



Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 20 March 2012¹

Case C-42/11

João Pedro Lopes Da Silva Jorge

(Reference for a preliminary ruling from the Cour d'appel d'Amiens (France))

(Police and judicial cooperation in criminal matters — Framework Decision on the European arrest warrant and the surrender procedures between Member States — Legislation of a Member State restricting the power not to execute the European arrest warrant to cases where the requested persons are nationals of that State — Discrimination based on nationality)

1. This reference for a preliminary ruling from the Cour d'appel d'Amiens (Court of Appeal, Amiens) (France) offers the Court a further opportunity to give consideration to the interpretation of Article 4(6) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.² The Court is asked in particular to clarify its case-law and to reconcile the margin of discretion which must be afforded to the Member States in the implementation of that framework decision with the scope of the guarantees that must be offered to citizens of the European Union when they are the subject of a European arrest warrant issued for the purposes of executing a custodial sentence.

I – Legal framework

A – International law

2. The Convention on the Transfer of Sentenced Persons signed on 21 March 1983 in Strasbourg, to which all the Member States of the European Union are parties, provides, in Article 2(1), that '[t]he Parties undertake to afford each other the widest measure of co-operation in respect of the transfer of sentenced persons in accordance with the provisions of this Convention'.

3. Article 3(1)(a) of the Convention on the Transfer of Sentenced Persons states:

'A sentenced person may be transferred under this Convention only on the following conditions:

(a) if that person is a national of the administering State'.

4. Article 3(4) of the Convention on the Transfer of Sentenced Persons specifies that '[a]ny State may, at any time, by a declaration addressed to the Secretary General of the Council of Europe, define, as far as it is concerned, the term "national" for the purposes of this Convention'.

¹ — Original language: French.

² — OJ 2002 L 190, p. 1.

B – *European Union law*

1. Framework Decision 2002/584

5. Article 1 of Framework Decision 2002/584 defines the European arrest warrant and the obligation to execute it as follows:

‘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’.

6. Article 4 of Framework Decision 2002/584 is devoted to the grounds for optional non-execution of the European arrest warrant. Paragraph 6 of that article provides that ‘[t]he executing judicial authority may refuse to execute the European arrest warrant ... if [it] 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’.

7. Article 32 of Framework Decision 2002/584 states that ‘[e]xtradition requests received before 1 January 2004 will continue to be governed by existing instruments relating to extradition. Requests received after that date will be governed by the rules adopted by Member States pursuant to this Framework Decision. However, any Member State may, at the time of the adoption of this Framework Decision by the Council, make a statement indicating that as executing Member State it will continue to deal with requests relating to acts committed before a date which it specifies in accordance with the extradition system applicable before 1 January 2004. ...’.

8. The statement made by the French Republic in relation to Article 32 reads as follows:

‘Pursuant to Article 32 of the framework decision on the European arrest warrant and the surrender procedures between Member States, France states that as executing Member State it will continue to deal with requests relating to acts committed before 1 November 1993 ... in accordance with the extradition system applicable before 1 January 2004’.

2. Framework Decision 2008/909/JHA

9. Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union³ establishes a system the purpose of which is to make it easier to enforce a sentence in a Member State other than the State which gave the criminal judgment with a view to improving the social rehabilitation of the sentenced person.

10. Article 3(1) of Framework Decision 2008/909 provides that ‘[t]he purpose of this Framework Decision is to establish the rules under which a Member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognise a judgment and enforce the sentence’.

³ — OJ 2008 L 327, p. 27.

11. Article 28(1) of Framework Decision 2008/909 provides that '[r]equests received before 5 December 2011 shall continue to be governed in accordance with the existing legal instruments on the transfer of sentenced persons. Requests received after that date shall be governed by the rules adopted by Member States pursuant to this Framework Decision'.

C – National law

12. Article 695-24 of the French Code of Criminal Procedure sets out the grounds on which a request to execute a European arrest warrant may be refused. It thus provides that '[t]he execution of a European arrest warrant may be refused:

...

2. If the person requested for the purposes of executing a custodial sentence or a measure involving deprivation of liberty is of French nationality and the competent French authorities undertake to execute that sentence or measure'.

II – The dispute in the main proceedings and the questions referred for a preliminary ruling

13. On 14 September 2006, a Portuguese criminal court issued a European arrest warrant against the defendant in the main proceedings, Mr Lopes Da Silva Jorge, a Portuguese national, for the purposes of executing a five-year prison sentence handed down in 2003 for acts committed in 2002. Since that date, Mr Lopes Da Silva Jorge has settled in France.

14. The order for reference shows that Mr Lopes Da Silva Jorge has been married to a French national, with whom he resides in French territory, since 11 July 2009. He has been employed as a long-distance lorry driver by a French company under an open-ended contract since 3 February 2008.

15. On 19 May 2010, following a summons issued by telephone, Mr Lopes Da Silva Jorge presented himself to the French police. He was informed at that time that a European arrest warrant had been issued against him and that the Portuguese authorities had requested that he be surrendered so that the aforementioned sentence could be executed. On 20 May 2010, the Public Prosecutor attached to the Cour d'appel d'Amiens brought the matter before the referring court with a view to obtaining a ruling on the surrender of Mr Lopes Da Silva Jorge to the Portuguese authorities.

16. In the course of the main proceedings, the Public Prosecutor submitted in essence that the European arrest warrant had been issued by the Portuguese authorities in accordance with the relevant legal requirements and that none of the mandatory or optional grounds for non-execution provided for in the French Code of Criminal Procedure applied. When asked to take a view on the impact of the Court's judgment in *Wolzenburg*,⁴ the Public Prosecutor stated that, although Mr Lopes Da Silva Jorge was entitled to rely on the French legislation laying down the conditions under which the competent authority may refuse to execute a European arrest warrant, in accordance with the Court's stipulations, and therefore to rely on Article 695-24 of the Code of Criminal Procedure, the ground provided for in that article, which relates only to French nationals, is indeed optional, in accordance with Article 4(6) of Framework Decision 2002/584. Thus, Article 695-24 of the Code of Criminal Procedure applies only on the twofold condition that the European arrest warrant was issued against a French national and that the competent French authorities have undertaken to execute the sentence themselves. He thus concluded that Mr Lopes Da Silva Jorge should be surrendered to the Portuguese authorities.

⁴ — Case C-123/08 *Wolzenburg* [2009] ECR I-9621.

17. During the main proceedings, Mr Lopes Da Silva Jorge, on the other hand, stated that he did not consent to being surrendered to the Portuguese authorities and asked to be imprisoned in France, relying initially on Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR'), and on the claim that a decision to surrender him to the Portuguese authorities for the purposes of executing the European arrest warrant would disproportionately infringe his right to respect for private life. Later, on the basis of the judgment in *Wolzenburg*, he relied on the fact that French law makes the right to refuse surrender available only to French nationals and cast doubt on the compatibility of Article 695-24 of the Code of Criminal Procedure with Article 4(6) of Framework Decision 2002/584 and, more broadly, with the principle of non-discrimination as enshrined in Article 18 TFEU.⁵

18. Thus faced with a difficulty relating to the interpretation of European Union law, the Chambre de l'instruction (Indictment Division) of the Cour d'appel d'Amiens decided to stay the proceedings and, by order received at the Court Registry on 31 January 2011, to refer the following two questions to the Court for a preliminary ruling on the basis of Article 267 TFEU:

- '(1) Does the principle of non-discrimination laid down by Article [18 TFEU] preclude national legislation such as Article 695-24 of the Code of Criminal Procedure which restricts the power to refuse to execute a European arrest warrant issued for the purposes of enforcing a penalty involving deprivation of liberty to cases where the person whose extradition is sought is of French nationality and the competent French authorities undertake to proceed with such enforcement?
- (2) Is the principle of the implementation in domestic law of the ground for non-enforcement provided for in Article 4[(6)] of Framework Decision [2002/584] a matter for the discretion of the Member States or is it mandatory, and in particular may a Member State adopt a measure involving discrimination based on nationality?'

III – Procedure before the Court

19. Written observations were lodged with the Court by Mr Lopes Da Silva Jorge, the Czech, German, French, Netherlands, Austrian and Polish Governments and the European Commission.

20. At the hearing on 31 January 2012, oral argument was presented by the defendant in the main proceedings, the German, French, Netherlands and Polish Governments and the European Commission.

IV – Legal analysis

21. Following a number of preliminary remarks, I shall begin my analysis, in logical order, by looking at the second question referred.

A – *Introductory remarks*

1. The jurisdiction of the Court to give preliminary rulings

22. The French Republic made a declaration under the former Article 35(2) EU accepting the jurisdiction of the Court to give preliminary rulings in accordance with the rules laid down in the former Article 35(3)(b) EU.⁶ In addition, in accordance with Article 10(1) of Protocol No 36 on transitional provisions, annexed to the TFEU, the powers of the Court under the former version of

5 — Although the pleadings, and in particular the order for reference, mention Article 12 EC, it is clearly Article 18 TFEU which is meant.

6 — See the information concerning the declarations by the French Republic and the Republic of Hungary on their acceptance of the jurisdiction of the Court of Justice to give preliminary rulings on the acts referred to in Article 35 of the Treaty on European Union (OJ 2005 C 318, p. 1).

Title VI of the Treaty on European Union concerning acts of the Union which were adopted before the entry into force of the Treaty of Lisbon are to remain the same, including where they have been accepted under the former Article 35(2) EU. The Court therefore has jurisdiction to give a ruling on the questions raised by the referring court.

2. The application of Framework Decision 2002/584

23. Although Article 32 of Framework Decision 2002/584 authorises executing Member States to continue to apply the extradition system applicable prior to 1 January 2004, it is clear from the statement made by the French Republic that it reserved that possibility only in relation to acts committed prior to 1 November 1993. It is therefore the system established by Framework Decision 2002/584 which is applicable in a situation such as that in the main proceedings, in which the offences which gave rise to the request were committed in 2002 and the request for execution of the European arrest warrant was itself made after 1 January 2004.

24. It must be asked, however, what impact Framework Decision 2008/909 has on the dispute in the main proceedings. The purpose of that framework decision, adopted on 27 November 2008, is to establish the rules under which a Member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognise a judgment and enforce the sentence.⁷ The deadline for the implementation of that framework decision by the Member States was set at 5 December 2011.⁸ The expiry of that deadline during the preliminary ruling procedure does not, however, have any direct bearing on this case. After all, Article 28 of that framework decision provides that, barring a unilateral declaration to the contrary, requests received before 5 December 2011 are to continue to be governed by the existing legal instruments on the transfer of sentenced persons. Since the request to execute the European arrest warrant at issue here was received by the French authorities before 5 December 2011, the situation of the defendant in the main proceedings must therefore be examined in the light of Framework Decision 2002/584, in the absence of a declaration to the contrary made by the French Republic.

B – The margin of discretion afforded to Member States with respect to the implementation of Article 4(6) of Framework Decision 2002/584

25. By the second question put to the Court, the referring court seeks in essence to determine whether the Member States are required to implement in their respective domestic legal systems the ground for optional non-execution provided for in Article 4(6) of Framework Decision 2002/584 and, if so, whether they are required to do so in all the situations covered by that paragraph, that is to say with respect both to nationals of the Member State in question and to nationals of other Member States who are resident or staying in their territory.

26. In my view, the difficulty here is due less to a problem with the drafting of the provision at issue than to uncertainties on the part of the Court in its case-law which may have given rise to diverging interpretations. Accordingly, I shall begin by looking at the wording of Article 4(6) of Framework Decision 2002/584 and the general scheme of that framework decision, and then go on to analyse the margin of discretion available to the Member States within the meaning of the Court's case-law.

27. First of all, however, I should like to make a number of observations which appear to me to be essential for a better understanding of the present case and the issues involved. To that end, it is important to bear in mind that Article 1(3) of Framework Decision 2002/584 states that that framework decision 'shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles' as enshrined in European Union law.

⁷ — See Article 3 of Framework Decision 2008/909.

⁸ — See Article 29 of Framework Decision 2008/909. The French Republic has failed to comply with that deadline because the draft law intended to implement Framework Decision 2008/909 into the French legal system is still, on the date on which I am delivering my Opinion in this case, being debated before Parliament (see the draft law laying down various provisions on matters of criminal law and criminal procedure pursuant to international commitments entered into by France, tabled before the Senate on 11 January 2012).

28. The reference to fundamental rights and principles made by Article 1(3) of Framework Decision 2002/584 must act as a safeguard. In the area covered by the Framework Decision, and more generally in the area of police and judicial cooperation in criminal matters, the principle of mutual recognition which lies at the heart of the mechanism behind the European arrest warrant cannot conceivably be applied in the same way as it is in the case of the recognition of a university qualification or a driving licence issued by another Member State. Nor can there be any question of the Member States contributing to the creation of an area of freedom, security and justice the effect of which would be to neglect the fundamental rights of those whose conduct may have constituted a threat to freedom, security or justice. The principle of mutual recognition, more specifically where it is applied in relation to a European arrest warrant issued for the purposes of executing a sentence, as it is in the main proceedings, cannot be applied automatically but must, on the contrary, be viewed in the light of the personal and human context of the individual situation underlying each request for the execution of that warrant. Thus, as Article 1(3) of Framework Decision 2002/584 is at pains to remind us, in the context of applying the principle of mutual recognition within the meaning of that framework decision, the protection of fundamental rights, the foremost among which is the dignity of the sentenced person,⁹ must be the overriding concern of the national legislature when it transposes acts of the European Union, of the national judicial authorities when they avail themselves of the powers devolved to them by European Union law, but also of the Court when it receives questions on the interpretation of the provisions of Framework Decision 2002/584. It is in the light of the higher principle represented by the protection of human dignity, the cornerstone of the protection of fundamental rights within the European Union legal order, that the free movement of judgments in criminal matters must not only be guaranteed but also, where appropriate, limited.

29. It is against the ever-present background of that reading of the principle of mutual recognition in the light of human rights that I shall now continue my analysis.

1. Literal and purposive interpretation

30. As a preliminary point, it is important to remind ourselves that the framework decision, as a legal act of the European Union, is binding upon the Member States ‘as to the result to be achieved but [...] leave[s] to the national authorities the choice of form and methods’, in accordance with the former Article 34(2)(b) EU.

31. More specifically, Articles 3 and 4 of Framework Decision 2002/584 set out the grounds for non-execution of a European arrest warrant addressed to the judicial authorities of the executing State. Limited in number by that framework decision so as not to jeopardise the very principle of surrender, those grounds cover both mandatory non-execution and optional non-execution. Indeed, it is clear from the title of Article 4 (‘Grounds for optional non-execution of the European arrest warrant’) that it is not the implementation of those grounds by the Member States which is optional but rather the execution of the European arrest warrant, which is thus left to the discretion of the national judicial authorities.¹⁰

32. Considered in isolation from the other paragraphs which it contains, the text of Article 4(6) of Framework Decision 2002/584 does indeed provide that the executing judicial authority may refuse to execute the European arrest warrant if that warrant has been issued for the purposes of execution of a sentence, 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 that sentence in accordance with its domestic law.

9 — Human dignity is the first of the fundamental rights set out in the Charter of Fundamental Rights of the European Union (see Article 1 of the Charter).

10 — The wording is just as clear in the other language versions: I am referring here primarily to the title of Article 4(6) of Framework Decision 2002/584 in its Spanish (‘Motivos de no ejecución facultativa de la orden de detención europea’), French (‘Motifs de non-exécution facultative du mandat d’arrêt européen’), Italian (‘Motivi di non esecuzione facoltativa del mandato di arresto europeo’) and Portuguese (‘Motivos de não execução facultativa do mandado de detenção europeu’) language versions.

33. Article 4(6) of Framework Decision 2002/584, read in the light of the former Article 34 EU, therefore requires that the Member States implement within their legal systems the ground for non-execution provided for in that paragraph, in all its provisions. I do not believe that any great significance is to be attached to the use of the conjunction ‘or’ in the text of that paragraph. It is true that, as some of the parties present at the hearing pointed out, most of the language versions use the conjunction ‘or’,¹¹ while the German language version, for example, uses the word ‘und’ (and), to determine the categories of person who qualify for the ground for non-execution provided for in Article 4(6) of that framework decision. I cannot but consider such an argument to be at the very least weak, if not irrelevant, since it would have made no sense to draft the French-language version of Article 4(6) using the conjunction ‘et’ (and). This would have run the risk of inviting an absurd line of argument to the effect that only a person who is a national of the executing State, who is staying there and who resides there would have been able to benefit from that ground.

34. Even assuming that the Member States are not obliged to implement Article 4(6) of Framework Decision 2002/584, in so far as the French legislature manifestly intended to transpose it, by means of Article 695-24 of the Code of Criminal Procedure, the national legislature was required to do so in relation to all the categories of person covered by paragraph 6. Leaving aside any differences between the language versions, the objective pursued by Article 4(6) of that framework decision makes it indisputably clear, in my view, that the Member States are required to implement that paragraph in such a way that their judicial authorities must be able, if necessary, to refuse to execute the European arrest warrant not only in relation to their own nationals but also in relation to the nationals of other Member States, provided that they satisfy the conditions laid down in Framework Decision 2002/584, on the basis of a comprehensive analysis of their individual circumstances.

35. Contrary to what most of the parties intervening in these proceedings have submitted, a finding to that effect does not appear to me to be contrary to the cardinal principle on which Framework Decision 2002/584 is based, that is to say mutual recognition. In the view of those parties, the grounds for non-execution provided for in that framework decision should be interpreted very restrictively so as to facilitate the surrender procedure, in accordance with the principle of mutual recognition.

36. It is true that, as the Court has held in its case-law, that principle, ‘which underpins Framework Decision 2002/584, means that, in accordance with Article 1(2) thereof, the Member States are in principle obliged to act upon a European arrest warrant’.¹² I note, however, that, notwithstanding the considerable importance attached to the principle of mutual recognition in that framework decision, the European Union legislature provided grounds for non-execution. It did so on a limited basis, precisely with a view to ensuring that the principle continues to be that European arrest warrants are executed. More specifically, Article 4(6) of Framework Decision 2002/584 pursues the objective of increasing the requested person’s chances of reintegrating into society when the sentence imposed on him expires.¹³ Thus, the principle of mutual recognition as implemented by Framework Decision 2002/584, important though it is, was none the less not intended to be absolute by the European Union legislature. The reference to fundamental rights contained in Article 1(3) of Framework Decision 2002/584 confirms this, as I made clear in my preliminary point above. Article 4(6) of that framework decision is thus a clear expression of the European legislature’s intention to allow the competent judicial authorities, where appropriate, the possibility of reconciling that principle with another factor which must just as crucially be preserved, such as the success of the sentenced person’s social rehabilitation.

37. That objective of rehabilitation does not merely serve the interests of the sentenced person himself. Successful social rehabilitation in an environment which is familiar to the person concerned also represents an additional assurance for the society of which his life necessarily forms a part that his unlawful conduct is less likely to recur. The importance which the European Union attaches to this was thus explicitly confirmed by Framework Decision 2008/909, the purpose of which, according to Article 3(1) thereof, is to ‘facilitat[e] the social rehabilitation of the sentenced person’.

11 — This is the case, in particular, in the Spanish, English, French, Italian and Portuguese language versions.

12 — *Wolzenburg* (paragraph 57).

13 — *Ibid.* (paragraph 67).

38. The Court has held that ‘Article 4(6) of ... Framework Decision [2002/584] has ... in particular the objective of enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person’s chances of reintegrating into society when the sentence imposed on him expires ... [S]uch an objective, while important, cannot prevent the Member States, when implementing the Framework Decision, from limiting, in a manner consistent with the essential rule stated in Article 1(2) thereof, the situations in which it is possible to refuse to surrender a person who falls within the scope of Article 4(6) thereof.’¹⁴ In so doing, it was simply pointing out that Article 4(6) does not seek to establish an unconditional right on the part of the sentenced person to serve his sentence in the territory of the executing State, and that, in the instant case, the application of the national legislation which made the eligibility of nationals of other Member States to benefit from the ground for optional non-execution subject to a period of lawful residence of five years was consistent with that framework decision. The Court then took a view on the application in a particular situation of legislation which limited, without thereby excluding, the circumstances in which it was possible to refuse to execute a European arrest warrant. I shall return later in this Opinion to the care which must be exercised when relying upon the Court’s existing case-law.¹⁵

39. Contrary to what the French Government has submitted, Article 4(6) of Framework Decision 2002/584, on the reading of it which I propose, does not by any means provide for the impunity of the requested person or call into the question the principle of mutual recognition, since the executing State can in fact refuse to execute the European arrest warrant only on the express condition that it undertakes to execute the sentence in its territory, without ever calling into question the decision by which that sentence was imposed. Accordingly, the logic of the mutual recognition of judicial decisions is fully preserved, even in cases where the requested person serves his sentence in the executing Member State and not in the issuing Member State. The interpretation which I propose that the Court should give to Article 4(6) of Framework Decision 2002/584 does not therefore appear to me to be contrary either to its general scheme or to the objectives which it pursues.

40. Finally, I cannot help thinking that an interpretation of Article 4(6) of the Framework Decision that supported a finding as to the conformity with that decision of national legislation which automatically excludes any citizen of the European Union staying or residing in the territory of a Member State from the potential benefit of the ground for optional non-execution, on the sole ground that he does not have the nationality of that Member State, would fly in the face of many fundamental rights and legal principles the observance of which is required by Article 1(3) of Framework Decision 2002/584 and would thus not be readily compatible itself with the conditions laid down in that article.

2. Margin of discretion available to the Member States and scope *ratione personae* of Article 4(6) of Framework Decision 2002/584

41. In its judgment in *Wolzenburg* the Court recognised that, ‘[w]hen implementing Article 4 of Framework Decision 2002/584 and in particular paragraph 6 thereof ... the Member States have, of necessity, a certain margin of discretion’.¹⁶ To my mind, however, the Court did not mean by that anything other than the margin of discretion that the Treaty affords to Member States with respect to the determination of the form and methods by which framework decisions are implemented. In any event, that margin of discretion must be exercised in a manner consistent with European Union law.¹⁷

42. The Court has already been called upon to interpret Article 4(6) of the framework decision, and the interested parties which have submitted observations in the course of the present proceedings referred at length to the related judgments in *Kozłowski*¹⁸ and *Wolzenburg*. Most of those parties inferred from paragraph 58 of *Wolzenburg* that the

14 — Ibid. (paragraph 62).

15 — See point 43 of this Opinion.

16 — *Wolzenburg* (paragraph 61).

17 — Ibid. (paragraph 45).

18 — Case C-66/08 *Kozłowski* [2008] ECR I-6041.

Court had established the freedom of the national legislature to implement the various grounds laid down in Article 4 of Framework Decision 2002/584. In that paragraph of *Wolzenburg*, the Court held that ‘a national legislature which, by virtue of the options afforded it by Article 4 of the Framework Decision, chooses to limit the situations in which its executing judicial authority may refuse to surrender a requested person merely reinforces the system of surrender introduced by that Framework Decision to the advantage of an area of freedom, security and justice’.

43. It is important, however, not to lose sight of the fact that the situation under national law was very different in *Wolzenburg*, since the Court was required in that case to give a ruling on legislation which did actually implement Article 4(6) of Framework Decision 2002/584, including in relation to nationals of Member States other than the executing State. There is thus a fundamental difference between that case and this one which accordingly requires that great care be exercised when relying on the Court’s findings in related judgments, in particular *Wolzenburg*, which *ipso facto* cannot be transposed to the case of a Member State under whose national legislation only its own nationals are eligible to benefit from Article 4(6) of Framework Decision 2002/584. Paragraph 58 of that judgment must therefore be interpreted in the light of the particular national context which was at issue in that case.

44. Thus, if we are to learn anything at all from that paragraph, it is that Framework Decision 2002/584 does not require the Member States to recognise an unconditional right for nationals of other Member States residing or staying in their territory to have the execution of a European arrest warrant concerning them refused. The margin of discretion afforded to the Member States, which also forms the subject-matter of that judgment, may quite legitimately take the form of a limit on such cases,¹⁹ but it certainly may not take the form of a provision which fully excludes all nationals of other Member States from the benefit of the ground for optional non-execution laid down in Article 4(6) of that framework decision. It is clear that Framework Decision 2002/584 requires the Member States to impose on their judicial authorities the duty to carry out a comprehensive assessment of each individual situation where those authorities are asked not to act on a European arrest warrant issued for the purposes of executing a sentence against a national of the executing State, a person who is staying in that State or a person who is resident in that State.²⁰

45. Furthermore, it is equally clear from its case-law that the Court does not regard the scope *ratione personae* of Article 4(6) of Framework Decision 2002/584 as covering, as a matter of choice, either the nationals of the executing Member State or the nationals of other Member States resident or staying in its territory, or both categories of persons. The Court held in paragraph 34 of *Kozłowski*, that, ‘according to Article 4(6) of ... Framework Decision [2002/584], the scope of that ground for optional non-execution is limited to persons who, if not nationals of the executing Member State, are ‘staying’ or ‘resident’ there’.

46. For all the foregoing reasons, I propose that the Court’s answer to the second question referred for a preliminary ruling should be that, without prejudice to the exercise of the margin of discretion which they enjoy, in accordance with European Union law, with respect to the determination of the conditions to which the application of the ground for non-execution provided for in Article 4(6) of Framework Decision 2002/584 may be made subject in the case of nationals of other Member States who are resident or staying in their territory, the Member States are required to implement Article 4(6) in such a way that the executing judicial authorities are given the power to refuse to execute a European arrest warrant issued for the purposes of executing a sentence in relation both to their own nationals and to the nationals of other Member States who are staying or resident in their territory, a power they must be able to exercise in the light of the circumstances of each individual case.

19 — Indeed, the Court held that Netherlands legislation which confined the eligibility to benefit from Article 4(6) of Framework Decision 2002/584 to nationals of the Netherlands unconditionally and to nationals of other Member States on condition that that they have resided lawfully in the territory of the Netherlands for an uninterrupted period of at least five [years] was consistent with EU law.

20 — This is clearly supported by the eighth recital in the preamble to Framework Decision 2002/584, which states that ‘[d]ecisions on the execution of the European arrest warrant must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender’.

C – *The first question*

47. In my opinion, the answer to the question examined above is sufficient to provide the referring court with useful clarification. Nevertheless, in the event that the Court finds that the Member States are not required, under Framework Decision 2002/584 alone, to implement Article 4(6) of that framework decision in relation both to their own nationals and to the nationals of other Member States who are staying or resident in their territory, and concludes that the French State availed itself of its margin of discretion in a manner wholly consistent with Framework Decision 2002/584, it will have to take a view on whether the principle of non-discrimination precludes national legislation such as that at issue in the main proceedings.

48. It must be observed, first of all, that the defendant in the main proceedings exercised his freedom of movement by moving to French territory, where he is lawfully resident and has established a family life. The Member States cannot, in the context of the implementation of a framework decision, infringe European Union law, in particular the provisions relating to the freedom accorded to every citizen of the Union to move and reside freely within the territory of the Member States.²¹ Thus, the Court has already held that a national of one Member State who is lawfully resident in another Member State is entitled to rely on the principle of non-discrimination against national legislation which lays down the conditions on which the competent judicial authority can refuse to execute a European arrest warrant issued with a view to the enforcement of a custodial sentence.²² This must be particularly true of the French legislation at issue in the main proceedings, which excludes any citizen of the Union, with the sole exception of French nationals, from the benefit of the ground for non-execution laid down in Article 4(6) of Framework Decision 2002/584. Consequently, the view must therefore be taken that the defendant in the main proceedings is entitled to rely on Article 18 TFEU against that legislation. It therefore remains to be determined whether Article 695-24 of the Code of Criminal Procedure entails discrimination based on nationality.

49. The Court has repeatedly held that the principle of non-discrimination requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.²³

50. It is very apparent from the French legislation that the nationals of other Member States are afforded treatment different from that reserved for French nationals. The line of argument put forward by certain governments to the effect that, in such circumstances, nationals are not in a situation comparable to that of the nationals of other Member States is untenable. Those governments emphasised the difference in nature between the link that binds a national to his State of nationality as compared with the link that binds a citizen of the Union to his State of residence, the nationality of which he does not hold. For example, it is said that any French national necessarily has a very strong attachment to French society, embodied by the possession of French nationality, which justifies the fact that the French State gives an undertaking to him alone to ensure that a sentence imposed by another Member State of the Union will be executed in its territory. I cannot help thinking that, if this type of argument had held sway, European Union law would certainly not have developed in the extraordinary way in which it has to date. Such a proposition strikes me as being very much out of date.

51. It is thus easy to understand why a Member State would wish to surround itself with guarantees and to undertake to ensure the execution of a sentence imposed in another country – which undeniably represents a heavy responsibility for that State – only in relation to persons who have a genuine, stable and lasting connection with the society of the State in question. It is, however, wholly inaccurate to submit that only persons holding the nationality of that State are capable of having such a connection. The case of the defendant in the main proceedings is a striking example. The corollary of

21 — See *Wolzenburg* (paragraph 45).

22 — *Ibid.* (paragraph 47).

23 — See, *inter alia*, Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 56 and the case-law cited, and *Wolzenburg* (paragraph 62).

the freedom of movement and residence enshrined in European Union law is that it is now no longer a matter of irrebuttable presumption that a sentenced person has the best chance of reintegrating into society only in the State of which he is a national. The view must therefore be taken that the French legislation does indeed treat comparable situations differently.

52. Such a difference in treatment may prove to be consistent with the principle of non-discrimination if it is objectively justified and proportionate to the legitimate objective pursued, which is to say that it must not go beyond what is necessary in order to attain that objective.²⁴

53. The French Government has argued that the difference in treatment between its nationals and the nationals of other Member States has an objective explanation. It refers to a difficulty connected with its domestic law. Article 4(6) of Framework Decision 2002/584 provides that the executing Member State must undertake to ensure that a sentence imposed in another country is executed in its own territory in accordance with its domestic law. However, French positive law does not permit the French State to make such an undertaking. The French Government pointed out in this regard that the execution in France of a sentence imposed in another country raises important legal questions which are not governed by Framework Decision 2002/584, which is why Article 4(6) refers to the domestic law of the Member States. The legal rules governing the execution of sentences imposed in another country are not uniform and usually depend on international, bilateral and multilateral conventions, and the French State cannot unilaterally decide to execute in its territory a sentence imposed in another Member State since it could not give the sentenced person a guarantee that the execution of his sentence would be recognised in the State which imposed it.

54. In my view, that line of argument may be countered in two ways: first, by rejecting the justification put forward and, secondly, by pointing out the manifestly disproportionate nature of the French legislation.

55. With regard to the difficulty connected with its domestic law which is cited by the French Government, I would point out first of all that this type of argument has rarely found favour with the Court.

56. I note next that, at the hearing, the French Government acknowledged that, although French law did not currently permit the execution of a sentence imposed by another Member State on a person who is not a French national, this has more to do with the legislature's interpretation of Article 4(6) of Framework Decision 2002/584 to the effect that that article does not require the Member States to afford equal treatment to their own nationals and to the nationals of other Member States than with an insurmountable legal obstacle based on the international agreement law which is currently binding on the French State. In that regard, the Commission rightly stated that the French State, like all the Member States of the European Union, is a party to the Convention on the Transfer of Sentenced Persons.²⁵ The Convention provides that a sentenced person may be transferred if that person is a national of the administering State,²⁶ but it also states that the States parties may determine unilaterally, by means of a declaration which may be made at any time, the definition which they intend to give to the term 'national' for the purposes of the Convention,²⁷ which means that the French State was indeed able to extend the benefit of the provisions of that convention to nationals of the other Member States.²⁸

24 — *Wolzenburg* (paragraph 69).

25 — See point 2 of this Opinion.

26 — See Article 3(1)(a) of the Convention on the Transfer of Sentenced Persons.

27 — See Article 3(4) of the Convention on the Transfer of Sentenced Persons.

28 — Furthermore, it is clear from an analysis of the unilateral declarations made by the States parties to the Convention on the Transfer of Sentenced Persons that at least seven Member States of the European Union have extended the meaning of 'national', as that term is used in the Convention, to cover persons who have their residence or domicile in the territory of the executing State or who have permanently settled in that State (Kingdom of Denmark, Hungary, Kingdom of the Netherlands, Portuguese Republic, Slovak Republic, Republic of Finland and Kingdom of Sweden). For their part, Ireland and the United Kingdom of Great Britain and Northern Ireland provide for the possibility of extending the meaning of that term on the basis of an assessment of the close ties that bind the sentenced person to the State concerned.

57. Finally, even on the assumption – of which I am obviously not convinced – that it is only since the adoption of Framework Decision 2008/909 that the legal issues connected with the execution of a sentence imposed in another Member State have been resolved, I feel compelled to point out that, having failed to implement that framework decision within the prescribed time-limits, the French legislature has alone been responsible, since 5 December 2011, for the alleged shortcomings in its domestic law and could therefore, if the Court were to uphold the argument relating to the difficulties caused by French positive law as it currently stands, continue to profit from its own negligence. Moreover, as the French Government, too, conceded at the hearing, Article 4(6) of Framework Decision 2002/584 contains a flexible reference to domestic law, which means that, even though requests received by the executing State before 5 December 2011 continue to be governed by Framework Decision 2002/584, the additional provisions contained in Framework Decision 2008/909 could be taken into account precisely because its implementation will have led to the amendment and adjustment of the domestic legal systems of the Member States.

58. Furthermore, it is clear that legislation the result of which is purely and simply to exclude all European Union citizens who do not hold French nationality from the benefit of the ground for non-execution provided for in Article 4(6) of Framework Decision 2002/584 is disproportionate. It systematically deprives the competent judicial authorities of their power to assess individual situations and makes a presumption, as peremptory as it is irrebuttable, that it is legally impossible to execute the sentence in French territory. However, it is clear from the line of argument put forward by the French Government that the situation is far more complex and that, since it is not possible to establish a uniform legal framework for all situations with which the judicial authorities of the executing State may be faced, the applicable law must be determined on a case-by-case basis given that it may change depending on the State of nationality of the sentenced person. The legislation at issue in the main proceedings is disproportionate in so far as it automatically excludes from the benefit of that ground sentenced persons who, taking into account the rules of law applicable to their request, could none the less potentially seek to have their sentence executed in French territory.

59. For all the foregoing reasons, I propose that the Court's answer to the first question referred by the national court should be that the principle of non-discrimination enshrined in Article 18 TFEU precludes national legislation such as that at issue in the main proceedings which confines the power to refuse to execute a European arrest warrant issued for the purposes of executing a sentence to cases where the requested person is a French national and the competent French authorities undertake to execute that sentence.

D – *The obligation to adopt a conforming interpretation*

60. In its judgment in *Pupino*, the Court held that 'the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. When applying national law, the national court that is 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 which it pursues and thus comply with [the former] Article 34(2)(b) EU'.²⁹ Furthermore, '[t]he obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that framework decision. In other words, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*.'³⁰

29 — Case C-105/03 *Pupino* [2005] ECR I-5285, paragraph 43.

30 — *Ibid.* (paragraph 47).

61. It will be for the referring court to determine whether, in this case, a conforming interpretation of its national law is possible. I would simply point out that, in the event that the referring court considers such an interpretation to be possible, for example by interpreting the expression ‘of French nationality’ in Article 69524(2) of the Code of Criminal Procedure as also covering the equivalent nationalities constituted by the nationalities of the other Member States of the European Union, that court will have to take into account the various objectives pursued by Framework Decision 2002/584, including the sentenced person’s successful social rehabilitation, and will usefully be able to draw on the criteria established by the Court in paragraph 48 of the judgment in *Kozłowski* and the assertion contained in paragraph 76 of the judgment in *Wolzenburg* when undertaking a comprehensive assessment of the attachment of the defendant in the main proceedings to French society in order to determine whether or not he may seek to have his sentence executed in France.

V – Conclusion

62. In the light of all of the foregoing, I propose that the Court should answer as follows the two questions referred by the Cour d’appel d’Amiens for a preliminary ruling:

- (1) Without prejudice to the exercise of the margin of discretion which they enjoy, in accordance with European Union law, with respect to the determination of the conditions to which the application of the ground for non-execution provided for in 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 may be made subject in the case of nationals of other Member States who are resident or staying in their territory, the Member States are required to implement Article 4(6) in such a way that the executing judicial authorities are given the power to refuse to execute a European arrest warrant issued for the purposes of executing a sentence in relation both to their own nationals and to the nationals of other Member States who are staying or resident in their territory, a power they must be able to exercise in the light of the circumstances of each individual case.
- (2) In any event, the principle of non-discrimination enshrined in Article 18 TFEU precludes national legislation such as that at issue in the main proceedings which confines the power to refuse to execute a European arrest warrant issued for the purposes of executing a sentence to cases where the requested person is a French national and the competent French authorities undertake to execute that sentence.