Case C-72/22 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 of receipt:

4 February 2022

Referring court:

Lietuvos vyriausiasis administracinis teismas (Lithuania)

Date of the order for reference:

2 February 2022

Appellant:

M. A.

Other party to the appeal proceedings:

Valstybės sienos apsaugos tarnyba (State Border Guard Service)

Subject matter of the action in the main proceedings

The lawfulness of and justification for the detention of a third-country national seeking asylum applicant status who has entered and remains unlawfully in the territory of the Republic of Lithuania in the case where an emergency has been declared in the country due to a mass influx of foreigners.

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

Interpretation of Article 7(1) 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; interpretation of Article 4(1) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted; and interpretation of Article 8(2) and (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.

The third paragraph of Article 267 of the Treaty on the Functioning of the European Union.

Questions referred

1. Must Article 7(1) 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, read in conjunction with Article 4(1) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, be interpreted as precluding rules of national law, such as those applicable in the present case, which, in the event of a declaration of martial law, a state of emergency or also a declaration of an emergency due to a mass influx of foreigners, do not in principle allow a foreigner who has entered and remains unlawfully in the territory of a Member State to lodge an application for international protection?

2. If the answer to the first question is in the affirmative: must Article 8(2) and (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 be interpreted as precluding rules of national law under which, in the event of a declaration of martial law, a state of emergency or also a declaration of an emergency due to a mass influx of foreigners, an asylum applicant may be detained merely because he or she entered the territory of the Republic of Lithuania by crossing the State border of the Republic of Lithuania unlawfully?

Provisions of EU law cited

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (hereinafter 'Directive 2011/95'): Article 4(1).

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 (hereinafter 'Directive 2013/32'): Articles 6, 7(1) and 33.

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 (hereinafter 'Directive 2013/33'): Recital 15, Article 8(2) and (3).

Provisions of national law cited

Įstatymas dėl užsieniečių teisinės padėties (Law of the Republic of Lithuania on the Legal Status of Foreigners) (current version; hereinafter the 'Law on the LSoF'): paragraphs 18^4 and 20 of Article 2 ('Definitions'); point 1 of Article 10 ('Unlawful entry into the Republic of Lithuania'); points 6 and 8 of Article 23 ('Unlawful stay in the Republic of Lithuania'); paragraph 1^1 of Article 67 ('Lodging of an application for asylum') (valid from 12 August 2021 to 1 January 2022); paragraph 1 of Article 77 ('Circumstances precluding the examination of an application for asylum'); paragraphs 1 and 4 of Article 113 ('Grounds for detention of a foreigner'); paragraphs 1 and 2 of Article 140^{12} ('Lodging of an application for asylum'), Article 140^{17} ('Grounds for detention of an asylum applicant'), and paragraphs 1 and 2 of Article 140^{19} ('Alternatives to detention') of Chapter X^2 ('Application of this Law in the event of a declaration of martial law, a state of emergency or also a declaration of an emergency due to a mass influx of foreigners').

Lietuvos Respublikos vidaus reikalų ministro 2016 m. vasario 24 d. įsakymu Nr. 1V-131 patvirtintas Prieglobsčio Lietuvos Respublikoje suteikimo ir panaikinimo tvarkos aprašas (Schedule of the Procedure for Granting and Revoking Asylum in the Republic of Lithuania, approved by Order No 1V-131 of 24 February 2016 of the Minister for the Interior of the Republic of Lithuania) (current version; hereinafter 'the Schedule'): Paragraphs 22, 23 and 24.

Lietuvos Respublikos Vyriausybės 2021 m. liepos 2 d. nutarimas Nr. 517 „Dėl valstybės lygio ekstremaliosios situacijos paskelbimo ir valstybės lygio ekstremaliosios situacijos operacijų vadovo paskyrimo“ (Resolution No 517 of the Government of the Republic of Lithuania of 2 July 2021 'On the declaration of an emergency at national level and the appointment of the Head of National Emergency Operations'): Paragraph 1.

Lietuvos Respublikos Seimo 2021 m. liepos 13 d. rezoliucija Nr. XIV-505 „Dėl hibridinės agresijos atrėmimo“ (Resolution No XIV-505 of the Parliament of the Republic of Lithuania of 13 July 2021 'On Countering Hybrid Aggression'): Paragraph 5.

Brief description of the facts and procedure in the main proceedings

1 On 17 November 2021, the appellant M. A., who had travelled from the Republic of Lithuania by minibus along with other third-country nationals, was detained in the territory of the Republic of Poland by border guards of that country as he was unable to present the necessary travel documents, visas or permits to stay or reside

in the Republic of Lithuania and in the European Union. On 19 November 2021, the appellant was handed over to officers of the State Border Guard Service attached to the Ministry of the Interior of the Republic of Lithuania (hereinafter 'the SBGS') and was detained by them for 48 hours. The SBGS applied to the Alytus Division of the Alytaus apylinkės teismas (Alytus District Court) (hereinafter the 'court of first instance') for detention of the appellant until a determination had been made as to his legal status but for no longer than 6 months. The SBGS indicated to the court of first instance that the information systems of the Republic of Lithuania did not contain data on the appellant's legal status in the Republic of Lithuania or on his crossings of the State border, that he had arrived in the Republic of Lithuania and was unlawfully there at a time when a national emergency had been declared due to a mass influx of foreigners, and that he might abscond in order to avoid detention and possible deportation. The appellant stated before the court of first instance that the final destination of his journey was another country in the European Union, namely Germany.

2 By decision of the court of first instance 20 November 2021, the appellant was placed in detention for 3 months pending a decision on his legal status in the Republic of Lithuania, but for no longer than until 18 February 2022. As the appellant had applied for international protection at the hearing, the court of first instance considered him to be an applicant for asylum. Taking into account the fact that the appellant had entered the Republic of Lithuania unlawfully, the court of first instance acknowledged that there was a ground for detention of an asylum applicant established in Article 113(4)(2) of the Law on the LSoF: according to that provision, an asylum applicant may be detained in order to identify the grounds underlying his or her application for asylum (when information on those grounds could not be obtained without detaining the asylum applicant) and where, having regard to certain circumstances referred to the Law on the LSoF, there are grounds for believing that the foreigner may abscond in order to avoid being returned to a foreign State or expelled from the Republic of Lithuania.

3 The appellant lodged an appeal against this decision of the court of first instance with the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania), requesting the application of a measure alternative to detention, namely the obligation to report regularly at a fixed time to the SBGS. At the hearing before the appellate court, the appellant repeated his application for asylum.

4 On 24 January 2022, the appellant made an application to the SBGS for asylum, which was forwarded to the Migration Department attached to the Ministry of the Interior of the Republic of Lithuania (hereinafter 'the MD'). On 27 January 2022, the MD returned the appellant's application for asylum, stating that it had not been submitted in accordance with the requirements of the legislation of the Republic of Lithuania and that, in addition, it had not been submitted promptly. At the hearing before the appellate court, the representative of the SBGS and the appellant's representative requested that the referring court order the MD to examine the appellant's application for asylum.

Essential arguments of the parties to the main proceedings

5 According to the appellant, the court of first instance wrongly imposed on him the most severe measure, namely detention, which was disproportionate and restricted the appellant more than was necessary in order to achieve its objective of clarifying the grounds on which his application for asylum was based. The appellant states that he submitted a written application for international protection to an unidentified SBGS officer on 20 November 2021, but does not have any information on the progress of the examination of that application. At the hearing, he also repeated his application for asylum. In addition, the appellant states that he was not aware that he had entered the Republic of Lithuania from the Republic of Belarus because Belarussian officers had assured him that he would find himself in the Republic of Poland after crossing the State border.

6 The SBGS points out that the appellant, who entered a safe country (the Republic of Lithuania) from an unsafe country, did not apply to the competent authorities for a determination of his legal status, but continued his journey through European Union States, illegally crossing their internal borders. In view of the fact that the appellant does not have a place of residence in the Republic of Lithuania, and that he has no social, economic or other ties nor means of subsistence in this country, it is very likely that, if a measure alternative to detention is applied, the appellant would leave the place of residence before a decision is taken on his legal status in the Republic of Lithuania. According to the SBGS, there are no data on the appellant's registered application for asylum because such an application was not submitted in accordance with the legislation in force in the Republic of Lithuania.

Concise justification of the request for a preliminary ruling

7 The referring court points out, first of all, that, in order to determine whether the appellant has been properly detained and whether a measure alternative to detention may be applied to him, it is necessary to determine whether the appellant is to be regarded as having the legal status of an asylum applicant because the provisions of national law govern differently the detention of, and measures alternative to detention for, foreigners who have and those who do not have that status.

8 In analysing the provisions of national law in that regard, the national court states that, according to Article 140^{17} of the Law on the LSoF, which regulates the grounds for detention of an asylum applicant in the event of a declaration of martial law, a state of emergency or also a declaration of an emergency due to a mass influx of foreigners, an asylum applicant may be detained only in the cases referred to in Article 113(4) of the Law on the LSoF as well as when he or she entered the territory of the Republic of Lithuania by unlawfully crossing the State border of the Republic of Lithuania, whereas a foreigner who does not have the status of an asylum applicant is subject to separate grounds for detention (paragraphs 1 to 7 of Article 113(1) of the Law on the LSoF). The referring court

also points out that a measure alternative to detention, namely accommodation of the foreigner at the SBGS or at another facility adapted for that purpose without restricting his or her freedom of movement, could be applied only in the event that the foreigner has been acknowledged as having the status of an asylum applicant (Article 140^{19}(1) and (2) of the Law on the LSoF).

9 Pursuant to the provisions of national law, the term 'asylum applicant' refers to a foreigner who has, in accordance with the procedure laid down in the Law on the LSoF, lodged an application for asylum in respect of which a final decision has not yet been taken (Article 2(20) of the Law on the LSoF). The referring court emphasises that, although Article $2(18^{4})$ of the Law on the LSoF defines an application for asylum as a request made in any form by a foreigner with regard to the granting of asylum in the Republic of Lithuania, such a request may be submitted only in accordance with the procedure laid down in the Law on the LSoF.

10 Article 140^{12}(1) of the Law on the LSoF establishes the following procedure for lodging an application for asylum in the event of a declaration of martial law, a state of emergency or also a declaration of an emergency due to a mass influx of foreigners: a foreigner's application for asylum may be lodged: (1) at border crossing points or in transit zones – with the State Border Guard Service ; (2) in the territory of the Republic of Lithuania in the event of lawful entry into Republic of Lithuania – with the Migration Department; (3) in a foreign State – with diplomatic missions or consular posts of the Republic of Lithuania designated by the Minister for Foreign Affairs. A foreigner's application for asylum lodged in a manner contrary to the procedure referred to in paragraph 1 of that article will not be accepted, and an explanation is to be provided explaining the procedure for lodging an application for asylum (Article 140^{12}(2) of the Law on the LSoF). If an asylum application has been submitted to an authority that is not indicated in the relevant provision of the Law on the LSoF and/or without satisfying the requirements established in the specific provisions of the Law on the LSoF or the Schedule, it must be returned to the foreigner concerned, while he or she is informed about the procedure for lodging applications for asylum (paragraph 23 of the Schedule).

11 According to the Law on the LSoF, the entry of a foreigner into the Republic of Lithuania is to be regarded as unlawful if that person has entered in breach of provisions of the Schengen Borders Code (Article 10(1)) and the stay of a foreigner in the Republic of Lithuania is to be regarded as unlawful if that person stays in the Republic of Lithuania without a travel authorisation or a visa, in the case where he or she is required to be in possession of a travel authorisation or a visa, or has unlawfully entered the Republic of Lithuania (Article 23(6) and (8)). Referring to those provisions of national law, and having regard to the fact that the appellant in the main proceedings entered the Republic of Lithuania in possession of a passport but not in possession of documents proving his lawful entry and stay, the referring court has concluded that the appellant entered and remains in the Republic of Lithuania unlawfully and, therefore, cannot, pursuant to

Article 140[12](1) of the Law on the LSoF, lodge an asylum application. Although the SBGS has a discretion to accept an application for asylum lodged by a foreigner who has unlawfully crossed the State border of the Republic of Lithuania by taking into account that person's vulnerability or other specific circumstances (Article 140[12](2) of the Law on the LSoF), such a discretion, according to the assessment of the referring court, is unspecified and it is impossible to determine its limits and effectiveness.

12 The referring court has further analysed the provisions of EU law relating to the granting of the status of applicant for international protection. This court points out that, according to Article 7(1) of Directive 2013/32, Member States are required to ensure that a person has the right to make an application for international protection. According to Article 4(1) of Directive 2011/95, Member States may require the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection, and the Member States are under a duty to cooperate with the applicant for such protection when he or she lodges the application. According to this court, Article 6 of Directive 2013/32 confers on Member States a discretion to establish the procedure for lodging applications for international protection; however, the implementation of such a discretion cannot have the effect of restricting an effective opportunity to lodge an application as soon as possible.

13 The referring court states that the submission of an application for international protection to one of the authorities referred to in Article 6 of Directive 2013/33 is considered by the Court of Justice to be an essential stage in the procedure for granting international protection. A third-country national or stateless person is an applicant for international protection within the meaning of Article 2(c) of Directive 2013/32 as soon as he or she makes such an application. Such an application is, moreover, deemed to have been made as soon as the person concerned has declared, to one of the authorities referred to in Article 6(1) of Directive 2013/32, his or her wish to receive international protection, without the declaration of that wish being subject to any administrative formality whatsoever (judgment of 17 December 2020, *European Commission* v *Hungary*, C-808/18, EU:C:2020:1029, paragraphs 97, 99 and 100).

14 It is also stated in the case-law of the Court of Justice that, first, acquisition of the status of an applicant for international protection cannot be made dependent on either the formal submission of an application or its registration and, second, the fact that a third-party national has expressed his or her wish to apply for international protection to 'another authority' within the meaning of the second subparagraph of Article 6(1) of Directive 2013/32 is sufficient to confer on that person the status of applicant for international protection and, therefore, to start the period of six working days within which the Member State concerned must register such an application (judgment of 9 September 2021, *Bundesrepublik Deutschland* v *SE*, C-768/19, EU:C:2021:709, paragraph 49). The requirement that the Member State must cooperate with the applicant for international protection means, in practical terms, that if, for any reason whatsoever, the

elements provided by that applicant are not complete, up to date or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, at that stage of the procedure, so that all the elements needed to substantiate the application may be assembled (judgment of 22 November 2012, *M. M.*, C-277/11, EU:C:2012:744, paragraph 66).

15 The referring court emphasises that, as is clear from the case-law of the Court of Justice, any third-country national or stateless person has the right to make an application for international protection on the territory of a Member State, including at its borders or in its transit zones, even if he or she is staying unlawfully in that Member State; that right must be recognised, irrespective of the prospects of success of such a claim; when such an application is made, a third-country national or stateless person acquires the status of applicant for international protection within the meaning of Directive 2013/32; such an applicant cannot, in principle, be regarded as staying unlawfully on the territory of the Member State in which he or she submitted his or her application, so long as no decision has been given on that application at first instance (judgment of 16 November 2021, *European Commission* v *Hungary*, C-821/19, EU:C:2021:930, paragraphs 136 and 137).

16 The referring court also notes that Article 33(2) of Directive 2013/32 sets out an exhaustive list of the situations in which Member States may consider an application for international protection to be inadmissible (judgment of 14 May 2020, *FMS and Others*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 149); therefore, in the view of this court, it is not possible, according to that provision, to consider the application for international protection to be inadmissible on the ground that it was not submitted in compliance with the procedure prescribed by the legislation. According to the referring court, the refusal to accept an application for international protection lodged in breach of the procedure laid down in the legislation cannot be justified by the fact that a mass influx of foreigners might impair the effective performance of functions of the authorities dealing with migration. Although it is indeed for Member States to ensure, inter alia, that external borders are crossed legally, compliance with such an obligation cannot, however, justify an infringement of Article 6 of Directive 2013/32 (judgment of 17 December 2020, *European Commission* v *Hungary*, C-808/18, EU:C:2020:1029, paragraph 127).

17 Since the provisions of national law in question exclude an opportunity to lodge an application for asylum in principle due to the fact that the foreigner entered and remains in the Republic of Lithuania unlawfully, the referring court asks whether those national provisions are contrary to Article 7(1) of Directive 2013/32, read in conjunction with Article 4(1) of Directive 2011/95/EU.

18 If the answer to the first question referred is in the affirmative, the referring court also asks whether Article 8(2) and (3) of Directive 2013/33 should be interpreted as precluding provisions of national law, such as, for example, Article 140^{17}(2) of the Law on the LSoF, according to which, in the event of a declaration of martial

law, a state of emergency or also a declaration of an emergency due to a mass influx of foreigners, an asylum applicant may be detained merely on the basis that he or she entered the territory of the Republic of Lithuania by crossing the State border of the Republic of Lithuania unlawfully. The referring court states that, according to the requirements laid down in Directive 2013/33, applicants for international protection may be detained only under very clearly defined exceptional circumstances laid down in that directive and subject to the principle of necessity and proportionality with regard to both the manner and the purpose of such detention. The referring court has doubts as to whether the detention provided for in Article 140^{17}(2) of the Law on the LSoF meets such requirements and whether such detention could be considered justified, even taking into account the threat posed to the functioning of the migration system by the mass influx of foreigners.