

Case C-422/21

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:

9 July 2021

Referring court:

Consiglio di Stato (Council of State, Italy)

Date of the decision to refer:

30 December 2020

Appellant:

Ministero dell'Interno

Respondent:

TO

Subject matter of the main proceedings

Appeal against a judgment of the Tribunale Amministrativo Regionale per la Toscana (Regional Administrative Court for Tuscany, Italy) upholding an action brought by a third-country national against a decision to withdraw reception measures from him.

Subject matter and legal basis of the reference

Article 267 TFEU; compatibility with Directive 2013/33/EU of Italian legislation which provides for the withdrawal of reception measures if the applicant is deemed to have engaged in violent behaviour.

Question referred for a preliminary ruling

Does Article 20(4) and (5) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 preclude national legislation which provides for the withdrawal of reception measures from adult applicants who are not

categorised as ‘vulnerable persons’, if such an applicant is deemed to have engaged in particularly violent behaviour outside the accommodation centre involving the use of physical force against public officials and/or public servants, causing such injuries to the victims that they were required to seek emergency treatment?

Provisions of EU law and EU case-law relied on

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; in particular Article 20(4).

Judgment of the Court of Justice of 12 November 2019 (Case C-233/18).

Provisions of national law and national case-law relied on

Decreto legislativo 18 agosto 2015, n. 142 (Legislative Decree No 142 of 18 August 2015) – Implementation of Directive 2013/33/EU laying down standards for the reception of applicants for international protection, as well as 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. In particular:

Article 14 sets out the procedures for accessing the reception system and provides that applicants who have lodged the relevant application and who do not have sufficient means to have an adequate standard of living to enable their subsistence and that of their families shall have access, with their family members, to the reception measures provided for in the legislative decree;

Article 23, in the version in force at the material time, provided that the prefect of the province in which the initial reception centres are situated should order the withdrawal of reception measures, particularly in the event of serious or repeated breaches by the asylum seeker of the rules of the accommodation centre, or of seriously violent behaviour. In adopting the withdrawal measure, consideration was to be given to the applicant’s situation, particularly in the case of vulnerable persons. It was possible to appeal against the withdrawal measure before the competent regional administrative court.

Decreto legislativo 25 luglio 1998, n. 286 (Legislative Decree No 286 of 25 July 1998) – Consolidated text of immigration rules and provisions on the status of foreign nationals; Articles 4(3) and 26(7-*bis*).

According to national case-law, the withdrawal of reception measures by the prefect is based on a largely discretionary assessment of the facts. It requires an assessment *in concreto* of the case and the particular circumstances of the person

concerned, taking into account the proportionality of the measure in relation to the seriousness of the conduct identified.

The case-law is divided on two questions: (1) whether it is necessary for the withdrawal of reception measures to be preceded by notice of the initiation of the procedure (the referring court holds that such notice should precede the withdrawal); (2) whether only conduct inside the accommodation centre is subject to sanctions, or whether this extends to conduct outside the centre, as in the present case (the referring court prefers the latter interpretation).

Succinct presentation of the facts and the procedure in the main proceedings

- 1 TO, a third-country national and an applicant for international protection who is housed in a temporary accommodation centre in Italy, is the addressee of the reception measures reserved by Legislative Decree No 142/2015 for asylum seekers who do not have sufficient means to enable their subsistence.
- 2 On 28 June 2019, the municipal police reported the violent and threatening behaviour of TO to the Prefecture of Florence during an incident that occurred at a railway station. During the incident, TO had verbally and physically assaulted a railway employee and two municipal police officers, who had suffered injuries requiring emergency treatment. The officers in question filed a formal complaint against TO and a notice of offence was forwarded by the municipal police.
- 3 Following the report, the Prefecture of Florence initiated proceedings against TO for the withdrawal of the reception measures for a serious breach of the rules of the accommodation centre. Since TO failed to submit any relevant documents or observations within the allotted time, an order was issued withdrawing the reception measures granted to him.
- 4 TO contested the order before the Regional Administrative Court for Tuscany, arguing that it was vitiated by an infringement of the law and misuse of powers. The Regional Administrative Court notably referred to the judgment of the Court of Justice of 12 November 2019 in Case C-233/18. It held that that judgment demonstrated that the national court was required to disapply Article 23(1)(e) of Legislative Decree No 142/2015 since it was incompatible with EU law, providing as it did that the withdrawal of the reception measure was the only sanction applicable to the facts in question. Consequently, it upheld the appeal and annulled the contested measure.
- 5 The Ministero dell'interno (Ministry of the Interior, Italy) appealed against the judgment.

Main arguments of the parties to the main proceedings

- 6 First, the Ministry of the Interior points out that the abovementioned judgment of the Court does not rule out the possibility of withdrawal of the reception conditions. Second, the situation in that case involved the withdrawal of reception measures from an unaccompanied minor who had started a fight inside the accommodation centre where he was temporarily housed. In the present case, however, TO was not only an adult at the time of the incident, but was not on the list of vulnerable persons (including non-minors) provided in Article 21 of the directive, as reproduced in Article 17 of Legislative Decree No 142/2015. Furthermore, the case giving rise to the abovementioned judgment concerned a breach of a rule of the accommodation centre, while TO's case involves unlawful conduct contrary to Italian criminal law which, according to Italian case-law, could be categorised as the 'seriously violent behaviour' expressly referred to in Article 23(1)(e) of Legislative Decree No 142/2015, for which the sanction of the withdrawal of reception measures applies.
- 7 The Ministry adds that the sanction of withdrawal also appears to comply with the principle of proportionality (referred to in the abovementioned judgment of the Court as a rule of thumb for imposing sanctions), given TO's particularly violent and aggressive behaviour. It was not possible to impose alternative sanctions, such as transferring TO a different accommodation centre, since this only applied to minor infringements. In the present case, therefore, the withdrawal was not just a proportionate sanction, but a necessary one.
- 8 TO contends that sanctions for breaches committed by individuals granted protection must be proportionate both with regard to such breaches and with regard to human dignity. However, the domestic legislation implementing the European directive only imposes the sanction of the withdrawal of reception measures, without the possibility of adjusting the sanction depending on the seriousness of the conduct.

Succinct presentation of the reasons for the reference

- 9 In the present case, it is both a question of the compatibility of national legislation with EU law and the legitimacy of that domestic provision under the Italian Constitution (for violation of the presumption of innocence). The problem thus arises of '*doppia pregiudizialità*'; that is to say, those disputes that can give rise to questions of constitutional legality and, at the same time, questions of compatibility with EU law. The referring court considers that the problem can be resolved by prioritising the reference for a preliminary ruling before the Court of Justice, on the basis of the case-law of the Corte costituzionale (Constitutional Court, Italy), which recently ruled that, in cases of '*doppia pregiudizialità*', it is for the referring court to decide whether to raise the constitutional question or the question of EU law first.

- 10 As to the possible argument that the Court, by the abovementioned judgment of 12 November 2019 in Case C-233/18, has already ruled on a substantially identical question, the referring court considers there to be a difference between the case previously examined by the Court, which involved an unaccompanied minor, and the present case. Moreover, according to legal academic writing, even if the Court has already ruled on the same question, the national court still has the right to refer the matter back to the Court if it believes it can present new arguments or if it is not convinced of the grounds of the judgment and seeks a review, or else relies on a departure from case-law.
- 11 The referring court has doubts as to the compatibility with EU law of the interpretation and application of said judgment by the court of first instance, which led it to disapply the domestic provision. The referring court takes the view that the judgment at first instance is incompatible with EU law.
- 12 In the first place, it notes that the approach taken by the court of first instance is potentially in conflict with the wording of EU law, and in particular Article 20(4) of Directive 2013/33/EU, based on which Member States may provide for 'sanctions' applicable to serious breaches of the rules of the accommodation centres as well as to 'seriously violent behaviour'. The referring court considers the use of the term 'sanctions' to be very significant, suggesting that the legislature intended to adjust the sanctions in view of the severity of the infringement and thus to apply the harshest sanctions to the most serious behaviour. From this perspective, recourse to the sanction of withdrawal for the most serious breaches is understandable.
- 13 Second, it fears an abuse of the principles which can be inferred from the judgment at first instance, if the withdrawal of the reception measures is not even allowed in the case of particularly serious conduct. Imposing sanctions for behaviour that, as in the present case, involves the use of physical violence, where those sanctions have less drastic effects against the applicant for international protection, seems inconsistent with the principle of effectiveness of the legal system. Such measures could prove ineffective from the point of view of prevention, since they would lose their general deterrent effect and could give the offender a feeling of impunity. In addition, by analogy with the rules applicable in Italy for other criminal offences that the legal system considers particularly serious (such as offences involving drugs, sexual freedom or illegal immigration, or aimed at the exploitation of prostitution or minors employed in criminal activities), for which, if convicted of those offences, even with a non-final sentence, a foreign national would be prevented from entering Italy, it seems unreasonable to suggest that equally or similarly reprehensible (or even more serious) conduct should be exempt from the toughest sanctions where the perpetrators are applicants for international protection.
- 14 As regards the dignity of the applicant for international protection – an aspect that the Court's judgment focuses on – it seems that it can be adequately guaranteed with respect for the fundamental rules of administrative procedure, including: (a)

the principle of a thorough investigation, which requires that the consequences for the beneficiary in the event of withdrawal of the reception measures be carefully examined, with the possible identification of private facilities willing to accommodate him; (b) the obligation to state reasons for the administrative measures, which requires consideration of the observations submitted by the foreign national during the procedure; compliance with these rules should avoid the risk that the withdrawal of the reception measures deprives the person concerned of the possibility of satisfying his most basic needs, such as food, hygiene and accommodation, placing him in a degrading situation incompatible with respect for a decent standard of living.

- 15 Lastly, the Court must also be asked whether it is possible to extend the application of the ‘sanctions’ provided for in the directive to behaviour that, as in the present case, was committed outside the accommodation centre, a possibility which is at odds with Italian law, given the unclear wording of the legislation. The referring court prefers the interpretation in which behaviour punishable by ‘sanctions’ within the meaning of Article 20(4) of the directive includes conduct outside the accommodation centre, if it is ‘seriously violent’, on both literal and teleological grounds. (A) From a literal point of view, the directive seems to imply that the Member States may provide for sanctions to be applied ‘to serious breaches of the rules of the accommodation centres as well as to seriously violent behaviour’: here, in fact, seriously violent behaviour seems to be a separate and independent offence from breaches of the rules of accommodation centres, and can thus be identified even where the conduct takes place outside those centres. However, the domestic provision is more ambiguous, because here the text lends itself to an interpretation that makes such behaviour punishable only if committed inside the accommodation centre. (B) From a teleological perspective, there is no doubt that the ‘seriously violent behaviour’, even if committed outside the accommodation centre, can have a negative impact on the smooth running of the centre.
- 16 The questions raised are pertinent to the decision first because, if the domestic provision is to be disapplied on the ground that it is incompatible with EU law, the judgment at first instance annulling the measures must be upheld and the appeal dismissed. However, if the opposite view were taken, the appeal would have to be upheld, since the court of first instance would have erred in disapplying Article 23(1)(e) of Legislative Decree No 142/2015. Similarly, if the seriously violent behaviour punishable under the directive only takes place inside the accommodation centre, the appeal cannot be upheld.