Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 6 September 2017 [1]

Case C-367/16

Criminal Proceedings
v
Dawid Piotrowski

(Request for a preliminary ruling from the
Hof van beroep te Brussel (Court of Appeal of Brussels, Belgium))

(Framework Decision 2002/584/JHA — European arrest warrant — Surrender procedures between the Member States — Grounds for mandatory non-execution of the European arrest warrant — Minor — Criminal responsibility — Principle that education should be preferred to punishment — Law relating to children — Article 24(2) of the Charter of Fundamental Rights of the European Union)

1. This request for a preliminary ruling, made by the Hof van beroep te Brussel (Court of Appeal of Brussels, Belgium), relates to the execution in Belgium of a European arrest warrant issued by the Polish authorities on 17 July 2014, in respect of Mr Dawid Piotrowski, a Polish national resident in Belgium, for the purposes of execution of two prison sentences.

2. More specifically, in this case the Court is invited, for the first time, to interpret Article 3(3) 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] ('Framework-Decision 2002/584'). Article 3(3) provides a ground for mandatory non-execution of a European arrest warrant where the person who is the subject of the warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing Member State.

3. In this Opinion, I will explain why Article 3(3) of Framework Decision 2002/584 must be interpreted as meaning that the ground for mandatory non-execution of the warrant which it contains does not apply simply because the perpetrator of the offence in respect of which the warrant was issued is a minor.

4. I will go on to set out why I consider that Article 3(3) of that framework decision, read in the light of Article 24(2) of the Charter of Fundamental Rights of the European Union, [4] must be interpreted as meaning that the executing Member State may refuse to surrender a minor where, having regard to his age at the time of commission of the offence, no penalty can be imposed on him under the law of that

1 Original language: French.

2 OJ 2002 L 190, p. 1.

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

4 'The Charter.'

State. On the other hand, the executing Member State must surrender the minor wherever, having regard to his age at the time of commission of the offence, the penalty which may be imposed in the issuing Member State corresponds, in nature and severity, to one which could equally have been imposed in the executing Member State.

5. In cases where the executing Member State refuses to surrender the minor, it must meet, in relation to that minor, its duty of care with respect to him within the framework of educational support it is required to provide.

I. Legal context

A. European Union law

6. Recitals 5 to 8 and recital 10 of Framework Decision 2002/584 read as follows:

'(5) The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.

(6) The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the "cornerstone" of judicial cooperation.

(7) Since the aim of replacing the system of multilateral extradition built upon the European Convention on Extradition of 13 December 1957 cannot be sufficiently achieved by the Member States acting unilaterally and can therefore, by reason of its scale and effects, be better achieved at Union level, the Council may adopt measures in accordance with the principle of subsidiarity as referred to in Article [3 TEU] and Article 5 [TEU]. In accordance with the principle of proportionality, as set out in the latter Article, this Framework Decision does not go beyond what is necessary in order to achieve that objective.

(8) Decisions on the execution of the European arrest warrant must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender.

…

(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States …'

7. Under Article 1 of the Framework Decision, headed 'Definition of the European arrest warrant and obligation to execute it':

'1. The European arrest warrant 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 European arrest warrant 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 amending the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [TEU].'

8. Article 3 of the Framework Decision lists the grounds for mandatory non-execution of the European arrest warrant. It provides:

'The judicial authority of the Member State of execution (hereinafter "executing judicial authority") shall refuse to execute the European arrest warrant in the following cases:

…

(3) if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.'

9. Under Article 15 of Framework Decision 2002/584:

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

2. If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in Article 17.

3. The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.'

B. Belgian law

10. Article 3(3) of Framework Decision 2002/584 was transposed into Belgian law by means of Article 4(3) of the wet betreffende het Europees aanhoudingsbevel (Law on the European arrest warrant) of 19 December 2003 ('the Law on the European arrest warrant').[5] That article provides that the execution of a European arrest warrant is to be refused if the person to whom it relates cannot yet, in view of his age, be held criminally responsible under Belgian law for the acts on which the arrest warrant is based.

11. The referring court observes, in this regard, that the age of criminal responsibility has been set at 18 under Belgian law. However, a minor over the age of 16 may be held criminally responsible if he has committed traffic offences or if the court with jurisdiction with respect to juveniles has declined to hear his case.

5 *Belgisch Staatsblad* of 22 December 2003, p. 60075.

12. Under Article 36(4) of the wet betreffende de jeugdbescherming, het ten laste nemen van minderjarigen die een als misdrijf omschreven feit hebben gepleegd en het herstel van de door dit feit veroorzaakte schade (Law of 8 April 1965 on youth protection, treatment of minors responsible for an act defined as an offence and compensation for damage caused by such acts) ('the Law on youth protection'),[6] in the version applicable to the main proceedings, the familie- en jeugdrechtbank (Juvenile Court, Belgium) has jurisdiction in respect of public prosecutions relating to persons subject to prosecution for acts defined as an offence committed before reaching 18 years of age.

13. Article 57a(1) of that Law provides that, if a person who is brought before the familie- en jeugdrechtbank (Juvenile Court) because of an act defined as an offence was 16 years old or older at the time of the act, and the familie- en jeugdrechtbank (Juvenile Court) does not consider a care, protection or education measure to be appropriate, that court is to decline to hear the matter, stating reasons for the decision, and is to refer it to the public prosecution service with a view to prosecution, either before a special chamber within the Juvenile Court or before an Assize Court, depending on the offence committed.

14. Article 57a(1) provides, however, that the familie- en jeugdrechtbank (Juvenile Court) may decline to hear the case only if one of the following conditions is satisfied: either that the person concerned has already been the subject of one or more of the measures referred to in Article 37(2), Article 37(2a) or Article 37(2b) of the Law on youth protection or of an offer of restorative justice as referred to in Article 37a to 37d, or that what is at issue is an act as referred to in Articles 373, 375, 393 to 397, 400, 401, 417b, 417c, and 471 to 475 of the Belgian Criminal Code or an attempt to commit an act as referred to in Articles 393 to 397 of that code.

15. Article 57a(1) of the Law on youth protection also provides that the reasons stated by the familie- en jeugdrechtbank (Juvenile Court) must relate to the individual characteristics of the person concerned and of his family and associates, and to his level of maturity. That provision may be applied even if the person concerned has already reached the age of 18 at the time of sentencing. In that case he is treated as a minor.

16. Under Article 57a(2) of the Law on youth protection, the familie- en jeugdrechtbank (Juvenile Court) may decline to hear the case pursuant to that article only after it has carried out social and medical/psychological enquiries. The purpose of medical/psychological enquiries is to evaluate the situation according to the personal characteristics of the person concerned and his family and associates and level of maturity. The nature, frequency and seriousness of the acts with which the person is charged are taken into account in so far as they contribute to the evaluation of his personal characteristics.

17. In certain circumstances, the familie- en jeugdrechtbank (Juvenile Court) may decline to hear a case without causing a social inquiry to be carried out and/or without being in possession of the report on the medical/psychological inquiry.

II. Facts of the dispute in the main proceedings

18. On 17 July 2014 the Sąd Okręgowy w Białymstoku (Regional Court of Białystok, Poland) issued a warrant for the arrest of Mr Piotrowski, a Polish national, on the basis of two convictions that are not subject to appeal.

6 *Belgisch Staatsblad* of 15 April 1965, p. 4014.

19. That court had sentenced Mr Piotrowski, by judgment of 15 September 2011, to a prison term of six months for an act of theft, more specifically the theft of a bicycle and, by judgment of 10 September 2012, to a prison term of two years and six months for giving false information concerning a serious attack. The two sentences imposed are still to be served in their entirety.

20. By order of 6 June 2016, the onderzoekrechter van de Nederlandstalige rechtbank van eerste aanleg Brussel (investigating judge of the Dutch-language Court of First Instance of Brussels, Belgium) ordered that Mr Piotrowski be detained for the purposes of execution of the arrest warrant and surrendered to the Polish authorities, on the basis of the conviction of 10 September 2012. On the other hand, by that same order the investigating judge stated that the arrest warrant could not be executed in relation to the conviction of 15 September 2011 because Mr Piotrowski had been a minor at the material time.

21. On 7 June 2016 the procureur des Konings (Public Prosecutor, Belgium) appealed against that order in respect of the refusal to execute the arrest warrant in relation to the conviction of 15 September 2011. He explained that a minor over the age of sixteen may be the subject of a European arrest warrant issued by the Belgian authorities if the familie- en jeugdrechtbank (Juvenile Court) has declined to hear the case, pursuant to the Law on youth protection. In such a case, that court assesses the minor's situation *in concreto* in order to determine whether he may be held criminally responsible and whether he may be the subject of criminal prosecution.

22. On the other hand, he considered that, in relation to the execution of an arrest warrant issued by the authorities of another Member State, it is not necessary to carry out such an *in concreto* assessment, and that the only matter to be taken into account is the age of the person concerned, that is, whether he had attained the age of 16 at the time of the offence. In the view of the procureur des Konings (Public Prosecutor) it is possible for criminal responsibility to attach from that age and, in the context of the law of surrender and extradition, it is unnecessary to determine what further conditions would have to be satisfied in order for a prosecution to be instituted in accordance with Belgian law. In this regard, the procureur des Konings (Public Prosecutor) observes that the Belgian courts do not have jurisdiction to rule on the criminal proceedings and also cannot impose conditions on the authority requesting the surrender or extradition which are alien to the national law of that authority.

23. The referring court, the Hof van beroep te Brussel (Court of Appeal of Brussels, Belgium) is, in essence, confronted with two contradictory lines of case-law on whether a minor aged 16 may or may not be surrendered in the execution of a European arrest warrant.

24. By judgment of 6 February 2013,[7] the Second Chamber, French-speaking division, of the Hof van cassatie (Court of Cassation, Belgium) held, in essence, that since the declining of jurisdiction procedure is not applicable to a person who is being prosecuted by the authorities of another State, it could not be applied in the context of the execution of a European arrest warrant relating to a minor. Accordingly the minor in question could not be surrendered.

25. However, by judgment of 11 June 2013,[8] le Hof van cassatie (Court of Cassation), in plenary session, held, in essence, that the principle of mutual recognition which underlies the European arrest warrant means that the courts of the executing Member State may not rule on the criminal proceedings. Accordingly, it is not open to the Belgian courts to undertake any prior assessment of the appropriateness of a care, protection or education measure with regard to whether or not the familie- en jeugdrechtbank (Juvenile Court) should decline jurisdiction over the minor. Consequently,

7 Judgment No P.13.0172.F, available in French at: http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20130206-3.

8 Judgment No P.13.0780.N, available in French at: http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20130611-2.

the surrender of a person who was 16 years of age or older at the time of commission of the offence — murder, in the case in question — does not depend on a decision to decline jurisdiction over the minor, who may therefore be held criminally responsible within the meaning of Article 4(3) of the Law on the European arrest warrant.

26. Confronted with that uncertainty in the case-law, the referring court decided to refer the matter to the Court of Justice.

III. The questions referred

27. Having doubts concerning the interpretation to be given to Framework Decision 2002/584, the Hof van Beroep te Brussel (Court of Appeal of Brussels) decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Should Article 3(3) of Framework Decision [2002/584] on the European arrest warrant be interpreted as meaning that surrender can be granted only in respect of persons who are regarded as having attained the age of majority under the law of the executing Member State, or does that provision allow the executing Member State also to grant the surrender of minors who, on the basis of national rules, can be held criminally responsible from a certain age (assessing, if necessary, whether there has been compliance with various conditions)?

(2) On the hypothesis that the surrender of minors is not prohibited by Article 3(3) of the Framework Decision, should that provision then be interpreted:

(a) as meaning that the existence of a (theoretical) possibility of being able to punish minors from a certain age in accordance with national law suffices as a criterion for granting the surrender (in other words, by carrying out an assessment *in abstracto* on the basis of the criterion of the age from which someone can be regarded as criminally responsible, without taking into account any possible further conditions)?; or

(b) as meaning that neither the principle of mutual recognition, as referred to in Article 1(2) of Framework Decision [2002/584], nor the text of Article 3(3) of [that] Framework Decision, preclude the executing Member State from carrying out an assessment *in concreto* on a case-by-case basis, where it may be required that, so far as concerns the person whose surrender is sought, the same conditions for criminal responsibility must be met as those that apply to the nationals of the executing Member State, having regard to their age at the time of the acts, having regard to the nature of the alleged offence and possibly even having regard to the preceding judicial interventions in the issuing Member State which led to a measure of an educational nature, even if those conditions did not exist in the issuing Member State?

(3) If the executing Member State may carry out an assessment *in concreto*, is then, in order to avoid impunity, no distinction to be made between a surrender for the purposes of a criminal prosecution and a surrender for the purposes of the enforcement of a sentence?'

IV. My analysis

28. I should state at the outset that, in my view, there is no doubt that the ground for mandatory non-execution of a European arrest warrant contained in Article 3(3) of Framework Decision 2002/584 does not apply simply because the perpetrator of the offence in respect of which the warrant was issued is a minor.

29. It is apparent from the *travaux préparatoires* which led to the adoption of the Framework Decision that the EU legislature gave specific consideration to the position of minors in inserting an amendment in the course of the legislative procedure, providing that a Member State may refuse to surrender a minor in respect of which a European arrest warrant has been issued where, owing to his age, he may not be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing Member State. More specifically, the European Parliament — the originator of the amendment — gave the following justification for it: 'where the requested person is considered to be a *minor* in the executing Member State, the state should have the possibility to refuse to execute the arrest warrant'. [9]

30. This ground for non-execution, which was initially optional, became one of the grounds for mandatory non-execution and now appears in Article 3(3) of the Framework Decision.

31. I would add that the age of criminal responsibility must not be confused with the age of criminal majority, these being two distinct concepts. Minors may be held criminally responsible for offences which they commit. Criminal majority, on the other hand, is a concept which defines the age from which a person is subject to the general law of criminal responsibility.

32. It is thus evident that the EU legislature, in laying down in this provision that the judicial authority of the executing Member State must refuse to surrender to the authorities of the issuing Member State a person who 'may not, owing to his age, be held criminally responsible' for his acts, was not referring to persons who have not yet reached the age of criminal majority, but to minors who cannot be held criminally responsible under the law of the executing Member State.

33. Accordingly, I consider that Article 3(3) of Framework Decision 2002/584 must be interpreted as meaning that the ground for mandatory non-execution of an arrest warrant contained in that provision does not apply simply because the person responsible for the offence in respect of which the warrant was issued is a minor.

34. It is appropriate at this juncture to determine the question — essentially the referring court's question — of whether the concept of being 'criminally responsible', as used in that provision, enables the executing Member State, in connection with the surrender of the minor to the issuing Member State, to investigate his situation in order to determine whether all the conditions which, under its national law, would have to be satisfied in order for him to be held criminally responsible, are in fact satisfied.

35. The questions referred relate to the criminal law applicable to minors. It is therefore necessary, in answering them, to have regard to the specific features of that area of law which, on the one hand, makes use of the traditional mechanisms of criminal responsibility, but, on the other, introduces rules which fundamentally alter their operation and approach.

36. In relation, first of all, to the traditional rules of the mechanism of responsibility in criminal matters, it should be observed that, in order to be recognised as criminally responsible for a substantive act amounting, under the law of the place where it was committed, to a criminal offence, the person committing that act:

– must have known what he was doing;

– must have known that the act was prohibited and;

9 See the European Parliament's report of 14 November 2001 on the Commission proposal for a Council framework decision on combating terrorism (A5-0397/2001, amendment 72), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2001-0397 + 0+DOC+PDF+V0//EN. My emphasis.

– must have nonetheless intended to commit that act.

37. Those attributes (awareness, capacity to distinguish right and wrong and intention) are to be assessed *in concreto*, on a case-by-case basis, and, with due regard to the rules governing a fair trial, they fall to be established by the judicial authorities responsible for investigation, prosecution and judgment. In this case the authorities in question are those of the issuing Member State.

38. As to the substantive features introduced by the law relating to minors, I should state what, fundamentally, these comprise.

39. In relation to the general rules governing criminal responsibility, first of all, it is readily apparent that the younger the minor, the more difficult it is to apply them. Certain Member States take an *in concreto* approach to resolving this difficulty, as has been described in points 36 and 37 above, while others have systems which exclude any criminal responsibility below an age fixed by law.

40. Secondly, in relation to the applicable penalty, there is a fundamental difference by comparison with the law applicable to offenders of full age, which consists, in reality, of the introduction of a distinction between responsibility and punishability. Thus, an offender who is a minor may be recognised as responsible and yet, by reason of his age, the law will prohibit any penalty being imposed on him.

41. This approach, which may appear rather singular, even singularly complicated, actually embodies one of the fundamental principles underlying the law relating to minors, namely the principle that education should be preferred to punishment.

42. The appearance of this principle is a consequence of the historical evolution of this branch of criminal law, which accelerated after the Second World War under the influence of, amongst other things, 'social defence' theories, which put the emphasis on prevention, education and rehabilitation.

43. Today, the fact that the criminal law relating to minors has a very particular nature is highlighted by the numerous international instruments on which the Member States have collaborated or of which they are signatories. These include the Convention on the Rights of the Child,[10] and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).[11]

44. The particular features of this branch of law have already been absorbed by the European Union, which ensures that it is reflected in all EU policies. Thus, in the EU Agenda for the Rights of the Child,[12] the Commission explains that 'making the justice system more child-friendly in Europe is a key action item under [that agenda]'and states that 'detention of children should be a measure of last resort and for the shortest appropriate period of time'.[13] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings[14] brings out very clearly the account taken in EU law of the particular features of the criminal law relating to minors.

10 This convention was adopted by the Assembly General of the United Nations by Resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990.

11 Adopted by the Assembly General of the United Nations by Resolution 40/33 of 29 November 1985.

12 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2011) 60 final.

13 See p. 6 et seq. of the communication referred to above.

14 OJ 2016 L 132, p. 1

45. The need for this has been emphasised by the Council of Europe in its report 'Child-friendly juvenile justice: from rhetoric to reality'.[15] In that report, the Council of Europe goes into yet greater detail and calls on the Member States, amongst other things, to set the minimum age of criminal responsibility at least at 14 years of age, while establishing a range of suitable alternatives to formal prosecution for younger offenders, to ensure that detention of juveniles is used as a measure of last resort and for the shortest possible period of time, for example by developing alternative non-custodial measures and sanctions to pre-trial detention and post-trial incarceration, such as warnings or reprimands, educational measures, fines, supervision orders, training programmes, etc. These recommendations all reflect, essentially, the rules of the Convention on the Rights of the Child[16] and the Beijing Rules.[17]

46. It follows from the foregoing that, in the criminal law relating to minors, punishment is secondary and education must take precedence. For that reason we speak of the principle that 'education should be preferred to punishment'.

47. This feature of the criminal law relating to minors has such weight that, in my opinion, it is a matter of fundamental rights. Confirmation of this is found in Article 24(2) of the Charter, which provides that 'in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration'.

48. It is, moreover, the child's best interests which justifies and requires the traditional pattern of the criminal law's response to be adjusted as necessary to take account of the interests of the child according to his age and the objective to be achieved, which is to ensure that judicial intervention by way of enforcement of the criminal law is maximally directed to his rehabilitation and education.

49. In relation to a human individual whose personality is, due to his age, still forming, the account to be taken of the child's best interests, which, moreover, correspond to those of society as a whole, justifies the taking of particular measures with regard to both investigation and prosecution procedures, and the diversification of the range of available responses to the point where an educational measure can be imposed as a criminal punishment, where the law so permits.

50. The law may, in fact, prohibit this on the basis that below a certain age, the very concept of criminal punishment is inapt, and that in relation to a young minor, the measure to be taken is to be understood purely as an educational measure and not a combination of punishment and education, which would carry a risk of distorting its meaning and undermining the minor's engagement with the measure, and thus its effectiveness.

51. Having regard to the principles I have set out above, in my view it must be recognised that any system which does not distinguish between the punitive measures applicable to an offender of full age and those applicable to an offender who is a minor would, in reality, infringe the fundamental rights of the minor in question, as the possibility of tailoring the sentence to the individual — a necessary condition for the operation of the principle that education should be preferred to punishment — would be lacking, in that the courts would not enjoy freedom of assessment, but would be hamstrung by the law itself.

15 Report of 19 May 2014, Doc. 13511.

16 See Article 40 of that convention.

17 See, in particular, Rule 17.

52. It is apparent from the study of comparative law that, at least in the law of EU Member States, systems have been put in place which enable the courts to individualise sentencing, through two complementary approaches. The first consists in expanding the range of penalties which the court may impose, the second in restricting the imposition of those which correspond, broadly speaking, to the traditional penalties of imprisonment or fines, so that they are only applicable beyond a certain age bracket.

53. Thus, below a certain age, no penalty may be imposed. Beyond that age, for crimes committed in the next age bracket, the penalty imposed must consist in an educational measure. In the next age bracket, the penalties which can ordinarily be imposed — but which are regarded as secondary, in the light of the principle that education should be preferred to punishment — will be subject to mandatory reductions, and to a requirement for specific reasons to be given for the principle of imposing them in a given case. Thus, by successive steps, corresponding to successive age brackets, offenders who are minors gradually move towards the status of criminal majority.

54. Within the framework of that approach, we thus find ourselves in an area where a reference to age is congruent for all the Member States. On the one hand, that leaves each Member State free to choose the method by which it will determine the criminal responsibility of minors, while requiring it to recognise the method chosen by the other Member States; on the other, by reference to the sentence which can be or has been imposed, it enables an objective matching criterion to be laid down which will determine whether or not the minor is surrendered.

55. It follows that Article 3(3) of Framework Decision 2002/584 must be interpreted on that basis. The reference to age which it makes concerns the age at which a penalty may be imposed on an offender who is a minor. It would be impossible to accept a situation in which certain Member States, on the ground that their national law takes a case-by-case approach to determining the criminal responsibility of minors, by means of an *in concreto* assessment as to whether requirements corresponding to the three criteria identified in points 36 and 37 above are met, could apply that same analysis when acting as the executing Member State. Indeed, that would be to reintroduce an onerous system of extradition under which the executing Member State would need to be provided with the entire prosecution or conviction file, and verify that it matched its own national procedure in every aspect.

56. Such a situation would be incompatible with the principle of mutual recognition. That principle obliges the executing Member State to accept the analysis of the issuing Member State as regards guilt, either potential in the case of a prosecution or established in the case of a conviction in the issuing Member State. Since the framework decision is based on the principle of mutual recognition, [18] it cannot be interpreted in such a way as to contradict that principle.

57. That said, the essential question remains whether, owing to his age, the minor is liable to have a penalty imposed on him. This fundamental question is raised by Article 3(3) of the framework decision, which makes it, if answered in the negative, a ground for mandatory refusal of surrender. That provision ensures absolute respect on the part of all Member States for one of the fundamental concepts of the law relating to minors. In so doing, it observes the fundamental right deriving inter alia from Article 24(2) of the Charter.

18 See judgment of 29 June 2017, *Popławski* (C-579/15, EU:C:2017:503, paragraph 19 and the case-law cited).

58. For the sake of completeness, I would add that the nature of the law relating to minors, which is fundamentally oriented towards prioritising education, dictates that a decision refusing surrender on the basis of Article 3(3) of Framework Decision 2002/584 cannot result in the minor simply being 'left to his own devices'. On the contrary, it gives rise, as a logical consequence of taking the best interests of the minor into account, to a duty of care with respect to him in another way, by providing educational support. This is a means of caring for and protecting the minor, in his best interests, whenever his health, safety or morals are threatened.

59. In the present case, of course, the issue of surrender arises because an offence has been committed in the issuing Member State — an offence which a lack of criminal responsibility, however that expression is defined, cannot erase. It cannot, therefore, be held that the commission of a prohibited act, unquestionably a serious one given that it met the criteria for a European arrest warrant to be issued, is to be regarded as normal. The executing Member State is therefore subject to a duty of care with respect to the minor, based once again on the fundamental rights of the child. It must also be borne in mind that the refusal is on the ground that the minor is too young for a penalty to be imposed, even one consisting in an educational measure, in the executing Member State. The duty of care of that State with respect to the minor has therefore only greater resonance.

60. This interpretation, based on the complementary operation of the various aspects of the law relating to minors, seems to me to respect the basis of the specific rules of that area of law which express, first and foremost, an essential solidarity across generations and peoples. I profoundly believe that the operation of the rules that enable the area of freedom, security and justice to be created cannot be interpreted in a way that runs counter to that ideal; on the contrary, they must be interpreted in such a way as to promote it.

61. In the present case, the request for surrender applies to a minor in respect of whom Belgian law does not prevent a penalty being imposed. However, this would necessitate an investigation by the authorities of the executing Member State into the personal characteristics of the minor, his past history and whether or not he had the capacity to distinguish right and wrong at the time of committing the offence. Those issues, in particular that of what penalty can be imposed on the minor having regard to his personal characteristics and age, also arise in the issuing Member State, and are therefore to be resolved by means of an assessment which is for that State alone to make. To hold otherwise would amount, from another perspective, to rejecting the principle of mutual trust.

62. Accordingly, for all the foregoing reasons, I consider that Article 3(3) of Framework Decision 2002/584, read in the light of Article 24(2) of the Charter, must be interpreted as meaning that the executing Member State may refuse to surrender a minor where, owing to his age at the time of commission of the offence, no penalty can be imposed on him under the law of that State. On the other hand, the executing Member State must surrender the minor whenever, having regard to his age at the time of commission of the offence, the penalty which could be imposed in the issuing Member State corresponds, in nature and severity, to one which could equally have been imposed in the executing Member State.

63. Where the executing Member State refuses to surrender the minor, it must meet, in relation to that minor, its duty of care with respect to him within the framework of the educational support it is required to provide.

V. Conclusions

64. In view of all the foregoing, I propose that the questions referred for a preliminary ruling by the Hof van beroep te Brussel (Court of Appeal of Brussels, Belgium) be answered as follows:

(1) Article 3(3) 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, read in the light of Article 24(2) of the Charter of Fundamental Rights of the European Union, is to be interpreted as meaning that:

– the ground for mandatory non-execution of the warrant contained in that provision does not apply simply because the perpetrator of the offence in respect of which the warrant was issued is a minor;

– the executing Member State may refuse to surrender a minor where, owing to his age at the time of commission of the offence, no penalty can be imposed on him under the law of that State;

– on the other hand, the executing Member State must surrender the minor whenever, having regard to his age at the time of commission of the offence, the penalty which could be imposed in the issuing Member State corresponds, in nature and severity, to one which could equally have been imposed in the executing Member State.

(2) Where the executing Member State refuses to surrender the minor, it must meet, in relation to that minor, its duty of care with respect to him within the framework of the educational support it is required to provide.