OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN
delivered on 6 July 2010[1]

1. This case raises a question of the interpretation of Framework Decision 2002/584/JHA,[2] in relation to the execution of decisions rendered *in absentia* in the issuing Member State. The Cour constitutionnelle (Constitutional Court) (Belgium) asks, essentially, whether, when a person sentenced *in absentia* must be surrendered by the judicial authorities of an executing Member State, the request is to be characterised as a request for an arrest warrant for the purposes of prosecution or as a request for a warrant for the execution of a sentence. How it is characterised is of critical importance, for, according to the wording of the Framework Decision, one type of warrant permits the executing Member State to make the surrender subject to the condition that the person should ultimately be returned in order to serve the sentence, if any, in that Member State, whereas the other type of warrant is understood not to permit that.

I — Legislative framework

A — *European Union law*

2. The preamble to Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States ('the Framework Decision') highlights the purpose of the measure and the importance of ensuring that fundamental rights are protected:

'(5) The objective set for the 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.

...

1 — Original language: Spanish.

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).

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

...

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

This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.'

3. Article 1 of the Framework Decision defines the European arrest warrant and once again states the importance of safeguarding the fundamental rights of persons subject to it:

'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.'

4. Article 4 of the Framework Decision sets out the optional grounds for non-execution available to a court in the executing Member State, amongst which it is worth highlighting the ground mentioned in Article 4(6):

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

…

(6) 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;…'

5. Article 5 of the Framework Decision sets out the guarantees that the issuing Member State must observe and which may justify a refusal to surrender if they are not observed. As far as the present proceedings are concerned, particular note should be taken of the guarantee relating to judgments given *in absentia*, which provides that:

'The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

(1) where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered *in absentia* and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered *in absentia*, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment;

…

(3) where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.'

B — *National law*

6. The Kingdom of Belgium has transposed Framework Decision 2002/584 by means of the Law of 19 December 2003 on the European arrest warrant, Article 2(3) of which defines its subject-matter:

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

7. Article 4 of the Law introduces a ground for non-execution based on the protection of fundamental rights which provides as follows:

'The execution of a European arrest warrant shall be refused in the following cases:

…

5 if there are valid grounds for believing that the execution of the European arrest warrant would have the effect of infringing the fundamental rights of the person concerned, as enshrined in Article 6 of the Treaty on European Union.'

8. One of the optional grounds for non-execution set out in Article 6 of the Law is as follows:

'Execution may be refused in the following cases:

…

4 if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the person concerned is Belgian or resides in Belgium and the competent Belgian authorities undertake to execute the sentence or detention order in accordance with Belgian law.

…'

9. The procedure for returning a person to the executing Member State is set out in Article 18(2) of the Law of 23 May 1990 'on the transfer between States of convicted persons, the taking-over and transfer of the monitoring of conditionally convicted or conditionally discharged persons and the taking-over and transfer of the execution of custodial sentences and detention orders', which provides as follows:

'A judicial decision taken pursuant to Article 6(4) of the Law of 19 December 2003 on

the European arrest warrant shall entail the taking-over of the execution of the custodial sentence or detention order referred to in that judicial decision. The sentence or detention order shall be executed in accordance with the provisions of this Law.'

10. Article 18 of the Law of 23 May 1990 falls under Chapter VI, which is entitled, 'The execution in Belgium of custodial sentences and detention orders imposed abroad'. It should be read in the light of Article 25 of that Law, which provides as follows:

'The provisions of Chapters V and VI shall not apply to criminal sentences imposed *in absentia*, save in the cases referred to by Article 18(2) where a sentence imposed *in absentia* has become final.'

11. Article 25 of the Law of 23 May 1990 precludes the application of Article 6(4) of the 2003 Law to a procedure for the execution of a European arrest warrant for the purposes of the execution of a sentence imposed by a decision given *in absentia*, but against which the convicted person still has a right of appeal which has not been waived.

12. With regard to the guarantees that the issuing Member State is obliged to respect, in the 2003 Law the Belgian legislature stipulated as follows:

'Where a European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered *in absentia* and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered *in absentia*, surrender may be subject to the condition that the issuing judicial authority should give an assurance deemed adequate to guarantee that the person who is the subject of the European arrest warrant will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment.

The existence in the law of the issuing State of a provision which provides for an appeal and a statement of the conditions for bringing that appeal, which make it clear that the person concerned may in fact bring an appeal shall be deemed an adequate guarantee within the meaning of the preceding paragraph.'

13. Article 8 of the 2003 Law contains a conditional surrender provision applicable to arrest warrants for the purposes of prosecution:

'Where a person who is the subject of a European arrest warrant for the purposes of prosecution is Belgian or resides in Belgium, surrender may be subject to the condition that the person, after being tried, should be

returned to Belgium in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.'

II — The facts and the proceedings before the Belgian courts

14. In June 2000, the Bucharest Court of First Instance sentenced I.B., a Romanian national, to four years' imprisonment for the offence of trafficking in nuclear and radioactive materials. The court ordered that the sentence, upheld on appeal in April 2001, was to be served under a system of supervised release. On 15 January 2002 the Supreme Court of Romania upheld the sentence imposed on I.B., but ordered that it be served in custody. The decision of the Supreme Court was rendered *in absentia* and I.B. was not personally notified of the date or place of the hearing which led to the decision.

15. According to I.B., those successive judicial decisions were rendered in serious breach of procedural guarantees. That, he claims, forced him to flee his country and settle in Belgium, where he has lived continuously to date, the sentence imposed on him never having been executed.

16. On 14 February 2006, I.B. obtained a residence permit for more than three months from the Belgian authorities. Furthermore, the pleadings state that since 2002 I.B. has been living in Belgium with his wife and three children. The order for reference states that I.B.'s wife is self-employed in Belgium.

17. On 11 December 2007, I.B. was detained by the Belgian police and held in custody pursuant to an order issued by Interpol on 10 February 2006. The order was for the arrest and surrender to Romania of I.B. for the purposes of executing the decision of the Romanian Supreme Court referred to previously. Having appeared before the examining judge, I.B. was conditionally released on 12 December pending a final decision regarding surrender.

18. On 13 December 2007, the Bucharest Court of First Instance issued a European warrant for the arrest of I.B. with a view to executing the sentence of four years' imprisonment imposed in Romania.

19. On 19 December 2007, I.B. applied to the Office des étrangers (Office for Foreign Nationals) for asylum, which was granted on 11 March 2008. However, on 7 July of that year the Commissariat géneral aux réfugiés et apatrides (Office of the Commissioner-General for Refugees and Stateless Persons) rejected the application. I.B appealed against

that decision to the Conseil d'État (Council of State) and the case currently awaits judgment.

20. On 29 February 2008 the Belgian public prosecution service applied to the Court of First Instance, Nivelles, for execution of the arrest warrant issued by the Romanian court. On 22 July of that year the court found that the warrant satisfied all the legal requirements. It noted, however, that the purpose underlying the surrender was to execute a judicial decision rendered *in absentia* which had not yet become final. In view of these circumstances, the court found that under Romanian procedural law, due to the fact that he was sentenced *in absentia*, I.B. is entitled to be retried by the court that heard the case at first instance.

21. The Court of First Instance, Nivelles, was uncertain how the arrest warrant issued by the Romanian court should be characterised. On the one hand, it could be characterised as a warrant for the execution of a sentence, namely, that passed in 2002 and subsequently upheld by the Romanian Supreme Court. On the other hand, inasmuch as I.B. is entitled to a retrial because he was sentenced *in absentia*, the request could be characterised as a warrant for the purposes of prosecution. The decision as to which way to characterise it has important consequences: if it is a warrant for the execution of a sentence, I.B. could not apply to serve the sentence in Belgium, for the situation does not concern execution of a final judgment; by contrast, if it is a warrant for the purposes of prosecution, the Belgian authorities can make the surrender subject to the condition that I.B. should subsequently be returned to Belgium, his country of residence.

22. The court took the view that it was a warrant for the execution of a sentence and that therefore there were no legal grounds for refusing execution or making it conditional on a later return.

23. Such are the doubts, based on a systematic interpretation of Belgian law, which underlie the reference concerning constitutionality made by the Court of First Instance, Nivelles, to the Cour constitutionnelle in the following terms:

'Does Article 8 of the Law of 19 December 2003 on the European arrest warrant, interpreted as applying only to a European arrest warrant issued for the purposes of prosecution, as opposed to one issued for the purposes of the execution of a custodial sentence or detention order, contravene Articles 10 and 11 of the Constitution in that it would prevent the surrender to the issuing judicial authority of a person who is a Belgian national or who resides in Belgium and who is the subject of a European arrest warrant for the purposes of the execution of a sentence imposed by a decision rendered *in absentia*, being made subject to the condition that, after lodging an appeal and obtaining a retrial, as to which the issuing judicial authority will have given an assurance deemed

adequate within the meaning of Article 7 of the abovementioned Law, that person be returned to Belgium to serve there the custodial sentence or detention order imposed in the issuing State?'

24. The Cour constitutionnelle took the view that the question related to matters which required an interpretation of Framework Decision 2002/584. Once the parties had been heard, and during the preliminary proceedings relating to constitutionality, the Cour constitutionnelle decided to make a reference to the Court of Justice for a preliminary ruling.

III — Proceedings before the Court of Justice

25. On 31 July 2009 the Court Registry received the order for reference from the Cour constitutionnelle raising the following questions:

'(1) Is a European arrest warrant issued for the purposes of the execution of a sentence imposed *in absentia*, without the convicted person having been informed of the date and place of the hearing, and against which that person still has a remedy, to be considered to be, not an arrest warrant issued for the purposes of the execution of a custodial sentence or detention order within the meaning of Article 4(6) of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, but an arrest warrant for the purposes of prosecution within the meaning of Article 5(3) of the Framework Decision?

(2) If the reply to the first question is in the negative, are Article 4(6) and Article 5(3) of the Framework Decision to be interpreted as not permitting the Member States to make the surrender to the judicial authorities of the issuing State of a person residing on their territory who is the subject, in the circumstances described in the first question, of an arrest warrant for the purposes of the execution of a custodial sentence or detention order, subject to a condition that that person be returned to the executing State in order to serve there the custodial sentence or detention order imposed by a final judgment against that person in the issuing State?

(3) If the reply to the second question is in the affirmative, do the articles in question contravene Article 6(2) of the Treaty on European Union and, in particular, the principles of equality and non-discrimination?

(4) If the reply to the first question is in the negative, are Articles 3 and 4 of the Framework Decision to be interpreted as preventing the judicial authorities of a Member State from refusing the execution of a European arrest warrant if there are valid grounds for believing that its execution would have the effect of infringing the fundamental rights of the person concerned, as enshrined by Article 6(2) of the Treaty on European Union?'

26. I.B., the Belgian, Austrian, German, Polish, Swedish and United Kingdom Governments and the Council and the Commission submitted written observations.

27. At the hearing held on 11 May 2010, the Belgian and Swedish Governments and the Commission presented their oral submissions.

IV — Preliminary analysis

28. This case raises a question of interpretation of the Framework Decision. The Cour constitutionnelle points out that the Framework Decision can be interpreted in such a way that a person sentenced *in absentia* in one Member State may be denied the opportunity of the executing Member State's making the surrender subject to the condition that that person should later be returned to serve the sentence in its territory.

29. This outcome is the result of the following interpretation.

30. Article 4(6) of Framework Decision 2002/584 empowers the executing judicial authority to refuse to execute a European arrest warrant if it has been issued in the issuing Member State 'for the purposes of execution of a custodial sentence or detention order' and the person sentenced is staying in, or is a national or a resident of the executing Member State. In those circumstances, and provided the executing Member State undertakes itself to execute the sentence or detention order, the court whose duty it is to implement the warrant may refuse to do so. In the terminology used in the Framework Decision, this is an 'optional ground for non-execution'.

31. On the other hand, Article 5 contains a series of guarantees that issuing courts must observe if their decisions are to be executed in accordance with the procedures set out in Framework Decision 2002/584. Of particular note is Article 5(1), which permits a conditional surrender where, a decision having been given in the absence of the accused, no guarantees are given to ensure that the person who is the subject of the warrant will have an

opportunity to apply for a retrial of the case. [3] Similarly, Article 5(3) adds that a surrender may also be conditional where an arrest warrant is sought for the purposes of prosecution and the person concerned is a national or resident of the executing Member State. In this situation the condition can consist only of the issuing Member State's undertaking to return the person to the executing Member State 'in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.'

32. This being the case, Framework Decision 2002/584 on the one hand protects nationals or residents of the executing Member State in order to preserve their connections with a particular place. This is really a form of exception to the arrest warrant based on the protection of certain emotional ties which a person has with his or her most intimate circle, furthermore assisting in any future rehabilitation. On the other hand, persons who have been tried *in absentia* in an issuing Member State are also protected in that they may be returned only if assurances are given that they may be retried.

33. But, as the Cour constitutionnelle has observed, the combination of these two objectives leads to an inconsistent result. This occurs when it is necessary to protect someone who falls within both situations at the same time. This is precisely the case of I.B.: a Romanian national who is legally resident and has created a family unit in the executing Member State, Belgium, but who must return to Romania in accordance with a decision rendered *in absentia*, the effects of which he intends to challenge by seeking the retrial to which he is entitled. In these circumstances, what type of warrant have the issuing Romanian authorities issued? Is it a warrant for the execution of a sentence or a warrant for the purposes of prosecution? It could be the former, but in that case the Belgian courts would not be expressly authorised by either the Framework Decision or the national legislation to make the surrender of I.B. subject to the condition that he should ultimately be returned to Belgium to serve his sentence there.

34. The inability of the Belgian courts to make the surrender subject to the condition that I.B. should be subsequently returned to serve the sentence in his Member State of residence is precisely the outcome which both the Court of First Instance, Nivelles, and the Cour constitutionnelle have questioned.

3 — It should be noted that this provision has been repealed and replaced by a new Article 4a, introduced by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ 2009 L 81, p. 24).

V — The first and second questions referred

35. In the first question the Cour constitutionnelle asks the Court of Justice to state whether a warrant for the execution of a decision rendered *in absentia*, the finality of which can be challenged by exercising the right to seek a retrial, constitutes a warrant for the execution of a sentence or a warrant for the purposes of prosecution. The second question, on the other hand, seeks to ascertain whether, if the warrant issued by the Romanian authorities is a warrant for the execution of a sentence, the Court of First Instance, Nivelles, is authorised by the Framework Decision to make the surrender of I.B. subject to the condition that he should be returned to the executing Member State to serve there any custodial sentence or detention order imposed in the issuing Member State which is in the nature of a final decision.

36. Although the two questions appear to address different issues, I think that they can be answered together. As I shall explain, the crux of this case is the interpretation of Articles 4(6) and 5(3) of the Framework Decision when an arrest warrant is used to return a person to the issuing Member State and he or she is retried there. How the warrant is actually characterised is a matter of secondary importance, in that, as I shall demonstrate, the Framework Decision can be construed in such a way that a person is covered by the guarantees given by these provisions, whether a refusal to surrender or making the surrender conditional, irrespective of how the arrest warrant is formally presented.

37. As a starting-point, it is to be emphasised that the purpose of the Framework Decision is to replace the multilateral system of extradition between Member States with a system of surrender, as between judicial authorities, of convicted persons or suspects for the purpose of enforcing judgments or of criminal proceedings based on the principle of mutual recognition. [4] To this end, Article 1(2) of the Framework Decision states that Member States are to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of that Framework Decision.

38. The Court of Justice has used this proposition to declare that any national provision which limits the grounds for non-execution 'merely reinforces the system of surrender introduced by that Framework Decision to the advantage of an area of freedom, security and justice'. [5] In other words: the narrower the margins of discretion given by the national legislatures to their courts to decide not to execute an arrest warrant, the stronger the system of cooperation created by the Framework Decision. In the words of the Court of Justice, 'by limiting the situations in which

4 — Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 28.

5 — Case C-123/08 *Wolzenburg* [2009] ECR I-9621, paragraph 58.

the executing judicial authority may refuse to execute a European arrest warrant, … the surrender of requested persons [is] only facilitate[d], in accordance with the principle of mutual recognition set out in Article 1(2) of Framework Decision 2002/584, which constitutes the essential rule introduced by that decision.' [6]

39. The scant case-law that exists to date would therefore seem to suggest that the Member States must interpret strictly the optional grounds provided for in Article 4 of the Framework Decision and the guarantees that may be required under Article 5. Thus, any broad interpretation which would lead to the extension of a condition for non-execution, such as that set out in Article 5(3) in respect of warrants for prosecution, to warrants for the execution of a sentence or detention order, should be rejected.

40. This argument is supported by the actual wording of Article 5(1) of the Framework Decision, which permits the executing jurisdiction to make the surrender subject to the condition that a person sentenced *in absentia* should have the right to a retrial. That provision reflects the case-law of the European Court of Human Rights in this area, [7] and would mean that the guarantees for a person such as I.B. have been safeguarded, inasmuch as it ensures that he has the opportunity to be retried with all the guarantees.

41. Although this interpretation benefits from the weight given to it by its adherence to the wording of the Framework Decision, I cannot share it. On the contrary, it is my understanding that there can be no derogation from the right to serve a sentence in the Member State of residence in cases where a retrial is sought.

42. In the first place, it is important to emphasise that the case-law of the Court of Justice has never stated that the grounds for non-execution and conditionality in Articles 4 and 5 respectively of the Framework Decision must be strictly interpreted. In fact, to the contrary, the judgment in *Wolzenburg* is actually very clear in its reluctance to impose a particular interpretation of these provisions, even recognising that 'when implementing

6 — *Wolzenburg*, paragraph 59.

7 — See, inter alia, *Goddi v. Italy*, judgment of 9 April 1984, paragraph 27; *Ekbatani v. Sweden*, judgment of 26 May 1988, paragraph 25; *Pfeifer and Plankl v. Austria*, judgment of 25 February 1992, paragraph 37; *Van Geyseghem v. Belgium*, judgment of 21 January 1999, paragraph 34; and *Poitrimol v. France*, judgment of 23 November 2003, paragraph 31.

[a provision such as Article 4], the Member States have, of necessity, *a certain margin of discretion*'. [8] Thus, the Court of Justice has not only avoided mentioning a strict interpretation, but also has not recognised either that the Member States have a wide margin of discretion. On the contrary, they have a 'certain' margin, but definitely not a wide margin.

43. In the second place, and linked to the foregoing, I believe that the interpretation to be given of the content and purposes of the Framework Decision must take into consideration all of the objectives sought by the text. Although mutual recognition is an instrument for strengthening the area of security, freedom and justice, it is equally true that the protection of fundamental rights and freedoms is a precondition which gives legitimacy to the existence and development of this area. The Framework Decision repeatedly states as much in Recitals 10, 12, 13 and 14, and in Article 1(3). Consequently, although Article 5(1) contains a guarantee which is recognised by the European Court of Human Rights regarding decisions rendered *in absentia*, it must to be emphasised too that Articles 4(6) and 5(3) also reflect a requirement contemplated by the European Convention on Human Rights and by the case-law of the associated Court. [9] The opportunity for the person sentenced to serve the sentence in the place where he or she has personal and emotional ties is a guarantee arising out of Article 8 of the Convention which the Framework Decision is intended to reflect. Likewise, these exceptions also have the objective of 'enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires', [10] a principle which in some Member States constitutes the very purpose of criminal law. [11]

44. Moreover, the need to interpret the Framework Decision in the light of fundamental rights has become more imperative since the entry into force of the Charter of Fundamental Rights, Article 7 of which

8 — *Wolzenburg*, paragraph 61 (emphasis added).

9 — See, inter alia, *Mehemi v. France*, judgment of 26 September 1997, paragraph 34, ECHR 1997-VI; *Dalia v. France*, judgment of 19 February 1998, paragraph 52, ECHR 1998-I; *Boultif v. Switzerland*, judgment of 2 July 2001, paragraphs 39, 41 and 46, ECHR 2001-IX; *Sen v. Netherlands*, judgment of 21 December 2001, paragraph 40; *Amrollahi v. Denmark*, judgment of 11 July 2002, paragraphs 33 to 44; and *Slivenko v. Lithuania*, judgment of 9 September 2003, paragraph 94.

10 — Case C-66/08 *Kozlowski* [2008] ECR I-6041, paragraph 45, and *Wolzenburg*, paragraph 62.

11 — See, for example, Article 27(3) of the Italian Constitution and Article 25(2) of the Spanish Constitution.

covers the right to private and family life. [12] Until now the case-law of the Court of Justice on this issue has related very specifically to the free movement of persons but has not involved itself directly in the relationship between this right and judicial cooperation in criminal matters. The fact that the *Kozlowski* and *Wolzenburg* judgments preceded the entry into force of the Charter is linked logically to that result. Nevertheless, from 1 December 2009, it is imperative that Articles 4(6) and 5(3) of the Framework Decision should be interpreted in the light of Article 7 of the Charter. This being the case, the narrow interpretation put forward in points 38 to 40 of this Opinion cannot prevail.

45. In the third place, the will of the legislature cannot be interpreted in a sense that leads to an outcome incompatible with its aims. I do not suggest that the Court of Justice should construe the Framework Decision according to its objectives, but rather that it should avoid interpreting it in a way which is *contrary* to them. Implicit in this conclusion is the recognition that the narrow interpretation described above (which I propose to reject) would be incompatible with the Framework Decision, and also with the fundamental rights which the legislation in question is intended to reflect.

46. Thus, these last arguments powerfully demonstrate that when the Framework Decision does not expressly refer to the possibility of making execution of a warrant for the execution of a sentence conditional in circumstances such as those in the present case, this does not reflect a deliberate legislative decision which is the product of a clear and precise political will. On the contrary, in my view it is more a question of silence due to faulty legislative technique, whose remedy may and must be sought through interpretation, without any need to create a new ground for non-execution.

47. Although the foregoing interpretation provides a direct answer to the question raised by the Cour Constitutionnelle, it is indisputable that there is some ambiguity as to the characterisation of the arrest warrant in circumstances such as those in the present case. On this point, both Belgium and Poland have argued that the execution of a decision rendered *in absentia*, which may be challenged in an exceptional review procedure, constitutes a warrant for the purposes of prosecution within the meaning of Article 5(3) of the Framework Decision. On the other hand, I.B., Sweden, Germany, Austria and the Commission all take the view that it

12 — See, inter alia, Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 38; Case C-459/99 *MRAX* [2002] ECR I-6591, paragraph 53; Case C-157/03, *Commission* v *Spain* [2005] ECR I-2911, paragraph 26; Case C-503/03 *Commission* v *Spain* [2006] ECR I-1097, paragraph 41; Case C-441/02 *Commission* v *Germany* [2006] ECR I-3449, paragraph 109; and Case C-291/05 *Eind* [2007] ECR I-10719, paragraph 44.

is a warrant for the execution of a sentence within the meaning of Article 4(6) of the Framework Decision.

48. By way of a preliminary remark, I will mention at this stage that all the interveners are to some extent correct, for I.B. will be surrendered to Romania in order to execute a sentence which, because it was passed *in absentia*, provides the basis for holding a second trial with all the guarantees which were not present the first time. However, I do not think that the warrant issued for the arrest of I.B. need necessarily be characterised as either one or the other. Rather, I believe that a warrant such as that in the present case falls within both categories, depending on the timing and on the conduct of the person concerned.

49. Indeed, an arrest warrant implementing a decision rendered *in absentia* will always be issued in the issuing Member State as a warrant for the execution of a custodial sentence or detention order. It is implicit in the transnational nature of the arrest warrant that this situation will arise very frequently, and, in this knowledge, the Framework Decision includes the Article 5(1) guarantees, precisely in order to avoid the lack of an opportunity to present a defence which arises where decisions are rendered *in absentia*. At the time the arrest warrant is issued, the issuing Member State clearly issues it for the purposes of executing a sentence, and it cannot do otherwise because it does not yet know whether or not the person concerned will contest the surrender or seek a retrial. It all depends on the person, who, upon being given notice of the warrant, can use the procedure set out in Articles 11 and 13 of the Framework Decision, and can likewise request the court in the executing Member State to ensure that the guarantees set out in Articles 3 to 5 of the Framework Decision are respected, if the court has not already done so.

50. From the foregoing it can be seen that an arrest warrant which allows the accused to be retried in the issuing Member State is formally a warrant for execution of a sentence or detention order, which, once the person concerned has stated that he or she wishes to be retried, becomes in substance a warrant for the purposes of prosecution. This transformation cannot entail a loss of any of the guarantees provided under the Framework Decision for persons who are the subject of an arrest warrant. On the contrary, entry into play of Article 5(1), which seeks to provide a solution to the difficulties arising where decisions are rendered *in absentia*, changes the form of the arrest warrant but does not affect the rights accorded to the person concerned under European Union law.

51. Consequently, I suggest that the Court of Justice should interpret Article 5(3) of the Framework Decision as meaning that, in the circumstances described in Article 5(1) of the Framework Decision, that provision permits an executing Member State to make the enforcement of a warrant for the execution of a sentence or detention order subject to the condition that the issuing Member State should guarantee that the person concerned, a national or resident of the executing Member State, will be returned to the executing Member State to serve the sentence or detention order imposed, if any, in the territory of that Member State.

VI — The third and fourth questions referred

52. The arguments put forward in the previous point render the third and fourth questions nugatory. I believe that my suggested response to the first two questions is not only correct in view of the objectives sought by the Framework Decision, but is also correct according to an interpretation of the Framework Decision in the light of fundamental rights. I therefore think it unnecessary to examine the remaining questions raised by the Cour constitutionnelle.

VII — Conclusion

53. In the light of the above considerations, I propose that the Court of Justice should answer the questions raised by the Cour constitutionnelle as follows:

Article 5(3) of 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 meaning that, in the circumstances described in Article 5(1) of the Framework Decision, that provision permits an executing Member State to make the enforcement of a warrant for the execution of a sentence or detention order subject to the condition that the issuing Member State should guarantee that the person concerned, a national or resident of the executing Member State, will be returned to the executing Member State to serve the sentence or detention order imposed, if any, in the territory of that Member State.