

Case C-718/19**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:**

27 September 2019

Referring court:

Cour constitutionnelle (formerly Cour d'arbitrage) (Belgium)

Date of the decision to refer:

18 July 2019

Applicants:

Ordre des barreaux francophones et germanophone

Association pour le droit des Étrangers ASBL

Coordination et Initiatives pour et avec les Réfugiés and Étrangers ASBL

Ligue des Droits de l'Homme ASBL

Vluchtelingenwerk Vlaanderen ASBL

Defendant:

Conseil des ministres

I. Subject matter of the main proceedings

- 1 By two separate applications, the Ordre des barreaux francophones et germanophone (Council of French- and German-language Bars; 'the OBFG'), on the one hand, and the ASBL Association pour le droit des Étrangers, the ASBL Coordination et Initiatives pour et avec les Réfugiés and Étrangers, the ASBL Ligue des Droits de l'Homme and the ASBL Vluchtelingenwerk Vlaanderen, on the other hand, brought actions seeking the annulment, in whole or in part, of the loi du 24 février 2017 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers afin de renforcer la protection de l'ordre public et de la sécurité nationale (Law of

24 February 2017 amending the Law of 15 December 1980 on the admission, residence, establishment and removal of foreign nationals in order to enhance protection of public policy and national security) (published in the *Moniteur belge* (Belgian Official Journal) of 19 April 2017, p. 51890) (<http://www.ejustice.just.fgov.be/eli/loi/2017/02/24/2017011464/justel>) ('the contested Law'). The cases are numbered 6749 and 6755 respectively and have been joined.

- 2 The contested law amends the loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Law of 15 December 1980 on the admission, residence, establishment and removal of foreign nationals) (published in the *Moniteur belge* of 31 December 1980, p. 14584) (<http://www.ejustice.just.fgov.be/eli/loi/1980/12/15/1980121550/justel>) ('the Law of 15 December 1980').

II. The contested Law

- 3 The Law of 24 February 2017 'seeks to make removal policy more transparent, coherent and effective, in particular where the aim is to safeguard public policy or national security, whilst respecting the fundamental rights of the persons concerned' (*Doc. parl.*, Chambre, 2016-2017, DOC 54-2215/001, p. 4). In particular 'it gives the authorities the means to act more swiftly and effectively where public policy or national security is threatened' (*ibid.*).
- 4 The preamble states as follows:

'In order to achieve those objectives, it is intended:

 - to carry out an in-depth review of the regime for return and expulsion and to replace it with separate regimes according to the foreign national's residence status;
 - to lay down more transparent, coherent and effective rules to protect public policy or national security;
 - to establish a mechanism to limit so far as possible the repeated adoption of turning back or removal measures;
 - to determine clearly the authorities that have power, during border controls, to take decisions refusing entry and annulling or revoking visas and the situations in which they are authorised to exercise that power' (*ibid.*, p. 5).
- 5 The contested Law partially transposes the following directives, among others:
 - Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending

Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77);

- 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).

III. The provisions at issue

6 The contested Law amends numerous provisions of the Law of 15 December 1980. The Cour constitutionnelle (Constitutional Court) found most of the pleas in law objecting to that Law to be unfounded and therefore dismissed the actions for annulment to that extent. However, that court finds that it must ask the Court of Justice to interpret a number of provisions of EU law before ruling on the remaining pleas in law. It has therefore stayed examination of certain pleas in law concerning Articles 28, 29, 30, 31 and 32 of the contested Law.

7 Articles 28, 29, 30, 31 and 32 of the contested Law insert Articles 44^{quater} to 44^{octies}, which provide as follows, into the Law of 15 December 1980:

8 Article 44^{quater}:

‘An EU citizen or a member of his or her family cannot be forcibly removed so long as the period under Article 44^{ter} has not expired.

To avoid any risk of absconding during the period referred to in Article 44^{ter}, the EU citizen or the member of his or her family may be required to comply with preventive measures. The King is authorised to determine those measures by decree debated in the Conseil des ministres (Council of Ministers)’.

9 Article 44^{quinquies}:

‘Paragraph 1. The Minister or a person delegated by the Minister shall take all the measures necessary to enforce the order to leave the territory where:

(1) the EU citizen or the member of his or her family has not been given a time limit by which to leave the territory of the Kingdom;

(2) the EU citizen or the member of his or her family has not left the territory of the Kingdom within the period given to that person;

(3) before expiry of the period given in which to leave the territory of the Kingdom the EU citizen or the member of his or her family presents a risk of absconding, has failed to comply with the preventive measures imposed or represents a threat to public policy or national security.

Paragraph 2. Where the EU citizen or the member of his or her family objects to his or her removal or presents a risk of dangerousness when being removed, he or she shall be forcibly returned, with an escort if necessary. Coercive measures may then be used in relation to that person, in compliance with Articles 1 and 37 of the loi du 5 août 1992 sur la fonction de police (Law on policing of 5 August 1992).

Where the removal is effected by air, the measures shall be taken in accordance with the Common Guidelines on security provisions for joint removals by air annexed to Decision 2004/573/EC.

Paragraph 3. By decree debated in the Council of Ministers, the King shall designate the entity responsible for supervising forced returns and shall determine the arrangements for that supervision. That entity shall be independent of the removal authorities’.

10 Article 44*sexies*

‘Where justified by the circumstances of each case, the Minister or a person delegated by the Minister may temporarily postpone the removal. That person shall inform the person concerned.

In order to avoid any risk of absconding, the EU citizen or the member of his or her family may be required to comply with preventive measures. The King is authorised to determine those measures by decree debated in the Council of Ministers.

The Minister or a person delegated by the Minister may, in those situations, place the EU citizen or the member of his or her family under house arrest for the period necessary to carry out that measure’.

11 Article 44*septies*:

‘Paragraph 1. Where required for reasons of public policy, national security or public health, and unless other less coercive measures can be applied effectively, EU citizens and members of their families may, in order to ensure that the removal measure is carried out, be held for the period strictly necessary to carry out the measure, which may not exceed two months.

The Minister or a person delegated by the Minister may nevertheless extend the period for which the person is held by two-month periods, where the procedures necessary for removal of the foreign national have been undertaken within seven working days of the EU citizen or the member of his or her family being held, have been pursued with all due diligence and there is still a possibility of effectively removing the person concerned within a reasonable time.

After a first extension, the decision to extend the period of holding may be taken only by the minister.

After five months, the EU citizen or the member of his or her family must be released. Where required in order to safeguard public policy or national security, the period of holding may be extended by one month each time although the total period of holding may not exceed eight months.

Paragraph 2. The EU citizen or the member of his or her family referred to in Paragraph 1 may appeal against the decision to hold him or her, in accordance with Article 71 et seq.’.

12 Article 44*octies*:

‘The following persons may not be held within the meaning of Article 74(8)(2):

- (1) EU citizens who are unaccompanied minors;
- (2) members of the family of an EU citizen who are unaccompanied minors;
- (3) families of EU citizens where those families consist of at least one minor’.

IV. Pleas in law and arguments of the parties

1. Article 28 of the contested Law (Article 44^{quater} of the Law of 15 December 1980)

- 13 The first part of the fifth plea in case no 6749 alleges infringement of the rights to free movement and freedom of establishment for European citizens and of Directive 2004/38 in so far as preventive measures to prevent a risk of absconding cannot be imposed on EU citizens or foreign nationals treated as EU citizens. In the alternative, the OBFG argues that the contested provision fails to define the risk of absconding objectively on the basis of clear criteria. It states that the concept of ‘risk of absconding’ is given a precise meaning in EU law in relation to third-country nationals and that it is unacceptable that EU citizens and foreign nationals treated as EU citizens should be treated less favourably than third-country nationals.

The Council of Ministers takes the view that the plea is inadmissible in so far as it alleges infringement of freedom of establishment, because, taken in the context of EU law, that freedom is intended to guarantee the right of undertakings and the self-employed to become established on the same terms as nationals of the host Member State. It also notes that the applicant has not stated in what way that freedom has been infringed.

On the concept of ‘risk of absconding’, according to the Council of Ministers that concept as applied in the context of the detention of asylum seekers awaiting transfer to another European State cannot be transposed to the present context.

The applicant submits that the Law is ambiguous on what the ‘preventive measures’ might be and argues that, since they are intended to prevent a risk of absconding, they concern, in essence, a limitation on the right to come and go freely.

- 14 By the second part, the applicant claims that the contested provision infringes the fundamental right to liberty guaranteed by Article 12 of the Constitution, Article 5 of the European Convention on Human rights (‘ECHR’) and Article 6 of the Charter of Fundamental Rights of the European Union (‘the Charter’), and the freedom of movement and establishment. It argues that the detention of an EU citizen or a foreign national treated as an EU citizen cannot be justified on the basis of a ‘risk of absconding’ since the removal measure can be neither taken nor carried out against that person, by virtue of the protection granted by Article 39/79 of the Law of 15 December 1980 and by virtue of Article 31 of Directive 2004/38.

The Council of Ministers contends that the applicant misreads the contested provision by equating ‘preventive measures’ with detention measures. It notes that detention measures are laid down by a different provision, that is to say, Article 44^{septies} of the Law of 15 December 1980. It adds that the fact that Directive 2004/38 does not authorise the Member States to adopt preventive measures does not mean that they are formally prohibited from doing so.

The applicant emphasises that preventive measures are necessarily a form of carrying out a removal measure, since their purpose is precisely to ensure that it is carried out. It observes that carrying out measures in that way is expressly prohibited.

- 15 By the third part, the applicant contends that the contested provision fails to respect the principle of the separation of powers, under Articles 33, 34, 36, 37, 105 and 108 of the Constitution, in so far as it gives the King powers in respect of detention and alternatives to detention in the form of measures that restrict the right to liberty and the free movement of EU citizens and persons treated as EU citizens.

The Council of Ministers is of the view that, provided the preventive measures do not restrict the freedom to come and go, they can be delegated to the King.

2. Article 29 of the contested Law (Article 44^{quinquies} of the Law of 15 December 1980)

- 16 The first part of the sixth plea in law in case no 6749 alleges infringement of Article 31(2) of Directive 2004/38, in so far as that provision of the directive states that EU citizens and members of their families may only be forcibly

removed and those foreign nationals may be deprived of the protection against forced removal during the period for appeal and while an appeal is being examined only on imperative grounds of public security under Article 28(3) of the directive. The applicant contends that the contested provision, by contrast, allows the Minister or a person delegated by the Minister to have the order to leave the territory enforced on other grounds.

The Council of Ministers considers that it is necessary to have regard to Article 39/79 of the Law of 15 December 1980, according to which the administrative authority may forcibly remove an EU citizen or a member of his or her family during examination of an appeal brought by that person against the decision ending the right of residence only if it does so on imperative grounds of national security.

The applicant contends that the interpretation advanced by the Council of Ministers is untenable because it is manifestly contrary to the terms of the Law.

3. Article 31 of the contested Law (Article 44 septies of the Law of 15 December 1980)

- 17 The eighth plea in law in case no 6749 alleges infringement of Article 12 of the Constitution in conjunction with Article 5 ECHR, Article 6 of the Charter and the principles of freedom of movement and establishment and the effectiveness of Directive 2004/38. The OBFG criticises Article 31 of the contested Law for, on the one hand, establishing a period of detention of two months, which, it argues, is too long where the issue is merely one of removing a person to another Member State (first part) and, on the other hand, failing to lay down clear criteria for determining the period strictly necessary to carry out the measure (second part).

The Council of Ministers contends that, given the detailed list of the situations in which a foreign national may be detained, both the substantive and procedural provisions contested satisfy the requirements under Article 5(1)(f) of the European Convention on Human Rights. That party notes that the express condition that the detention may not be longer than the time strictly necessary means that the measure must be applied in good faith, and the two-month maximum period is therefore neither the rule nor a dispensation to authorise detention for that period in all cases.

According to the applicant the Council of Ministers failed to have regard to the specific circumstances of EU citizens, such as, amongst others, the fact that they have a fundamental right to move freely within the European Union and that the exercise of free movement must be facilitated.

4. Articles 28 to 32 of the contested Law (Articles 44quater to 44 octies of the Law of 15 December 1980)

- 18 The first part of the ninth plea in case no 6749 alleges, inter alia, that Articles 28 to 32 of the contested Law infringe the principles of freedom of movement and establishment and Directive 2004/38, in so far as, according to those sources of law, preventive measures designed to avoid a risk of absconding may not be imposed on EU citizens and foreign nationals treated as EU citizens. In the alternative, the OBFG contends that, if it had to be found that the directive does authorise preventive measures of that kind, the contested provisions should be found to be unlawful because they do not lay down legally defined objective criteria to determine the risk of absconding. It claims that the concept of ‘risk of absconding’ has a particular meaning in EU law in relation to third-country nationals. It contends that there can be no grounds for treating EU citizens and persons treated as EU citizens less favourably than third-country nationals.

The Council of Ministers refers to the line of argument which it set out in response to the first part of the fifth plea.

- 19 The second part of the plea alleges infringement of Article 22 of the Constitution in conjunction with Articles 17 and 23 of the International Covenant on Civil and Political Rights, Article 8 ECHR, Articles 7 and 33 of the Charter and Articles 27 and 28 of Directive 2004/38, in so far as the contested provisions use overly imprecise, vague and diffuse concepts such as ‘reasons of public policy, national security or public health’, ‘serious reasons of public policy or national security’ and ‘imperative reasons of national security’ on which to base a decision terminating residence or an order to leave the territory.

The Council of Ministers fails to understand how the legislature could have infringed Articles 27 and 28 of Directive 2004/38 given that the contested Law uses the same terms as the directive.

- 20 The third part of that plea alleges infringement of the principle of the separation of powers, under Articles 33, 34, 36, 37, 105 and 108 of the Constitution. The OBFG submits that the detention measures and alternatives to detention restrict the right to liberty and of free movement of EU citizens and foreign nationals treated as EU citizens.

The Council of Ministers refers to the line of argument which it set out in response to the third part of the fifth plea and to the seventh plea.

- 21 The first three parts of the tenth plea in law in case no 6749 allege that Article 33 of the contested Law infringes the freedom of movement and of establishment of EU citizens and the effectiveness of Directive 2004/38, in so far as it authorises an entry ban to be attached automatically to an order to leave the territory on grounds of public policy (first part), in so far as it authorises an entry ban of more than five years in length to be imposed if the EU citizen or the member of his or her family represents a serious threat to public policy or national security, which is always

the case if an order to leave the territory has been imposed on the foreign national concerned (second part), and in so far as it permits the Minister or a person delegated by the Minister to impose an entry ban for several years with no requirement to give specific precise reasons to believe that the foreign national concerned will continue to represent a serious threat affecting one of the fundamental interests of society (third part).

The Council of Ministers believes that the plea is inadmissible to the extent that it alleges infringement of the principle of freedom of establishment and infringement of the effectiveness of Directive 2004/38, because the applicant has not indicated which provisions of the directive it claims are infringed.

It argues that the applicant has misconstrued the contested provision, which provides for an option to issue an entry ban but not an obligation to do so, and that it therefore cannot be argued that the contested provision authorises an entry ban to be imposed automatically. According to the Council of Ministers, it is incorrect to say that the Minister or a person delegated by the Minister is authorised to impose an entry ban of more than five years in all cases, without having to state reasons for that length other than using the same findings that led to adoption of the order to leave the territory. It states that the aforementioned directive provides that an entry ban can be imposed on EU citizens or members of their families for reasons of public policy, public security or public health. Lastly it adds that the authorities themselves carry out an individual examination for each decision, and infers therefrom that any infringement of the principle of proportionality would arise not from the contested Law but from its application by the competent authority.

The applicant asserts that the reading given by the Council of Ministers to the contested provision is not self-evident and that the Council of Ministers is perpetuating a degree of ambiguity indicative of the vagueness of the applicable thresholds and the scope of the concepts used in the Law. The applicant also notes that by maintaining that position the Council of Ministers is at odds with the second subparagraph of Article 27(2) of Directive 2004/38 and the case-law of the Court of Justice of the European Union.

- 22 The fourth part of the tenth plea alleges infringement of Articles 10, 11 and 191 of the Constitution, read in conjunction with Article 26 of the International Covenant on Civil and Political Rights, Article 14 ECHR, Article 1 of supplementary Protocol No 12 to that convention and Articles 20 and 21 of the Charter. According to the OBF, the contested provision discriminates between EU citizens and third-country nationals, for whom Article 74/11 of the Law of 15 December 1980 prevents any of the public-policy grounds that could form the basis for a decision ending a stay or an order to leave the territory from also forming the basis for a five-year entry bar.

The Council of Ministers contends that the applicant is misreading the Law and that the difference in treatment which it alleges does not exist. The Council of

Ministers refers to the fourth subparagraph of Article 74/11(1) of the Law of 15 December 1980.

According to the applicant, the Council of Ministers is obscuring the fact that Article 74/11 of the Law of 15 December 1980 prevents any of the public-policy grounds that could form the basis for a decision terminating residence or an order to leave the territory from also forming the basis for an entry bar of more than five years. The applicant notes that, in order to apply an entry bar of more than five years, that article requires a higher severity threshold than that required to make an order to leave the territory, whereas, in relation to EU citizens, the authority is authorised to make an order to leave the territory and an entry bar for more than five years on identical grounds.

- 23 The applicants in case 6755 advance a forty-seventh plea alleging that Articles 28 to 31 of the contested Law infringe Articles 10 and 11 of the Constitution, whether or not read in conjunction with Articles 20 and 21 TFEU and the principle of legal certainty. They claim that the contested provisions, in breach of the Treaty provisions referred to, authorise the King to establish restrictions on the free movement of EU citizens which are not provided for by Directive 2004/38. Moreover, the provision unjustifiably distinguishes between EU citizens and their family members who are subject to measures taken under Article 44*quater* of the Law of 15 December 1980, and other EU citizens and their family members, in so far as the Law does not define the ‘risk of absconding’ criterion (first part). The contested Articles 29 and 31 infringe the principle of legality in so far as they authorise the King to adopt measures which restrict liberty (second part). Lastly, the applicants allege legal uncertainty because it is not clear whether measures can already be taken against EU citizens and their family members who are at risk of absconding, when no implementing decree has yet been adopted. Specifically, they are prevented from knowing which provisions apply where there is a risk of absconding: the measures determined by the King or the measures taken under the Law by the Office des étrangers (Immigration Office, Belgium) (third part).

The Council of Ministers observes that, by definition, the contested provisions do not concern EU citizens and their family members who, according to Directive 2004/38, cannot benefit from protection against expulsion and whose right to freedom of movement is subject to limitations within the meaning of Article 21 TFEU. It also draws attention to the fact that the definition of ‘risk of absconding’ in Article 1(11) of the Law of 15 December 1980 applies not only to third-country nationals but also to EU citizens and their family members. Furthermore, it is apparent from the *travaux préparatoires* that the measures that the King can take may not entail any restriction on freedoms. The Council of Ministers refers to the measures listed in Article 110*quaterdecies* of the Royal Decree of 8 October 1981. Lastly, the Council of Ministers asserts that, by virtue of Article 44*quinquies* of the Law of 15 December 1980, there are clear limitations on the application of those measures, to the extent that there is, in its view, no legal uncertainty.

- 24 The applicants in case no 6755 advance a forty-eighth plea alleging that Articles 28 to 31 of the contested Law infringe Articles 10 and 11 of the Constitution, read in conjunction with Article 5 ECHR and Article 6 and Article 52(3) of the Charter. They claim that the contested provisions insufficiently define the ‘risk of absconding’. The definition given in Article 1(11) of the Law of 15 December 1980 applies only to third-country nationals and, what is more, does not define what constitutes the ‘objective and genuine factors’ to which it refers. Furthermore, the contested Articles 28 and 30 establish a difference in treatment between EU citizens and their family members on whom preventive measures can be imposed where there is a risk of absconding, and other foreign nationals.

The Council of Ministers believes that the contested provisions provide sufficient protection against arbitrary action. The person delegated by the competent State Secretary must base his or her decision on objective and genuine factors before being able to invoke any risk of absconding, and an action for annulment is available against the decision before the Conseil du Contentieux des Étrangers (Council for asylum and immigration proceedings, Belgium).

- 25 The applicants in case no 6755 advance a fiftieth plea alleging that Articles 28 to 31 of the contested Law infringe Articles 10 and 11 of the Constitution, whether or not read in conjunction with Articles 5 and 13 ECHR and Article 2 of supplementary Protocol No 4 to that convention. They contend that the contested provisions are not sufficiently accessible, precise and foreseeable to prevent all risk of arbitrary action, specifically because the concept of ‘risk of absconding’ is very vague. When reviewing legality, the Conseil du Contentieux des Étrangers (Council for asylum and immigration proceedings) does not examine the applicant’s current situation, and that review is therefore not an effective legal remedy and does not satisfy the convention provisions referred to (first part). Moreover, under Article [31] of Directive 2004/38 EU citizens and their family members may not be expelled whilst proceedings are pending (second part). Lastly, they argue, the period for which EU citizens and their family members may be detained is unreasonable and there is an unjustified equality of treatment for EU citizens and third-country nationals (third part).

The Council of Ministers calls to mind first of all the fact that Article 5 ECHR does not apply to measures involving merely a restriction on liberty. It argues *inter alia* in that respect that this is not a matter of a deprivation of liberty, since for that purpose the Law of 15 December 1980 uses the concepts of ‘holding’ and ‘detention’. An obligation to stay in a specific place does not, it argues, involve any deprivation of liberty, and Article 5 ECHR therefore does not apply. In addition, an appeal is available to the Conseil du Contentieux des Étrangers (Council for asylum and immigration proceedings) and proceedings for interim relief can also be brought before a civil court where an individual’s right is unlawfully infringed. Lastly, the Council of Ministers contends that the measure satisfies the requirements of Article 2 of supplementary Protocol No 4 to the aforementioned convention. What is more, Article 44*septies* of the Law of

15 December 1980 explicitly provides that a deprivation of liberty may be imposed exceptionally, with the effect that the other preventive measures, by definition, do not constitute a deprivation of liberty. Article 44^{septies} provides for a speedy appeal to a court, with the result that the requirements of the convention provisions referred to are satisfied. The other preventive measures can be imposed only once the decision to refuse or withdraw the right of residence has become final. In respect of the second part, the Council of Ministers refers to Article 39/79 of the Law of 15 December 1980, from which it can be seen that as a general rule the contested decision has suspensory effect and satisfies the requirements of Directive 2004/38. As regards the third part, the Council of Ministers believes that the legislature has provided sufficient safeguards to prevent an infringement of Article 5 of the European Convention on Human Rights.

V. Assessment by the referring court

Articles 28 to 31 of the contested Law (Articles 44^{quater} to 44^{septies} of the Law of 15 December 1980)

- 26 The preamble to this part of the contested Law states that those provisions, ‘in the interests of transparency and legal certainty, clarify the measures that can be taken in respect of EU citizens and members of their families in order to remove them from the territory of the Kingdom’, that they ‘seek to establish an effective policy for removing EU citizens and members of their families, ensuring that it is humane and fully respects their fundamental rights and dignity’ and that ‘the intention is to guarantee a removal regime for EU citizens and members of their families that is no less favourable than that for third-country nationals’ (*Doc. parl.*, Chambre, 2016-2017, DOC 54-2215/001, pp. 37 and 38; DOC 54-2215/003, p. 4).
- 27 The Constitutional Court will examine those pleas in law grouped as follows:
- the ‘preventive measures’ intended to prevent a ‘risk of absconding’;
 - forced removal before passing of the time limit;
 - detention and alternatives to detention.

1. ‘Preventive measures’ and the ‘risk of absconding’

- 28 Article 44^{quater}, inserted in the Law of 15 December 1980 by Article 28 of the contested Law, provides that ‘preventive measures’ can be imposed on an EU citizen or the member of his or her family against whom an order to leave the territory has been issued, before the time limit within which that person must leave the territory of the Kingdom has passed, in order to ‘avoid any risk of absconding’. Article 44^{quinquies}, inserted in the Law of 15 December 1980 by Article 29 of the contested Law, provides in paragraph 1(3) that the Minister or a person delegated by the Minister is to take all the measures necessary to enforce

the order to leave the territory where, amongst other situations, the foreign national concerned has failed to comply with the preventive measures imposed. Article 44*sexies*, inserted in the Law of 15 December 1980 by Article 30 of the contested Law, provides that, ‘in order to avoid any risk of absconding’, ‘preventive measures’ may be imposed on the EU citizen or the member of his or her family where, after the passing of the time limit or where there is no time limit, the forced removal is temporarily postponed by the Minister or a person delegated by the Minister. Articles 44*quater* and 44*sexies* authorise the King to determine those measures by decree debated in the Council of Ministers. Article 44*sexies* also provides that the Minister or a person delegated by the Minister may place the person concerned under house arrest while that measure is being carried out.

- 29 The applicants argue in particular that Article 44*quater* of the Law of 15 December 1980 infringes Articles 10 and 11 of the Constitution, read in conjunction with Directive 2004/38, with the right of EU citizens to freedom of movement and with Articles 105 and 108 of the Constitution, because under EU law preventive measures cannot be imposed on EU citizens and members of their families in order to avoid the risk of absconding during the period given in which to leave the territory.
- 30 The ‘return’ directive [Directive 2008/115], which does not apply to EU citizens and members of their families, but which does apply to illegally staying third-country nationals, provides that the Member States may impose certain obligations on foreign nationals against whom an order to leave the territory has been issued, aimed at ‘avoiding the risk of absconding’ (Article 7). Those obligations may consist of regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place. Article 3.7 of the same directive defines the ‘risk of absconding’ as ‘the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond’.

By contrast, Directive 2004/38, which does apply to EU citizens and members of their families, contains no provisions on measures that can be taken in relation to those foreign nationals aimed at preventing a risk of absconding, during the period given to them in which to leave the territory, where a decision to withdraw the right of residence has been made against them.

- 31 The preamble to the contested provisions states that:

‘These new rules do not transpose 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”) but are broadly inspired by it.

In that regard, in its order of 10 February 2004, (*Mavrona*, C-85/03, EU:C:2004:83, paragraph 20), the European Court of Justice held that a national legislature is not precluded from introducing, for a category of situations or persons, rules inspired by the provisions of a directive the scope of application of which does not include those situations or persons, where it appears expedient to do so and provided that no other provision of Community law prevents it from doing so.

The aim is to provide EU citizens and members of their families with a removal regime that is no less favourable than that available for third-country nationals.

These new articles provide that if the EU citizen or the member of his or her family does not comply voluntarily, the Minister or a person delegated by the Minister will carry out his or her removal. The same applies where the EU citizen or the member of his or her family presents a risk of absconding, has failed to comply with the preventive measures imposed or represents a threat to public policy or national security, even though the period given to that person in which to leave the territory of the Kingdom voluntarily has not yet expired' (*Doc. parl.*, Chambre, 2016-2017, DOC 54-2215/001, p. 38).

It is further clarified that the Law expressly provides for house arrest because the legislature alone can lay down a measure that restricts the freedom to come and go (*Doc. parl.*, Chambre, 2016-2017, DOC 54-2215/001, p. 38). The Council of Ministers infers from the foregoing that the other 'preventive measures' that the King is authorised to establish cannot have the purpose or effect of restricting the freedom to come and go of the persons concerned.

- 32 Whatever the type of preventive measures in question, they necessarily affect the rights and freedoms of the EU citizen or the member of his or her family concerned because their very purpose is to prevent that person from absconding, thereby, where applicable, potentially preventing him or her from travelling to a different Member State and, ultimately, to ensure his or her forced departure from Belgian territory.
- 33 In its order in *Mavrona*, to which the *travaux préparatoires* cited in paragraph 31 refer, the Court of Justice held that, in the absence of any harmonisation in EU law for a category of professionals, that is to say, commission agents, a national legislature may introduce, for the protection of that category, appropriate rules inspired by the provisions of a directive concerning a different category of professionals, that is to say, commercial agents, where no other provision of Community law prevents it from doing so (order of 10 February 2004, *Mavrona*, C-85/03, EU:C:2004:83, paragraph 20). This does not appear to suggest that restrictions on the fundamental rights of nationals of countries not belonging to the European Union that are permitted by a directive that relates expressly to the situation of those nationals can be applied by analogy to EU citizens where the directive that applies to their situation does not provide for those restrictions.

34 The Court of Justice has also held that:

‘Directives 2004/38 and 2008/115 do not preclude a decision to return an EU citizen, such as that at issue in the main proceedings, from being adopted by the same authorities and according to the same procedure as a decision to return a third-country national staying illegally referred to in Article 6(1) of Directive 2008/115, provided that the transposition measures of Directive 2004/38 which are more favourable to that EU citizen are applied’ (judgment of 14 September 2017, *Petrea*, C-184/16, EU:C:2017:684, paragraph 56).

35 The purpose of the contested provision is not to designate the authority competent to make a return decision in respect of an EU national or a member of his or her family. Nor is it a procedural provision. The ruling in *Petrea* cannot therefore be transposed by analogy to the contested provision, because the present case concerns restrictions on the fundamental rights of EU citizens and foreign nationals treated as EU citizens that are not laid down in the directive applicable to their situation.

36 It follows from the foregoing that there is uncertainty as to whether the provisions of Directive 2008/115 on preventive measures in the event of the removal of a third-country national are applicable by analogy to EU citizens.

37 Before ruling on the substance in relation to the second paragraph of Article 44*quater*, Article 44*quinquies*(1)(3) and the second paragraph of Article 44*sexies* of the Law of 15 December 1980, inserted by Articles 28, 29 and 30 of the contested Law, it is therefore necessary to refer the first question in the operative part to the Court of Justice for a preliminary ruling.

2. Forced removal before passing of the time limit

38 Under Article 44*quinquies*, inserted in the Law of 15 December 1980 by Article 29 of the contested Law, the Minister or a person delegated by the Minister may ‘take all the measures necessary to enforce the order to leave the territory’ where no time limit has been given in which to do so, where the person concerned has not left the territory within the time limit given or where, before the period in question has expired, that person either has not complied with preventive measures intended to avoid a risk of absconding or represents a threat to public policy or to national security.

39 Examination of the provision, to the extent that it enables an order to leave the territory issued against a foreign national who has failed to comply with preventive measures imposed to be enforced before the passing of the time limit, should be stayed pending a response from the Court of Justice.

3. *Detention and alternatives to detention*

- 40 Under Article 44*septies* of the Law of 15 December 1980, inserted by Article 31 of the contested Law, EU citizens and members of their families can be held in order to ensure that the removal measure is carried out, for the period strictly necessary to carry out the measure. The period for which they can be held is in principle limited to two months but may be extended initially by the Minister or a person delegated by the Minister for a period of two months. It may then be extended by the Minister alone. The person concerned must be freed after five months, unless it is necessary to continue to hold him or her in order to safeguard public policy or national security. In such a case, the total length of time for which the person can be held is limited to eight months.
- 41 The applicants criticise that provision for establishing periods for which a person can be held that are excessively long and therefore disproportionate and for failing to establish clear criteria in order to determine objectively the period necessary to carry out the measure and what amounts to diligent treatment by the authority responsible for effecting the measure.
- 42 For EU citizens and members of their families, the contested provision reproduces the regime that Article 74/5(3) of the Law of 15 December 1980 lays down for third-country nationals. It accordingly provides that EU citizens and members of their families will be treated in exactly the same way as all other foreign nationals, while awaiting removal to any country in the world, in particular in relation to the maximum period of detention for the purposes of removal.
- 43 Although Article 5(1)(f) of the ECHR does not preclude a foreign national from being held in a particular place for the purposes of his or her forced removal from the territory if that person has not complied with an order to leave the territory, detention is justified in the light of that provision only on the condition that the removal procedure is carried out with due diligence (ECtHR, 4 April 2017, *Thimothawes v. Belgium*, CE:ECHR:2017:0404JUD003906111, § 60). The question also arises as to whether Article 44*septies*(1), second to fourth subparagraphs, of the Law of 15 December 1980, inserted by Article 31 of the contested Law of 24 February 2017, is compatible with the freedom of movement guaranteed to EU citizens and members of their families by Articles 20 and 21 TFEU and the provisions of Directive 2004/38 from which it can be inferred that the length of time for which they can be held is limited to the time strictly necessary to carry out the removal measure. Although Article 44*septies* of the Law of 15 December 1980, inserted by the contested provision, expressly states that persons cannot be held for more than the time strictly necessary to carry out the measure, it provides that that period can be extended to up to eight months in order to arrange and carry out the transfer of an EU citizen or a member of his or her family to the country of which that person has the nationality or in which that person has a right of residence as the member of the family of a national of that country. Furthermore, it does not clarify the procedures that the authority has to

undertake for the purposes of removing the foreign national to a different EU country.

- 44 Before ruling on the substance in relation to the second to fourth subparagraphs of Article 44*septies*(1) of the Law of 15 December 1980, inserted by Article 31 of the contested Law, it is therefore necessary to refer the second question in the operative part to the Court of Justice for a preliminary ruling.

VI. Questions referred

1. Must EU law, in particular Articles 20 and 21 of the Treaty on the Functioning of the European Union and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC be interpreted as precluding national legislation according to which the provisions that apply to EU citizens and members of their families are similar to those which, in respect of third-country nationals, transpose Article 7(3) 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, that is to say, provisions according to which EU citizens and members of their families can be obliged to comply with preventive measures designed to prevent any risk of absconding during the period given to those persons in which to leave the territory following adoption of a decision to terminate residence on grounds of public policy or during an extension of that period?
2. Must EU law, in particular Articles 20 and 21 of the Treaty on the Functioning of the European Union and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC be interpreted as precluding national legislation according to which a provision that applies to EU citizens and members of their families who have not complied with a decision terminating residence on grounds of public policy is identical to that applied to third-country nationals in the same situation in relation to the maximum period of detention for the purposes of removal, that is to say, eight months?