



Court of Justice of the European Union

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Advocate General's Opinion in Joined Cases C-473/13 and C-514/13 and in
Case C-474/13

Bero v Regierungspräsidium Kassel, Bouzalmate v Kreisverwaltung Kleve
and Pham v Stadt Schweinfurt, Amt für Meldewesen und Statistik

Press and Information

According to Advocate General Bot, a Member State may not, except in exceptional circumstances, rely on the lack of specialised centres in part of its territory in order to detain in prison a third-country national awaiting his removal, even with the consent of that third-country national

The 'Returns' Directive¹ provides that, where third-country nationals are awaiting removal, the Member States must use the least coercive measures possible, according to a gradation which goes from the granting of a period for voluntary departure to detention. Where the authorities opt for detention, this must take place in a specialised facility and can only take place on an exceptional basis in a prison, the Member State then having to ensure that the third-country national is separated from ordinary prisoners.

In Germany, the federated States (Länder) are responsible for carrying out the detention of illegally staying third-country nationals. Of the 16 German Länder, 10 did not, at the relevant time, have specialised detention facilities, with the result that in those Länder third-country nationals awaiting removal were detained in prisons and subject, in some cases, to the same rules and restrictions as ordinary prisoners.

Thus, since the Land of Hesse had no specialised detention facility which could accommodate women, Ms Adala Bero, a Syrian national, was placed in detention from 6 January 2011 to 2 February 2011 in Frankfurt prison without being separated from ordinary prisoners. Mr Ettayebi Bouzalmate, a Moroccan national, for his part was detained for three months in a separate area of the prison of the city of Munich, due to a lack of specialised detention facilities in the Land of Bavaria. Lastly, Ms Thi Ly Pham, a Vietnamese national, was also placed in detention from 29 March 2012 to 10 July 2012 in a prison in Bavaria, it being understood that, unlike Ms Bero and Mr Bouzalmate, she consented to be detained with ordinary prisoners.

Seised by two German courts (the Bundesgerichtshof and the Landgericht München), the Court of Justice is invited to clarify the conditions in which Member States must detain third-country nationals awaiting removal, taking account, inter alia, of the federal structure of Germany and the powers reserved to the Länder for carrying out the detention. In *Pham*, the issue of the consent of the party concerned is also raised.

In his Opinion delivered today, Advocate General Yves Bot concludes that a Member State may not rely on the lack of specialised facilities in part of its territory to detain a third-country national awaiting removal in a prison, including where the person concerned has waived his right to be separated from ordinary prisoners.

Mr Bot points out that, according to the terms and purpose of the Directive, detention must take place in facilities specially adapted to the nature and the purpose of the detention, unless the

¹ Directive 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).

Member State cannot² organise detention in such facilities. Having regard to the terms of the Directive, it is only where a Member State is faced with 'emergency situations' that detention in a prison may be ordered. In such a situation, Advocate General Bot points out that the Directive requires migrants to be separated from ordinary prisoners.

Mr Bot states that those requirements contribute directly to the respect for human dignity and the fundamental rights of migrants whose detention is different, in essence, from the enforcement of a sentence. They enable third-country nationals to be guaranteed a regime and material conditions of detention which are appropriate to their legal situation and able to meet their needs, in particular those of families and children.

The Advocate General takes the view, consequently, that, except in emergency situations linked to a massive influx of migrants, a Member State may not order detention in a prison unless there are exceptional and legitimate grounds for doing so, such as those alleging a state of necessity. Advocate General Bot infers from this that the lack of specialised detention facilities in part of the territory of a Member State does not meet those criteria of urgency or seriousness. Accordingly, when a Member State has a specialised detention facility in its territory, it must order the detention of the person concerned in that facility regardless of the federal organisation of that State or the geographical location of the facility. Mr Bot also observes that in Germany the Länder may conclude cooperation agreements in order to remedy the lack of necessary facilities.

Advocate General Bot does not accept the German Government's argument that detention in a prison could constitute a 'more favourable measure' or represent a 'personalised solution' for the person awaiting removal. As regards minors in particular, Mr Bot points out that their detention in a facility for young offenders gives rise to an infringement of the rights of the child enshrined in the Charter of Fundamental Rights of the European Union³. He adds in that regard that the practice of tending to use prisons instead of specialised detention facilities disregards the function of imprisonment and the ensuing regulation of prison life: imprisonment is designed to enforce a sentence or to keep a person at the disposal of the legal system in very specific conditions pending his judgment.

Likewise, Mr Bot does not uphold the argument as to the costs incurred by the establishment of specialised detention facilities and by the transfer of the persons concerned, if only because the detention of migrants in prisons is itself very costly in terms of the use of space and the organisation of the premises.

As regards the issue of the consent of the person concerned (*Pham*), Mr Bot points out that the Directive does not provide for any exception to the obligation to separate migrants from ordinary prisoners. Furthermore, Mr Bot considers that a person placed in detention is in a position of weakness vis-à-vis the authorities and it is not inconceivable that he gives his consent under pressure, however slight (not to mention that the action taken by the national authorities may be motivated not by the interests of the person, but by purely material considerations). Lastly, such a person, experiencing psychological deprivation, often does not have the means to obtain legal assistance and is not always fully aware of his rights at the time when he is invited to waive them. For those reasons, Mr Bot takes the view that consent given in such circumstances cannot be considered to have any legal value.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

² Mr Bot observes that the German version of the Directive ('[w]here there *are no* specialised detention facilities in a Member State') is incorrect as compared to the other language versions ('[w]here a Member State *cannot* provide accommodation in a specialised detention facility'). According to Mr Bot, the German wording has the consequence of rendering redundant the principle of detention in specialised detention facilities, given that the Member States could be dissuaded from constructing such facilities by ordering illegally staying migrants to be detained in prisons.

³ Article 24(3) of the Charter.

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 Opinions ([C-473/13](#) & [C-514/13](#), and [C-474/13](#)) are published on the CURIA website on the day of delivery.

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