

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 — Possibility of detaining a third-country national with ordinary prisoners where he has given his consent)

In Case C-474/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Germany), made by decision of 11 July 2013, received at the Court on 3 September 2013, in the proceedings

Thi Ly Pham

v

Stadt Schweinfurt, Amt für Meldewesen und Statistik,

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 Pham, by M. Sack, Rechtsanwalt,
- Stadt Schweinfurt, Amt für Meldewesen und Statistik, by J. von Lackum, acting as Agent,
- 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 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 This request for a preliminary ruling concerns 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 request has been made in proceedings between Ms Pham and Stadt Schweinfurt, Amt für Meldewesen und Statistik (Municipality of Schweinfurt, Registration and Statistical Office) concerning the legality of the decision to detain her for the purpose of removal that was taken in her regard.

Legal context

EU Law

3 Recital 17 in the preamble to Directive 2008/115 states:

'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 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.'

6 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

- 7 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) ('the AufenthG'), 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 specialised detention facilities, 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 dispute in the main proceedings and the question referred for a preliminary ruling

- 8 Ms Pham, who is a Vietnamese national, entered Germany without identity documents and a residence permit. On 29 March 2012 she was ordered to be detained until 28 June 2012 in order to secure her removal. By a written declaration of 30 March 2012, she consented to being accommodated in a prison together with ordinary prisoners, because she wanted contact with compatriots who were in that prison.
- 9 By order of 25 June 2012, the Amtsgericht Nürnberg (Local Court, Nuremberg) extended Ms Pham's detention for the purpose of removal until 10 July 2012. The appeal which she brought against that order was dismissed by order of the Landgericht Nürnberg (Regional Court, Nuremberg) of 5 July 2012. Following her actual deportation to Vietnam on 10 July 2012, Ms Pham seeks by her action before the Bundesgerichtshof (Federal Court of Justice) a declaration that her rights were impaired by those orders relating to the extension of her detention in the prison.
- 10 According to the Bundesgerichtshof, in view of the infringement of a particularly important fundamental right, appeals against a measure involving a deprivation of liberty are admissible even after the measure has been carried out, because the person concerned has a legitimate interest in the measure involving the deprivation of liberty being declared unlawful even after its implementation.
- 11 The Bundesgerichtshof states that, in principle, to detain a third-country national who is the subject of return procedures in a prison together with ordinary prisoners is contrary to Article 16(1) of Directive 2008/115 and to Paragraph 62a of the AufenthG, which transposes that provision into national law. However, that detention would be lawful if Article 16(1) of Directive 2008/115 were to be interpreted as meaning that the Member States have a degree of discretion in the application of that provision, enabling them to take account of the consent of the person concerned to being accommodated with ordinary prisoners.
- 12 The Bundesgerichtshof observes, on the one hand, that there is a potential risk of circumvention of the separation requirement if, inter alia, the authorities involved regularly make the third-country nationals covered by Directive 2008/115 sign declarations of consent drawn up in advance, or urge them to give their consent to being detained in prison accommodation together with ordinary prisoners. On the other hand, it states that the separation requirement is designed solely to improve the situation of the third-country nationals and that they should be able to forgo that if, after having been informed of their right to separate accommodation, they wish to be accommodated together with convicted prisoners, or expressly consent thereto, inter alia — as in this case — because of the opportunities for contact with compatriots or people of the same age. It adds that under German law, in cases of preventive detention, where provision is made for the persons concerned to be placed

separately, the case-law of the Bundesverfassungsgericht (Federal Constitutional Court) takes account of such a person's consent to be accommodated with other prisoners.

- 13 In those circumstances, the Bundesgerichtshof decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is it consistent with Article 16(1) of Directive [2008/115] to place a pre-deportation detainee in accommodation together with [ordinary] prisoners if he consents to such accommodation?'

Consideration of the question referred

- 14 By its question, the national court asks, in essence, whether the second sentence of Article 16(1) of Directive 2008/115 must be interpreted as permitting a Member State to detain a third-country national for the purpose of removal in prison accommodation together with ordinary prisoners if the third-country national consents thereto.
- 15 It should be noted first of all that it is clear from the documents sent to the Court by the national court that Ms Pham was detained in prison accommodation on the basis of Paragraph 62a(1) of the AufenthG.
- 16 However, it is apparent from paragraphs 28 to 31 of the judgment in *Bero and Bouzalmate* (C-473/13 and C-514/13, EU:C:2014:2095) that the ground that there are no specialised detention facilities in a *Land* of the Federal Republic of Germany cannot in itself justify the application of the second sentence of Article 16(1) of Directive 2008/115.
- 17 As to the interpretation of that provision in the context of the main proceedings, it is clear from its wording that it lays down an unconditional obligation requiring illegally staying third-country nationals to be kept separated from ordinary prisoners when a Member State cannot provide accommodation for those third-country nationals in specialised detention facilities.
- 18 The German Government, supported by the Netherlands Government, submits that, given that the objective of that separation requirement is to protect the interests and the welfare of the illegally staying third-country national, the latter is able to waive this, in particular in a situation such as that in the main proceedings, where the person concerned wished to remain in contact with her compatriots.
- 19 It must be stated that the obligation requiring illegally staying third-country nationals to be kept separated from ordinary prisoners is not coupled with any exception and constitutes a guarantee of observance of the rights which have been expressly accorded by the EU legislature to those third-country nationals in the context of the conditions relating to detention in prison accommodation for the purpose of removal.
- 20 Indeed, the Court has already held that Directive 2008/115 pursues 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 their dignity (judgments in *El Dridi*, C-61/11 PPU, EU:C:2011:268, paragraph 31, and *Arslan*, C-534/11, EU:C:2013:343, paragraph 42).
- 21 In that regard, the obligation requiring illegally staying third-country nationals to be kept separated from ordinary prisoners, laid down in the second sentence of Article 16(1) of that directive, is more than just a specific procedural rule for carrying out the detention of third-country nationals in prison accommodation and constitutes a substantive condition for that detention, without observance of which the latter would, in principle, not be consistent with the directive.
- 22 In this context, a Member State cannot take account of the wishes of the third-country national concerned.

- 23 It is therefore clear from the foregoing considerations that the answer to the question referred for a preliminary ruling is that the second sentence of Article 16(1) of Directive 2008/115 must be interpreted as not permitting a Member State to detain a third-country national for the purpose of removal in prison accommodation together with ordinary prisoners even if the third-country national consents thereto.

Costs

- 24 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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:

The second sentence 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 must be interpreted as not permitting a Member State to detain a third-country national for the purpose of removal in prison accommodation together with ordinary prisoners even if the third-country national consents thereto.