OPINION OF ADVOCATE GENERAL
BOT
delivered on 10 May 2016 (1)

Case C-182/15

Aleksei Petruhhin

(Request for a preliminary ruling from the Augstākā tiesa (Supreme Court, Latvia))

(Request for a preliminary ruling — Citizenship of the European Union — First paragraph of Article 18 TFEU and Article 21(1) TFEU — Request for the extradition to Russia of a national of one Member State present on the territory of another Member State — Refusal of a Member State to extradite its own nationals — Difference in treatment on the ground of nationality — Whether justified — Combating impunity — Verification of the guarantees provided for in Article 19(2) of the Charter of Fundamental Rights of the European Union)

1. Extradition may be defined as an international mutual assistance enforcement procedure whereby one State asks another State to surrender to it a person on the territory of the latter State in order to be prosecuted and tried or, if he has already been convicted, in order to serve his sentence.

2. The present case concerns an extradition request issued by the Russian Federation to the Republic of Latvia in relation to an Estonian national who had been arrested on the territory of the Republic of Latvia.

3. In essence, the Court is asked to rule on whether the protection against extradition which Latvian nationals enjoy under national law and under a bilateral agreement with the Russian Federation must, under the rules of the FEU Treaty on citizenship of the Union, be extended to nationals of other Member States.

4. A number of Member States, including the Republic of Latvia, recognised, in their national law and also in the international conventions to which they are parties, the principle that they refuse to extradite their nationals. When an extradition request is addressed to a Member State and that request concerns a citizen of the Union who is not a national of the requested Member State, such a principle establishes a difference in treatment between the nationals of that State and the nationals of the other Member States. I am of the view, however, that such a difference in treatment does not constitute discrimination on the ground of nationality contrary to the first paragraph of Article 18 TFEU, provided that it is shown that those two categories of nationals are not in a comparable situation in the light of the objective of combating the impunity of persons suspected of having committed an offence in a third State.

I – Legal framework

A – *EU law*

5. Article 19 of the Charter of Fundamental Rights of the European Union, (2) entitled 'Protection in the event of removal, expulsion or extradition provides, in paragraph 2:

'No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.'

B – *Latvian law*

6. The Latvian Constitution provides in the third sentence of Article 98:

'A citizen of Latvia may not be extradited to a foreign country, except in the cases provided for in international agreements ratified by the Saeima (Latvian Parliament) if by the extradition the basic human rights specified in the Constitution are not violated.'

7. Under Article 4 of the Krimināllikums (criminal law, 'the Latvian Criminal Law'):

'1. Latvian citizens, Latvian non-citizens [(3)] and foreign nationals who have a permanent residence permit for Latvia shall be held liable, in Latvian territory and in accordance with the present Law, for an offence committed in the territory of another State or outside the territory of any State, irrespective of whether it is recognised as an offence and punishable in the place in which it was committed.

…

3. Foreign nationals who do not have a permanent residence permit for Latvia and who have committed serious or very serious offences in the territory of another State which have been directed against the interests of the Republic of Latvia or the interests of its inhabitants shall be held criminally liable in accordance with this Law irrespective of the laws of the State in whose territory the offence was committed if they have not been held criminally liable or faced criminal proceedings in application of the laws of the State in which the offence was committed.

4. Foreign nationals who do not have a permanent residence permit for Latvia and who have committed a criminal offence in the territory of another State or outside any national territory shall, in the cases provided for in international agreements binding on the Republic of Latvia, be held liable in accordance with this Law irrespective of the laws of the State in whose territory the offence was committed if they have not been held criminally liable for such offence or faced criminal proceedings in respect of that offence in the territory of another State.'

8. Chapter 66 of the Kriminālprocesa likums (code of criminal procedure, 'the Latvian Code of Criminal Procedure'), entitled 'Extradition of a person to a foreign State', provides in Article 696(1) and (2):

'(1) A person who is present in the territory of the Republic of Latvia may be extradited for the purpose of criminal proceedings, trial, or the execution of a judgment, if a request has been received from a foreign State for the temporary detention or the extradition of that person and the facts are characterised as a criminal offence under Latvian law and the law of the foreign State.

(2) A person may be extradited for the purpose of criminal proceedings or trial in respect of an offence the commission of which is punished by imprisonment for a maximum term of not less than

one year or by a more severe penalty, unless an international treaty provides otherwise.'

9. Article 697(2) of the Latvian Code of Criminal Procedure is worded as follows:

'Extradition shall not be granted if:

(1) the person concerned is a Latvian citizen;

(2) the request for the extradition of the person concerned has been made with the aim of commencing criminal proceedings against him or punishing him on the ground of race, religious beliefs, nationality or political views, or if there are sufficient grounds for believing that his rights may be infringed on the abovementioned grounds;

…

(7) the person concerned may be tortured in the foreign State.'

10. The Agreement of 3 February 1993 between the Republic of Latvia and the Russian Federation on Judicial Assistance and Judicial Relations in Civil, Family and Criminal Matters provides, in articles 1 and 62:

'Article 1: Legal protection

1. As regards personal and economic rights, the nationals of one of the Contracting Parties present in the territory of the other Contracting Party shall enjoy in that territory the same legal protection as the nationals of the other Contracting Party.

2. The nationals of one of the Contracting Parties shall be entitled to access freely and without hindrance the courts, the office of the Public Prosecutor and notarial offices … and other institutions of the other Contracting Party with competence for civil, family and criminal matters, they may bring proceedings, submit requests, lodge appeals and carry out other procedural acts before those bodies on the same terms as nationals of that other Contracting Party.

…

Article 62: Refusal of extradition

1. Extradition shall not be granted if:

(1) the person whose extradition is requested is a national of the Contracting Party to which the request is addressed or if he has obtained refugee status in that State.

…'

11. The Agreement between the Republic of Latvia, the Republic of Estonia and the Republic of Lithuania on Judicial Assistance and Judicial Relations, signed at Tallinn on 11 November 1992, provides in Article 1(1):

'As regards personal and economic rights, the nationals of one of the Contracting Parties present in the territory of the other Contracting Party shall enjoy in that territory the same legal protection as the nationals of the other Contracting Party.'

II – Facts of the main proceedings and questions for a preliminary ruling

12. Mr Aleksei Petruhhin, an Estonian national, was made the subject of a priority Red Notice on

Interpol's website on 22 July 2010.

13. Mr Petruhhin was arrested on 30 September 2014 in the town of Bauska (Latvia), then placed in provisional custody on 3 October 2014.

14. On 21 October 2014, the Latvian authorities received an extradition request from the Office of the Prosecutor-General of the Russian Federation. It is apparent from that request that criminal proceedings were initiated against Mr Petruhhin by decision of 9 February 2009 and that Mr Petruhhin ought to have been placed in custody as a security measure. According to that decision, Mr Petruhhin is accused of attempted large-scale drug-trafficking in criminal association. Under Russian law, that offence is punishable with a term of imprisonment of between 8 and 20 years.

15. The Public Prosecutor of the Republic of Latvia authorised Mr Petruhhin's extradition to Russia. However, on 4 December 2014 Mr Petruhhin filed an appeal against the extradition decision, on the ground that, under Article 1 of the Agreement between the Republic of Latvia, the Republic of Estonia and the Republic of Lithuania on Judicial assistance and Judicial Relations, he enjoyed the same rights in Latvia as a Latvian national and that, consequently, the Republic of Latvia was required to protect him against unjustified extradition.

16. The Augstākā tiesa (Supreme Court, Latvia) points out that neither Latvian law nor any international agreement signed by the Republic of Latvia with, in particular, the Russian Federation and with the other Baltic countries restricts the extradition of an Estonian national to Russia. Under Article 62 of the Agreement of 3 February 1993 between the Republic of Latvia and the Russian Federation on Judicial Assistance and Judicial Relations in Civil, Family and Criminal Matters, protection against such extradition is conferred only on Latvian nationals.

17. The referring court observes, moreover, that although Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (4) authorises the Member States to surrender their own nationals, no consultation mechanism has been established between the Member States for obtaining the consent of the Member State of which a person is a national to the extradition of that person to a third State.

18. According to the referring court, it follows from the foregoing considerations that the protection afforded by a Member State to its own nationals against extradition to a third State is effective only on the territory of that Member State. The referring court is of the view, however, that that is contrary to the essence of citizenship of the Union, that is to say, the right to equivalent protection. It emphasises that that situation creates uncertainty for citizens of the European Union as regards freedom of movement within the European Union.

19. The referring court expresses the view that, under EU law, where there is a request for the extradition of a national of a Member State to a third State, the requested Member State should ensure the same level of protection for citizens of the Union as for its own nationals.

20. Being uncertain, none the less, as to the interpretation to be given to EU law, the Augstākā tiesa (Supreme Court) decided on 26 March 2015, while annulling the detention of Mr Petruhhin, to stay proceedings and to submit the following questions to the Court for a preliminary ruling:

'1. Are the first paragraph of Article 18 TFEU and Article 21(1) TFEU to be interpreted as meaning that, in the event of extradition of a citizen of any Member State of the European Union to a non-Member State under an extradition agreement concluded between a Member State and a third country, the same level of protection must be guaranteed as is guaranteed to a citizen of the Member States in question?

2. In those circumstances, must the court of the Member State to which the request for extradition has been made apply the conditions for extradition of the Member State of which the person concerned is a citizen or that in which he has his habitual residence?

3. In cases in which extradition must be carried out without taking into consideration the specific level of protection established for the citizens of the State to which the request for extradition has been made, must the Member State to which the request for extradition has been made verify compliance with the safeguards established in Article 19 of the Charter, that is, that no one may be extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment? May such verification be limited to checking that the State requesting extradition is a party to the Convention against Torture or is it necessary to check the factual situation by taking into consideration the evaluation of that State carried out by the bodies of the Council of Europe?'

III – My analysis

A – *Preliminary observations*

1. The possible application of Article 1(1) of the Agreement between the Republic of Latvia, the Republic of Estonia and the Republic of Lithuania on Judicial Assistance and Judicial Relations for the purpose of resolving the main proceedings

21. In his appeal against the decision of the Public Prosecutor of the Republic of Latvia authorising his extradition, Mr Petruhhin relies, in particular, on Article 1(1) of the Agreement between the Republic of Latvia, the Republic of Estonia and the Republic of Lithuania on Judicial Assistance and Judicial Relations. He claims, on the basis of that provision, that he should receive from the Republic of Latvia the same protection as that Member State affords its nationals in the event of criminal proceedings. It follows that that Member State is required to protect Mr Petruhhin against an unjustified extradition request and that he is entitled to expect that the Republic of Latvia will do its utmost to obtain evidence to establish his guilt or innocence. In his submission, however, it is apparent from the position adopted by the Public Prosecutor of the Republic of Latvia that nothing will be done to verify as much and as accurately as possible the offences which he is alleged to have committed on Russian territory.

22. At the hearing, the Latvian Government was asked whether Article 1(1) of the Agreement between the Republic of Latvia, the Republic of Estonia and the Republic of Lithuania on Judicial Assistance and Judicial Relations might be interpreted as conferring on Estonian and Lithuanian nationals the same protection against extradition as that enjoyed by Latvian nationals. The Latvian Government stated, in that regard, that thus far the Latvian case-law has not interpreted that provision as conferring additional guarantees on Estonian and Lithuanian nationals not to be extradited by the Republic of Latvia.

23. It is for the referring court to ascertain whether it may find a solution to the main proceedings by interpreting Article 1(1) of the Agreement between the Republic of Latvia, the Republic of Estonia and the Republic of Lithuania on Judicial Assistance and Judicial Relations. It is incumbent on that court, in particular, to consider whether the expression 'personal rights' in that provision covers the right to legal protection against extradition.

2. Admissibility of the request for a preliminary ruling

24. At the hearing, the Latvian Government revealed that Mr Petruhhin is no longer on its territory, but that, following the cancellation of his detention on 26 March 2015, he returned to

Estonia. The Governments of the Member States which expressed their views at the hearing inferred that the present request for a preliminary ruling should be declared inadmissible.

25. In that regard, it should be recalled that, according to settled case-law, the procedure provided for by Article 267 TFEU is an instrument for cooperation between the Court of Justice and the national courts, by means of which the former provides the latter with the points of interpretation of EU law which they require in order to decide the disputes before them. (5)

26. In the context of that cooperation, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, provided that the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling. (6)

27. It follows that questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (7)

28. Thus, it should be borne in mind that, according to settled case-law, it is clear from both the wording and the scheme of Article 267 TFEU that a national court or tribunal is not empowered to bring a matter before the Court by way of a request for a preliminary ruling unless a case is pending before it, in which it is called upon to give a decision which is capable of taking account of the preliminary ruling. (8)

29. That is the position in the present case. The Latvian Government confirmed at the hearing that there is still a dispute pending before the referring court. Whatever the uncertainty as to Mr Petruhhin's present whereabouts, the referring court must therefore adjudicate on the legality of the decision taken by the Public Prosecutor of the Republic of Latvia to extradite him. Under Article 707 of the Latvian Code of Criminal Procedure, the referring court may decide either that the Public Prosecutor's decision must be upheld, or that it must be annulled and that the extradition must not be authorised, or that the extradition request must be further examined. From the aspect of the decision to be taken by the referring court, an answer from the Court to the questions submitted by the referring court is still wholly relevant. Just as in the case of a convicted person who absconds after being found guilty, such a decision may then be enforced at any time, if need be after Mr Petruhhin has been re-arrested on Latvian territory.

30. In the light of those factors, I therefore consider that the present request for a preliminary ruling is admissible.

B – *First and second questions*

31. By its first and second questions, which should be examined together, the referring court asks the Court, in essence, to rule on whether the first paragraph of Article 18 TFEU and Article 21(1) TFEU must be interpreted as meaning that a national of one Member State who is on the territory of another Member State and who is the subject of an extradition request by a third State must benefit from the same rule as that which protects the nationals of that other Member State against extradition.

32. It is appropriate first of all to ascertain whether Mr Petruhhin's situation falls within the scope of EU law and, in particular, the provisions of the FEU Treaty on citizenship of the Union.

33. All the Governments which have submitted observations to the Court, with the exception of the Government of the United Kingdom, claim that the rules on extradition, in a situation in which the European Union has not concluded an agreement on extradition with a third State, falls within the competence of the Member States and is therefore not covered by EU law.

34. I do not share that view. On the contrary, I endorse the view position expressed by the Government of the United Kingdom at the hearing, namely that the first paragraph of Article 18 TFEU and Article 21(1) TFEU are applicable since Mr Petruhhin exercised his right to freedom of movement or his right of residence under EU law and that he is therefore, in principle, entitled to be treated in the same way as nationals of the host Member State.

35. It should be pointed out that, as an Estonian national, Mr Petruhhin has the status of a citizen of the Union pursuant to the first paragraph of Article 20(1) TFEU and may therefore rely, as against both his Member State of origin and the Member State to which he travels, on the rights attaching to such a status.

36. As the Court has held on numerous occasions, the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy, within the scope *ratione materiae* of the FEU Treaty, the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for in that regard. (9)

37. As citizenship of the Union, established by Article 20 TFEU, is not intended to extend the material scope of the FEU Treaty to internal situations which have no link with EU law, (10) it is necessary to identify whether such links exist.

38. On this point, the Governments of the Member States have reiterated, in the context of these proceedings, the classic position in this type of situation, namely that in order for the FEU Treaty rules on citizenship of the Union to be applicable the facts of the main proceedings must relate to a matter governed by EU law and that it is not sufficient that the citizen of the Union concerned has exercised his freedom of movement.

39. However, it must be emphasised that it is settled case-law that the situations falling within the scope of EU law include those involving the exercise of the fundamental freedoms guaranteed by the FEU Treaty, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Article 21 TFEU. (11) Thus, in matters falling within the competence of the Member States, a relevant link with EU law may consist in the exercise by a national of one Member State of his right to move and reside on the territory of another Member State. (12) Conversely, where the Court is faced with a situation in which the matter at issue falls within the competence of the Member State and, moreover, the person relying on EU law has not made use of his right to freedom of movement provided for in Article 21 TFEU, it will declare that it has no jurisdiction to rule on the request for a preliminary ruling before it. (13)

40. It is common ground that Mr Petruhhin, who was arrested in Latvia, made use of his freedom to move and reside in another Member State, guaranteed by Article 21(1) TFEU.

41. It should also be made clear that, in the absence of rules of EU law on the extradition of nationals of the Member States to Russia, (14) the Member States retain the power to adopt such rules and to conclude agreements on such extradition with the Russian Federation.

42. However, the Member States are required to exercise that power in a manner consistent with EU law, and in particular with the provisions of the FEU Treaty on freedom to move and reside on the territory of the Member States, as conferred by Article 21(1) TFEU on every citizen of the Union. That constitutes the application, in matters related to extradition, of a consistent body of case-law to the effect that the Member States are required, in the exercise of their powers, to respect EU law and in particular the provisions of the FEU Treaty on freedom to move and reside on the territory of the European Union recognised to every citizen. (15)

43. Thus, in areas falling within the powers of the Member States, where a particular situation has a sufficiently close link with EU law, which is the case of a citizen of the Union who has exercised his right to move and reside on the territory of the Member States, those States are required to justify, by objective reasons, a difference in treatment between their nationals and the nationals of the other Member States. (16)

44. It is now appropriate to examine whether the rule that the Republic of Latvia does not extradite its own nationals constitutes discrimination on the ground of nationality, contrary to the first paragraph of Article 18 TFEU.

45. Mr Petruhhin was arrested in Latvia and held in custody there until 26 March 2015. An extradition request from the Prosecutor-General of the Russian Federation was received by the Public Prosecutor of the Republic of Latvia on 21 October 2014. It is therefore the provisions of Latvian law and those of the Agreement of 3 February 1993 between the Republic of Latvia and the Russian Federation on Judicial Assistance and Judicial Relations in Civil, Family and Criminal Matters that are to be applied.

46. In the context of the present case, the rule that Latvian nationals may not be extradited from Latvia to a third State is set out in the third sentence of Article 98 of the Latvian Constitution, Article 697(2)(1) of the Latvian Code of Criminal Procedure and Article 62(1)(1) of the Agreement of 3 February 1993 between the Republic of Latvia and the Russian Federation on Judicial Assistance and Judicial Relations in Civil, Family and Criminal Matters.

47. Since under that rule only Latvian nationals enjoy that protection against extradition, it follows that they are treated differently from nationals of other Member States who are on Latvian territory and whose extradition has been requested by a third State.

48. As Mr Petruhhin exercised his freedom to move and reside on Latvian territory, as conferred by Article 21(1) TFEU, it is in the light of the first paragraph of Article 18 TFEU that the compatibility of the rule that the Republic of Latvia does not extradite its own nationals to Russia with the principle prohibiting any discrimination on the ground of nationality must be examined.

49. It is appropriate in that regard to bear in mind that it is settled case-law that the principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way. Such treatment may be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued. (17)

50. It is therefore necessary to compare, in a context such as that of the main proceedings, the situation of non-Latvian citizens of the Union residing in Latvia with that of Latvian nationals.

51. The principle that a State does not extradite its own nationals is a traditional principle of extradition law. Its origins lie in the sovereignty of States over their nationals, the mutual obligations between a State and its nationals and the lack of confidence in the legal systems of other States. Thus, the grounds relied upon to justify that principle include, in particular, the State's duty

to protect its nationals from the application of a foreign legal system, of whose procedures and language they are ignorant and in the context of which it may be difficult for them to mount their defence. (18)

52. When examined in the light of EU law and the equal treatment which it requires, the foundations of the principle of non-extradition of nationals seem relatively weak. The same applies to the duty of protection which a Member State should have towards its nationals. I do not see why such a duty should not be extended to the nationals of the other Member States. Article 20(2)(c) TFEU lends support to that view, moreover, in so far as it provides that citizens of the Union are to have 'the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State'.

53. The same also applies to the argument that the principle of non-extradition of nationals is based on the States' distrust of foreign legal systems. It has been appositely observed on that point that 'this distrust is no doubt one of the essential foundations of what fashions the way in which extradition is practised — and in particular refused — nowadays. But while it may constitute good reason for a State not to respond favourably to an extradition request, it does not readily explain why such a request would be refused only where it involves the extradition of a national, on the ground of his nationality. If distrust justifies a refusal to extradite, it justifies a refusal with respect to everyone and not just nationals. (19)

54. Although the foundations of the rule that a State does not extradite its own nationals must therefore be treated with caution when they are evaluated in the light of the principle of non-discrimination on the ground of nationality, there is, however, in my view, an objective reason to distinguish the situation of the nationals of the requested Member State and that of nationals of other Member States where extradition is requested by a third State.

55. Thus, it is necessary to compare, in a context such as that of the main proceedings, the situation of non-Latvian citizens of the Union residing in Latvia with that of Latvian nationals by reference to the objective to which several Member States and the European Commission have drawn attention in the present proceedings, namely the objective of combating the impunity of persons suspected of having committed an offence. Such an objective is most certainly a legitimate objective in EU law. (20)

56. I would, on that point, observe that extradition is a procedure which enables an offence to be prosecuted or a penalty enforced. In other words, it is a procedure whose intrinsic aim is to combat the impunity of a person who is present in a territory other than that in which an offence was committed. (21)

57. In the light of such an objective, the situation of the two categories of citizens of the Union referred to above could be regarded as comparable only if both could be prosecuted in Latvia for offences committed in a third State.

58. In other words, when examining of the comparability of the situations of nationals of the requested Member State and nationals of the other Member States, it is necessary to ascertain whether, in accordance with the maxim *aut dedere aut judicare* (either extradite or prosecute), Union citizens who were not extradited to a third State could be prosecuted in the requested Member State for offences committed in that third State. It is therefore necessary to ascertain whether the traditional principle of international law on extradition that a requested State which refuses to extradite its nationals must be able to prosecute them is observed in the present case.

59. Hugo Grotius defined the principle *aut dedere aut punire* (either extradite or punish) as follows: 'when appealed to, a State should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal'. (22) The word 'punish' is now replaced by the word 'prosecute' as the second part of the alternative to extradition in order to take account of the presumption of innocence enjoyed by all those suspected of having committed an offence.

60. The maxim *aut dedere aut judicare* is also expressed in many bilateral or multilateral conventions on extradition. (23) The obligation to extradite or prosecute is expressed, for example, in the European Convention on Extradition, signed in Paris on 13 December 1957. Article 6(1)(a) of that Convention thus provides that 'a Contracting Party shall have the right to refuse extradition of its nationals'. Article 6(2) of that Convention completes that provision in so far as it provides that 'if the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate'.

61. As indicated in the United Nations Final Report of 2014, entitled 'The obligation to extradite or prosecute (*aut dedere aut judicare*)', those conventions are based on the mutual general commitment of the States Parties to surrender any person against whom the competent authorities of the requesting State have initiated proceedings or who is being sought for the purpose of executing a sentence or a security measure. There are a number of exceptions to that obligation to extradite, however, in particular where the person whose extradition is requested is a national of the requested State. In order to avoid impunity, those conventions impose the second part of the alternative on the requested State, namely the obligation to prosecute the offender if it refuses to extradite him. (24)

62. Thus, under the obligation to extradite or to prosecute, if the requested State does not comply with an extradition request, it is required to prosecute (25) the suspected person in order to ensure the effectiveness of international co-operation between States and to ensure that he does not remain unpunished.

63. It is precisely by reference to the latter element that, in the context of the present case, Latvian nationals and nationals of other Member States are not in a comparable situation.

64. The risk of impunity of the person named in an extradition request may exist if the requested Member State has not made provision in its domestic law for jurisdiction allowing it to try a national of another Member State suspected of having committed an offence on the territory of a third State.

65. In that regard, I would observe, as the Commission has done, that under Article 4(1) of the Latvian penal law, 'Latvian citizens, Latvian non-citizens [(26)] and foreign nationals who have a permanent residence permit for Latvia shall be held liable, in Latvian territory and in accordance with the present Law, for an offence committed in the territory of another State or outside the territory of any State, irrespective of whether it is recognised as an offence and punishable in the place in which it was committed'.

66. It follows from that provision that Latvian nationals who have committed an offence in a third State may be prosecuted in Latvia. That is also the case for foreign nationals in possession of a permanent residence permit for Latvian territory.

67. In the case of foreign nationals not in possession of such a permit, on the other hand, the exercise by the Latvian criminal courts of their jurisdiction in respect of offences committed on the territory of another State is limited, under Article 4(3) of the Latvian criminal law, to cases of

‘serious or very serious offences which have been directed against the interests of the Republic of Latvia or the interests of its inhabitants’.

68. It therefore appears to follow from those provisions of the Latvian criminal law that a national of a Member State other than the Republic of Latvia, such as Mr Petruhhin, who, as the parties are agreed, does not have a permanent residence permit for Latvian territory, cannot be prosecuted in Latvia for an offence which he is suspected of having committed in Russia. It follows that, in the light of the objective of preventing the impunity of persons suspected of having committed an offence in a third State, that national is not in a situation comparable with that of Latvian nationals.

69. Accordingly, the difference in treatment between non-Latvian citizens of the Union residing in Latvia and Latvian nationals does not constitute discrimination prohibited by the first paragraph of Article 18 TFEU, in so far as it is justified by the objective of combating the impunity of persons suspected of having committed an offence in a third State.

70. Consequently, in circumstances such as those of the main proceedings, the first paragraph of Article 18 TFEU and Article 21(1) TFEU should be interpreted as meaning that they do not require that a national of a Member State present on the territory of another Member State who is the subject of an extradition request by a third State should benefit from the same rule as that which protects the nationals of that other Member State against extradition.

C – *Third question*

71. By its third question, the referring court asks the Court, in essence, to rule on whether a Member State which decides to extradite a citizen of the Union to a third State is required to verify the guarantees provided for in Article 19(2) of the Charter and on what form that verification must take.

72. It is apparent from the file before the Court that that question seems to originate in Mr Petruhhin’s claim that he would be threatened with torture if he were extradited to Russia.

73. According to Article 19(2) of the Charter, ‘no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment’.

74. The explanations relating to the Charter of Fundamental Rights (27) state that Article 19(2) ‘incorporates the relevant case-law from the European Court of Human Rights regarding Article 3 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (28)]’. (29)

75. Since the situation of a national of a Member State who, like Mr Petruhhin, has exercised his freedom to move and reside in the territory of another Member State, falls, as we have seen earlier, within the scope of EU law, I am of the view that Article 19(2) of the Charter may apply in such a situation.

76. Thus, a court of a Member State which receives a request relating to the extradition of a national of another Member State who has exercised rights conferred by Article 21(1) TFEU is required to verify the guarantees provided for in Article 19(2) of the Charter.

77. As to what form that verification must take, it is appropriate, in accordance with the explanations in respect of Article 19(2) of the charter, to refer to the relevant case-law of the European Court of Human Rights on Article 3 of the ECHR.

78. It follows from the consistent case-law of that Court that protection against the treatment prohibited under Article 3 of the ECHR is absolute, and that, accordingly, the extradition of a person by a Contracting State can raise problems under that provision and therefore engage the responsibility of the State in question under the ECHR, where there are serious grounds to believe that if the person is extradited to the requesting country, he would run the real risk of being subjected to treatment contrary to that provision. (30) In such cases, Article 3 of the ECHR 'implies an obligation not to remove the person in question to the said country, even if it is a non-Convention State'. (31) The European Court of Human Rights states that it 'draws no distinction in terms of the legal basis for removal; it adopts the same approach in cases of both expulsion and extradition'. (32)

79. When the European Court of Human Rights examines whether an applicant would run the real risk of being subjected to ill treatment in the third country of destination, it considers 'both the general human rights situation in that country and the particular characteristics of the applicant. In a case where assurances have been provided by the receiving State, those assurances constitute a further relevant factor which the Court will consider'. (33) Beyond the general situation in the country of destination, the real risk of being subjected to treatment prohibited by Article 3 of the ECHR must therefore be assessed by reference to the individual circumstances of the person concerned.

80. In order to determine whether there are substantial grounds for believing the existence of a real risk of treatment contrary to Article 3 of the ECHR, the European Court of Human Rights assesses the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu*. (34) As regards the general situation in a country, it has often attached importance to information in recent reports from independent international associations for the protection of human rights, such as Amnesty International or government sources. (35)

81. In addition to that description of the case-law of the European Court of Human Rights, and along the lines of that case-law, it is also appropriate to take note of what the Court recently held in its judgment of 5 April 2016 in *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198), in the context of the application of Framework Decision 2002/584, as amended by Framework Decision 2009/299.

82. The Court held in that judgment, in particular, with regard to Article 4 of the Charter, that 'in order to ensure respect for [that article] in the individual circumstances of the person who is the subject of the European arrest warrant, the executing judicial authority, when faced with evidence of the existence of [deficiencies which may be systemic or generalised, or which may affect certain groups of people] that is objective, reliable, specific and properly updated, is bound to determine whether, in the particular circumstances of the case, there are substantial grounds to believe that, following surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of [that article]'. (36)

83. To my mind, the methodology thus defined by the Court can be transposed to a situation in which, following a request for the extradition of a citizen of the Union issued by a third country, the judicial authority of the requested Member State ascertains whether the guarantees laid down in Article 19(2) of the Charter are respected.

IV – Conclusion

84. In the light of all of the foregoing consideration, I propose that the questions submitted by the Augstākā tiesa (Supreme Court, Latvia) should be answered as follows:

In circumstances such as those of the main proceedings, the first paragraph of Article 18 TFEU and Article 21(1) TFEU should be interpreted as meaning that they do not require that a national of a Member State present on the territory of another Member State who is the subject of an extradition request by a third State should benefit from the same rule as that which protects the nationals of that other Member State against extradition.

In order to ensure respect for Article 19(2) of the Charter of Fundamental Rights of the European Union in the individual circumstances of the person who is the subject of an extradition request, the judicial authority of the requested Member State, when faced with evidence of the existence of deficiencies which may be systemic or generalised, or which may affect certain groups of people that is objective, reliable, specific and properly updated, is bound to determine whether, in the particular circumstances of the case, there are substantial grounds to believe that, following his extradition to the requesting third State, that citizen of the Union will run a real risk of being subject in that State to inhuman or degrading treatment, within the meaning of that provision.

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1 Original language: French.

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2 ‘The Charter’.

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3 When questioned at the hearing about the meaning of this expression, the Latvian Government explained that ‘Latvian non-citizens’ are former Soviet citizens who arrived in Latvia before that State gained independence. These persons did not choose either Latvian nationality or Russian nationality and may become naturalised.

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4 OJ 2002 L 190, p. 1. Framework Decision as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009, L 81, p. 24).

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5 See, in particular, judgment of 6 October 2015 in *Capoda Import-Export* (C-354/14, EU:C:2015:658, paragraph 23 and the case-law cited).

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6 See, in particular, judgment of 6 October 2015 in *Capoda Import-Export* (C-354/14, EU:C:2015:658, paragraph 24 and the case-law cited).

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7 See, in particular, judgment of 6 October 2015 in *Capoda Import-Export* (C-354/14, EU:C:2015:658, paragraph 25 and the case-law cited).

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8 See, in particular, order of 5 June 2014 in *Antonio Gramsci Shipping and Others* (C-350/13, EU:C:2014:1516, paragraph 10 and the case-law cited).

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9 See, in particular, judgment of 26 February 2015 in *Martens* (C-359/13, EU:C:2015:118, paragraph 21 and the case-law cited).

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10 See, in particular, judgment of 26 October 2006 in *Tas-Hagen and Tas* (C-192/05, EU:C:2006:676, paragraph 23 and the case-law cited).

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11 See, in particular, judgments of 11 July 2002 in *D'Hoop* (C-224/98, EU:C:2002:432, paragraph 29 and the case-law cited); of 16 December 2008 in *Huber* (C-524/06, EU:C:2008:724, paragraph 71 and the case-law cited); of 4 October 2012 in *Commission* v *Austria* (C-75/11, EU:C:2012:605, paragraph 39 and the case-law cited); and of 26 February 2015 in *Martens* (C-359/13, EU:C:2015:118, paragraph 22 and the case-law cited).

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12 See Iliopoulou, A., 'Entrave et citoyenneté de l'Union', *L'entrave dans le droit du marché intérieur*, Bruylant, Brussels, 2011, p. 191. According to the author, 'no national rule can be excluded a priori from the classification as a barrier in the context of citizenship. The existence of a cross-border element is sufficient to bring the situation within the context of Community law and to trigger a review of compatibility with the requirements of the Treaty' (p. 202). See also, on that point, the Opinion of Advocate General Kokott in *Tas-Hagen and Tas* (C-192/05, EU:C:2006:223, points 25 to 43).

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13 See, in particular, order of 19 June 2014 in *Teisseyre* (C-370/13, not published, EU:C:2014:2033, paragraphs 33 to 35).

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14 There is, on the other hand, an Agreement on extradition between the European Union and the United States (OJ 2003 L 181, p. 27) (see Council Decision 2009/820/CFSP of 23 October 2009 on the conclusion on behalf of the European Union of the Agreement on extradition between the European Union and the United States of America and the Agreement on mutual legal assistance between the European Union and the United States of America (OJ 2009 L 291, p. 40)).

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15 See, in particular, concerning national provisions on compensation for victims of assaults carried out on national territory, judgment of 2 February 1989 in *Cowan* (186/87, EU:C:1989:47, paragraph 19); regarding national rules on criminal matters and criminal procedure, judgment of 24 November 1998 in *Bickel and Franz* (C-274/96, EU:C:1998:563, paragraph 17); on national rules governing a person's surname, judgments of 2 October 2003 in *Garcia Avello* (C-148/02, EU:C:2003:539, paragraph 25), and of 12 May 2011 in *Runevič-Vardyn and Wardyn* (C-391/09, EU:C:2011:291, paragraph 63 and the case-law cited); regarding an enforcement procedure for the recovery of debts, judgment of 29 April 2004 in *Pusa* (C-224/02, EU:C:2004:273, point 22); as regards national rules on direct taxation, judgment of 12 July 2005 in *Schempp* (C-403/03, EU:C:2005:446, paragraph 19); concerning national rules defining the persons entitled to vote and stand as a candidate in elections to the European Parliament, judgment of 12 September 2006 in *Spain* v *United Kingdom* (C-145/04, EU:C:2006:543, paragraph 78); regarding the definition of the conditions for the acquisition and loss of nationality, judgment of 2 March 2010 in *Rottmann* (C-135/08, EU:C:2010:104, paragraphs 39 and 41); as regards the Member States' power to organise their social security schemes, judgments of 19 July 2012 in *Reichel-Albert* (C-522/10, EU:C:2012:475, paragraph 38 and the case-law cited), and of 4 October 2012 in *Commission* v *Austria* (C-75/11, EU:C:2012:605, paragraph 47 and the case-law cited); and, as regards the content of teaching and the organisation of the education systems of the Member States, judgment of 26 February 2015 in *Martens* (C-359/13, EU:C:2015:118, paragraph 23 and the case-law cited).

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16 See Iliopoulou, A., op. cit. According to that author, 'the right of citizenship of the Union obliges the right of national citizenship to justify itself, to demonstrate its relevance and its proportionality. The State must review in the light of European standards its relations not only with the Community "abroad" but also with its nationals' (p. 196).

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17 See, in particular, judgment of 16 December 2008 in *Huber* (C-524/06, EU:C:2008:724, paragraph 75 and the case-law cited).

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18 See Deen-Racsmány, Z., and Blekxtoon, R., 'The Decline of the Nationality Exception in European Extradition?', *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 13/3, Koninklijke Brill NV, The Netherlands, 2005, p. 317.

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19 See Thouvenin, J.-M., 'Le principe de non extradition des nationaux', *Droit international et nationalité*, Colloque de Poitiers de la Société française pour le droit international, Pedone, Paris, 2012, p. 127, especially p. 133.

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20 That objective of combating impunity was taken into account by the Court, in particular, in its judgment of 27 May 2014 in *Spasic* (C-129/14 PPU, EU:C:2014:586, paragraphs 58 and 72).

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21 See, in particular, Eur. Court HR, 4 September 2014, *Trabelsi v. Belgium* (CE:ECHR:2014:0904JUD000014010, § 117 and the case-law cited), where the European Court of Human Rights states that it 'does not lose sight of the fundamental aid of extradition, which is to prevent fugitive offenders from evading justice, nor the beneficial purpose which it pursues for all States in a context where crime is taking on a larger international dimension'.

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22 See Grotius, H., *De jure belli ac pacis*, Book II, Chap. XXI, sect. IV. Le droit de la guerre et de la paix: French translation by Barbeyrac, J., Amsterdam, Pierre de Coud, 1724, vol. 1, p. 639, especially p. 640.

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23 See, for example, the multilateral conventions cited on page 14 of the United Nations Final Report 2014, entitled 'The obligation to extradite or prosecute (aut dedere aut judicare)', namely the European Convention on Extradition, signed in Paris on 13 December 1957; the General Convention on Judicial Cooperation, signed in Tananarive on 12 September 1961; the Inter-American Convention on Extradition of 1981; the Economic Community of West African States Convention on Extradition, adopted in Abuha on 6 August 1994, and the London Scheme for Extradition within the Commonwealth.

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24 See p. 14 of the Final Report.

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25 Although the expression 'obligation to prosecute' is most often used, it would be more accurate to speak of an obligation to bring the matter before the authorities with the power to prosecute. Depending on the evidence, the fulfilment of that obligation may or may not lead to the initiation of a prosecution.

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26 As to the meaning of this expression, see footnote 3 of this Opinion.

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27 OJ 2007 C 303, p. 17.

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28 'The ECHR'.

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29 Reference is made to the judgments of the Eur. Court HR of 7 July 1989 in *Soering v. United Kingdom* (CE:ECHR:1989:0707JUD001403888) and of 17 December 1996 in *Ahmed v. Austria* (CE:ECHR:1996:1217JUD002596494).

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30 See, in particular, Eur. Court HR, 4 February 2005, *Mamatkoulov and Askarov v. Turkey* (CE:ECHR:2005:0204JUD004682799, § 67); 28 February 2008, *Saadi v. Italy* (CE:ECHR:2008:0228JUD003720106, § 125 and the case-law cited); and 4 September 2014, *Trabelsi v. Belgium* (CE:ECHR:2014:0904JUD000014010, § 116 and the case-law cited).

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31 Eur. Court HR, 4 September 2014, *Trabelsi v. Belgium* (CE:ECHR:2014:0904JUD000014010, § 116).

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32 Eur. Court HR, 4 September 2014, *Trabelsi v. Belgium* (CE:ECHR:2014:0904JUD000014010, § 116 and the case-law cited).

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33 See, in particular, Eur. Court HR, 17 January 2012, *Othman (Abu Qatada) v. United Kingdom* (CE:ECHR:2012:0117JUD000813909, § 187).

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34 See, in particular, Eur. Court HR, 30 October 1991, *Vilvarajah and Others v. United Kingdom* (CE:ECHR:1991:1030JUD001316387, § 107; 4 February 2005, *Mamatkoulov and Askarov v. Turkey* (CE:ECHR:2005:0204JUD004682799, § 69); and 28 February 2008 *Saadi v. Italy* (CE:ECHR:2008:0228JUD003720106, § 128 and the case-law cited).

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35 See, in particular, Eur. Court HR, 4 February 2005, *Mamatkoulov and Askarov v. Turkey*, (CE:ECHR:2005:0204JUD004682799, § 72), and 28 February 2008, *Saadi v. Italy*, (CE:ECHR:2008:0228JUD003720106, § 131 and the case-law cited).

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36 Judgment of 5 April 2016 in *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 94).