Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 18 October 2012 [1]

Case C-396/11

Ministerul Public – Parchetul de pe lângă Curtea de Apel Constanța
v
Ciprian Vasile Radu

(Reference for a preliminary ruling from the Curtea de Apel Constanța (Romania))

(Police and judicial cooperation in criminal matters — Framework Decision on the European arrest warrant and surrender procedures between Member States — Whether it is open to the executing Member State to refuse the request for surrender of the requested person)

1. By this reference for a preliminary ruling, the Court is asked to construe Framework Decision 2002/584. [2] In very broad overview, three points are at issue. First, they concern the construction to be given to that decision following the entry into force of the Treaty of Lisbon and, in particular, whether that construction should differ as a result of the modifications to the Treaty on European Union introduced by Article 6 TEU. Second, they involve the interrelationship between, on the one hand, Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention') and Article 6 of the Charter of Fundamental Rights of the European Union ('the Charter') and, on the other, the provisions of the Framework Decision which entail the deprivation of liberty of a requested person as part of the procedures leading to the execution of a European arrest warrant. Third, they ask whether the Framework Decision, properly construed, permits a Member State to refuse to execute such a warrant in the event of breaches of human rights legislation including the articles just mentioned.

Legislative framework

European Union (EU) legislation

The Treaty on European Union

2. Article 6 TEU provides:

'1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

1 — Original language: English.

2 — Council Framework Decision 2002/584/JHA on the European arrest warrant and surrender procedure between Member States of 13 June 2002 ('the Framework Decision' or 'the decision') (OJ 2002 L 190, p. 1).The decision has been amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24). The amendments made do not affect the subject-matter of this Opinion.

…

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.' [3]

The Charter

3. Article 6 of the Charter provides:

'Everyone has the right to liberty and security of person.'

4. Article 47 of the Charter further provides:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. …'

5. Article 48 states:

'1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.

2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.'

6. Article 52 provides:

'1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

…

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

…'

3 — Article 6 TEU replaced, with some amendments, Article 6 EU, which was in force both when the Framework Decision was adopted and when the European arrest warrants in the present case were issued. Paragraphs 1 and 2 of that article provided:

'1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'

The Framework Decision

7. The Framework Decision replaces the former procedure for multilateral extradition founded on the European Convention on Extradition of 13 December 1957 with a system based on the European arrest warrant. Under the new system, where a person ('the requested person') whose commission or alleged commission of a criminal offence leads to him being sought by the authorities of one Member State ('the issuing Member State') is physically present in the territory of another Member State ('the executing Member State'), the competent judicial authority in the former State may issue a European arrest warrant seeking his arrest and surrender by the latter.

8. Chapter 1 of the Framework Decision is entitled 'General Principles' and comprises Articles 1 to 8. Article 1 provides:

'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 modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.'

9. Articles 3 and 4 specify a number of grounds on which the non-execution of a European arrest warrant is, respectively, mandatory or optional.

10. Article 8 specifies the content and form of the European arrest warrant. In particular, Article 8(1)(c) requires that there must be 'evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2'.

11. Chapter 2 of the Framework Decision comprises Articles 9 to 25. It is entitled 'Surrender Procedure' and, as well as laying down a number of general requirements, contains provisions intended to protect the rights of the requested person. In particular:

— a requested person is to be informed, on arrest, of the contents of the warrant and of the possibility of his being surrendered; where the requested person is arrested for the purposes of the execution of a European arrest warrant, he has a right to be assisted by legal counsel and by an interpreter (Article 11);

— the executing judicial authority may decide to release the requested person following his arrest and may release him provisionally at any time provided all necessary measures are taken to prevent him absconding (Article 12);

— where the requested person consents to surrender, the consent must be given voluntarily and with full knowledge of the consequences; he is entitled to legal counsel to that end (Article 13); should he not give that consent, he is entitled to be heard by the appropriate judicial authority in the executing Member State, which may request further information from the issuing Member State (Articles 14 and 15);

— a European arrest warrant is to be dealt with as a matter of urgency; where the requested person consents to surrender, the final decision on the execution of the warrant is to be taken within 10 days of consent being given; in other cases, the period is 60 days after arrest. As long as no final decision has been taken on the warrant, the executing judicial authority is to ensure that the material conditions necessary for effective surrender of the person remain fulfilled (Article 17);

— where the warrant has been issued for the purposes of the requested person's prosecution, that person must, as a rule, be heard by the executing judicial authority (Articles 18 and 19);

— where the decision taken by the judicial authority of the executing Member State is that the requested person is to be surrendered, he is to be surrendered no later than 10 days after the final decision on the execution of the European arrest warrant. That period may be extended where circumstances beyond the control of the Member States should intervene or where there are serious humanitarian reasons militating against the surrender (Article 23).

The Convention

12. Article 5 of the Convention, in so far as relevant to this case, provides:

'1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

…

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

…

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

…

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

13. Article 6 of the Convention states:

'1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

Interrelationship between the Charter and the Convention

14. Article 52(3) of the Charter makes it plain that there is, and is intended to be, overlap between the provisions of the Charter and those of the Convention. In so far as material to this Opinion, Article 6 of the Charter corresponds to Article 5 of the Convention. The second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the Convention and Article 48 of the Charter corresponds to Article 6(1) and (2) of the Convention. [4]

National law

Romania

15. The provisions transposing the Framework Decision into national law are contained in Articles 97 and 98 of Law No 302 of 28 June 2004 on international judicial cooperation in criminal matters, as amended. Those articles form part of Title III of that law.

16. Article 97 is entitled 'Special conditions'. It lays down certain requirements as to the provision of guarantees by the imposing Member State issuing a warrant.

17. Article 98(1) contains provisions concerning the mandatory non-execution of a European arrest warrant. These are essentially similar to those laid down in Article 3 of the Framework Decision.

18. Optional grounds for non-execution of European arrest warrants are laid down in Article 98(2). These are largely the same as those set out in Article 4 of the Framework Decision.

4 — See the Explanations relating to the Charter of Fundamental Rights (2007/C 303/02) (OJ 2007 C 303, p. 17).

Germany

19. Germany transposed the Framework Decision into national law by the law on the European arrest warrant of 21 July 2004. Following its enactment, the German Constitutional Court decided in 2005 that the legislation was unconstitutional and thus of no effect.[5] By a further act of 20 July 2006, that Member State adopted a new measure intended to remedy the defects highlighted by the Constitutional Court and fully to implement the Framework Decision under national law. That measure remains in force.

Facts, procedure and questions referred

20. On various dates in 2007 and 2008, four European arrest warrants were issued by Public Prosecutor's Offices in Germany for the arrest of Mr Radu. Each of those warrants related to the offence of robbery. That offence is also a crime under Romanian law by virtue of Article 211 of the Romanian Penal Code. Mr Radu did not consent to his surrender.

21. By judgment of 5 June 2009, the Curte de Apel Constanța (Court of Appeal, Constanța) ordered the execution of three of the warrants in question. As regards the fourth, it refused execution on the ground that Mr Radu was already subject to criminal proceedings in Romania in relation to the same act as that on which the warrant was based.[6]

22. Mr Radu brought an appeal against that judgment before the Înalta Curte de Casație și Justiție a României (High Court of Cassation and Justice, Romania). By judgment of 18 June 2009, that court upheld the appeal and referred the case back to the Curte de Apel for reconsideration. It also ordered that Mr Radu be released from detention and imposed certain restrictions on his freedom of movement, including a prohibition on his leaving the commune in which he resides without first obtaining the court's permission.

23. On 22 February 2011, the case was once again entered in the register of the Curte de Apel. Before that court, Mr Radu puts three principal arguments in support of his claim that the warrants in question should not be enforced. First, he argues that on the date on which the Framework Decision was adopted, neither the Convention nor the Charter had been specifically incorporated into the Founding Treaties of the European Union as rules of law. That is in contrast to the position under the consolidated version of the EU Treaty which entered into force on 1 December 2009 with the Lisbon Treaty. As a result, it is necessary to interpret and apply the Framework Decision in accordance with the Charter and the Convention. Second, he claims that the procedures by which the Member States apply the decision are not consistent and draws attention to the requirement of reciprocity in the execution of arrest warrants both as regards the issuing Member State and the executing Member State. Third, he contends that it is the duty of the executing State to ascertain whether the issuing State has observed the rights and guarantees established by the Charter and the Convention. A failure on that State's part to do so would represent a ground for refusal to execute the European arrest warrants in question.

24. In those circumstances, the Curte de Apel Constanța decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Are Article 5(1) of [the Convention], and Article 6, read in conjunction with Articles 48 and 52 of [the Charter], with reference also to Article 5(3) and (4) and Article 6(2) and (3) of [the Convention], provisions of primary [EU] law, contained in the founding Treaties?

5 — Decision of 18 July 2005, 2 BvR 2236/4. The national court reached that decision on grounds concerning the application of that Law to German nationals.

6 — That ground for refusal is set out in Article 4(2) of the Framework Decision and Article 98(2)(b) of Law No 302/2004.

(2) Does the action of the competent judicial authority of the State of execution of a European arrest warrant, entailing deprivation of liberty and forcible surrender, without the consent of the person in respect of whom the European arrest warrant has been issued (the person whose arrest and surrender is requested) constitute interference, on the part of the State executing the warrant, with the right to individual liberty of the person whose arrest and surrender is requested, which is authorised by EU law, pursuant to Article 6 TEU, read in conjunction with Article 5(1) of [the Convention], and pursuant to Article 6 of [the Charter], read in conjunction with Articles 48 and 52 thereof, with reference also to Article 5(3) and (4) and Article 6(2) and (3) of [the Convention]?

(3) Must the interference on the part of the State executing a European arrest warrant with the rights and guarantees laid down in Article 5(1) of [the Convention] and in Article 6 of [the Charter], read in conjunction with Articles 48 and 52 thereof, with reference also to Article 5(3) and (4) and Article 6(2) and (3) of [the Convention], satisfy the requirements of necessity in a democratic society and of proportionality in relation to the objective actually pursued?

(4) Can the competent judicial authority of the State executing a European arrest warrant refuse the request for surrender without being in breach of the obligations authorised by the founding Treaties and the other provisions of [EU] law, by reason of a failure to observe all the cumulative conditions under Article 5(1) of [the Convention] and Article 6 of [the Charter], read in conjunction with Articles 48 and 52 thereof, with reference also to Article 5(3) and (4) and Article 6(2) and (3) of [the Convention]?

(5) Can the competent judicial authority of the State executing a European arrest warrant refuse the request for surrender without being in breach of the obligations authorised by the founding Treaties and the other provisions of [EU] law, on the ground that the State issuing the European arrest warrant has failed to transpose or fully to transpose or has incorrectly transposed (in the sense that the condition of reciprocity has not been satisfied) [the Framework Decision]?

(6) Is the domestic law of Romania, a Member State of the European Union – in particular Title III of Law No 302/2004 – incompatible with Article 5(1) of [the Convention] and Article 6 of [the Charter], read in conjunction with Articles 48 and 52 thereof, with reference also to Article 5(3) and (4) and Article 6(2) and (3) of [the Convention], to which Article 6 TEU refers, and have the above provisions properly transposed into national law [the Framework Decision]?'

25. Written observations have been submitted by the Minister Public, Parchet de pe lângă Curte de Apel Constanța (the Public Prosecutor at the Curte de Apel Constanța), the Czech, German, Lithuanian, Austrian, Polish, Romanian and United Kingdom Governments and the European Commission. At the hearing on 10 July 2012, counsel for Mr Radu, the German and Romanian Governments and the European Commission made oral submissions and responded to the questions put by the Court.

Analysis

Preliminary observations

Admissibility

26. A number of objections have been made concerning the admissibility of the order for reference. All those submitting observations are agreed that Question 6, which asks the Court to interpret the provisions of national law and to which I shall return below,[7] is inadmissible. The German Government raises a partial objection as to admissibility, while the Austrian and Romanian Governments and the Commission submit that the order is inadmissible in its entirety. The Czech, Lithuanian, Polish and United Kingdom Governments take no further issue on admissibility.

27. The objections made essentially argue that the order for reference is insufficiently detailed and excessively hypothetical for this Court to be able to provide a useful answer to the national court.

28. It is undeniable that the order for reference is laconic in its description of the background to the case in the main proceedings and, in particular, the reasons underlying the questions put by the national court.

29. However, according to the Court's case-law, 'as regards the division of jurisdiction between national courts and the Court of Justice under [Article 267 TFEU] the national court, which is alone in having a direct knowledge of the facts of the case and of the arguments put forward by the parties, and which will have to give judgment in the case, is in the best position to appreciate, with full knowledge of the matter before it, the relevance of the questions of law raised by the dispute before it and the necessity for a preliminary ruling so as to enable it to give judgment'.[8] Indeed, the Court has held that, when the questions referred relate to the interpretation of a provision of Union law, 'it is, in principle, bound to give a ruling'.[9]

30. That seems to me to be the case here. The national court makes it plain in its order for reference that it sees the answers to its questions as being essential to the resolution of the dispute before it. Had the terms of the order for reference been such that it was manifestly impossible for the Governments of the Member States and the institutions to submit observations, that point on its own would not be determinative.[10] But that is not the case here. No fewer than seven Governments, together with the Public Prosecutor and the Commission, have lodged observations. With a very few exceptions, each of them has been able to make useful observations about the national court's questions.

31. Nothing would be gained by declaring the order for reference in this case to be inadmissible. With the exception of the observations concerning Question 6, I therefore consider that the objections should be rejected.

7 — See point 105 et seq. below.

8 — See, inter alia, Case 83/78 *Pigs Marketing Board* [1978] ECR 2347, paragraph 25.

9 — See, inter alia, Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraph 20.

10 — See, to that effect, Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 20.

Jurisdiction of the Court

32. Romania has made a declaration under the former Article 35(2) EU accepting the jurisdiction of the Court to give preliminary rulings in accordance with the rules laid down in the former Article 35(3)(b) EU.[11] In accordance with Article 10(1) of Protocol No 36 on transitional provisions, annexed to the FEU Treaty, the powers of the Court under the former version of Title VI of the EU Treaty concerning acts of the Union which were adopted before the entry into force of the Treaty of Lisbon are to remain the same, including where they have been accepted under the former Article 35(2) EU.[12] This Court therefore has jurisdiction to give a ruling on the questions raised by the national court.

The Framework Decision

33. Before turning to the substance of the questions, it is worth considering the background to the Framework Decision and the aims it sets out to achieve.

34. The decision must be understood in the context of the objective that the Union should become an area of freedom, security and justice. To that end, it introduces a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions. That system is given practical shape in the form of the European arrest warrant. The warrant implements the principle of mutual recognition, which the European Council described in its Tampere Conclusions as the 'cornerstone' of judicial cooperation.[13] Such a principle, if it is to be capable of being effective, requires a high level of confidence between Member States.[14]

35. A major objective of the new arrangements introduced by the Framework Decision is the removal of delays inherent in the previous extradition system.[15] That aim has, it appears, been achieved in practice. In its 2011 report into the implementation of the decision,[16] the Commission notes that the average time taken for extradition was of the order of one year. Under the European arrest warrant system, the average period for implementation has been reduced to between 14 and 17 days, where the requested person consents to his surrender. Where he does not so consent, the period is 48 days.

36. While the obligations imposed on the Member States by the Framework Decision relate to matters that are essentially procedural, that does not mean that the legislature failed to take fundamental and human rights into account when enacting the Framework Decision. On the contrary: it did so in a number of ways.

37. First, it incorporated express references to those rights in the decision. That is clear, for example, from recitals 10, 12 and 13 in the preamble. More fundamentally, Article 1(3) specifically provides that the decision is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in what is now Article 6 TEU. I shall return to that point below.[17]

11 — See OJ 2010 C 56, p. 7.

12 — By virtue of Article 10(3) of the Protocol, the transitional provision which Article 10(1) represents will cease to have effect five years after the date of entry into force of the Treaty of Lisbon, that is to say, on 30 November 2014.

13 — See the Conclusions of the Tampere European Council at www.cvce.eu.

14 — See, generally, recitals 5, 6 and 10 in the preamble to the Framework Decision.

15 — See recital 5 in the preamble to the Framework Decision.

16 — Report of 11 April 2011 from the Commission to the European Parliament and the Council on the implementation since 2007 of the Framework Decision (COM(2011) 175 final) (the '2011 Report'), section 1.

17 — See point 70 below.

38. Second, the high level of mutual confidence between Member States referred to in recital 10 is predicated on the observance by each of the Member States both of the rights enshrined in the Convention and of the fundamental rights which form part of the constitutional traditions common to the Member States. With effect from the coming into force of the Treaty of Lisbon on 1 December 2009, it is now necessary to add – to the extent that it did not previously already have a role to play – the Charter.

39. Third, the Framework Decision incorporates a number of provisions designed to protect the fundamental rights of the requested person. I have summarised these in point 11 above and shall not repeat them here, save to note the rights to a hearing expressly provided for where the requested person does not consent to his surrender (Article 14) and where the European arrest warrant has been issued for the purpose of conducting a criminal prosecution (Article 18).

40. As regards the Framework Decision's objectives, it would be wrong to see the system it introduces as being purely intended to benefit the administrative authorities of the Member States. By introducing a form of procedure which is designed to be more efficient and effective than its predecessor, the legislature also intended to improve the protection afforded to victims of criminal offences by seeing their perpetrators brought to justice more rapidly and more efficaciously.

41. While the record of the Member States in complying with their human rights obligations may be commendable, it is also not pristine. There can be no assumption that, simply because the transfer of the requested person is requested by another Member State, that person's human rights will automatically be guaranteed on his arrival there.[18] There can, however, be a presumption of compliance which is rebuttable only on the clearest possible evidence. Such evidence must be specific; propositions of a general nature, however well supported, will not suffice.

Question 1

42. By its first question, the national court asks whether the provisions of the Charter and the Convention form part of the primary law of the Union.

43. I shall start with the position since the coming into force of the Treaty of Lisbon.

44. By virtue of Article 6(1) TEU, the Charter has the same legal value as the Treaties and accordingly now forms part of the primary law of the Union.

45. The provisions of the Convention have also been enshrined by the Lisbon Treaty. Article 6(3) TEU provides that fundamental rights, as guaranteed by the Convention and as they result from the constitutional traditions common to the Member States, constitute general principles of Union law.

46. It follows that not only the Union and its institutions, but also the Member States when interpreting and applying EU law, will be bound by the Charter and the Convention.[19]

18 — See, inter alia, in that regard section 4 of the 2011 Report. See also point 249 and footnote 97 of my Opinion in Case C-27/09 P *French Republic* v *People's Mojahedin Organization of Iran* [2011] ECR I-13427.

19 — As regards the Charter, see also Article 51(1), which states that it binds the Member States only when they are implementing Union law. It is plain that, when complying with their obligations under the Framework Decision, Member States will be implementing Union law. Since all Member States are parties to the Convention, they will be bound by it not only as regards their implementation of Union law, but also in the context of their national rules.

47. That, of itself, is sufficient to answer the letter of the national court's first question. However, it is plain from the order for reference that the dispute before it is somewhat wider, inasmuch as Mr Radu appears to claim that the coming into force of the Treaty of Lisbon brought with it a fundamental change in the manner in which fundamental rights and principles fell to be applied in the Union. [20] In order to give a useful answer to the national court, it is therefore necessary to look to the position prior to 1 December 2009.

48. While the Charter was solemnly proclaimed in Nice on 7 December 2000, the decision as to the precise legal status to be given to it was, however, postponed. As a result, it was not incorporated into any of the Treaties and its provisions were not given the force of law in any other way. None the less, the Charter quickly came to be regarded as an authoritative catalogue of fundamental rights, confirming as it did the general principles inherent in the rule of law which are common to the constitutional traditions of the Member States. This Court frequently drew guidance from the provisions of the Charter in delivering its judgments. [21] As a result, the Charter acquired the status of 'soft' law; that is to say, although its provisions were not directly applicable as part of EU law, they none the less were capable of producing legal effects – in many cases, far-reaching effects – within the Union.

49. The role of the Convention in Union law is far more deeply rooted. As long ago as 1969, the Court held in *Stauder* [22] that 'fundamental human rights [are] enshrined in the general principles of Community law and protected by the Court'. That case-law, initially embryonic, has been applied and developed through leading judgments such as *Internationale Handelsgesellschaft* [23]and *Nold* [24] through to the present day. In *Kadi and Al Barakaat*, the Court roundly stated that 'measures incompatible with respect for human rights are not acceptable in the Community'. [25] With specific reference to the Convention, the Court in *Der Grüne Punkt* described the right to a fair trial given by Article 6(1) of the Convention 'as a general principle of Community law'. [26]

50. Given that, can it be said that the coming into force of the Treaty of Lisbon altered Union law to a material degree?

51. I do not believe so. It seems to me that Article 6(1) and (3) TEU merely represents what the United Kingdom terms in its observations a 'codification' of the pre-existing position. They encapsulate, to put it another way, a political desire that the provisions they seek to enshrine and to protect should be more visible in their expression. They do not represent a sea change of any kind. For that reason, I see any argument that the provisions of the Framework Decision must be given a different interpretation with their coming into force as being bound to fail. [27]

52. In the light of the above, the answer to Question 1 should be that the provisions of the Charter, including Articles 6, 48 and 52 thereof, form part of the primary law of the Union. Fundamental rights, as guaranteed by the Convention, including the rights set out in Articles 5(1), (3) and (4) and 6(2) and (3) of the Convention, constitute general principles of Union law.

20 — See point 23 above.

21 — See, for example, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37, and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] ECR I-6351, paragraph 335.

22 — Case 29/69 [1969] ECR 419, paragraph 7.

23 — Case 11/70 [1970] ECR 1125, paragraph 4.

24 — Case 4/73 [1974] ECR 491, paragraph 13.

25 — Cited in footnote 21 above, paragraph 284. See also the case-law cited.

26 — Case C-385/07 P [2009] ECR I-6155, paragraph 178. See also the case-law cited.

27 — I should refer for the sake of completeness to the Opinion of Advocate General Cruz Villalón in Case C-306/09 *I.B.* [2010] ECR I-10341, where he said 'the need to interpret the Framework Decision in the light of fundamental rights has become more imperative since the entry into force of the Charter of Fundamental Rights' (point 44). While that may, at first glance, appear to suggest the need for a different interpretation of the Framework Decision following the coming into force of Article 6(1) TEU, I do not consider that it was in that spirit that the observation was made. Rather, I see it as emphasising the strength of the political desire for visibility to which I have referred above.

Questions 2 and 3

53. By these questions, which are best addressed together, the national court essentially asks whether the deprivation of liberty and forcible surrender of the requested person that the European arrest warrant procedure entails constitute an interference with that person's right to liberty and whether, for that interference to be authorised by Article 5(1) of the Convention and Article 6 of the Charter, it must satisfy the requirements of necessity and proportionality. [28]

54. All individuals have the right to liberty. So much is clear from Article 5 of the Convention and Article 6 of the Charter. The question is whether the deprivation of that right can be justified. Here, the European arrest warrant must be understood in its context. Its purpose is to ensure that persons in respect of whom a warrant is issued will be personally present in the issuing Member State in order to face trial or imprisonment, as the case may be. Such an objective is, in my view, clearly necessary in the interests of society.

55. In that regard, Article 5 of the Convention expressly lays down a number of circumstances in which a person may lawfully be deprived of his liberty. These include (in paragraph (a)) his detention following conviction by a competent court and (in paragraph (c)) his arrest or detention when, inter alia, he is suspected of having committed an offence. Paragraph (f) is of particular relevance to this discussion, since it qualifies the right to liberty in cases where a person is lawfully arrested or detained with a view to, inter alia, extradition (the inter-State procedure which the European arrest warrant replaces).

56. The essential issue is whether detention pursuant to a warrant is proportionate. The European Court of Human Rights ('the Court of Human Rights') has held in relation to Article 5(1)(f) of the Convention that 'this provision does not require that the detention of a person against whom action is being taken with a view to extradition be reasonably considered necessary, for example to prevent his committing an offence or absconding. In this connection, Article 5(1)(f) provides a different level of protection from Article 5(1)(c): all that is required under subparagraph (f) is that "action is being taken with a view to deportation or extradition". It is therefore immaterial, for the purposes of Article 5(1)(f), whether the underlying decision to expel can be justified under national or Convention law ...'. [29]

57. It would be wrong, however, to interpret that part of the case-law concerning the Convention as meaning that any detention under Article 5(1)(f) will always be lawful, provided that it is done with a view to deportation or extradition. The Court of Human Rights has also held that 'any deprivation of liberty under the second limb of Article 5(1)(f) will be justified … only for as long as deportation or extradition [[30]] proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5(1)(f) ... The deprivation of liberty must also be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: Article 5(1) requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5(1) and the notion of "arbitrariness" in Article 5(1) extends beyond lack of conformity with

28 — While the national court's questions also refer to other articles of the Charter and the Treaty, I interpret those references as a reminder of the context in which the right to liberty operates with regard to criminal proceedings. I have therefore concentrated on those provisions which appear to me to be most relevant.

29 — See *Chahal v. United Kingdom*, 15 November 1996, § 112, *Reports of Judgments and Decisions* 1996-V, *Ismoilov v. Russia*, no. 2947/06, § 135, 24 April 2008, and *Lokpo and Toure v. Hungary*, no. 10816/10, § 16, 20 September 2011.

30 — Although the judgment was delivered in a case concerning extradition proceedings and not the European arrest warrant procedure, I do not consider that there is any difference in the underlying principles in this context. That does not, of course, mean that it will always be legitimate to apply principles derived from extradition to such cases.

national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention ... To avoid being branded as arbitrary, detention under Article 5(1)(f) must be carried out in good faith; it must be closely connected to the ground of detention relied on by the [national authorities]; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued ...' [31]

58. Completeness requires that I refer not only to Article 5(1) of the Convention, but also to its equivalent in the Charter, that is to say, Article 6. That provision contains no equivalent to Article 5(1)(f) of the Convention. However, Article 52(3) of the Charter makes it clear that where rights laid down in that document correspond to rights laid down under the Convention the meaning and scope of the Charter rights are to be the same as those laid down by the Convention. Article 5(1)(f) accordingly applies by implication.

59. It follows that, in giving effect to Article 12 of the Framework Decision, the competent authorities must have regard to the principles outlined in point 57 above. Their application will of necessity vary from case to case and it will not be possible to lay down any hard and fast rules.

60. I would, however, add this point. As the Commission notes in its 2011 Report, one of the criticisms levelled at the manner in which the Framework Decision has been implemented by the Member States is that confidence in its application has been undermined by the systematic issuing of European arrest warrants for the surrender of persons sought in respect of often very minor offences which are not serious enough to justify the measures and cooperation which the execution of such warrants requires. The Commission observes that there is a disproportionate effect on the liberty and freedom of requested persons when European arrest warrants are issued concerning cases in which (pre-trial) detention would otherwise be felt inappropriate. [32]

61. I agree.

62. In the light of the above, the answer to Questions 2 and 3 should be that the deprivation of liberty and forcible surrender of the requested person that the European arrest warrant procedure entails constitutes an interference with that person's right to liberty for the purposes of Article 5 of the Convention and Article 6 of the Charter. That interference will normally be justified as 'necessary in a democratic society' by virtue of Article 5(1)(f) of the Convention. Nevertheless, detention under that provision must not be arbitrary. To avoid being arbitrary, such detention must be carried out in good faith; it must be closely connected to the ground of detention relied on by the executing judicial authority; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued (thus satisfying the proportionality test). Article 6 of the Charter falls to be construed in the same way as Article 5(1) of the Convention.

Question 4

63. By its fourth question, the national court asks, in effect, whether an executing Member State may refuse to implement a European arrest warrant where to do so would infringe, or would risk infringing, the requested person's rights under Articles 5 and 6 of the Convention or Articles 6, 48 and 52 of the Charter.

31 — *A. and Others v. United Kingdom* [GC], no. 3455/05, § 164, ECHR 2009.

32 — See the 2011 Report, section 5.

64. By contrast to the second and third questions, where the Court was asked to look at the circumstances surrounding the requested person's detention in the period between the service of a European arrest warrant and that person's transfer to the issuing Member State, here the issues are wider. Can the competent judicial authority in the executing Member State refuse altogether to execute a warrant where infringements of the requested person's human rights are in issue?

65. The question raises that point by reference to the enumerated provisions of Articles 5 and 6 of the Convention and Article 6 of the Charter. Mr Radu's counsel stated at the hearing that his client had 'not been notified in respect of the charges against him, not been subpoenaed in respect of them and found himself in a situation where it was completely impossible to defend himself'. Since the impossibility of maintaining a proper defence also gives rise, at least potentially, to issues concerning Article 6(1) of the Convention, and Article 47 of the Charter, I shall include them in my analysis for the sake of completeness.

66. A cursory reading of the Framework Decision might lead one to conclude that such infringements (whatever their temporal effects) do not fall to be taken into consideration. Articles 3 and 4 list the circumstances in which the judicial authority of the executing Member State either must (Article 3) or may (Article 4) refuse to execute a European arrest warrant. In neither case do they refer to human rights issues as a ground for doing so. The Court has held that the list of grounds set out in those articles is exhaustive. [33]

67. Such a conclusion might also be reached on the basis of the objectives of the decision. The system of surrender it introduces is founded on the principles of mutual recognition [34] and a high level of mutual confidence between Member States, [35] and is intended to reduce the delays inherent in the former extradition procedure. [36]

68. The Court has, no doubt having regard to this consideration, held that 'the principle of mutual recognition, which underpins the Framework Decision, means that, in accordance with Article 1(2) of the Framework Decision, the Member States are in principle obliged to act upon a European arrest warrant'. [37] That must plainly be correct, since, if the position were otherwise, the objectives underlying the decision would risk being seriously undermined.

69. However, I do not believe that a narrow approach – which would exclude human rights considerations altogether – is supported either by the wording of the Framework Decision or by the case-law.

70. Article 1(3) of the Framework Decision makes it clear that the decision does not affect the obligation to respect fundamental rights and fundamental principles as enshrined in Article 6 EU (now, after amendment, Article 6 TEU). It follows, in my view, that the duty to respect those rights and principles permeates the Framework Decision. It is implicit that those rights may be taken into account in founding a decision not to execute a warrant. To interpret Article 1(3) otherwise would risk its having no meaning – otherwise, possibly, than as an elegant platitude.

33 — See, to that effect, Case C-388/08 PPU *Leymann and Pustovarov* [2008] ECR I-8993, paragraph 51, and Case C-123/08 *Wolzenburg* [2009] ECR I-9621, paragraph 57. See also, as regards Article 4, Case C-139/10 *Prism Investments* [2011] ECR I-9511, paragraph 33.

34 — See, inter alia, *Advocaten voor der Wereld*, cited in footnote 10 above, paragraph 28, and Case C-66/08 *Kozlowski* [2008] ECR I-6041, paragraph 31.

35 — See recital 10 in the preamble to the Framework Decision.

36 — See recital 5 in the preamble to the Framework Decision.

37 — See Case C-261/09 *Mantello* [2010] ECR I-11477, paragraph 36 and the case-law cited.

71. Support for this view is to be found in a number of Opinions of the Court's Advocates General relating to the interpretation of the Framework Decision. I would refer in particular to Advocate General Cruz Villalón's Opinion in *I.B.*,[38] where he stated:

'... I believe that the interpretation to be given of the content and purposes of the Framework Decision must take into consideration all of the objectives sought by the text. Although mutual recognition is an instrument for strengthening the area of security, freedom and justice, it is equally true that the protection of fundamental rights and freedoms is a precondition which gives legitimacy to the existence and development of this area. The Framework Decision repeatedly states as much in recitals 10, 12, 13 and 14, and in Article 1(3). …'[39]

72. I agree.

73. In my view, it is clear that the judicial authorities of an executing Member State are bound to have regard to the fundamental rights set out in the Convention and the Charter when considering whether to execute a European arrest warrant. When must they then refuse to make an order for surrender and what factors must they take into account in reaching such a decision?

74. It is apparent from the case-law of the Court of Human Rights that not every breach of the Convention will justify a refusal to implement an extradition order.[40] In *Dzhaksybergenov v. Ukraine*, for example, it held that 'reference to a general problem concerning human rights observance in a particular country cannot alone serve as a basis for refusal of extradition'.[41]

75. In *Soering v. United Kingdom*,[42] that Court held, in relation to Article 3 of the Convention,[43] that 'the decision by a contracting state to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that state under the Convention, where *substantial grounds* have been shown for believing that the person concerned, if extradited, faces a *real risk* of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country'.[44] With regard to Article 6 it observed: 'the right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society ... The Court does not exclude that an issue might *exceptionally* be raised under Article 6 … by an extradition decision in circumstances where the fugitive has suffered or risks suffering a *flagrant denial* of a fair trial in the requesting country.'[45]

76. Although there are no directly equivalent dicta in this Court's case-law relating to the Framework Decision, issues of a similar nature arose in *N.S. and Others*,[46] where the Court had to consider the effect of Article 4 of the Charter[47] on the duties of the national authorities under, inter alia, Regulation No 343/2003.[48] In the same way as the Framework Decision, that regulation lays down rules for the movement of persons – in that case, asylum seekers – from one Member State to another in accordance with specified procedures and time-limits. The Court held that 'it cannot be concluded …

38 — Cited in footnote 27 above.

39 — Point 43. See also the Opinions of Advocate General Bot in *Wolzenburg*, cited in footnote 33 above, points 148 and 151, and *Mantello*, cited in footnote 37 above, points 87 and 88, and of Advocate General Mengozzi in Case C-42/11 *Lopes da Silva Jorge* [2012] ECR, point 28.

40 — As indicated in footnote 30 above, I do not consider that the underlying principles differ in this context as between extradition and the European arrest warrant procedure.

41 — No 12343/10, § 37, 10 February 2011.

42 — No 14038/88.

43 — Article 3 of the Convention prohibits torture and inhuman or degrading treatment or punishment.

44 — Paragraph 91, emphasis added.

45 — Paragraph 113, emphasis added.

46 — Joined Cases C-411/10 and C-493/10 [2011] ECR I-13905.

47 — Article 4 of the Charter is the equivalent of Article 3 of the Convention.

48 — Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1).

that any infringement of a fundamental right by the Member State [to which the asylum seeker would fall to be transferred under the provisions of the regulation] will alter the obligations of the other Member States to comply with the provisions of [the Regulation]'. If the threshold were to be set at such a low level, the objectives of the legislation would risk being undermined. It went on to hold that: '[in order] to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the "Member State responsible" within the meaning of Regulation No 343/2003 where they *cannot be unaware* that *systemic deficiencies* in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to *substantial grounds* for believing that the asylum seeker would face a *real risk* of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.' [49]

77. To summarise, both Courts accept that fundamental rights may affect the legislative obligation of a Member State to transfer a person to another State. As regards Article 3 of the Convention and the equivalent provisions in Article 4 of the Charter, they consider that the test should be whether there are 'substantial grounds for believing' that there is a 'real risk' that the provision in question will be infringed in the State to which the person in question would otherwise fall to be transferred. In the context of Article 6, the Court of Human Rights has held that the obligation to transfer will be affected only 'exceptionally' and where the person in question 'has suffered or risks suffering a flagrant denial' of his rights under the Convention. This Court has yet to give a ruling in relation to Articles 47 and 48 of the Charter.

78. As regards the onus on the person bringing a challenge, the Court of Human Rights has held that the Court's examination of the existence of a risk must necessarily be a rigorous one and that it is for the applicant to produce the necessary evidence. [50] With respect to the standard of proof required to justify a refusal to transfer, that Court held in *Garabayev v. Russia* [51] that 'in assessing the evidence on which to base the decision whether there has been a violation of Article 3, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the parties when evidence is being obtained has to be taken into account ...' [52] Although that statement was made in the context of Article 3 of the Convention, there can be no question of a higher standard being imposed in relation to Article 6, for the simple reason that no higher standard exists.

79. Should this Court adopt the tests laid down by the Court of Human Rights?

80. In considering the case-law of that Court, it is always necessary to bear in mind that Article 52(3) of the Charter provides that it is open to Union law to provide more extensive protection than that laid down by the Convention.

81. I have no difficulty in accepting that an executing Member State should only exceptionally refuse to transfer a requested person under the Framework Decision. It is plain that the whole objective of the decision would be undermined if it were possible to raise what I might describe as 'routine' challenges based on notional breaches of human rights. It is necessary to bear in mind that the interests of the victims of crimes in seeing their perpetrators brought to justice are also at stake. [53]

49 — Paragraphs 82 and 94, emphasis added.

50 — See *Saadi v. Italy* [GC], no 37201/06, §§ 128 and 129.

51 — No 38411/02.

52 — Paragraph 76.

53 — See point 40 above.

82. From this, it follows clearly that the test for refusal must be a rigorous one. I take issue, however, with the case-law of the Court of Human Rights in two respects. First, I do not feel that I can recommend to this Court that it accept the test that the breach in question should be 'flagrant'. Such a concept appears to me to be too nebulous to be interpreted consistently throughout the Union. It has been suggested that the breach must be so fundamental as to amount to a complete denial or nullification of the right to a fair trial. [54]

83. However, such a test – assuming always that it can be clearly understood – seems to me unduly stringent. Construed in one way, it would require that every aspect of the trial process be unfair. But a trial that is only partly fair cannot be guaranteed to ensure that justice is done. I suggest that the appropriate criterion should rather be that the deficiency or deficiencies in the trial process should be such as fundamentally to destroy its fairness. [55]

84. Second – as regards the standard of proof – it is not right, in my view, to require that a potential breach be established 'beyond reasonable doubt'. Such a standard may be appropriate, and is used in certain jurisdictions, in determining the onus to be imposed on the prosecution services in criminal trials. It ensures that the risk of an accused person being wrongfully convicted is minimised so far as it is ever possible to do so. But it does not seem to me to have a role to play here. Furthermore, there is a risk that the onus it imposes on the person concerned, who may well be impecunious and forced to rely on State assistance in seeking to defend his rights, will be impossible in practice to satisfy.

85. Equally, however, something more than mere suggestions of potential impropriety will be needed. If the decision-maker is not to implement a European arrest warrant on the basis that there is a real risk that the requested person's rights will be infringed, it will not be sufficient that inchoate doubts are raised in his mind. I suggest that the appropriate test is that the requested person must persuade the decision-maker that his objections to the transfer are substantially well founded. [56]

86. In the above analysis, I have concentrated on the effect that a *future breach* of a person's fundamental rights may have on the decision to transfer that person to another Member State. It is in that area that the most relevant dicta of the Court of Human Rights and of this Court may be found. I shall now focus on the effect of a *past* breach.

87. The emphasis, it seems to me, will remain the same.

88. First, breaches that are remediable will not justify a refusal to transfer the requested person to the 'offending' Member State. Such breaches cannot prevail over the objectives of the swift and efficient administration of justice which the Framework Decision seeks to promote. The Court of Human Rights has repeatedly held that, when considering whether a breach of Article 6 of the Convention has been established, it is necessary to ascertain 'whether the proceedings, considered as a whole … were fair'. [57] There will, of course, be nothing to prevent the person in question from seeking to recover damages in respect of the infringement, under the relevant principles of EU or national law or, if appropriate, Article 41 of the Convention.

54 — See the joint partly dissenting opinion of Judges Bratza, Bonello and Hedigan in the Court of Human Rights judgment in *Mamatkulov and Askarov v. Turkey*, nos. 46827/99 and 46951/99, § 14.

55 — Such an approach was, for example, adopted by Lord Phillips in paragraph 136 of his speech in the House of Lords in the case of *RB (Algeria) and Another* v *Secretary of State for the Home Department* (see http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090218/rbalge-1.htm).

56 — At the hearing, counsel for Mr Radu was invited by the Court to be specific as to what violations of fundamental rights were being alleged. I confess that, for my part, I was not particularly enlightened by his reply.

57 — See, inter alia, *Bernard v. France*, § 37, *Reports of Judgments and Decisions* 1998-II.

89. It follows that it is only breaches that fundamentally destroy the fairness of the trial process (the test set out in point 83 above) that are capable of being relevant. In order for that to be so, however, in the context of a past infringement, *it must be demonstrated either that their effect, if spent, will of itself be such that no fair trial can be possible or that their past effects, if continuing will be such that they will have the same result.*

90. Let me illustrate that by giving two examples. Under the first, a requested person is charged with murder in the issuing Member State. A European arrest warrant is issued with a view to his transfer there from the executing Member State. Prior to that, however, the competent authorities in the first Member State had ordered that evidence, in the form of DNA samples from the deceased which, in the requested person's view were crucial to establishing his innocence, be destroyed. The requested person had, through his legal counsel, made representations in the issuing Member State that the samples should be retained in order to serve as evidence in his trial. There is no real doubt that the decision to destroy was wrongly taken, in breach of the requested person's human rights. There is no other material evidence that might go to show his innocence. Here, it seems to me that there is little doubt that the executing judicial authorities should refuse to execute the warrant. Under the second example, the circumstances are the same, save that the alleged breach of Article 6 was a failure to serve notice on the requested person of impending criminal proceedings against him. Such a breach is capable of remedy and there should be no question of its justifying a refusal to execute the warrant.

91. It may be observed that most examples of alleged breaches will be less clear than the two extreme illustrations I have just given. That is true. I do not propose to go into further detail in this regard, since it seems to me that the underlying issues will fall to be decided by the national courts on a case-by-case basis. It is not possible to lay down hard and fast rules.

92. It is necessary, in order to give a full answer to the national court's question, also to address Article 5 of the Convention and Article 6 of the Charter. In that regard, I find it hard to see that a breach prior to the transfer of a requested person to the issuing Member State would *not* be remediable. That possibility cannot entirely be ruled out, at least as a theoretical possibility, although the Court was not addressed on the point. Generally, it seems to me that the same principles apply as those which apply to Article 6 of the Convention.

93. In the present case, it will be a matter for the national court, applying the principles set out above, to determine whether the breaches of fundamental rights complained of by Mr Radu are sufficient to justify a refusal to execute the European arrest warrants at issue in the main proceedings.

94. There was some suggestion by Mr Radu's counsel at the hearing that procedural matters leading to the issue of a European arrest warrant might be at issue in the main proceedings. For the sake of good order, I would offer the following observations in that context.

95. First, it is not only where significant human rights infringements or any of the mandatory or optional grounds of non-execution specified in Articles 3 and 4 respectively of the Framework Decision are at issue that an executing judicial authority may refuse to execute a European arrest warrant. It may also refuse to do so if it is proved that there has been a breach of a fundamental procedural requirement as to the issuing of the warrant. If, for example, it were clearly established that the European arrest warrant failed to contain proper evidence of a national arrest warrant specified in Article 8(1)(c) of the decision (because, for example, the latter was void on procedural grounds under the law of the issuing Member State) the warrant should, I suggest, not be executed. The procedural rights given to requested persons pursuant to Articles 11 to 23 of the Framework Decision allow ample opportunity for points of this kind to be raised prior to a warrant being executed.

96. Second, the Framework Decision does not seek to harmonise or approximate the laws of the Member States concerning the reasons for, and the procedures leading to, the service of an arrest warrant on a person suspected or convicted of committing a criminal offence. The principle of mutual trust enshrined in the decision necessarily entails that each of the Member States recognises the criminal law of the others. [58]

97. In the light of the above, the answer to Question 4 should be that the competent judicial authority of the State executing a European arrest warrant can refuse the request for surrender without being in breach of the obligations authorised by the founding Treaties and the other provisions of Community law, where it is shown that the human rights of the person whose surrender is requested have been infringed, or will be infringed, as part of or following the surrender process. However, such a refusal will be competent only in exceptional circumstances. In cases involving Articles 5 and 6 of the Convention and/or Articles 6, 47 and 48 of the Charter, the infringement in question must be such as fundamentally to destroy the fairness of the process. The person alleging infringement must persuade the decision-maker that his objections are substantially well founded. Past infringements that are capable of remedy will not found such an objection.

Question 5

98. By this question, the national court asks whether an executing Member State may refuse to execute a European arrest warrant on the ground that the issuing Member State has failed to transpose, or incorrectly transposed, the Framework Decision.

99. In that regard, it is the Court's settled case-law that it is not open to one Member State to justify a failure to give effect to EU law by pointing to alleged failures on the part of another Member State to implement the same or similar obligations. [59]

100. That would suggest that the question must be clearly answered in the negative.

101. Should that view be qualified having regard to the national court's emphasis on the question of reciprocity? That point appears to be in issue in the main proceedings, [60] inasmuch as it is claimed on Mr Radu's behalf that German law fails to give proper effect to the Framework Decision.

102. It is true that the German Constitutional Court decided in 2005 that the domestic law implementing the decision was unconstitutional and thus of no effect. [61] However, it is my clear understanding, confirmed by Germany at the hearing, that the passage of new legislation in 2006 has remedied that situation.

103. I would add one thing. At the hearing, counsel for Germany used the example of a stolen goose. If that Member State were asked to execute a European arrest warrant in respect of that crime where the sentence passed in the issuing Member State was one of six years, she thought that execution of the warrant would be refused. She considered that such a refusal would be justifiable on the basis of the doctrine of proportionality and referred the Court to Article 49(3) of the Charter, according to which 'the severity of penalties must not be disproportionate to the criminal offence'. This Court has yet to rule on the interpretation of that article. In the context of the Convention, the Court of Human Rights has held that while, in principle, matters of appropriate sentencing largely fall outside the scope of the Convention, a sentence which is 'grossly disproportionate' could amount to ill-treatment

58 — See, to that effect, Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-1345, paragraphs 32 and 33.

59 — See to that effect, inter alia, Case 232/78 *Commission* v *France* [1979] ECR 2729, paragraph 9.

60 — See points 19 and 23 above.

61 — See point 19 and footnote 5 above.

contrary to Article 3 but that it is only on 'rare and unique occasions' that the test will be met.[62] It would be interesting to speculate as to the interpretation to be given to Article 49(3) of the Charter having regard to the interpretation given by the Court of Human Rights of the provisions of Article 3 of the Convention. However, I do not intend to explore the point for the simple reason that it does not arise in the present case. Even if one were to assume that such an approach on the part of the executing judicial authorities in Germany *would* represent a failure on that Member State's part to give effect to its obligations under the Framework Decision, it would not, for the purposes of Question 5, justify a refusal on an executing Member State's part to give effect to a European arrest warrant issued in Germany.

104. For those reasons, the answer to Question 5 should be that the competent judicial authority of the State executing a European arrest warrant cannot refuse the request for surrender on the ground that the State issuing the European arrest warrant has failed to transpose or fully to transpose or has incorrectly transposed the Framework Decision without being in breach of the obligations authorised by the founding Treaties and the other provisions of EU law.

Question 6

105. By this question, the national court asks whether certain provisions of national law are compatible with the Convention and the Charter and whether those provisions have properly transposed the Framework Decision into national law.

106. It is settled case-law that it is not for the Court, in the context of the procedure provided for in Article 267 TFEU, to determine whether national provisions are compatible with EU law.[63] While the Court, in qualification of that rule, may have jurisdiction to provide the national court with the criteria for the interpretation of EU law which may enable it to assess whether those provisions are so compatible, the information provided by the national court in its order for reference is not sufficient to enable the Court to undertake such an exercise in this case.[64]

107. Question 6 is accordingly inadmissible.

Conclusion

108. In the light of all of the above, I suggest that the Court should give the following answers to the questions referred by the Curtea de Apel Constanța:

(1) The provisions of the Charter of Fundamental Rights of the European Union, including Articles 6, 48 and 52 thereof, form part of the primary law of the Union. Fundamental rights, as guaranteed by the European Convention for the Protection of Fundamental Rights and Freedoms, including the rights set out in Articles 5(1), (3) and (4) and 6(2) and (3) of the Convention, constitute general principles of Union law.

(2) The deprivation of liberty and forcible surrender of the requested person that the European arrest warrant procedure entails constitutes an interference with that person's right to liberty for the purposes of Article 5 of the Convention and Article 6 of the Charter. That interference will normally be justified as 'necessary in a democratic society' by virtue of Article 5(1)(f) of the Convention. Nevertheless, detention under that provision must not be arbitrary. To avoid being

62 — See *Vinter and Others v. United Kingdom*, nos. 66069/09, 130/10 and 3096/10, § 89.

63 — See, inter alia, Case C-489/09 *Vandoorne* [2011] ECR I-225, paragraph 25 and the case-law cited.

64 — The Commission notes in its observations that the 2011 Report records Romania as having correctly transposed the provisions of the Framework Decision that are relevant to this case. Such a statement can, for obvious reasons, have the force of guidance only.

arbitrary, such detention must be carried out in good faith; it must be closely connected to the ground of detention relied on by the executing judicial authority; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued. Article 6 of the Charter falls to be construed in the same way as Article 5(1) of the Convention.

(3) The competent judicial authority of the Member State executing a European arrest warrant can refuse the request for surrender without being in breach of the obligations authorised by the founding Treaties and the other provisions of European Union law, where it is shown that the human rights of the person whose surrender is requested have been infringed, or will be infringed, as part of or following the surrender process. However, such a refusal will be competent only in exceptional circumstances. In cases involving Articles 5 and 6 of the Convention and/or Articles 6, 47 and 48 of the Charter, the infringement in question must be such as fundamentally to destroy the fairness of the process. The person alleging infringement must persuade the decision-maker that his objections are substantially well founded. Past infringements that are capable of remedy will not found such an objection.

(4) The competent judicial authority of the State executing a European arrest warrant cannot refuse the request for surrender on the ground that the State issuing the European arrest warrant has failed to transpose or fully to transpose or has incorrectly transposed the Framework Decision without being in breach of the obligations authorised by the founding Treaties and the other provisions of European Union law.