

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 12 May 2011<sup>1</sup>

**I — Introduction**

1. The central question in the present reference for a preliminary ruling is whether Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings<sup>2</sup> precludes a national provision pursuant to which on an invariable and mandatory basis in cases of domestic violence as an ancillary penalty the offender is prohibited from communicating with the victim, even in cases in which the victim would like to resume communication with the offender.

<sup>1</sup> — Original language: German.

<sup>2</sup> — OJ 2001 L 82, p. 1, 'Framework Decision 2001/220' or 'Framework Decision'.

**II — Legal framework**

*A — European Union law*

2. Article 2(1) of Framework Decision 2001/220, entitled 'respect and recognition', provides as follows:

'Each Member State shall ensure that victims have a real and appropriate role in its criminal legal system. It shall continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings and shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings.'

3. Article 3, which bears the heading 'hearings, and provision of evidence', provides in paragraph 1:

'Each Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence.'

4. Article 8 of the Framework Decision concerns the ‘right to protection.’ The first paragraph of that article reads:

‘Each Member State shall ensure a suitable level of protection for victims and, where appropriate, their families or persons in a similar position, particularly as regards their safety and protection of their privacy, where the competent authorities consider that there is a serious risk of reprisals or firm evidence of serious intent to intrude upon their privacy.’

5. Finally, Article 10(1) of the Framework Decision 2001/220 is concerned with mediation in criminal proceedings:

‘Each Member State shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure.’

criminal law policy behind this is that such offences represented a social evil which is the manifestation of the fact that the balance of power in relations between men and women has historically been unequal.

7. It is apparent from what is stated by the referring court that in all cases of domestic violence, the courts are bound to impose in accordance with the provisions of Article 57(2) in conjunction with Article 48(2) of the Código Penal (Criminal Code, ‘CP’) as an ancillary penalty intended to give protection to the victim, a prohibition on the offender approaching or communicating with the victim. This injunction to stay away from the victim applies either for a period of between 1 and 5 years greater than the duration of any period of imprisonment or for a period greater than 6 months and less than 5 years if the penalty is other than imprisonment. The referring court states that this applies even in less serious cases of domestic violence, such as slapping, scratching, pushing or ‘mild verbal threats without weapons’.

## B — *National law*

6. The referring court points out that the Spanish law in relation to crimes committed within the family has been considerably tightened up in recent years. It states that the

8. The referring court emphasises that in every case, the criminal law requires the courts to impose that ancillary penalty and the judge has no discretion – except as to duration – to assess the circumstances of the case, such as the family interests at stake,

the victim's wishes or her decision to resume cohabitation.

9. Article 468(2) of the CP punishes the breach of such an injunction to stay away from the victim as the crime of contempt of court. According to a decision of the Tribunal Supremo (Supreme Court), the victim's consent to the resumption of cohabitation does not preclude the commission of the crime of contempt of court either. According to the referring court, there is even the theoretical possibility that in certain cases the victim of a crime committed within the family will be prosecuted for instigating or aiding and abetting contempt of court in some cases of resumption of cohabitation with the offender by mutual consent.

10. Moreover, according to the referring court, by virtue of Article 84(3) of the CP, the consequence of a breach of the injunction to stay away from the victim ordered by means of an ancillary penalty is that a suspended sentence is automatically recalled, even if the resumption of communication occurred with the consent of the victim.

11. Finally, the referring court points out that Article 87(b)(5) of the *Ley Orgánica del Poder Judicial* (Organic Law on the judiciary) prohibits mediation in all cases of crimes or offences (including mere insults) committed within the family.

### III — Facts and main proceedings

12. The Juzgado de lo Penal No 23 de Barcelona (Criminal Court, No 23 of Barcelona) convicted Mr Gueye of a crime of domestic abuse, which is not described in any more detail in the reference for a preliminary ruling, the victim being his partner, with whom Mr Gueye had maintained a relationship in the four preceding years. Consequently, the court imposed, inter alia, an ancillary penalty which prohibited the offender from approaching within 1 000 metres of the victim or communicating with her for a period of 17 months.

13. A few days after those penalties were imposed, Mr Gueye resumed cohabitation with the victim; this occurred at the request of the victim. Due to this breach of the injunction to stay away from the victim, the Juzgado de lo Penal No 1 de Tarragona (Criminal Court, No 1 of Tarragona) convicted him of the crime of contempt of court pursuant to Article 468(2) of the CP. Mr Gueye appealed against that judgment to the referring court, Section 4 of the Audiencia Provincial de Tarragona (Provincial Court, Tarragona).

14. The Audiencia Provincial de Tarragona must also decide, as appeal court, on the conviction of Mr Valentín Salmerón Sánchez for the crime of contempt of court pursuant to Article 468(2) of the CP. Mr Salmerón Sánchez is accused of having failed to comply with an ancillary penalty imposed on him by a judgment of the Juzgado de Instrucción No 7 de Valencia Sobre la Mujer de El Vendrell (Court of Preliminary Investigations,

No 7, Valencia with special jurisdiction over crimes of violence against women) on 6 November 2006, which prohibited him from approaching within 500 metres of the victim or communicating with her for a period of 16 months.

15. The basis of the imposition of an ancillary penalty by the Juzgado de Instrucción No 7 de Valencia Sobre la Mujer, de El Vendrell, was a crime of domestic abuse, which is not described in any more detail in the reference for a preliminary ruling, the victim being his partner, with whom the second defendant had maintained a relationship in the six preceding years.

16. According to the court's findings, in both cases the defendants began living with the victims again only a few days after being sentenced, despite an injunction to stay away from the victims. When they were heard by the referring court, each of the victims stated that they had continued the relationship with the offender of their own free will, without having been pressurised to do so and without economic necessity; they said that the initiative to do so had substantially come from them. They therefore regarded themselves as indirect victims of the Spanish criminal law, particularly since they said that the cohabitation had been without problems prior to the detention of the defendants for contempt of court.

17. The appeal court entertains doubts about the compatibility of the Spanish provisions

with the Framework Decision. It considers that it may well be necessary to impose an injunction to stay away from the victim for the protection of the victim, even against the latter's will. However, the fact that even in cases involving minor offences Spanish law does not allow scope for an assessment on a case-by-case basis or for the victim's wishes to be taken into account and requires that without exception an injunction to stay away from the victim for at least six months should be imposed, does not appear appropriate to the appeal court.

#### **IV — Reference for a preliminary ruling and proceedings before the Court of Justice**

18. Against this background, by order of 15 September 2009, in the proceedings relating to Mr Gueye and by order of 18 December 2009, in the proceedings relating to Mr Salmerón Sánchez, the appeal court, the Audiencia Provincial de Tarragona, referred the following questions – which are identical in both proceedings – to the Court for a preliminary ruling:

(1) Should the right of the victim to be understood, referred to in recital (8) of the preamble to the Framework Decision, be interpreted as meaning that the State authorities responsible for the prosecution and punishment of criminal conduct have a positive obligation to allow the victim to express her assessment, thoughts and

opinion on the direct effects on her life which may be caused by the imposition of penalties on the offender with whom she has a family relationship or a strong emotional relationship?

- (2) Should Article 2 of the Framework Decision 2001/220/JHA be interpreted as meaning that the duty of States to recognise the rights and legitimate interests of victims creates the obligation to take into account their opinions when the penalties arising from proceedings may jeopardise fundamentally and directly the development of their right to freedom of personal development and the right to private and family life?
- (3) Should Article 2 of the Framework Decision 2001/220/JHA be interpreted as meaning that the State authorities may not disregard the freely expressed wishes of victims where the imposition or maintenance in force of an injunction to stay away from the victim when the offender is a member of their family are opposed by the victim and where no objective circumstances indicating a risk of re-offending are established, where it is possible to identify a level of personal, social, cultural and emotional competence which precludes any possibility of subservience to the offender or, rather, as meaning that such an order should be held appropriate in every case in the light of the specific characteristics of such crimes?
- (4) Should Article 8 of the Framework Decision 2001/220/JHA providing that Member States are to guarantee a suitable level of protection for victims be interpreted as permitting the general and mandatory imposition of injunctions to stay away from the victim or orders prohibiting communication as ancillary penalties in all cases in which a person is a victim of crimes committed within the family, in the light of the specific characteristics of those offences, or, on the other hand, does Article 8 require that an assessment of each individual case be undertaken to allow the identification, on a case-by-case basis, of the suitable level of protection having regard to the competing interests?
- (5) Should Article 10 of the Framework Decision 2001/220/JHA be interpreted as permitting a general exclusion of mediation in criminal proceedings relating to crimes committed within the family, in the light of the specific characteristics of those crimes or, on the other hand, should mediation also be permitted in proceedings of that kind, assessing the competing interests on a case-by-case basis?

19. By order of the President of the Court of 24 September 2010, the Court of Justice joined the two proceedings for the purposes of the procedure and the judgment.

20. In both proceedings before the Court, written submissions were made by the Italian, Dutch, Austrian, Polish, Swedish and Spanish Governments and by the Commission; the German Government submitted written observations in Case C-483/09. The German and Spanish Governments and the Government of the United Kingdom and the Commission participated in the hearing on 3 March 2011.

## V — Legal appraisal

### *A — Right to refer questions for a preliminary ruling and admissibility of the reference for a preliminary ruling*

21. There is no doubt as to the right of the Audiencia Provincial de Tarragona to refer questions for a preliminary ruling. Framework Decision 2001/220 which must be interpreted in the present case was adopted on the basis of Articles 31 and 34(2)(b) EU. Pursuant to Article 35 EU, it is a pre-requisite for a reference for a preliminary ruling in relation to an act adopted under Article 34(2), that the Member State concerned has accepted the jurisdiction of the Court of Justice. This restriction on the right to refer questions for a preliminary ruling also remains for a transitional period after the Treaty of Lisbon coming into

force.<sup>3</sup> Spain has made a corresponding declaration pursuant to Article 35(3)(a) EU,<sup>4</sup> pursuant to which any Spanish court against whose decisions there is no judicial remedy under national law has a right to refer questions for a preliminary ruling.

22. The Commission has explained, without being contradicted, that there is no judicial remedy under Spanish law against the decision of an Audiencia Provincial which rules as the appeal court on the judgment of a Juzgado penal. Accordingly, in the present case the Audiencia Provincial is a court deciding at last instance within the meaning of Article 35(3)(a) EU and therefore has a right to refer questions for a preliminary ruling.

23. The Governments of Spain and Italy consider the reference for a preliminary ruling to be inadmissible on the grounds that the questions referred are not relevant to the decision.

24. In accordance with settled case-law, in the context of the cooperation between the Court and the national courts, it is solely for the national court which must assume

3 — Protocol (No 36) on transitional provisions, OJ 2010 C 83, p. 322.

4 — This follows from the Information concerning the date of entry into force of the Treaty of Amsterdam, published in the *Official Journal of the European Community* on 1 May 1999, (OJ 1999 L 114, p. 56).

responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Where the questions submitted for a preliminary ruling concern the interpretation of European Union law ('EU law'), the Court is, in principle, bound to give a ruling,<sup>5</sup> and there is therefore a presumption that the questions referred by national courts for a preliminary ruling are relevant.<sup>6</sup>

25. It may only be presumed that a reference is inadmissible in certain exceptional cases, in particular where it is quite obvious that the interpretation which is sought of the provisions of EU law referred to in the questions is hypothetical.<sup>7</sup> Against this background, the objections of the two governments do not convince me.

26. The Spanish Government states that the questions referred are hypothetical, because the subject-matter of the main proceedings is no longer the injunction to stay away from the victim itself, but instead the sanction for the breach of the injunction to stay away from the victim, namely the crime of contempt of court. However, it submits that the referring court's questions only relate to the injunction to stay away from the victim and not to the

crime of contempt of court in relation to the breach of the injunction to stay away from the victim.

27. However, the question of whether in the course of its decision in relation to the contempt of court the referring court must, can or may wish to take into account the admissibility of the imposition of the injunction to stay away from the victim upon which that contempt of court is based comes within its jurisdiction. Accordingly, it is free to request the interpretation of the Framework Decision in connection with such an injunction to stay away from the victim.

28. The Italian Government considers the reference to be inadmissible, since if it were to be assumed that the national law conflicts with the Framework Decision, then an interpretation of that national law in conformity with the Framework Decision would be impossible. It says that this could possibly be done *contra legem*. It submits that the referring court in fact points out itself that where the requirements of Article 57(2) of the CP are met it is mandatory to impose an injunction to stay away from the victim as an ancillary penalty.

29. The court has repeatedly held that the obligation on a national court to interpret national law in conformity with EU law cannot serve as the basis for an interpretation of

5 — See, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59 and Case C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 26.

6 — Case C-105/03 *Pupino* [2005] ECR I-5285, paragraph 30; Case C-404/07 *Katz* [2008] ECR I-7607, paragraph 31; and Case C-82/09 *Dimos Agiou Nikolaou* [2010] ECR I-3649, paragraph 15.

7 — Settled case-law, see only Case C-450/09 *Schröder* [2011] ECR I-2497, paragraph 17.

national law *contra legem*.<sup>8</sup> However, it does not appear to me to be unambiguously clear as yet whether a prohibition on interpreting *contra legem* arises from EU law itself<sup>9</sup> or whether EU law merely does not preclude a national prohibition on interpreting *contra legem*.<sup>10</sup> In any case, in a scenario in which the national law allows such an interpretation and this would not lead to a burden on the individual, for example in the present situation it would not lead to a punishment being imposed or made more stringent, but on the contrary to a punishment being inapplicable, it is not apparent why that should be precluded by EU law.

30. However, for the purposes of the present proceedings this question does not need to be examined conclusively: at this point, in the course of the examination of admissibility, it is not in any case obvious that – supposing that the Framework Decision precluded the national law – the referring court could only arrive at a conclusion in conformity with the Framework Decision by means of an interpretation *contra legem*. In any case, it is in fact to be demanded from the national courts, when interpreting in conformity with the Framework Decision, that the entirety of national law be taken into account if necessary in order to assess the extent to which it can be

applied so that no result which conflicts with the Framework Decision is achieved.<sup>11</sup>

31. In its written observations, the Spanish Government itself stated that the extent to which Spanish law does in fact allow the wishes of the victim to be taken into account is certainly disputed in the Spanish case-law. It pointed out that the statements of the Tribunal Supremo in relation to the liability to punishment for contempt of court in relation to breach of the injunction to stay away from the victim, as a consequence of which the contrary wishes of the victim have no effect on punishment of the breach of the injunction, should not be ascribed any ‘binding status.’ In that light, it is not evident that an interpretation in conformity with the Framework Decision would be impossible and therefore that a reply from the Court would be of no value to the main proceedings.

32. Accordingly, the references for a preliminary ruling are admissible.

## B — Interpretation of Framework Decision 2001/220

33. By means of its references, the referring court essentially seeks to know whether the

8 — See Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 110; Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 100; and Case C-12/08 *Mono Car Styling* [2009] ECR I-6653, paragraph 61.

9 — The judgment in *Pupino* is inclined in this direction (cited in footnote 6, paragraph 47).

10 — The judgments cited in footnote 8, which are based on the obligation in EU law to interpret national law in conformity with EU law, point towards the first alternative.

11 — *Pupino* (cited in footnote 6, paragraph 47).



Framework Decision precludes a national provision, which in relation to crimes committed within the family provides for the mandatory imposition of a prohibition on communication between the offender and the victim, without providing for the possibility to refrain from such a prohibition in exceptional cases after having considered the circumstances of the individual case and in particular the wishes of the victim to resume the relationship with the offender.

circumstances in which the imposition of such a sanction may even harm the interests and rights of the victim for whose protection it is actually intended. In this respect, the victim may rely on her fundamental right to respect for her private and family life. At the hearing, the German Government cited as an example case the situation of a couple who jointly manage a business. It submitted that in such a case an injunction to stay away from the victim could lead to the collapse of the business and consequently even the destruction of the victim's economic means of support.

## 1. Preliminary remark

34. A provision which provides for a mandatory injunction to stay away from the victim as an ancillary penalty in all cases of domestic violence – as the referring court emphasises, even in relation to verbal threats – and of a duration which exceeds that of any period of imprisonment by at least a year and in cases where the penalty is other than imprisonment, at least six months,<sup>12</sup> is very strict.

35. The referring court clearly expresses doubts as to the proportionality of such an injunction to stay away from the victim in situations in which the victim, of her own free will and without pressure, would like to resume cohabitation with the offender. It questions whether there are not exceptional

36. On the other hand, the Spanish Government emphasised that the strict provisions were necessary in order to take effective action against the phenomenon of domestic violence. In this respect it must be observed that the legislature owes a duty of protection to the victims. The European Court of Human Rights has also recently emphasised these duties of protection.<sup>13</sup> It is precisely in domestic violence cases that an injunction to stay away from the victim can be a sensible means of giving the victim the opportunity to reorganise her life free from direct pressure. The referring court does point out that the victims in the main proceedings had made their wish to resume cohabitation with the offender entirely of their own free will. However, in cases of domestic violence it is not always easy to

12 — The maximum duration of the injunction to stay away from the victim is five years in this case.

13 — Judgment of the European Court of Human Rights of 9 June 2009, *Opuz v Turkey* (No 33401/02).

establish whether any pressure was actually exerted on the victim, since the latter does not usually take place in public view.

37. It becomes clear that a mandatory injunction to stay away from the victim lies in the area where the requirement to take effective State action against domestic violence on the one hand is in conflict with respect for private and family life and private autonomy on the other. The problem area, which is only briefly outlined here, requires a difficult balancing of the various legal interests.

38. In order to anticipate the result of my assessment: in my view, this difficult question of balancing does not come within the objective scope of Framework Agreement 2001/220, but is instead a question of national constitutional law<sup>14</sup> and the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>15</sup>

39. As I will explain below, the Framework Decision is solely concerned with the standing of the victim in criminal *proceedings*, even if understood in the broadest sense. On the

other hand, it does not impose any requirements in relation to *substantive* criminal law, in particular, none in relation to the form and extent of penalties. Therefore the question of the suitability of a mandatory injunction to stay away from the victim, as is provided for in the Spanish Criminal Code, is outside its objective scope.

40. In the following paragraphs, I will first of all comment on the general regulatory objective of Framework Decision 2001/220, in order then to jointly examine the first two questions and then the third and fourth questions. Finally, I will answer the fifth question.

2. The general regulatory objective of Framework Decision 2001/220

41. By means of Framework Decision 2001/220 minimum standards for the protection of victims of crimes were to be drawn up.<sup>16</sup> The general objective of the decision is to protect the interests of the victims of crimes at the various stages of criminal proceedings and to guarantee a comparable, high level of protection across the European Union, irrespective of the Member State in which they are present.<sup>17</sup> The Member States should ensure that the victim of a crime

14 — By its judgment of 7 October 2010, the Tribunal Constitucional (Spanish constitutional court) held in Case STC 60/2010 that the Spanish provisions were constitutional.

15 — European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

16 — See recital (3) of the Framework Decision, which refers to the conclusions of the European Council meeting in Tampere on 15 and 16 October 1999.

17 — See recital (4) of the Framework Decision.

receives measures of assistance which are suitable to mitigate the effects of the crime.<sup>18</sup>

the Member States to hear the victim with regard to the effects of a penalty on the offender with whom she has a family relationship and on the other hand whether it follows from Article 2 of the Framework Decision that the courts must take into account that expression of her opinion.

42. According to recital (8) of the Framework Decision, the rules as regards the standing and main rights of victims need to be approximated, with particular regard to the right to be treated with respect for their dignity, the right to provide and receive information, the right to understand and be understood, the right to be protected at the various stages of procedure and the right to have allowance made for the disadvantage of living in a different Member State from the one in which the crime was committed. In other words: the victim of a crime should not merely be the object of the proceedings. On the contrary, as recital (5) emphasises, ‘victims’ needs should be considered and addressed in a comprehensive and coordinated manner, avoiding partial or inconsistent solutions which may give rise to secondary victimisation.’

44. First of all, it must be made clear with regard to the first question that no legal obligation for the Member States may arise from the recital of a Framework Decision.<sup>19</sup> The recitals may only be used for the purposes of interpreting its provisions.

### 3. First and second questions referred

43. With its first two questions, the referring court seeks to know whether on the one hand recital (8) of the Framework Decision obliges

45. A right for victims to be heard is laid down in Article 3 of the Framework Decision. Pursuant to that provision, the Member States must ensure that victims may be heard during proceedings and may supply evidence. Since Article 3 constitutes a special provision in relation to the victim’s right to be heard, it must also be examined in preference to Article 2(1) for the purposes of answering the second question referred. Accordingly, Recital (8) may only possibly acquire importance for the purposes of applying Article 3.

<sup>18</sup> — See recitals (3) and (6) of the Framework Decision.

<sup>19</sup> — See only Case C-562/08 *Müller Fleisch* [2010] ECR I-1391, paragraph 40 and case-law cited.

## (a) Article 3 of the Framework Decision

46. As the Court has already held in connection with the right of victims to supply evidence, provided for in Article 3, the Member States are allowed a large measure of discretion when implementing this obligation.<sup>20</sup> Recital (9) of the Framework Decision therefore also emphasises that the Member States are not obliged to treat victims in a manner equivalent to that of a party to proceedings. Accordingly, Member States are free to lay down the form in which they afford victims the right to be heard.

47. In order to take into account the interests of the victim and not restrict the victim to a purely passive role, a narrow understanding of this right to be heard is out of the question, as the German and Polish Governments correctly point out. In addition to having the opportunity to describe how the offence happened, the victim's right to be heard must also include the victim's right to communicate subjective opinions and expectations of the proceedings. In any case, in a situation in which the victim has a close personal relationship with the offender, and therefore an injunction to stay away from the victim has an indirect effect on the victim's private and family life, the principle of the right to

be heard also covers the opinion of the victim with regard to the imposition of such an injunction.

48. In order not to deprive this right to be heard of its practical effect,<sup>21</sup> there must also be the possibility for the victim's opinion to have an effect on sentencing. In interpreting Article 3, the Court has referred to the statement in Article 2(1).<sup>22</sup> Pursuant to that provision, each Member State must ensure that victims have a real and appropriate role in its criminal legal system. In order to take into account this right, the court must consider the victim's testimony and there must accordingly be the possibility that this testimony can have an effect on the court's findings: the victim would not have any real role in the proceedings if her testimony did not have to be taken into account.

49. However, it cannot follow from the right to be heard – as, *inter alia*, the Austrian Government correctly emphasises – that the imposition of the penalty is placed at the disposal of the victim. On the contrary, the question of sentencing requires a complex balancing of factors, in which quite distinct aspects have to be taken into account and therefore it cannot be based solely on the victim's wishes. Accordingly, the competent court is not bound by the victim's opinion. As a further argument against the obligatory taking into account of the wishes of the victim, the Swedish Government correctly submitted that there would

20 — *Katz* (cited in footnote 6, paragraph 46). Also see in relation to this my Opinion delivered on 10 July 2008 in that case.

21 — See, for example, *Katz* (cited in footnote 6, paragraph 47).

22 — *Katz* (cited in footnote 6, paragraph 47).

then be the risk that the victim would be pressurised by the offender into pleading in court for a more lenient penalty.

for in national law. It should be made clear that this does not mean that the court has to follow the wishes of the victim. In sentencing, it is not bound by the views expressed by the victim on that subject.

50. As I will state in the course of answering questions three and four, the effectiveness of this right to be heard does not however preclude the provision of a minimum penalty under national law. The possibility to take into account the opinion of the victim, as required by Article 3 of the Framework Decision, must merely exist within the range of penalties provided for in national law.

4. Third and fourth questions referred

52. With these two questions, the referring court would in essence like to know whether the Framework Decision precludes an injunction to stay away from the victim, which must be imposed on a mandatory basis in all cases of domestic violence without an assessment of the circumstances of the individual case and also against the wishes of the victim.

(b) Interim conclusion

53. Following on from the above interpretation of Article 3, first of all it is necessary to consider the right to be heard.

51. The interim conclusion must accordingly be that Article 3(1) obliges the Member States to allow the victim the opportunity to express her views on the imposition of an injunction to stay away from the victim on an offender with whom the victim has a family or strong emotional relationship. There must also be the possibility for the court to be able to take into account the opinion of the victim in reaching its decision. However, this only applies within the scope of the range of penalties provided

(a) Article 3 of the Framework Decision

54. With reference to the victim's right to be heard which was considered in the context of the first two questions, it could be argued that the right to be heard is only effective if in certain cases the victim being heard can lead to

no injunction to stay away from the victim being imposed at all. According to what is stated by the referring court, where the offender is sentenced to imprisonment, an injunction to stay away from the victim applies for at least a year after the sentence has been served, and in other cases has a minimum duration of six months. In response to an inquiry from the Court, the Spanish Government also stated at the hearing that in certain cases the minimum duration of an injunction to stay away from the victim could possibly be reduced to one month.

55. Against the background of a minimum duration for an injunction to stay away from the victim of six months, the United Kingdom expressed doubts at the hearing as to the Spanish provision's conformity with the Framework Decision. It argued that the victim's right to be heard with regard to the sanction to be imposed was worthless with regard to those six months, since regardless of what the victim submitted, the court could not impose an injunction to stay away from the victim for a period less than six months. However, this is not consistent with the requirement of an effective right to be heard.

56. However, in my opinion, the right to be heard cannot be assigned such an effect on the sentence provided for in national law. Provided that a victim makes known her opinion in relation to the imposition of an injunction to stay away from her, and that her testimony may be taken into account generally within the range of penalties provided for in national law, the requirements of Article 3 are satisfied.

57. Any greater requirements would exceed the procedural law legislative content of the Framework Decision. The objective of the Framework Decision is to ensure that the victim of a crime has certain *procedural rights* in criminal proceedings. Whether a Member State provides for ancillary penalties for domestic violence offences, and the nature of those penalties, is not the legislative subject-matter of Framework Decision 2001/220. The latter does not regulate all aspects of victim protection in a general and comprehensive way, but specifically those aspects relating to procedural rights in criminal proceedings. Therefore the victim's right to be heard pursuant to Article 3 may not be understood so broadly as to influence, even indirectly, the range of penalties itself which is provided for in national law.

58. In essence, the United Kingdom was also of the opinion that substantive criminal law and therefore the nature and duration of penalties do not come within the scope of the Framework Decision.

(b) Article 8 of Framework Decision 2001/220

59. From the wording of 'suitable level of protection for victims' used in Article 8, the German Government infers that the Framework Decision precludes the invariable and mandatory imposition of an injunction to stay away from the victim. It submits that it

follows from the requirement of suitability of victim protection that the Member States have a duty to assess each case where an injunction to stay away is imposed on an individual basis.

60. I am not convinced by such an interpretation. First of all, an *overly extensive* level of victim protection was certainly not what the European Union legislature had in mind when it required a *suitable* level of protection for victims in Article 8(1). However, in the present case the protection resulting from the Spanish injunction to stay away from the victim could only be unsuitable because it was ordered against the wishes of the victim and therefore could in that case be too extensive. The requirement for suitable victim protection was included in Article 8 rather as a result of concerns about an overly low level of protection.

61. Apart from that, as is apparent from the legislative context of Article 8, that provision is concerned with the protection of the victim in the course of the proceedings, where ‘there is a serious risk of reprisals or firm evidence of serious intent to intrude upon their privacy’. As the Swedish Government correctly emphasises, these protective measures are intended to protect the victim from attacks or the exercise of influence *by the offender* or a

person connected with him during the proceedings. Article 8(1) is not concerned with protecting the victim against the negative consequences of penalties imposed on the offender.

62. The connection with the other paragraphs of Article 8 of Framework Agreement 2001/220, to which the Dutch Government refers in its observations, also points in favour of the interpretation adopted here. Thus, pursuant to Article 8(3), the Member States are to ensure that contact between victims and the *offender* within court premises should be avoided, where possible by means of providing separate waiting areas for victims. The same purpose is served by Article 8(4) of Framework Agreement 2001/220, which also seeks to prevent the victim from being confronted with the *offender* in open court and having to testify there. These are all aspects which relate to the criminal proceedings.

63. In other words, the guarantee of protection in Article 8 of Framework Agreement 2001/220 primarily has an *auxiliary function*: it is intended to ensure that the victim may exercise the other procedural rights which she is guaranteed safely and without fear and therefore effectively. Article 8 is therefore connected with the rights of the victim in the proceedings and it is not concerned with covering all conceivable interests of the victim.

64. Therefore it does not follow from Article 8 either that the Framework Decision precludes a mandatory injunction to stay away from the victim which is provided for in national criminal law.

(c) Article 2 of the Framework Decision

instead is restricted to the context of *criminal procedural law*.

65. Under Article 2(1) of the Framework Decision 2001/220, Member States are to ensure that victims have a real and appropriate role in their criminal legal system, and are to recognise victims' rights and legitimate interests with particular reference to criminal proceedings.

66. Article 2 does not contain any specific guarantees but is instead worded distinctly openly. Therefore to date the Court has also used it from time to time for the purposes of interpreting the specific guarantees in the subsequent articles of the Framework Decision.<sup>23</sup> It is therefore intended rather to outline in a general way the scheme of the Framework Decision, before the specific obligations of the Member States follow in the subsequent articles.

67. However, it is not possible to infer from Article 2 a prohibition on the invariable and mandatory imposition of an injunction to stay away from the victim. The issue of the proportionality of an injunction to stay away from the victim which must be imposed on a mandatory basis pertains to the penalties provided for in substantive criminal law. The general reference in Article 2 to respect and recognition of the victim cannot create an obligation on the Member States to give effect to the victim's interests in the whole of criminal law, including *substantive* criminal law, but

68. This may be readily inferred from the title and the overall context of the provisions of Framework Decision 2001/220. All the provisions following Article 2 serve to further develop and specify the standing of the victim specifically in relation to criminal proceedings. Accordingly, they relate, inter alia, to 'hearings and provision of evidence', the 'right to receive information', 'communication safeguards', and 'victims' expenses with respect to criminal proceedings.' In contrast, express aspects of victim protection which relate to substantive criminal law are not found at any point in the Framework Decision.

69. In the Framework Decision there are no statements on the substantive criminal law of the Member States in general or on the associated issue of punishment of the offender. It may also be read from the definition of 'victim' in Article 1 that the Framework Decision is not intended to affect substantive criminal law, but takes this as a starting point for the procedural rights of the victim. Pursuant to that provision, a victim is a person who has suffered harm caused by an act which is in violation of the criminal law of a Member State.

70. No other conclusion follows from the definition of the term 'proceedings', also contained in Article 1, as it is also used in

23 — *Katz* (cited in footnote 6, paragraph 47) and *Pupino* (cited in footnote 6, paragraph 52).



Article 2(1). The definition there is as follows: “proceedings” shall be broadly construed’ to include, in addition to actual criminal proceedings, all contacts of victims as such with any authority, public service or victim support organisation in connection with their case, before, during, or after criminal process. It cannot be inferred from that definition that the organisation of substantive law penalties also comes within the term ‘proceedings’. Recitals (6) and (10) take as their topic the importance of certain measures and bodies to provide assistance to victims before and after criminal proceedings.

71. The fact that a broad understanding of the term ‘proceedings’ is taken as a basis for the Framework Decision is only logical because pursuant to Article 1 ‘criminal proceedings’ is understood to mean the relevant proceedings in accordance with the national law. Since the national legal systems may differ with regard to what they actually deem to be criminal proceedings, it is necessary for the purposes of protection of victims throughout the European Union to also include aspects which are directly connected to the criminal proceedings, but which occur before or after those proceedings. The protection of the victim may also require that measures to provide assistance to victims do not abruptly end with the delivery of the judgment, but continue to operate for a certain time afterwards.

72. However, even a broad understanding of the term ‘proceedings’ does not allow the imposition of criminal penalties on the offender to become a procedural aspect. The Framework Decision does not regulate all aspects of victim protection in a general and comprehensive way but only in relation to procedural

rights in criminal proceedings. Therefore the Framework Decision is not concerned with protecting the victim from indirect consequences of the penalty imposed on the offender by a court which occur outside those proceedings.

73. If the Framework Decision were to be interpreted in a way which would have indirect effects on the penalties provided for in national law, the question would then arise as to whether the European Union would have any legislative competence to do this.

74. On other occasions<sup>24</sup> I had already drawn attention to the fact that certain doubts exist as to whether questions of victim protection in criminal proceedings are actually covered by the legal basis identified in Framework Agreement 2001/220 (Article 34(2)(b) EU). This applies *a fortiori* to the aspects of substantive penalties and sentencing addressed in the present case. The principle of an interpretation which is compatible with primary law accordingly also militates against interpreting the Framework Decision to cover the suitability of penalties.

24 — See my Opinion delivered on 11 November 2004 in Case C-105/03 *Pupino* [2005] ECR I-5285, point 48 et seq. and my Opinion delivered on 8 March 2007 in Case C-467/05 *Dell’Orto* [2007] ECR I-5557, point 40.

75. Finally, it is also necessary to consider the Charter of Fundamental Rights to which the Commission in particular refers. In the Commission's view, the obligation on the Member States contained in Article 2(1) of the Framework Decision to recognise the rights of victims in criminal proceedings also means that the Member States must safeguard all rights under the Charter of Fundamental Rights. The Commission therefore examines an infringement of Article 7 of the Charter, which lays down the right to respect for private and family life.

76. It should be recalled in relation to this, that the Framework Decision must of course be interpreted in such a way that fundamental rights are respected.<sup>25</sup> However, this can only apply within the limits of its objective scope. At the outset, I briefly mentioned the fact that the victims' fundamental rights could be affected in the present cases. Nevertheless, this finding cannot lead to the Framework Decision acquiring a content which it does not have.

77. In the present case the question does not arise either as to the interpretation of Article 51(1) of the Charter of Fundamental Rights, which determines its scope. Pursuant to that provision, the Charter applies to

the Member States 'only when they are implementing Union law'. It has not yet been conclusively clarified whether this should be understood restrictively or comprehensively means all cases in which a national provision comes within the field of application of EU law.<sup>26</sup>

78. Since the Framework Decision is only concerned with the criminal proceedings aspects of victim protection and not the penalties to be imposed on the offender, the facts of the present case do not come within the scope of the Framework Decision and therefore EU law.

79. Therefore the Court does not have jurisdiction to examine whether and to what extent the provisions of Spanish criminal law concerning the imposition of an injunction to stay away from the victim for domestic violence offences, which are called into question by the referring court, are compatible with fundamental rights, for instance the duty to respect private and family life.<sup>27</sup> On the contrary, this examination of the fundamental rights of the persons concerned remains the task of the national constitutional court or the European Court of Human Rights.

26 — See in relation to this the Opinion of Advocate General Bot delivered on 5 April 2011 in Case C-108/10 *Scattolon* pending before the Court, points 110 to 121.

27 — See in this respect Case 12/86 *Demirel* [1987] ECR 3719, paragraph 28 and Case C-260/89 *ERT* [1989] ECR I-2925, paragraph 42.

25 — *Katz* (cited in footnote 6, paragraph 48).

(d) Interim conclusion

is only binding with regard to its objective, the national authorities are however left to choose the form and means. The Member States must be granted a large measure of discretion for the purposes of the detailed implementation of the Framework Decision.<sup>28</sup>

80. Therefore the answer to the third and fourth questions referred must be that Framework Decision 2001/220 does not affect the question of the suitability of penalties to be imposed. Therefore it does not preclude a national provision which provides, on an invariable and mandatory basis, for an injunction to stay away from the victim as an ancillary penalty.

83. In relation to the possibility of mediation in criminal proceedings, Article 10 of Framework Decision 2001/220 merely enjoins each Member State to seek to promote mediation for offences which it ‘considers appropriate’. This open criterion of appropriateness alone makes it clear that it is for the Member States to decide on the offences for which there is the possibility of mediation.<sup>29</sup>

5. Fifth question referred

81. By its fifth question the referring court seeks to ascertain whether Article 10 of Framework Decision 2001/220 should be interpreted as obliging the Member States also to provide for the possibility of mediation in relation to crimes committed within the family.

84. While it is true that these decisions of Member States may be restricted by the obligation to use objective criteria to determine the types of offences concerned,<sup>30</sup> there is no indication that that is at issue in the present case: if mediation is excluded for offences committed within the family, there still remains substantial scope for the possibility of mediation.

82. In relation to this, it must be pointed out once more that the Framework Decision

28 — *Katz* (cited in footnote 6, paragraph 46) and Case C-205/09 *Eredics* [2010] ECR I-10231, paragraph 38.

29 — *Eredics* (cited in footnote 28, paragraph 37).

30 — See, for example, *Eredics* (cited in footnote 28, paragraph 39).

## VI — Conclusion

85. In the light of the foregoing considerations, I suggest that the Court should answer the reference for a preliminary ruling as follows:

- ‘(1) Article 3 of Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings obliges the Member States to allow the victim the opportunity to express her views with regard to the imposition of an injunction to stay away from the victim, in a situation in which the victim has a close personal relationship with the offender, and therefore an injunction to stay away from the victim has an indirect effect on the victim’s private and family life. There must also be the possibility that the court can take into account such an opinion of the victim in reaching its decision. However, this only applies within the range of penalties provided for in national law and does not mean that the court is bound by the wishes of the victim.
- (2) Framework Decision 2001/220 does not affect the question of the suitability of penalties to be imposed. Therefore it does not preclude a national provision which provides, on an invariable and mandatory basis, for an injunction to stay away from the victim as an ancillary penalty.
- (3) Article 10 of Framework Decision 2001/220 grants the Member States a large measure of discretion in determining the offences for which they provide for mediation. The provision does not oblige the Member States to provide for mediation in relation to crimes within the family.’