

**Case C-519/20**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

15 October 2020

**Referring court:**

Amtsgericht Hannover (Germany)

**Date of the decision to refer:**

12 October 2020

**Person concerned and appellant:**

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**Applicant and other party to the proceedings:**

Landkreis Gifhorn

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**Subject matter of the case in the main proceedings**

Order to declare that the decision of the Amtsgericht (Local Court) ordering detention pending removal for the period from 25 September 2020 to 2 October 2020 infringed the rights of the applicant.

**Subject matter and legal basis of the reference**

Interpretation of EU law, in particular Directive 2008/115; Article 267 TFEU

**Questions referred**

1. Must EU law, in particular Article 18(1) and (3) of Directive 2008/115/EC, be interpreted as meaning that a national court deciding on detention for the purpose of removal must, in each individual case, examine the conditions laid down in that provision, in particular whether the exceptional situation persists, where the national legislature, on the basis of Article 18(1), has derogated from the conditions laid down in Article 16(1) in national law?

2. Must EU law, in particular Article 16(1) of Directive 2008/115/EC, be interpreted as precluding national legislation which on a temporary basis, until 1 July 2022, allows the placement of detainees awaiting removal in a prison facility despite specialised detention facilities being provided in the Member State and despite the fact that there is no emergency situation within the meaning of Article 18(1) of Directive 2008/115/EC which would make that absolutely necessary?

3. Must Article 16(1) of Directive 2008/115/EC be interpreted as meaning that a ‘specialised detention facility’ to detain persons awaiting removal is not deemed to exist merely because:

- the ‘specialised detention facility’ indirectly is subject to supervision by the same government body as detention facilities for prisoners, namely the Minister for Justice,
- the ‘specialised detention facility’ is organised as a division of a prison and, while it has its own governor, is under the overall management of the prison facility as it is one of a number of divisions of that prison?

4. If Question 3 is answered in the negative:

Must Article 16(1) of Directive 2008/115/EC be interpreted as meaning that accommodation in a ‘specialised detention facility’ for detainees awaiting removal exists if a prison facility sets up a specific division as a detention facility, if that division operates for detainees awaiting removal a specific area with three buildings within the perimeter fence and one of those three buildings temporarily solely houses prisoners serving custodial sentences for default of payment of a fine or short custodial sentences, where the prison facility takes care to ensure detainees awaiting removal are separated from prisoners and where, in particular, every house has its own facilities (its own clothing store, medical facilities, gym) and, while the yard/outside space is visible from all houses, each house has its own area for use by the detainees which is fenced off with a wire-mesh fence that prevents direct access between houses?

#### **Provisions of EU law cited**

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Members States for returning illegally staying third country nationals, Article 16(1) (‘Conditions of detention’) and Article 18(1) and (3) (‘Emergency situations’)

#### **Provisions and explanatory notes of national law cited**

Law on residence, economic activity and integration of foreign nationals on Federal territory (‘the Residence Law’), Paragraph 62a(1) (in the version

applicable between 29 July 2017 and 20 August 2019); the relevant part of the provisions for these purposes reads as follows: ‘As a rule, detention pending removal shall take place in specialised detention facilities. ...’

Second law to improve the implementation of the obligation to leave Germany of 15 August 2019, Article 1, subparagraph 22, Article 6 and Article 8.

Explanatory notes to the draft law relating to Article 1, subparagraph 22 of the Second law to improve the implementation of the obligation to leave Germany

### **Brief summary of the facts and procedure**

- 1 The Immigration Office of the Landkreis Gifhorn (District of Gifhorn) (‘the applicant’) is pursuing the removal of a Pakistani national to Pakistan. The person concerned is required to leave Germany. He stated that he will not voluntarily comply with his obligation to leave Germany, subsequently went into hiding and ceased all contact. On 11 August 2020, he was stopped and arrested on a coach travelling from Berlin to Brussels. On the same day, the competent Amtsgericht (Local Court) ordered detention pending removal (preventive detention) until and including 25 September 2020. Following an appeal, on 2 September 2020 the Amtsgericht (Local Court) did not grant relief. The competent Landgericht (Regional Court) rejected the appeal on 8 September 2020.
- 2 On 11 August 2020, the person concerned was taken to Hanover prison facility, Langenhagen division.
- 3 The applicant initiated the issuing of passport replacement papers, which, according to the regional authorities, takes approximately six weeks. On 12 August 2020, a flight was booked for the person concerned. The passport replacement document for the person concerned, received in Langenhagen in mid-September 2020, is valid until 31 December 2020 and contains a reference to the date of the flight, the flight number and the destination.
- 4 On 23 September 2020, the person concerned was taken to Frankfurt airport. However, the airline did not transport him to his destination because he expressed his intention not to fly. In those circumstances, it would only be possible for the person concerned to fly if accompanied by security. In order to organise the transportation in that manner, the applicant requested that detention pending removal be extended until 12 November 2020.
- 5 It justified that request by arguing that to obtain another set of passport replacement papers would again take about six weeks. An unaccompanied return was unlikely to be successful. The applicant therefore intended to return the appellant on a charter flight organised by the Bavarian authorities, accompanied by security, on 10 November 2020.

- 6 In its application, the authority stated that the person concerned was to continue to be housed at Hanover prison facility, Langenhagen division.
- 7 The referring court describes Hanover prison facility, Langenhagen division, as follows. The Langenhagen division is responsible, as the central facility for Lower Saxony, for providing accommodation for detainees awaiting removal. It is run by a civil servant employed by the prison service. Hanover prison facility as a whole, which is part of one of the main prisons of Lower Saxony and has approximately 600 prison places, is run by a governor who, in that capacity, is also operationally responsible for the Langenhagen division. As is the case for the other prison facilities in Lower Saxony, Hanover prison facility and therefore also the Langenhagen division are under the supervision of the Ministry of Justice, which is headed by the Minister of Justice.
- 8 The site is situated on the outskirts of the town of Langenhagen. The site is a former barracks. It is fenced off with a high wire-mesh fence. On the site of the division, there are three two-storey buildings of approximately equal size. The windows are barred. Next to one of the buildings there is another small building and a security gate for vehicles which is used as the entrance for visitors and staff as well as the entry and exit for vehicles. In the middle of the three buildings there is yard, similar to a park, with trees, which is, however, sealed off and is not in use. In front of each house there is a fenced-off area to which detainees awaiting removal have access for two hours a day. There are currently spaces for up to 48 detainees awaiting removal (42 male and 6 female detainees). One of the buildings (house 1) houses male detainees awaiting removal. Depending on occupancy levels, the other building (house 2) is used to house female and additional male detainees awaiting removal. The detainees are allowed one visitor per day, a number of hours' access to outside space, internet access and a mobile phone. Each room houses only one detainee; upon request detainees can be housed together. Between 25 September 2020 and 2 October 2020, house 3 was used for prisoners serving custodial sentences for default of payment of a fine or short custodial sentences of up to three months. The prison facility ensured that the prisoners were kept separate by housing them in separate houses between which there was no direct access.

### **Brief summary of the basis for the reference**

- 9 In the court's view, the interpretation of EU law is relevant to whether the detention order was unlawful for the period between 25 September 2020 and 2 October 2020.
- 10 According to the referring court, detention pending removal should not have been ordered if it was envisaged that such detention would infringe Paragraph 62a(1) of the Residence Law, which must be interpreted in the light of the first sentence of Article 16(1) of Directive 2008/115.

- 11 According to the referring court, accommodating the person concerned in the Langenhagen division between 25 September 2020 and 2 October 2020 infringed Paragraph 62a(1) of the Residence Law since the detention pending removal did not occur in a 'specialised detention facility'. In the period between 25 September 2020 and 2 October 2020, the Langenhagen division of the prison facility no longer constituted a 'specialised detention facility' given that prisoners were also housed on the site (in house 3) alongside detainees awaiting removal (the appellant in house 1). In order for there to be a 'specialised detention facility', it must be separated from the prison facilities in terms of space and organisation. There was no such separation in place at the time in question. The three houses are in immediate proximity to one another and can only be accessed via a common entrance area or the vehicle security gate mentioned above. While it is true that the Langenhagen detention division has its own governor, the fact remains that the same prison staff was deployed both for prisoners and for detainees awaiting removal. Even though the specific skills of prison officers in relation to the supervision, care and accommodation of (long-term) detainees may constitute a compelling reason for integrating a facility for detainees awaiting removal into the judicial administration, the court is of the opinion that measures for the sufficient geographical and organisational separation between prisoners and detainees awaiting removal are nevertheless necessary.
- 12 If it were to interpret EU law, the referring court would rule on the basis of Article 62a(1) of the Residence Law in the version in force between 29 July 2017 and 20 August 2019. That provision was, however, amended by Article 1 no. 22 of the Second law to improve the implementation of the obligation to leave Germany of 15 August 2019 ('the Amending Law') with the effect that the placement described above would be permissible. However, according to the referring court, the amendment introduced by that law does not comply with Article 16(1) of Directive 2008/115, from which the national legislature was not permitted to derogate.
- 13 While it is true that, when the Amending Law was adopted, the national legislature referred to there being an emergency situation within the meaning of Article 18(1) of Directive 2008/115. Irrespective of whether such an emergency situation existed at the time of the adoption of the Amending Law, the emergency situation would have to continue until the present day. Even if it seems plausible that prison facilities are overstretched due to the Covid-19 pandemic and the corresponding increased need for space and distancing within the detention facilities, that cannot be attributed to an unusually large number of third-country nationals. Nor do the explanatory notes to the draft Amending Law contain a convincing description of an emergency situation.
- 14 Given that, by passing the Amending Law, the legislature intends to derogate from Article 16(1) of Directive 2008/115 by relying on an emergency situation within the meaning of Article 18(1) of that Directive, the first question that arises is whether the court concerned with the detention order needs to establish the existence of an emergency situation in all proceedings relating to an order for

detention pending removal or whether it must accept the decision taken by the legislature without examining the position itself in relation to the particular case.

- 15 In the event that the court ordering detention has to satisfy itself that there is an emergency situation, the referring court considers that the requirements for such an emergency situation have not been met, which would then give rise to the second question whether, under Article 16(1) of Directive 2008/115, the Amending Law must be disapplied.
- 16 If that question is also answered in the affirmative, the term ‘specialised detention facility’ must be interpreted. Question 3 seeks to ascertain whether the detention facility for persons awaiting removal cannot be a ‘specialised detention facility’ because it has been integrated into the judicial administration. If that question is answered in the negative, question 4 seeks to ascertain the specific requirements for a ‘specialised detention facility’ and, in particular, whether the use of one house for prisoners within the perimeter fence of a facility precludes it being categorised as a ‘specialised detention facility’ for detainees awaiting removal.