



Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 15 December 2022¹

Case C-700/21

O.G.

intervener:

Presidente del Consiglio dei Ministri

(Request for a preliminary ruling from the Corte costituzionale (Constitutional Court, Italy))

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – Framework Decision 2002/584/JHA – European arrest warrant – Optional grounds for refusal to surrender – Respect for private and family life – Nationals of a third country staying or residing in the territory of a Member State)

1. The Corte costituzionale (Constitutional Court, Italy) seeks from the Court of Justice an interpretation of Article 4(6) of Framework Decision 2002/584/JHA,² the transposition of which into Italian law may be in breach of the Italian Constitution.
2. This reference provides the Court with an opportunity to expand upon its already extensive case-law concerning arrest and surrender warrants ('EAWs'). In particular, it will be called upon to determine whether the discretion granted to Member States in Article 4(6) of Framework Decision 2002/584 allows them to avail themselves of a ground for optional non-execution of an EAW which will not apply to nationals of a third country.

¹ Original language: Spanish.

² Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24).

I. Legislative framework

A. *European Union law*

1. *Framework decision 2002/584*

3. Recital 12 states:

‘This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 [TEU] and reflected in the Charter of Fundamental Rights of the European Union, [³] in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a[n] [EAW] has been issued when there are reasons to believe, on the basis of objective elements, that the said [EAW] 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.

This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.’

4. Article 1 (‘Definition of the [EAW] and obligation to execute it’) provides:

‘1. The [EAW] is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

2. Member States shall execute any [EAW] on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [TEU].’

5. Article 4 (‘Grounds for optional non-execution of the European arrest warrant’) provides:

‘The executing judicial authority may refuse to execute the [EAW]:

...

6. if the [EAW] has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law;

...’

³ ‘The Charter’.

6. Article 5 ('Guarantees to be given by the issuing Member State in particular cases') states:

'The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

...

3. where a person who is the subject of a[n] [EAW] for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.'

2. *Framework Decision 2008/909/JHA*⁴

7. Recital 9 states:

'Enforcement of the sentence in the executing State should enhance the possibility of social rehabilitation of the sentenced person. In the context of satisfying itself that the enforcement of the sentence by the executing State will serve the purpose of facilitating the social rehabilitation of the sentenced person, the competent authority of the issuing State should take into account such elements as, for example, the person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State.'

8. According to recital 12:

'This Framework Decision should also, *mutatis mutandis*, apply to the enforcement of sentences in the cases under Articles 4(6) and 5(3) of [Framework Decision 2002/584]. This means, inter alia, that, without prejudice to that Framework Decision, the executing State could verify the existence of grounds for non-recognition and non-enforcement as provided in Article 9 of this Framework Decision, including the checking of double criminality to the extent that the executing State makes a declaration under Article 7(4) of this Framework Decision, as a condition for recognising and enforcing the judgment with a view to considering whether to surrender the person or to enforce the sentence in cases pursuant to Article 4(6) of [Framework Decision 2002/584].'

⁴ Council Framework Decision of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ 2008 L 327, p. 27).

9. Recital 16 states:

‘This Framework Decision should be applied in accordance with applicable Community legislation, including in particular ... Directive 2003/86/EC [⁵] ... [and] ... Directive 2003/109/EC [⁶] ...’

10. Article 3 (‘Purpose and scope’) states:

‘1. The purpose of this Framework Decision is to establish the rules under which a Member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognise a judgment and enforce the sentence.

2. This Framework Decision shall apply where the sentenced person is in the issuing State or in the executing State.

3. This Framework Decision shall apply only to the recognition of judgments and the enforcement of sentences within the meaning of this Framework Decision. ...’

11. Article 25 (‘Enforcement of sentences following a[n] [EAW]’) states:

‘Without prejudice to Framework Decision [2002/584], provisions of this Framework Decision shall apply, *mutatis mutandis* to the extent they are compatible with provisions under that Framework Decision, to enforcement of sentences in cases where a Member State undertakes to enforce the sentence in cases pursuant to Article 4(6) of that Framework Decision, or where, acting under Article 5(3) of that Framework Decision, it has imposed the condition that the person has to be returned to serve the sentence in the Member State concerned, so as to avoid impunity of the person concerned.’

B. National law. Legge 22 aprile 2005, n. 69⁷

12. According to Article 18bis(1)(c):

Surrender may be refused, ‘where the EAW has been issued for the purpose of executing a custodial sentence or detention order, if the requested person is an Italian national or a national of another Member State of the European Union who is lawfully and actually resident or staying in Italian territory, on condition that the appeal court orders that the custodial sentence or detention order is enforced in Italy in accordance with domestic law’.

⁵ Council Directive of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12). Article 17 thereof provides that, ‘Member States shall take due account of the nature and solidity of the person’s family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family’.

⁶ Council Directive of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44), as amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 (OJ 2011 L 132, p. 1). Article 12(3) thereof provides that, ‘before taking a decision to expel a long-term resident, Member States shall have regard to the following factors: (a) the duration of residence in their territory; (b) the age of the person concerned; (c) the consequences for the person concerned and family member members; (d) links with the country of residence or the absence of links with the country of origin’.

⁷ Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d’arresto europeo e alle procedure di consegna tra Stati membri (Law No 69 of 22 April 2005 laying down provisions aimed at bringing domestic law into line with Framework Decision ...) (GURI No 98 of 29 April 2005), in the version applicable in the main proceedings; ‘Law No 69 of 2005’.

13. In accordance with Article 19(1):

‘Execution of the EAW by the Italian judicial authority ... is subject to the following conditions:

...

(b) if the EAW was issued for the purpose of bringing a criminal prosecution against a[n] [Italian] national or a resident of the Italian State, surrender shall be subject to the condition that the person concerned, after being heard, is returned to the executing Member State in order to serve there any custodial sentence or detention order that may be imposed on him or her in the issuing Member State.’⁸

II. Facts, dispute and questions referred for a preliminary ruling

14. O. G., a Moldovan national, was finally convicted and sentenced in Romania to five years’ imprisonment.⁹ The referring courts notes that, according to the court which itself referred the constitutional question to the referring court, O. G. ‘has stable family and occupational roots in Italy’.¹⁰

15. On 13 February 2012, the Judecătoria Braşov (Court of First Instance, Braşov, Romania) issued an EAW against O. G. for the purpose of enforcing the sentence.

16. On 7 July 2020, the Corte d’appello di Bologna (Court of Appeal, Bologna, Italy) ordered that the requested person be surrendered to the issuing judicial authority.

17. On 16 September 2020, following the appeal brought by O. G., the Corte di cassazione (Court of Cassation, Italy) set aside the judgment of the appeal court, to which it referred the case back, asking it to consider whether an issue of constitutionality should be referred to the Corte costituzionale (Constitutional Court).

18. The appeal court raised the matter before the Corte costituzionale (Constitutional Court) and asked it whether Article 18bis(1)(c) of Law No 69 of 2005 was consistent with Articles 2, 3, 11, 27(3) and 117(1) of the Italian Constitution.

19. The appeal court’s doubts were based, in essence, on the fact that, in accordance with the provision incorporating into Italian law the ground for optional non-execution under Article 4(6) of Framework Decision 2002/584:

– the option not to execute the EAW is limited to Italian nationals and nationals of other Member States of the European Union, if they are lawfully and actually resident or staying in Italian territory. It therefore excludes nationals of a third country, who cannot serve in Italy a

⁸ According to the referring court, both this article and that cited in the previous point were amended by Legislative Decree No 10 of 2 February 2021 and now refer both to Italian nationals and to nationals of other Member States, the latter being required to have been actually resident [in Italy] for a period of at least five years. The legislation applicable *ratione temporis* to this case, however, is that previously in force (first subparagraph of paragraph 4 of the order for reference).

⁹ He was convicted and sentenced for offences of tax evasion and misappropriation of sums owed in default of payment of income tax and VAT which he had committed in his capacity as director of a limited liability company between September 2003 and April 2004.

¹⁰ The Corte costituzionale (Constitutional Court) states that ‘it is not for it to assess whether O. G.’s roots can be regarded as stable and genuine or whether his stay in national territory can be regarded as legitimate, these being matters which fall exclusively to the court in the main proceedings to assess’ (paragraph 5 of the order for reference).

sentence imposed in the issuing Member State even if they are lawfully and actually resident or staying in Italian territory and have established significant and stable links there;

- that exclusion might not be consistent with respect for the requested person’s personal and family life if he or she has strong social and family links in Italy, or with the ‘rehabilitative function of the sentence’.

20. The Corte costituzionale (Constitutional Court), after noting that this aspect of Article 4(6) of Framework Decision 2002/584 has not yet been addressed by the Court of Justice,¹¹ has referred the following questions to it:

- ‘(1) Does Article 4(6) of [Framework Decision 2002/584] interpreted in the light of Article 1(3) of that decision and Article 7 of the Charter ..., preclude legislation, such as the Italian legislation, that – in the context of a[n] [EAW] procedure for the purpose of executing a custodial sentence or detention order – absolutely and automatically precludes the executing judicial authorities from refusing to surrender third-country nationals staying or residing in Italian territory, irrespective of the links those individuals have with that territory?
- (2) If the answer to the first question is in the affirmative, what criteria and assumptions are used to establish that such links are to be regarded as so significant as to require the executing judicial authority to refuse surrender?’

III. Procedure before the Court

21. The request for a preliminary ruling was registered at the Court on 22 November 2021. It was given priority treatment.

22. Written observations have been lodged by the Austrian, Hungarian and Italian Governments and the European Commission.

23. The public hearing held on 11 October 2022 was attended only by the Italian Government and the Commission.

IV. Analysis

A. First question referred for a preliminary ruling

24. The first question referred for a preliminary ruling seeks to determine, in essence, whether Article 4(6) of Framework Decision 2002/584, read in the light of Article 1(3) thereof and Article 7 of the Charter, is compatible with Italian law, which precludes a national of a third country who has received a custodial sentence in the State issuing the EAW (Romania) from serving that sentence in the executing State (Italy), where he appears¹² to be lawfully and stably resident.

¹¹ Second subparagraph of paragraph 7 of the order for reference.

¹² See the referring court’s reservation in this regard, reproduced in footnote 10.

25. In accordance with Article 4(6) of Framework Decision 2002/584, the judicial authority may refuse to execute an EAW issued for the purposes of execution of a custodial sentence or detention order, provided that two, cumulative, conditions are met:

- The requested person must be staying in, or be a national or a resident of, the executing Member State.
- The executing State must undertake to execute the sentence or detention order in accordance with its domestic law.

26. When incorporating the ground for optional non-execution into its legal system, the Italian legislature introduced two modifications:

- First, to the condition of being an (Italian) *national* it added that of being a *national of another Member State* of the European Union.¹³ It thus extended the group of persons eligible for non-surrender to the State issuing the EAW in return for the serving of their sentence in Italy, provided that they are lawfully and stably resident or staying in Italian territory.
- Second, it excluded *nationals of a third country* from eligibility for that option. It therefore restricted the condition of *residing or staying* in the executing Member State that is laid down in Article 4(6) of Framework Decision 2002/584. This means that nationals of a third country, even if they are resident or staying in Italian territory, will in any event be surrendered (if the other required circumstances are present) to the State issuing the EAW.

27. In order to answer the first question raised by the referring court, it seems appropriate to analyse: (a) the margin of discretion available to Member States in implementing Article 4 of Framework Decision 2002/584; (b) how that provision is to be interpreted from the point of view of the right to equality; and (c) what, if any, impact the answer to this question may have on other fundamental rights protected by the Charter.

1. The margin of discretion available to Member States in incorporating Article 4 of Framework Decision 2002/584 into domestic law

28. It is the settled case-law of the Court that, when implementing Article 4 of Framework Decision 2002/584, and in particular paragraph 6 thereof, Member States have ‘a margin of discretion’.¹⁴ That margin of discretion does not, however, include the option to extend the grounds for non-execution exhaustively listed¹⁵ in Framework Decision 2002/584.¹⁶

¹³ The Corte costituzionale (Constitutional Court), in judgment No 227 of 2010 (IT:COST:2010:227), and ‘on the basis in particular of the judgments in *Kozłowski* (judgment of 17 July 2008, C-66/08, EU:C:2008:437; “the judgment in *Kozłowski*”) and *Wolzenburg* (judgment of 6 October 2009, C-123/08, EU:C:2009:616; “the judgment in *Wolzenburg*”)), declared to be unconstitutional ‘the Italian approach to transposing Framework Directive ... in so far as it did not provide for refusals to surrender – in addition to Italian citizens – citizens of other Member States of the European Union lawfully and actually resident or staying in Italian territory, for the purposes of execution of a sentence ... in Italy’ (paragraph 8.2.4 of the order for reference).

¹⁴ Judgment in *Wolzenburg*, paragraph 61. See to the same effect the judgments of 29 April 2021, *X* (European arrest warrant – *Ne bis in idem*) (C-665/20 PPU, EU:C:2021:339, paragraph 41), and of 13 December 2018, *Sut*, C-514/17, EU:C:2018:1016; ‘the judgment in *Sut*’, paragraph 42.

¹⁵ In general terms, see the judgment of 25 July 2018, *Minister for Justice and Equality* (Deficiencies in the system of justice) (C-216/18 PPU, EU:C:2018:586, paragraph 41).

¹⁶ Which is not to say that the principles of mutual recognition and trust between Member States, the true ‘cornerstone’ of judicial cooperation in criminal matters, may not be limited ‘in exceptional circumstances’ such as those present in the proceedings that gave rise to, inter alia, the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198).

29. In accordance with that case-law, execution of the EAW constitutes the rule, while refusal to execute it is intended to be an exception which must be interpreted strictly.¹⁷

30. There is nothing to stop Member States from choosing to limit, or not to take up, the option granted to them by Article 4 of Framework Decision 2002/584. Since these are grounds for optional non-execution, each Member State is free to decide when not to apply them: in such circumstances, the executing judicial authorities of the Member State concerned *cannot refuse* to surrender a person requested under an EAW.¹⁸

31. In fact, as the Court has stated, the decision by Member States, as permitted by Framework Decision 2002/584, not to avail themselves of this ground for non-execution ‘... merely reinforces the system of surrender introduced by that Framework Decision to the advantage of an area of freedom, security and justice’.¹⁹

32. The reason for this is that, ‘by limiting the situations in which the executing judicial authority may refuse to execute a[n] [EAW], such legislation only *facilitates the surrender* of requested persons, in accordance with the principle of mutual recognition set out in Article 1(2) of Framework Decision 2002/584, which constitutes *the essential rule* introduced by that decision’.²⁰

33. However, the national legislature’s freedom of choice is not unlimited. There are several reasons why this is the case.

34. First, Framework Decision 2002/584 does not change ‘the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [TEU]’.²¹ So far as the present case is concerned, therefore, Article 4(6) of that decision does not permit the transposition thereof by Member States in a manner which results in the infringement of fundamental rights or the principles of Article 6 TEU.

35. Second, the margin of discretion available to Member States in transposing the aforementioned Article 4(6) is restricted not only by the terms of that provision but also by the purpose it serves within Framework Decision 2002/584 and by the general context of which that decision forms part, that is to say by EU law as a whole.

36. From that point of view, I concur with the Commission that the approach adopted by the Italian legislature is not supported by the wording of Article 4(6) of Framework Decision 2002/584, the objective which that provision pursues or the context of which it forms part.²²

37. As regards its *wording*, Article 4(6) of Framework Decision 2002/584 does not attach any relevance to nationalities other than that of the executing Member State. It provides only that the requested person must be a national of that State.

¹⁷ See, inter alia, the judgment of 17 December 2020, *Openbaar Ministerie* (Independence of the issuing judicial authority) (C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paragraph 37 and the case-law cited.

¹⁸ Judgment in *Wolzenburg*, paragraph 58.

¹⁹ Judgment in *Wolzenburg*, paragraph 58.

²⁰ Judgment in *Wolzenburg*, paragraph 59. Emphasis added. See to the same effect the judgment in *Sut*, paragraphs 43 and 44.

²¹ Article 1(3) of Framework Decision 2002/584.

²² An approach which, as the Commission stated at the hearing, was not adopted by the ‘vast majority’ of Member States in taking up the option provided for in Article 4(6) of Framework Decision 2002/584 without attaching further conditions to it.

38. Nationalities other than that of the executing Member State are therefore immaterial and are replaced by the category of ‘residence’ (or stay). The scope of Article 4(6) of Framework Decision 2002/584 is defined, for nationals of any Member State other than the executing State, by reference to the concept of residence (or stay).

39. As regards the *objective* of Article 4(6) of Framework Decision 2002/584, the Court has stated that it is ‘in particular ... [to enable] the executing judicial authority to give particular weight to the possibility of increasing the requested person’s chances of reintegrating into society when the sentence imposed on him expires’.²³

40. So far as attaining the objective of reintegration is concerned, the nationality of the requested person is not in itself relevant: what that provision seeks to ensure is that anyone residing or staying²⁴ in the executing Member State qualifies for that option.

41. With respect to the *normative context* in which Article 4(6) of Framework Decision 2002/584 must be interpreted, it is appropriate to mention Framework Decision 2008/909 on the mutual recognition of judgments in criminal matters. Its inclusive scope covers foreign nationals of any nationality, who, if they have roots of some degree in the executing Member State,²⁵ also benefit from the purpose of social reintegration served by the enforcement of custodial sentences.

42. In accordance with Article 25 of Framework Decision 2008/909, the latter is to apply, *mutatis mutandis* to the extent that it is compatible with Framework Decision 2002/584, to the enforcement of sentences under Article 4(6) of the latter decision.²⁶

43. Everything would therefore suggest that the EU legislature, sensitive to the objective of rehabilitation that is pursued by the serving of sentences,²⁷ intended Article 4(6) of Framework Decision 2002/584 as a means of attaining that objective, in cases where the specific circumstances listed above are present, without nationality (other than nationality of the executing State itself) being a relevant factor.

2. Article 4 of Framework Decision 2002/584 and the principle of equality

44. The Court has held that, in the light of the foregoing, nationals of the Member State of execution and nationals of other Member States staying or resident in the Member State of execution and who are integrated into the society of that State should not, as a rule, be treated differently.²⁸

²³ Judgment in *Kozłowski*, paragraph 45.

²⁴ *Actually* residing, to be more precise, as follows from the case-law of the Court that forms the basis of the judgment in *Wolzenburg*.

²⁵ According to recital 9 of Framework Decision 2008/909, ‘in the context of satisfying itself that the enforcement of the sentence by the executing State will serve the purpose of facilitating the social rehabilitation of the sentenced person, the competent authority of the issuing State should take into account such elements as, for example, the person’s attachment to the executing State, whether he or she considers it the place of *family, linguistic, cultural, social or economic and other links to the executing State*’. Emphasis added.

²⁶ As the referring court states (paragraph 8.4 of its order for reference), other provisions of EU law refer to the protection of the interest of third-country nationals in not being removed from the Member State in which they are actually residing. A reference to these is contained in recital 16 of Framework Decision 2008/909: ‘This Framework Decision should be applied in accordance with applicable Community legislation, including in particular Council Directive 2003/86/EC [family reunification] [and] ... Directive 2003/109/EC [status of third-country nationals who are long-term residents].’

²⁷ In paragraph 8.5 of the order for reference, the Corte costituzionale (Constitutional Court) cites the case-law of the European Court of Human Rights (ECtHR) on the social rehabilitation function of punishment.

²⁸ Judgment of 5 September 2012, *Lopes Da Silva Jorge* (C-42/11, EU:C:2012:517, paragraph 40). In the same vein, I have noted above the fact that the Corte costituzionale (Constitutional Court) declared the Italian law reserving for exercise only in relation to its own nationals the right to refuse surrender under Article 4(6) of Framework Decision 2002/584 to be unconstitutional.

45. The question now is whether a rule that applies to the nationals of Member States must also apply to nationals of third countries in the context of the non-execution of an EAW.

46. In my opinion, there is no reason why this should not be the case.

47. It is true that there is no reason why the legal status of nationals of a third country should generally be regarded as being the same as that of nationals of Member States.²⁹ Nonetheless, a difference in treatment between the former and the latter cannot prevail where the EU secondary legislation in question itself provides, implicitly or explicitly, for a uniform regime for both groups. In those circumstances, the principle of equality before the law laid down in Article 20 of the Charter applies.

48. Given the inviolability of the obligation to respect the fundamental rights and principles enshrined in Article 6 TEU, Article 1(3) of Framework Decision 2002/584 precludes Article 4(6) thereof from permitting forms of transposition by Member States which have the effect of infringing the Charter or the fundamental principles of the European Union.

49. Those principles include the principle of equality, which is guaranteed by Article 2 TEU and Article 20 of the Charter. Both of those articles provide a sufficiently robust benchmark to support the assertion that Article 4(6) of Framework Decision 2002/584 has not been incorporated into Italian law in a manner compatible with them.

50. In particular, the principle of equality before the law has to operate in the manner I have proposed given that Article 4(6) of Framework Decision 2002/584 does not attach any relevance to the criterion of nationality, which it replaces with that of residence (or stay), the only exception to this being in relation to nationals of the Member State of execution.

51. Thus, the scope *ratione personae* of Article 4(6) of Framework Decision 2002/584 covers persons who, if they are not nationals of the Member State of execution, are staying or resident in that Member State.³⁰ The law before which nationals of a third country are entitled to be treated equally does not therefore provide any basis for treating them differently from nationals of Member States of the European Union.

52. The net effect of the margin of discretion available when it comes to transposing that provision of EU law cannot therefore be a set of rules which treats nationals of third countries worse than nationals of Member States. As noted by the Commission, when considered in the light of the objective of Article 4(6) of Framework Decision 2002/584, the situation of a national of a third country actually resident in the State of execution is comparable to that of a national of a Member State.

²⁹ Article 18 TFEU, which prohibits any discrimination on grounds of nationality, ‘is not intended to apply to cases of a possible difference in treatment between nationals of Member States and those of third States’ (see judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, EU:C:2020:262, paragraph 40).

³⁰ Judgment in *Kozłowski*, paragraph 34, to which Advocate General Mengozzi also referred in his Opinion in *Lopes Da Silva Jorge* (C-42/11, EU:C:2012:151). He recalled that the Court ‘... does not regard the scope *ratione personae* of Article 4(6) of Framework Decision 2002/584 as covering, as a matter of choice, either the nationals of the executing Member State or the nationals of other Member States resident or staying in its territory, or both categories of persons. The Court held in paragraph 34 of *Kozłowski*, that, “according to Article 4(6) of [...] Framework Decision [2002/584], the scope of that ground for optional non-execution is limited to persons who, if not nationals of the executing Member State, are ‘staying’ or ‘resident’ there”.

53. For these purposes, stable and actual residence by a national of a third country entails in principle a degree of integration into the country where he or she is staying equivalent to that of the nationals of that State. Such a link with the executing Member State is capable of facilitating the social reintegration of the requested person once the custodial sentence imposed on him or her has been enforced there.³¹

3. Impact of other fundamental rights protected by the Charter on the application of Article 4 of Framework Decision 2002/584

54. In my opinion, the foregoing is sufficient to support the conclusion that the contested national provision is incompatible with Article 4(6) of Framework Directive 2002/584. I do not therefore consider it necessary to analyse the (further) impact of other fundamental rights of the Charter on the interpretation of that article.

55. The rights in question include those enshrined in Article 7 of the Charter (respect for private and family life), which the referring court cites, and in Article 24(3) of the Charter (the right of the child to maintain on a regular basis a personal relationship and direct contact with both his or her parents), on which the Commission relies.³²

56. It stands to reason that those rights are not capable of overriding the enforcement of a custodial sentence. They are, however, capable of supporting the choice that such a sentence be served in one Member State (where the EAW is executed) rather than in another (where the EAW is issued), in cases involving a person residing or staying in the former State who retains family links there.

57. This operates to the benefit of the right of the requested person to maintain the minimum degree of family relations compatible with his or her stay in prison. Those relations will be facilitated in the place where his or her vital interests are located, that is to say in the State where he or she is actually resident.

B. Second question referred for a preliminary ruling

58. In the event that, as I propose, the Court answers the first question referred in the affirmative, the Corte costituzionale (Constitutional Court) wishes to ascertain ‘what criteria and assumptions are used to establish that such links [which a national of a third country has with the executing State] are to be regarded as so significant as to require the executing judicial authority to refuse surrender’.

59. The wording of the second question referred calls in my opinion for two preliminary observations on the conditions for not executing an EAW and the alleged ‘obligation’ to refuse surrender.

³¹ This ensures that there is no impunity. As Advocate General Mengozzi noted in his Opinion in *Lopes Da Silva Jorge* (C-42/11, EU:C:2012:151), ‘... Article 4(6) of Framework Decision 2002/584, on the reading of it which I propose, does not by any means provide for the impunity of the requested person or call into the question the principle of mutual recognition, since the executing State can in fact refuse to execute the European arrest warrant only on the express condition that it undertakes to execute the sentence in its territory, without ever calling into question the decision by which that sentence was imposed. Accordingly, the logic of the mutual recognition of judicial decisions is fully preserved, even in cases where the requested person serves his sentence in the executing Member State and not in the issuing Member State’ (point 39).

³² According to the referring court, the requested person is the father of a minor (fifth subparagraph of paragraph 5 of the order for reference).

1. *Conditions for non-execution of an EAW*

60. The question referred concerns only one of the two conditions which Article 4(6) of Framework Decision 2002/584 attaches to any refusal to surrender the requested person.

61. Article 4(6) of Framework Decision 2002/584 deals first and foremost with the conditions (nationality of, or residence or stay in, the executing State) establishing a link between the requested person and the executing Member State. That link must be sufficient to support his or her social reintegration once the sentence imposed expires.³³

62. However, the provision under examination also lays down another inescapable condition: that the executing Member State give an undertaking³⁴ that the custodial sentence giving rise to the EAW will be enforced there. In the present case, the referring court takes it as read that this condition is met, and confines itself to the condition relating to the requested person's link with the executing Member State.

2. *Obligation to refuse surrender?*

63. Although the referring court refers to the 'obligation' to refuse surrender where the established links are sufficiently relevant, Article 4(6) of Framework Decision 2002/584 does not provide for such an obligation in any circumstances. It simply provides that the judicial authority 'may' refuse to execute the EAW if the conditions laid down in that provision are fulfilled.

64. Just as the principle of mutual recognition, on which the system under Framework Decision 2002/584 is based, does not entail an absolute obligation to execute the EAW,³⁵ so it is also the case, once the ground for optional non-execution at issue here has been incorporated into domestic law, that the executing judicial authority must have a margin of discretion as to whether or not it is appropriate to refuse to execute the EAW.³⁶

65. In the words of the Court:

- 'Legislation of a Member State which implements Article 4(6) of Framework Decision 2002/584 by providing that its judicial authorities are, in any event, obliged to refuse to execute an EAW in the event that the requested person resides in that Member State, without those authorities having any margin of discretion, ... cannot be regarded as compatible with [Framework Decision 2002/584].'³⁷
- '... [W]here a Member State chose to transpose that provision [Article 4(6) of Framework Decision 2002/584] into domestic law, the executing judicial authority must, nevertheless, have a margin of discretion as to whether or not it is appropriate to refuse to execute the EAW. In that regard, that authority must take into consideration the objective of the ground for optional non-execution set out in that provision, which, according to the Court's settled case-law, means enabling the executing judicial authority to give particular weight to the

³³ In general, the judgment of 29 June 2017, *Popławski* (C-579/15, EU:C:2017:503; 'judgment in *Popławski*'), paragraph 21.

³⁴ This must be an 'actual' undertaking, as the Court notes. See to that effect the judgment in *Sut*, paragraph 35.

³⁵ Judgment in *Sut*, paragraph 30.

³⁶ Judgment in *Popławski*, paragraph 21.

³⁷ Judgment in *Popławski*, paragraph 23.

possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires.'³⁸

66. It is not sufficient, therefore, for the executing judicial authority to find that the two conditions laid down in Article 4(6) of Framework Decision 2002/584 are met. It must also ascertain whether there is a legitimate interest in the sentence imposed in the issuing Member State being enforced in the executing Member State.³⁹

67. The answer to the second question referred for a preliminary ruling, concerning the criteria for determining whether the requested person has roots in the executing Member State, should therefore indicate to the referring court that:

- There is no abstract *obligation* laid down by law to refuse to execute an EAW solely because that ground for optional non-execution has been incorporated into domestic law.
- The judicial authority of the executing Member State must ascertain in each case whether there is a legitimate interest in the sentence in question being enforced in that State rather than in the issuing State.

3. *The requested person's roots in the executing State*

68. The ground for optional non-execution set out in Article 4(6) of Framework Decision 2002/584 is based on the possibility of increasing the requested person's chances of reintegrating into society once the sentence imposed on him or her expires. The executing Member State is therefore entitled to pursue such an objective only in respect of persons who have demonstrated a certain degree of integration in the society of that Member State.⁴⁰

69. Consequently, the criteria forming the subject of the referring court's question must make it possible to establish a degree of integration such that the requested person's chances of rehabilitation are significantly greater in the executing Member State than in the issuing Member State.

70. This makes it easier to understand why Article 4(6) of Framework Directive 2002/584, on the one hand, refers to having the nationality of the executing Member State and, on the other, uses the terms 'residing' and 'staying' in that State without distinction:

- Having the nationality of the executing Member States sustains the presumption that the person sought is sufficiently integrated there.⁴¹
- To the extent that what really matters is the degree of integration in the society of the executing Member State, the EU legislature, in using terms indicative of a factual situation (residence or stay), envisages 'situations in which the person who is the subject of a[n] [EAW] has either established his actual place of residence in the executing Member State or has acquired,

³⁸ Judgment in *Popławski*, paragraph 21.

³⁹ Judgment in *Sut*, paragraph 36.

⁴⁰ Judgment in *Wolzenburg*, paragraph 67.

⁴¹ Judgment in *Wolzenburg*, paragraph 68.

following a stable period of presence in that State, certain connections with that State which are of a similar degree to those resulting from residence’.⁴²

71. In particular, ‘in order to determine whether, in a specific situation, there are connections between the requested person and the executing Member State which lead to the conclusion that that person is covered by the term ‘staying’ within the meaning of Article 4(6) of the Framework Decision, it is necessary to make an overall assessment of various objective factors characterising the situation of that person, which include, in particular, the length, nature and conditions of his presence and the family and economic connections which he has with the executing Member State’.⁴³

72. Those objective factors will be particularly relevant where the requested person is not only staying but residing in the executing Member State.

73. I agree with the Commission that the factors listed in recital 9 of Framework Decision 2008/909, concerning the mutual recognition of judgments imposing custodial sentences, may be illustrative in this regard: ‘family, linguistic, cultural, social or economic and other links to the executing State’.

74. As the referring court has rightly noted,⁴⁴ the Court’s case-law contains rulings in which the requested person’s degree of integration in the executing Member State is linked to his or her genuine and actual connection with the society of that Member State.

75. It is true that that case-law was developed for situations in which the requested person was a national of a Member State. However, in keeping with my proposed answer to the first question referred for a preliminary ruling, the criteria for assessing how integrated nationals of Member States are in the executing Member State can also be used for nationals of a third country.

76. Consequently, it is for the executing judicial authority to carry out an overall assessment of the factors enabling it to determine whether the requested person, *whatever his or her nationality*, maintains with the society of the executing Member State a link sufficient to support the anticipation that, if his or her sentence is enforced in the territory of that Member State, he or she has a greater chance of integrating into society and, therefore, of attaining the objective pursued by Article 4(6) of Framework Decision 2002/584.

77. Those factors include the length of the requested person’s stay to date,⁴⁵ the nature and strength of his or her family links with the executing Member State (together, where appropriate, with the absence of such links with his or her country of origin), his or her degree of integration and the linguistic, cultural, occupational, social or economic links which he or she has developed in that Member State.

78. That list is, inevitably, not exhaustive, since a particular case might entail specific circumstances which it will be for the court to consider when ruling on the surrender of the requested person.

⁴² Judgment in *Kozłowski*, paragraph 46.

⁴³ Judgment in *Kozłowski*, paragraph 48.

⁴⁴ Paragraph 8.2 of the order for reference.

⁴⁵ In particular in the case of long-term residents, who form the subject of Directive 2003/109.

V. Conclusion

79. In the light of the foregoing, I propose that the Court's answer to the Corte costituzionale (Constitutional Court, Italy) should be as follows:

Article 4(6) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009,

must be interpreted as meaning that:

It precludes national legislation which, after choosing to adopt one of the grounds for optional non-execution of a European arrest warrant issued for the purpose of executing a custodial sentence or detention order, absolutely precludes the executing judicial authorities from refusing to surrender nationals of a third country staying or residing in national territory, irrespective of any links they may maintain with that territory.

The relevant criteria for establishing that the requested person has sufficient links with the executing Member State are all of those which, when considered as a whole, support the presumption that, if the sentence is enforced in that State, the requested person, whatever his or her nationality, will have a greater chance of reintegration there than in the issuing Member State.

The length of the requested person's stay to date, the nature and conditions of that stay and his or her family, linguistic, cultural, occupational, social and economic links with the executing Member State are some of the factors which the executing judicial authority must take into account in this regard.