



Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 26 July 2017¹

Case C-270/17 PPU

Openbaar Ministerie
v
Tadas Tupikas

(Request for a preliminary ruling from the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands))

(Reference for a preliminary ruling — European arrest warrant — Grounds for optional non-execution — Warrant issued for the purpose of executing a custodial sentence or a detention order — ‘Trial resulting in the decision’ — Appeal proceedings)

I. Introduction

1. Mr Tadas Tupikas, a Lithuanian national, is the subject of a European arrest warrant (‘EAW’) issued by the Lithuanian judicial authority. That authority seeks the surrender of Mr Tupikas, currently detained in the Netherlands, for the purpose of executing a custodial sentence of one year and four months.
2. That sentence was imposed by a court of first instance in Lithuania before which Mr Tupikas appeared in person. Mr Tupikas appealed against the judgment. The information provided in the EAW does not make it possible to establish whether he appeared in person at the proceedings at second instance. The appeal was dismissed.
3. The EAW is based on the judgment delivered at first instance. It states that the person in question appeared in person at the trial which resulted in the decision.
4. Under the national law transposing Article 4a of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (‘the Framework Decision’),² the competent Netherlands authority must refuse to execute an EAW if the person in question did not appear in person *at the trial resulting in the decision*,³ unless one of the situations listed in the applicable national provision arises.

¹ Original language: French.

² OJ 2002 L 190, p. 1. That framework decision was amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24).

³ Emphasis added.

5. Lacking information concerning whether Mr Tupikas appeared at the appeal proceedings, the referring court asks whether the abovementioned concept of '*trial resulting in the decision*' also refers to appeal proceedings that resulted in an examination of the merits of the case and confirmed the sentence imposed at first instance which the EAW is intended to execute.

6. By that question the referring court seeks to ascertain whether it is necessary to assess whether the rights of defence of the person concerned have been respected in relation to the criminal proceedings at first instance and on appeal or whether it is sufficient for that court to satisfy itself that those rights were respected at first instance.

II. Legal context

A. *The ECHR*

7. Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁴ ('the ECHR') provides:

'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...'

B. *EU law*

1. *The Charter*

8. Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') provides:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

...'

9. Under Article 48(2) of the Charter 'respect for the rights of the defence of anyone who has been charged shall be guaranteed'.

2. *The Framework Decision*

10. Article 1(1) of the Framework Decision defines the EAW as 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'.

11. Article 1(2) provides that 'Member States shall execute any [EAW] on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision'.

⁴ Signed at Rome on 4 November 1950.

12. Article 1(3) provides that the Framework Decision ‘shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [TEU]’.

13. Article 4a of the Framework Decision was introduced by Framework Decision 2009/299, for the purpose of establishing the optional grounds for refusing to execute an EAW when the person concerned did not appear in person at his trial:

‘1. The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:

(a) in due time:

(i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial;

and

(ii) was informed that a decision may be handed down if he or she does not appear for the trial;

or

(b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;

or

(c) after being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed:

(i) expressly stated that he or she does not contest the decision;

or

(ii) did not request a retrial or appeal within the applicable time frame;

or

(d) was not personally served with the decision but:

(i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed;

and

- (ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant.

2. In case the European arrest warrant is issued ... under the conditions of paragraph 1(d) and the person concerned has not previously received any official information about the existence of the criminal proceedings against him or her, he or she may, when being informed about the content of the European arrest warrant, request to receive a copy of the judgment before being surrendered. ... it shall neither be regarded as a formal service of the judgment nor actuate any time limits applicable for requesting a retrial or appeal.

3. In case a person is surrendered under the conditions of paragraph (1)(d) and he or she has requested a retrial or appeal, the detention of that person awaiting such retrial or appeal shall, until these proceedings are finalised, be reviewed in accordance with the law of the issuing Member State, either on a regular basis or upon request of the person concerned. ...'

14. Article 8(1) of the Framework Decision provides that the EAW must contain the following information:

'...

- (c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2;
- (d) the nature and legal classification of the offence ...

...

- (f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;

...'

15. Article 15 of the Framework Decision, headed 'Surrender decision' is worded as follows:

1. The executing judicial authority shall decide, within the time limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.

2. If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information ... be furnished as a matter of urgency ...

...'

16. Paragraph (d) of the Annex ('European arrest warrant) to the Framework Decision is worded (after amendment by Framework Decision 2009/299) as follows:

(d) Indicate if the person appeared in person at the trial resulting in the decision:

1. Yes, the person appeared in person at the trial resulting in the decision.
2. No, the person did not appear in person at the trial resulting in the decision.
3. If you have ticked the box under point 2, please confirm the existence of one of the following:
 - 3.1a. the person was summoned in person on ... (day/month/year) and thereby informed of the scheduled date and place of the trial which resulted in the decision and was informed that a decision may be handed down if he or she does not appear for the trial;

OR

 - 3.1b. the person was not summoned in person but by other means actually received official information of the scheduled date and place of the trial which resulted in the decision, in such a manner that it was unequivocally established that he or she was aware of the scheduled trial, and was informed that a decision may be handed down if he or she does not appear for the trial;

OR

 - 3.2. being aware of the scheduled trial, the person had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;

OR

 - 3.3. the person was served with the decision on ... (day/month/year) and was expressly informed about the right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and
 - the person expressly stated that he or she does not contest this decision;

OR

 - the person did not request a retrial or appeal within the applicable timeframe;

OR

 - 3.4. the person was not personally served with the decision, but
 - the person will be personally served with this decision without delay after the surrender; and
 - when served with the decision, the person will be expressly informed of his or her right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed; and
 - the person will be informed of the timeframe within which he or she has to request a retrial or appeal, which will be days.
4. If you have ticked the box under point 3.1b, 3.2 or 3.3 above, please provide information about how the relevant condition has been met:
.....
.....
.....
.....

C. Netherlands law

17. The Overleveringswet (Law on surrender) of 29 April 2004 (Stb. 2004, No 195, 'the OLW') transposes the Framework Decision into Netherlands law. Article 12 provides that 'surrender will not be allowed if the European arrest warrant was issued for the purpose of enforcing a sentence if the suspect did not appear in person at the court hearing resulting in the judgment, unless the European arrest warrant states, in accordance with the procedural requirements of the issuing Member State', that one of the four situations described in that provision has arisen. Those situations are described in Article 12(a) to (d) of the OLW and correspond to Article 4a(1)(a) to (d) of the Framework Decision.

18. Point D of Annex 2 to the OLW, entitled ‘Template for the European arrest warrant referred to in Article 2(2) of the OLW’, corresponds to point (d) of the Annex to the Framework Decision.

III. The facts, the main proceedings and the questions referred for a preliminary ruling

19. On 22 February 2017, an application for the execution of an EAW issued on 14 February 2017 by the Klaipėdos apygardos teismas (Regional Court, Klaipėda, Lithuania) was made before the referring court by the officer van justitie bij de Rechtbank (Public Prosecutor’s Office, Netherlands).

20. That EAW seeks the arrest and surrender of Mr Tupikas, a Lithuanian national, for the purpose of carrying out in Lithuania a sentence of imprisonment of one year and four months.

21. The EAW mentions the existence of an enforceable judgment pronounced by the Klaipėdos apylinkės teismas (District Court, Klaipėda, Lithuania) on 26 August 2016 and relating to two offences. It states that Mr Tupikas appealed against that judgment and that, by decision of 8 December 2016, the Klaipėdos apygardos teismas (Regional Court, Klaipėda) dismissed the appeal.

22. Mr Tupikas appeared in person at the trial at first instance.

23. The EAW does not contain any information concerning the appeal proceedings, in particular as regards the issue whether the requested person appeared at those proceedings and, if not, whether the requirements of one of subparagraphs (a) to (d) of Article 4a(1) of the Framework Decision have been complied with.

24. The national court asks whether, in such a case, the Framework Decision applies only to proceedings at first instance or also to appeal proceedings.

25. It was in those circumstances that the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Are appeal proceedings

- in which there has been an examination of the merits of the case and
- which resulted in the passing of a (new) sentence on the person concerned and/or the confirmation of the sentence handed down at first instance,
- where EAW concerns the execution of that sentence,

the “trial resulting in the decision” as referred to in Article 4a(1) of [the] Framework Decision ...?’

IV. The urgent procedure before the Court of Justice

26. The referring court has requested that the present reference for a preliminary ruling be dealt with under the urgent procedure provided for in Article 107 of the Rules of Procedure of the Court.

27. In support of that request, it argued that the question referred concerns the interpretation of the Framework Decision, which comes within Title V of Part Three of the FEU Treaty. It also observed that the person concerned was in custody in the Netherlands pending a decision on the action to be taken concerning his surrender. The Court’s urgent answer will have a direct and decisive impact on the length of detention of the person concerned.

28. The Fifth Chamber of the Court decided on 8 June 2017 to grant that request.

29. Written observations were lodged by Openbaar Ministerie (the Public Prosecutor, Netherlands), the applicant in the main proceedings, Mr Tupikas, the defendant in the main proceedings, the Netherlands Government and the European Commission. The Public Prosecutor, Mr Tupikas, the Netherlands, Irish and Lithuanian Governments and the Commission presented their oral arguments at the hearing held on 11 July 2017.

V. Analysis

30. This analysis will be structured as follows. As a preliminary point, I shall clarify the specific subject matter of the present case (A). I shall then analyse the question referred for a preliminary ruling as it has been expressly raised (B). By applying the results of that analysis to the present case, I shall also examine the nature of the optional ground for refusal, resulting from Article 4a of the Framework Decision, which was made obligatory by the national implementing legislation (C).

A. Preliminary observations

31. The right to an effective remedy and the rights of the defence and to a fair trial are enshrined, respectively, in Article 47 and Article 48(2) of the Charter.

32. In accordance with the explanations relating to the Charter, those provisions have the same meaning and the same scope as Article 6 of the ECHR, which guarantees the effective exercise of the rights of the defence. That does not prevent EU law from affording wider protection under Article 52(3) of the Charter.⁵

33. In other words, there must be a minimum level of parallelism between the standards of protection provided for by the ECHR, on the one hand, and those existing in EU law, on the other hand. In this case, that concern is clear in particular from the preamble⁶ and Article 1(3) of the Framework Decision⁷ and the preamble⁸ and Article 1(2) of Framework Decision 2009/299.

34. As the first recital of Framework Decision 2009/299 points out, the right to a fair trial includes the right of an accused person to appear in person.⁹ However, that right is not absolute and ‘under certain conditions the accused person may, of his or her own free will, expressly or tacitly but unequivocally, waive that right’.¹⁰

35. Regarding an appeal, the case-law of the European Court of Human Rights (‘the ECtHR’) confirms that Article 6 of the ECHR does not require a second instance in criminal matters.¹¹

⁵ See, concerning Article 4a(1)(a)(i) of the Framework Decision, my Opinion in *Dworzecki* (C-108/16 PPU, EU:C:2016:333, point 74).

⁶ See recital 12, according to which the Framework Decision ‘respects fundamental rights and observes the principles recognised by Article 6 [TEU] and reflected in the Charter ...’.

⁷ See, also, judgment of 24 May 2016, *Dworzecki* (C-108/16 PPU, EU:C:2016:346, paragraph 37).

⁸ See recitals 1, 4 and 8 of Framework Decision 2009/299.

⁹ See, also, judgments of the ECtHR, 12 February 1985, *Colozza v. Italy*, CE:ECHR:1985:0212JUD 000902480, § 27; 23 November 1993, *Poitrimol v. France*, CE:ECHR:1993:1123JUD001403288, § 35.

¹⁰ See recital 1 of Framework Decision 2009/299. See judgments of the ECtHR, 9 June 2009, *Strzalkowski v. Poland*, CE:ECHR:2009:0609JUD 003150902, § 40 to 42, and 1 March 2006, *Sejdovic v. Italy*, CE:ECHR:2006:0301JUD 005658100, § 82. See, also, judgment of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 49). See also, in other contexts, judgments of 17 November 2011, *Hypoteční banka* (C-327/10, EU:C:2011:745, paragraphs 50 to 53); of 15 March 2012, *G* (C-292/10, EU:C:2012:142, paragraph 48 et seq.); and of 6 September 2012, *Trade Agency* (C-619/10, EU:C:2012:531, paragraph 55).

¹¹ Judgment of the ECtHR, 18 February 2009, *Andrejewa v. Latvia*, CE:ECHR:2009:0218JUD005570700, § 97. The requirement of a two-tier system of criminal jurisdiction is enshrined in Article 2 of Protocol 7 to the ECHR, signed in Strasbourg on 22 November 1984. That said, to date, that protocol has not been ratified by all Member States. See also, in that connection, the Opinion of Advocate General Cruz Villalón in *Åkerberg Fransson* (C-617/10, EU:C:2012:340, points 71 to 74).

36. However, where provision is made for an appeal, it must respect the guarantees arising from Article 6 of the ECHR,¹² and the detailed rules for the application of Article 6 of the ECHR in appeal proceedings depend on the particularities of the appeal procedure in question.¹³

37. Thus, where provision is made for an appeal in criminal proceedings, the fact that the person concerned was able to exercise his rights of defence at first instance does not make it possible to conclude that the guarantees in Article 6 of the ECHR have been fully respected.¹⁴

38. The above having been pointed out, it should be noted that the present case *is not concerned* directly with the existence of a right of appeal. It is undisputed that Mr Tupikas was *offered* and even *availed himself* of the opportunity to appeal. At the heart of the question referred in this case is mutual recognition in the context of the functioning of the Framework Decision, when the optional ground for refusal provided for in Article 4a is implemented. In particular, it is concerned with interpreting the concept of ‘trial resulting in the decision’ in the introductory sentence of that provision.

39. In interpreting the concept of ‘trial resulting in the decision’, the Court is required to bear in mind and to respect those guarantees deriving from fundamental rights. I would emphasise, however, that the purpose of this analysis is *not* to establish a right to bring an appeal as a right arising under EU law.

B. The question raised by the referring court

40. The referring court seeks to determine whether it must take into consideration the proceedings at first instance or the appeal proceedings when examining whether the procedural rights of the person concerned were respected in the ‘trial resulting in the decision’ which convicted him and which forms the basis of the EAW. According to that court, if it is necessary to take into account only the proceedings at first instance, the EAW will be executed since Mr Tupikas appeared in person at those proceedings. If, on the other hand, the appeal proceedings are to be taken into account, the court must examine the circumstances of that appeal before the competent Lithuanian authority. No information concerning those appeal proceedings is available, except for the fact that Mr Tupikas brought them and that the appeal resulted in the decision at first instance being upheld.

41. On the basis of the case-law of the ECtHR and a systemic interpretation of the Framework Decision (having regard, in particular, to the wording of Article 4a(1)(c) and (d)), the referring court considers that if the appeal proceedings result in an examination of the merits of the case (including the issue of guilt or of the penalty), then they fall within the concept of ‘trial resulting in the decision’. On the other hand, that would not be the case where the appeal court confined itself to ruling on questions of law, such as in an appeal in cassation.

42. Mr Tupikas agrees, in essence, with the answer proposed by the referring court to the question referred for a preliminary ruling. However, he emphasises the importance which should be attached to respect for the rights of the defence, including on appeal where such proceedings are provided for.

¹² Judgments of the ECtHR, 26 October 2000, *Kudla v. Poland*, CE:ECHR:2000:1026JUD00302109, § 122; 14 February 2017, *Hokkeling v. Netherlands*, CE:ECHR:2017:0214JUD003074912, § 56 and 58; 18 February 2009, *Andrejewa v. Latvia*, CE:ECHR:2009:0218JUD005570700, § 97. See also, in relation to cassation proceedings, Judgment of the ECtHR, 17 January 1970, *Delcourt v. Belgium*, CE:ECHR:1970:0117JUD000268965, § 25.

¹³ According to the ECtHR, it is necessary, in particular, to take into account, with regard to the issues which it had to resolve and their importance to the appellant, the role of the appeal court and the way in which the rights of the defence were protected. Judgments of the ECtHR, 18 October 2006, *Hermi v. Italy*, CE:ECHR:2006:1018JUD001811402, § 62; 21 July 2009, *Seliwiak v. Poland*, CE:ECHR:2009:0721JUD000381804, § 54 to 64; 9 June 2009, *Sobolewski v. Poland*, CE:ECHR:2009:0609JUD001984707, § 33 to 44; 9 June 2009, *Strzalkowski v. Poland*, CE:ECHR:2009:0609JUD003150902, § 39 to 55; 21 September 1993, *Kremzow v. Austria*, CE:ECHR:1993:0921JUD001235086, § 67; 26 July 2002, *Meftah v. France*, CE:ECHR:2002:0726JUD003291196, § 41; 25 April 2013, *Zahirović v. Croatia*, CE:ECHR:2013:0425JUD005859011, § 54 to 57.

¹⁴ See to that effect, judgment of the ECtHR, 14 February 2017, *Hokkeling v. Netherlands*, CE:ECHR:2017:0214JUD 003074912, § 57 and 58.

43. The Public Prosecutor notes the variety of practices among issuing judicial authorities concerning the enforceable judgment on which an EAW must be based: it may be the judgment at first instance, the judgment delivered on appeal or both. It is that choice made by the issuing authority which therefore determines what constitutes in practice the ‘trial which resulted in the decision’. The Public Prosecutor takes the view that that concept may include appeal proceedings in which the issue of guilt has been re-examined. If the proceedings at first instance do not fulfil the requirements of Article 4a of the Framework Decision, but the appeal proceedings do, surrender may then be authorised.

44. The Netherlands Government takes the view, for its part, that appeal proceedings such as those described in the question referred for a preliminary ruling are not covered by the concept of ‘trial resulting in the decision’. In its opinion, the examination carried out by the executing judicial authority must be conducted in the light of the enforceable judgment presented by the issuing authority. It is not for the executing authority to verify the prior criminal proceedings, as this would challenge the principle of mutual recognition. In the present case, the executing judicial authority must confine itself to verifying the judgment on which the EAW is founded. It must not examine the appeal proceedings.

45. At the hearing the Irish Government proposed that the question referred for a preliminary ruling be answered in the negative, on the basis that only the judgment at first instance was relevant in the present context. That government supported its position with particular reference to the wording of Article 4a(1)(c) and (d) of the Framework Decision and Article 5(1) thereof, in the version prior to the amendment introduced by Framework Decision 2009/299.

46. At the hearing, the Lithuanian Government argued for a broad interpretation of the concept of ‘trial resulting in the decision’. According to that government, the review under Article 4a of the Framework Decision cannot be limited to the judgment at first instance where the facts in the case were re-examined in a subsequent decision of a higher court.

47. The Commission, for its part, submits that the appeal at issue in the main proceedings is covered by the concept of ‘trial resulting in the decision’. That follows from the need to ensure that procedural rights are respected, since appeal proceedings are provided for. The Commission refers, moreover, to the provisions of Directive (EU) 2016/343¹⁵ harmonising the guarantees in relation to the right to be present at the trial. It concludes that appeal proceedings resulting in a final judgment imposing a custodial sentence on the person concerned must be subject to an examination of the ground for refusal provided for in Article 4a of the Framework Decision.

48. The positions of the parties having thus been presented, I shall examine below how the concept of ‘trial resulting in the decision’, within the meaning of the introductory sentence of Article 4a(1) of the Framework Decision, should be understood. To that end, I shall first consider the concept of enforceable judgment (1) and then the implications of appeal proceedings, if they are brought (2).

1. Concept of enforceable judgment

49. It follows from Article 8(1)(c) of the Framework Decision and from part (b)(2) of its Annex that the issuing judicial authority must specify an ‘enforceable judgment’ on which the EAW is based.

50. This, in my view, has to be a judgment, the enforceability of which makes it possible, under national law, to execute the custodial sentence.

¹⁵ Directive of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, p. 1).

51. Two variables are used to determine what, in a given case, constitutes such a judgment.

52. The *first* variable relates, as the Public Prosecutor and the Netherlands Government note, in essence, to the organisation of criminal proceedings within the Member State concerned. In that context, it is necessary to ask whether the applicable procedural law provides for the possibility of an appeal in which the merits of the case are fully examined, including an examination of guilt or of the penalty imposed.¹⁶

53. The circumstances of the particular case are the *second* variable. It is necessary to consider whether the appeal was actually brought and what effect it had on the judgment given at first instance. If an appeal was brought, the applicable national law determines whether it is the judgment at first instance or the judgment given on appeal which is the enforceable instrument.

54. In the light of the foregoing considerations, I consider that the enforceable judgment within the meaning of Article 8(1)(c) of the Framework Decision is the judgment which allows the competent authorities, under the applicable national law, to ensure execution of the custodial sentence which was imposed on the person concerned. What constitutes such a judgment in a particular case will depend on the procedural framework in the Member State and the manner in which the person concerned has used it (or in which it has been used in relation to him).

2. Appeal brought against a judgment

55. The concept of ‘enforceable judgment’ within the meaning of Article 8(1)(c) of the Framework Decision must be distinguished from that of ‘trial resulting in the decision’ within the meaning of the introductory sentence of Article 4a(1) of the Framework Decision.

56. As the Commission pointed out at the hearing, the latter concept encompasses all the stages of criminal proceedings in which a court has examined the merits of the case, that is to say either the issue of guilt or that of the penalty.

57. However, I consider that, in view of the structure and logic of the EAW form, the issuing judicial authority must provide information on the procedural stage which made it possible immediately to pronounce an enforceable criminal conviction. Consequently, it is for the executing judicial authority to ensure compliance with the requirements of Article 4a of the Framework Decision only in relation to that *last stage* of the procedure, during which the merits of the case, as understood above, were examined.

58. It should be recalled that, according to Article 1 of Framework Decision 2009/299, the prohibition on convictions *in absentia* pursues the objective of safeguarding the effectiveness of the rights of defence of the person concerned.

59. The key elements of such an examination are: (i) knowledge of the existence of the trial on the part of the person concerned and (ii) the possibility for the person concerned to defend himself effectively and to put forward all the arguments in his favour regarding *the merits* of the case, that is to say the question of *guilt* or question of the *penalty*.

¹⁶ The European Court of Human Rights has stated that ‘the word “conviction”, for the purposes of Article [5(1)(a) of the ECHR], has to be understood as signifying both a finding of guilt after it has been established in accordance with the law that there has been an offence ... and the imposition of a penalty or other measure involving deprivation of liberty ...’ (judgment of the ECtHR, 21 October 2013, *Del Rio Prada v. Spain*, CE:ECHR:2013:1021JUD004275009, § 123). In the judgment in *Kremzow v. Austria*, the ECtHR held that the fairness of the proceedings involved the right of the applicant to be present at the hearing of the appeal, because of the significant consequences which this could have on the length of the sentence to be imposed (judgment of the ECtHR, 21 September 1993, *Kremzow v. Austria*, CE:ECHR:1993:0921JUD001235086, § 67).

60. With regard to that second aspect, it is imperative that the person concerned is in a position fully to assert his rights during the last stage of the criminal proceedings leading to the enforceable judgment. In practice, they may be (i) proceedings at first instance, if the particular procedural system does not afford an opportunity for an appeal on the substantive issues in their entirety or if such an opportunity exists but no appeal has been brought, or ii) proceedings at second instance, where an appeal was brought and the applicable law allows an examination of all the substantive issues.¹⁷

61. It is in relation to the part of the proceedings immediately preceding the enforceable judgment that the executing judicial authority has to verify, in accordance with the detailed rules of Article 4a of the Framework Decision, the circumstances of the trial at which the person concerned did not appear.

62. In the context of an appeal examining the substantive issues in their entirety, the foregoing considerations mean that where the person concerned did not appear at the proceedings at first instance but appeared at the appeal proceedings, it must be concluded that he appeared in person at the trial resulting in the decision within the meaning of Article 4a of the Framework Decision. Conversely, where the person concerned appeared at the proceedings at first instance but did not appear at the appeal proceedings, execution of the EAW may be refused if the executing judicial authority concludes that, in that particular case, the person's procedural rights were not respected, unless the situation at issue is one of those described in Article 4a(a) to (d) of the Framework Decision.

63. In such a case, the situation described in Article 4a(1)(d) of the Framework Decision is relevant: the person concerned was not personally served with the decision but will be expressly informed of his or her right 'to ... an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed'.

64. Furthermore, it is appropriate to highlight the importance of the principle of mutual trust in that context.¹⁸ The judicial cooperation mechanism established by the Framework Decision would not be functional if the executing judicial authority had to carry out a lengthy examination to verify whether respect for the procedural rights of the person concerned had been guaranteed at each prior stage of the proceedings. The need to ensure that the system remains operational means, in my view, that the review of whether the rights of the defence were respected must be limited to the stage immediately preceding the moment at which it becomes possible to execute the custodial sentence. The earlier stages are, for their part, covered by the principle of mutual trust. That implies the need for the executing judicial authority to trust that the judicial system in the Member State of the issuing judicial authority is able to remedy any earlier procedural shortcomings.

65. In the light of the foregoing considerations, I consider that appeal proceedings in which the question of guilt or the question of the penalty were examined constitute a 'trial resulting in the decision' within the meaning of the introductory sentence of Article 4a(1) of the Framework Decision. It is that procedural step which determines whether the conviction underlying the EAW is enforceable. It is therefore in the light of that procedural step that the executing judicial authority must ensure that the procedural rights of the person concerned are respected with a view to implementation of an optional ground for refusal as provided for in Article 4a(1) of the Framework Decision.

¹⁷ I would add that subsequent proceedings which are a type of 'extraordinary' appeal, such as an appeal in cassation or a constitutional appeal, are, in principle, excluded from the definition of proceedings leading to the enforceable judgment. This is due to the fact that their possible introduction does not in principle allow an examination of the substantive issues in their entirety or a postponement of the moment at which the person concerned is deprived of his liberty in execution of the sentence imposed. However, those stages must still fulfil the requirements of Article 6 of the ECHR (judgment of the ECtHR, 18 October 2006, *Hermi v. Italy*, CE:ECHR:2006:1018JUD001811402, § 60 to 61). See, also, judgments of the ECtHR, 20 March 2009, *Gorou v. Greece*, CE:ECHR:2009:0320JUD001268603, § 41, and 2 June 2016, *Papaioannou v. Greece*, CE:ECHR:2016:0602JUD001888015, § 45.

¹⁸ Judgment of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraphs 62 and 63).

C. The present case and the optional nature of the ground for refusal under Article 4a(1) of the Framework Decision

66. The order for reference states that Mr Tupikas was convicted at first instance by judgment of 26 August 2016 given by the Klaipėdos apylinkės teismas (District Court of Klaipėda). It is also stated that Mr Tupikas appealed against that judgment and that the Klaipėdos apygardos teismas (Regional Court of Klaipėda) dismissed that appeal by decision of 8 December 2016. The EAW contains no further information concerning the circumstances in which the appeal proceedings took place. The referring court states that it does not know whether Mr Tupikas appeared at those proceedings or, if he did not, whether one of the requirements set out in Article 4a(1)(a) to (d) of the Framework Decision was fulfilled.

67. It follows from all the information available (which it is for the referring court to verify) that Mr Tupikas was present at the proceedings at first instance. The fact that Mr Tupikas appealed demonstrates that he must have been informed of the existence of the decision at first instance.

68. The referring court observes that it lacks information concerning the appeal proceedings, particularly on the question of whether or not Mr Tupikas appeared at them in person.

69. The facts presented by the referring court suggest that Mr Tupikas must have known of the existence of the appeal proceedings, since he himself brought the appeal. It is true that such knowledge does not in itself guarantee that Mr Tupikas was duly summoned to the hearing or hearings organised in that context. Accordingly, the decision as to whether his procedural rights were, in that factual context, respected must be made by the executing judicial authority. Where the latter applies the optional ground for refusal to execute the EAW provided for in Article 4a of the Framework Decision, it must request for that purpose the necessary supplementary information pursuant to Article 15(2) of the Framework Decision.

70. That specific factual context leads me to a consideration of the issue which underlies the present case, namely the problematic transposition of Article 4a of the Framework Decision into national law.

71. First, I note that the logic of Article 4a is as follows.

72. The general rule stemming from Article 1(2) of the Framework Decision is the *requirement* for Member States to execute the EAW ‘on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision’.

73. Article 4a(1) introduced the *possibility* of refusing to execute an EAW where the person concerned did not appear in person at the trial which resulted in the decision. That possibility of not executing an EAW must be based on an examination by the executing judicial authority of the circumstances of each specific case.

74. The possibility of non-execution ceases when the executing judicial authority establishes that a particular case is covered by one of the situations listed in Article 4a(1)(a) to (d) of the Framework Decision. In such a scenario, a refusal to execute the EAW is excluded and the requirement to surrender the person concerned becomes the rule once again.

75. However, I note, secondly, that the national legislation as presented in the order for reference (namely Article 12 of the OLW) reverses the logic of the Framework Decision by transforming the ‘*possibility* of non-execution *unless* (a) to (d)’ into a ‘*requirement* of non-execution *unless* (a) to (d)’.

76. Thirdly, as a consequence of transposing Article 4a of the Framework Decision in that way, the list of four exceptions to the possibility of not executing the EAW when the person concerned did not appear at the trial which resulted in the decision has been transformed into an *exhaustive* list of the *only* situations in which the executing authority may execute the EAW when the person concerned did not appear in person at the trial.

77. In my view, that transposition prevents the executing judicial authorities from considering all the factual circumstances in a particular case in order to determine whether the procedural rights of the persons concerned were respected. In transposing, by analogy, the Court's conclusion concerning the optional ground for refusal under Article 4(6) of the Framework Decision, the executing judicial authority must, in my view, enjoy, in this context also, a margin of discretion as to whether or not it is appropriate to refuse to execute the EAW.¹⁹

78. I therefore consider that Article 12 of the OLW incorrectly transposes Article 4a of the Framework Decision.

79. The difficulties inherent in such a rigid transposition are clearly visible in this case. The national court cannot take into consideration all the factual circumstances of Mr Tupikas' individual situation. Subject to the checks to be carried out by the referring court, that situation does not appear to fall within any of the categories provided for in Article 4a of the Framework Decision. However, the person concerned was aware of the decision given at first instance and brought an appeal (and was therefore aware of those proceedings). If, moreover, such a person was duly represented, it is difficult to see how his rights of defence were not respected.

80. However, that factual situation does not fall within any of the sets of circumstances provided for in Article 4a(1)(a) to (d) of the Framework Decision. Insisting on the exhaustive nature of the requirements for concluding that the rights of defence of the person concerned (who did not appear in person) have been respected may lead to a situation in which a person who has brought an appeal but did not participate in those proceedings at second instance (although his rights were defended by a legal counsel) could still obtain a refusal to execute the EAW, under the national legislation, in so far as his case would not be covered by any of the exceptions provided for in Article 4a of the Framework Decision.

81. As the Court has already noted in *Dworzecki*, concerning the scenario described in Article 4a(1)(a)(i) of the Framework Decision, the situations listed in Article 4a of the Framework Decision are *obligatory* 'exceptions to an *optional* ground for non-recognition.' In other words, it follows from the logic of that provision that situations other than those expressly provided for under Article 4a(1)(a) to (d) of the Framework Decision may be put forward in order to allow the executing judicial authority to ensure that the procedural rights of the person concerned have been respected.²⁰

82. I shall conclude by once again pointing out that the Framework Decision is based on the principle of mutual recognition and on the high level of confidence which should exist between the Member States.²¹ However, the concepts of mutual recognition and mutual trust cannot conceal the importance which EU law, in general, and the Framework Decision, in particular, attach to respect for fundamental rights, in this case procedural rights.²²

¹⁹ Judgment of 29 June 2017, *Popławski* (C-579/15, EU:C:2017:503 paragraphs 21 to 23). See, also, judgment of 24 May 2016, *Dworzecki* (C-108/16 PPU, EU:C:2016:346, paragraphs 50 to 52).

²⁰ 'The executing judicial authority may in any event, even after having found that they did not cover the situation at issue, take into account other circumstances that enable it to be assured that the surrender of the person concerned does not mean a breach of his rights of defence.' (Judgment of 24 May 2016, *Dworzecki*, C-108/16 PPU, EU:C:2016:346, paragraph 50).

²¹ Judgment of 1 June 2016, *Bob-Dogi* (C-241/15, EU:C:2016:385, paragraphs 31 to 33 and case-law cited).

²² For example, judgment of 16 July 2015, *Lanigan* (C-237/15 PPU, EU:C:2015:474, paragraph 53 and case-law cited).

83. Article 4a of the Framework Decision reflects the balance which the EU legislature struck between the effectiveness of the surrender of persons within the European legal area, on the one hand, and the scope of the review which it is the task of the executing judicial authority to carry out, on the other. Where that authority is convinced that fundamental rights were respected, taking into account, where appropriate, the behaviour of the person concerned, it should not be prevented by the national legislation from meeting its obligation to execute an EAW under Article 1(2) of the Framework Decision.

VI. Conclusion

84. In the light of the foregoing considerations, I propose that the Court answer the question referred by the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands) as follows:

The concept of ‘trial resulting in the decision’, within the meaning of the introductory sentence of Article 4a(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as referring also to the last instance of criminal proceedings, in which there was an examination, in a particular case, of the merits of the case, namely the question of guilt or the penalty imposed, and on the basis of which the conviction became enforceable.

In that context, the decision to apply the optional ground for refusal to execute a European arrest warrant in accordance with the above provision falls to the executing judicial authority, which must assess, in the light of all the factual circumstances available to it, whether the rights of defence of the person concerned have been respected.