



Reports of Cases

OPINION OF ADVOCATE GENERAL

RICHARD DE LA TOUR

delivered on 14 July 2022¹

Case C-158/21

**Ministerio Fiscal,
Abogacía del Estado,
Partido político VOX**

v

**Lluís Puig Gordi,
Carles Puigdemont Casamajó,
Antoni Comín Oliveres,
Clara Ponsatí Obiols,
Meritxell Serret Aleu,
Marta Rovira Vergés,
Anna Gabriel Sabaté**

(Request for a preliminary ruling
from the Tribunal Supremo (Supreme Court, Spain))

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – European arrest warrant – Framework Decision 2002/584/JHA – Article 1(3) – Article 6(1) – Surrender procedures between Member States – Conditions for execution – Competence of the issuing judicial authority to issue a European arrest warrant – Charter of Fundamental Rights of the European Union – Second paragraph of Article 47 – Fundamental right to a fair trial before a tribunal previously established by law – Two-step examination – Obligation of the executing judicial authority to determine, during the first step, whether there is a real risk of infringement of this fundamental right, on account of systemic or generalised deficiencies in the functioning of the judicial system of the issuing Member State – Whether a new European arrest warrant concerning the same person and to be executed in the same Member State may be issued)

¹ Original language: French.

I. Introduction

1. This request for a preliminary ruling concerns the interpretation of a number of provisions of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States,² as amended by Council Framework Decision 2009/299/JHA of 26 February 2009.³

2. The referring court asks the Court of Justice a series of questions designed, essentially, to establish whether an executing judicial authority may refuse to execute a European arrest warrant on grounds of the alleged lack of competence of the issuing judicial authority to issue such a warrant and the alleged lack of jurisdiction of the court called upon to try the person charged, and whether Framework Decision 2002/584 precludes the issue of a new European arrest warrant after the execution of a first European arrest warrant has been refused.

3. Those questions have arisen in connection with the prosecution of former Catalan leaders following a referendum, held on 1 October 2017, concerning self-determination for the Autonomous Community of Catalonia (Spain). European arrest warrants have been issued for a number of those defendants who left Spain at the end of 2017. Those warrants have not been executed, either because a number of the defendants in question were elected to the European Parliament or because of controversy surrounding the criminal proceedings in question. In so far as concerns the case under consideration, that controversy concerns the rules establishing the jurisdiction of the Tribunal Supremo (Supreme Court, Spain) to try the defendants, those rules applying, *inter alia*, on the basis of the place where the offences were committed and on the connection between the offences with which the defendants are charged.

4. More specifically, this request for a preliminary ruling has arisen from the refusal of the Belgian courts to give effect to the European arrest warrant issued against Mr Lluís Puig Gordi. The appellate court which gave a final ruling in the matter based its refusal on the existence of a risk of infringement of the right to be tried by a tribunal established by law, in that it found there to be no express legal basis conferring jurisdiction on the Tribunal Supremo (Supreme Court) to try Mr Puig Gordi. It also held that the likelihood of the presumption of innocence being breached was also to be taken very seriously. Although that refusal directly concerns Mr Puig Gordi alone, the referring court's request is presented as a means of determining what decisions should be taken with regard to all of the defendants.

5. The issues submitted to the Court of Justice require it, as is often the case, to strike a fair balance between the efficacy of the system for surrender between Member States established by Framework Decision 2002/584 and observance of the fundamental rights of individuals for whom European arrest warrants are issued.

6. In its judgment of 5 April 2016, *Aranyosi and Căldăraru*,⁴ the Court defined the procedure to be followed by the executing judicial authority where a person who is the subject of a European arrest warrant alleges before that authority a risk of inhuman or degrading treatment, as prohibited by Article 4 of the Charter of Fundamental Rights of the European Union,⁵ on account of the conditions of detention in the issuing Member State. In essence, the executing judicial authority must complete a two-step review. First, it must determine whether there is a

² OJ 2002 L 190, p. 1.

³ OJ 2009 L 81, p. 24, 'Framework Decision 2002/584'.

⁴ C-404/15 and C-659/15 PPU, EU:C:2016:198, 'the judgment in *Aranyosi and Căldăraru*'.

⁵ 'The Charter'.

real risk of infringement of the fundamental right in question owing to deficiencies, which may be systemic or generalised or which may affect certain groups of people or certain places of detention in the issuing Member State. Secondly, it must determine whether there is a specific and individual risk of infringement of that right for the individual concerned.

7. In its judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*,⁶ the Court extended that two-step examination process to the situation where there is a risk of infringement of the fundamental right to a fair trial, guaranteed by the second paragraph of Article 47 of the Charter. It confirmed that case-law in its judgment of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)*,⁷ and then in its judgment of 22 February 2022, *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*.⁸

8. In the cases which gave rise to those judgments, it was alleged, in so far as the first step is concerned, that there were systemic or generalised deficiencies in the independence of the issuing Member State's judiciary.

9. The main issue in the present case is whether, in the situation where no such deficiencies in the functioning of the judicial system of the issuing Member State are alleged, the executing judicial authority may nevertheless refuse to execute a European arrest warrant on the ground of a risk of infringement of the fundamental right to a fair trial before a tribunal previously established by law, guaranteed by the second paragraph of Article 47 of the Charter, in that Member State.

10. In the case of this fundamental right, are the two steps of the review which the executing judicial authority must carry out cumulative? In other words, if, in the first step, no systemic or generalised deficiencies affecting the functioning of the judicial system of the issuing Member State are found, is that authority authorised to refuse to execute the European arrest warrant in question?

11. The Court has repeatedly held that the principle of mutual recognition constitutes, according to recital 6 of Framework Decision 2002/584, the 'cornerstone' of judicial cooperation in criminal matters, and is expressed in Article 1(2) thereof, which lays down the rule that Member States are required to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of that framework decision.⁹

12. It is important, in my view, to ensure that this 'cornerstone', which constitutes the bedrock of judicial cooperation in criminal matters, does not, as a result of too many exceptions to the principle of mutual recognition being accepted in the name of observance of fundamental rights, begin to crack, and that the edifice patiently constructed does not sway, or collapse, for want of solid foundations.

13. Care must also be taken not to jeopardise the attainment of the objective of Framework Decision 2002/584 and the mutual trust between the Member States on which the European arrest warrant mechanism established by that framework decision rests.

⁶ C-216/18 PPU, EU:C:2018:586, 'the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*'.

⁷ C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, 'the judgment in *Openbaar Ministerie (Independence of the issuing judicial authority)*'.

⁸ C-562/21 PPU and C-563/21 PPU, EU:C:2022:100, 'the judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*'.

⁹ See, inter alia, the judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraph 43 and the case-law cited.

14. That is why I shall suggest that the Court must continue to hold that any refusal of surrender that is justified by an alleged risk of infringement of the fundamental right of the person who is the subject of a European arrest warrant to a fair trial before a tribunal previously established by law, guaranteed by the second paragraph of Article 47 of the Charter, must be truly exceptional. Unless it can show that there are systemic or generalised deficiencies in the functioning of the judicial system of the issuing Member State, the executing judicial authority cannot be justified in refusing to execute a European arrest warrant on the basis of a mere allegation of an individual risk of infringement of that fundamental right.

II. The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling

15. Following the adoption of laws relating to the independence of the Autonomous Community of Catalonia (Spain) and to the holding of a referendum to that end, criminal proceedings were initiated before the Tribunal Supremo (Supreme Court) against a number of individuals, who are charged inter alia with the offences of sedition and misappropriation of public funds.

16. It is apparent from the request for a preliminary ruling that, in the context of those proceedings, the Tribunal Supremo (Supreme Court) issued a European arrest warrant against Mr Carles Puigdemont Casamajó on 14 October 2019 and, on 4 November 2019, issued further European arrest warrants against Mr Antoni Comín Oliveres, Mr Puig Gordi and Ms Clara Ponsatí Obiols. Ms Ponsatí Obiols was arrested in the United Kingdom and the three other defendants were arrested in Belgium, in which Member State procedures for the execution of the European arrest warrants have consequently been commenced. None of the individuals sought has consented to their surrender.

17. As a result of their election as Members of the European Parliament, the procedures concerning Mr Puigdemont Casamajó and Mr Comín Oliveres in Belgium were suspended, on account of the parliamentary immunity which they enjoy as Members.¹⁰ However, the procedure for the execution of the European arrest warrant issued against Mr Puig Gordi went ahead. It is therefore on that procedure that the present case is centred.

18. By order of 7 August 2020, the 27th Chamber (Chamber for Deliberations in Criminal Proceedings) of the Nederlandstalige rechtbank van eerste aanleg Brussel (Brussels Court of First Instance (Dutch-speaking), Belgium)¹¹ refused to execute the European arrest warrant issued against Mr Puig Gordi.

19. The referring court explains that the Brussels Court of First Instance took the view that Framework Decision 2002/584 allowed it to assess whether the issuing judicial authority had competence to issue the European arrest warrant. It relied in particular, in this connection, on

¹⁰ See, in that regard, the order of the Vice-President of the Court of 24 May 2022, *Puigdemont i Casamajó and Others v Parliament* (C-629/21 P(R), EU:C:2022:413), setting aside the order of the Vice-President of the General Court of the European Union of 30 July 2021, *Puigdemont i Casamajó and Others v Parliament* (T-272/21 R, not published, EU:T:2021:497), and suspending the operation of Decisions P9_TA(2021)0059, P9_TA(2021)0060 and P9_TA(2021)0061 of the European Parliament of 9 March 2021 on the requests for waiver of the immunity of Mr Puigdemont i Casamajó, Mr Comín i Oliveres and Ms Ponsatí i Obiols.

¹¹ ‘The Brussels Court of First Instance’.

the Court of Justice’s case-law concerning the classification of the public prosecution services of a number of Member States as ‘judicial authorities’,¹² recitals 8 and 12 of Framework Decision 2002/584 and the case-law of the European Court of Human Rights (‘the ECtHR’).¹³

20. The Brussels Court of First Instance then examined that issue of competence and concluded that the Tribunal Supremo (Supreme Court) did not have jurisdiction to try the case against Mr Puig Gordi and therefore did not have competence to issue the European arrest warrant against him. That view was based on the opinions of the Working Group on Arbitrary Detention of the Human Rights Council of the United Nations General Assembly¹⁴ concerning individuals involved in the same acts, on the case-law of the ECtHR¹⁵ and on other provisions of Spanish and Belgian law.

21. The appeal brought by the Belgian Public Prosecutor was dismissed by judgment of 7 January 2021 of the Indictment Division of the Cour d’appel de Bruxelles (Court of Appeal, Brussels, Belgium),¹⁶ which consequently upheld the contested order and confirmed the refusal to execute the European arrest warrant issued against Mr Puig Gordi. In reaching its conclusion that the jurisdiction of the issuing judicial authority did not appear to be founded on any express provision of law, the Brussels Court of Appeal relied on a report of the Working Group on Arbitrary Detention of 27 May 2019, the case-law of the ECtHR and a document explaining the jurisdiction of the Tribunal Supremo (Supreme Court) which the latter had provided on 11 March 2021.

22. In that context, the referring court states that it must adopt a decision on whether to maintain or withdraw the existing European arrest warrants and on whether new European arrest warrants may be issued against all the co-defendants in this case or any of them.

23. As regards Mr Puig Gordi specifically, the referring court states that the present request for a preliminary ruling will enable it to ascertain whether the surrender request can be repeated, by issuing a new European arrest warrant against Mr Puig Gordi, when his surrender was refused by the judicial authority of the same executing Member State on grounds for refusal which could be contrary to Framework Decision 2002/584.

24. The referring court is in doubt as to whether the judicial authority responsible for executing a European arrest warrant has power, first, to assess the jurisdiction of the issuing judicial authority, under the national law of the issuing Member State, to try the defendants and, secondly, to refuse to execute a warrant on the ground of an alleged infringement of a defendant’s fundamental rights arising from an error of jurisdiction. The referring court sets out several arguments in this regard.

¹² The Brussels Court of First Instance cited, in that regard, judgments of 12 December 2019, *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyons and Tours)* (C-566/19 PPU and C-626/19 PPU, EU:C:2019:1077); of 12 December 2019, *Openbaar Ministerie (Swedish Public Prosecutor’s Office)* (C-625/19 PPU, EU:C:2019:1078); and of 12 December 2019, *Openbaar Ministerie (Public Prosecutor’s Office, Brussels)* (C-627/19 PPU, EU:C:2019:1079).

¹³ The Brussels Court of First Instance cited, in that regard, the judgment of the ECtHR of 2 June 2005, *Claes and Others v. Belgium* (CE:ECHR:2005:0602JUD004682599).

¹⁴ ‘The Working Group on Arbitrary Detention’.

¹⁵ The Brussels Court of First Instance relied on the judgment of the ECtHR of 22 June 2000, *Coëme and Others v. Belgium* (CE:ECHR:2000:0622JUD003249296), and of 2 June 2005, *Claes and Others v. Belgium* (CE:ECHR:2005:0602JUD004682599).

¹⁶ ‘The Brussels Court of Appeal’.

25. In the first place, as to the question of whether the executing judicial authority may check whether the issuing judicial authority does have the necessary jurisdiction to hear the substance of the case, which is a prerequisite of competence to issue a European arrest warrant, the referring court considers that such a power must derive either from a formal rule of EU law or from an interpretation of EU law that indicates that it does.

26. The referring court observes, in particular, that no such power can be based on the wording of Articles 3, 4 or 4a of Framework Decision 2002/584, which relate to the mandatory and optional grounds for a refusal to execute a European arrest warrant, nor can it be inferred from a broad interpretation of the framework decision or of Article 6(1) thereof, given that the principle established in Article 1(2) of the framework decision is that European arrest warrants must be executed, while refusal to do so is the exception, and thus subject to strict interpretation.

27. In the second place, in the event that the Court of Justice should hold that that the executing judicial authority does have power to review the jurisdiction of the issuing judicial authority, the referring court wonders what matters must be taken into account by the executing judicial authority in that review.

28. As regards that point, the referring court considers that the jurisdiction of the judicial authority issuing a European arrest warrant can only be determined in accordance with the national law of the issuing Member State. Yet, to accept that the executing judicial authority may interpret the national law of the issuing Member State would give rise to an incoherent and untenable situation, since the executing judicial authority would be required to interpret and apply a law with which it had no connection and of which it is not required to have any knowledge.

29. In the present case, the referring court considers that both of the Belgian courts have interpreted Spanish law incorrectly, and that they have also ignored the numerous decisions in which it has settled the issue of its jurisdiction, as well as the fact that the debate has already been brought before the Tribunal Constitucional (Constitutional Court, Spain), which confirmed the referring court's jurisdiction *inter alia* in a judgment of 17 February 2021.¹⁷ The referring court considers that the Belgian courts have thus failed to take account of the interpretation adopted by the Spanish courts and of the fact that the persons sought have had the benefit of first- and second-level judicial review of the European arrest warrants issued.

30. In the third place, in so far as concerns the significance of the mechanism for requesting supplementary information provided for in Article 15(2) of Framework Decision 2002/584, the referring court considers that the executing judicial authority has not made sufficient use of that mechanism. It should have requested supplementary information from the issuing judicial authority, which could have provided material drawn from its national law, in particular the numerous existing decisions ruling on the question of the jurisdiction of the issuing judicial authority to hear the substance of the case.

31. In the fourth place, the referring court notes that, in refusing the European arrest warrant at issue, the Brussels Court of Appeal relied on Article 4(5)(5) of the Loi du 19 décembre 2003 relative au mandat d'arrêt européen (Law of 19 December 2003 on the European arrest warrant),¹⁸ which provides that the execution of a European arrest warrant must be refused

¹⁷ See the judgment of the Tribunal Constitucional (Constitutional Court) of 17 February 2021 (No 34/2021, BOE No 69 of 22 March 2021, p. 32889). The referring court states that that judgment was given on an appeal brought by one of the defendants, who claimed to be in the same situation as Mr Puig Gordi.

¹⁸ *Moniteur belge* of 19 December 2003, p. 60075.

where there are valid grounds for believing that it would result in the infringement of the fundamental rights of the person concerned. That ground for non-execution, however, is not among those expressly mentioned in Framework Decision 2002/584.

32. The referring court also considers that a refusal to execute based on Article 1(3) of that framework decision is permissible, according to the case-law of the Court of Justice, only in exceptional circumstances, characterised thus far, in so far as concerns the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, by the existence of systemic or generalised deficiencies in the independence of the judiciary of the issuing Member State.

33. Furthermore, in that it relied in its assessment on the report of the Working Group on Arbitrary Detention of 27 May 2019, the Brussels Court of Appeal failed to satisfy the requirement that the executing judicial authority must be in possession of objective, reliable, specific and duly updated information or material in order to find that there is a serious, real, specific and individual risk of infringement of the fundamental rights of the person sought.

34. It was in that context that the Tribunal Supremo (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does [Framework Decision 2002/584] enable the executing judicial authority to refuse [to surrender] the person sought via [a European arrest warrant], based on grounds for refusal which are laid down in its national law but which are not provided for as such in [that] framework decision?

(2) If the answer to the previous question is affirmative, and for the purpose of ensuring the viability of [a European arrest warrant] and relying properly on the source of assistance provided for in Article 15(3) of [Framework Decision 2002/584]:

Must the issuing judicial authority investigate and examine the different laws of Member States in order to take into consideration any potential grounds for refusal of [a European arrest warrant] not provided for in [Framework Decision 2002/584]?

(3) In the light of the answers to the previous questions, [and] taking account of the fact that, pursuant to Article 6(1) of [Framework Decision 2002/584], the competence of the issuing judicial authority to issue [a European arrest warrant] is established pursuant to the law of the issuing State:

Must [Article 6(1)] be interpreted as meaning that the executing judicial authority is entitled to call into question the issuing judicial authority’s jurisdiction to try the criminal case in point and to refuse surrender on the grounds that that judicial authority is not competent to issue the [European arrest warrant]?

(4) As regards [the question] whether the executing judicial authority [may review the observance of] the fundamental rights of the person sought in the issuing State:

(a) Does [Framework Decision 2002/584] enable the executing judicial authority to refuse to surrender the person sought on the grounds that it [considers there to be] a serious risk of infringement of that person’s fundamental rights in the issuing Member State [on the basis of a working group report] submitted to the national executing authority by the person sought?

- (b) For the purposes of the previous question, does such a report constitute information that is objective, reliable, specific and properly updated in order to justify, in the light of the case-law of the Court of Justice, the refusal to surrender the person sought [on the ground of] a serious risk of infringement of his fundamental rights?
 - (c) If the answer to the previous question is affirmative, what evidence does EU law require in order for a Member State to be able to conclude that [there is, in the issuing Member State, a] risk of infringement of fundamental rights [as alleged] by the person sought and [justifying the] refusal to execute the [European arrest warrant]?
- (5) Are the answers to the previous questions affected if the person whose surrender is sought has been able to put forward before the courts of the issuing Member State, including at a second level of jurisdiction, arguments concerning the lack of [jurisdiction] of the issuing judicial authority, the arrest warrant issued against him and the [observance] of his fundamental rights?
- (6) Are the answers to the previous questions affected where the executing judicial authority refuses to execute [a European arrest warrant] on grounds not expressly laid down in [Framework Decision 2002/584], in particular because it has found that the issuing judicial authority lacks [jurisdiction] and that there is a serious risk of infringement of fundamental rights in the issuing State, and it does so without asking the issuing judicial authority for the specific additional information on which that decision depends?
- (7) If it follows from the answers to the previous questions that, in the circumstances of the case, [Framework Decision 2002/584] precludes the surrender of a person based on [the] grounds for refusal [mentioned]:

Does [Framework Decision 2002/584] preclude the referring court from issuing a new [European arrest warrant] against the same person and addressed to the same Member State?’

35. Mr Puig Gordi, Mr Puigdemont Casamajó, Mr Comín Oliveres, Ms Ponsatí Obiols, Ms Rovira Vergés, Ms Gabriel Sabaté, the Ministerio Fiscal, the Spanish, Belgian, Polish and Romanian Governments and the European Commission have lodged written observations. A hearing was held on 5 April 2022.

III. Analysis

36. The general aim of the questions referred by the national court is that the Court define the conditions under which an executing judicial authority may refuse to give effect to a European arrest warrant on the ground that there is a risk, should the person sought be surrendered to the issuing judicial authority, of infringement of his or her fundamental right to a fair trial before a tribunal established by law, enshrined in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹⁹ to which the second paragraph of Article 47 of the Charter corresponds.

37. In large part, those questions arise from the reasoning of the executing judicial authority on the basis of which it refused to execute the European arrest warrant issued against Mr Puig Gordi.

¹⁹ Signed at Rome on 4 November 1950, ‘ECHR’.

A. The admissibility of the questions referred for a preliminary ruling

38. I will quickly state my view on the admissibility of the questions referred for a preliminary ruling and recall that, according to settled case-law, questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law or the assessment of the validity of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.²⁰

39. In its judgment of 25 July 2018, *AY (Arrest warrant – Witness)*,²¹ the Court found to be admissible the questions referred by an issuing judicial authority in order to determine the extent of an executing judicial authority's competence following the issue of European arrest warrants which have proved ineffective.²²

40. In reaching that conclusion, the Court first of all took account of the fact that the referring court had stated that it had brought the matter before the Court with a view to adopting a decision, depending on the answers provided to the questions submitted, on the withdrawal of a European arrest warrant. It could not, therefore, be claimed that the questions referred bore no relation to the actual facts of the proceedings pending before the referring court or its purpose, or that the problem was hypothetical.²³

41. Secondly, the Court held that the admissibility of a request for a preliminary ruling was not called into question by the fact that the questions submitted concerned the obligations of an executing judicial authority, even where the referring court was the judicial authority that had issued the European arrest warrant: the issue of a European arrest warrant could result in the arrest of the person sought and therefore affects that individual's personal freedom. The Court held that, with regard to proceedings relating to a European arrest warrant, the observance of fundamental rights fell primarily within the responsibility of the issuing Member State.²⁴

42. Following that line of argument, the Court has also held, in the judgment in *Spetsializirana prokuratura (Letter of rights)*, that, in order to ensure the observance of those rights – which could lead a judicial authority to decide to issue a European arrest warrant – such an authority must be able to refer questions to the Court for a preliminary ruling.²⁵

43. In my view, there is no doubt that that case-law applies to the present case. Indeed, given that the European arrest warrant mechanism translates in practice into a relationship between two judicial authorities, it must be accepted that either of those authorities may bring proceedings before the Court of Justice in order to obtain clarification with a view to preventing or resolving any problems with that mechanism. As the Commission has rightly pointed out in its observations, care must be taken not to create any imbalance in the freedom of the courts of the issuing Member State and of the executing Member State to make a reference to the Court of

²⁰ See, inter alia, the judgment of 28 January 2021, *Spetsializirana prokuratura (Letter of rights)* (C-649/19, EU:C:2021:75, 'the judgment in *Spetsializirana prokuratura (Letter of rights)*', paragraph 36 and the case-law cited).

²¹ C-268/17, EU:C:2018:602, 'the judgment in *AY (Arrest warrant – Witness)*'.

²² See the judgment in *AY (Arrest warrant – Witness)*, paragraph 31.

²³ See the judgment in *AY (Arrest warrant – Witness)*, paragraph 27.

²⁴ See, in particular, the judgment in *AY (Arrest warrant – Witness)*, paragraph 28 and the case-law cited.

²⁵ Paragraph 39 of the judgment and the case-law cited.

Justice for a preliminary ruling. The problem is not hypothetical if its resolution is necessary in order to enable an issuing judicial authority to decide to withdraw or to issue a European arrest warrant in the context of pending criminal proceedings.²⁶ Moreover, the application of the case-law mentioned does not, in my view, require that the questions referred by the national court coincide completely with the grounds on which the Brussels Court of Appeal decided to refuse to execute the European arrest warrant at issue.

44. As to the substance, in the reasoning which follows I shall examine the questions referred by the national court in three stages.

45. I shall begin by addressing the first question referred for a preliminary ruling, which will lead me to clarify whether, and if so under what conditions, a Member State may provide for a ground for non-execution which is not expressly provided for by Framework Decision 2002/584.

46. Secondly, I shall examine together the third to sixth questions referred, which essentially ask for clarification of the conditions under which an executing judicial authority may refuse to execute a European arrest warrant on the ground that the issuing judicial authority does not have competence to issue the warrant or jurisdiction to try the person sought.

47. Thirdly, I shall answer the seventh question referred, the aim of which is to establish whether, after the execution of a European arrest has been refused, the issuing judicial authority's freedom to issue a new European arrest warrant is restricted.

B. The first question referred for a preliminary ruling

48. By the first question referred for a preliminary ruling, the national court asks, in essence, whether Framework Decision 2002/584 is to be interpreted as allowing an executing judicial authority to refuse to execute a European arrest warrant on a ground for non-execution which is provided for in its national law but which is not stated in that framework decision.

49. The Court has already held that, in the field governed by Framework Decision 2002/584, the principle of mutual recognition, which, as is apparent in particular from recital 6 of that framework decision, constitutes the 'cornerstone' of judicial cooperation in criminal matters, is applied in Article 1(2) thereof, which lays down the rule that Member States are required to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of that framework decision. Executing judicial authorities may therefore, in principle, refuse to execute such a warrant only on the grounds for non-execution exhaustively listed in Framework Decision 2002/584 and execution of the warrant may be made subject only to one of the conditions exhaustively laid down in Article 5 thereof. Accordingly, while execution of the European arrest warrant constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly.²⁷

²⁶ See the judgment in *Spetsializirana prokuratura (Letter of rights)*, paragraph 38.

²⁷ See, inter alia, the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, paragraph 41 and the case-law cited.

50. Thus, Framework Decision 2002/584 explicitly states the grounds for mandatory non-execution (Article 3) and optional non-execution (Articles 4 and 4a) of a European arrest warrant, as well as the guarantees to be given by the issuing Member State in particular cases (Article 5).²⁸

51. Nonetheless, the Court has extended, beyond the grounds for non-execution expressly mentioned in Articles 3, 4 and 4a of that framework decision, the cases in which the execution of a European arrest warrant should be refused.

52. First of all, it has held that execution must be refused where the European arrest warrant does not satisfy the requirements as to lawfulness laid down in Article 8(1) of that framework decision.²⁹ It subsequently held that Article 1(3) of Framework Decision 2002/584 provided a basis for bringing a procedure for execution to an end in order to avert, in certain exceptional cases, an infringement of fundamental rights.³⁰ Lastly, it has held that the principle of mutual recognition applies only to European arrest warrants within the meaning of Article 1(1) of that framework decision, which signifies that European arrest warrants not issued by a ‘judicial authority’ within the meaning of Article 6(1) of the framework decision should not be executed,³¹ or those issued upon the conclusion of a procedure that does not satisfy the requirement of effective judicial protection.³²

53. In all of those situations in which an executing judicial authority may refuse to execute a European arrest warrant, the Court has consistently based its reasoning on the provisions of Framework Decision 2002/584, read, where necessary, in the light of Articles 4 and 47 of the Charter.

54. On the other hand, a ground for non-execution provided for in the national law of a Member State for which no basis can be found in the provisions of that framework decision cannot be accepted.

55. It follows that Framework Decision 2002/584 must, in my view, be interpreted as precluding an executing judicial authority from refusing to execute a European arrest warrant on a ground for non-execution which is provided for in its national law but which is not stated in that framework decision.

56. In order to give a full answer to the referring court, I nevertheless think it necessary to reiterate that, in the present case, the ground for non-execution which is at the heart of the debate and on which the Belgian courts relied in refusing to execute the European arrest warrant issued against Mr Puig Gordi is set out in Article 4(5)(5) of the Belgian Law on the European Arrest Warrant, which provides that ‘the execution of a European arrest warrant shall be refused ... if there are valid grounds for believing that the execution of the European arrest warrant would have the effect of infringing the fundamental rights of the person concerned, as enshrined in Article 6 [TEU]’.

²⁸ See, inter alia, the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, paragraph 42 and the case-law cited.

²⁹ See the judgment of 1 June 2016, *Bob-Dogi* (C-241/15, EU:C:2016:385, paragraphs 63 and 64).

³⁰ See, in particular, the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, paragraphs 44 and 45 and the case-law cited.

³¹ See, in particular, the judgment in *Openbaar Ministerie (Independence of the issuing judicial authority)*, paragraph 38 and the case-law cited.

³² See, in particular, the judgments of 24 November 2020, *Openbaar Ministerie (Forgery of documents)* (C-510/19, EU:C:2020:953, paragraph 46 and the case-law cited), and of 10 March 2021, *PI* (C-648/20 PPU, EU:C:2021:187, paragraph 38 and the case-law cited).

57. A provision of that type is not uncommon in the national laws of the Member States³³ and it is a reflection of the importance which the EU legislature attaches to devising a mechanism that observes the fundamental rights of individuals for whom European arrest warrants are issued.

58. I would point out in this connection that Article 1(3) of Framework Decision 2002/584 states that that decision ‘shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [TEU]’. Recitals 10, 12 and 13 of the framework decision are also relevant in this regard.³⁴

59. As I have indicated, the Court has recognised that limitations may be placed on the principles of mutual recognition and mutual trust between Member States ‘in exceptional circumstances’,³⁵ and it has based that reasoning on Article 1(3) of Framework Decision 2002/584 in particular.³⁶

60. I shall go on to explain why the conditions which an executing judicial authority must observe in order to be entitled to refuse to execute a European arrest warrant, where it finds there to be valid grounds for believing that its execution would have the effect of infringing the fundamental rights of the person concerned, must be interpreted strictly, so as to ensure that any refusal of execution remains an exception.

61. Given the matters I have just set out, I do not think it objectionable, as such, for a Member State to mention in its national law that an executing judicial authority may refuse to execute a European arrest warrant for such reasons, inasmuch as the Court itself, in recognising that limitations may be placed on the principles of mutual recognition and mutual trust between Member States, has based its reasoning on Article 1(3) of Framework Decision 2002/584. However, I would immediately add an important qualification, which is that a provision of national law, such as Article 4(5)(5) of the Belgian Law on the European arrest warrant, must of course, like any provision of national law implementing EU law, be interpreted in conformity with EU law. An executing judicial authority cannot, therefore, rely on such a provision as the

³³ As the Commission stated in its report of 2 July 2020 to the European Parliament and the Council on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (COM(2020) 270 final, p. 8), ‘the large majority of Member States have explicitly transposed the obligation to respect fundamental rights and fundamental legal principles, some in general terms, but others with specific reference to the rights mentioned in recitals 12 and 13. For example, some national transpositions refer generally to treaties on human rights and fundamental freedoms ... and/or to Article 6 [TEU]. A few Member States transposed Article 1(3) of the Framework Decision by referring solely to the [ECHR], omitting a reference to the [Charter].’

³⁴ Recital 10 of the framework decision states that ‘the mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) [TEU], determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof’. Recital 12 states that that framework decision ‘respects fundamental rights and observes the principles recognised by Article 6 [TEU] and reflected in the Charter ..., in particular Chapter VI thereof. Nothing in [Framework Decision 2002/584] may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person’s position may be prejudiced for any of these reasons’. Recital 13 of the framework decision reflects Article 4 and Article 19(2) of the Charter and states that ‘no person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment’.

³⁵ See, in particular, the judgments in *Aranyosi and Căldăraru* (paragraph 82 and the case-law cited) and in *Minister for Justice and Equality (Deficiencies in the system of justice)* (paragraph 43).

³⁶ See, in particular, the judgments in *Aranyosi and Căldăraru* (paragraph 83) and in *Minister for Justice and Equality (Deficiencies in the system of justice)* (paragraph 45). See also the Opinion of Advocate General Campos Sánchez-Bordona in Joined Cases *L and P (Independence of the issuing judicial authority)* (C-354/20 PPU and C-412/20 PPU, EU:C:2020:925, point 39), which states that ‘the Court has accepted that, in addition to the cases expressly referred to in the Framework Decision (Articles 3 to 5), execution of [a European arrest warrant] may also be refused “in exceptional circumstances” which, on account of their seriousness, necessitate the limitation of the principles of mutual recognition and mutual trust between Member States on which judicial cooperation in criminal matters is founded’.

basis for mandatory and automatic refusal to execute European arrest warrants in cases where the fundamental rights of the person concerned are allegedly infringed,³⁷ in disregard of the body of case-law which strictly circumscribes the conditions under which an issuing judicial authority's request may, exceptionally, be refused.

62. Consequently, I suggest that the answer to the first question referred for a preliminary ruling should be that Framework Decision 2002/584 is to be interpreted as precluding an executing judicial authority from refusing to execute a European arrest warrant on the basis of a ground for non-execution which is provided for in its national law but is not stated in that framework decision. However, that framework decision does not preclude a provision of national law implementing Article 1(3) of that framework decision that provides that an executing judicial authority may refuse to give effect to a European arrest warrant where it has valid grounds for believing that its execution would have the effect of infringing the fundamental rights of the person concerned, provided that that provision is applied in accordance with the case-law of the Court laying down the strict conditions under which such a refusal is permissible.

63. In light of the answer which I propose that the Court should give to the first question referred for a preliminary ruling, I believe it unnecessary to answer the second question referred for a preliminary ruling.

C. The third to sixth questions referred for a preliminary ruling

64. As I have mentioned, I shall examine together the third to sixth questions referred for a preliminary ruling, since they all seek clarification of the conditions under which an executing judicial authority may refuse to execute a European arrest warrant on the ground that the issuing judicial authority does not have competence to issue the warrant or jurisdiction to try the person sought.

65. The referring court asks for guidance on several aspects of this issue. First of all, can such a ground for non-execution be derived from Article 6(1) of Framework Decision 2002/584? Next, and this is the crux of the problem submitted to the Court, under what conditions may an executing judicial authority, on the basis of Article 1(3) of that framework decision, refuse to execute a European arrest warrant on the ground of an alleged risk of infringement of the fundamental right to a fair trial, protected by the second paragraph of Article 47 of the Charter? Lastly, how might the answer to that last question be affected, first, by the fact that the person sought has been able to put forward before the courts of the issuing Member State arguments concerning the observance of his or her fundamental rights and the lack of jurisdiction of those courts and, secondly, by the possible existence of an obligation upon an executing judicial authority which envisages refusing to execute a European arrest warrant to request supplementary information from the issuing judicial authority, pursuant to Article 15(2) of that framework decision?

³⁷ I should emphasise in this connection that it is only if the European Council adopts a decision and suspends Framework Decision 2002/584 in respect of the Member State concerned, pursuant to Article 7(2) and (3) TEU that the executing judicial authority is required to refuse automatically to execute any European arrest warrant issued by that Member State: see, in particular, the judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraph 65 and the case-law cited.

1. *Can a ground for non-execution based on the lack of competence of the issuing judicial authority to issue a European arrest warrant be derived from Article 6(1) of Framework Decision 2002/584?*

66. I would observe that Framework Decision 2002/584 and, in particular, Articles 3, 4 and 4a thereof, contain no provisions expressly providing for a ground of non-execution based on the issuing judicial authority's lack of competence to issue a European arrest warrant. Moreover, it does not seem to me that any such ground for non-execution may be inferred from Article 6(1) of that framework decision either.

67. The Court has already held that the principle of mutual recognition proceeds from the assumption that only European arrest warrants, within the meaning of Article 1(1) of Framework Decision 2002/584, must be executed in accordance with the provisions of that decision, which requires that such a warrant, which is classified in that provision as a 'judicial decision', be issued by a 'judicial authority' within the meaning of Article 6(1) of that framework decision.³⁸

68. I recall that, under that provision, 'the issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.'

69. In addition, Article 6(3) of that framework decision provides that 'each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law'. Pursuant to that provision, the Kingdom of Spain informed the Council that, in accordance with Article 35 of Ley 23/2014, de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea (Law No 23/2014 of 20 November 2014 on the mutual recognition in the European Union of decisions in criminal matters),³⁹ the judicial authority having competence to issue European arrest warrants is 'the Judge or Court that presided over the case ... to the extent that that type of order is appropriate'.⁴⁰ There is therefore a correspondence between the jurisdiction of a judicial authority to hear a case and the competence of that authority to issue a European arrest warrant for the purposes of criminal proceedings.

70. As the Court held in its judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*,⁴¹ the words 'judicial authority' contained in Article 6(1) of Framework Decision 2002/584 are not limited to designating only the judges or courts of a Member State, but must be construed as designating, more broadly, the authorities participating in the administration of criminal justice in that Member State, as distinct from, inter alia, ministries or police services, which are part of the executive.⁴²

³⁸ See, inter alia, the judgment in *Openbaar Ministerie (Independence of the issuing judicial authority)*, paragraph 38 and the case-law cited.

³⁹ BOE No 282 of 21 November 2014, p. 95437.

⁴⁰ See Council of the European Union, 'Statements to be made by the Spanish State as a result of the adoption of Law 23/2014 of 20 November on the mutual recognition of decisions in criminal matters in the European Union', 23 April 2015 (document No 8138/15, p. 2, available at: <https://data.consilium.europa.eu/doc/document/ST-8138-2015-INIT/en/pdf>).

⁴¹ C-508/18 and C-82/19 PPU, EU:C:2019:456, 'the judgment in *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*'.

⁴² Paragraph 50 of that judgment and the case-law cited.

71. In addition, the Court has held that the concept of ‘judicial authority’, within the meaning of Article 6(1) of Framework Decision 2002/584, implies that the authority concerned acts independently in the execution of its responsibilities which are inherent in the issuing of a European arrest warrant.⁴³

72. If the criteria which define the concept of ‘judicial authority’ for the purposes of Article 6(1) of Framework Decision 2002/584 are not met, the executing judicial authority can refuse to execute a European arrest warrant. On the other hand, where those criteria *are* met, I do not think that the wording of that provision, in so far as it refers to the judicial authority ‘which is competent to issue a European arrest warrant by virtue of the law of that State’, may be interpreted as conferring power on the executing judicial authority to verify the competence of the issuing judicial authority to issue the European arrest warrant in question and to refuse to execute that warrant if it considers that that authority does not have competence.

73. Indeed, to accept that Article 6(1) of that framework decision enables an executing judicial authority to review the competence of the issuing judicial authority would be contrary to the principle of procedural autonomy, in accordance with which the Member States may designate, in their national law, the ‘judicial authority’ which has competence to issue a European arrest warrant.⁴⁴ Consequently, it is not for the executing judicial authority, given the division of functions between it and the issuing judicial authority, to verify whether the latter has competence, in accordance with the rules of the issuing Member State governing the organisation of the courts and court procedures, to issue a European arrest warrant. As long as a European arrest warrant emanates from a ‘judicial authority’ within the meaning of Article 6(1) of that framework decision, the executing judicial authority must presume that the issuing judicial authority complies with the national rules which define its competence.

74. In short, given that the meaning and scope of the concept ‘judicial authority’ for the purposes of Article 6(1) of Framework Decision 2002/584 cannot be left to the assessment of each Member State,⁴⁵ and given that that concept requires, throughout the European Union, an autonomous and uniform interpretation,⁴⁶ the rules which determine the competence of such an authority to issue European arrest warrants fall within the procedural autonomy of the issuing Member State, and the executing judicial authority may not impinge upon that procedural autonomy on the basis of Article 6(1). Any other interpretation would undermine the principle of mutual recognition.

75. What I have just said is, of course, without prejudice to the judicial review which may be carried out in the issuing Member State, either by a court of its own motion or upon the application of the individual whose surrender is requested, in order to verify compliance with the national rules which determine the jurisdiction of the issuing judicial authority.

⁴³ See, inter alia, the judgment in *Openbaar Ministerie (Independence of the issuing judicial authority)*, paragraph 38 and the case-law cited. Similarly, the Court has made it clear that the concept of ‘executing judicial authority’ within the meaning of Article 6(2) of Framework Decision 2002/584 refers, like the concept of ‘issuing judicial authority’ within the meaning of Article 6(1) of that framework decision, to either a judge or a court, or a judicial authority, such as the public prosecution service of a Member State, which participates in the administration of justice of that Member State and which enjoys the necessary independence vis-à-vis the executive: see, inter alia, the judgment of 28 April 2022, *C and CD (Legal obstacles to the execution of a decision on surrender)* (C-804/21 PPU, EU:C:2022:307, paragraph 61 and the case-law cited).

⁴⁴ See, inter alia, the judgment in *OG and PI (Public Prosecutor’s Offices, Lübeck and Zwickau)*, paragraph 48 and the case-law cited.

⁴⁵ See, in particular, the judgment in *OG and PI (Public Prosecutor’s Offices, Lübeck and Zwickau)*, paragraph 48 and the case-law cited.

⁴⁶ See, in particular, the judgment in *OG and PI (Public Prosecutor’s Offices, Lübeck and Zwickau)*, paragraph 49 and the case-law cited.

76. It follows from those considerations that, in my view, Article 6(1) of Framework Decision 2002/584 is to be interpreted as not allowing an executing judicial authority to check whether an issuing judicial authority has competence, under the law of the issuing Member State, to issue a European arrest warrant.

2. Under what conditions may an executing judicial authority, on the basis of Article 1(3) of Framework Decision 2002/584, refuse to execute a European arrest warrant in the event of an alleged risk of infringement of the fundamental right to a fair trial before a tribunal previously established by law, protected by the second paragraph of Article 47 of the Charter?

77. It is necessary at this point to clarify the conditions under which Article 1(3) of Framework Decision 2002/584, as the basis for a possible derogation from the principle of mutual recognition, may allow an executing judicial authority to refuse to execute a European arrest warrant in the event of an alleged risk of infringement of the fundamental right of the person sought to a fair trial before a tribunal previously established by law, protected by the second paragraph of Article 47 of the Charter.

78. I would immediately say that, in answering that question, it is necessary to follow the premiss for any analysis in this area, which is that ‘the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law’.⁴⁷

79. That premiss of mutual trust in national systems for the protection of fundamental rights implies, as the Court forcefully stated in Opinion 2/13 (*Accession of the European Union to the ECHR*), that, ‘when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that *not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU*’.⁴⁸ Latterly, with regard to the European arrest warrant, the Court has continued to emphasise that only in exceptional cases may an executing judicial authority check the observance of fundamental rights in the issuing Member State.⁴⁹ That is an expression, in this domain, of the fact that the Member States’ obligation to observe fundamental rights must always be understood within the framework of the structure and objectives of the European Union.⁵⁰

80. It must be remembered in this connection that Framework Decision 2002/584 seeks, by the establishment of a simplified and effective system for the surrender of persons convicted or suspected of having infringed criminal law, to facilitate and accelerate judicial cooperation with a

⁴⁷ See, in particular, Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014 (EU:C:2014:2454, ‘Opinion 2/13 (*Accession of the European Union to the ECHR*)’, point 191 and the case-law cited), and, with regard to the European arrest warrant, the judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraph 40 and the case-law cited.

⁴⁸ See Opinion 2/13 (*Accession of the European Union to the ECHR*), point 192 (my italics).

⁴⁹ See, inter alia, the judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraph 41.

⁵⁰ As the Court held in its judgment of 17 December 1970, *Internationale Handelsgesellschaft* (11/70, EU:C:1970:114, paragraph 4). See, more recently, Opinion 2/13 (*Accession of the European Union to the ECHR*), point 170 and the case-law cited.

view to contributing to the attainment of the objective set for the European Union of becoming an area of freedom, security and justice, and has as its basis the high level of trust which must exist between the Member States.⁵¹

81. Moreover, as I have already indicated, in order to attain that objective, the principle of mutual recognition requires that execution of a European arrest warrant constitutes the rule and that refusal to execute must be considered an exception that must be interpreted strictly.⁵²

82. In that context, the Court accepted, in its judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, that, like a real risk of breach of Article 4 of the Charter, a real risk of breach of the fundamental right of the individual concerned to a fair trial, as laid down in the second paragraph of Article 47 of the Charter, was capable of resulting, by way of exception, in a refusal to execute a European arrest warrant.

83. Indeed, ‘the high level of trust between Member States on which the European arrest warrant mechanism is based is thus founded on the premiss that the criminal courts of the other Member States – which, following execution of a European arrest warrant, will have to conduct the criminal procedure for the purpose of prosecution, or of enforcement of a custodial sentence or detention order, and the substantive criminal proceedings – meet the requirements inherent in the fundamental right to a fair trial enshrined in the second paragraph of Article 47 of the Charter’.⁵³ According to the Court, ‘that fundamental right is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded’.⁵⁴

84. Meeting the requirements inherent in the fundamental right to a fair trial enshrined in the second paragraph of Article 47 of the Charter is therefore the foundation of a European arrest warrant mechanism that operates in a manner observant of the rights enjoyed by individuals for whom a European arrest warrant is issued.

85. In that regard, there can be no question that, as authorities responsible for implementing Framework Decision 2002/584, the issuing and executing judicial authorities are required to observe the fundamental rights protected by the Charter. However, in order for the system of surrender established by that framework decision to work, the relevant responsibilities must, in accordance with the principle of mutual trust, be shared between those two authorities. Indeed, if the issuing judicial authority and the executing judicial authority were allowed to carry out the same checks, the efficacy and speed of the surrender would be compromised. Moreover, mutual trust, by nature, opposes the carrying out of cross-checks by each of the authorities in order to verify the observance of fundamental rights in the Member State to which the other authority belongs. According to that logic, any refusal to execute a European arrest warrant based on the executing judicial authority’s finding that there is a risk of infringement of fundamental rights in the issuing Member State must be exceptional.

⁵¹ See, inter alia, the judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraph 42 and the case-law cited. See also the judgment of 28 April 2022, *C and CD (Legal obstacles to the execution of a decision on surrender)* (C-804/21 PPU, EU:C:2022:307, paragraph 51 and the case-law cited).

⁵² See, inter alia, the judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraphs 43 and 44 and the case-law cited.

⁵³ The judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraph 45 and the case-law cited.

⁵⁴ The judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraph 45 and the case-law cited.

86. That is the thought which the Court expressed in holding that, ‘while it is primarily for each Member State, in order to ensure the full application of the principles of mutual trust and mutual recognition which underpin the operation of that mechanism, to ensure, subject to final review by the Court, that the requirements inherent in [the fundamental right to a fair trial, guaranteed by the second paragraph of Article 47 of the Charter] are safeguarded, by refraining from any measure capable of undermining it ... the existence of a real risk that the person in respect of whom a European arrest warrant has been issued would, if surrendered to the issuing judicial authority, suffer a breach of that fundamental right is capable of permitting the executing judicial authority to refrain, exceptionally, from giving effect to that European arrest warrant on the basis of Article 1(3) of that framework decision’.⁵⁵

87. Thus, the existence of a real risk that the person for whom a European arrest warrant has been issued would, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to a fair trial is capable of altering, by way of exception, the division of responsibilities between the issuing judicial authority and the executing judicial authority. I would reiterate here that, in so far as proceedings relating to a European arrest warrant are concerned, observance of the rights of the person whose surrender is requested falls primarily within the responsibility of the issuing Member State, which must be presumed to be complying with EU law, in particular the fundamental rights conferred by that law.⁵⁶

88. The possibilities for an executing judicial authority to rebut that presumption, on reviewing whether there is a risk of infringement of fundamental rights in the issuing Member State such as might lead it to refuse to execute a European arrest warrant on the basis of Article 1(3) of Framework Decision 2002/584, have been strictly circumscribed by the Court, which, first in its judgment in *Aranyosi and Căldăraru* and consistently thereafter, has insisted on a two-step examination which combines an assessment of the existence of the alleged risk on a systemic level with an assessment thereof on an individual level.

89. The Court has thus held that, ‘where the executing judicial authority called upon to decide on the surrender of a person in respect of whom a European arrest warrant has been issued has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, it cannot, however, presume that there are substantial grounds for believing that that person runs a real risk of breach of his or her fundamental right to a fair trial, if surrendered to that Member State, without carrying out a specific and precise verification which takes account of, inter alia, that person’s personal situation, the nature of the offence in question and the factual context in which that warrant was issued, such as statements or acts by public authorities which are liable to interfere with how an individual case is handled’.⁵⁷

⁵⁵ The judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraph 46 and the case-law cited.

⁵⁶ See, inter alia, the judgments of 23 January 2018, *Piotrowski* (C-367/16, EU:C:2018:27, paragraph 50 and the case-law cited), and of 13 January 2021, *MM* (C-414/20 PPU, EU:C:2021:4, paragraph 61 and the case-law cited). See also the judgment in *Spetsializirana prokuratura (Letter of rights)*, in which the Court noted that, ‘with regard to proceedings relating to [a European arrest warrant], observance of fundamental rights falls primarily within the responsibility of the issuing Member State’ (paragraph 39 and the case-law cited).

⁵⁷ The judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraph 50 and the case-law cited. For the Court’s first confirmation of the need for a two-step examination with reference to the second paragraph of Article 47 of the Charter, see the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, paragraphs 47 to 75.

90. As part of that two-step examination, ‘the executing judicial authority must, as a first step, determine whether there is objective, reliable, specific and duly updated material indicating that there is a real risk of breach, in the issuing Member State, of the fundamental right to a fair trial guaranteed by that provision, on account of systemic or generalised deficiencies so far as concerns the independence of that Member State’s judiciary’.⁵⁸

91. As a second step, ‘the executing judicial authority must determine, specifically and precisely, to what extent the deficiencies identified in the first step are liable to have an impact at the level of the courts of that Member State which have jurisdiction over the proceedings in respect of the person concerned and whether, having regard to that person’s personal situation, the nature of the offence for which he or she is prosecuted and the factual context in which that arrest warrant was issued, and having regard to any information provided by that Member State pursuant to Article 15(2) of Framework Decision 2002/584, there are substantial grounds for believing that that person will run such a risk if he or she is surrendered to the latter’.⁵⁹

92. In its judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, the Court confirmed, with reference to the judicial appointment procedure in the issuing Member State, the need for a two-step examination where the guarantee – also inherent in the fundamental right to a fair trial enshrined in the second paragraph of Article 47 of the Charter – of a tribunal previously established by law is at issue, and it described the conditions and detailed rules for applying that examination.

93. The two-step examination in the situation at issue in that case was justified by three considerations.

94. First of all, the Court emphasised the inextricable links which exist, for the purposes of the fundamental right to a fair trial between the guarantees of judicial independence and impartiality as well as that of access to a tribunal previously established by law.⁶⁰ Secondly, the Court pointed out the need to balance observance of the fundamental rights of the persons whose surrender is requested against other interests, such as the protection of victims’ rights and combatting impunity, which meant that the executing judicial authority should not confine its examination to the first step.⁶¹ Thirdly, the Court warned against an approach which would lead to a de facto suspension of the implementation of the European arrest warrant mechanism in respect of the Member State in question, in disregard of the competence of the European Council and the Council in that respect.⁶²

95. I consider that the reasoning followed by the Court in its judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, which was largely based on the need to preserve the exceptional nature of any refusal to execute a European arrest warrant on the ground of an alleged infringement of the fundamental right of the person sought to a fair trial by a tribunal previously established by law, as enshrined in the second paragraph of Article 47 of the Charter, must be reiterated in the present case. This is for two main reasons.

⁵⁸ The judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraph 52 and the case-law cited.

⁵⁹ The judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraph 53 and the case-law cited.

⁶⁰ The judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraphs 55 to 58 and the case-law cited.

⁶¹ The judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraphs 59 to 62 and the case-law cited.

⁶² The judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraphs 63 to 65 and the case-law cited.

96. In the first place, the risk alleged in the present case relates to the same requirement inherent in the fundamental right to a fair trial, namely the requirement of a tribunal previously established by law, even though, in this case, it is not the judicial appointment procedure in the issuing Member State that is at issue, but compliance with the legal rules which determine the respective jurisdictions of the courts of that Member State.

97. In the second place, I think it essential that the assessment of a real risk of infringement of that fundamental right in the event of surrender should be carried out as a two-step examination so that any refusal to execute a European arrest warrant on the basis of such a risk remains truly exceptional.

98. I shall examine these two points in turn.

(a) The need for a two-step examination of any alleged risk of infringement of the fundamental right to a fair trial before a tribunal previously established by law, arising from non-compliance with the legal rules which determine the jurisdiction of the courts of the issuing Member State

99. One of the elements of the guarantee of a tribunal previously established by law is the requirement for the tribunal's jurisdiction to have a legal basis. I would observe that, in so far as the Charter sets out rights corresponding to rights guaranteed under the ECHR, Article 52(3) of the Charter is intended to ensure the necessary consistency between the rights contained in the Charter and the corresponding rights guaranteed under the ECHR, without thereby adversely affecting the autonomy of EU law. According to the Explanations relating to the Charter of Fundamental Rights,⁶³ the second paragraph of Article 47 of the Charter corresponds to Article 6(1) ECHR. The Court must, therefore, ensure that the interpretation which it gives to the second paragraph of Article 47 of the Charter safeguards a level of protection which does not fall below the level of protection established in Article 6(1) ECHR, as interpreted by the ECtHR.⁶⁴

100. The requirement of a 'tribunal established by law' and the requirements of 'independence' and 'impartiality' of a tribunal form part of the 'institutional requirements' of Article 6(1) ECHR. In the case-law of the ECtHR, there is a very close interrelationship between those requirements.⁶⁵

101. The ECtHR has held that, while they each serve specific purposes as distinct fair trial guarantees, a common thread runs through the institutional requirements of Article 6(1) ECHR, in that they are guided by the aim of upholding the fundamental principles of the rule of law and the separation of powers, noting in that regard that the need to maintain public confidence in the judiciary and to safeguard its independence vis-à-vis the other powers underlies each of those requirements.⁶⁶ The Court of Justice has integrated those qualifying characteristics into its case-law.⁶⁷

⁶³ OJ 2007 C 303, p. 17.

⁶⁴ See, inter alia, the judgment of 29 March 2022, *Getin Noble Bank* (C-132/20, EU:C:2022:235, 'the judgment in *Getin Noble Bank*'), paragraph 116 and the case-law cited.

⁶⁵ See the judgment of the ECtHR of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418), § 231.

⁶⁶ See the judgment of the ECtHR of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418), §§ 231 and 233.

⁶⁷ See the judgment in *Getin Noble Bank*, paragraph 117 and the case-law cited. See also, with reference to the European arrest warrant, the judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraph 56 and the case-law cited.

102. Moreover, the ECtHR has interpreted the requirement of a ‘tribunal established by law’ to mean a ‘tribunal established in accordance with the law’.⁶⁸ Like irregularities in the process of appointing judges,⁶⁹ breaches of rules of domestic law regulating the competence of a tribunal to rule on a particular case are liable to frustrate the requirement of a ‘tribunal established by law’.⁷⁰ Indeed, the ‘law’ referred to in Article 6(1) ECHR comprises in particular the legal provisions on the establishment and competence of judicial bodies.⁷¹ Consequently, according to the ECtHR, ‘if a tribunal does not have jurisdiction to try a defendant in accordance with the provisions applicable under domestic law, it is not “established by law” within the meaning of Article 6(1)’.⁷²

103. I should clarify in this connection that, according to the ECtHR, the object of the words ‘established by law’ in Article 6 ECHR is to ensure that the organisation of the judiciary in a democratic society does not depend on the discretion of the executive but is regulated by law emanating from parliament.⁷³ Furthermore, according to the ECtHR, ‘nor, in countries where the law is codified, can organisation of the judicial system be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret the relevant national legislation’.⁷⁴

104. It follows from those considerations that the legal origin of the rules which establish the jurisdiction of the courts, and the courts’ compliance with those rules, are inextricably linked to the guarantees of judicial independence and impartiality. More broadly, this contributes to ensuring that the rule of law and the separation of powers are upheld, thus maintaining public confidence in the judiciary and safeguarding its independence vis-à-vis the other powers.

105. Thus, the guarantees of access to an independent and impartial tribunal previously established by law represent the cornerstone of the right to a fair trial. Checking whether a court constitutes a tribunal established by law, where a serious doubt arises as to the jurisdiction of that court, is necessary for the confidence which the courts in a democratic society must inspire in those who are subject to their jurisdiction.⁷⁵

106. It follows that, as the Court held in its judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)* in relation to a judicial appointment procedure, a two-step examination must be carried out by the executing judicial authority also in the event of an alleged risk of failure of the guarantee of a tribunal previously established by law arising from irregularities relating to the jurisdiction of the courts of the issuing Member State.

⁶⁸ See the judgment of the ECtHR of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418), § 229.

⁶⁹ See the judgment in *Getin Noble Bank*, paragraph 120 and the case-law cited.

⁷⁰ See the judgment of the ECtHR of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418), § 224.

⁷¹ See the judgment of the ECtHR of 12 July 2007, *Jorgic v. Germany* (CE:ECHR:2007:0712JUD007461301), § 64.

⁷² The judgment of the ECtHR of 12 July 2007, *Jorgic v. Germany* (CE:ECHR:2007:0712JUD007461301), § 64. In its judgment of 22 June 2000, *Coëme and Others v. Belgium* (CE:ECHR:2000:0622JUD003249296), §§ 107 and 108, the ECtHR held that the Belgian Court of Cassation trying defendants other than ministers for offences connected with those for which ministers were standing trial was not a ‘tribunal established by law’, the connection rule not having been established by law.

⁷³ See, in particular, the judgments of the ECtHR of 22 June 2000, *Coëme and Others v. Belgium* (CE:ECHR:2000:0622JUD003249296), § 98, and of 25 October 2011, *Richert v. Poland* (CE:ECHR:2011:1025JUD005480907), § 42.

⁷⁴ See, in particular, the judgments of the ECtHR of 22 June 2000, *Coëme and Others v. Belgium* (CE:ECHR:2000:0622JUD003249296), § 98, and of 20 October 2009, *Gorguilladze v. Georgia* (CE:ECHR:2009:1020JUD000431304), § 69.

⁷⁵ See, by analogy, the judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraph 58 and the case-law cited.

(b) A two-step examination justified by the need to preserve the exceptional nature of any refusal of execution on the ground of an alleged risk of infringement of the fundamental right to a fair trial

107. The possible lack of jurisdiction of an issuing judicial authority could prove problematic both at the point where a European arrest warrant is issued and if it were to mean that the execution of the warrant would result in the defendant being tried by a court that lacks jurisdiction. The role which an executing judicial authority must play when a problem with the jurisdiction of the issuing judicial authority is alleged before it has been debated before the Court.

108. Until now, the Court has primarily concerned itself with explaining why, after completing the first stage of its examination, an executing judicial authority must proceed to the second stage of its examination. To date, in the cases brought before the Court, the person sought has complained of systemic or generalised deficiencies in the issuing Member State. In that specific context, the principal aim of the requirement that a two-step examination be carried out has been to ensure that the mere demonstration of systemic or generalised deficiencies does not prevent the application of Framework Decision 2002/584 when the individual sought is not, in fact, personally exposed to any real risk.

109. However, in the present case, the issue is a different one, inasmuch as it is necessary to establish whether an executing judicial authority may base a refusal to execute a European arrest warrant on an individual risk of breach of the guarantee of a tribunal previously established by law not arising from the existence of systemic or generalised deficiencies in the functioning of the judicial system of the issuing Member State. Thus, the question here is not whether the existence of such systemic and generalised deficiencies is *sufficient*, but whether it is *necessary* in order for an executing judicial authority to be entitled to refuse to execute a European arrest warrant on the basis of Article 1(3) of Framework Decision 2002/584 when a risk of infringement of the fundamental right to a fair trial by a tribunal previously established by law, guaranteed by the second paragraph of Article 47 of the Charter, is alleged.

110. It seems to me that the essential terms of the debate that has taken place in this regard before the Court may be summarised as follows, with an exposition of the two opposing views.

111. According to the first view, the finding of systemic or generalised deficiencies in the functioning of the judicial system of the issuing Member State is not a necessary step in order for an executing judicial authority to proceed to check whether there exists an individual and specific risk of infringement of the fundamental right to a fair trial before a tribunal established by law that must be enjoyed by the person for whom a European arrest warrant has been issued. In that regard, the fact that the Court has, until now, required that the executing judicial authority conduct an examination in two stages in cases in which the observance in the issuing Member State of the second paragraph of Article 47 of the Charter has been called into question may be explained by the fact that, in those cases, the issue was whether, where systemic or generalised deficiencies are found, the second stage, being the assessment of an individual risk of infringement of that fundamental right, was necessary. The Court has not, on the other hand, ruled on the question of whether the first stage is always necessary.

112. The proponents of this first view thus tip the balance, as it were, between mutual trust and the protection of the fundamental right to a fair trial before a tribunal established by law in favour of the latter. Moreover, the arguments in support of this view do not ascribe decisive importance to the difference in nature of the fundamental rights protected under the Charter, that is, between those which are absolute and those which may be subject to limitations.

113. According to the second view, on the other hand, in the case of the fundamental right to a fair trial before a tribunal established by law, guaranteed by the second paragraph of Article 47 of the Charter, the two stages, defined by the Court as the parameters of the executing judicial authority's verification of whether there is a real risk of infringement of that right in the issuing Member State, must be strictly adhered to. Given that any such verification carried out by an executing judicial authority should be exceptional in nature, so as not to jeopardise the mutual trust which the Member States must have in the proper functioning of each other's judicial systems, a finding of systemic or generalised deficiencies in the issuing Member State is imperative. Only deficiencies of that sort are capable of creating a real risk of the essence of that right being adversely affected or, in any event, a real risk of a sufficiently serious infringement of that right. Some proponents of this view have accepted that there could be a difference in this regard depending on whether the alleged infringement concerns a right, such as that protected by Article 4 of the Charter, which is absolute, or a right such as that guaranteed by the second paragraph of Article 47 of the Charter, which may be subject to limitations.

114. The proponents of this second view therefore tip the balance, to put it simply, in favour of mutual trust, which they believe should be called into question by an executing judicial authority only in exceptional cases, which, in so far as the second paragraph of Article 47 of the Charter is concerned, must always be characterised by the existence of systemic or generalised deficiencies in the functioning of the judicial system of the issuing Member State.

115. It is the second view that finds my support, since it contributes, by regarding refusal to execute a European arrest warrant as an exception that must be interpreted strictly, to ensuring the effectiveness of the system of judicial cooperation between the Member States, of which the European arrest warrant is an essential component.

116. To that end, I think it essential that the division of responsibilities between the issuing Member State and the executing Member State be maintained as far as possible. As I have already indicated, it is primarily the responsibility of the issuing Member State to ensure that any decision to issue a European arrest warrant observes the rights which the person for whom the warrant is issued derives from EU law, which include the fundamental rights protected by the Charter. The issuing Member State must, to that end, ensure that the individual concerned enjoys effective legal protection, in particular by providing the legal remedies necessary for that review.⁷⁶ If no systemic or generalised deficiencies in the functioning of the judicial system of the issuing Member State can be demonstrated, there is no reason for the executing judicial authority to doubt that, by pursuing the judicial remedies available in that Member State, the individual concerned will be able to have any infringement of his or her fundamental right to a fair trial before a tribunal previously established by law, guaranteed by the second paragraph of Article 47 of the Charter, established and, where appropriate, rectified or penalised. In that regard, from the debate which has taken place before the Court, it has emerged that the defendants in the criminal proceedings at issue in the main action have at their disposal remedies in the issuing Member State enabling them to have the observance of that fundamental right reviewed, up to the Tribunal

⁷⁶ I would point out in this connection that 'the European Union is a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act': see, *inter alia*, the judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117, paragraph 31 and the case-law cited), and the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, paragraph 49.

Constitucional (Constitutional Court).⁷⁷ I would add that, in the majority of cases, difficulties relating to the jurisdiction of the courts are resolved by the application of national procedural rules, which the courts of the issuing Member State are best placed to apply, so ensuring the protection of the fundamental right to be tried by a tribunal established by law.

117. Thus, in the absence of any allegation of systemic or generalised deficiencies in the functioning of the judicial system of the issuing Member State, consisting in particular in a dysfunctioning of the judicial system of that State which could prevent an infringement of the fundamental right in question from being established and, where appropriate, rectified or penalised by a court of that State, the principle of mutual trust between the Member States must operate fully, in the interests of attaining the objective, pursued by Framework Decision 2002/584, of accelerating and simplifying judicial cooperation between the Member States, founded on the high level of confidence which should exist between the Member States.⁷⁸

118. On the other hand, to allow an executing judicial authority to verify, in a specific case, observance of the fundamental right to a fair trial before a tribunal previously established by law in the issuing Member State in the absence of systemic or generalised deficiencies in the functioning of the judicial system of that Member State, would make that authority's task much more onerous and so run counter to the requirements of the efficacy and speed of the surrender. Moreover, the facts which gave rise to the present case point up the difficulties which an executing judicial authority encounters when it attempts to apply, to interpret or even simply to understand the procedural rules of the issuing Member State.

119. Consequently, it is, in my view, only in exceptional circumstances, characterised by the existence of systemic or generalised deficiencies in the functioning of the judicial system of the issuing Member State, that a shift in the division of responsibilities between the issuing judicial authority and the executing judicial authority may occur, and so enable the latter to check whether the issuing Member State actually has, in a specific case, observed the fundamental right to a fair trial before a tribunal previously established by law, guaranteed by the second paragraph of Article 47 of the Charter.⁷⁹ In other words, it is only in the presence of systemic or generalised deficiencies in the functioning of the judicial system of the issuing Member State that it is possible to derogate, exceptionally, from the rule that the executing judicial authority may not verify the

⁷⁷ For a comparable approach in the field of judicial cooperation in civil matters, see the judgment of 22 December 2010, *Aguirre Zarraga* (C-491/10 PPU, EU:C:2010:828, paragraphs 69 to 74). I note that it was confirmed at the hearing that Mr Puig Gordi has brought a '*recurso de amparo*' (appeal seeking the protection of fundamental rights and freedoms) before the Tribunal Constitucional (Constitutional Court).

⁷⁸ See, inter alia, the judgment of 28 April 2022, *C and CD (Legal obstacles to the execution of a decision on surrender)* (C-804/21 PPU, EU:C:2022:307, paragraph 51 and the case-law cited).

⁷⁹ See, on this point, the Opinion of Advocate General Tanchev in *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:517), in which the Advocate General cited the judgment of the Supreme Court (Ireland) of 4 May 2007, *The Minister for Justice Equality and Law Reform v Brennan* [(2007) IESC 21], in which the Irish court held that it would take exceptional circumstances, 'such as a clearly established and fundamental defect in the system of justice of a requesting State', for surrender under the European Arrest Warrant Act to be refused on the basis of a breach of Article 6 ECHR rights (footnote 47). See also judgment of the Cour de cassation (Court of Cassation, France) of 10 May 2022 (No 22-82.379, FR:CCASS:2022:CR00676), by which that court held that 'it follows from the case-law of the Court of Justice of the European Union that the principle of mutual recognition on which the European arrest warrant system is based is itself based on mutual trust between Member States that their respective national legal systems are capable of providing equivalent and effective protection of fundamental rights recognised at EU level, and that it is therefore not for the executing State, except in the case of a systemic or generalised deficiency in the issuing State, to ensure a review of the observance of fundamental rights by the latter' (paragraph 14, my italics).

observance of fundamental rights in the issuing Member State, as the Court indicated in point 192 of Opinion 2/13 (*Accession of the European Union to the ECHR*). That rule therefore requires that the admission of exceptional circumstances be strictly circumscribed.⁸⁰

120. In that regard, it is clear from the Court's case-law that the first stage of the examination to be carried out by an executing judicial authority is a necessary preliminary to commencing the second stage of that examination. Indeed, in that second stage, 'the executing judicial authority must assess *whether the systemic or generalised deficiencies found in the first step of that examination are likely to materialise if the person concerned is surrendered* to the issuing Member State and whether, in the particular circumstances of the case, that person thus runs a real risk of breach of his or her fundamental right to a fair trial before a tribunal previously established by law, enshrined in the second paragraph of Article 47 of the Charter'.⁸¹ As the Commission has rightly asserted, the two stages of the examination to be carried out by the executing judicial authority are cumulative, one following on from the other in a sequence of analyses that that authority must adhere to.

121. Moreover, by analogy with the Court's finding in paragraph 62 of its judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, I consider that, if verification of a risk of infringement of that fundamental right in a specific case were in itself sufficient to enable an executing judicial authority to refuse, in relevant cases, to execute a European arrest warrant, the increased checks which that authority might be led to carry out in that regard would be liable to compromise the objective of combatting impunity pursued by Framework Decision 2002/584, as well as, in some cases, other interests, such as the need to observe the fundamental rights of the victims of the offences concerned.⁸²

122. In short, it is only in the presence of serious difficulties with the functioning of the judicial system of the issuing Member State, established rigorously and to a sufficient degree of certainty, on the basis of objective, reliable, specific and duly updated information, that an executing judicial authority may find that there is a real risk of infringement in that Member State of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter. In my view, this goes to the attainment of the area of freedom, security and justice and, more specifically, to the smooth, effective implementation of the surrender mechanism established by Framework Decision 2002/584, which is based on mutual trust and the presumption of observance by the Member States of EU law and, in particular, of the fundamental rights protected by the Charter.

123. I consider that the Court should maintain the approach which it has taken with regard to the European arrest warrant, even though it has adopted a more flexible approach in asylum cases, in relation to the transfer of asylum seekers to the Member State responsible for examining their application. Indeed, the objectives pursued in these two areas are different.⁸³ Moreover, the latter approach addresses an individual, not a systemic risk of infringement of fundamental rights and

⁸⁰ See, on this point, Spielmann, D. and Voyatzis, P., 'Le mandat d'arrêt européen entre Luxembourg et Strasbourg: du subtil exercice d'équilibriste entre la CJUE et la Cour EDH', *Sa Justice – L'Espace de Liberté, de Sécurité et de Justice – Liber amicorum en hommage à Yves Bot*, Bruylant, Brussels, 2022, p. 256. As those authors point out, one of the challenges for the Court is certainly that of preventing the generalisation of exceptional circumstances, which would undermine the principle of mutual trust and the efficacy of the European arrest warrant mechanism (p. 300).

⁸¹ Judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraph 82 (my italics).

⁸² See the judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraph 60.

⁸³ See, on this point, Billing, F., 'Limiting mutual trust on fundamental rights grounds under the European arrest warrant and lessons learned from transfers under Dublin III', *New Journal of European Criminal Law*, SAGE Journals, 2020, Vol. 11(2), p. 184.

concerns Article 4 of the Charter, which enshrines an absolute right.⁸⁴ By contrast, the right to a fair trial under the second paragraph of Article 47 of the Charter is a right which may be subject to limitations.

124. The objective of establishing a speedy, effective system for surrender, taken together with the objective of combatting impunity, is not compatible with the executing judicial authority's having too broad a discretion to review the existence of risks of infringement of fundamental rights in the issuing Member State, especially in the case of the fundamental right to a fair trial before a tribunal previously established by law, which is not an absolute right.⁸⁵

125. I would also emphasise that it is necessary for the proper functioning of the European arrest warrant mechanism that executing judicial authorities should not be allowed to carry out a review which they are not in a position to carry out. The exercise of verifying the jurisdiction of the issuing judicial authority to try individuals who are the subject of a European arrest warrant and its competence to issue such warrants naturally falls to the courts of the issuing Member State, which are the best able to interpret and apply the procedural rules which form part of the legal system of that State. In the absence of systemic or generalised deficiencies in the functioning of the judicial system of the issuing Member State, there is no reason for an executing judicial authority to carry out a review which would be an expression of a lack of trust in the courts of the issuing Member State. Adopting a solution diametrically opposed to the initial intention of establishing judicial cooperation in criminal matters on the foundation of mutual recognition and mutual trust would pave the way for the dismantling of an edifice that has been patiently constructed.

126. It is also important, in my view, to guard against applying mechanically, in the context of an alleged infringement of the fundamental right to a fair trial before a tribunal previously established by law, guaranteed by the second paragraph of Article 47 of the Charter, what the Court has held in relation to the existence of a legal remedy enabling persons in detention to challenge, in legal proceedings, the legality, with regard to Article 4 of the Charter, of the conditions of their detention in the issuing Member State, namely that such a remedy 'cannot, on its own, suffice to

⁸⁴ As held in the judgment of 16 February 2017, *C. K. and Others* (C-578/16 PPU, EU:C:2017:127), the prohibition of inhuman or degrading treatment or punishment, laid down in Article 4 of the Charter, is of fundamental importance, to the extent that it is absolute in that it is closely linked to respect for human dignity, which is the subject of Article 1 of the Charter (paragraph 59 and the case-law cited; see also paragraph 69). That finding led the Court to accept the possibility that the transfer of an asylum seeker whose state of health was particularly serious could, in itself, result, for the person concerned, in a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter, even where there were no substantial grounds for believing that there were systemic flaws in the asylum procedure and the conditions for the reception of asylum seekers in Croatia (paragraphs 71 and 73). See also the judgment of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218, paragraphs 78 and 87). In that judgment, the Court indicated that the solution it was adopting required a finding of exceptional circumstances. It nevertheless stated in paragraph 95 of the judgment, that 'it cannot be entirely ruled out that an applicant for international protection may be able to demonstrate the existence of exceptional circumstances that are unique to him and mean that, in the event of transfer to the Member State normally responsible for processing his application for international protection, he would find himself, because of his particular vulnerability, irrespective of his wishes and personal choices, in a situation of extreme material poverty ... after having been granted international protection'.

⁸⁵ From the debate which has taken place before the Court it has emerged that, with regard to the European arrest warrant, a more qualified position, more accommodating of risks that are not systemic, could be envisaged where it is the protection of an absolute fundamental right, such as that protected by Article 4 of the Charter, that is at issue. At the hearing, the Commission acknowledged that, in the event of a risk of infringement of that fundamental right, arising, for example, from the particular characteristics of the person whose surrender is requested, an executing judicial authority could refuse to execute the warrant even in the absence of systemic deficiencies in the issuing Member State. That view seems to me to be related to the exception laid down in Article 23(4) of Framework Decision 2002/584, which provides that 'the surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. The execution of the European arrest warrant shall take place as soon as these grounds have ceased to exist'. See, on this point, Billing, F., 'Limiting mutual trust on fundamental rights grounds under the European arrest warrant and lessons learned from transfers under Dublin III', *New Journal of European Criminal Law*, SAGE Journals, 2020, Vol. 11(2), p. 197. See also, on whether and to what extent an executing judicial authority could refuse to surrender a requested person if he or she suffers from an illness likely to be aggravated in the event of the execution of a European arrest warrant, the ongoing case of *E.D.L. v Presidente del Consiglio dei Ministri* (C-699/21).

rule out a real risk that the individual concerned will be subject in the issuing Member State to inhuman or degrading treatment within the meaning of Article 4 of the Charter'.⁸⁶ Indeed, according to the Court, such a judicial review, while it may be taken into account by the executing judicial authority in its overall assessment of the conditions in which it is intended that a person for whom a European arrest warrant has been issued will be held, 'is not, as such, capable of averting the risk that that person will, following his surrender, be subjected to treatment that is incompatible with Article 4 of the Charter on account of the conditions of his detention'.⁸⁷

127. I consider that the situation in which it is alleged that there is a risk of infringement of the fundamental right to a fair trial before a tribunal previously established by law, guaranteed by the second paragraph of Article 47 of the Charter, in the event that the person sought is surrendered, must be distinguished from the situation in which a risk of infringement of Article 4 of the Charter is alleged on account of the conditions of detention in the issuing Member State.⁸⁸ In the absence of systemic or generalised deficiencies in the functioning of the judicial system of the issuing Member State, the possibility of effective judicial protection in the issuing Member State of the fundamental right to a fair trial before a tribunal previously established by law, guaranteed by the second paragraph of Article 47 of the Charter, seems to me to be decisive in ruling out the existence of a real risk of infringement of that right. Indeed, given that this concerns procedural matters, the judicial review that might be carried out in the issuing Member State would be apt to remedy any irregularity in the jurisdiction of the issuing judicial authority.

128. I will conclude my examination of the third to sixth questions referred for a preliminary ruling by making a number of observations regarding the content of the first stage of the examination to be carried out by the executing judicial authority.

129. It is clear from the Court's case-law that, 'as a first step in that examination, the executing judicial authority must make a general assessment of whether there is a real risk of breach of the fundamental right to a fair trial, connected in particular with ... a failure to comply with the requirement for a tribunal established by law, on account of systemic or generalised deficiencies in that Member State'.⁸⁹ That evaluation calls for an 'overall assessment',⁹⁰ which must be based on 'objective, reliable, specific and duly updated material'.⁹¹ That assessment must be carried out having regard to the standard of protection of the fundamental right that is guaranteed by the second paragraph of Article 47 of the Charter.⁹² The Court has held, in relation to a judicial appointment procedure, that not every irregularity in such a procedure can be regarded as

⁸⁶ See the judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)* (C-220/18 PPU, EU:C:2018:589, paragraph 73).

⁸⁷ See the judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)* (C-220/18 PPU, EU:C:2018:589, paragraph 74).

⁸⁸ Again, the differences in nature of various fundamental rights will have an impact on the reasoning. See, on this point, the Opinion of Advocate General Campos Sánchez-Bordona in *Generalstaatsanwaltschaft (Conditions of detention in Hungary)* (C-220/18 PPU, EU:C:2018:547), in which the Advocate General stated that, 'in so far as it is, ultimately, the guarantee of an absolute right, which must, by its very nature, receive preventive rather than remedial protection, I believe that, for all its relevance, the existence of an effective system of remedies might not be sufficient if the executing court has legitimate doubts regarding the possibility that the person specifically sought might *immediately* suffer inhuman or degrading treatment, irrespective of whether that infringement is subsequently redressed through effective legal remedies in the issuing State' (point 57). As the Belgian Government stated at the hearing, in the case of the fundamental right protected by Article 4 of the Charter, recourse to a judicial remedy will not always make it possible to redress the infringement relied on, since that infringement may occur in the meanwhile.

⁸⁹ Judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraph 67 and the case-law cited.

⁹⁰ Judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraphs 74 and 77.

⁹¹ Judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraph 52 and the case-law cited.

⁹² See, in particular, the judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraph 68 and the case-law cited.

constituting a breach of the fundamental right to a tribunal previously established by law, within the meaning of that provision.⁹³ That would require, according to the Court, an irregularity of a particular kind and of a particular gravity.⁹⁴

130. The Court has thus adopted a standard of protection of that fundamental right comparable to the standard which emerges from the case-law of the ECtHR. Indeed, while the ECtHR considers itself competent to verify whether national law complies with the requirement of a tribunal established by law, it nevertheless considers that, having regard to the general principle according to which it is in the first place for the national courts themselves to interpret the provisions of domestic law, it may not question their interpretation, unless there has been a flagrant violation of domestic law.⁹⁵ I infer from these elements of the ECtHR's case-law that it is only in the event of a manifest violation of the rules of national law relating to the jurisdiction of the courts, exceeding the interpretative discretion which national courts must be allowed, that an infringement of Article 6(1) ECHR may be found. Consequently, the seriousness of any such infringement must reach a high threshold in order for it to be found that the fundamental principles underlying the requirement of a 'tribunal established by law', within the meaning of Article 6(1) ECHR, have been violated.⁹⁶

131. To require an executing judicial authority to verify the existence of systemic or generalised deficiencies in the functioning of the judicial system of the issuing Member State before identifying a real risk of infringement in that Member State of the fundamental right to a fair trial before a tribunal established by law, guaranteed by the second paragraph of Article 47 of the Charter, seems to me to be consistent with the high threshold of seriousness which the ECtHR has set with regard to infringements of the right to a 'tribunal established by law' within the meaning of Article 6(1) ECHR. Moreover, the ECtHR has on several occasions taken account of the specific nature of an area of freedom, security and justice which relies on the principle of mutual recognition, the need for various competing interests to be reconciled and the need for the executing judicial authority to rely on a sufficient factual basis.⁹⁷

132. In short, the requirement of systemic or generalised deficiencies in the functioning of the judicial system of the issuing Member State accords with the requirement that the risk of infringement of the fundamental right to a fair trial must reach a high threshold of seriousness in order to result in a refusal to execute a European arrest warrant. In that it helps to ensure that any

⁹³ See the judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraph 72.

⁹⁴ See, in particular, the judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraph 73 and the case-law cited.

⁹⁵ See, in particular, the judgment of the ECtHR of 12 July 2007, *Jorgic v. Germany* (CE:ECHR:2007:0712JUD007461301, § 65). The ECtHR has also clarified that, 'when examining whether there has been a breach of the relevant domestic rules in a given case, the Court will in principle defer to the national courts' interpretation and application of domestic law – unless their findings are arbitrary or manifestly unreasonable': ECtHR, 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418, § 251).

⁹⁶ See, with regard to alleged failures to meet the requirement of a 'tribunal established by law' in a judicial appointment process, the judgment of the ECtHR of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418, § 234). In that judgment, the ECtHR applied a test in three cumulative stages (§ 243). First, the ECtHR must, in principle, find that there is a manifest breach of domestic law (§ 244). Secondly, the breach in question must be assessed in the light of the object and purpose of the requirement of a 'tribunal established by law', namely to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers, which means that only those breaches that relate to the fundamental rules of the procedure for appointing judges – that is, breaches that affect the essence of the right to a 'tribunal established by law' – are likely to result in a violation of that right (§§ 246 and 247). Thirdly, the ECtHR considers that the review conducted by national courts, if any, as to the legal consequences – in terms of an individual's ECHR rights – of a breach of a domestic rule on judicial appointments plays a significant role in determining whether such breach amounted to a violation of the right to a 'tribunal established by law' (§ 248). I think it pertinent to relate that third stage to what I have said on the subject of the importance of judicial review, in the issuing Member State, of the observance of the fundamental right to a fair trial before a tribunal previously established by law, guaranteed by the second paragraph of Article 47 of the Charter.

⁹⁷ See, in particular, the judgment of the ECtHR of 9 July 2019, *Castañón v. Belgium* (CE:ECHR:2019:0709JUD000835117).

refusal to execute a warrant remains an exception, that requirement ultimately preserves the necessary balance between the protection of that fundamental right and the general interest objectives pursued by the European arrest warrant mechanism.

133. The necessary inference from all of the foregoing is, in my view, that an executing judicial authority may not refuse to execute a European arrest warrant where, like the Brussels Court of Appeal, it itself rules out the existence of systemic or generalised deficiencies in the functioning of the judicial system of the issuing Member States and then expresses doubts as to the observance of the fundamental right to a fair trial of the person whose surrender is requested on the basis of a report of the Working Group on Arbitrary Detention and judgments of the ECtHR, which, though they may in theory constitute evidence,⁹⁸ do not, in the case in hand, substantiate the existence of such deficiencies in that Member State. I would add that a refusal to execute must not be based on an uncertain interpretation of the procedural law of the issuing Member State and must not be decided upon without first requesting from the issuing judicial authority, pursuant to Article 15(2) of Framework Decision 2002/584, up-to-date supplementary information regarding legal remedies and how legal debate in the issuing Member State stands on verification of whether the jurisdiction of the issuing authority is consistent with that fundamental right.⁹⁹

134. In light of all the foregoing considerations, I propose that the Court's answer to the third to sixth questions referred for a preliminary ruling should be that Article 1(3) of Framework Decision 2002/584 must be interpreted as meaning that, where the executing judicial authority called upon to decide on the surrender of a person for whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution does not have before it evidence which, after an overall assessment based on objective, reliable, specific and duly updated material, demonstrates a real risk of infringement of the fundamental right to a fair trial before a tribunal previously established by law, guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies in the functioning of the judicial system of the issuing Member State, that authority may not refuse to give effect to that European arrest warrant.

D. The seventh question referred for a preliminary ruling

135. By the seventh question referred for a preliminary ruling, the national court asks, in essence, whether Framework Decision 2002/584 must be interpreted as precluding an issuing judicial authority from issuing a new European arrest warrant for the same individual and addressed to the same executing judicial authority, where that executing authority has refused to execute a previous European arrest warrant in circumstances contrary to EU law.

136. In that regard, I would immediately observe that Framework Decision 2002/584 does not contain any provision that limits the issue of European arrest warrants. Moreover, the Court has already acknowledged, on examining questions of admissibility, that several European arrest warrants may be issued successively against the same requested person.¹⁰⁰

⁹⁸ See, in particular, the judgment in *Aranyosi and Căldăraru*, paragraph 89.

⁹⁹ It must be borne in mind in this connection that the Court has held that 'the issuing and executing judicial authorities must, in order to ensure effective cooperation in criminal matters, make full use of the instruments provided for, inter alia, in ... Article 15 of Framework Decision 2002/584 in order to foster mutual trust on the basis of that cooperation': see, in particular, the judgment in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, paragraph 49 and the case-law cited.

¹⁰⁰ See, to that effect, the judgments in *AY (Arrest warrant – Witness)* and *Spetsializirana prokuratura (Letter of rights)*.

137. Furthermore, the objective of combatting impunity pursued by Framework Decision 2002/584 militates in favour of the possibility of issuing several European arrest warrants, against the same person and addressed to the same executing judicial authority, for the purposes of prosecuting that person or enforcing a sentence passed on him or her. That being so, to impose a limit on the number of European arrest warrants that may be issued would be tantamount to calling into question the effectiveness of the system of judicial cooperation between the Member States and undermining efforts toward the effective prosecution of offences within the area of freedom, security and justice.

138. That is especially true where a previous refusal to execute a warrant proves to be contrary to EU law. In a situation such as that at issue in the main proceedings, the issuing judicial authority must be able to act upon the interpretation of Framework Decision 2002/584 which it has requested and which has been provided to it by the Court in a judgment on a reference for a preliminary ruling and, where appropriate, to issue a new European arrest warrant. In such a context, the issuing judicial authority must of course consider whether, in the light of the specific circumstances of the case, the issue of a new warrant would be proportionate.¹⁰¹

IV. Conclusion

139. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Tribunal Supremo (Supreme Court, Spain) for a preliminary ruling as follows:

- (1) 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 precluding an executing judicial authority from refusing to execute a European arrest warrant on a ground for non-execution which is provided for in its national law but which is not stated in that framework decision. However, Framework Decision 2002/584 does not preclude a provision of national law implementing Article 1(3) of that framework decision that provides that an executing judicial authority may refuse to give effect to a European arrest warrant where it has valid grounds for believing that its execution would have the effect of infringing the fundamental rights of the person concerned, provided that that provision is applied in accordance with the case-law of the Court laying down the strict conditions under which such a refusal is permissible.
- (2) Article 6(1) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, must be interpreted as not allowing an executing judicial authority to check whether an issuing judicial authority has competence, under the law of the issuing Member State, to issue a European arrest warrant.
- (3) Article 1(3) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, must be interpreted as meaning that, where the executing judicial authority called upon to decide on the surrender of a person for whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution does not have before it evidence which, after an overall assessment based on objective, reliable, specific and duly updated material, demonstrates a real risk of infringement of the fundamental right to a fair trial before a tribunal previously established by law, guaranteed by the second paragraph of Article 47 of

¹⁰¹ See, in particular, the judgment of 27 May 2019, *PF (Prosecutor General of Lithuania)* (C-509/18, EU:C:2019:457, paragraph 49).

the Charter of Fundamental Rights of the European Union, on account of systemic or generalised deficiencies in the functioning of the judicial system of the issuing Member State, that authority may not refuse to give effect to that European arrest warrant.

- (4) Framework Decision 2002/584, as amended by Framework Decision 2009/299, must be interpreted as not precluding an issuing judicial authority from issuing a new European arrest warrant for the same individual and addressed to the same executing judicial authority, where that executing authority has refused to execute a previous European arrest warrant in circumstances contrary to EU law, after considering whether the issue of a new warrant would be proportionate.