

Case C-150/24 [Aroja]ⁱ

Request for a preliminary ruling

Date lodged:

27 February 2024

Referring court:

Korkein oikeus (Finland)

Date of the decision to refer:

27 February 2024

Applicant:

A

Defendant:

Rikoskomisario B

KORKEINOIKEUS

(Supreme Court, Finland)

DECISION

Reference 1(11)

R2023/945

No

321

given on

27 February 2024

APPLICANT

A

DEFENDANT

Rikoskomisario B (Detective Inspector B)

SUBJECT MATTER

Complaint relating to detention of a foreign national

REQUEST FOR THE APPLICATION OF THE URGENT PROCEDURE

The Korkein oikeus (Supreme Court) requests that this reference for a preliminary ruling be dealt with under the urgent preliminary ruling

ⁱ The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

procedure, pursuant to Article 107 of the Rules of Procedure of the Court of Justice. This case raises questions of interpretation 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) ('Return Directive'), which comes under Title V of Part Three of the FEU Treaty. The applicant was kept in detention for the purpose of removal within the meaning of the Return Directive. There were four consecutive periods of detention (the first from 10 September 2022 to 23 November 2022, the second from 5 December 2022 to 15 March 2023, the third from 11 September 2023 to 18 January 2024 and the fourth, still ongoing, since 7 February 2024). The question raised before the Korkein oikeus (Supreme Court) concerns the lawfulness of the third period of detention, which has now ended. In order to assess after the event the lawfulness of the third period of detention, the Korkein oikeus (Supreme Court) could not order A's release. However, for the purposes of calculating the maximum duration of A's deprivation of liberty, the answers to the questions referred for a preliminary ruling will make it possible to determine, in particular, whether the abovementioned periods of detention must be added together. If that is the case, there will be no legal basis under the Return Directive to justify A's detention when the maximum duration is reached in the spring of 2024.

If the request for the urgent procedure for the reasons set out above cannot be granted, the Korkein oikeus (Supreme Court) requests, in the alternative, that the case be dealt with under the expedited procedure provided for in Article 105 of the Rules of Procedure of the Court of Justice, on the ground that, in any event and for the reasons set out above, the nature of the case requires that it be dealt with within a short time.

REQUEST FOR CONFIDENTIALITY

The käräjäoikeus (District Court, Finland) and the hovioikeus (Court of Appeal, Finland) ordered that the identity of A, the asylum seeker, should remain confidential until 15 September 2083, pursuant to Paragraph 6(1)(2) of the laki oikeudenkäynnin julkisuudesta yleisissä tuomioistuimissa (Law on the public nature of proceedings before ordinary courts). The Korkein oikeus (Supreme Court) therefore requests, with reference to Article 95 of the Rules of Procedure of the Court of Justice, that A's anonymity also be protected in the present proceedings before the Court of Justice.

THE DECISION OF THE KORKEIN OIKEUS (SUPREME COURT)

Subject matter of the dispute

- 1 The case concerns a third-country national kept in detention for the purposes of removal in a situation governed by the Return Directive. The first question is whether, when setting the maximum durations of detention referred to in

Article 15(5) and (6) of the Return Directive, account should always be taken of previous periods of detention and, if not, in what circumstances should those periods not be taken into account for the purposes of determining the maximum durations of detention. If the periods of detention were to be added together in such a way that the initial maximum duration of six months laid down in Article 15(5) of the Return Directive has already been reached, the question also arises as to whether the circumstances in which the maximum duration of six months was exceeded should have been examined by the court of its own motion before that maximum duration was reached, or at least without delay after that point. If the judicial review was not carried out until after the time when it should have taken place, the question also arises as to what legal consequences should flow from such a procedural defect and, in particular, whether it should result in the release of the person kept in detention for the purposes of removal, even if all the substantive conditions governing detention are fulfilled.

The relevant facts

The context of the case

- 2 A, a Moroccan national, arrived irregularly in Finland on 10 September 2022. At the time of his arrival, he was subject to an entry ban covering the Schengen Area which the Netherlands had imposed on him after he disappeared during the asylum procedure which he had initiated there. Before arriving in Finland, he had also applied for asylum in Sweden and Switzerland.
- 3 On 10 September 2022, A was detained in Finland on the grounds set out in Paragraph 121(1)(1) to (3) of the ulkomaalaislaki (301/2004) (Law 301/2004 on foreign nationals), which corresponds to Article 15(1) of the Return Directive. By decision of 25 October 2022, the maahanmuuttovirasto (National Immigration Office, Finland) returned A to Morocco. On 29 October 2022, A applied for asylum in Finland. On 24 November 2022, the Immigration Office rejected the asylum application as manifestly unfounded, returned A to Morocco, and imposed a ban on entry to the entire Schengen Area for a period of two years. By order of 5 January 2023, the Turun hallinto-oikeus (Turku Administrative Court, Finland) dismissed A's application for a prohibition on enforcement of the removal decision and, subsequently, by decision of 19 December 2023, dismissed A's appeal concerning asylum. It is apparent from the grounds of the decision on the substance of the case given by the hallinto-oikeus (Administrative Court) that some of the take back requests submitted by the Immigration Office to other Member States had not been successful and that the hallinto-oikeus had held that the Immigration Office was entitled to consider that it was the authority competent to examine A's asylum application pursuant to Article 17 of Regulation (EU) No 604/2013 (Dublin III Regulation).
- 4 A was detained pursuant to Paragraph 121 of the Law on foreign nationals, firstly from 10 September 2022 to 23 November 2022, second from 5 December 2022 to 15 March 2023 and, third, from 11 September 2023 to 18 January 2024. The

Korkein oikeus (Supreme Court) is to examine the lawfulness of the third period of detention. The third period of detention was interrupted on 18 January 2024, after A had absconded to Denmark. On 7 February 2024, the police detained A on the basis of a new decision after A had been returned from Denmark to Finland pursuant to the Dublin Regulation. This fourth period of detention is, according to the Korkein oikeus (Supreme Court), still ongoing. The periods of detention were based on the need to ensure preparation for removal from the country, or enforcement of the decision concerning that removal, under Paragraph 121(1)(1) and (3) of the Law on foreign nationals, and, initially, also on the need to establish identity under subparagraph 2 thereof. As regards the period between the date on which the asylum application was lodged, 29 October 2022, and the date on which the enforcement order was issued by the hallinto-oikeus (Administrative Court), 5 January 2023, it is apparent from the case file that the detention was also based on the need to ensure processing of the asylum application in accordance with Paragraph 121(1)(1) of the Law on foreign nationals.

- 5 As grounds for the detention, the police relied inter alia on A's disappearance in various Member States, including Finland, during the asylum procedure, his negative attitude towards his return to Morocco, the criminal offences which he committed during his stay in Finland, his false declaration concerning his date of birth and identity on his arrival in Finland, and his failure to comply with the obligation to report to the authorities in the summer of 2023 as an alternative measure to detention. Some of those grounds only became apparent after the end of the second period of detention and therefore constituted new grounds justifying the third period of detention, which began on 11 September 2023. The return decision was enforced in stages and in collaboration with the Moroccan authorities during and between the various periods of detention.
- 6 A's third period of detention, examined by the Korkein oikeus (Supreme Court), began with the police decision of 11 September 2023 adopted pursuant to Paragraph 121(1)(1) and (3) of the Law on foreign nationals. According to that police decision, taking into account previous periods of detention, A had already been detained for a total of five months and 23 days, and the conditions which govern exceeding the initial maximum period of six months had been fulfilled, given that enforcement of the removal had been delayed due to A's lack of cooperation in enforcement of the return and the fact that the documents required for the return had not yet been obtained from Morocco. The police brought an action before the Helsingin käräjäoikeus (Helsinki District Court) for a review of the conditions governing detention and also submitted to the District Court its decision of 11 September 2023. On 15 September 2023, at the hearing before the Helsingin käräjäoikeus (Helsinki District Court), the conditions which govern exceeding the maximum period of six months were not examined in the light of the evidence submitted, nor were they mentioned in the District Court's decision. According to the information set out in the police decision of 11 September 2023, A himself was notified of that decision.

- 7 Following the decision of the Helsingin käräjäoikeus (Helsinki District Court) of 15 September 2023, this detention case was re-examined on 7 December 2023 by the Etelä-Karjalan käräjäoikeus (South Karelia District Court, Finland), which held a hearing of its own motion when it appeared that the initial maximum six-month period of detention may have been exceeded.

Decision of the Etelä-Karjala käräjäoikeus (District Court, South Karelia) of 7 December 2023

- 8 In its decision, the käräjäoikeus (District Court) held, first, that the various periods of detention should be added together because, although some time had elapsed since the previous detention and certain changes had occurred in the case, it was still necessary to ensure that the same removal decision was enforced. Second, the käräjäoikeus (District Court) held that the conditions applicable to exceeding the six-month period, and also all the other substantive conditions governing extension of detention, had been fulfilled. Third, the käräjäoikeus (District Court) held that A should not be released solely on the ground that hearing had been held in the case of the court's own motion once the total duration of detention had exceeded six months. The käräjäoikeus (District Court) ordered that the applicant's detention be continued.

Decision of the Itä-Suomen hovioikeus (Court of Appeal, Eastern Finland) of 19 December 2023

- 9 On 7 December 2023, A lodged an appeal against the decision of the Etelä-Karjalan käräjäoikeus (District Court, South Karelia) with the Itä-Suomen hovioikeus (Court of Appeal, Eastern Finland), which dismissed that appeal. In its grounds, the hovioikeus (Court of Appeal) held, *inter alia*, that, under Paragraph 128 of the Law on foreign nationals, a review of a detention case was subject to the request of the detained person and that A had not requested such a review, despite the fact that the police had referred to the conditions applicable to exceeding the duration of six months in its decision of 11 September 2023. For those reasons, A should not be released solely on the ground that the käräjäoikeus (District Court) had not, before the expiry of the maximum duration of six months, ruled of its own motion on the abovementioned conditions.

The appeal before the Korkein oikeus (Supreme Court)

- 10 A appealed on a point of law against the decision of the hovioikeus (Court of Appeal) of 19 December 2023. A challenged the lawfulness of the detention solely on the ground that the question of whether the maximum duration of six months had been exceeded had not been dealt with in accordance with the procedure.
- 11 The defendant, the detective inspector, contended that the appeal should be dismissed. The detective inspector considers that, in view of the changes which have taken place in the case, the third period of detention, which began on 11 September 2023, is new, and therefore the original maximum period of six

months has not even been exceeded in this case, and that A should not have been released on the grounds on which he relies, the grounds for detention being satisfied in any event.

Legal context

European Union law

- 12 Article 6 of the Charter of Fundamental Rights of the European Union lays down the right to liberty and Article 52(3) provides that, in so far as the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights is to be the same as those laid down by the said Convention. It follows from Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms that, for a deprivation of liberty to be regarded as lawful, it must have been effected in accordance with due process of law. Paragraph 4 of that article lays down the right to demand a prompt review of the lawfulness of the deprivation of liberty and to be released if the measure is not lawful.
- 13 The resolution of the present case turns in particular on the interpretation of Article 15(3), (5) and (6) of the Return Directive.
- 14 Recital 16 of the Return Directive refers to the objective of limiting detention and the application of the principle of proportionality.
- 15 Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common ‘Return Handbook’ to be used by Member States’ competent authorities when carrying out return-related tasks states, *inter alia*, as follows:

‘14.5 Re-detention of returnees

The maximum period of detention prescribed by the Return Directive must not be undermined by re-detaining returnees immediately, following their release from detention.

Re-detention of the same person at a later stage may only be legitimate if an important change of relevant circumstance has taken place (for instance the issuing of necessary papers by a third country or an improvement of the situation in the country of origin, allowing for safe return), if this change gives rise to a “reasonable prospect of removal” in accordance with Article 15(4) of the Return Directive and if all other conditions governing the imposition of detention under Article 15 of that Directive are fulfilled.’

National law

- 16 The general conditions governing the adoption of precautionary measures concerning foreign nationals are laid down in Paragraph 117 bis (813/2015) of the Law on foreign nationals. Under point 2 of subparagraph 1 (49/2017) of that paragraph, a foreign national may be subject to a precautionary measure under Articles 118 to 122 and 122 bis if that is necessary and proportionate to prepare or ensure the enforcement of a removal decision concerning him or her or to otherwise verify his or her departure from the country. Subparagraph 3 of that paragraph provides, inter alia, that a precautionary measure must be lifted as soon as it is no longer necessary to guarantee the adoption of the decision or the enforcement thereof.
- 17 The specific conditions governing detention are set out in Paragraph 121(1)(1) to (4) of the Law on foreign nationals(813/2015) as follows:

'Paragraph 121

Conditions governing detention

If the precautionary measures referred to in Paragraphs 118 to 120 are not sufficient, the foreign national may be detained on the basis of an individual assessment if:

- (1) having regard to the foreign national's personal or other circumstances, there are reasonable grounds to believe that he or she is likely to go into hiding, abscond or otherwise significantly hinder the adoption of a decision concerning him or her or the enforcement of a removal decision;
- (2) detention is necessary in order to establish the identity of the foreign national;
- (3) the foreign national has committed or is suspected of having committed a criminal offence and the detention is necessary to ensure the preparation or enforcement of the removal decision;
- (4) during his or her detention, the foreign national has submitted a new application for international protection mainly with the aim of delaying or preventing enforcement of a removal decision.'

- 18 Paragraph 123 (813/2015) of the Law on foreign nationals defines the administrative authorities competent to decide on detention, and Paragraph 124(1) and (2) (49/2017) lays down the obligation on the authority to notify the district court of the detention without delay and the obligation on the district court to hear the detention case within four days of the detention. This is a judicial review of the initial phase of detention, which is therefore carried out by the court of its own motion. Under Paragraph 126(1) of the law, the district court is to order the immediate release of a foreign national who has been detained if the conditions governing detention are not fulfilled.

- 19 With regard to the subsequent phases of detention, Paragraph 127(1) (195/2011) and Article 128(1) and (2) (646/2016) of the law provide as follows:

‘Paragraph 127

Release of the detained person

The authority dealing with the case must order the release of the detained person as soon as the conditions governing detention are no longer fulfilled. The detained person must be released no later than six months after the detention decision was adopted. However, the period of detention may be longer, up to a maximum of 12 months, if the detained person does not cooperate in enforcing the return or if the necessary return documents have not been obtained from the third country and enforcement of the removal is delayed for those reasons.

...

Paragraph 128

Review of the case by the käräjäoikeus (District Court)

If the release of the detained foreign national has not been ordered, the district court in whose territorial jurisdiction the place of detention of the detained person is situated must, at the request of that person, review the case concerning the detention The case must be heard without delay and at the latest within four days of the request being made. However, it shall not be necessary to review a case concerning detention before the expiry of a period of two weeks starting from the decision of the district court ordering the extension of the detention of the person concerned at the place of detention concerned. For the purposes of calculating the time limits referred to in this subparagraph, Paragraph 5 of the laki säädettyjen määräaikain laskemisesta (Law on the calculation of time limits) shall not apply.

At the request of the detained person, the käräjäoikeus (District Court) must review the case even before the time limit referred to in subparagraph 1 if it is necessary to do so on account of a fact that has come to light after the previous examination. The authority dealing with the case must immediately inform the detained person and his or her representative of any significant change in the circumstances giving rise to a review, unless the detained person has been the subject of a release decision pursuant to Paragraph 127(1).

...

The need for a preliminary ruling

First question

- 20 The case concerns, first, the determination of the maximum periods of detention referred to in Article 15(5) and (6) of the Return Directive in a situation where a third-country national has been detained for the purposes of removal for several consecutive periods, between which he has been released. It is not clear from the provisions of the Return Directive, nor from the scheme or recitals thereof, whether those periods of detention must be added together without exception or whether, and if so on what grounds, previous periods of detention may be excluded from the calculation of the maximum duration of detention.
- 21 In the view of the Korkein oikeus (Supreme Court), the Court of Justice has not, at least not explicitly, adopted a specific position on the first question in its case-law. In its judgment of 30 November 2009, *Kadzoev* (C-357/09 PPU, ‘judgment in *Kadzoev*’, EU:C:2009:741), the Court of Justice pointed out, (i), that Article 15(5) and (6) of the Return Directive in no case authorises the maximum period defined in that provision to be exceeded (paragraphs 35 to 37 and 69) and, (ii), that it would be contrary to the objective pursued by Article 15(5) and (6) of Directive 2008/115, namely to ensure a maximum duration of detention common to the Member States, if the duration of detention could vary, sometimes considerably, from case to case within a Member State or from one Member State to another because of the particular features and circumstances peculiar to national judicial procedures (paragraph 54). The Korkein oikeus (Supreme Court) states that similar reasons support a uniform interpretation, within the scope of the Return Directive, of whether successive periods of detention between which a third-country national who is the subject of removal proceedings has been released should be aggregated or disregarded.
- 22 In the context of the first question, it should further be noted that the provision relating to the maximum duration of detention of six months laid down in Paragraph 127(1) of the Law on foreign nationals, which corresponds to Article 15(5) of the Return Directive, applies to any detention of a foreign national, regardless of whether the legal basis for the detention is founded on EU law or national law. The question whether A’s detention was motivated by reasons other than those provided for in the Return Directive is therefore of no consequence in the present case, even though EU law itself appears to authorise the exclusion of a period of detention which is not based on the Return Directive for the purposes of calculating the maximum duration provided for by the Return Directive (*Kadzoev*, cited above, paragraphs 45 to 48). There is therefore no need, in the main proceedings, to rule on the way in which it is necessary to deal with, for example, the period of detention between A’s filing of the asylum application on 29 October 2022 and the order of 5 January 2023 of the hallinto-oikeus (administrative court) ruling on the application for an order prohibiting enforcement (final phase of the first period of detention and initial phase of the second period of detention) in the light of the prohibition, resulting from an ongoing asylum procedure, on continuing to keep a person in detention on the basis of the Return Directive until a certain stage of the asylum procedure (in

particular, in the case of manifestly unfounded asylum applications; order of 5 July 2018, *C and Others*, C-269/18 PPU, EU:C:2018:544).

- 23 Consequently, the Korkein oikeus (Supreme Court) did not include in its reference for a preliminary ruling the question of how, in calculating the maximum period laid down by the Return Directive, account should be taken of any period during which, on the basis of the grounds stated for the decisions taken by the authorities, detention appears at times to have been based both on the Return Directive and, in parallel or momentarily, on a completely different ground. In any event, it is clear from the case file that A's detention was based, all or most of the time, at least principally, on the Return Directive.
- 24 In the view of the Korkein oikeus (Supreme Court), an interpretation of Article 15(5) and (6) of the Return Directive as meaning that, in a situation such as that in the present case, previous periods of detention should be taken into account when calculating the maximum duration is justified, *inter alia*, by the fact that, during those periods, A's detention was essentially founded on the same legal basis, namely that of securing his removal. That is so despite certain changes in the factual and legal grounds relied on in support of A's detention. A contrary interpretation is supported by the fact that, prior to the third period of detention, A had been released for almost six months, during which he had failed to comply with the less severe coercive measure imposed on him, namely the obligation to register, had left Finland for Sweden, and had been returned from there to Finland.

Second question

- 25 In the light of the case-law of the Court of Justice, it may be held that a Member State is under an obligation to ensure that the judicial review referred to in the second sentence of Article 15(3) of the Return Directive is carried out in any event where the maximum period of six months laid down in Article 15(5) is exceeded. That is the case irrespective, for example, of whether the authority which has referred a detention case to the court or the detained third-country national has made an express request to that effect. In the course of that review, the court must be able to rule of its own motion, and independently of the detained person's actions, on any matter of fact and of law relevant to determining whether an extension of the detention is justified [judgment of 5 June 2014, *Mahdi*, C-146/14 PPU, 'the judgment in *Mahdi*', EU:C:2014:1320, paragraphs 49, 56, 62 and 63; see also judgment of 8 November 2022, *Staatssecretaris van Justitie en Veiligheid (Examination of the detention of the court's own motion)*, C-704/20 and C-39/21, 'the judgment in *Staatssecretaris van Justitie en Veiligheid*', EU:C:2022:858, paragraph 86]. It is also apparent from the case-law that Article 15 of the Return Directive has not only interpretative but also direct effect (see, for example, judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 288). However, the Member States remain competent, in accordance with the principle of procedural autonomy, to lay down requirements for the review of detention which are not governed by EU

law (see judgment in *Mahdi*, paragraph 50). In addition, given the fundamental importance of the case for assessing the lawfulness of the measure depriving A of his liberty, the Korkein oikeus (Supreme Court) wishes to ascertain, for the sake of clarity, whether the second sentence of Article 15(3) of the Return Directive precludes an interpretation of national law which makes the initiation of judicial review of the fact that the maximum period of six months referred to in Article 15(5) has been exceeded subject to a request to that effect by the detained person.

- 26 The second part of the second question relates to the time limit requirements to which the judicial review referred to in the second sentence of Article 15(3) is subject. That provision does not specify whether the judicial review of a decision by an administrative authority to exceed the maximum duration of the detention of six months referred to in paragraph 5 of that article must take place *ex ante*, that is to say before that maximum duration is exceeded. Although the judicial review may also be carried out *ex post*, that is to say after the event, that provision does not specify the time limit by which it must be carried out. The Korkein oikeus (Supreme Court) considers that it is relatively obvious that the requirement arising from Article 15(2) of the Return Directive, that the judicial review referred to therein must be applied without delay, should at the very least be applied by analogy in the context of the second sentence of Article 15(3), so as not to render the judicial review meaningless. That is borne out by the fact that detention and the extension thereof are similar in nature as regards the detained person (see, in that regard, judgment in *Mahdi*, cited above, paragraph 44).
- 27 The time limit requirements laid down in the second sentence of Article 15(3) of the Return Directive, to which judicial review is subject, are of specific relevance, in particular for assessing the nature and seriousness of the infringement which may have been committed in the main proceedings and the legal effects thereof. If the judicial review must take place before the maximum duration of detention of six months is exceeded, it would appear that the deprivation of liberty has had no legal basis as from 18 September 2023, assuming that the previous periods of detention must be taken into account in calculating the maximum duration. If, on the other hand, it is possible to carry out the judicial review after the expiry of that maximum period, any irregularity in the deprivation of liberty may not have become apparent until later and may constitute a less serious breach. Consequently, the Korkein oikeus (Supreme Court) decided to include in its reference for a preliminary ruling also the question of the time limit requirement to which the judicial review is subject.

Third question

- 28 In the event that, on the basis of the answers given by the Court of Justice to the questions set out above, the Korkein oikeus (Supreme Court) must conclude, when ruling in the main proceedings, that the judicial review of the maximum duration of six months was improper and that the deprivation of liberty likely to arise therefrom was unlawful, the question remains as to what requirements and

conditions EU law imposes on the specific consequences of such a conclusion. In practice, the question is whether the käräjäoikeus (District Court) should have released A on 7 December 2023, even though the substantive conditions governing detention were found to have been fully fulfilled at that time and the case had therefore been dealt with correctly from a procedural point of view.

- 29 Article 15(2) and (4) of the Return Directive lays down the obligation to release a person whose detention is unlawful. However, that provision does not exclude, at least not explicitly, the possibility that a defect affecting the conditions governing the lawfulness of the detention may, following a judicial review, be remedied for the future, that is to say *ex nunc*, so that immediate release would not necessarily be justified.
- 30 The Court of Justice does not appear to have ruled on this matter in its case-law in such a way as to make it possible to deduce a sufficiently clear answer in the present context.
- 31 The judgment in *G. and R.* (judgment of 10 September 2013, ‘the judgment in *G. and R.*’, C-383/13 PPU, EU:C:2013:533) concerned the consequences of an infringement of the rights of the defence of a detained person, in particular the right to be heard. The Court of Justice held (paragraph 35) that, where neither the conditions under which observance of the third-country nationals’ right to be heard is to be ensured, nor the consequences of the infringement of that right, are laid down by European Union law, those conditions and consequences are governed by national law, provided that the rules adopted to that effect are the same as those to which individuals in comparable situations under national law are subject (principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights of defence conferred by the European Union legal order (principle of effectiveness). The judgment also mentions the relevance of whether, in the light of the factual and legal circumstances of the case, the outcome of the infringement of the rights of the defence could have been different (paragraph 40). In paragraph 41 of that judgment, the Court of Justice also points out that not to recognise that the national court has the power of assessment related to the latter aspect, and to require that every infringement of the right to be heard automatically brings about the annulment of the decision extending the detention and the lifting of that measure, even though such a procedural irregularity might actually have had no impact on that extension decision and the detention fulfils the substantive conditions laid down in Article 15 of the Return Directive, would be liable to undermine the effectiveness of that directive.
- 32 The considerations set out in that judgment suggest that the national court has discretion to assess the need for an immediate release where a subsequent judicial review, properly carried out at the time, finds a procedural error. The existence of such discretion in a situation such as that in the present case is also supported by the fact that the release of a detained person solely on the basis of a previous procedural defect, even though the substantive conditions governing detention are

fulfilled, would not in principle prevent the authorities from detaining him or her again shortly after his or her release. However, as regards judgment in *G. and R.*, the Korkein oikeus (Supreme Court) notes that it was delivered in a situation where the procedural defect was not based on an express provision of the Return Directive and that it is, therefore, unclear to what extent a similar interpretation of the court's discretion can be made in a situation where a possible procedural defect is based on the directly applicable provisions of Article 15 of the Return Directive. Furthermore, in the abovementioned judgment in *Staatssecretaris van Justitie en Veiligheid*, the Court of Justice held that, where it is apparent that the conditions governing the lawfulness of detention laid down in the Return Directive have not been or are no longer satisfied, the person concerned must be released immediately (paragraph 79), which would seem to suggest a very broad obligation to release. However, it is possible that, in this context, the expression 'conditions governing lawfulness' refers to the substantive conditions governing detention, also having regard to the nature of the provisions of the Return Directive referred to in paragraph 76 of that judgment.

- 33 The question is what requirements and framework conditions are imposed by EU law for assessing the consequences of procedural defects likely to affect the lawfulness of A's deprivation of liberty. In the light of the foregoing, the Korkein oikeus (Supreme Court) deems open to interpretation the question whether the käräjäoikeus (District Court) should have released A on 7 December 2023, even though the conditions governing detention were considered to have been fulfilled at that time.
- 34 Lastly, for the sake of clarity, the Korkein oikeus (Supreme Court) states that, even if, in the course of the proceedings, A's removal were to be effected or the deprivation of liberty to which he is subject were to cease for other reasons, the questions referred for a preliminary ruling in the present proceedings would still not lose their relevance. According to national case-law, a person who is the subject of a measure depriving him or her of his or her liberty is entitled to obtain an opinion on the lawfulness of that measure, even if that person obtains his or her release during the appeal proceedings. In the present case, in order to determine whether A's deprivation of liberty was lawful at all times, it is necessary, in principle, to obtain an answer to all the questions referred for a preliminary ruling. If the Korkein oikeus (Supreme Court) were to resolve those issues relating the interpretation of the Return Directive in the absence of a preliminary ruling from the Court of Justice, the requirement relating to a uniform interpretation of the Return Directive in the various Member States would not be fulfilled.

Questions referred for a preliminary ruling

- 35 After giving the parties the opportunity to submit their observations on the content of the request for a preliminary ruling, the Korkein oikeus (Supreme Court) decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling, pursuant Article 267 TFEU:

1. (a) Must Article 15(5) and (6) of the Return Directive 2008/115/EC be interpreted as meaning that all previous periods of detention must be taken into account when calculating the maximum durations of detention referred to therein? If such an obligation does not exist in all cases, what aspects are to be taken into consideration to determine whether the duration of the previous period of detention must be taken into account when calculating the maximum durations?

(b) In particular, how is the situation to be assessed in circumstances such as those in the case in the main proceedings, where, on the one hand, the principal legal basis for detention, namely to secure the removal of an illegally staying third-country national, has remained essentially the same, but where, on the other hand, partly new factual and legal grounds have been put forward in support of the re-detention, the person concerned went, between the periods of detention, to another Member State from where he was returned to Finland, and several months also elapsed between the end of the previous period of detention and the re-detention?

2. (a) Does the second sentence of Article 15(3) of Directive 2008/115/EC preclude national legislation which makes the initiation of a judicial review of the exceeding of the maximum duration of six months subject to a request by the person detained?

(b) Must the judicial review referred to in the second sentence of Article 15(3) of Directive 2008/115/EC, which concerns the decision of an administrative authority to exceed the initial maximum duration of detention of six months, be carried out before that maximum duration is reached and, if not, must it in any event be carried out without delay after the decision of that administrative authority?

3. Does the absence of a judicial review as referred to in the second sentence of Article 15(3) of Directive 2008/115/EC, where the maximum duration of detention of six months referred to in Article 15(5) is exceeded, entail an obligation to release the detained person, even if, at the time that belated judicial review is carried out, it is found that all the substantive conditions governing detention have been fulfilled and the case is then being dealt with properly from a procedural point of view? If there is no obligation relating to automatic release in such a situation, what aspects are to be taken into consideration from the point of view of EU law in order to determine the consequences of a judicial review carried out late, in particular in circumstances such as those in the main proceedings?

Once it has received a preliminary ruling, the Korkein oikeus (Supreme Court) will rule on the case.

KORKEIN OIKEUS (Supreme Court)