



Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 6 November 2018¹

Case C-492/18 (PPU)

Openbaar Ministerie

v
TC

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

(Reference for a preliminary ruling — Urgent preliminary ruling procedure — Police and judicial cooperation in criminal matters — Framework Decision 2002/584/JHA — European arrest warrant — Decision on surrender — Article 17 — Rights of the requested person — Charter of Fundamental Rights of the European Union — Article 6 — Right to liberty)

I. Introduction

1. The present request for a preliminary ruling was made in the context of the execution, in the Netherlands, of a European arrest warrant ('EAW') issued by a judicial authority in the United Kingdom of Great Britain and Northern Ireland against TC for the purposes of conducting a criminal prosecution.
2. Following TC's arrest in the Netherlands, the Court received a reference for a preliminary ruling, in *RO*,² concerning the impact of the United Kingdom's notification of its intention to withdraw from the European Union, pursuant to Article 50(2) TEU, on the execution of an EAW issued by the authorities of that Member State. The referring court in the present case having stayed the proceedings before it pending the delivery of the judgment in *RO*, TC was detained for a period longer than 90 days.
3. According to a provision transposing Framework Decision 2002/584/JHA³ into Netherlands law, the detention of a person requested under an EAW should be suspended on the expiry of a period of 90 days from his arrest. The Netherlands courts, however, consider that that time limit should be suspended so that such a person can be kept in detention.
4. It is in those circumstances that the referring court asks the Court of Justice whether keeping TC in detention is in conformity with Article 6 of the Charter of Fundamental Rights of the European Union ('the Charter').

¹ Original language: French.

² Judgment of 19 September 2018 (C-327/18 PPU, EU:C:2018:733).

³ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ 2009 L 81, p. 24, 'the Framework Decision').

II. Legal framework

A. *EU law*

5. According to Article 1(3) of the Framework Decision, that decision ‘shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union’.

6. Under Article 12 of the Framework Decision, entitled ‘Keeping the person in detention’:

‘When a person is arrested on the basis of [an EAW], the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State. The person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding.’

7. According to Article 17(1),(3) to (5) and (7) of the Framework Decision:

‘1. An [EAW] shall be dealt with and executed as a matter of urgency.

...

3. In other cases, the final decision on the execution of the [EAW] should be taken within a period of 60 days after the arrest of the requested person.

4. Where in specific cases the [EAW] cannot be executed within the time limits laid down in paragraph 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days.

5. As long as the executing judicial authority has not taken a final decision on the [EAW], it shall ensure that the material conditions necessary for effective surrender of the person remain fulfilled.

...

7. Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it shall inform Eurojust, giving the reasons for the delay. In addition, a Member State which has experienced repeated delays on the part of another Member State in the execution of European arrest warrants shall inform the Council with a view to evaluating the implementation of this Framework Decision at Member State level.’

B. *Netherlands law*

8. The Framework Decision was transposed into Netherlands law by the Overleveringswet (Stb. 2004, No 195) (Law on the Surrender of Sentenced Persons; ‘OLW’). Article 22(1), (3) and (4) of the OLW provides:

‘1. The decision on surrender must be given by the Rechtbank (court) no later than 60 days following the arrest of the requested person within the meaning of Article 21.

...

3. In exceptional cases, and subject to the obligation to give reasons to the issuing judicial authority, the Rechtbank (court) may extend the 60-day time limit by a maximum of 30 days.

4. If the Rechtbank (court) has not yet given its decision within the time limit referred to in paragraph 3, it can once again extend the time limit indefinitely by temporarily suspending the deprivation of liberty of the requested person, subject to certain conditions, and notifying the issuing judicial authority.’

9. Under Article 64 of the OLW:

‘1. In cases where a decision relating to the deprivation of liberty can or must be taken pursuant to this Law, an order may be made to the effect that the deprivation of liberty be conditionally deferred or suspended until such time as the Rechtbank (court) gives a decision authorising surrender. The conditions imposed shall be aimed only at preventing absconding.

2. Article 80, with the exception of paragraph 2, and Articles 81 to 88 of the Wetboek van Strafvordering [Netherlands Code of Criminal Procedure] shall apply *mutatis mutandis* to orders made by the Rechtbank (court) or the investigating judge under paragraph 1.’

10. In accordance with the first sentence of Article 84(1) of the Code of Criminal Procedure, applicable on the basis of Article 64(2) of the OLW, the public prosecutor’s office may order the arrest of the requested person in the event of non-compliance with one of the conditions attached to the suspension of detention pending surrender, or if specific circumstances give rise to a risk that the requested person will abscond.

III. Facts and proceedings before the referring court

11. On 12 June 2017, a United Kingdom judicial authority issued an EAW for the purposes of conducting criminal proceedings against TC, a British national living in Spain who was suspected of having been involved in the importation, supply and sale of hard drugs.

12. On 4 April 2018, TC was arrested in the Netherlands. The 60-day time limit for adopting a decision on the execution of an EAW, laid down in Article 22(1) of the OLW and Article 17(3) of the Framework Decision, started to run on that date.

13. On 31 May 2018, the referring court extended the time limit for adopting a decision on the execution of an EAW by 30 days.

14. By decision of 14 June 2018, the referring court stayed the proceedings pending the delivery of the judgment in *RO*.⁴ The referring court having also authorised the suspension of the time limit for adopting a decision on the execution of the EAW, TC was kept in detention.

15. On 27 June 2018, TC’s counsel, acting on the basis of Article 22(4) of the OLW, made an application to the referring court requesting that his client be provisionally released on 4 July 2018, that is to say, after 90 days’ detention. For, under Article 22(4) of the OLW, the referring court has a duty in principle to terminate the requested person’s detention pending surrender upon expiry of the 90-day time limit for adopting a final decision on the execution of the EAW.

⁴ Judgment of 19 September 2018 (C-327/18 PPU, EU:C:2018:733).

16. The referring court, on the other hand, considers, first, that, at the time of transposing the Framework Decision, the Netherlands legislature operated on the premiss that the Framework Decision provided that the requested person should no longer be in detention pending surrender once the 90-day time limit has expired. It is clear from the judgment in *Lanigan*,⁵ however, that the Framework Decision does not lay down a general and unconditional obligation to release the requested person (provisionally) upon expiry of the 90-day time-limit, provided that the surrender procedure has been carried out in a sufficiently diligent manner and the duration of the custody is, accordingly, not excessive.⁶

17. The rechtbank Amsterdam (District Court, Amsterdam, Netherlands) goes on to say, secondly, that Article 22(4) of the OLW does not take adequate account of the obligations incumbent on the referring court under EU primary law.

18. More specifically, the referring court states that it is required: first, to refer a question to the Court of Justice for a preliminary ruling where the answer to that question is necessary to enable it to give its decision on the execution of an EAW; secondly, to await the answers to the questions raised by the judicial authorities of other Member States where the answer to a question raised by another court is necessary to enable it to take its decision; and, thirdly and finally, in accordance with the judgment in *Aranyosi and Căldăraru*,⁷ to suspend the decision on surrender if there is a real danger that the requested person will be subjected to inhuman or degrading detention conditions in the issuing Member State.

19. In this regard, the referring court also states that, according to the Court's case-law, circumstances giving rise to one of the abovementioned obligations constitute 'exceptional circumstances', within the meaning of Article 17(7) of the Framework Decision, which prevent the executing Member State from complying with the 90-day decision period.⁸

20. The referring court further says that it has identified a number of reasons which, in its view, illustrate the risk that TC will abscond after being released. In those circumstances, the referring court considers that it is not in a position to terminate the deprivation of TC's liberty while at the same time ensuring that the material conditions necessary for TC's effective surrender within the meaning of Article 17(5) of the Framework Decision remain fulfilled.

21. The referring court points out that, in order to resolve the contradiction between the obligations incumbent on it and the wording of Article 22(4) of the OLW, it has, in earlier decisions, arrived at an interpretation of that provision which it considers to be in conformity with the Framework Decision. Thus, according to that interpretation, where circumstances give rise to one of the obligations mentioned in point 18 of this Opinion, it suspends the time limit for adopting a decision on the execution of an EAW. During the suspension period, it states, it is not required to release the requested person provisionally because the 90-day time limit is not running and cannot therefore expire. That interpretation does not preclude provisional release if, in particular, the period of detention becomes excessively long. The referring court considers, however, that, in the present case, TC's detention pending surrender has not become excessively long.

⁵ Judgment of 16 July 2015 (C-237/15 PPU, EU:C:2015:474, paragraph 50).

⁶ Judgment of 16 July 2015, *Lanigan* (C-237/15 PPU, EU:C:2015:474, paragraphs 52 and 58).

⁷ Judgment of 5 April 2016 (C-404/15 and C-659/15 PPU, EU:C:2016:198).

⁸ The referring court mentions in this regard the judgments of 30 May 2013, *F* (C-168/13 PPU, EU:C:2013:358, paragraphs 64 and 65), and of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 99).

22. The referring court points out, however, that the *Gerechtshof Amsterdam* (Amsterdam Court of Appeal, Netherlands), the appeal court in the matter, has taken the converse view in its earlier decisions that Article 22(4) of the OLW cannot be interpreted in the manner proposed in the previous point. According to the referring court, the *Gerechtshof Amsterdam* (Amsterdam Court of Appeal) strikes a balance between the interest in protecting the EU legal order and the interest in preserving national law in the light of the principle of legal certainty in order to determine whether time limits for the adoption of a decision on the execution of an EAW should be suspended.

23. It is clear from the request for a preliminary ruling that, up until now, the balancing of those interests has always led to a practical outcome identical to that arrived at by following the referring court's approach. In any event, the referring court has continued to apply the interpretation established in its own case-law in its decision-making practice.

IV. The question referred to the Court for a preliminary ruling

24. It was in those circumstances that the *rechtbank Amsterdam* (District Court, Amsterdam), by decision of 27 July 2018, received on the same day at the Court's Registry, referred the following question to the Court of Justice for a preliminary ruling:

'In a case in which:

- the executing Member State has transposed Article 17 of Framework Decision [2002/584] in such a way that the detention pending surrender of the requested person must in all cases be suspended once the 90-day period for taking a final decision on the execution of the [EAW] has expired and
- the courts of that Member State have interpreted domestic law as meaning that the decision period is suspended as soon as the executing judicial authority decides to refer a question to the Court of Justice for a preliminary ruling or to await the reply to a question referred for a preliminary ruling by another executing judicial authority or to postpone the decision on surrender owing to a real danger of inhuman or degrading detention conditions in the issuing Member State,

does the maintenance of the detention pending surrender of a requested person who represents a flight risk once that detention has continued for more than 90 days after that person's arrest contravene Article 6 of the [Charter]?'

V. Procedure before the Court

25. As TC is in detention and the request for a preliminary ruling raises questions in an area covered by Title V of Part Three of the Treaty on the Functioning of the European Union (TFEU), the referring court has also asked the Court, by the same decision, to deal with this reference under the urgent preliminary ruling procedure provided for in Article 107 of its Rules of Procedure.

26. By decision of 9 August 2018, the Court decided to grant that request.

27. Written observations have been submitted by the parties to the main proceedings, the Netherlands Government and the European Commission. Those parties, as well as the Netherlands, Czech and Italian Governments, Ireland and the Commission, also presented oral argument at the hearing held on 4 October 2018.

28. In the meantime, on 19 September 2018, the Court delivered its judgment in *RO* (C-327/18 PPU), pending which, on 14 June 2018, the main proceedings had been suspended. In that judgment, the Court held in essence that the executing Member State cannot refuse to execute an EAW as long as the issuing Member State forms part of the European Union.

29. In answer to a request from the Court, the referring court stated, on 26 September 2018, that the EAW at issue had not yet been executed and that TC was still in detention. TC had therefore been in detention for more than six months on the day when the hearing was held.

VI. Analysis

30. By the question it has referred for a preliminary ruling, the national court seeks to ascertain, in essence, whether the keeping in detention of a person requested under an EAW after the expiry of the period of 90 days from his arrest constitutes a limitation of the right to liberty which fulfils the requirement as to the existence of a legal basis laid down in Article 6 and Article 52(1) of the Charter, in the case where that limitation is based on a number of different case-law interpretations of a national provision which precludes a person from being kept in detention in this way.

31. The order for reference also contains some questions which are not reflected in the question referred. These have to do with whether, in the event that the Court's answer to the question referred were that keeping the requested person in detention is contrary to the Charter, the referring court would be required to refrain from applying Article 22(4) of the OLW. In my view, those questions relate to the obligation incumbent on a national court to disapply provisions of its domestic law which are incompatible with EU law in the case where that court is not in a position to ensure their compatibility with EU law by recourse to their interpretation in case-law.

32. In this Opinion, I shall be proposing that the Court's answer to the question referred should be that, in circumstances such as those at issue, the Charter precludes a person from being kept in detention after the expiry of the period of 90 days from arrest. More specifically, I consider that the interpretations adopted in the case-law of the referring court and the *Gerechtshof Amsterdam* (Amsterdam Court of Appeal) respectively do not fulfil the requirement as to the existence of a legal basis within the meaning of Article 52(1) of the Charter.

33. In view of the answer I am proposing should be given to the question referred, as it is worded, it will also be necessary, in order to give a useful answer to the referring court, to resolve the legal issue relating to the obligation incumbent on a national court to disapply provisions of its domestic law which are incompatible with EU law. The questions raised by the referring court in this regard are based on the premiss that a national provision such as Article 22(4) of the OLW is incompatible with the system established by the Framework Decision.

34. First of all, therefore, I shall examine whether the requirement as to the existence of a legal basis is fulfilled in the case where executing judicial authorities seek to impose a limitation on the right to liberty by recourse to case-law. Secondly, I shall consider whether a national provision which lays down an unconditional obligation to release a person requested under an EAW upon the expiry of the period of 90 days from his arrest is in conformity with the Framework Decision. In the event of a negative answer to that question, I shall look, thirdly, at the issue relating to the obligation to disapply such a provision transposing the Framework Decision into national law.

A. *The requirement as to the existence of a legal basis*

35. It is true that Article 52(1) of the Charter is not explicitly mentioned in the request for a preliminary ruling. The referring court asks the Court of Justice whether the case-law interpretations described in its request are in conformity with Article 6 of the Charter and makes repeated reference in this context to the principle of legal certainty.

36. I take the view, however, that depriving a person of his liberty constitutes a limitation of the exercise of the right enshrined in Article 6 of the Charter. Such a limitation is contrary to that provision where it does not fulfil the requirements laid down in Article 52(1) of the Charter.⁹ Furthermore, the principle of legal certainty requires, particularly, that rules of law be clear, precise and predictable in their effects, in particular where they may have negative consequences on individuals.¹⁰ As I shall show in points 39 to 52 of this Opinion, the same conditions apply to the requirement as to the existence of a legal basis within the meaning of Article 52(1) of the Charter. For those reasons, that requirement might be considered to be a reflection of the principle of legal certainty in the context of a limitation of the exercise of rights and freedoms guaranteed by the Charter.

37. Those advocating an answer to the effect that the Charter precludes the interpretations adopted by Netherlands courts, that is to say, TC, the Netherlands and Italian Governments and the Commission, express doubts as to the existence in Netherlands law of a legal basis allowing a person to be kept in detention after the expiry of a period of 90 days from arrest. Ireland, on the other hand, considers that a case-law interpretation of a national provision may constitute such a legal basis, provided that it fulfils certain conditions.¹¹

38. I therefore consider that the present case calls for an answer to the question whether the requirement as to the existence of a legal basis laid down in Article 52(1) of the Charter is fulfilled in the case where case-law interpretations such as those described in the request for a preliminary ruling are present.

1. Identification of the characteristics of a 'law' within the meaning of Article 52(1) of the Charter

39. In Opinion 1/15,¹² the Court rejected the European Parliament's argument that the term 'law' used in particular in Article 52(1) of the Charter dovetails with the notion of 'legislative act' provided for in the TFEU.¹³ The Court thus held that 'it has not in any way been argued in the present procedure that [the envisaged agreement] may not meet the requirements as to accessibility and predictability required for the interferences which it entails to be regarded as being laid down by law within the meaning of Article 52(1) of the Charter'.¹⁴ Opinion 1/15¹⁵ therefore supports the inference that the conditions necessary for fulfilment of the requirement of a legal basis were not linked to the formal

⁹ In a similar vein, it seems to me that articulating the issues raised by the question referred in these terms is consistent with the reasoning followed by the Court in the judgment of 16 July 2015, *Lanigan* (C-237/15 PPU, EU:C:2015:474, paragraphs 54 and 55). The Court thus started from the principle that keeping the requested person in detention constitutes a limitation within the meaning of Article 52(1) of the Charter. The Court took the same approach in the judgment in *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 101), in which it held that, where the authority has not taken a decision on the execution of an arrest warrant upon the expiry of the 90-day period and, at that point, intends to keep the person in detention, it must respect the requirement of proportionality laid down in Article 52(1) of the Charter. As regards a limitation of the right to freedom consisting in the retention in custody of the person concerned, see judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 51).

¹⁰ See, in particular, judgment of 18 November 2008, *Förster* (C-158/07, EU:C:2008:630, paragraph 67 and the case-law cited).

¹¹ It is true that Article 52(1) of the Charter attaches other requirements to the permissibility of a limitation on the exercise of rights and freedoms recognised by the Charter. However, where the requirement as to the existence of a legal basis is not fulfilled, there is no need to verify whether those other requirements are fulfilled.

¹² Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017 (EU:C:2017:592).

¹³ Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017 (EU:C:2017:592, paragraph 37).

¹⁴ Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017 (EU:C:2017:592, paragraph 146).

¹⁵ Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017 (EU:C:2017:592).

characteristics of the source of the limitation, but rather to its substantive characteristics in relation to accessibility and predictability. It is therefore reasonable to ask whether a line of case-law exhibiting those substantive characteristics may in certain cases constitute a legal basis justifying the limitation of a right guaranteed by the Charter.

40. I should point out, however, that, in the judgment in *Knauf Gips v Commission*,¹⁶ which partially set aside a judgment of the General Court, the Court of Justice held that, in the absence of a specific legal basis, a limitation of the right to an effective remedy and access to an impartial tribunal, guaranteed by Article 47 of the Charter, is contrary to the fundamental principles of the rule of law. In that context, the Court recalled that, under Article 52(1) of the Charter, any limitation of the rights and freedoms recognised by the Charter must be provided for by law.

41. It is to be noted that, in the judgment in *Knauf Gips v Commission*,¹⁷ the General Court had based the limitation censured by the Court of Justice on the judgment in *Akzo Nobel v Commission*.¹⁸ It had therefore proceeded on the basis of case-law. I take the view, in consequence, that the Court's reference to 'absence of a specific legal basis' makes clear that, in circumstances such as those in that case, a line of case-law did not constitute an appropriate basis for justifying a limitation of a right guaranteed by the Charter.

42. It is true that the approach taken in the judgment in *Knauf Gips v Commission*¹⁹ cannot be construed as meaning generally that a line of case-law cannot ever constitute the basis for a limitation within the meaning of Article 52(1) of the Charter. That judgment does, however, bring to light certain features which are exhibited by the introduction of a limitation on fundamental rights by reference to case-law.

43. The case-law relied on in that case was interlocutory. Moreover, the judgment in *Akzo Nobel v Commission*²⁰ cited by the General Court in support of the conclusions quashed by the Court of Justice had not been reviewed by the Court of Justice, since the applicant had withdrawn the appeal directed against that judgment.²¹ It cannot therefore be inferred from the judgment in *Knauf Gips v Commission*²² that the Court has ruled out the possibility that a line of case-law which is accessible and predictable and is not an interlocutory line of case-law that has not been endorsed at a higher instance may constitute the legal basis for a limitation within the meaning of Article 52(1) of the Charter.

44. It seems to me that that interpretation is shared by some of the Advocates General who have already expressed the view in relation to this issue that a limitation of the rights guaranteed by the Charter may, in certain cases, be founded on settled case-law and followed by the lower courts.²³ The emphasis placed on the recognition of a line of case-law by lower courts would seem to indicate, however, that that case-law must emanate from higher courts or at least be confirmed by them.

16 Judgment of 1 July 2010 (C-407/08 P, EU:C:2010:389, paragraphs 91 and 92).

17 Judgment of 8 July 2008 (T-52/03, not published, EU:T:2008:253, paragraph 360).

18 Judgment of 27 September 2006 (T-330/01, EU:T:2006:269).

19 Judgment of 1 July 2010 (C-407/08 P, EU:C:2010:389, paragraphs 91 and 92).

20 Judgment of 27 September 2006 (T-330/01, EU:T:2006:269).

21 See order of the President of the Court of 8 May 2007, *Akzo Nobel v Commission* (C-509/06 P, not published, EU:C:2007:269).

22 Judgment of 1 July 2010 (C-407/08 P, EU:C:2010:389, paragraphs 91 and 92).

23 In her Opinion in Joined Cases *NS* (C-411/10 and C-493/10, EU:C:2011:610, footnote 75), Advocate General Trstenjak considered that a limitation of fundamental rights which is provided for in national law can also include customary law or judge-made law. In that regard, it seems to me that customary law or judge-made law is by definition highly stable and, to some extent, binding. It is true that, in his Opinion in *Scarlet Extended* (C-70/10, EU:C:2011:255, point 113), Advocate General Cruz Villalón stated that 'only a law in the parliamentary sense of the term would have made it possible to examine the other conditions in Article 52(1) of the Charter'. However, the same Advocate General later expressed the view, in his Opinion in *Coty Germany* (C-580/13, EU:C:2015:243, point 37), that, in certain circumstances, 'consistent decisions' which are published, and therefore accessible, and are followed by the lower courts are capable of supplementing a legislative provision and clarifying it to the point of making it predictable.

45. Similarly, the European Court of Human Rights ('ECtHR') does not appear to rule out the possibility that the limitation of a freedom guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), may derive from an accessible and predictable line of case-law where this is characterised by a degree of stability and followed by the lower courts.²⁴

46. Thus, in the light of the foregoing, I am of the view that a line of case-law is capable of fulfilling the requirement as to the existence of a legal basis, provided, first, that it is accessible and predictable (general requirements) and, secondly, that it is settled and has not been routinely called into question (specific requirements).

2. Does a limitation of the exercise of the right to liberty which consists in the detention of an individual fulfil the requirement as to the existence of a legal basis in the case where that limitation is derived from case-law?

47. The present case is unusual in that the Netherlands executing judicial authorities have developed case-law interpretations in accordance with which they seek to impose limitations on the right to liberty in a manner which is at odds with the clear wording of the law in the parliamentary sense of that term.

48. After all, so far as concerns a limitation of the right to liberty consisting in the detention of an individual, the ECtHR considers that the requirement laid down in Article 5 ECHR, to the effect that deprivation of liberty must take place 'in accordance with a procedure prescribed by law', is to be understood as meaning that the legal basis for a limitation must be sufficiently accessible, precise and predictable in order to afford the individual adequate protection against arbitrariness.²⁵

49. On the basis of the same criteria, the Court, in the judgment in *Al Chodor*,²⁶ held that detention must be declared unlawful where the objective criteria indicating the presence of a risk that the person concerned will abscond, which is the ground for detention, are derived from settled case-law confirming a consistent administrative practice on the part of the police authorities and are not laid down in a binding provision of general application.²⁷ On the other hand, the adoption of rules of general application provides the necessary guarantees in so far as such wording sets out the limits of the flexibility of those authorities in the assessment of the circumstances of each specific case in a manner that is binding and known in advance. Furthermore, criteria established by a binding provision are best placed for the external direction of the discretion of those authorities for the purposes of protecting applicants against arbitrary deprivations of liberty.²⁸

50. It is true that the Court also said, again in the judgment in *Al Chodor*,²⁹ that the limitation of the exercise of the right to liberty was based, in that case, on a provision of EU law which referred in turn to national law for the definition of the objective criteria indicating the presence of a risk of absconding. The Court held that such provisions of EU law require the Member States to establish such objective criteria in a binding provision of general application.³⁰

24 See ECtHR, 26 April 1979, *Sunday Times v. United Kingdom*, (CE:ECHR:1979:0426JUD000653874, §§ 47 to 52). See, also, ECtHR, 25 May 1998, *Müller and Others v. Switzerland*, (CE:ECHR:1988:0524JUD001073784, § 29). According to the ECtHR, decisions 'which [are] accessible because they ha[ve] been published[,] ... [are] followed by the lower courts' and clarify the scope of a national provision introducing a limitation on the right to freedom of expression may fulfil the requirement as to the existence of a legal basis.

25 See ECtHR, 24 April 2008, *Ismoilov and Others v. Russia*, (CE:ECHR:2008:0424JUD000294706, § 137), and ECtHR, 19 May 2016, *J.N. v. United Kingdom* (CE:ECHR:2016:0519JUD003728912, § 77).

26 Judgment of 15 March 2017 (C-528/15, EU:C:2017:213, paragraph 40).

27 Judgment of 15 March 2017, *Al Chodor* (C-528/15, EU:C:2017:213, paragraph 45).

28 Judgment of 15 March 2017, *Al Chodor* (C-528/15, EU:C:2017:213, paragraph 44).

29 Judgment of 15 March 2017 (C-528/15, EU:C:2017:213, paragraph 41).

30 Judgment of 15 March 2017, *Al Chodor* (C-528/15, EU:C:2017:213, paragraph 45).

51. However, the fact that the Court drew largely on the case-law of the ECtHR leads me to the conclusion that, irrespective of the regulatory context and the EU legislative acts applicable to the case in question, all of the requirements relating to the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness should (always) be satisfied where an individual is to be deprived of his liberty. After all, any form of deprivation of liberty constitutes a serious infringement of the right to liberty and must therefore meet strict requirements.

52. It follows from the foregoing considerations that cases involving a limitation of the right to liberty guaranteed in Article 6 of the Charter which consists in the detention of an individual are subject to particularly strict requirements. It is important in particular to avoid any risk of arbitrariness that might arise in the absence of a clear, precise and predictable legal basis.

53. The referring court must therefore be provided with a useful answer to the question as to whether case-law interpretations such as those at issue fulfil the above requirements.

3. Application to the present case

54. It should be recalled that the referring court states that, since its case-law and that of the Gerechtshof Amsterdam (Amsterdam Court of Appeal) are published, TC could foresee — if necessary, after consulting his counsel — that his detention pending surrender might be extended beyond the period of 90 days from his arrest. It says that those case-law interpretations are clear and confined to well-defined situations. The referring court further asserts that, although the interpretation it has adopted in its case-law is based on a line of reasoning different from that followed by the Gerechtshof Amsterdam (Amsterdam Court of Appeal), the application of the latter reasoning does not lead in practice — or, in any event, has not led in practice — to outcomes different from those arrived at from the application of its own reasoning.

55. It should be noted that those two case-law interpretations deviate from the letter of a national provision adopted in implementation of the Framework Decision. However, the referring court is not asking the Court to tell it whether it has exceeded the limits of compliant interpretation. It is not for the Court in any event to interpret the domestic law of a Member State or to determine whether an interpretation by national authorities leads to an interpretation *contra legem*.³¹

56. Moreover, it is clear from the order for reference that the interpretation adopted by the referring court in its case-law has been routinely overturned by the Gerechtshof Amsterdam (Amsterdam Court of Appeal). The referring court nonetheless appears to be continuing to use the interpretation set out in its own case-law in its decision-making practice. Those two case-law interpretations are thus being routinely called into question.

57. To my mind, the fact that the application of those case-law interpretations has not so far led to different outcomes is not such as to make good the lack of consistency between them.

58. I am not ruling out the possibility that, given the overlap between a number of such case-law interpretations, an individual may be able to arrive at a broad understanding of how those interpretations might affect his legal position, irrespective of the interpretation ultimately applied.

59. In the first place, however, any inconsistency in a line of case-law imposing limitations on the fundamental rights of individuals would considerably reduce its clarity, precision and predictability. Such inconsistency might also contribute towards the emergence of more substantial differences between the case-law interpretations at issue.

³¹ See, to that effect, judgment of 13 July 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraph 70).

60. It is to be noted in this regard that, according to TC, the two interpretations adopted by the Netherlands courts in their respective lines of case-law are inconsistent in relation to the point from which the time limits for adopting a decision on the execution of an EAW are suspended.

61. Moreover, the Netherlands Government states in its written observations that the referring court usually suspends the time limits in question in accordance with Article 17 of the Framework Decision, in cases other than those referred to in the request for a preliminary ruling. Irrespective of the fact that the Netherlands Government, in answer to the question put to it at the hearing, did not provide any examples to support that assertion, it submitted that, the interpretations applied by the Netherlands courts being matters of case-law, it is not inconceivable that they are applied inconsistently in cases other than those referred to in the order for reference.

62. Secondly, inconsistencies in the case-law on the basis of which an individual's rights might be subjected to limitations would lead to a situation in which that individual would be unable to arrive at an unambiguous knowledge and understanding of how the limitation which has been imposed on him will work. For an individual, that mechanism plays a key role in guaranteeing the legitimacy of the limitation of his fundamental rights and in enabling him to contest that limitation before the competent authorities. Thus, in circumstances such as those in the present case, an individual criticising the interpretation recognised by the court of first instance in its case-law will know in advance that the court of second instance, despite sharing his criticism, will nonetheless endorse the initial decision by recourse to the interpretation established in its own case-law.

63. In the light of those considerations, I take the view that a limitation of a right guaranteed by the Charter that is introduced by virtue of two case-law interpretations which are based on different lines of reasoning and are routinely called into question does not fulfil the requirement as to the existence of a legal basis within the meaning of Article 52(1) of the Charter. Since at least one of the requirements referred to in point 46 of this Opinion is not fulfilled, there is no need to ascertain whether, in order to ensure the compatibility of national law with EU law, a limitation of a right guaranteed by the Charter may be introduced on the basis of case-law, contrary to the clear wording of the provisions of the law in the parliamentary sense of that term.

64. Such case-law interpretations certainly do not fulfil the requirements applicable to a limitation of the right guaranteed in Article 6 of the Charter that consists in keeping an individual in detention, since those requirements, as I explained in point 52 of this Opinion, are particularly strict.

65. It follows from the foregoing that, in circumstances such as those at issue, a limitation of the right to liberty which consists in keeping an individual in detention after the expiry of the period of 90 days from his arrest has no legal basis in national law. In the present case, Article 22(4) of the OLV obliges the executing judicial authority to terminate the detention of a person requested under an EAW. We must therefore examine whether that obligation is in conformity with the Framework Decision.

B. The unconditional obligation to release a person requested under an EAW

66. TC and the Netherlands Government submit that Article 22(4) of the OLV is the result of a conscious choice by the national legislature. I understand that argument to mean that, in the view of those parties, a Member State may, when transposing the Framework Decision, introduce a provision obliging the executing judicial authorities to release a person requested under an EAW as soon as the time limits laid down in Article 17 of the Framework Decision have lapsed.

67. I do not share that view.

68. First, the Framework Decision does not exhaustively regulate all aspects of the procedure for adopting decisions on the execution of an EAW. Thus, the Member States may introduce their own arrangements to supplement the system established by the Framework Decision. If the Framework Decision is to achieve its objective, however, certain limits must be imposed on the discretion enjoyed by the Member States in this respect.³²

69. After all, as the judgment in *Lanigan*³³ makes clear, a general and unconditional obligation to release a person requested under an EAW in the case where the total duration of the period that person has spent in custody exceeds the time limits laid down in Article 17 of the Framework Decision could limit the effectiveness of the surrender system put in place by the Framework Decision and, consequently, obstruct the attainment of the objectives pursued by it.

70. It is true that the second sentence of Article 12 of the Framework Decision refers to the law of the executing Member State in order to specify that provisional release is possible at any time in conformity with domestic law. As is clear from the wording of that provision, however, provisional release in conformity with domestic law is subject to the condition that the competent authority of that Member State takes all the measures it deems necessary to prevent the requested person absconding. On the other hand, where non-custodial measures do not provide a guarantee that surrender will be possible, the obligation to terminate the detention would have the effect of preventing the executing judicial authority from complying with the obligation laid down in Article 17(5) of the Framework Decision. According to that provision, a judicial authority is required to ensure that the material conditions necessary for effective surrender of the person remain fulfilled.

71. Secondly, it is reasonable to ask whether Article 22(4) of the OLW does indeed express the intention of the Netherlands legislature to apply a higher standard of protection for fundamental rights than that which derives from the provisions of the Framework Agreement.

72. To my mind, however, a national provision obliging an executing judicial authority to terminate the detention of a requested person upon the expiry of the 90-day time limit notwithstanding the existence of an exceptional circumstance within the meaning of Article 17(7) of the Framework Decision would call into question the uniformity of the standard of protection for fundamental rights defined by the Framework Decision and undermine its effectiveness, for the reasons given in the preceding points of this Opinion. This, in my view, was the line of reasoning which the Court followed in the judgment in *Melloni*.³⁴

73. Thirdly, as the Czech Government maintains, a general and unconditional obligation to release persons requested under an EAW as soon as the period of 90 days from arrest has elapsed would encourage such persons to use delaying tactics to obstruct the execution of an EAW.

74. Fourthly, it should be observed that the strict application of a provision transposing the Framework Decision, such as Article 22(4) of the OLW, might discourage national courts from referring questions for a preliminary ruling in the case where the release of a person requested under an EAW upon the expiry of the 90-day time limit might prompt that person to abscond. It is important to note in this context that the Court has already held that a national rule the effect of which may be that a national

³² See judgment of 30 May 2013, *F* (C-168/13 PPU, EU:C:2013:358, paragraphs 52, 56 and 58). As regards the discretion enjoyed by the Member States when transposing the Framework Decision, see Peers, S., *EU Justice and Home Affairs Law (Volume II: EU Criminal Law, Policing, and Civil Law)*, 4th edition, OUP, Oxford, 2016, pp. 91, 92 and 95.

³³ Judgment of 16 July 2015 (C-237/15 PPU, EU:C:2015:474, paragraph 50).

³⁴ Judgment of 26 February 2013 (C-399/11, EU:C:2013:107, paragraphs 56 to 63). For the record, the Court held in that judgment that allowing a Member State to use Article 53 of the Charter in order to make the surrender of a person convicted *in absentia* subject to a condition not provided for in EU legislation, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision.

court will choose to refrain from referring questions for a preliminary ruling to the Court is detrimental to the prerogatives granted to national courts and tribunals under Article 267 TFEU and, consequently, to the effectiveness of the cooperation between the Court and the national courts and tribunals established by the preliminary ruling mechanism.³⁵

75. For those reasons, I take the view that, at least in cases where non-custodial measures cannot guarantee that surrender remains possible, the Framework Decision precludes an unconditional obligation to release a person requested under an EAW where the total duration of the period that person has spent in custody exceeds the time limits laid down in Article 17 of the Framework Decision. We must now examine the referring court's questions concerning the existence of an obligation to disapply provisions of national law which are incompatible with EU law.

C. The obligation of a national court to disapply provisions of its national law which are incompatible with EU law

76. As a preliminary point, it is to be noted that, apart from raising questions of a subsidiary and general nature, the referring court did not address in detail the issue relating to the obligation to disapply provisions of national law which are incompatible with EU law. Neither was that issue explored by the parties to the proceedings in their observations.

77. For those reasons, I shall confine my analysis to the factors that must be considered in order to be able to provide a useful answer to the referring court.

78. In the judgment in *Popławski*,³⁶ the Court held that provisions of the Framework Decision do not have direct effect. Moreover, the Court placed the emphasis in that judgment on the obligation of the authorities to interpret national law in conformity with EU law.³⁷

79. What the Court did *not* answer in the judgment in *Popławski*,³⁸ however, was the question whether an executing judicial authority is obliged to disapply a national provision adopted in implementation of the Framework Decision in the case where that provision is not compatible with the Framework Decision and an interpretation of it in conformity [with EU law] would lead to a *contra legem* interpretation of national law. The national court which referred for a preliminary ruling the question that gave rise to that judgment submitted a second request for a preliminary ruling by which it asked the Court once again about the existence of such an obligation.³⁹

80. I take the view that, in circumstances such as those at issue, the question as to whether an executing judicial authority is obliged to disapply a national provision which is incompatible with the Framework Decision must be answered in the negative.

³⁵ Judgment of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514, paragraph 25).

³⁶ Judgment of 29 June 2017 (C-579/15, EU:C:2017:503, paragraph 26).

³⁷ Judgment of 29 June 2017, *Popławski* (C-579/15, EU:C:2017:503, paragraph 31).

³⁸ Judgment of 29 June 2017 (C-579/15, EU:C:2017:503).

³⁹ The first question referred for a preliminary ruling in *Popławski* (C-573/17, currently pending before the Court of Justice) is worded as follows: 'If the executing judicial authority cannot interpret the national provisions implementing a framework decision in such a way that their application leads to an outcome in conformity with the framework decision, must it then, in accordance with the principle of primacy, disapply those national provisions not in conformity with that framework decision?'

81. First, it is true that, so far as concerns the obligation to disapply a national provision which is incompatible with EU law, the legal literature draws a distinction between the substitutionary effect and the exclusionary effect of EU legislation. The concept of exclusionary effect is based on the idea that, notwithstanding the direct effect of an EU act, national authorities can disapply a national provision which is not compatible with that act.⁴⁰

82. However, irrespective of the ambiguous distinction between those two effects, it should be noted that the main proceedings are not between two individuals but between a public prosecutor's office and an individual, and, as such, are concerned only with the issue of the application of EU law in vertical relationships. Consequently, in order to disapply a national provision such as Article 22(4) of the OLW, which makes it impossible for a person requested under an EAW to be kept in detention after the expiry of the period of 90 days from his arrest, the Member State concerned would have to rely, as against that person, on a framework decision which has been incorrectly transposed into national law by that Member State. However, to use the Framework Decision in this way would be to give it inverse direct effect, which the Court has already repeatedly censured.⁴¹

83. Secondly, disapplying Article 22(4) of the OLW would have the consequence not only of adversely affecting the rights of a third party, as a result of the application of the Framework Decision in a dispute between two State entities, but also of seriously interfering with TC's right to liberty in proceedings between him and an emanation of the State.⁴²

84. Moreover, unlike in the case of the question referred for a preliminary ruling in *Popławski* (C-579/17, currently pending before the Court of Justice), in this case, the referring court considers itself able to interpret a national provision adopted in implementation of the Framework Decision in a way which respects the prohibition on *contra legem* interpretations and ensures that the application of that provision gives rise to an outcome which is in conformity with that Framework Decision. Nonetheless, by its interpretation, the referring court seeks in essence to limit the right to liberty of a person requested under an EAW. In so doing, that court is confronted by the principle of legal certainty as reflected in Article 52(1) of the Charter in the requirement as to the existence of a legal basis. Similarly, whatever legal basis it chooses for doing so, the national court cannot disapply Article 22(4) of the OLW without taking into account the principle of legal certainty.

85. In the light of the foregoing, I take the view that, in circumstances such as those at issue in the present case, an executing judicial authority cannot rely on the provisions of the Framework Decision in order to disapply a national provision adopted in implementation of the Framework Decision, such as Article 22(4) of the OLW, to the detriment of a person requested under an EAW.

40 On the distinction between substitutionary effect and exclusionary effect, see Dougan, M., 'When worlds collide! Competing visions of the relationship between direct effect and supremacy', *Common Market Law Review*, 2007, Vol. 44, No 4, pp. 931 to 963; Figueroa Regueiro, P.V., 'Invocability of Substitution and Invocability of Exclusion: Bringing Legal Realism to the Current Developments of the Case-Law of "Horizontal" Direct Effect of Directives', *Jean Monnet Working Paper*, 2002, No 7, pp. 28 to 34.

41 See, in the case of directives, judgments of 5 April 1979, *Ratti* (148/78, EU:C:1979:110, paragraph 22,) and of 8 October 1987, *Kolpinghuis Nijmegen* (80/86, EU:C:1987:431, paragraph 10).

42 See, by converse inference, judgment of 21 March 2013, *Salzburger Flughafen* (C-244/12, EU:C:2013:203, paragraphs 46 and 47). On the interpretations in legal literature of the reference made by the Court to the judgment of 7 January 2004, *Wells* (C-201/02, EU:C:2004:12, paragraph 57), see Squintani, L., Vedder, H.H.B., 'Towards Inverse Direct Effect? A Silent Development of a Core European Law Doctrine', *Review of European Comparative & International Environmental Law*, Vol. 23(1), 2014, pp. 147 to 149.

VII. Conclusion

86. In the light of the foregoing considerations, I propose that the Court's answer to the question referred by the rechtbank Amsterdam (District Court, Amsterdam, Netherlands) for a preliminary ruling should be as follows:

Article 6 and Article 52(1) of the Charter of Fundamental Rights of the European Union preclude the introduction by recourse to case-law of a limitation on the right to liberty which consists in keeping a person requested under a European arrest warrant (EAW) in detention after the expiry of the period of 90 days from his arrest, in the case where that limitation is based on different case-law interpretations of a national provision, such as Article 22(4) of the Overleveringswet (Law on the Surrender of Sentenced Persons), which obliges an executing judicial authority to release such a person upon the expiry of that time limit.