Case C-241/21

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:

14 April 2021

Referring court:

Riigikohus (Estonia)

Date of the decision to refer:

30 March 2021

Appellant:

I.L.

Respondent:

Politsei- ja Piirivalveamet

Subject matter of the main proceedings

Appeal brought by I.L., by which he requests that the order of the Tallinna Ringkonnakohus (Court of Appeal, Tallinn, Estonia) of 2 December 2020 be annulled and that a new order be made declaring that both the application of the Politsei- ja Piirivalveamet (Police and Border Guard Board; 'the PPA') to have him placed in a detention facility and his placement in a detention facility were unlawful.

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

This request for a preliminary ruling seeks an interpretation of the first sentence of Article 15(1) 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 (OJ 2008 L 348, p. 98).

Question referred for a preliminary ruling

Is the first sentence of Article 15(1) 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 to be interpreted as meaning that Member States may keep in detention a third-country national in respect of whom there is a real risk that, while at liberty and prior to removal, he or she will commit a criminal offence, the investigation and punishment of which may substantially impede the execution of the removal process?

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, recitals 2 and 16, point 7 of Article 3, and Article 15

Provisions of national law applied

Väljasõidukohustuse ja sissesõidukeelu seadus (Law on forced departure and the prohibition on entry; 'the VSS'), Paragraph 6^8 and Paragraph 15

Succinct presentation of the facts and procedure in the main proceedings

1 I.L., a national of the Republic of Moldova, who was staying in the Republic of Estonia on the basis of a visa exemption, was apprehended on 12 October 2020 on suspicion of inflicting physical pain on his cohabiting partner and another injured party, both female, and causing harm to their health. By judgment of 13 October 2020, the Harju Maakohus (Court of First Instance, Harju, Estonia) sentenced I.L. for physical abuse in accordance with points 2 and 3 of Paragraph 121(2) of the Karistusseadustik (Criminal Code; 'the KarS') in simplified urgent proceedings. According to the indictment underlying the judgment, the public prosecutor's office also accused the person concerned of having threatened the victim by telling her that if he were removed from Estonia he would return to the country and kill her. However, he was acquitted of that charge under Paragraph 120(1) of the KarS (Threatening behaviour). The final sentence imposed by the judgment of the Court of First Instance was imprisonment for one year, one month and 28 days with a probationary period of two years, with the result that the court released the person concerned from custody in the courthouse.

2 By notification of 13 October 2020, the PPA prematurely terminated the visa-exempt stay of the person concerned pursuant to the Välismaalaste seadus (Law on aliens; 'the VMS'). The notification stated that the last day of his authorised stay was 13 October 2020 and that a foreign national was obliged to leave the

territory of the Member States of the Schengen area immediately if his or her stay is prematurely terminated. The obligation to leave the territory could be enforced immediately in accordance with the provisions of the VSS. The PPA re-arrested the person concerned on the same day on the premises of the Court of First Instance, Harju in accordance with point 1 of Paragraph 15(2) of the VSS. It was noted in the record of the arrest that his attitude towards the offence committed and his behaviour after the sentencing had been taken into account in the arrest. On the basis of that attitude and behaviour, there were grounds to believe that the person concerned may abscond prior to his removal, despite his undertaking to depart voluntarily and his request for voluntary departure to be ordered. Accordingly, on the same day, the PPA issued an order obliging the person concerned to leave Estonia pursuant to the VSS, as he was staying there without a legal basis. According to the order, I.L. was required to leave the territory immediately, but no later than by 13 October 2020. The order was enforceable from the same day and, after the expiry of the said period, the foreign national was to be removed from the Republic of Estonia to Moldova in accordance with the VSS if he had not complied with the obligation to leave the territory. At the same time, the PPA also imposed an entry ban on the person concerned for three years from the date on which the obligation to leave the territory was fulfilled.

3 On 14 October 2020, the PPA applied to the Tallinna Halduskohus (Tallinn Administrative Court, Estonia) for authorisation to detain the person concerned pursuant to points 1 to 3 of Paragraph 15(2) of the VSS and to place him in a detention facility for two months. It gave, inter alia, the following reasons in support of its application. The person concerned could abscond prior to his removal. He had used violence in a close relationship and there was a strong public interest in preventing such offences. The main objective of the order to leave the territory to be enforced was to prevent future criminal offences. Although the person concerned had stated that he wanted to solve the problems with his cohabiting partner before leaving the territory, the PPA was not convinced that his violent behaviour would not be repeated in a stressful situation. The PPA was permitted to take into account the fact that the person concerned had threatened to become violent against his partner in the event of his removal. His previous criminal offence illustrated the danger that he posed, which is why he must be placed in a detention facility until his removal. Since he had not built up trust through his previous behaviour, it was not possible for less restrictive supervision measures to be applied.

4 At the hearing before the Administrative Court, Tallinn, the PPA specified that I.L. had fulfilled his duty to cooperate and was in possession of the documents required to return to the Republic of Moldova. Therefore, the PPA applied to have him placed in a detention facility on the sole basis of point 1 of Paragraph 15(2) of the VSS. By order of 15 October 2020, the Administrative Court granted authorisation for I.L. to be placed in a detention facility until his removal, but not beyond 15 December 2020.

5 The Administrative Court, Tallinn agreed that there was a risk that the person concerned would avoid the removal process and not leave Estonia voluntarily (points 1 and 4 of Paragraph 6^8 of the VSS). Even though he had stated at the court hearing that, upon his release, he would only go to his flat to collect his belongings, and would avoid meeting his former partner and then leave Estonia voluntarily, the Administrative Court found that, taking into account his previous behaviour, there were grounds to believe that it was likely that his departure from Estonia would not take place in the manner described. It could not be guaranteed that he would not come into contact with his former cohabiting partner when collecting his belongings. If he were to come into contact with her, there was a high probability that the situation would escalate and he might re-offend. If he were to do so, voluntary departure would obviously be ruled out. This is because, if criminal proceedings were instituted, the person concerned had the right to be present at his trial, and, moreover, remand in custody pending trial could also be ordered in criminal proceedings. There was therefore reason to doubt the credibility of the intentions that he described at the hearing. The State had an interest in preventing potential new offences. There was currently a high risk that the person concerned would re-offend.

6 Furthermore, the Administrative Court, Tallinn took into account that the person concerned had to be tested for COVID-19 in order to return to the Republic of Moldova, causing an additional time delay, which was why it had not been possible to carry out the removal within the 48 hours provided for in the VSS. The court took the view that less restrictive supervision measures might not have ensured the completion of the removal process, and, moreover, there was also a lack of trust in the person concerned, such as was required for the application of other supervision measures. Finally, the court found that his placement in a detention facility was not contrary to health and safety considerations and that such detention was proportionate.

7 I.L. brought an appeal against the order of the Administrative Court, Tallinn before the Court of Appeal, Tallinn, requesting that the order of the Administrative Court be set aside and his release be ordered. The Court of Appeal, Tallinn dismissed that appeal by order of 2 December 2020 and upheld the order of the Administrative Court. In its reasoning, it referred to the fact that the person concerned presented a risk of absconding within the meaning of point 1 of Paragraph 6^8 of the VSS, that is to say, that the foreign national had still not left the territory of Estonia after the expiry of the time limit for voluntary departure set in the return decision. Since the person concerned had attached conditions to his departure, it was likely that he would not leave the territory if those conditions were not fulfilled. He could look for new ways to stay in the country and refuse to leave. The shorter the period of time given to him to leave the territory, the higher the likelihood of that. In view of the nature and seriousness of the offence committed by the person concerned, it could also not be considered likely that he would succeed in fulfilling the conditions that he had set and would then leave Estonia voluntarily within the time limit set for him. The Court of Appeal, Tallinn also stated that the grounds for detention provided for in points 1 to 3 of

Paragraph 15(2) of the VSS did not confer entitlement to detain a person to prevent a possible new offence. According to the provisions of the VSS, the purpose of detaining a person was to ensure that the person left the territory of Estonia. The Court of Appeal also stated that point 4 of Paragraph 6^8 of the VSS was applicable only if the judicial decision handing down the conviction had become final. However, on the date on which the Administrative Court, Tallinn authorised the placement of I.L. in a detention facility, that judicial decision had not yet become final. It became final soon afterwards, on 21 October 2020. Lastly, the Court of Appeal, Tallinn found that the application of less restrictive supervision measures was not warranted.

8 I.L. was removed from the Republic of Estonia to Moldova on 23 November 2020.

Essential arguments of the parties in the main proceedings

9 I.L. had already lodged an appeal against the order of the Court of Appeal, Tallinn prior to his removal, requesting that that order be set aside and that a new order be made declaring that the application of the PPA and his placement in a detention facility were unlawful. He submits that he had learned from his actions and would not commit any more offences in the future. He had cooperated fully in the proceedings. There was therefore no reason to fear that he would commit a new offence when collecting his belongings. His wish to pack up his belongings and take them with him before leaving the territory was understandable and could not be regarded as an unacceptable condition. There was no risk of absconding, and less restrictive supervision measures should have been applied. I.L. takes the view that, since he had now already been removed from Estonia, it was appropriate to move from an application for annulment to an application for a declaratory finding. If the Riigikohus (Supreme Court, Estonia; ‘the referring court’) were to find that the application of the PPA and the placement in a detention facility were unlawful, this would provide him with a basis on which to assert a claim for damages against the PPA (he had not been able to work or receive pay, and has been unlawfully deprived of his liberty).

10 The PPA requested that the appeal be dismissed. It explains that it prematurely terminated I.L.’s visa-exempt stay following the hearing of the criminal case before the Court of First Instance, in which I.L. was convicted, and that I.L. was arrested immediately after the hearing before the court of first instance. He was told that he had to leave the territory of Estonia and was asked whether he agreed to do so voluntarily. The person concerned did agree, but set conditions: he would not leave the territory until he had resolved the conflict with the victim. The PPA could not allow him to return to the victim. The victim feared for her life because of the threats made by I.L. When issuing the return decision, the PPA had assessed the evidence and weighed up the factual circumstances, and had also taken into account the objections of the person concerned, his attitude towards the offence committed and his behaviour after the conviction. The person concerned

could abscond prior to his removal and posed a threat to public order. He had used violence in a close relationship. The prevention of violence against a partner was a priority of the Republic of Estonia, and there was a very strong public interest in respect of such incidents. While punishment in criminal proceedings was a reaction to an act that had already been committed, it also served the purpose of separating a potentially dangerous person from law-abiding society, such that the primary objective of the return decision to be enforced was the State's desire to prevent possible new offences. The PPA had not applied the ground provided for in point 1 of Paragraph 6^{8} of the VSS when assessing the risk of absconding in relation to the person concerned. An enforceable return decision had been issued in respect of the person concerned on the basis of points 1 and 4 of Paragraph 7^{2}(2) of the VSS. The PPA had deemed it necessary to place him in a detention facility in order to carry out the removal. It had not been possible to apply other supervision measures to him, as there was not a sufficient probability that they would successfully lead to the desired outcome. The person concerned did not have a legal basis on which to reside and work in the Republic of Estonia, and, moreover, the financial means available to him were not sufficient to cover accommodation costs. He could have avoided the removal process and this would have made it much more difficult to remove him from Estonia. Taking into account the circumstances of the offence committed by I.L. and considering his emotional state, the PPA took the view that he would not leave the territory of Estonia voluntarily and that he intended to resolve the conflict that had arisen in a close relationship. The injured party had informed the law enforcement authorities that I.L. was calling and writing to her and threatening to find a way to come to Estonia to take revenge on her.

Summary of the grounds for the request for a preliminary ruling

11 The dispute in the case concerns only the permissibility of the placement of the person concerned in a detention facility. The question of whether the premature termination of his stay, the return decision issued in respect of him and the entry ban were lawful is not the subject matter of this case.

12 The Administrative Court, Tallinn authorised the placement of the person concerned in a detention facility by order of 15 October 2020. He has now been released and removed from Estonia. The person concerned takes the view that it is appropriate to move from an application for annulment to an application for a declaratory finding. Authorisation is granted by order which is subject to appeal (Halduskohtumenetluse seadustik [Law on the administrative courts]; 'the HKMS', Paragraph 265(5)). The fact that circumstances have changed during the appeal proceedings (the person concerned has been removed from Estonia, for example) does not preclude the court of higher instance from reviewing the lawfulness of the order granting the authorisation and, if necessary, annulling it, that is to say, revoking it with retroactive effect. At the same time, this removes the presumption of the permissibility of the restriction of the fundamental rights of

the person concerned. The possibility to set aside the order granting authorisation is not precluded by Paragraph 158(2) of the HKMS either in the present case.

13 In accordance with Paragraph 23(1^1) of the VSS, the administrative court is to grant authorisation to arrest a person who is to be removed and to place him or her in a detention facility for up to two months if one of the grounds provided for in Paragraph 15(2) of the VSS exists and the principles set out in subparagraph 1 of that paragraph are complied with. Paragraph 15(2) of the VSS provides that a foreign national may be detained if the application of the supervision measures provided for in the VSS does not ensure effective compliance with the obligation to leave the territory and, in particular, if 1) there is a risk of absconding, 2) the foreign national fails to comply with the obligation to cooperate, or 3) the foreign national is not in possession of the documents required for return or there is a delay in obtaining them from the receiving country or country of transit. Paragraph 15 of the VSS transposes Article 15 of Directive 2008/115/EC into Estonian law.

14 The Administrative Court granted authorisation for the person concerned to be placed in a detention facility pursuant to point 1 of Paragraph 15(2) of the VSS, that is to say, because of a risk of absconding. In accordance with Article 3(7) of the directive, the term ‘risk of absconding’ is to be understood as being based on objective criteria defined by law (see also judgment of 15 March 2017, *Al Chodor and Others*, C-528/15, EU:C:2017:213). In Estonian law, these are exhaustively provided for in Paragraph 6^8 of the VSS. The circumstances set out in that provision must be present in order to establish a risk of absconding, but other circumstances characterising the foreign national and the case must also be taken into consideration in order for that risk to be established definitively.

15 The adjudicating Chamber of the referring court takes the view that there are no circumstances in the case which indicate that the person concerned poses a risk of absconding. The Administrative Court found that there was a risk of absconding for two reasons: 1) the foreign national had not left the territory of Estonia within the time limit for voluntary departure set in the return decision (point 1 of Paragraph 6^8 of the VSS); and 2) the foreign national had committed a criminal offence for which he had been sentenced to a custodial sentence (point 4 of Paragraph 6^8 of the VSS).

16 Point 1 of Paragraph 6^8 of the VSS is not applicable in this case, because its application presupposes that the person concerned has been set a time limit for voluntary departure by way of a written return decision. However, the PPA confirmed to the referring court that the appellant was not set a time limit for voluntary departure when the return decision was issued and that an immediately enforceable return decision was issued in respect of him in accordance with points 1 and 4 of Paragraph 7^2(2) of the VSS. This is also confirmed by the steps taken by the PPA on 13 October 2020 – it was factually impossible for the person concerned to depart voluntarily. In the light of the foregoing, he also cannot be accused of failing to comply with the time limit for voluntary departure, and it

cannot be concluded from that alleged failure that he poses a risk of absconding pursuant to point 1 of Paragraph 6^8 of the VSS.

17 Point 4 of Paragraph 6^8 of the VSS is not applicable in the present case either. The provision requires that the person concerned has been sentenced to a custodial sentence for a criminal offence by final judgment (presumption of innocence under Paragraph 22(2) of the Eesti Vabariigi põhiseadus [Basic Law of the Republic of Estonia]). The decision convicting the appellant became final after the Administrative Court had granted authorisation.

18 The adjudication Chamber takes the view that there are also no other circumstances which indicate that the person concerned posed a risk of absconding within the meaning of Paragraph 6^8 of the VSS; in particular, point 6 of Paragraph 6^8 of the VSS, according to which 'the foreign national has informed the Police and Border Guard Board … or the administrative authority concludes from his or her attitude and behaviour that he or she does not wish to comply with the obligation to leave the territory', is not applicable. From the representations recorded in the minutes of the hearing of the person concerned in the proceedings for the issuance of a return decision, in which he stated that he did not want to separate from his partner and asked for the opportunity to make amends, it cannot be inferred that he intended to abscond prior to removal. A person must be given the opportunity to express his or her point of view on the content of the onerous administrative act under consideration in the procedure for the adoption of an administrative act, without this entailing adverse consequences. It cannot automatically be concluded from the statements made at the hearing that the person concerned intends not to comply with the administrative act, if there are no further circumstances indicating a risk that he will abscond prior to removal. Nor is a risk of absconding apparent from the desire expressed by him at the hearing before the Administrative Court to recover the belongings that he had left with his cohabiting partner and to receive the remuneration to be paid by his employer. A person's desire to recover property belonging to him or her before leaving the territory is in principle legitimate, because it would be difficult, if not impossible, to retrieve it after having left the territory. The PPA has not presented any circumstances which, together with the statements made by the person concerned, would lead to the conclusion that there is a risk that he would go into hiding or abscond prior to his removal and that there was therefore a risk of absconding within the meaning of Paragraph 6^8 of the VSS.

19 The adjudicating Chamber takes the view that there also does not appear to be any circumstances in the present case that would indicate that the grounds for detention provided for in points 2 and 3 of Paragraph 15(2) of the VSS exist.

20 The lawfulness of the detention of the person concerned therefore depends on the question of how Paragraph 15(2) of the VSS is to be interpreted, namely whether the grounds provided for in points 1 to 3 constitute an exhaustive list, at least one of which must exist, or whether it is a non-exhaustive illustrative list, and a person can also be detained on the basis of a general provision. The general provision

contemplated by the adjudicating Chamber is that concerning the threat posed to effective removal, as referred to in the introductory sentence of Paragraph 15(2) of the VSS. The latter interpretation is supported by the wording of the provision, namely the words 'in particular, if' preceding points 1 to 3. In fact, the final assessment of a detention as being lawful also presupposes, in any event, compliance with the principles laid down in Paragraph 15(1) of the VSS (detention as a last resort, observance of the principle of proportionality).

21 On the basis of a preliminary assessment by the adjudicating Chamber, the circumstances in the present case confirm that the condition for detention laid down in the general provision is satisfied, and the detention of the person concerned on the basis of the general provision laid down in Paragraph 15(2) of the VSS would be permissible when read in conjunction with the principles referred to in Paragraph 15(1) of the VSS. In view of the temporal proximity between the events and the nature of the offence committed by the person concerned, there was sufficient reason to assume that the person concerned might make another attempt to resolve the conflict that had arisen with his cohabiting partner and, in doing so, commit a new offence. Therefore, there was a real risk that the person concerned, while at large, would commit a criminal offence before being removed, the investigation and punishment of which (delivery of a judgment and possible subsequent execution of the sentence) would affect his removal, or more precisely, postpone it indefinitely and thereby make it considerably more difficult to remove him from the territory. Effective removal was therefore at risk. Taking into account the circumstances characterising the appellant's person (age, state of health), behaviour and circumstances (connection to Estonia, lack of a place of permanent residence), it was not possible to ensure that successful removal could be carried out as effectively by means of other supervision measures (Paragraph 10(2) of the VSS). Having regard to, inter alia, the possible duration of the detention, the latter was in accordance with the principle of proportionality.

22 Paragraph 15 of the VSS transposed the provisions of Article 15 of Directive 2008/115/EC. Article 15(1) provides that, unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when: (a) there is a risk of absconding or (b) the third-country national concerned avoids or hampers the preparation of return or the removal process. It is also provided that any detention is to be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

23 Article 15(1) (read in conjunction with recital 16) of Directive 2008/115/EC does not provide a clear answer to the question of whether detention is also permissible on the sole basis of the general provision, that is to say, where there is a threat to effective removal, or whether one of the grounds listed in that provision must be present in every case (point (a) or (b)). The European Commission has taken the

view that the listing is not exhaustive (see 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, point 14.1]). As far as the adjudicating Chamber is aware, the Court of Justice of the European Union has yet to provide a clear answer to this question (cf., for example, judgments of 6 December 2011, *Achughbabian*, C-329/11, EU:C:2011:807, paragraph 36; 5 June [2014], *Mahdi*, C-146/14 PPU, EU:C:2014:1320, paragraphs 61 and 74; 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraphs 269 to 272).

24 Article 15 is unconditional and sufficiently precise, and therefore produces direct legal effect (see, for example, judgments of 28 April 2011, *El Dridi*, C-61/11 PPU, EU:C:2011:268, paragraph 47; of 5 June 2014, *Mahdi*, C-146/14 PPU, EU:C:2014:1320, paragraph 54; and the judgment in *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, cited above, C-924/19 PPU and C-925/19 PPU, paragraph 288). The adjudicating Chamber takes the view that it cannot be ruled out that the facts under consideration could in principle correspond, for example, to the ground referred to in Article 15(1)(b). However, the wording of points 2 and 3 of Paragraph 15(2) of the VSS, which transposes Article 15 of the directive, differs from that of the directive to a certain extent; moreover, as stated above, the adjudicating Chamber takes the view that neither of those two provisions of Estonian law is applicable in this case. Notwithstanding the direct effect of a directive, a person's rights cannot be directly restricted on the basis of a directive.

25 According to settled case-law of the Court of Justice of the European Union, when interpreting a provision of EU law, both the wording and the general scheme and the purpose of the rules of which it forms part must be taken into account (for example, judgment of 2 July 2020, *Stadt Frankfurt am Main*, C-18/19, EU:C:2020:511, paragraph 33).

26 The wording of Article 15(1) – 'eelkõige kui' ('in particular when') (*insbesondere dann, wenn, en particulier lorsque*) – suggests the listing in that provision is non-exhaustive and serves only as an aid for interpreting the general provision, namely the risk posed to effective removal. This is also supported by a comparison with, for example, Article 8(3) 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 (OJ 2013 L 180, p. 96), in which the word 'üksnes' ('only') (*nur, ne ... que*) is used, which expressly indicates that the list of grounds for detention is exhaustive (see also, for example, judgment of 17 December 2020, *Commission* v *Hungary*, C-808/18, EU:C:2020:1029, paragraph 168). The grounds for detention provided for in Article 28(2) of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a

stateless person (OJ 2013 L 180, p. 31) are also exhaustive (see also the *Al Chodor and Others* judgment, C-528/15, cited above). On the other hand, the Court of Justice of the European Union has repeatedly emphasised that the provisions on detention in Directive 2008/115/EC must be interpreted strictly (see, for example, the judgment in *El Dridi*, cited above, C-61/11 PPU, paragraph 42; *Mahdi*, cited above, C-146/14 PPU, paragraph 55; the judgment of 7 June 2016, *Affum*, C-47/15, paragraph 62; the judgment in *Stadt Frankfurt am Main*, cited above, C-18/19, paragraph 42). This could militate against the interpretation that the listing is to be understood as being non-exhaustive.

27 One objective of Directive 2008/115/EC is to ensure the effective removal of illegally staying third-country nationals (second recital, Article 1). The Court of Justice of the European Union has also repeatedly emphasised that the directive obliges Member States to apply the standards and procedures laid down therein in order to ensure the effective return or removal of a third-country national staying illegally in a Member State (for example, judgment of 24 February 2021, *M and Others*, C-673/19, paragraph 31). On the other hand, the purpose of Directive 2008/115/EC is to protect the fundamental rights of the person concerned (second recital, Article 1). This is particularly significant in the case of detention in application of a coercive measure, because the person concerned is thereby deprived of his or her right to liberty (Article 6 of the Charter of Fundamental Rights of the European Union). In accordance with Article 5(1)(f) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, liberty may be deprived only in accordance with a procedure prescribed by law in the case of a lawful arrest or deprivation of liberty of a person against whom action is being taken with a view to deportation or extradition. Therefore, under the Convention, the detention of a person for the purpose of removal is permissible as such, but the case-law of the European Court of Human Rights has established certain qualitative requirements for the legal basis of detention. Accordingly, the Court of Justice of the European Union has also emphasised that the legal basis for detention must be clear, predictable, accessible and protect against arbitrariness (see the judgment in *Al Chodor*, cited above, C-528/15, paragraphs 40 to 44). According to a preliminary assessment by the adjudicating Chamber, the threat to effective removal, together with the obligation to apply less restrictive measures and to assess proportionality, constitutes a predictable legal basis for detaining a person that ensures sufficient protection of fundamental rights and protects against arbitrariness.

28 The Court of Justice of the European Union has stated that the possibility of detaining a person on grounds of public order and public safety cannot be based on Directive 2008/115/EC (judgment of 30 November 2009, *Kadzoev*, C-357/09 PPU, paragraph 70). It is also emphasised in the abovementioned Commission Recommendation of 16 November 2017 that detention cannot be used for the purpose of protecting public order. In other words, the sole purpose of detaining a foreign national on the basis of Paragraph 15 of the VSS and Article 15 of Directive 2008/115/EC can be to ensure effective removal. However, according to a preliminary assessment by the adjudicating Chamber, the detention

of a person to ensure effective removal is not precluded where there is a real risk that the person concerned, while at liberty and prior to removal, will commit a criminal offence, the investigation and punishment of which may substantially impede the execution of the removal process. The Court of Justice of the European Union has also held (albeit in the context of its examination of the imprisonment of third-country nationals for illegal entry or stay) that imprisonment is liable to thwart the application of that procedure and delay return, thereby undermining the effectiveness of Directive 2008/115/EC (see the judgment in *Affum*, cited above, C-47/15, paragraph 63, and judgment of 1 October 2015, *Skerdjan Celaj*, C-290/14, EU:C:2015:640, paragraph 26 and the case-law cited).

29 Since only the Court of Justice of the European Union is competent to give a binding interpretation of EU law, a preliminary ruling on the interpretation of Article 15(1) of Directive 2008/115/EC must be obtained in view of the various possible interpretations described above.