Case C-39/21 PPU

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:

26 January 2021

Referring court:

Rechtbank Den Haag, zittingsplaats 's-Hertogenbosch (District Court, The Hague, sitting in 's Hertogenbosch) (Netherlands)

Date of the decision to refer:

26 January 2021

Applicant:

X

Defendant:

Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security)

Subject matter of the main proceedings

The main proceedings concern an appeal by foreign national X against the continuation of the administrative detention for foreign nationals in which he has been placed.

Subject matter and legal basis of the request

In this request for a preliminary ruling under Article 267 TFEU, the referring court asks the Court of Justice of the European Union ('the Court of Justice') whether EU law requires the court to review ex officio the lawfulness of all the conditions pertaining to administrative detention for foreign nationals. That question has already been raised in the order for reference of 23 December 2020 of the highest administrative court of the Netherlands, the Afdeling bestuursrechtspraak van de Raad van State (Administrative Jurisdiction Division of the Council of State; 'the Division') (Case C-704/20). However, according to

the referring court, that order for reference is incomplete. In its view, it is particularly important to ascertain whether the Netherlands procedure for the administrative detention of foreign nationals, which does not permit an ex officio review of the lawfulness of detention, still constitutes an effective remedy within the meaning of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

Questions referred for a preliminary ruling

I Having regard to Article 47 of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 6 of the Charter and Article 53 of the Charter and in the light of Article 15(2)(b) of the Return Directive, Article 9(3) of the Reception Directive and Article 28(4) of the Dublin III Regulation, are the Member States permitted to structure the judicial procedure for challenging the detention of a foreign national ordered by the authorities in such a way as to prohibit the courts from carrying out an ex officio review and assessment of all aspects of the lawfulness of the detention and, where a court finds of its own motion that the detention is unlawful, from ordering that the unlawful detention be ended and the foreign national released immediately? If the Court of Justice of the European Union finds that such national legislation is incompatible with EU law, does that then also mean that, if the foreign national applies to the court for his or her release, that court is always required to carry out an active and thorough ex officio review and assessment of all the facts and factors relevant to the lawfulness of the detention?

II Having regard to Article 24(2) of the Charter, read in conjunction with Article 3(9) of the Return Directive, Article 21 of the Reception Directive and Article 6 of the Dublin III Regulation, does the answer to Question I differ if the foreign national detained by the authorities is a minor?

III Does the right to an effective remedy guaranteed by Article 47 of the Charter, read in conjunction with Article 6 of the Charter and Article 53 of the Charter and in the light of Article 15(2)(b) of the Return Directive, Article 9(3) of the Reception Directive and Article 28(4) of the Dublin III Regulation, mean that, where a foreign national requests a court of any instance to end the detention and order his or her release, that court must give an adequate substantive statement of reasons for any decision on that request, if the remedy is otherwise structured in the same manner as it is in this Member State? If the Court of Justice considers a national legal practice in which the court of second, and therefore highest, instance may confine itself to ruling without giving any substantive reasons to be incompatible with EU law, having regard to the way in which the legal remedy is otherwise structured in this Member State, does that then mean that such a power for the court of second and therefore highest instance in asylum and ordinary immigration cases must also be regarded as being incompatible with EU law, in the light of the vulnerable position of the foreign national, the considerable importance of immigration procedures and the fact that, in contrast to all other

administrative procedures, in terms of legal protection, those procedures contain the same weak procedural guarantees for the foreign national as the detention procedure? Having regard to Article 24(2) of the Charter, are the answers to these questions different if the foreign national challenging a decision of the authorities concerning matters of immigration law is a minor?

Provisions of EU law relied on

Charter of Fundamental Rights of the European Union, Articles 6, 24, 47, 52 and 53

Directive 2008/115 (Return Directive), Articles 3, 5 and 15

Directive 2013/33 (Reception Directive), Articles 2, 9 and 21

Regulation No 604/2013 (Dublin III Regulation), Articles 6 and 28

European Convention on Human Rights (ECHR), Article 5

Provisions of national law relied on

Vreemdelingenwet 2000 (2000 Law on foreign nationals), Articles 85, 89, 91, 94 and 96

Succinct presentation of the facts and procedure in the main proceedings

1 Applicant X is of Moroccan nationality. He has been placed in administrative detention pending his deportation to Morocco. The appeal against that detention was dismissed by the referring court as unfounded on 14 December. No judgment has yet been given in the subsequent appeal. On 8 January 2021, the applicant also lodged an appeal against his continued detention.

Essential arguments of the parties in the main proceedings

2 According to the applicant, he must be released because there is no expectation that he will be deported within a reasonable period. The defendant contends that the procedure for applying for a replacement travel document is still ongoing and that the Moroccan authorities have not stated that a travel document will not be issued.

Succinct presentation of the reasoning in the request for a preliminary ruling

3 In the context of procedures in the Netherlands relating to the detention of foreign nationals under the Return Directive (Directive 2008/115), the Reception Directive (Directive 2013/33) or the Dublin III Regulation (Regulation

No 604/2013), it was until recently settled case-law of the Division that the court may assess the lawfulness of the detention of a foreign national only on the basis of the facts and circumstances presented by that foreign national. If the court finds that detention is unlawful on grounds other than those relied on by the foreign national, it may not release the foreign national.

4 Doubts have been expressed as to whether that settled case-law is tenable. On 23 December 2020, the Division referred to the Court of Justice the question as to whether, in immigration matters, the court must review the lawfulness of a detention measure ex officio (Case C-704/20). The referring court feels compelled to supplement the question referred for a preliminary ruling, as it is not clear whether the detailed rules governing the appeal proceedings concerning detention in the Netherlands satisfy the requirements of an effective remedy within the meaning of Article 47 of the Charter. It points out that the Division did not mention that article in its order for reference. It referred only to the right to liberty enshrined in Article 5 of the ECHR and Article 6 of the Charter, and explained that, according to the explanations relating to the Charter, the latter article also guarantees the right to an effective remedy. According to the Division, the Netherlands immigration procedure and its relevant case-law comply with Article 5 of the ECHR. In Case C-704/20, the Court of Justice has been asked only whether Article 6 of the Charter might offer greater protection than the Division derives from Article 5 of the ECHR.

5 According to the referring court, the Netherlands immigration procedure does not guarantee an effective remedy and therefore does not satisfy the requirements of the ECHR and the Charter. It therefore proposes that the Court of Justice answer the questions referred in the two orders for reference to the effect that the court is required to review the lawfulness of detention ex officio. A power of ex officio review alone would not be sufficient, since that would create legal uncertainty. The degree of legal protection enjoyed by a foreign national who cannot choose the court before which his or her case is to be heard would then depend on chance.

6 In the absence of provisions in EU law and the ECHR concerning the procedures for reviewing the legality of detention, the principle of procedural autonomy applies here. Member States may lay down their own procedural rules, while respecting the principles of proportionality and effectiveness. However, the referring court also points out that fundamental rights must always be respected and therefore questions the extent of the legal protection to be afforded by those procedural rules. The fact that the European Court of Human Rights has never expressly ruled that the ex officio review of detention is mandatory does not mean that the Netherlands procedure cannot be in breach of Article 5 of the ECHR. Rather, it seems to the court that it is so obvious that unlawful detention must be ended that the question referred here has never previously been addressed.

7 The referring court raises the question as to whether, in judicial proceedings, it is not always for the authorities to prove that detention is lawful. After all, it is the authorities who, when detaining a person, derogate significantly from the

fundamental right to liberty. If that burden of proof lies with the authorities, the court must, irrespective of what the foreign national claims, be convinced, on the basis of the arguments put forward by the authorities, that detention is lawful. If it is not convinced, the detention must be brought to an end.

8 The referring court cites certain judgments of the Court of Justice. In its judgment of 6 November 2012, *Otis and Others*, C-199/11, EU:C:2012:684, the Court of Justice held that the court could only rule in accordance with Article 47 of the Charter if it has 'power to consider all the questions of fact and law that are relevant to the case before it' (paragraph 49). Although the facts and questions of law raised in the judgment of 5 June 2014, *Mahdi*, C-146/14 PPU, EU:C:2014:1320 are not identical to those of the case in the main proceedings, the referring court also infers from that judgment that the court must always be in a position, and is indeed obliged, to examine thoroughly the factual elements of each specific case and to review fully the lawfulness of the detention.

9 Finally, in its judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 and C-925/19, EU:C:2020:367, the Court of Justice held that a court which cannot derive from any provision of national law the power to assess the lawfulness of detention must declare that it has jurisdiction to do so under Article 47 of the Charter. Although there was no judicial review in this case, the referring court asks whether Article 47 of the Charter therefore gives it power to review ex officio the lawfulness of detention if the procedure in place does not constitute an effective remedy.

10 The Netherlands immigration procedure contains a number of safeguards designed to ensure an appropriate remedy, such as judicial review of any deprivation of liberty, the right of foreign nationals to be heard when their detention is first reviewed and the right to legal aid. However, the referring court doubts whether those safeguards are sufficient for the procedure to be regarded as an effective remedy. Those doubts are reinforced by the fact that the Division, which rules in the second and final instance, is permitted to confine itself to the 'abridged statement of reasons'. If a foreign national contests the rejection of his or her application for release on appeal, the Division may, in principle, give final judgment without stating any reasons as to the substance of the matter.

11 The referring court asks the Court of Justice whether an effective remedy can be said to exist in the absence of an obligation to state reasons at second instance. It suggests that this should be answered in the negative. It is objectionable, in particular, that a foreign national who is detained for a prolonged period does not, in the event of a further appeal, know why his or her detention was not initially regarded as unlawful. Such an inadequate remedy also demonstrates the importance of an ex officio review of lawfulness.

12 Finally, the referring court points out that the prohibition of ex officio review and the abridged statement of reasons on appeal are also applicable in cases

concerning foreign nationals who are minors. It asks the Court of Justice whether the fact that the foreign national is a minor makes any difference to the question as to whether the Netherlands procedure constitutes an effective remedy.