

**Case C-673/19****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:**

11 September 2019

**Referring court:**

Raad van State (Netherlands)

**Date of the decision to refer:**

4 September 2019

**Applicants:**

M

A

Staatssecretaris van Justitie en Veiligheid

**Defendants:**

Staatssecretaris van Justitie en Veiligheid

T

**Subject of the action in the main proceedings**

Appeals against three judgments of the rechtbank Den Haag (District Court, The Hague) on whether three foreign nationals have been lawfully detained under Article 59(2) of the Vreemdelingenwet 2000 (Law on Foreign Nationals 2000), without a prior return decision, with a view to securing their departure to other EU Member States, where they enjoy international protection.

**Subject and legal basis of the request for a preliminary ruling**

Applicability of 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, if departure to another Member State is envisaged instead of removal to a third country. If the

directive applies: interpretation of the conditions for the application of national provisions as laid down in Article 4(3) of the Return Directive. Article 267 TFEU.

### **Question referred**

Does 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), in particular Articles 3, 4, 6 and 15 thereof, preclude a foreign national who enjoys international protection in another EU Member State from being detained under national law, given that the purpose of the detention is removal to that other Member State and, for that reason, an instruction to depart to the territory of that Member State had initially been issued but no return decision was subsequently taken?

### **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 Member States for returning illegally staying third-country nationals ('the Return Directive'): recitals 2 and 5; Articles 1, 2, 3, 4, 5, 6 and 15

Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks (OJ 2017 L 339, p. 83)

### **Provisions of national law cited**

Vreemdelingenwet 2000 (Law on Foreign Nationals 2000; 'Vw 2000'): Articles 59, 62a, 63 and 106

Vreemdelingencirculaire 2000 (Circular on Foreign Nationals; 'Vc 2000'): paragraph A3/2

### **Brief summary of the facts and the procedure in the main proceedings**

- 1 The foreign nationals M, A and T, nationals of third countries, have each applied for international protection in the Netherlands. The Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security; 'Staatssecretaris') declared those requests inadmissible by decisions of 28 February 2018, 9 October 2018 and 13 June 2018 respectively, because the foreign nationals already hold valid refugee status in another EU Member State. In the decisions, the Staatssecretaris instructed the foreign nationals concerned under Article 62a(3) of the Vreemdelingenwet 2000 (which transposed Article 6(2) of the Return Directive

into Netherlands law) to depart immediately to the territory of the Member State where they enjoy international protection and, in addition, stated that they risk removal if they do not comply with that instruction. The foreign nationals have not complied with that instruction. The Staatssecretaris subsequently placed them in detention on 28 September 2018, 22 November 2018 and 25 October 2018 respectively under Article 59(2) of the Vw 2000 in order to ensure their departure to the Member States concerned.

- 2 The foreign nationals lodged an appeal with the rechtbank Den Haag. Among other things, they submitted on appeal that the detention measure is unlawful in the absence of a return decision.
- 3 In the cases of M and A, the rechtbank Den Haag considered that the Staatssecretaris had lawfully placed them in detention under Article 59(2) of the Vw 2000 without first taking a return decision. According to the Rechtbank, a return decision is not required for a detention measure based on Article 59(2) of the Vw 2000. Their appeals were therefore declared unfounded.
- 4 In the case of T, on the other hand, the court considered, inter alia, that it is unclear whether Article 59 of the Vw 2000 provides grounds for detaining third-country nationals in order to ensure their departure to another Member State. That would only be possible if the term 'return' in Article 59(2) of the Vw 2000 has a different meaning to that in the rest of Article 59. According to the Rechtbank, that did not appear to be the intention of the legislature after the transposition of the Return Directive in Article 59 of the Vw 2000, so that a restrictive interpretation of the term 'return' in the Vw 2000 is called for, which corresponds to the definition of that term in the Return Directive. Furthermore, the Staatssecretaris failed to submit a number of documents to the Rechtbank on time and in full. The detention of foreign national T was therefore unlawful from the moment that it was imposed.

### **Main submissions of the parties to the main proceedings**

- 5 On appeal to the Raad van State (Council of State), M and A argue that the Rechtbank wrongly held that a return decision is not necessary. They submit that, because the foreign nationals did not comply with the instruction to depart to the territory of the other Member States, the Staatssecretaris was required to take a return decision in accordance with Article 62a(3) of the Vw 2000. The absence of a return decision results in the detention measure being unlawful.
- 6 The Staatssecretaris argues that Article 59(2) of the Vw 2000 predates the transposition of the Return Directive and that that Article makes provision for detention powers under national law. Where the law is not exclusively a transposition of the Return Directive or where it makes provision for an arrangement for situations in which the directive does not apply, the term 'return' must be given the meaning it has in common parlance. According to the Staatssecretaris, there is no reason for a restrictive interpretation of Article 59(2)

of the Vw 2000, in which the meaning of ‘return’ corresponds to that in the Return Directive. According to the Staatssecretaris, under that Article, third-country nationals staying illegally on Netherlands territory can therefore be detained in order to ensure their departure to the Member State where they hold valid refugee status or subsidiary protection status.

### **Brief summary of the reasons for the referral**

- 7 Article 59 of the Vw 2000 contains various grounds for detention. Paragraph 1 of that Article transposes Article 15 of the Return Directive. That paragraph therefore contains a ground for the detention of third-country nationals who are the subject of a return procedure within the meaning of the directive, in order to prepare their return and/or to carry out the removal. A return decision is part of that return procedure, so that detention on that ground requires a return decision. Article 59(2) of the Vw 2000 contains an additional ground for detention that is not based on the Return Directive. According to that provision, detention is required in the interests of public policy if the documents required for the return are available or will be available within a short period.
- 8 At the hearing, the Staatssecretaris explained that he currently uses the ground in Article 59(2) of the Vw 2000 only for the detention of illegally staying third-country nationals who enjoy international protection in another Member State, with a view to securing their departure to that Member State. Moreover, he only proceeds to detention if the foreign national does not comply with the instruction to leave immediately for the relevant Member State. Although Article 62a(3) of the Vw 2000 requires the Staatssecretaris to take a return decision if the instruction to leave is not complied with, in practice that does not happen in the case of foreign nationals who enjoy international protection. According to the Staatssecretaris, the prohibition of refoulement precludes a return decision in such cases.
- 9 The Return Directive leaves room for national rules for situations not covered by the directive. It is not designed to harmonise in their entirety the national rules on the stay of foreign nationals, but concerns only the adoption of return decisions and the implementation of those decisions (see the judgment of the Court of Justice of 6 December 2011, *Achughbabian*, C-329/11, EU:C:2011:807, paragraphs 28 and 29). The Raad van State therefore sees no reason to restrict the interpretation of the term ‘return’ in Article 59(2) of the Vw 2000 to the definition given to it in the Return Directive.
- 10 In order to be able to assess whether the Staatssecretaris has lawfully detained the foreign nationals without a return decision, it is necessary to examine whether the Return Directive applies and, if so, whether the Member States have the option, within the directive, to detain foreign nationals in order to ensure their departure to another Member State.

### *Scope of the Return Directive*

- 11 According to Articles 1 and 2(1) of the Return Directive, the directive concerns the return of third-country nationals staying illegally on the territory of a Member State. Since the aim in such cases is departure to another Member State instead of removal to a third country, the question is to what extent the standards and procedures in the Return Directive should be applied in such a situation. According to recital 5 of the Return Directive, the directive should establish rules applicable to all third-country nationals who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State. Furthermore, removal to another Member State is not covered by the definition of 'return' in Article 3(3) of the Return Directive. For that reason alone, the ground for detention in Article 15 of the Return Directive does not apply in those cases. If recital 5 is read in conjunction with Article 3(1) and Article 1 of the Return Directive, a possible conclusion is that the directive does not lay down standards and procedures that should be applied by the Netherlands in the case of the forced departure of foreign nationals to the Member State where they enjoy international protection. In that case, the detention of those foreign nationals is entirely governed by national law.
- 12 On the other hand, Article 6(2) of the Return Directive expressly provides that Member States must take a return decision if an illegally staying third-country national does not comply with the instruction to depart immediately to the Member State where he holds a valid residence permit or other authorisation offering a right to stay. That arrangement was apparently based on the notion that a third-country national will, as a rule, comply with the instruction to depart immediately to the other Member State, because otherwise he would risk removal to his country of origin.
- 13 However, that arrangement cannot be applied automatically to third-country nationals who have been granted refugee or subsidiary protection status in another Member State. In such a case, deportation to the country of origin is not possible in view of the prohibition of refoulement, which is to be observed when implementing that directive in accordance with, inter alia, Articles 1 and 5 of the Return Directive.
- 14 In the present cases, the refugee status granted to the foreign nationals therefore precludes return to their country of origin. Return to a country of transit is also out of the question. The foreign nationals have also not indicated that they wish to depart voluntarily to another third country. In view of that, taking a return decision imposing or adopting a return obligation for the purpose of returning to the country of origin is also not possible in those cases. The question is whether the Return Directive leaves room for Member States not to take a return decision in those cases and to detain foreign nationals without a return decision with a view to their departure to the Member State where they hold valid refugee status.

*More favourable provisions*

- 15 According to paragraphs 5.3 and 5.4 of the Return Handbook, the general regime laid down in Article 6(2) of the Return Directive applies when a third-country national refuses to go back voluntarily to the Member State that granted him international protection. If return or removal to a third country is not possible and the removal of the third-country national to another Member State can be qualified as a more favourable measure, the person can be removed to the Member State where he has a right to legal stay. In that situation, the Member State that issued the authorisation must consent to take back the third-country national and the procedures related to that removal are governed by national law, according to the Return Handbook.
- 16 According to paragraph [3] of the Return Handbook, the term ‘more favourable’ in Article 4(3) of the Return Directive must be interpreted as more favourable for the foreign national and not more favourable for the Member State. That gives rise to problems in those cases, because the foreign nationals have not complied with the instruction to depart to the Member State where they enjoy international protection. They apparently prefer illegal stay in the Netherlands to legal stay in the other Member State. The Raad van State wonders what factors should be taken into account when assessing whether a more favourable provision is involved. It is obvious that removal to the country of origin should not be a factor in the assessment, given the conflict with the prohibition of *refoulement*.
- 17 In addition to the condition that any national provisions should be more favourable, Article 4(3) of the Return Directive requires that they be compatible with the directive. The question is whether a provision of national law permitting detention in order to ensure departure to another Member State is compatible with the Return Directive. Neither the directive nor the Return Handbook gives a definitive answer to that.
- 18 If detention with a view to departure to another Member State is not qualified as more favourable or is incompatible with the Return Directive and the directive therefore precludes detention, it becomes considerably more difficult to compel illegally staying third-country nationals who enjoy international protection in another Member State to depart to that Member State. In that case, the only remaining option is to instruct that foreign national repeatedly to depart to the other Member State. That makes it impossible to pursue an effective removal policy (the objective of the Return Directive according to recital 2 thereof) within the EU in relation to those foreign nationals.
- 19 The Raad van State sees two possible outcomes. The first option is to interpret the Return Directive as meaning that the departure of third-country nationals to other Member States where they enjoy international protection falls outside the scope of the Return Directive. In that case, only national law applies. In the second option, the Return Directive does apply to that situation. National law can also be applied

in those cases, but only if it is more favourable for the foreign nationals and if it is compatible with the Return Directive.

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