

Case C-36/20 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:

25 January 2020

Referring court:

Juzgado de Instrucción n.º 3 de San Bartolomé de Tirajana (Spain)

Date of the decision to refer:

20 January 2020

Applicant:

Ministerio Fiscal

Defendant:

VL

Subject matter of the main proceedings

Removal of a third-country national.

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

To determine whether examining magistrates' courts may be regarded as an authority before which applicants for international protection may indicate their intention to apply for such protection. If so, to determine certain legal consequences that flow from their status as such.

The legal basis is Article 267 TFEU.

Questions referred for a preliminary ruling

1) The second subparagraph of Article 6(1) of Directive 2013/32/EU provides for the situation where applications for international protection are made before other authorities that are not competent to register them under national law, in

which event Member States are to ensure that the registration takes place no later than six working days after the application is made.

Is the foregoing to be interpreted as meaning that examining magistrates who are competent to adjudicate on the detention or otherwise of foreign nationals under Spanish national law are to be regarded as one of those ‘other authorities’, which are not competent to register an application for international protection but before which applicants may nonetheless indicate their intention to make such an application?

2) If an examining magistrate is deemed to be one of those authorities, is Article 6(1) of Directive 2013/32/EU to be interpreted as meaning that he or she must provide applicants with information on where and how to make an application for international protection, and, if such an application is made, transfer it to the body competent under national law to register and process it, as well as to the competent administrative body, so that the applicant can be granted the reception measures provided for in Article 17 of Directive 2013/33/EU?

3) Are Article 26 of Directive 2013/32/EU and Article 8 of Directive 2013/33/EU to be interpreted as meaning that a third-country national may not be held in detention unless the conditions laid down in Article 8(3) of Directive 2013/33/EU are met, on the ground that the applicant is protected by the principle of non-refoulement from the point at which he indicates his intention [to apply for international protection] before the examining magistrate?

Provisions of EU law relied on

- Articles 67 and 78 TFEU.
- Articles 18, 19 and 21 of the Charter of Fundamental Rights of the European Union.
- Articles 6, 9, 12 and 26 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.
- Articles 8, 9, 10 and 17 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

Provisions of national law relied on

- Articles 58(4), 61, 62 and 64(5) of the Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social (Basic Law 4/2000, of 11 January 2000, on the rights and freedoms of foreign

nationals in Spain and their social integration) (Boletín Oficial del Estado No 10 of 12 January 2000).

- Articles 2, 3 and 5 of the Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria (Law 12/2009 of 30 October 2009 regulating the right to asylum and subsidiary protection) (Boletín Oficial del Estado No 263 of 31 October 2009).

Brief presentation of the facts and the main proceedings

- 1 On 12 December 2019, a dinghy trying to enter Spain was intercepted and found to contain VL and 44 other males of sub-Saharan origin. The dinghy's occupants were put onto a sea rescue vessel that docked in Gran Canaria on the same day.
- 2 After receiving initial humanitarian and medical assistance from the Red Cross and the Canary Islands health service, they were taken to local police stations, where the procedure for placing them in detention and informing them of their rights was commenced on 13 December 2019. On the same day, the Office of the Spanish Government's Provincial Representation in Las Palmas issued an order for their return on the ground that they had attempted to enter Spain illegally and made an application for them to be placed in an immigration removal centre ('IRC').
- 3 On 14 December 2019, VL was brought before the referring court, the Juzgado de Instrucción n.º 3 de San Bartolomé de Tirajana (Examining Magistrates' Court No 3, San Bartolomé de Tirajana) for the purposes of obtaining an order for his detention in the IRC. The referring court commenced the preliminary procedures and made an order for a statement to be taken from VL, who was informed of his rights and afforded the assistance of a lawyer and a Bambara interpreter. His rights were explained to him and he made it clear that it was his intention to apply for international protection because of well-founded fears of being persecuted on grounds of race or membership of a social group on account of the war in his country of origin, Mali, and that he was afraid of returning there because he might be killed. His statement was passed to the Public Prosecutor's Office, which did not object to his being detained in an IRC.
- 4 In addition, the application for international protection was forwarded to the Comisión Española de Ayuda al Refugiado (Spanish Commission for Refugee Assistance), which stated that it did not have any initial reception space available but that there might be humanitarian assistance space at the Red Cross until such time as space for applicants for international protection was secured. The Red Cross reported that it had 16 humanitarian assistance places available but that these had to be processed via the police or the Office of the Spanish Government's Regional Representation. Consequently, the referring court sent the respective documents to those bodies so that the provision of accommodation on humanitarian grounds could be processed.

- 5 In addition, an interlocutory order was made requiring the police, on the ground that VL and 25 other persons in respect of whom detention in an IRC had been requested had expressed their intention to apply for international protection and that application had been made to an authority not competent to register it under national law, to issue the appropriate document for indicating an intention to apply for international protection. That interlocutory order was made for the purposes of compliance with Article 6(1) of Directive 2013/33, according to which Member States are to ensure that registration takes place no later than six working days after the application is made. Since the applicants for international protection had no means of subsistence, that interlocutory order also called upon the Ministry of Labour, Migration and Social Security, along with other public authorities, to grant them humanitarian reception accommodation.
- 6 The Ministry of Labour, Migration and Social Security stated that there were 12 humanitarian reception places available that had to be allocated to those applicants in accordance with criteria based on vulnerability. It was decided that the remaining 14 applicants, including VL, would be placed in an IRC on the ground that there were no other humanitarian reception facilities available even for applicants for international protection. An order was thus made for VL to be placed in detention in an IRC, although it was noted that he could not be detained on a removal basis, and for the application for international protection to be processed in the IRC. Before he was taken to the IRC, a police officer went to the referring court to inform it of the existence of international protection application interviews for those who had made such applications, pursuant to the document referred to in paragraph 4 above.
- 7 On 18 December 2019, the Public Prosecutor's Office lodged an appeal against the aforementioned order. The Public Prosecutor's Office takes the view that that order is not consistent with the purpose for which it is intended, namely to secure the foreign national's return, and that the referring court exceeded its jurisdiction inasmuch as it lacks competence to take receipt of a statement of intent to apply for international protection. VL's counsel also appealed against that order, on the ground that VL could not be held in detention in an IRC, in accordance with Directives 2013/32 and 2013/33.
- 8 Being uncertain as to how to dispose of those appeals, the referring court decided to suspend the proceedings and submit the present request for a preliminary ruling to the Court of Justice, with a request that this be dealt with under the urgent procedure.

Main arguments of the parties to the main proceedings

- 9 The Public Prosecutor's Office considers that an examining magistrate is not competent to take receipt of a statement of intent to apply for international protection, since the examining magistrate is not one of the bodies to which an intention to apply for asylum can be indicated under the Law on Asylum. The

Public Prosecutor's Office takes the view that, in considering whether or not to order the detention of a foreign national with a view to ensuring his return to his country of origin, the examining magistrate must take into account only whether that person's presence in Spain is unlawful. In its opinion, the fact that the application for international protection was made in the examining magistrates' court is not sufficient reason not to order detention in an IRC. It also considers that the examining magistrate exceeded his powers in questioning the third-country national on this subject when taking his statement and in seeking initial reception accommodation intended for applicants for international protection or, failing that, humanitarian reception accommodation.

- 10 VL considers that the examining magistrate is competent to take receipt of a statement of intent to apply for international protection. It takes the view that, since an order for detention in an IRC is made with a view to ensuring the return of the person concerned, and applicants for international protection cannot be returned to their country of origin, a statement of intent to apply for international protection must produce effects from the point at which it is made, and that, consequently, he cannot be the subject of an order to detain him in an IRC.

Brief presentation of the grounds for the request for a preliminary ruling

- 11 The second subparagraph of Article 6(1) of Directive 2013/32 provides that, if the application for international protection is made to other authorities which, despite being likely to receive such applications, are not competent to register them under national law, Member States are to ensure that the registration takes place no later than six working days after the application is made.
- 12 The referring court, the Juzgado de Instrucción n.º 3 de San Bartolomé de Tirajana (Examining Magistrates' Court No 3, San Bartolomé de Tirajana), considers that the examining magistrate is one of those 'other authorities', which, although not competent to register an application [for international protection] under national law, can, pursuant to Directive 2013/32, urge the body that is competent to register it within the maximum period of six working days laid down in that directive. It takes the view that, if the Court of Justice concurred with that position, the examining magistrate would be obliged to transfer the application to the body competent to register and process it, and to request a date for completion of those formalities. That person would thus have the status of an applicant for international protection and would be protected by the principle of non-refoulement from the point at which his application is transferred to the competent body and is registered
- 13 The referring court also notes that examining magistrates who are competent to order or decline to order the detention of foreign nationals must take into account for those purposes certain circumstances listed in Article 62 of the Basic Law 4/2000 of 11 January 2000 on the rights and freedoms of foreign nationals in Spain and their social reintegration, including the risk of non-appearance owing to

the foreign national's lack of a place of residence or identifying documentation and any actions on his part aimed at hindering or avoiding removal, the existence of any previous criminal convictions or administrative penalties and of any other criminal proceedings or punitive administrative proceedings, and any serious illness from which the foreign national may be suffering. The referring court takes the view that those circumstances are not exhaustively listed in the aforementioned provision.

- 14 The referring court notes that, in accordance with Article 26 of Directive 2013/32, applicants for international protection cannot be held in detention. That article refers to Directive 2013/33, Article 8 of which establishes the general principle that applicants for international protection are not to be held in detention, sets out the cases in which such applicants may be detained and provides for the possibility of adopting alternative measures. For its part, the second subparagraph of Article 10(1) of Directive 2013/[33] provides that detained applicants are to be kept separately from other third-country nationals who have not lodged an application for international protection.
- 15 Now, the referring court considers that those directives impose on any examining magistrate an obligation to provide information and to ask whether it is the third-country national's intention to apply for international protection, in order to ensure, if the conditions laid down in the aforementioned Article 8 are not met, that that person is not placed in detention, and, if a detention order is made, that applicants for international protection are kept separately from other third-country nationals who have not applied for international protection. Similarly, a statement of intent to that effect would make it necessary to grant the person concerned the reception measures provided for in the aforementioned directives.