



A failure to respect the rights of defence in a decision extending detention for the purpose of removal does not automatically bring about the lifting of the detention

The national court must assess whether such an infringement has actually deprived the party relying thereon of the possibility of better arguing its defence to the extent that the outcome of the administrative procedure that led to the decision maintaining the detention could have been different

Directive 2008/115¹ lays down the procedural safeguards as regards decisions on the removal of illegally staying third-country nationals. In that context, it requires Member States to put in place effective remedies against those decisions and provides, moreover, that the third-country national concerned is to be released immediately if the detention is not lawful.²

G and R were placed in detention by the Netherlands authorities under a removal procedure. They each lodged judicial actions challenging the decisions to extend their respective detention. By judgments of 22 and 24 May 2013, the Rechtbank Den Haag, court of first instance, found that the rights of the defence had been infringed, but rejected their actions, on the ground that the infringement in question did not give rise to the annulment of the extension decisions. G and R lodged appeals against those judgments before the Raad van State (Council of State).

According to that court, the rights of the defence were infringed, since the interested parties were not properly heard, under the conditions provided for by national law, before the adoption of the extension decisions. It specifies that, under national law, the courts determine the legal consequences of such an infringement by taking into account the interests served by the extension of detention and that they are therefore not required to annul an extension decision adopted without the interested party being heard beforehand if the interest served by keeping the party concerned in detention is considered to be a priority.

The referring court is uncertain, however, whether such case-law is in accordance with EU law. It also states that, in Netherlands law, if a national court holds that a detention decision must be annulled, the competent authorities cannot adopt a new decision and that the concerned party must be immediately released. It is in that context that the Raad van State decided to stay the proceedings and to make a request for a preliminary ruling to the Court of Justice, asking that the request be dealt with under the urgent procedure. The Court decided to grant that request, in consideration, inter alia, of the fact that the parties in question are currently deprived of their liberty.

In its judgment delivered today, the Court finds that that the referring court regards it as established that the extension decisions infringed the right to be heard. Therefore, it is not necessary for the Court to adjudicate on the conditions which may lead to an infringement of the obligation to ensure the right to be heard in the light of EU law, but only to indicate to the referring court the consequences, under EU law, of such an infringement.

¹ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

² Art. 15(2), final sub-paragraph, of Directive 2008/115.

It is settled case-law that the rights of the defence are among the fundamental rights forming an integral part of the EU legal order and enshrined in the Charter of Fundamental Rights of the European Union.

However, the Court has held that fundamental rights, such as respect for the rights of the defence, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed. Moreover, the question whether there is an infringement of the rights of the defence must be examined in relation to the specific circumstances of each particular case.

It follows that it is not every irregularity in the observation of the rights of the defence in an administrative procedure extending the detention of a third-country national with a view to his removal that constitutes an infringement of those rights. Moreover, and accordingly, every breach of, inter alia, the right to be heard does not systematically render unlawful the decision taken, and therefore does not automatically require the release of the third-country national concerned.

To make such a finding of unlawfulness, the referring court must assess whether, in the light of the factual and legal circumstances of the case, the outcome of the administrative procedure at issue could have been different if the third-country nationals in question had been able to put forward information which might show that their detention should be brought to an end.

Not to acknowledge such a power of assessment on the part of the national court and to require that every infringement of the right to be heard automatically brings about the annulment of the decision extending the detention and the lifting of that measure would be liable to undermine the effectiveness of the directive. In that respect, the Court notes that the directive is intended to establish an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity. Likewise, the use of coercive measures should be expressly subject to not only the principle of proportionality, but also to the principle of effectiveness, with regard to the means used and objectives pursued.

Therefore, the national court can order the lifting of the measure of detention only if it considers, in the light of all of the factual and legal circumstances of each case, that the infringement at issue actually deprived the party relying thereon of the possibility of better arguing its defence to the extent that the outcome of that administrative procedure could have been different.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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