JUDGMENT OF THE COURT (Fourth Chamber)

21 October 2010 *

In Case C-306/09,

REFERENCE for a preliminary ruling under Article 35 EU from the Cour constitutionnelle (Belgium), made by decision of 24 July 2009, received at the Court on 31 July 2009, in the proceedings concerning the execution of a European arrest warrant issued against

I.B.,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann, L. Bay Larsen (Rapporteur), C. Toader and M. Berger, Judges,

Advocate General: P. Cruz Villalón,
Registrar: M.-A. Gaudissart, Head of Unit,

* Language of the case: French.

having regard to the written procedure and further to the hearing on 11 May 2010,

after considering the observations submitted on behalf of:

— I.B., by P. Huget, avocat,

— the Belgian Government, by T. Materne, acting as Agent, assisted by J. Bourtembourg and F. Belleflamme, avocats,

— the German Government, by J. Möller and J. Kemper, acting as Agents,

— the Austrian Government, by E. Riedl, acting as Agent,

— the Polish Government, by M. Dowgielewicz, acting as Agent,

— the Swedish Government, by A. Falk and C. Meyer-Seitz, acting as Agents,

— the United Kingdom Government, by I. Rao, acting as Agent,

— the Council of the European Union, by O. Petersen and I. Gurov, acting as Agents,

— the European Commission, by R. Troosters and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 July 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 3, 4(6), 5(1) and 5(3) of Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), and the validity of Articles 4(6) and 5(3) of that framework decision.

2 The reference has been made in proceedings concerning the execution, by the Tribunal de première instance de Nivelles (Court of First Instance, Nivelles) (Belgium) ('the executing judicial authority'), of a European arrest warrant issued on 13 December

2007 by the Tribunalul București (Regional Court of Bucharest) (Romania) '(the Romanian issuing judicial authority') in respect of I.B., a Romanian national residing in Belgium, for the purposes of execution of a four-year custodial sentence imposed by a judicial decision rendered *in absentia*.

Legal framework

European Union Law

3 It is apparent from the information concerning the date of entry into force of the Treaty of Amsterdam, published in the *Official Journal of the European Communities* of 1 May 1999 (OJ 1999 L 114, p. 56), that the Kingdom of Belgium made a declaration on the basis of Article 35(2) EU by which it accepted the jurisdiction of the Court to give preliminary rulings in accordance with the arrangements laid down in Article 35(3)(b) EU.

4 In accordance with Article 10(1) of Protocol No 36 on transitional provisions, annexed to the TFEU, the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union 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 Article 35(2) EU.

Framework Decision 2002/584

Recitals 1, 5, 10 and 12 in the preamble to Framework Decision 2002/584 state as follows:

‘(1) According to the Conclusions of the Tampere European Council of 15 and 16 October 1999 …, the formal extradition procedure should be abolished among the Member States in respect of persons who are fleeing from justice after having been finally sentenced and extradition procedures should be speeded up in respect of persons suspected of having committed an offence.

…

(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.

…

(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) [EU], determined by the Council pursuant to Article 7(1) [EU] with the consequences set out in Article 7(2) [EU].

...

(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 [EU] and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof ...

...'

6 Article 1 of Framework Decision 2002/584 states:

'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 [EU].'

7 Article 2(1) of Framework Decision 2002/584, under the heading 'Scope of the European Arrest Warrant' provides:

'A European arrest warrant may be issued for acts punishable by the law of the issuing Member State … or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.'

8 Article 3 of Framework Decision 2002/584 lists three '[g]rounds for mandatory non-execution of the European arrest warrant.'

9 Article 4 of Framework Decision 2002/584, entitled 'Grounds for optional non-execution of the European arrest warrant', states, in seven paragraphs, what those grounds are. Article 4(6) states:

'The executing judicial authority may refuse to execute the European arrest warrant:

…

(6) if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law.'

10 Article 5 of Framework Decision 2002/584, entitled 'Guarantees to be given by the issuing Member State in particular cases', states:

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

(1) where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered *in absentia* and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered *in absentia*, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment;

...

(3) where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned

to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.'

11 Article 8 of the Framework Decision, entitled 'Content and form of the European arrest warrant', provides:

'1. The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex:

…

(c) 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;

…

(f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;

…'

12 Article 15(2) of the Framework Decision provides:

'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 …'

13 Article 32 of Framework Decision 2002/584 provides:

'Extradition requests received before 1 January 2004 will continue to be governed by existing instruments relating to extradition. Requests received after that date will be governed by the rules adopted by Member States pursuant to this Framework Decision. However, any Member State may, at the time of the adoption of this Framework Decision by the Council, make a statement indicating that as executing Member State it will continue to deal with requests relating to acts committed before a date which it specifies in accordance with the extradition system applicable before 1 January 2004. The date in question may not be later than 7 August 2002. The said statement will be published in the Official Journal of the European Communities. It may be withdrawn at any time.'

Framework Decision 2009/299/JHA

14 Council Framework Decision 2009/299/JHA of 26 February 2009, amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ 2009 L 81, p. 24), which, under Article 8(1), must be implemented by the Member States by 28 March 2011 at the latest,

repealed Article 5(1) of Framework Decision 2002/584 and inserted a new Article 4a in that framework decision.

15 However, Article 4a of Framework Decision 2002/584/JHA, entitled 'Decisions rendered following a trial at which the person did not appear in person', applies only to the recognition and execution of decisions rendered in the absence of the person concerned at the trial as from 28 March 2011.

National law

Belgian legislation

16 The Law of 19 December 2003 on the European arrest warrant (*Moniteur belge* of 22 December 2003, p. 60075; 'the Law on the European arrest warrant') transposes Framework Decision 2002/584 into national law.

17 With regard, first, to the grounds of mandatory non-execution of the European arrest warrant, Article 4 of the Law on the European arrest warrant provides:

'The execution of a European arrest warrant shall be refused in the following cases:

…

(5) if there are valid grounds for believing that the execution of the European arrest warrant would have the effect of infringing the fundamental rights of the person concerned, as enshrined in Article 6 [EU].'

18 Regarding, second, the grounds for optional non-execution of the European arrest warrant, Article 6 of the Law on the European arrest warrant provides:

'Execution may be refused in the following cases:

…

(4) if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the person concerned is Belgian or resides in Belgium and the competent Belgian authorities undertake to execute the sentence or detention order in accordance with Belgian law;

…'

19 With regard to the actual implementation of a decision taken under Article 6(4) of the Law on the European arrest warrant, Article 18(2) of the Law of 23 May 1990 on the inter-State transfer of convicted persons, the taking-over and transfer of the monitoring of persons convicted or discharged subject to conditions and the taking-over and transfer of the execution of custodial sentences and detention orders (*Moniteur belge*

of 20 July 1990, p. 14304), as amended by the Law of 26 May 2005 (*Moniteur belge* of 10 June 2005, p. 26718) ('the Law on transfers'), provides:

'A judicial decision taken pursuant to Article 6(4) of the Law … on the European arrest warrant shall entail the taking-over of the execution of the custodial sentence or detention order referred to in that judicial decision. The sentence or detention order shall be executed in accordance with the provisions of this Law.'

20 Article 18 of the Law on transfers, which appears in Chapter VI of that law, entitled 'The execution in Belgium of custodial sentences and detention orders imposed abroad', must be read in the light of Article 25 of that law, which provides:

'The provisions of Chapters V and VI shall not apply to criminal sentences imposed *in absentia*, save in the cases referred to in Article 18(2) where a sentence imposed *in absentia* has become final.'

21 With regard, third, to the guarantees which must be observed by the issuing Member State, Articles 7 and 8 of the Law on the European arrest warrant transpose Article 5(1) and Article 5(3) of Framework Decision 2002/584 respectively. Article 7 of that law provides, for the purposes of executing a sentence imposed by a decision rendered *in absentia*:

'Where a European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered *in absentia* and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered *in absentia*, surrender may be subject to the condition that the issuing judicial authority should give an assurance deemed adequate to guarantee the person who is the subject of the

European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment.

The existence in the law of the issuing State of a provision which provides for an appeal and a statement of the conditions for bringing that appeal, which make it clear that the person concerned may in fact bring an appeal shall be deemed an adequate guarantee within the meaning of the preceding paragraph.'

22 Article 8 of the Law on the European arrest warrant provides:

'Where a person who is the subject of a European arrest warrant for the purposes of prosecution is Belgian or resides in Belgium, surrender may be subject to the condition that the person, after being tried, should be returned to Belgium in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.'

Romanian legislation

23 Article 522a of the Romanian Code of Criminal Procedure provides:

'Retrial of persons tried *in absentia* in extradition cases.

Where the extradition is requested of a person who has been tried and sentenced in *absentia*, the case may be retried by the court which heard the case at first instance, on application by that person.

The provisions of Articles 405 to 408 apply by analogy.'

24 Article 405 of the Romanian Code of Criminal Procedure provides:

'Following acceptance in principle of an application for review, that case shall be re-heard in accordance with the rules of procedure which applied to the trial at first instance.

If it considers it to be necessary, the court shall re-examine the evidence submitted when the case was first tried or when the application for review was accepted in principle.'

The proceedings in the main action and the questions referred

25 By judgment of 16 June 2000, the Tribunalul Bucureşti sentenced I.B. to four years' imprisonment for the offence of trafficking in nuclear and radioactive substances. That judgment was upheld, by decision of 3 April 2001, by the Curtea de apel Bucureşti (Court of Appeal, Bucharest).

26 Those two courts had authorised I.B. to serve his sentence, which was imposed and upheld in adversarial proceedings, at his workplace rather than in custody.

27 By decision of 15 January 2002, the Curtea Supremă de Justiție (Supreme Court of Justice) (Romania), ruling, according to the statements of the referring court, *in absentia*, and without I.B. having been informed in person of the date or place of the hearing, quashed the earlier judgments in so far as they authorised I.B. to serve his four-year prison sentence at his workplace, and ordered that it be served in custody.

28 In February 2002, I.B. decided to go to Belgium after having been, according to his evidence, the victim of serious breaches of his right to a fair trial. His wife and two children then joined him as from October 2002.

29 On 11 December 2007, I.B. was taken into custody in Belgium, following the entry by the Romanian authorities, on 10 February 2006, of an alert in the Schengen Information System (SIS) seeking his arrest and surrender to those authorities for the purposes of execution of the custodial sentence that had been imposed on him.

30 Considering that that alert was equivalent to a European arrest warrant, the Public Prosecutor referred the case to the investigating judge who decided, by order of 12 December 2007, to release I.B. conditionally pending a final decision on his surrender.

31 On 13 December 2007, the Tribunalul București issued a European arrest warrant in respect of I.B. for the purposes of executing the sentence of four years' imprisonment passed against him in Romania.

32 On 19 December 2007, I.B. lodged an application at the Office for Foreign Nationals for the grant of refugee status in Belgium.

33 On 29 February 2008, the Public Prosecutor requested the Tribunal de première instance de Nivelles to rule that the arrest warrant issued by the Romanian issuing judicial authority was enforceable.

34 On 2 July 2008, I.B. was refused refugee status and subsidiary protection. That refusal, which was confirmed by the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings), is currently the subject of proceedings before the Conseil d'État (Council of State) (Belgium).

35 By order of 22 July 2008, the Tribunal de première instance de Nivelles, when checking the conditions with which the European arrest warrant must comply before it can be executed, held that it fulfilled all the conditions laid down by the Law on the European arrest warrant. In particular, it considered that there was no valid ground for believing that the execution of the European arrest warrant would have the effect of infringing I.B.'s fundamental rights.

36 In that regard, that court observes that, while the European arrest warrant at issue in the main proceedings concerns, admittedly, the execution of a judicial decision rendered *in absentia*, the Romanian issuing judicial authority has nevertheless given certain assurances which can be regarded as adequate under Article 7 of the Law on the European arrest warrant, since the arrest warrant in question refers to the fact that, under Article 522a of the Romanian Code of Criminal Procedure, the case may,

on application by the person sentenced *in absentia*, be retried by the court which heard the case at first instance.

37 The Tribunal de première instance de Nivelles held that I.B. could not rely on Article 6(4) of the Law on the European arrest warrant, which provides that the execution of the European arrest warrant may be refused if the European arrest warrant has been issued for the purposes of execution of a custodial sentence, where the person concerned resides in Belgium and the competent authorities undertake to execute that sentence in accordance with Belgian law.

38 That ground for refusal applies only to sentences rendered *in absentia* which have become final, as laid down in Article 25 of the Law on transfers, read in conjunction with Article 18(2) of that law. However, I.B. would still have the right to request a retrial.

39 In addition, the Tribunal de première instance de Nivelles points out that, while Article 8 of the Law on the European arrest warrant provides that the surrender of a person for the purposes of prosecution who is the subject of a European arrest warrant and resides in Belgium may be subject to the condition that the person, after being tried, is returned to Belgium in order to serve there the custodial sentence passed against him in the issuing Member State, Article 7 of that law provides that an arrest warrant based on a judgment rendered *in absentia* is considered as being issued for the purposes of executing a sentence.

40 Considering that that difference in treatment may result in discrimination, and taking into account the fact that I.B. resides in Belgium for the purposes of that legislation, the Tribunal de première instance de Nivelles, on the assumption that Article 8 must be interpreted as applying only to a European arrest warrant issued for the purposes of prosecution and not also to a European arrest warrant issued for the purposes of executing a custodial sentence rendered *in absentia* against which the convicted person still has a remedy, referred to the Cour constitutionnelle (Constitutional Court)

the question of the compatibility of Article 8 of the Law on the European arrest warrant with Articles 10 and 11 of the Constitution, which concern the principles of equal treatment and non-discrimination.

41 Having in its turn held that the only purpose of the Law on the European arrest warrant was to implement Framework Decision 2002/584 in the domestic legal system, the Cour constitutionnelle decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is a European arrest warrant issued for the purposes of the execution of a sentence imposed *in absentia*, without the convicted person having been informed of the date and place of the hearing, and against which that person still has a remedy, to be considered to be, not an arrest warrant issued for the purposes of the execution of a custodial sentence or detention order within the meaning of Article 4(6) of Framework Decision [2002/584], but an arrest warrant for the purposes of prosecution within the meaning of Article 5(3) of the Framework Decision?

(2) If the reply to the first question is in the negative, are Article 4(6) and Article 5(3) of the Framework Decision to be interpreted as not permitting the Member States to make the surrender to the judicial authorities of the issuing State of a person residing on their territory who is the subject, in the circumstances described in the first question, of an arrest warrant for the purposes of the execution of a custodial sentence or detention order, subject to a condition that that person be returned to the executing State in order to serve there the custodial sentence or detention order imposed by a final judgment against that person in the issuing State?

(3) If the reply to the second question is in the affirmative, do the articles in question contravene Article 6(2) [EU] and, in particular, the principles of equality and non-discrimination?

(4) If the reply to the first question is in the negative, are Articles 3 and 4 of the Framework Decision to be interpreted as preventing the judicial authorities of a Member State from refusing the execution of a European arrest warrant if there are valid grounds for believing that its execution would have the effect of infringing the fundamental rights of the person concerned, as enshrined by Article 6(2) [EU]?'

The questions referred for a preliminary ruling

42 As a preliminary point, it should be noted first that, according to Article 32 of Framework Decision 2002/584, the framework decision applies to requests for execution of an arrest warrant received after 1 January 2004, on condition that the executing Member State has not made a statement indicating that it will continue to deal with requests relating to acts committed before 7 August 2002 in accordance with the extradition system applicable before 1 January 2004. While the request at issue in the main proceedings indeed relates to acts which took place before that date, it is agreed that the Kingdom of Belgium did not make such a statement. It follows that that framework decision is applicable to the present case.

43 It should be recalled, secondly, that the grounds for non-execution of a European arrest warrant listed in Article 3 and 4 of that framework decision do not include an application for asylum or an application for the grant of refugee status or subsidiary protection.

44 With regard, more particularly, to a request for asylum submitted to the competent authorities of a Member State by a national of another Member State, the sole article of Protocol No 29 on asylum for nationals of member states of the European Union annexed to the EC Treaty (now Protocol No 24 annexed to the TFEU) provides inter alia that, given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States are to be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters.

45 Similarly, it should be pointed out that a request for the grant of refugee status or subsidiary protection by a national of a Member State does not fall within the scope of the international protection mechanism established by Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12).

46 Therefore, the fact that I.B. lodged a request with the competent Belgian authorities for the grant of refugee status or subsidiary protection within the meaning of Directive 2004/83 cannot be considered relevant, for the purpose of the answers to be given to the questions raised by the referring court.

47 Third, it should be noted that the referring court proceeds on the assumption that the request submitted to it was for execution of a judgment rendered *in absentia* within the meaning of Article 5(1) of Framework Decision 2002/584. It is for that court, as appropriate, to make use of the possibilities offered to it in Article 15(2) of that framework decision in order to check that point. In any case, it is for the Court of Justice to rule on the matter in the light of the factual and legal considerations set out in the order for reference.

First and second questions

48 By its first and second questions, which should be examined together, the referring court asks essentially whether Articles 4(6) and 5(3) of Framework Decision 2002/584 may be interpreted as meaning that the execution of a European arrest warrant issued for the purposes of execution of a sentence imposed *in absentia* within the meaning of Article 5(1) of that framework decision may be subject to the condition that the person concerned, a national or resident of the executing Member State, should be returned to the executing State in order, as the case may be, to serve there the sentence passed against him, following a new trial organised in his presence in the issuing Member State.

49 In order to reply to those questions, it must be noted that the European arrest warrant may, under Article 1(1) of Framework Decision 2002/584, apply to two situations. Thus, that arrest warrant may be issued, on the one hand, for the purposes of conducting a criminal prosecution or, on the other hand, for the purposes of executing a custodial sentence or detention order.

50 While the system established by Framework Decision 2002/584 is based on the principle of mutual recognition, that recognition does not, as is clear from Articles 3 to 5 of the framework decision, mean that there is an absolute obligation to execute the arrest warrant that has been issued.

51 The system established by the framework decision, as evidenced inter alia by the provisions of those articles, makes it possible for the Member States to allow the competent judicial authorities, in specific situations, to decide that a sentence must be executed on the territory of the executing Member State.

52 That is the case, in particular, under Articles 4(6) and 5(3) of Framework Decision 2002/584. For both types of European arrest warrant envisaged by the framework decision, those provisions have, in particular, the objective of enabling particular weight to be given to the possibility of increasing the requested person's chances of reintegrating into society (see, in particular, Case C-123/08 *Wolzenburg* [2009] ECR I-9621, paragraph 62).

53 There is nothing to indicate that the European Union legislator wished to exclude persons requested on the basis of a sentence imposed *in absentia* from that objective.

54 First, a judicial decision rendered *in absentia*, where the person concerned was not summoned in person or otherwise informed of the date and place of the hearing which led to that decision, falls within the scope of Framework Decision 2002/584 which, specifically, in Article 5(1), provides that the execution of the arrest warrant issued following such a decision may be subject to the guarantee that the person concerned will have an opportunity to apply for a retrial of the case.

55 Second, the mere fact that Article 5(1) makes the execution of an arrest warrant issued following a decision rendered *in absentia* subject to such a guarantee cannot have the effect of rendering inapplicable to a warrant of that kind the ground or the condition laid down in Article 4(6) or Article 5(3) of Framework Decision 2002/584 respectively in order to increase the requested person's chances of reintegrating into society.

56 If the sentence imposed *in absentia* – which, in the case in the main proceedings, provides the basis for the arrest warrant – is not yet enforceable, the surrender would serve the specific purpose of enabling a criminal prosecution to be conducted or the case to be retried, that is to say surrender would be for the purposes of criminal

prosecution which is the situation envisaged by Article 5(3) of Framework Decision 2002/584.

57 Given that the situation of a person who was sentenced *in absentia* and to whom it is still open to apply for a retrial is comparable to that of a person who is the subject of a European arrest warrant for the purposes of prosecution, there is no objective reason precluding an executing judicial authority which has applied Article 5(1) of Framework Decision 2002/584 from applying the condition contained in Article 5(3) of that framework decision.

58 Furthermore, such an interpretation is the only one which, currently, offers a real possibility of reintegrating into society for a person resident in the executing Member State who, having been sentenced by a judgment which is not yet enforceable, may be retried in the issuing Member State.

59 Finally, that interpretation also makes it possible, as emphasised, in particular, by the Swedish Government, to avoid constraining the person sentenced *in absentia* to waive a retrial in the issuing Member State in order to ensure that his sentence may, pursuant to Article 4(6) of Framework Decision 2002/584, be executed in the Member State where he is resident within the meaning of the relevant provisions of that framework decision.

60 It follows that, as argued by all the Member States and the European Commission which submitted observations on the first question or on the first and the second questions, the executing member State may make the surrender of a person in a situation such as that of I.B. subject to the joint application of the conditions laid down in Article 5(1) and Article 5(3) of Framework Decision 2002/584.

61 In the light of all of the foregoing considerations, the answer to the first and second questions is that Article 4(6) and 5(3) of Framework Decision 2002/584 must be interpreted as meaning that, where the executing Member State has implemented Article 5(1) and Article 5(3) of that framework decision in its domestic legal system, the execution of a European arrest warrant issued for the purposes of execution of a sentence imposed *in absentia* within the meaning of Article 5(1) of the framework decision, may be subject to the condition that the person concerned, who is a national or resident of the executing Member State, should be returned to the executing State in order, as the case may be, to serve there the sentence passed against him, following a new trial organised in his presence in the issuing Member State.

The third and fourth questions

62 The third and fourth questions in fact require a reply only if the answer given to the first and second questions does not, in circumstances such as those in the main proceedings, allow the executing judicial authority to make the surrender of the person concerned subject to the condition that he should be returned to the executing Member State.

63 Since the Court has, in its answer to the first and second questions, accepted that it is possible to make the surrender subject to the guarantee provided for in Article 5(3) of Framework Decision 2002/584, it is not necessary to reply to the third and fourth questions.

Costs

64 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Articles 4(6) and 5(3) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States must be interpreted as meaning that, where the executing Member State has implemented Articles 5(1) and Article 5(3) of that framework decision in its domestic legal system, the execution of a European arrest warrant issued for the purposes of execution of a sentence imposed *in absentia* within the meaning of Article 5(1) of the framework decision, may be subject to the condition that the person concerned, a national or resident of the executing Member State, should be returned to the executing State in order, as the case may be, to serve there the sentence passed against him, following a new trial organised in his presence in the issuing Member State.

[Signatures]