17(2) and (3) of the Framework Decision, where the person concerned consents to his surrender, the final decision on the execution of the European arrest warrant must be taken by the executing judicial authority within 10 days of consent being given, whereas, if that person does not consent to surrender, the decision must be taken within 60 days of his arrest.

56. The purpose of the right conferred on the person concerned to consent to his surrender is therefore to enable him to speed up the surrender procedures. It gives him the right to reduce the length of the procedures in the executing Member State and, as the case may be, the length of time during which he is held in detention in that State for the purposes of applying the European arrest warrant. As a result, he is able to appear sooner before the issuing judicial authority in order to assert his rights.

57. However, under the scheme provided for in the Framework Decision, the consent or lack of consent on the part of the person concerned has no binding influence on the decision taken by the executing judicial authority.

58. It is possible to imagine that the fact that the person concerned objects might lead the executing judicial authority to examine whether there are grounds for non-execution under Articles 3 or 4 of the Framework Decision, a question which, in the event of consent, it would not necessarily have

13 — An examination of the other language versions leads to same conclusion. See, for example, in German, 'Die Mitgliedstaaten vollstrecken jeden Europäischen Haftbefehl'; and in English, 'Member States shall execute any European arrest warrant'; and so on.

examined on its own initiative, given the very tight deadlines applicable to the surrender procedure in that situation.

59. I am thinking, for example, of the grounds laid down in Articles 3(2) and 4(5) of the Framework Decision, concerning situations where final judgment has been passed on that person in another Member State or in a third State in respect of the acts referred to in the European arrest warrant and where sentence has already been served or its execution is no longer possible. Under those provisions, those reasons constitute or may constitute a ground for non-execution, in so far as 'the executing judicial authority is informed'.

60. If the person concerned objects to his surrender and invokes one of those grounds when being heard by the executing judicial authority, even though such a ground does not appear in the information communicated by the issuing judicial authority, the executing judicial authority might well ask the latter authority for supplementary information in order to ascertain whether that ground exists and to draw the necessary inferences in its decision.

61. However, the Framework Decision does not expressly provide that those matters are to be taken into consideration because the European Union legislature wanted to give precedence in the Framework Decision to the person's speedy surrender.

62. Similarly, the application of the ground for non-execution provided for in Article 4(6) of the Framework Decision is not conditional upon the consent or lack of consent of the person concerned, even though, in all probability, it is an element which must be taken into consideration by the executing judicial authority when assessing that ground.

63. It must therefore be found, at this stage of reasoning, that lack of consent on the part of the requested person cannot in itself constitute a ground for the non-execution of the European arrest warrant.

64. The absence of any reference to that lack of consent among the grounds for non-execution listed in Articles 3 and 4 of the Framework Decision confirms the intention of the European Union legislature, as stated in the first recital in the preamble to the Framework Decision, to prevent a requested person from fleeing from justice in the Member State in which he has committed, or is suspected of having committed, a crime.

65. Consequently, irrespective of whether the person concerned does or does not consent to his surrender to the issuing judicial authority, it is for the executing judicial authority to rule on the execution of the European arrest warrant and it can oppose execution only by a decision based specifically on one of the grounds for non-execution listed in Articles 3 and 4 of the Framework Decision.

66. It follows that a provision of the legislation of a Member State, such as Paragraph 80(3) of the IRG, which makes lack of consent on the part of a national an absolute ground for non-execution is, as such, contrary to the scheme of the Framework Decision.

67. Unlike the German Government, I do not believe that the objective underlying Article 4(6) of the Framework Decision can invalidate that analysis.

2. The objective pursued in Article 4(6) of the Framework Decision cannot justify an absolute bar to execution of a European arrest warrant concerning a national of the executing State where that national opposes his surrender

68. As the German Government states in its written observations and as the Oberlandesgericht has explained in its reference for a preliminary ruling, the purpose of the ground for non-execution provided for in Article 4(6) of the Framework Decision is to facilitate the reintegration of the convicted person at the end of his sentence.

69. Admittedly, that objective is not expressly stated in the Framework Decision, but it featured very clearly in the proposal presented by the Commission of the European Communities. [14] In fact, the Commission proposed to insert, in the chapter setting out the grounds for refusal of surrender, an Article 33 entitled 'Principle of integration', paragraph 1 of which was drafted as follows:

'The execution of a European arrest warrant in respect of a requested person may be refused if this person would have better possibilities of reintegration in the executing Member State, and if he or she consents to serve the sentence in this Member State.

In that case, the sentence pronounced in the issuing Member State shall be served in the executing Member State in accordance with the laws of the latter Member State. The sentence pronounced in the issuing Member State shall not be substituted by a sanction prescribed by the law of the executing Member State for the same offence.'

70. Article 4(6) of the Framework Decision differs from that proposal. None the less, it largely retains the substance of the proposal and it appears successfully to meet the same objectives, that is to say, to facilitate the reintegration of the convicted person. That opinion is shared by all the parties who intervened in the present proceedings. It is based on a number of factors.

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

71. The objective can be inferred, first, from the Framework Decision itself.

72. Thus, under Article 4(6) of the Framework Decision, the application of that provision is conditional upon an undertaking by the executing Member State to execute the custodial sentence or detention order pronounced in the issuing Member State. In the light of the European arrest warrant scheme, under which surrender is the rule and the grounds for non-execution the exceptions to that rule, a non-execution decision can therefore be based on Article 4(6) of the Framework Decision only if there is a legitimate interest in the execution of the sentence in the territory of the State where the person concerned was arrested.

73. The same analysis holds true with regard to Article 5(3) of the Framework Decision, which is applicable where a European arrest warrant is issued for the purposes of a prosecution. Under that provision, it will be recalled, the surrender of a person who is a national or resident of the executing Member State can be made subject to the condition that the person be returned to that State in order to serve there the sentence pronounced against him in the issuing Member State.

74. The only legitimate interest that I can see is that of facilitating the reintegration of the convicted person, in his own interests and in the interests of the community at large, in which that person is once more to live when his sentence has been served.

75. That analysis is confirmed, secondly, by a number of documents in which the Member States and the Community institutions have stated that criminal penalties must not be solely punitive but should also assist rehabilitation.

76. The role to be played by penalties in assisting rehabilitation has, for example, been asserted by the Council of Europe, first, in the recommendations on European prison rules [15] and, secondly, in the Council of Europe Convention on Sentenced Persons of 21 March 1983. That role is also mentioned in the Resolution of the European Parliament on respect for human rights in the European Union (1997), [16] in which the Parliament stated that prison sentences are intended to have both a corrective and a social rehabilitation function and that the objective is the human and social reintegration of the prisoner. [17]

77. However, contrary to the position of the German Government, I do not believe that, in every case, the social rehabilitation of a German national who opposes his surrender is necessarily better guaranteed if he serves his sentence in Germany. In other words, even if the status as a national of the executing Member State demonstrates the existence of a very strong connection with that State, I am not convinced that it can

15 — See, inter alia, Recommendation No R (87) 3 of the Committee of Ministers on the European Prison Rules, adopted on 12 February 1987 and replaced by Recommendation Rec(2006)2, adopted on 11 January 2006.

16 — OJ 1999 C 98, p. 279.

17 — Paragraph 78.

establish an irrebuttable presumption that the execution of the sentence in that State best favours the social rehabilitation of the person concerned.

78. As proof of this one can point to the great variety of human situations with which the judicial authorities of a Member State are confronted on a daily basis. Thus, one can imagine the case of a German national who has been living for many years in a Member State other than the Federal Republic of Germany, in which he has a family and a job, and which he has only left in order to flee from justice in that State. I do not believe that, in such a situation, there can be an irrebuttable presumption that the social rehabilitation of that person is necessarily better guaranteed in Germany.

79. That is why I am of the opinion that the objective of social rehabilitation, pursued by Article 4(6) of the Framework Decision, is no justification for a Member State depriving its judicial authorities of any discretion where a European arrest warrant concerns one of its nationals who opposes his surrender.

80. If the arrest warrant was issued for the purposes of the execution of a sentence concerning a national of the executing Member State and if he opposes his surrender, the judicial authority of that State must, in my opinion, be able to assess, in the light of the person's factual situation and criteria which I shall go on to propose in this View, whether execution of the custodial sentence in the territory of that State is really required in order to facilitate his social rehabilitation.

81. The opposite interpretation, contended for by the German Government, leads in my opinion to the reintroduction, to a certain extent, of the principle of non-extradition of nationals — a principle which the Framework Decision seeks to renounce — and, in consequence, partly frustrates the effectiveness of that decision.

3. The renunciation in the Framework Decision of the principle of the non-extradition of nationals, and the effectiveness of the Framework Decision

82. The non-extradition by a State of its nationals constitutes a traditional principle of the law of extradition. It has the status of a constitutional principle in a number of Member States.[18] It is acknowledged by the European Convention on Extradition, signed by the Member States of the Council of Europe on 13 December 1957, Article 6(1)(a) of which provides that a Contracting Party has the right to refuse extradition of its nationals.

18 — For example, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Republic of Austria, the Republic of Poland and the Portuguese Republic.

83. With a view to preventing that principle from resulting in total impunity for nationals of a State in respect of crimes committed by them abroad, the national courts have, as a rule, jurisdiction to try cases on the basis of those facts under their domestic criminal law. Article 6(2) of the European Convention on Extradition in fact makes that a binding corollary of the application of the principle of the non-extradition of nationals.

84. Traditionally, extradition therefore entails the surrender, to a foreign judicial authority, of a foreigner found by a State on its territory. As for the nationals of that State, they are excluded from the scope of that procedure and must answer to crimes committed by them abroad before their national courts, notwithstanding the difficulties encountered by the latter in trying such cases, particularly with regard to the obtaining of evidence.

85. At the root of the principle of the non-extradition of nationals is the sovereign authority of the State over its nationals, the reciprocal obligations linking them and a lack of trust in the legal systems of other States. Thus, among the grounds relied upon to justify that principle are the State's duty to protect its nationals from the application of a foreign legal system, of whose procedures and language they are ignorant and in the context of which it is difficult for them to mount their defence. [19]

86. The Framework Decision clearly marks the renunciation of that principle as between the Member States.

87. As we have seen, its purpose is to abolish, as between the Member States, the extradition procedure and to replace it with a system of surrender, under which the executing judicial authority may refuse surrender only by a decision specifically based on one of the grounds for non-execution exhaustively listed in Articles 3 and 4 of the Framework Decision.

88. Article 3 of the Framework Decision, concerning the mandatory grounds for non-execution, does not provide for any exception — whether on grounds of principle or for reasons of systemic cohesion — for nationals of the executing Member State. [20]

89. In Article 4(6) of the Framework Decision, the status of national of the executing

19 — 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, pp. 317 to 363, Koninklijke Brill NV, Netherlands, 2005.

20 — The three cases listed in Article 3 of the Framework Decision are as follows: (i) where the offence on which the arrest warrant is based is covered by an amnesty in the executing Member State; (ii) where final judgment has already been passed in another Member State in respect of that offence and any sentence imposed thereunder has been served or may no longer be served; and (iii) the person concerned is not old enough to be criminally responsible in the executing Member State.

Member State is referred to as a factor which may, possibly, justify a decision by the executing judicial authority to refuse surrender if that authority considers that the execution of the custodial sentence in its State is necessary to facilitate the reintegration in society of the person concerned. In addition, in that provision, the European Union legislature provided that that ground for non-execution must apply in exactly the same terms to persons residing in the executing Member State, which clearly confirms that it is not nationality as such which provides the justification for that ground for non-execution.

90. The renunciation of the principle of non-extradition of nationals in the Framework Decision is again confirmed — if further confirmation be needed — by the transitional provisions laid down in Article 33 of the Framework Decision for the benefit of the Republic of Austria, authorising that Member State to maintain the principle for as long as is required for the amendment of its constitution and, at the latest, until 31 December 2008.

91. Such renunciation is perfectly logical in the light of the principle which underpins the Framework Decision.

92. As is stated repeatedly in the recitals in its preamble and in its enacting terms, the Framework Decision is based on the principle of mutual recognition. The European arrest warrant, as stated in the 16th recital in the preamble to the Framework Decision, is the first concrete measure in the field of criminal law implementing the principle of mutual recognition, which the European Council meeting at Tampere on 15 and 16 October 1999 referred to as the 'cornerstone' of judicial cooperation.

93. Pursuant to that principle, as soon as a decision is taken by a judicial authority in compliance with the law of its home State, it takes full and direct effect throughout the European Union, meaning that the competent authorities of all the other Member States are under an obligation to assist its execution as if it originated from one of their own judicial authorities. [21] The scope of a judicial decision is therefore no longer limited to the territory of the issuing Member State but extends to the whole Union.

94. It follows that, if a judicial authority of a Member State requests the surrender of a person, whether pursuant to a final conviction or because he is being prosecuted for an offence, that decision must be recognised and automatically executed in all the Member States, with no possible ground for non-execution except those laid down in the Framework Decision. In other words, by agreeing to set up the European judicial area and, in particular, the European arrest warrant scheme on the basis of the principle of mutual recognition, the Member States have given up the sovereign power to shield

21 — See, in that regard, the Commission Communication to the European Parliament and the Council of 26 July 2000 on Mutual Recognition of Final Decisions in Criminal Matters (COM(2000) 495 final, in particular, p. 8).

their own nationals from the investigations and penalties of the judicial authorities of the other Member States.

95. That surrender of sovereignty has been 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'.

96. That confidence is expressed first by the waiver by the Member States of the exercise of their right to prosecute, contained in the *ne bis in idem* principle, which is enshrined in Article 54 of the Convention implementing the Schengen Agreement, [22] under which a person whose trial has finally been disposed of in one Member State cannot be prosecuted again in another Member State for the same acts. The objective of that principle is to ensure that no one is prosecuted for the same acts in several Member States on account of having exercised his right to freedom of movement.

97. As the Court stated in *Gözütok and Brügge*, [23] according to that principle there is a necessary implication that, however the penalty comes to be imposed, the Member States have mutual trust in their criminal justice systems and each of them recognises the criminal law in force in the other Member States even where the outcome would be different if its own national law were applied. [24]

98. That trust stems from various factors. First, all Member States have shown, by establishing the European Communities or acceding to them, that they adhere to the rule of law and observe fundamental rights, such as those laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and, since 7 December 2000, in the Charter of Fundamental Rights of the European Union. In addition, apart from the ratification of that Convention and the proclamation of that Charter, all Member States are closely committed to the concept of the rule of law, as stated by the Commission in paragraph 1 of the explanatory memorandum accompanying the proposal for a Framework Decision. [25]

99. Despite the absence, to date, of extensive harmonisation of substantive and procedural

22 — 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.

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

24 — Paragraph 33.

25 — See footnote 14.

criminal law within the European Union,[26] the Member States have therefore succeeded in convincing each other that the conditions in accordance with which their nationals are prosecuted and tried in other Member States are such as to ensure compliance with the rights of those nationals and to enable them to defend themselves adequately, notwithstanding language problems and a lack of familiarity with the procedures.

100. Secondly, the confidence which each Member State and its nationals should have in the systems of justice of other Member States is the logical and inevitable outcome of the creation of the single market and of European citizenship.

101. Each Member State has the obligation, in implementation of the rights concerning freedom of movement laid down by the EC Treaty, to allow the nationals of other Member States to carry out an economic activity in its territory — whether as employed or self-employed persons — under the same conditions as its own nationals.

102. With the creation of citizenship of the Union, a further stage was reached, since each Member State is also obliged to admit to its territory nationals of other Member States who wish to live there, if those nationals have, at least during the first five years, sufficient resources and insurance cover. It must also allow them to participate in municipal elections and in elections to the European Parliament. It must finally also extend the protection afforded by its diplomatic or consular authorities to every citizen of the Union in a third country, if protection by that person's own Member State is lacking.

103. The completion of the single market and the creation of citizenship of the Union have therefore gradually obliged the Member States to treat nationals of other Member States in the same way as their own nationals in an increasingly broad spectrum of economic, social and political life. They also allow every citizen to go to live or work in the Member State of their choice within the Union, in the same way as any national of that State.

104. The right moment therefore seems to have arrived to add equal treatment before the courts to these legal constructs. In other words, since a citizen of the Union from now on has rights in every Member State which are largely the same as those enjoyed by nationals of that State, it is fair that he should comply with the same obligations in criminal law matters and, if he commits an offence, be prosecuted and tried before the courts of that State in the same way as its nationals.

26 — To date, about 20 framework decisions have been adopted. Harmonisation has focused on the definition and prevention of cross-border crime, such as counterfeiting of the euro, fraud and counterfeiting of means of payment, money laundering, terrorism, human trafficking, facilitating illegal immigration, corruption in the private sector, sexual exploitation of children, drug trafficking and attacks against information systems. It has also concerned operational matters and the enforcement of decisions, such as the establishment of joint investigation teams, the mutual recognition of confiscation orders or of orders freezing property or evidence, or indeed financial penalties, as well as the standing of victims in criminal proceedings. The European Union has also adopted a number of decisions, creating bodies such as Eurojust and the European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, or providing for activities such as the exchange of information extracted from the criminal record, training activities and programmes.

105. Lastly, it should be pointed out that the renunciation of the principle of non-extradition of a State's nationals, enshrined in the Framework Decision, does not deprive the executing judicial authority of any means of protection of the person concerned if, exceptionally, it becomes apparent that a surrender request is liable to infringe that person's fundamental rights. There is therefore no question of the executing Member State trusting blindly or without any safeguards.

106. Thus, although the Framework Decision, like all secondary legislation, depends for its validity on compliance with fundamental rights [27] and although the Member States, in implementing the Framework Decision — like any other Community law measure — are also obliged to observe those rights, [28] the Council has been careful to specify, in Article 1(3) of the Framework Decision, that the surrender obligation imposed must in no way infringe the fundamental rights and principles enshrined in Article 6 EU.

107. Accordingly, the executing judicial authority may, in an individual case and exceptionally, refuse to execute a European arrest warrant if, as stated in the 12th recital in the preamble to the Framework Decision, 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'.

108. In addition, it should be borne in mind that, if a Member State were to adopt provisions of criminal law, whether substantive or procedural, which infringed the principles laid down in Article 6 EU, the Council could suspend the implementation of the Framework Decision under Article 7 EU, as indicated in the 10th recital in the preamble.

109. The laying down of those various safeguards in the Framework Decision, which does not itself create new law, since those safeguards are already an integral part of the Community legal order, shows to what extent the European Union legislature wanted to ensure that the innovations contained in that Framework Decision as compared with the traditional system of extradition, such as the renunciation of the principle of the non-extradition of nationals, do not lead to a diminution in the protection of fundamental rights.

110. The Member States cannot, therefore, without compromising the effectiveness of the Framework Decision, adopt provisions of national law which, in one way or another, would have the effect of reintroducing a

27 — The conformity of the Framework Decision with the principles laid down in Article 6 EU, with regard to the abolition of the dual criminality condition in the case of the 32 offences listed in Article 2 of the Framework Decision has, moreover, been confirmed by the Court in the context of a reference for a preliminary ruling on a question concerning validity, in Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633.

28 — See, for an example of that settled case-law, *Advocaten voor de Wereld*, paragraph 45.

systematic exception in favour of their own nationals.

111. In the light of the above considerations, I propose that the Court rule that Article 4(6) of the Framework Decision must be interpreted as precluding legislation of a Member State under which the execution of a European arrest warrant issued for the purposes of execution of a custodial sentence is ruled out where that arrest warrant concerns one of its own nationals and he does not consent to his surrender.

112. I shall now examine the implications for the referring court of that interpretation, should it be adopted by the Court.

4. The implications of the principles of primacy and of conforming interpretation

113. Framework decisions are instruments of secondary legislation introduced into the European legal system by the Treaty of Amsterdam, by which the Member States gave the European Union, established under the Maastricht Treaty, the objective of creating a genuine area of freedom, security and justice. Contrary to the acts which can be adopted under the Maastricht Treaty in the context of cooperation in the fields of justice and home affairs, framework decisions themselves have a real binding effect, since, under Article 34(2)(b) EU, they are to be 'binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods'.

114. By thus giving the Council the power to adopt such binding instruments, the definition of which is almost identical to that of the directives which can be adopted under the European Community framework, the Member States necessarily accepted the transfer of a part of their powers in criminal matters to the European Union, to the extent necessary to achieve the objectives set out in Title VI of the EU Treaty and in compliance with the principle of subsidiarity.

115. The grounds on which, in *Costa*, [29] the Court held that the Member States, having freely consented to a transfer of their powers to the Community, may not set a measure of their domestic law, however framed, against a binding Community measure, can be applied to a framework decision. A framework decision, like all binding measures of Community law, is of such a nature as to take precedence over any provision of national law what-

29 — Case 6/64 [1964] ECR 585, at p. 592.

soever, even of a constitutional nature or forming part of a basic law. [30]

116. Admittedly, the mechanisms provided for by the EU Treaty in order to ensure that primacy where a framework decision conflicts with a provision of national law are less extensive than those which exist under the EC Treaty.

117. First, unlike the EC Treaty, the EU Treaty does not allow the Commission to bring an action for failure to fulfil obligations against a Member State which is in breach of those obligations. Under Article 35(7) EU, failure by a Member State to apply, or to apply correctly, a framework decision can do no more than give rise to a dispute between Member States which must be referred to the Council and which can be brought before the Court if not settled within six months.

118. Secondly, the provisions of a framework decision which have not been transposed, or which have been incorrectly transposed, cannot be applied directly by the national court. Under Article 34(2)(b) EU, framework decisions are not to entail direct effect.

119. Nonetheless, the national courts do not completely lack the means by which to rely on the content of framework decisions or to ensure their primacy. In *Pupino*, [31] the Court ruled that the national courts, when confronted with a conflict between a framework decision and a provision of national law, are bound by the principle of conforming interpretation. In the present case, that principle means that, in applying its national law, the referring court called upon to interpret it must do so as far as possible in the light of the wording and purpose of the Framework Decision in order to attain the result pursued by that measure and thus to comply with Article 34(2)(b) EU. [32]

120. The only limit to that principle is where the national law cannot be applied in that way because it would be *contra legem* to do so. [33]

121. In the present case, the situation under German law of nationals of other Member States such as Mr Kozłowski is specifically governed by Paragraph 83b(2)(b) of the IRG, the compatibility of which with the Framework Decision does not seem open to dispute.

30 — See, to that effect, Case C-285/98 *Kreil* [2000] ECR I-69, paragraph 32, with regard to the incompatibility of Article 12a of the Basic Law of the Federal Republic of Germany, concerning the conditions for the access of women to the armed forces, with Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

31 — Case C-105/03 [2005] ECR I-5285.

32 — Paragraph 43.

33 — *Pupino*, paragraph 47.

122. That provision states, it may be recalled, that extradition of a foreign national whose habitual residence is situated in the national territory can be refused where, in the case of extradition for the purposes of execution of a sentence, the person does not consent to it and where he has an interest — which deserves protection and predominates — in the sentence being executed in the national territory. That concept of 'an interest that deserves protection and predominates' appears well suited to application in accordance with the underlying objective of the ground for non-execution provided for in Article 4(6) of the Framework Decision.

123. Since, by contrast, Paragraph 80(3) of the IRG is not to my mind compatible with the Framework Decision and since that provision concerns only German nationals, it seems to me that, in accordance with the principle of conforming interpretation, the referring court must not take it into account and must apply Paragraph 83b(2)(b) of the IRG. In other words, the principle of non-discrimination, which ought to lead to the provisions laid down in Paragraph 80(3) of the IRG in favour of German nationals being extended to nationals of other Member States — particularly in view of the fact that Article 4(6) of the Framework Decision treats nationals and residents in exactly the same way — must not be applied, because Paragraph 80(3) runs counter to the Framework Decision, which takes precedence over any conflicting provision of national law.

124. That approach does not breach the limits of the obligation of conforming interpretation, because it does not lead the referring court to interpret its national law *contra legem*. The situation before the referring court differs, in that regard, from the situation with which the Court was confronted in the case which led to the judgment in *Pfeiffer and Others*. [34] In *Pfeiffer and Others*, the provision of national law which specifically governed the applicants' situation in the main proceedings infringed Community law and the question arose whether the principle of conforming interpretation could oblige the national court to set aside that provision in favour of a rule of national law of wider scope.

125. In the present case, the question is simply one of applying to Mr Kozłowski the provisions of national law specifically applicable to his situation, in accordance with the objective of the Framework Decision.

126. I therefore propose that the Court supplement its answer to the second question referred for a preliminary ruling by stating that, in the dispute before it, the referring court must apply to Mr Kozłowski the provisions of its national law applicable to nationals of the other Member States, in accordance with the objective of the Framework Decision. The principle of conforming interpretation precludes the extension to nationals of other Member States, pursuant to the principle of non-discrimination, of the ground for non-execution laid down in national law in favour of German nationals who oppose their surrender.

34 — Joined Cases C-397/01 to C-403/01 [2004] ECR I-8835.

B — *The concept of 'a resident' as referred to in Article 4(6) of the Framework Decision*

127. By its first question, the referring court asks the Court whether Article 4(6) of the Framework Decision must be interpreted as meaning that a person can be regarded as staying or residing in the executing Member State where:

— his stay there has not been uninterrupted;

— his stay there is not in conformity with the national legislation governing the right of foreign nationals to enter and remain in the country;

— he commits crimes there systematically; and

— he is in custody there serving a prison sentence.

128. By this question, the referring court is asking the Court of Justice, essentially, to define the scope of the concepts of 'staying in', or being 'a resident of', the executing Member State, as referred to in Article 4(6) of the Framework Decision, and whether one or more of the circumstances listed in its question is decisive or relevant for recognition of the status of a person who is 'staying in' or who is 'a resident'.

129. The referring court submits those questions to the Court because the two concepts are not defined in the Framework Decision. Nor does the Framework Decision refer to other Community law measures referring to the concept of domicile or residence, or to the right of the Member States to determine the content of that concept.

130. The Czech and Netherlands Governments maintain that the definition of those concepts must be left to the assessment of each Member State. I do not share that view.

131. The purpose of the Framework Decision is to put in place a system of compulsory surrender as between the judicial authorities of the Member States, which can be refused only on the basis of one of the grounds for non-execution expressly provided for in that Framework Decision. The effective application of the Framework Decsion requires, in my opinion, that the ground for non-execution laid down in Article 4(6) be the subject of a standard definition applied in all the Member States.

132. A number of Member States and the Commission have also maintained that the transposition into national law of the ground for non-execution provided for in Article 4(6) of the Framework Decision must be left to the discretion of each Member State. That provision must be understood, according to those parties, as leaving the Member States free to choose whether to provide that their judicial authorities may rely on that ground for non-execution.

133. I do not agree with that interpretation either. As we have seen, the purpose of the ground for non-execution provided for in Article 4(6) of the Framework Decision is to facilitate the reintegration of the convicted person. Since that person, if a citizen of the Union, has the right to move and reside in all Member States, the success of his reintegration concerns not only the executing Member State but also all the other Member States and the persons living there.

134. The same can be said of third country nationals. As a result of the abolition of border controls in the Schengen area, those nationals may move freely within that area. They may also move and reside throughout the European Union as members of the family of a national of a Member State.

135. It follows that the opening of the borders has made Member States collectively responsible for the fight against crime. That is why the creation of the European criminal justice area has emerged as essential in order to ensure that the exercise of freedom of movement does not undermine public safety.

136. In consequence, the transposition of Article 4(6) of the Framework Decision into the national law of each Member State is necessary, in my opinion, in order to ensure that the European arrest warrant does not apply to the detriment of the reintegration of the convicted person — and, therefore, to the detriment of the legitimate interest of all Member States in crime prevention — which that ground for non-execution aims to protect.

137. With regard to the issue, in the present case, of the meaning of 'staying in' and being 'a resident of' the executing Member State, I share the opinion of the Austrian, Polish and Finnish Governments and of the Commission that those expressions must be interpreted as independent concepts, defined in the light of the underlying aim of Article 4(6) of the Framework Decision, and of the scheme and its objectives.

138. The concept of residence has been defined in other Community measures on the basis of the specific scheme and aims of those acts, which do not correspond to those of the Framework Decision. Those definitions cannot therefore be applied as such for the purposes of interpreting the concept of residence in the Framework Decision. They

may, however, be taken into consideration for that purpose, [35] as can Resolution (72)1 on the standardisation of the legal concepts of 'domicile' and 'residence', adopted by the Committee of Ministers of the Council of Europe on 18 January 1972, to which the Oberlandesgericht Stuttgart refers. [36]

139. Consideration of the aims of the Framework Decision leads me to infer that the ground for non-execution stated in Article 4(6) must be interpreted restrictively. That ground permits derogation from the mandatory surrender provided for in Article 1(2) of the Framework Decision. It is therefore an exception to a general rule.

140. That analysis is also confirmed by the tight deadlines by which the executing judicial authority must adopt its decision on execution of the European arrest warrant.

141. We have also seen that the objective underlying Article 4(6) of the Framework Decision is to facilitate the reintegration of the requested person. It is in the light of that objective that the concepts of 'staying in' and being 'a resident of', as referred to in the Framework Decision, should be defined; and the scope of those definitions should be narrow, in keeping with the aims of the Framework Decision.

142. The place where a person due to serve a prison sentence, or subject to a detention order, stays or resides is relevant to his reintegration, because that reintegration aims to allow the person to rediscover his place in society, that is to say, the family, social and professional environment in which he lived before serving his sentence and to which it is probable that he will return thereafter.

35 — In the field of social security, the place of residence of a worker — which serves to determine the applicable legislation on unemployment benefits — is determined by the place where the habitual centre of interests is situated. In that regard, it is important to consider the family situation of the worker as well as the reasons that have led him to move, and the nature of the work (Case C-372/02 *Adanez-Vega* [2004] ECR I-10761, paragraph 37). With regard to tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another, normal residence must be regarded as the place where a person has established his permanent centre of interests and that place must be determined on the basis of all the criteria laid down in the applicable provision of Community law and all the relevant facts (see Case C-392/05 *Alevizos* [2007] ECR I-3505, paragraphs 54 and 55). In the Staff Regulations for Officials and Other Servants of the European Communities, an official's place of habitual residence before his entry into service, which constitutes the decisive criterion for the purposes of the expatriation allowance, is that in which the official concerned has established, with the intention that it should be of a lasting character, the permanent or habitual centre of his interests (Case C-452/93 P *Magdalena Fernández* v *Commission* [1994] ECR I-4295, paragraph 22).

36 — According to that resolution, domicile is a legal concept. It implies a legal relationship between a person and a country, resulting from that person's intention to establish there the centre of his personal, social and economic interests. The concept of residence, on the other hand, is determined solely by reference to factual criteria. It does not depend upon the legal entitlement to reside. It results from the fact that a person lives in a country for a certain period of time, which need not necessarily be continuous. In order to determine whether residence is habitual, account is to be taken of the duration and the continuity of the residence as well as of other facts of a personal or professional nature which point to durable ties between a person and his residence.

143. Thus, in their recommendations on prison rules, the Member States of the Council of Europe expressed their wish that imprisonment should be organised, as far as possible, in conditions enabling the person held in custody to sustain and strengthen links with his family. Imprisonment must also give the person held in custody the impression that he is not excluded from the community at large. Lastly, the conditions of custody must be such as to facilitate the acquisition or resumption of employment on expiry of the sentence, under a pre-release regime organised in the penal institution or by conditional release under supervision. [37]

144. The implementation of those recommendations requires, consequently, that the execution of the sentence or detention order disturbs as little as possible those links between the person in custody and his family and with his social and professional environment.

145. The following lessons can be drawn from the above observations for the definition of the concepts of 'staying in' or being 'a resident of', as referred to in Article 4(6) of the Framework Decision.

146. First, the content of those two concepts is not, in my view, different, as confirmed by the fact that Article 5(3) of the Framework Decision refers only to a 'resident'. Secondly, they refer to the situation in which the requested person has links with the executing Member State of such a kind as to enable the judicial authority of that State to infer that, in order to fulfil its function of reintegration, the sentence must be served in that State. The concept of 'resident' for the purposes of Article 4(6) of the Framework Decision must therefore be understood as the place where the person has his centre of main interests.

147. That concept thus corresponds, in my opinion, to a factual situation which results from the presence of a group of criteria of which the most important — as the Austrian, Polish and Finnish Governments and the Commission propose — are family and social links, use of the language, the availability of a place to live, having a job, and the length of residence in the State, together with the intention of the person concerned to stay there when he is no longer held in custody.

148. That list must not be exhaustive, since the ground for non-execution provided for in Article 4(6) of the Framework Decision must always, in my opinion, be applied by the executing judicial authority on the basis of an assessment of the person's individual situation.

149. The following conclusions can be drawn from this analysis as regards the circumstances listed by the referring court.

37 — Recommendation No R (87) 3 (rules 65(c), 70.1 and 88) and Recommendation Rec(2006)2 (rules 24, 103 and 107).

150. With regard, first, to the fact that the person concerned has not stayed without interruption in the executing Member State, that cannot call into question the connection of that person to that State. A person can go abroad on holidays or to carry out his chosen profession without that changing his centre of main interests.

151. Thus, the fact that, in the case before the referring court, Mr Kozłowski left Germany in June 2005, then during the Christmas holidays of that year and in February and March 2006, does not in itself prove that his main interests lie outside that Member State.

152. With regard, secondly, to the fact that the requested person is being held in custody in the executing Member State following a criminal conviction, this cannot constitute a relevant criterion either, whether for proving the status of resident or for ruling it out.

153. As we have seen, the concept of 'resident', for the purposes of Article 4(6) of the Framework Decision, must be understood as the place where the requested person has his centre of main interests and where he is likely to return after serving his sentence. The criteria enabling that place to be identified serve to indicate the strength of the connection of that person to life in the executing Member State.

154. The concept of 'resident' for the purposes of Article 4(6) of the Framework Decision is therefore based on the intention of the person concerned and necessarily describes a place where he enjoys or can enjoy his rights.

155. The place where a requested person serves a prison sentence is therefore of no relevance in that regard, since that place is not chosen by him but by the judicial authorities and he is deprived there of the exercise of a significant number of his rights.

156. The referring court also asks the Court whether the fact that the requested person is staying in the executing Member State in breach of the national legislation governing the right of foreign nationals to enter and remain in the country and the fact that he commits crimes there systematically mean that he cannot be regarded as a resident. It also asks whether the fact that the person systematically commits crimes suffices, in itself, to rule out habitual residence.

157. The referring court asks these questions because the lawfulness of Mr Kozłowski's stay in Germany beyond a period of three months appears doubtful under the national legislation, in so far as he is not working and earns his living essentially by committing crimes.

158. As the Netherlands Government maintains, the serving of his sentence in the executing Member State presupposes that the person concerned can in fact remain in that State when his sentence is over. That is the condition for ensuring that the objective of reintegration pursued by Article 4(6) of the Framework Decision can be achieved.

159. It follows that, if the executing judicial authority concludes that the person concerned no longer has the right to remain in the executing Member State following completion of his sentence, there is no reason to apply the ground for non-execution provided for in Article 4(6) of the Framework Decision.

160. However, the assessment of the ability of the person concerned to remain in the executing Member State after his sentence has been served, in light of the fact that he does not reside there in conformity with the national legislation governing the right of foreign nationals to enter and remain in the country and the fact that he has systematically committed crimes there, must be carried out by the executing judicial authority in accordance with the requirements of Community law and fundamental rights.

161. The situation is therefore different depending on whether the person concerned is a citizen of the European Union or a national of a third State.

162. The conditions governing the right of nationals of third States to enter and remain in Member States of the European Union are, in the current state of Community law, still largely a matter within the competence of the Member States. The situation of those nationals is only covered by Community law, in essence, if they are members of the family of a Union citizen or nationals of a State with which the Community has drawn up a Convention, or if they fall within the scope of the directive on the right to family reunification [38] or of the directive concerning the status of third-country nationals who are long-term residents. [39]

163. Consequently, if, under the legislation of the Member State of execution, the fact that a national of a third State stays there illegally and commits crimes there systematically means that he is not allowed to remain in that State when his sentence comes to an end, subject to compliance with the rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union, he cannot be regarded as a resident within the meaning of Article 4(6) of the Framework Decision.

38 — Council Directive 2003/86/EC of 22 September 2003 (OJ 2003 L 251, p. 12).

39 — Council Directive 2003/109/EC of 25 November 2003 (OJ 2004 L 16, p. 44).

164. By contrast, the situation is different where the requested person has, like Mr Kozłowski, the status of a Union citizen.

165. As the Commission pointed out and as is stated in the 11th recital in the preamble to Directive 2004/38/EC of the European Parliament and of the Council, [40] the fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative provisions in the host Member State.

166. Admittedly, that right is not unconditional. It is subject, during the first five years, to the condition that the person concerned have sufficient resources and sickness insurance so as not to become a burden on the social assistance system of the host Member State. However, the absence of stable resources cannot as such automatically justify an expulsion measure.

167. Such a measure may only be taken, according to the 16th recital in the preamble to Directive 2004/38, if the person concerned becomes an unreasonable burden on the social assistance system of the host Member State. In that regard, the Member State must determine whether it is a case of temporary difficulties and must take into account the duration of residence, the personal circumstances and the amount of aid granted.

168. Accordingly, the sole fact that Mr Kozłowski does not have stable resources and that he therefore finds himself in breach of the German legislation governing the right of foreign nationals to enter and remain in the country does not, as such, prove that he may not lawfully stay in the executing Member State once his prison sentence is over. That fact does not constitute, in itself, a factor which rules out the possibility that the person concerned may be regarded as resident in that State, provided that he has not been the subject of an expulsion measure adopted in compliance with Community law. [41]

169. Similarly, if, following the committing of crimes in a Member State, a citizen of the Union may be deprived of his right to remain in that State, this can be brought about only by an expulsion decision taken in compliance

40 — 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).

41 — That reply is capable, to my mind, of being applied also to Case C-123/08 *Wolzenburg*, currently pending before the Court. Mr Wolzenburg is a German national who has been living in the Netherlands since June 2005. He has a flat there, in which he lives with his wife, who is pregnant. He worked there until 2007. He is the subject of a European arrest warrant issued by the Staatsanwaltschaft (Public Prosecutor) of Aachen (Germany). The referring court in the Netherlands points out that, according to the Netherlands legislation, Mr Wolzenburg cannot rely on the ground for non-execution provided for under Article 4(6) of the Framework Decsion, because the Netherlands law transposing that provision reserves the use of that ground for persons holding a residence permit of unlimited duration. In my opinion, that restriction is contrary to the Framework Decision. In that case, too, recognition of the status of 'resident', within the meaning of Article 4(6) of the Framework Decision, cannot depend on the possession of a long-term residence permit, when the right of the person concerned, who is a citizen of the Union, to remain in the Netherlands stems directly from Community law.

with the very restrictive conditions laid down in Articles 27 to 33 of Directive 2004/38.

170. It should be noted that such a decision may be taken only in exceptional circumstances, where the person's behaviour constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. In addition, 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 remained in its territory, his age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his links with the country of origin.

171. It follows that the fact that a citizen of the Union has systematically committed crimes on the territory of the executing Member State does not, in itself, preclude him from having the status of 'resident' within the meaning of Article 4(6) of the Framework Decision. Such a fact does not prove that his centre of main interests lies outside that State.

172. It also follows that the fact that such a national is staying in the executing Member State in breach of the legislation of that State governing the right of foreign nationals to enter and remain in the country and that he systematically commits crimes there do not preclude recognition of the status of 'resident' within the meaning of Article 4(6) of the Framework Decision, unless that person has been the subject of an expulsion measure adopted in compliance with Community law.

173. It is in the light of the above considerations that I propose that the Court rule, in answer to the first question referred for a preliminary ruling, that a person is staying in, or a resident of, the executing Member State, within the meaning of Article 4(6) of the Framework Decision, if that person has his centre of main interests there, so that the execution of the sentence in that State is necessary in order to facilitate his reintegration. In order to establish whether that condition is satisfied, the executing judicial authority must examine all the facts relevant to the individual situation of the person concerned.

174. Secondly, the fact that the requested person has interrupted his stay in the executing Member State and the fact that he is being held in custody there do not constitute decisive or relevant criteria for the purposes of assessing whether he is staying in, or a resident of, that State within the meaning of Article 4(6) of the Framework Decision. Finally, the fact that the person concerned is staying in the executing Member State in breach of the legislation of that State governing the right of foreign nationals to enter and remain in the country and the fact that he systematically commits crimes there do not preclude him from having the status of a person who is staying in or is a resident of that State, if he is a citizen of the Union, unless he has been the subject of an expulsion decision adopted in compliance with Community law.

V — Conclusion

175. In the light of the abovementioned observations, I propose that the Court answer the questions referred to it for a preliminary ruling by the Oberlandesgericht Stuttgart as follows:

(1) 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 interpreted as precluding legislation of a Member State under which the execution of a European arrest warrant issued for the purposes of execution of a custodial sentence is ruled out where that arrest warrant applies to one of its own nationals and he does not consent to his surrender.

In the case before it, the referring court must apply to Mr Kozłowski the provisions of its national law applicable to nationals of the other Member States, in accordance with the objective of Framework Decision 2002/584. The principle of conforming interpretation precludes the extension to nationals of other Member States, pursuant to the principle of non-discrimination, of the ground for non-execution laid down in national law in favour of German nationals who oppose their surrender.

(2) A person is staying in or is a resident of the executing Member State, within the meaning of Article 4(6) of Framework Decision 2002/584, if that person has his centre of main interests there, so that the execution of the sentence in that State appears necessary for his reintegration.

In order to establish whether that condition is satisfied, the executing judicial authority must examine all the facts relevant to the individual situation of the person concerned.

The fact that the person who is the subject of a European arrest warrant has interrupted his stay in the executing Member State and the fact that he is being held in custody there do not constitute decisive or relevant criteria for the purposes of assessing whether he is staying in or is a resident of that State within the meaning of Article 4(6) of Framework Decision 2002/584.

The fact that the person concerned is staying in the executing Member State in breach of the national legislation governing the right of foreign nationals to enter and remain in the country and the fact that he systematically commits crimes there do not preclude him from having the status of a person who is staying in or is a resident of that State, if he is a citizen of the Union, unless he has been the subject of an expulsion decision adopted in compliance with Community law.