



Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 26 July 2017¹

Case C-271/17 PPU

Openbaar Ministerie
v
Sławomir Andrzej Zdziasek

(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’ — Proceedings relating to a cumulative sentence — Appeal proceedings)

I. Introduction

1. Mr Sławomir Andrzej Zdziasek, a Polish national, is the subject of a European arrest warrant (‘EAW’) issued by the Polish judicial authority. That authority seeks the surrender of Mr Zdziasek, currently detained in the Netherlands, for the purpose of executing two custodial sentences of one year and six months and of three years and six months, respectively.
2. Those sentences were imposed by a ‘cumulative judgment’ which forms the basis of the EAW in question (‘the cumulative judgment’). That cumulative judgment is not concerned with the guilt of the person concerned but merely seeks to combine and modify three sentences imposed previously. Thus, the sentence of one year and six months combines two sentences imposed on Mr Zdziasek in two separate sets of proceedings. For its part, the sentence of three years and six months represents a reduction in a four-year sentence imposed on Mr Zdziasek by a previous judgment (‘the original judgment’). That reduction in the sentence took place following a legislative amendment favourable to Mr Zdziasek.
3. The referring court observes that the EAW form contains only information relating to the cumulative judgment. Further information obtained by the referring court shows that Mr Zdziasek was duly represented during the appeal proceedings which led to the original judgment, of which he was aware. In the view of that court, Mr Zdziasek’s rights of defence at first instance were, for their part, not respected.

¹ Original language: French.

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 therein arises.

5. In those circumstances, the referring court asks whether the concept of 'trial resulting in the decision' includes the proceedings which led to the adoption of the cumulative judgment, even though the question of guilt was no longer at issue in those proceedings. The referring court thus seeks to determine whether respect for the procedural rights of the person concerned must be assessed in the light of those proceedings or whether it is in fact necessary to take into account the proceedings which gave rise to the original judgment.

6. If it is necessary to take into account the proceedings which gave rise to the original judgment, the referring court is uncertain as to the consequences of Mr Zdziaszek's lack of effective representation at first instance.

7. The referring court also asks whether it is possible for it to refuse to execute the EAW on the ground that neither the form accompanying the EAW nor the additional information which has been provided establishes that one of the situations described in Article 4a(1)(a) to (d) of the Framework Decision applies to the present case.

8. The background to those questions is the particular way in which the latter provision has been transposed into Netherlands law. Article 4a(1) of the Framework Decision introduces the *possibility* of refusing the surrender of a person convicted *in absentia*, unless the executing judicial authority has been able to ensure respect for that person's procedural rights. If one of the four situations provided for in that provision arises, however, the executing judicial authority is required to execute the EAW. The national legislation reverses the logic of that option by *prohibiting* the referring court from surrendering the person concerned *where* none of those situations arise.

II. The legal framework

A. The ECHR

9. 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. ...'

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.

⁴ Signed at Rome on 4 November 1950.

B. EU law

1. The Charter

10. 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.

...'

11. 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

12. 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'.

13. 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'.

14. 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]'.

15. 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. ...'

16. 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;

...'

17. Article 15 of the Framework Decision, entitled 'Surrender decision', provides:

'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 ...

...'

18. 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 time frame;
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 time frame within which he or she has to request a retrial or appeal, which will be ... days.
 4. If you have ticked the box under points 3.1b, 3.2 or 3.3 above, please provide information about how the relevant condition has been met:
.....
.....

C. Netherlands law

19. 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.

20. 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

21. On 17 January 2017, the referring court received a request for execution of an EAW issued on 12 June 2014 by the Sąd Okręgowy w Gdańsku (Regional Court, Gdańsk, Poland).

22. The EAW seeks the arrest and surrender of Mr Zdziasek, a Polish national, for the purpose of executing in Poland two custodial sentences of, respectively, one year and six months (for offences 1 and 2)⁵ and three years and six months (for offences 3 to 5).⁶

23. The EAW refers to the cumulative judgment handing down those two sentences, delivered on 25 March 2014 by the Sąd Rejonowy w Wejherowie (District Court, Wejherowo, Poland) ('the cumulative judgment'). On the one hand, that judgment combined into a single custodial sentence of one year and six months the two sentences imposed on Mr Zdziasek for offences 1 and 2 by the final judgments delivered on 21 April 2005 by the Sąd Rejonowy w Wejherowie (District Court, Wejherowo) and on 16 June 2006 by the Sąd Rejonowy w Gdyni (District Court, Gdynia, Poland). On the other hand, the same judgment reduced to three years and six months an original custodial sentence of four years which was imposed on Mr Zdziasek for offences 3 to 5 by the final judgment of 10 April 2012 delivered by the Sąd Rejonowy w Wejherowie (District Court, Wejherowo). That change was made following an amendment to the law favourable to the person concerned

24. By decision of 11 April 2017, the referring court refused to surrender Mr Zdziasek in connection with the custodial sentence relating to offence 1, in so far as that offence is not punishable under Netherlands law. It stayed the proceedings in relation to offence 2, in order to put further questions to the issuing judicial authority.

25. Thus, this request for a preliminary ruling is concerned only with that part of the cumulative judgment relating to *the reduction of the sentence in connection with offences 3 to 5*.

26. Mr Zdziasek did not appear in person at the proceedings leading to the cumulative judgment. The EAW indicates, however, that he was aware of the scheduled trial and had given a mandate to a legal counsellor who defended him.

27. More specifically, it is apparent from the order for reference that Mr Zdziasek was summoned to a first hearing on 28 January 2014 at the address which he had supplied. He did not respond to the summons and did not appear. The Sąd Rejonowy w Wejherowie (District Court, Wejherowo), of its own motion, appointed a lawyer and stayed the proceedings. Mr Zdziasek was similarly summoned to a second hearing on 25 March 2014. He did not appear in person but his lawyer participated at the hearing. It was at the end of that hearing that the cumulative judgment was handed down.

28. Notwithstanding those factual assertions, the referring court takes the view that the situation referred to in Article 4a(1)(b) of the Framework Decision does not apply, since it has not been established that the person whose surrender is sought '[was] aware of the scheduled trial' or that he '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'.

29. The referring court's *first* question requires it to be determined whether the proceedings which led to the cumulative judgment constitute the 'trial resulting in the decision' within the meaning of the introductory sentence of Article 4a(1) of the Framework Decision. If that is the case, the referring court will refuse to execute the EAW.

5 Offence 1 relates to insults directed at two police officers in the exercise of, and in connection with, their duties, and offence 2 concerns the use of violence with the intent to induce certain behaviour.

6 Offence 3 concerns a repeated offence of grievous bodily harm; offence 4 relates to a sexual assault, and offence 5 relates to driving whilst intoxicated in breach of a driving ban imposed by the courts.

30. If, however, the cumulative judgment is not relevant for the purposes of applying Article 4a(1) of the Framework Decision, the referring court takes the view that it must examine whether Mr Zdziaszek appeared in person at the prior stage of the proceedings and, if not, whether one of the situations referred to in Article 4a(1)(a) to (d) of the Framework Decision applies.

31. According to the referring court, the information provided in the EAW does not relate to the original judgment.

32. The *second* question requires it to be determined whether, in that context, the referring court may refuse to execute the EAW.

33. If that is not the case, the referring court considers that it is in the light of the original judgment that the referring court must determine whether the present case is covered by one of the situations referred to in Article 4a(1)(a) to (d) of the Framework Decision.

34. In that regard, it takes the view that Mr Zdziaszek did not appear in person at the trial which resulted in the decision at first instance and that none of the circumstances referred to in Article 4a(1)(a) to (d) of the Framework Decision applies to the proceedings at first instance.

35. With regard to the appeal proceedings, Mr Zdziaszek did not appear at the hearing. However, he was properly notified and his counsellor did appear there. The referring court infers from this that Mr Zdziaszek was ‘aware of the scheduled trial’ on appeal and that he ‘had given a mandate to a legal counsellor ... to defend him ... at the trial’.

36. Also, the referring court asks in the *third* place whether the appeal proceedings constitute the ‘trial resulting in the decision’ within the meaning of Article 4a(1) of the Framework Decision

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

‘(1) Are proceedings

- in which the court in the issuing Member State decides to combine separate custodial sentences which had previously been imposed on the person concerned by a final judgment into one single custodial sentence, and/or to change an aggregate custodial sentence which had previously been imposed on the person concerned by a final judgment and
- in which that court no longer examines the question of guilt,

such as the proceedings which led to the cumulative sentence of 25 March 2014, a “trial resulting in the decision” as referred to in the introductory sentence of Article 4a(1) of [the] Framework Decision ... ?

(2) Can the executing judicial authority:

- in a case where the requested person did not appear in person at the trial resulting in the decision,
- but where the issuing judicial authority has not, either in the EAW or in the supplementary information requested pursuant to Article 15(2) of [the] Framework Decision ..., provided information about the applicability of one or more of the circumstances referred to in subparagraphs (a) to (d) of Article 4a(1) of [the] Framework Decision ..., in accordance with the wording of one or more of the categories of point 3 of paragraph (d) of the EAW form,

for those very reasons conclude that none of the conditions of Article 4a(1)(a) to (d) of [the] Framework Decision ... has been satisfied and for those very reasons refuse to execute the EAW?

(3) Are appeal proceedings

- in which there has been an examination of the merits 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 the 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

38. 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.

39. In support of that request, it argued that the questions referred concerned the interpretation of a Framework Decision which falls under 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. An urgent answer by the Court will have a direct and decisive impact on the duration of the detention on the person concerned.

40. The Fifth Chamber of the Court decided on 8 June 2017 to grant that request by the referring court.

41. Written observations were lodged by the Openbaar Ministerie (the Public Prosecutor, the Netherlands), the applicant in the main proceedings, Mr Zdziasek, the defendant in the main proceedings, the Netherlands Government and the European Commission. The Polish Government submitted a written reply to the questions put by the Court concerning the Polish legislative framework applicable.

42. The Public Prosecutor, Mr Zdziasek, the Netherlands, Irish and Polish Governments and the Commission presented their oral arguments at the hearing held on 11 July 2017.

V. Assessment

43. By its *first* question, the referring court seeks to ascertain whether the proceedings which led to the cumulative judgment, and at which the question of guilt was no longer concerned, constitute a ‘trial resulting in the decision’ within the meaning of the introductory sentence of Article 4a(1) of the Framework Decision. To answer that question, I shall first analyse the concept of criminal conviction, the existence of which is a precondition for the concept of an ‘enforceable judgment’ and of a ‘trial resulting in the decision’. I shall then examine the specific nature of the cumulative judgment (A).

44. By its *second* question, the referring court seeks to determine the consequences to be drawn, for the purpose of the execution of an EAW, from the inadequacy of the information provided by the issuing judicial authority. That question can be formally understood as referring to the number of times that the executing judicial authority may request relevant information from the issuing judicial

authority or to the maximum duration of the exchange between those two courts, taking into account in particular the time limits applicable to the execution of an EAW. Less obviously, the background of that question is the problematic transposition of Article 4a of the Framework Decision into Netherlands law (B).

45. By its *third* question the referring court asks whether the concept of ‘trial resulting in the decision’, within the meaning of the introductory sentence of Article 4a(1) of the Framework Decision, 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. That question requires an assessment whether the effective protection of the rights of defence of the person concerned during the appeal proceedings can remedy any shortcomings which may have arisen at first instance (C).

A. The first question referred for a preliminary ruling

46. The parties which submitted written observations and participated at the hearing essentially share the view that proceedings which lead only to an adaptation of the sentence without any examination of the question of guilt do *not* constitute a ‘trial resulting in the decision’ within the meaning of the introductory sentence of Article 4a(1) of the Framework Decision.

47. That said, the written submissions and oral arguments bear witness to the lack of consensus as to what constitutes the ‘merits’ of the case. There does not appear to be any doubt that proceedings which relate to the question of guilt *and* the sentence constitute proceedings on the merits. However, what of proceedings which concern *only* the sentence, an adaptation of it or its reduction? Must the proceedings on the merits include an examination of the question of guilt as an indispensable part of those proceedings?

48. Mr Zdziasek argues that, where the adaptation of the sentence is not a mere arithmetical exercise, the related proceedings constitute a ‘trial resulting in the decision’. Those proceedings must therefore comply with the requirements of Articles 47 and 48 of the Charter and Article 6 of the ECHR.

49. The Public Prosecutor emphasises that, in the interests of a better guarantee of the rights of the defence, the review must relate to a decision concerning guilt. The opposite approach would entail the risk that the person concerned could be surrendered without his rights of defence having been respected at the earlier stages of the proceedings.

50. Similarly, the Netherlands Government proposes that the first question referred for a preliminary ruling be answered in the negative. It submits that the review must relate to proceedings on the merits which have led to a conviction. This presupposes that the court has ruled on the question of guilt. Proceedings which combine or adapt custodial sentences do not therefore fall within the concept of ‘trial resulting in the decision’.

51. The Irish and Polish Governments also propose that the first question be answered in the negative. To the extent that the guilt of the person concerned was not examined during the proceedings which led to the cumulative judgment, those proceedings cannot constitute a ‘trial resulting in the decision’ within the meaning of the introductory sentence of Article 4a(1) of the Framework Decision. According to the Irish Government, a micro-analysis of proceedings resulting in a cumulative judgment would be contrary to the principle of mutual trust. The Polish Government takes the view that the inclusion of proceedings leading to a cumulative judgment within the abovementioned concept would be tantamount to an extension of the scope of Article 4a of the Framework Decision. According to the Polish Government, the concept of ‘merits of the case’ entails determination of the facts and examination of the question of guilt, elements which were last ruled upon in the appeal proceedings which led to the original judgment.

52. The Commission, for its part, finds it difficult to imagine that the review under Article 4a of the Framework Decision can cover proceedings limited to adapting the sentence whilst the proceedings which led to the initial conviction are not subject to that provision. By contrast, proceedings giving rise to an adaptation of the original sentence, while allowing the person concerned to put forward his arguments, would fall within the concept of ‘trial resulting in the decision’.

53. I do not share the view that only the question of guilt is relevant in the context of the examination of the ‘merits of the case’, to the exclusion of the determination of the sentence. The concept of *criminal conviction*, which is relevant both to the concept of ‘enforceable judgment’ and to the concept of ‘trial resulting in the decision’ (used respectively in the introductory sentence of Article 4a(1) and Article 8(1) of the Framework Decision), comprises two elements: guilt and punishment (1). To the extent that the cumulative judgment determines the sentence, it falls within the concept of criminal conviction (2). For the purposes of applying Article 4a of the Framework Decision, it nevertheless remains to be ascertained whether the proceedings which led to that judgment leave to the court the discretion to determine the specific manner of adapting the sentence (3). To the extent that such discretion exists in this case, the proceedings giving rise to the cumulative judgment constitute a ‘trial that led to the decision’ within the meaning of the introductory sentence of Article 4a(1) of the Framework Decision (4).

1. Elements of a criminal conviction

54. Where its purpose is the execution of a sentence, the EAW presupposes the existence of a criminal conviction. The latter typically contains two elements, namely a finding of guilt and, consequently, the imposition of a penalty.⁷ Those two elements therefore constitute the ‘merits’ of the case, either in combination (the merits in their entirety) or considered separately (a part of the merits).

55. Those two elements must therefore appear in the EAW. The issuing judicial authorities are actually required to provide information not only on the offences committed but also on the penalties imposed in practice. This is essential for verification of the applicability of the EAW in a particular case by the executing judicial authority, in the light of the offence committed⁸ and the penalty imposed.⁹ That information is also important for assessing the existence of a ground for mandatory non-execution of the EAW.¹⁰

56. As regards the concept of enforceable judgment within the meaning of Article 8(1)(c) of the Framework Decision, an enforceable judgment is a judgment which allows the competent authorities, under the applicable national law, to execute the custodial sentence which was imposed on the person concerned. What constitutes such a judgment in a particular case will depend on two variables, namely the procedural framework in the Member State and the specific manner in which the person concerned has used it (or in which it has been used in relation to him).¹¹

7 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 of 21 October 2013, *Del Rio Prada v. Spain*, CE:ECHR:2013:1021JUD004275009, § 123). In the judgment in *Kremzow v. Austria*, the ECtHR held that there was a violation of Article 6(1) in relation to the absence of the person concerned from the hearing of the appeal, even though that stage of the proceedings was concerned only with the sentence to be imposed (judgment of the ECtHR of 21 September 1993, *Kremzow v. Austria*, CE:ECHR:1993:0921JUD001235086, § 67).

8 Having regard, for example, to the possible application of the double criminality requirement. See, in particular, Article 2(4) of the Framework Decision.

9 See Article 2(1) of the Framework Decision.

10 See Article 3 of the Framework Decision.

11 See points 49 to 54 of my Opinion in *Tupikas* (C-270/17 PPU).

57. Where a judgment is the instrument for enforcing a custodial sentence, it must by definition relate to the sentence. The question which arises in this case is whether a decision relating *solely* to a sentence can be an ‘enforceable judgment’ within the meaning of the Framework Decision. That is what I shall now examine.

2. The specific nature of the cumulative judgment

58. The cumulative judgment forming the basis of the EAW in the present case is specific in two respects.

59. First, it combines two substantive decisions into a single measure. In that respect, (i) it combines the penalties imposed previously (and separately) for offences 1 and 2, and (ii) it reduces the duration of the penalty imposed previously and cumulatively for offences 3 to 5.

60. Secondly, with respect to offences 3 to 5, the cumulative judgment is limited to reducing the sentence imposed without addressing the question of guilt, as previously determined in the original judgment.

61. It follows from the order for reference and the explanations provided by the Polish Government that that reduction took into account an amendment to the law favourable to the person concerned, which occurred between the adoption of the original judgment and the handing down of the cumulative judgment.

62. At the hearing, the Polish Government confirmed that the cumulative judgment had the effect of replacing the original judgment.

63. Subject to verification by the referring court, it is thus established that the decision on the penalty as set out in the cumulative judgment is the *only basis* in law permitting Mr Zdziasek to be deprived of his liberty for the period provided for therein. Therefore, the two elements of the criminal conviction of Mr Zdziasek were last examined in two separate sets of proceedings: the proceedings which led to the original judgment, in so far as concerns the question of guilt, and the proceedings which led to the cumulative judgment, in so far as concerns the sentence ultimately imposed.

64. It is now necessary to consider the nature of the proceedings leading to the cumulative judgment.

3. Characteristics of the proceedings which led to the cumulative judgment

65. It is useful to point out, like Mr Zdziasek and Commission, that the European Court of Human Rights draws a distinction between two types of proceedings leading to the imposition of cumulative penalties: (i) proceedings which confer no discretion on the court and in which that court makes only an arithmetic calculation, and (ii) proceedings in which the court exercises its discretion. While the first type of proceedings is not covered by Article 6 of the ECHR, the situation is different for the second.¹²

66. The determination of the nature of the proceedings in question should take into account the following aspects.

¹² Judgment of the ECtHR of 15 July 1982, *Eckle v. Germany*, ECLI:CE:ECHR:1983:0621JUD000813078, § 77. See also judgment of the ECtHR of 28 November 2013, *Aleksandr Dementyev v. Russia*, ECLI:CE:ECHR:2013:1128JUD004309505, § 25.

67. Where a court must confine itself to the mechanical application of a legal requirement which leaves it no discretion as to how the sentence will be reduced, such proceedings cannot constitute a trial within the meaning of Article 4a of the Framework Decision. The person concerned has no opportunity to assert his procedural rights in order to influence the outcome of a mechanical application of the law of that kind.

68. It is different in the case of proceedings in which the court exercises discretion. In that regard, it is appropriate, in particular, to ask the following questions: is there new evidence that the court is required to identify and to take into account (for example, the behaviour of the person concerned after his initial conviction, the assessment made by the prison authorities, etc.)? Should a hearing be held in the course of the proceedings leading to the adaptation of the sentence? Can an appeal be lodged against a new decision concerning the adaptation of the sentence? First and foremost, does the court have discretion throughout those proceedings?

69. If the answer to those questions is in the affirmative, especially the answer to the last question, I consider that the case is concerned with a trial within the meaning of the introductory sentence of Article 4a of the Framework Decision. Those procedural elements allow the person concerned to have an influence on the determination of the sentence. The effectiveness with which the person concerned can assert his procedural rights is, in that respect, of cardinal importance.

70. It is for the referring court to determine whether, in the present case, the proceedings which led to the cumulative judgment conferred discretion on the national court. In view of the evidence provided to the Court in this case, it seems to me that, in proceedings leading to a cumulative judgment, the Polish court enjoys a not inconsiderable discretion.

71. At the hearing, the Polish Government confirmed that a court delivering a cumulative judgment, although it does not examine the question of guilt, has discretion to determine (or adapt) the cumulative sentence within the limits established by the sentences imposed in the earlier, underlying judgments.

72. However, that government refuses to describe the proceedings which led to the cumulative judgment as a 'trial resulting in the decision' as provided for in the introductory sentence of Article 4a(1) of the Framework Decision, in so far as the result of those proceedings *is always favourable* to the person concerned. That government argues that the length of the sentence ultimately imposed will necessarily be shorter than that which would be the result of adding the sentences together. Similarly, the sentence after the reduction will necessarily be shorter than that previously imposed.

73. I do not agree with the conclusion that the proceedings which led to the cumulative judgment do not fall within the scope of Article 4a of the Framework Decision.

74. Although adaptation of the sentence always results in a reduction of the original sentence, it remains fundamentally important for the person concerned to argue in favour of the *maximum* reduction.

75. For example, imagine a situation in which the national court is required to combine three sentences, of five, four and three years, imposed previously. Imagine, also, that the discretion available to the court allows it to set the cumulative sentence within a range from five years' imprisonment to twelve years' imprisonment. It is true that the final result will, by definition, be more favourable to the person concerned, since the mere addition of the sentences would have led to a cumulative sentence of twelve years. However, there is a substantial difference between the imposition of a cumulative sentence of a length which is near the lower limit of the range (for instance, six years) and one which is near its upper limit (for example, eleven years).

76. If, by his presence, the person concerned may have an influence on the determination of the length of the sentence, neither the guarantees of Article 6(1) of the ECHR nor, consequently, those of Article 4a of the Framework Decision can be disregarded during the trial at issue.

77. As I noted above, the fact that it was possible to verify that procedural rights were respected in connection with the original judgment is not relevant in relation to ‘sentencing’, since, first, the court ruling on the new sentence exercised discretion and, secondly, the new decision relating to that sentence *replaced* the earlier decision. The cumulative judgment thus became the only enforceable judgment on which an EAW can be based.

78. In order to ensure that the procedural rights of the person concerned have been respected, it is for the referring court to determine, in a given case, which decision constitutes the enforceable judgment forming the basis of the EAW. It must request, if appropriate, supplementary information on the basis of Article 15(2) of the Framework Decision in order to identify the stage of the proceedings at which the court exercised discretion to determine most recently the duration of the sentence. In that context, the executing judicial authority must also be able to examine whether the rights of defence of the person concerned were respected in relation to the final procedural stage at which guilt was established.

79. In an entirely practical manner, this means that the issuing judicial authority must complete parts (c) and (d) of the EAW form in relation to the proceedings which immediately resulted in the enforceable judgment.

80. However, in order to prevent any lack of information and to limit the use of Article 15(2) of the Framework Decision, it seems to me desirable for the issuing judicial authority to provide, primarily in part (b) of the form, any additional information likely to be useful to the executing judicial authority in ensuring that the rights of defence of the person concerned were respected. Such information may, in particular, relate to the last procedural stage at which a position was taken on the question of guilt, where that question was considered in proceedings other than those during which the court determined the sentence in the exercise of its discretion.

81. Nonetheless, it must be emphasised in that context that it is not for the executing judicial authority to examine in its entirety the patchwork of earlier criminal proceedings.

82. As is rightly argued by the Public Prosecutor and the Netherlands Government, this would undermine the principle of mutual trust — the cornerstone of cooperation in criminal matters in this area —¹³ and would adversely affect the functioning of the system established by the Framework Decision.

83. Article 1(3) of the Framework Decision provides that the Framework Decision cannot have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU and reflected in the Charter. That obligation is incumbent on both the issuing Member State and the executing Member State.¹⁴

84. I would recall that all Member States are bound by the ECHR, in particular by Article 6(1) thereof. This means that the Member State of the issuing judicial authority is required to remedy, where appropriate, any shortcomings which may have arisen at earlier stages of the proceedings.

¹³ See recital 6 of the Framework Decision.

¹⁴ Judgment of 16 July 2015, *Lanigan* (C-237/15 PPU, EU:C:2015:474, paragraph 53 and the case-law cited).

85. If the judgment was delivered *in absentia*, the Member State of the issuing judicial authority must, in principle, ensure a retrial under the provisions of national law. The correction of any procedural errors is therefore the responsibility of the issuing Member State which receives the surrendered person on the basis of the EAW. It is not for the national law of the executing judicial authority to ascertain or to correct all the shortcomings of the proceedings which resulted in a judgment, in cases where the person concerned did not appear in person at his trial.

86. It would be otherwise only if the executing judicial authority were to find that the criminal justice system of the Member State issuing the EAW is failing to such an extent that the principle of mutual trust no longer applied, for example because of the existence of a serious and proven risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter,¹⁵ or because the criminal courts of a Member State are no longer able to guarantee a fair trial, thus excluding automatic mutual recognition.¹⁶

4. Interim conclusion

87. On the basis of the foregoing considerations, I conclude that proceedings which give rise to a judgment, such as the cumulative judgment at issue in the main proceedings, may constitute a ‘trial resulting in the decision’ within the meaning of the introductory sentence of Article 4a(1) of the Framework Decision, where (i) that judgment, which has become enforceable, imposes a custodial sentence and where, (ii) in the proceedings relating to the imposition of that sentence, the national court has a discretion.

B. The second question referred for a preliminary ruling

88. By its second question, the referring court asks, in essence, whether it can refuse to execute an EAW where it is apparent that respect for the procedural rights of the person concerned must be assessed in connection with a judgment other than that referred to in the EAW and where the supplementary information provided under Article 15(2) of the Framework Decision does not make it possible to verify whether the procedural rights of the person concerned were respected.

89. The referring court considers that refusal is possible in such circumstances. It may be inferred from the wording ‘unless the [EAW] states that’, used in the introductory sentence of Article 4a(1) of the Framework Decision, that information on the applicability of one of the circumstances referred to in Article 4a(1)(a) to (d) of that provision must be communicated in part (d) of the EAW form, or at least in accordance with the categories as formulated therein.

90. While Mr Zdziasek takes no position on the second question, the Public Prosecutor takes the view, for its part, that execution of the EAW cannot be refused if the issuing judicial authority does not use the formulations in part (d) of the form, as long as the information provided is useful.

91. The Netherlands Government takes the view that the second question seeks to ascertain whether the referring court must review the original judgment in the light of Article 4a of the Framework Decision. It proposes a negative response in so far as the verification should be made in the light of the judgment which is referred to as being enforceable in the EAW.

¹⁵ See, to that effect, judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 104).

¹⁶ It is clear that, in order to be able to participate in the European mutual recognition system (in any field of law — criminal, civil or administrative), national courts and tribunals must fulfil all the criteria defining ‘court or tribunal’ in EU law, including whether or not they are independent — see, to that effect, my Opinion in *Pula Parking* (C-551/15, EU:C:2016:825, points 95 to 96 and 101 to 107).

92. According to the Commission, the executing judicial authority must request information concerning the last stage of the proceedings at which the merits of the case were discussed and which resulted in the final sentence. In the present case, it was the appeal proceedings which resulted in the original judgment. The Commission recalls that, in any event, Article 4a of the Framework Decision concerns an optional ground for refusal. In its view, there are, in addition to the four situations in which surrender is obligatory, cases where the EAW may be executed without adversely affecting the right of the person concerned to attend his trial. In that regard, the executing judicial authority may take account of all available data.

93. In order to answer the second question referred, I shall distinguish between its outward form, which concerns the detailed arrangements for communication between judicial authorities, (1) and its underlying context, to which reference is made in the aforementioned response from the Commission (2). Next, I shall explain why it is necessary for the executing judicial authorities to retain discretion when examining whether the procedural rights of the persons concerned under Article 4a of the Framework Decision were respected (3).

1. The detailed arrangements for communication between judicial authorities under Article 15(2) of the Framework Decision

94. Communication between the two authorities under the abovementioned provision will always depend on the specific needs of each case. It is therefore difficult to answer such a question in the abstract. Indeed, the type of information required will typically depend on the purpose for which that information is sought.

95. However, I consider that the approach to be adopted in that context could be guided by the following considerations.

96. By way of an introduction, I would point out that the executing judicial authority may refuse to execute an EAW only in the exhaustively listed cases of mandatory non-execution provided for in Article 3 of the Framework Decision or optional non-execution provided for in Articles 4 and 4a of the Framework Decision.¹⁷

97. The Court has also noted the requirements as to lawfulness in Article 8(1) of the Framework Decision, compliance with which is a condition for the validity of the EAW, since their infringement leads in principle to a refusal to execute the EAW. Before refusing execution (which must remain exceptional), the competent authority must therefore, pursuant to Article 15(2) of the Framework Decision, request that the issuing judicial authority *urgently* provide any necessary additional information.¹⁸

98. It is only if the executing judicial authority, having regard to the information provided pursuant to Article 15(2) of the Framework Decision and to any other information it may also have obtained, reaches the conclusion that the EAW was issued unlawfully (in the light of the conditions laid down in Article 8(1) of the Framework Decision) that the executing judicial authority must not act upon that EAW.

¹⁷ Judgment of 1 December 2008, *Leymann and Pustovarov* (C-388/08 PPU, EU:C:2008:669, paragraph 51); of 30 May 2013, *F* (C-168/13 PPU, EU:C:2013:358, paragraph 36), and of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 38).

¹⁸ Judgment of 1 June 2016, *Bob-Dogi* (C-241/15, EU:C:2016:385, paragraphs 64 to 65).

99. More specifically, with regard to Article 15(2) of the Framework Decision, it should first be pointed out that the communication under that provision seeks to strike a balance between the obligation to execute (in compliance with the urgency with which the EAW must be considered, taking into account the time limits laid down in the Framework Decision) and the requirement to protect the procedural rights of the person concerned.¹⁹ Indeed, the exchange between the authorities cannot go on indefinitely. It must permit compliance with the time limit of 60 days²⁰ within which the EAW must, in principle, be executed.²¹

100. Secondly, it is important that the abovementioned detailed arrangements for communication ensure the operational capacity of the system. Thus, any questions should be asked as precisely and clearly as possible. It seems reasonable in particular to ask a question once, and then to check a second time, highlighting any aspects to be clarified. If such communication fails to have the desired outcome, it seems reasonable to me, in the light of those objectives of urgency and the protection of the rights of the persons concerned, to go no further in actively seeking information.

101. However, this does not exempt the competent authority from assessing each case on a case-by-case basis, in view of the need to ensure that the rights of defence of the person concerned are respected.

102. In the present case, the executing judicial authority wished to ask additional questions concerning the proceedings which led to the original judgment. It has expressed doubts, as noted by the Netherlands Government, concerning the level of protection of Mr Zdziaszek's rights of defence in the proceedings which led to the cumulative judgment.

103. That said, the more fundamental issue underlying the second question referred is that of the transposition into Netherlands law of Article 4a of the Framework Decision. I shall now devote myself to that aspect of the question.

2. *The context underlying communication under Article 15(2) of the Framework Decision*

104. Additional information was in the present case requested under Article 15(2) of the Framework Decision, in order to assess the application of the conditions provided for in Article 4a of the Framework Decision. As already noted, that provision establishes an optional ground for refusal of an EAW.²²

105. As I have already noted elsewhere,²³ 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'.

106. 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.

19 See, to that effect, the judgment of 24 May 2016, *Dworzecki* (C-108/16 PPU, EU:C:2016:346, paragraphs 34 to 37).

20 Which may be extended by 30 days under Article 17 of the Framework Decision.

21 In *Lanigan*, the Court emphasised the obligation to execute the EAW, notwithstanding the expiry of the time limits laid down in Article 17 of the Framework Decision, including, if necessary, the continued detention of the person concerned (judgment of 16 July 2015, *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraphs 34 to 42 and 62).

22 See recitals 6 and 15 of Framework Decision 2009/299, which emphasise the 'alternative' and 'optional' nature of the grounds for refusal under Article 4a of the Framework Decision (subject to respect for the fundamental rights of the person concerned).

23 See my Opinion in *Tupikas* (C-270/17 PPU, points 70 to 78).

107. 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.

108. However, I note 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)’.

109. 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. 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.²⁴

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

111. The issue of the exhaustive nature of Article 4a also arises in this case:²⁵ are the circumstances described under Article 4a(1)(a) to (d) the *only ones* capable of allowing the requested authority to verify whether the rights of defence of the person concerned were respected? Or may that authority refer to other circumstances in order to be able to execute the EAW, whilst ensuring respect for the fundamental rights of the person concerned?

112. I shall conclude by 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.²⁶ However, the concepts of mutual recognition and mutual trust cannot conceal the importance which the Framework Decision and EU law attach to respect for fundamental rights, in this case procedural rights.²⁷

113. Article 4a of the Framework Decision reflects the balance which the European Union legislature struck between the effectiveness of the surrender of persons within the European legal area, on 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.

²⁴ 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).

²⁵ See a similar scenario described in my Opinion in *Tupikas* (C-270/17 PPU, points 79 to 80).

²⁶ Judgment of 1 June 2016, *Bob-Dogi* (C-241/15, EU:C:2016:385, paragraphs 31 to 33 and case-law cited).

²⁷ See, in particular, judgment of 16 July 2015, *Lanigan* (C-237/15 PPU, EU:C:2015:474, paragraph 53 and case-law cited).

3. *Interim conclusion*

114. In the light of the foregoing considerations, the executing judicial authority may refuse to execute an EAW in the event that neither the information contained in the EAW form nor the information which the executing judicial authority received from the issuing judicial authority under Article 15(2) of the Framework Decision allows it to verify whether the rights of defence of a person concerned who did not appear in person at his trial were respected. The decision to apply the optional ground for refusal to execute an EAW for the purposes of Article 4a(1) of the Framework Decision falls to the executing judicial authority, which must be able to assess, in the light of all the factual circumstances available to it, whether the rights of defence of the person concerned have been respected.

C. *The third question referred for a preliminary ruling*

115. It follows from the foregoing that verification of the applicability of the optional ground for refusal under Article 4a of the Framework Decision must be carried out in connection with proceedings such as those which led to the cumulative judgment in the main proceedings. I would point out, first, that this follows from the fact that, in the present case, the cumulative judgment determined the sentence imposed on Mr Zdziaszek in such a way as to render the custodial sentence enforceable and, secondly, that it appears that the proceedings leading to the cumulative judgment involved a discretion on the part of the court, which it is for the referring court to ascertain.

116. It is clear from my proposed answer to the first question that the executing judicial authority has to consider whether the rights of the defence have been respected in relation to the final procedural stage at which the merits of the case were examined and which led to the enforceable judgment. In this case, it appears that that last stage of the proceedings is the one which led to the cumulative judgment. It is true that those proceedings were concerned only with the final determination of the penalty.

117. However, since the referring court is of the view that respect for the rights of the defence was not ensured at that specific procedural stage, it seems to me superfluous to consider whether the rights of the defence were respected in the context of the last procedural stage at which the other element of the sentence in question, namely *guilt*, was determined.

118. Should the Court adopt a different approach and conclude that the original judgment is still relevant for the purposes of the review to be carried out by the executing judicial authority under Article 4a of the Framework Decision, I would refer to the position which I expressed in *Tupikas*.²⁸

119. The only difference between that case and the present case lies in the fact that, as regards the original judgment, the referring court considers that Mr Zdziaszek was properly represented on appeal but not at first instance. Since, according to the information provided, the appeal proceedings resulted in an examination of the merits of the case, the fact that the rights of the defence were respected at that stage of the proceedings remedies any shortcomings which may have arisen at earlier stages.

120. However, the fact remains that the decision on the sentence contained in the original judgment was replaced and, as I mentioned above, that the conviction of Mr Zdziaszek now rests on two separate sets of proceedings. In so far as it has been established that his rights of defence were not respected in the proceedings which led to the cumulative judgment, I am of the view, I repeat, that it is not relevant to ascertain whether they were respected in connection with the original judgment.

²⁸ Points 55 to 65 of my Opinion in *Tupikas* (C-270/16 PPU).

VI. Conclusion

121. Having regard to the foregoing considerations, I propose that the Court answer the first and second questions referred by the Rechtbank Amsterdam (District Court, Amsterdam) 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 meaning that it may apply to proceedings resulting in a judgment, such as the cumulative judgment at issue in the main proceedings, where that judgment, which has become enforceable, imposes a custodial sentence, and where, in the proceedings relating to the imposition of that sentence, the national court has a discretion.

The executing judicial authority may refuse to execute a European arrest warrant in the event that neither the information contained in the form nor the information which the executing judicial authority received from the issuing judicial authority under Article 15(2) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, or from another source allows it to verify whether the rights of defence of a person concerned who did not appear in person at his trial were respected. The decision to apply the optional ground for refusal to execute a European arrest warrant as provided for in Article 4a(1) of the Framework Decision falls to the executing judicial authority, which must be able to assess, in the light of all the factual circumstances available to it, whether the rights of defence of the person concerned have been respected.