

JUDGMENT OF THE COURT (Grand Chamber)

17 July 2014 (*)

(Area of freedom, security and justice — Directive 2008/115/EC — Common standards and procedures in Member States for returning illegally staying third-country nationals —

Article 16(1) — Detention for the purpose of removal — Detention in prison accommodation — Not possible to provide accommodation for third-country nationals in a specialised detention facility — No such facility in the Land where the third-country national is detained)

In Joined Cases C-473/13 and C-514/13,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof and the Landgericht München I (Germany), made by decisions of 11 July and 26 September 2013, received at the Court on 3 September and 8 October 2013 respectively, in the proceedings

Adala Bero

v

Regierungspräsidium Kassel (C-473/13),

and

Ettayebi Bouzalmate

v

Kreisverwaltung Kleve (C-514/13),

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta, T. von Danwitz, A. Borg Barthet and M. Safjan, Presidents of Chambers, A. Rosas, G. Arestis (Rapporteur), J. Malenovský, D. Šváby, C. Vajda and S. Rodin, Judges,

Advocate General: Y. Bot,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 8 April 2014,

after considering the observations submitted on behalf of:

- Ms Bero, by P. Fahlbusch, Rechtsanwalt,
- Mr Bouzalmate, by G. Meyer and H. Habbe, Rechtsanwälte,
- the German Government, by T. Henze, acting as Agent,
- the Netherlands Government, by M. de Ree, M. Bulterman and H. Stergiou, acting as Agents,
- the Swedish Government, by L. Swedenborg and A. Falk, acting as Agents,
- the Swiss Government, by D. Klingele, acting as Agent,

– the European Commission, by G. Wils and M. Condou-Durande, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 30 April 2014,
gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 16(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).

2 The requests have been made in proceedings brought by Ms Bero against the Regierungspräsidium Kassel (Kassel Regional Council) and by Mr Bouzalmate against the Kreisverwaltung Kleve (Kleve District Authority) concerning the legality of the decisions to detain them for the purpose of removal that were taken in their regard.

Legal context

EU law

3 Recitals 2, 6, 16 and 17 in the preamble to Directive 2008/115 state:

‘(2) The Brussels European Council of 4 and 5 November 2004 called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.

...

(6) Member States should ensure that the ending of illegal stay of third-country nationals is carried out through a fair and transparent procedure. According to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay. ...

...

(16) The use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient.

(17) Third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law. Without prejudice to the initial apprehension by law-enforcement authorities, regulated by national legislation, detention should, as a rule, take place in specialised detention facilities.’

4 Article 1 of Directive 2008/115, headed ‘Subject matter’, provides:

‘This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.’

5 In accordance with Article 4(3), the directive is to be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with the directive.

6 Article 15 of the directive, headed 'Detention', provides:

'1. 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.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

...

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

(a) a lack of cooperation by the third-country national concerned, or

(b) delays in obtaining the necessary documentation from third countries.'

7 Article 16 of the directive, headed 'Conditions of detention', states in paragraph 1:

'Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners.'

German law

8 Paragraph 62a(1) of the Law on the residence, gainful employment and integration of foreign nationals in federal territory (Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet) of 30 July 2004 (BGBl. 2004 I, p. 1950), as amended (BGBl. 2011 I, p. 2258), which transposes Article 16(1) of Directive 2008/115, provides:

'Detention for the purpose of removal shall take place, as a rule, in specialised detention facilities. Where a *Land* does not have a specialised detention facility, detention may take place in other prisons in that *Land*; in that case, persons detained pending their removal must be kept separated from prisoners serving a sentence. ...'

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-473/13

- 9 Ms Bero, who, according to the referring court, is probably a Syrian national, applied for asylum in Germany. Following the refusal of that application, the aliens office sought her removal from German territory before the Amtsgericht Frankfurt am Main (Local Court, Frankfurt am Main). On 6 January 2011 that court ordered that Ms Bero be kept in detention for the purpose of her removal until 17 February 2011. The appeal brought by Ms Bero against that decision was dismissed by the Landgericht Frankfurt am Main (Regional Court, Frankfurt am Main).
- 10 Given that, in Germany, the *Länder* have the task of carrying out detention measures for the purpose of removal, the *Land* of Hesse placed Ms Bero in the penal institution of Frankfurt, which is an ordinary prison. The referring court explains that, in contrast to the situation obtaining in other German *Länder*, there is no specialised detention facility, within the meaning of Directive 2008/115, in the *Land* of Hesse.
- 11 On 2 February 2011 Ms Bero was released following a petition to the Commission for Cases of Hardship of the *Land* of Hesse. By her appeal before the referring court, she seeks a declaration that the decision of the Amtsgericht Frankfurt am Main that she be detained and the dismissal of her subsequent appeal by the Landgericht Frankfurt am Main impaired her rights.
- 12 According to the Bundesgerichtshof (Federal Court of Justice), the outcome of the case before it depends on the interpretation of Article 16(1) of Directive 2008/115.
- 13 It was, therefore, in those circumstances that the Bundesgerichtshof decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:
- 'Does it follow from Article 16(1) of Directive [2008/115] that a Member State is also required, as a rule, to detain a person for the purpose of removal in a specialised detention facility if such facilities exist in only one part of the federal subdivisions of that Member State but not in others?'
- Case C-514/13*
- 14 Mr Bouzalmate, who is a Moroccan national, entered Germany illegally on 24 September 2010 and on 8 October 2010 he applied to be recognised as entitled to asylum.
- 15 By decision of 12 January 2012, which became definitive and enforceable on 25 January 2012, the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees) rejected that application and demanded that Mr Bouzalmate leave Germany territory within a week following notification of the decision, failing which he would be removed to his country of origin. On 2 March 2012, the municipality of Geldern (district of Kleve), to which Mr Bouzalmate had been assigned, determined that he had left the municipality with no new known address.
- 16 Mr Bouzalmate was arrested on 25 March 2013, and on 9 April 2013 the Amtsgericht München (Local Court, Munich) sentenced him to a suspended term of five months' imprisonment for unlawful residence. Following his release from detention pending trial, Mr Bouzalmate did not present himself to the aliens office of the Landratsamt Kleve (administrative authority of the district of Kleve) or to any other authority.
- 17 On 13 July 2013 Mr Bouzalmate was arrested again in Munich and, by decision of 26 July 2013, the Amtsgericht München ordered that he be detained, pending his removal, for a maximum of 10 weeks from 14 July 2013, that is to say, until 21 September 2013 at the latest.
- 18 Following an attempt to commit suicide, Mr Bouzalmate was placed in a psychiatric clinic on 12 September 2013. In the light of that situation, the aliens office of the Landratsamt Kleve cancelled the date set for Mr Bouzalmate's removal, namely 16 September 2013.
- 19 After Mr Bouzalmate's psychiatric treatment ended on 20 September 2013, the Amtsgericht München, on a further application from the Landratsamt Kleve, ordered by decision of the same day that Mr Bouzalmate continue to be detained, in a specific section of Munich prison

for persons in the same situation, until his removal might take place, but until 19 October 2013 at the latest.

- 20 Mr Bouzalmate appealed against that decision of the Amtsgericht München to the Landgericht München I (Regional Court Munich I).

- 21 Since the Landgericht München I was uncertain in relation to the issue of providing accommodation for persons covered by Directive 2008/115 in specialised detention facilities, as required by Article 16(1) of the directive, it decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Does it follow from Article 16(1) of Directive [2008/115] that a Member State is also required, as a rule, to detain a person for the purpose of removal in a specialised detention facility if such facilities exist only in a part of the federal structure of the State, but not in another part in which the detention is carried out in accordance with the provisions governing the federal structure of that Member State?’

- 22 At the request of the referring court, the designated chamber examined the need to deal with this case under the urgent preliminary ruling procedure provided for in Article 107 of the Rules of Procedure of the Court of Justice. The chamber decided, after hearing the Advocate General, not to accede to that request.

- 23 By decision of the President of the Court of 22 October 2013, Cases C-473/13 and C-514/13 were joined for the purposes of the written and oral procedure and the judgment.

Consideration of the questions referred

- 24 By their questions, the referring courts ask, in essence, whether Article 16(1) of Directive 2008/115 must be interpreted as requiring a Member State, as a rule, to detain illegally staying third-country nationals for the purpose of removal in a specialised detention facility of that State even if the Member State has a federal structure and the federated state competent to decide upon and carry out such detention under national law does not have such a detention facility.

- 25 It is to be observed at the outset that the first sentence of Article 16(1) of Directive 2008/115 lays down the principle that the detention of illegally staying third-country nationals for the purpose of removal is to take place in specialised detention facilities. The second sentence of that provision lays down a derogation from that principle, which, as such, must be interpreted strictly (see, to this effect, the judgment in *Kamberaj*, C-571/10, EU:C:2012:233, paragraph 86).

- 26 As the German Government has pointed out, the second sentence of Article 16(1) of Directive 2008/115 is not couched in identical terms in all the language versions. This provision states, in the German version, that, ‘[w]here a Member State does not have specialised detention facilities and prison accommodation must be used, the third-country nationals in detention shall be kept separated from ordinary prisoners’. In the other language versions, the provision refers not to the absence of specialised detention facilities, but to the fact that a Member State ‘cannot’ provide accommodation for those third-country nationals in such facilities.

- 27 According to the German Government, the latter language versions of the second sentence of Article 16(1) of Directive 2008/115 leave the national authorities wider discretion than the German version, so that the fact that it is not possible to provide accommodation for the third-country nationals concerned in specialised detention facilities could also be linked to the circumstance that in the federated state of a Member State, responsible under domestic law for implementing the detention measure, no specialised detention facilities exist.

- 28 It must be held that the obligation, laid down in the first sentence of Article 16(1) of Directive 2008/115, requiring detention to take place as a rule in specialised detention facilities is imposed upon the Member States as such, and not upon the Member States according to their respective administrative or constitutional structures.

- 29 The national authorities responsible for applying the national legislation transposing Article 16 of Directive 2008/115 must therefore be able to detain third-country nationals in specialised detention facilities.
- 30 Thus, if application of the national legislation transposing Directive 2008/115 is entrusted in a Member State to authorities falling under a federated state, the fact that in certain federated states the competent authorities have the possibility of such detention cannot amount to sufficient transposition of Directive 2008/115 by the Member State concerned if the competent authorities of other federated states of that Member State lack that possibility.
- 31 This interpretation of Article 16(1) of Directive 2008/115 nevertheless does not mean that a Member State which, like the Federal Republic of Germany, has a federal structure is obliged to set up specialised detention facilities in each federated state. However, it must be ensured, inter alia pursuant to agreements providing for administrative cooperation, that the competent authorities of a federated state that does not have such facilities can provide accommodation for third-country nationals pending removal in specialised detention facilities located in other federated states.
- 32 Accordingly, the answer to the questions referred for a preliminary ruling is that Article 16(1) of Directive 2008/115 must be interpreted as requiring a Member State, as a rule, to detain illegally staying third-country nationals for the purpose of removal in a specialised detention facility of that State even if the Member State has a federal structure and the federated state competent to decide upon and carry out such detention under national law does not have such a detention facility.

Costs

- 33 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 16(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 must be interpreted as requiring a Member State, as a rule, to detain illegally staying third-country nationals for the purpose of removal in a specialised detention facility of that State even if the Member State has a federal structure and the federated state competent to decide upon and carry out such detention under national law does not have such a detention facility.