ECLI:EU:C:2022:753

Provisional text

JUDGMENT OF THE COURT (Second Chamber)

6 October 2022 (*)

(Reference for a preliminary ruling – Directive 2008/115/EC – Return of illegally staying third-country nationals – Article 15(1) – Detention – Grounds for detention – General criterion based on the risk that the effective enforcement of the removal would be compromised – Risk that the person concerned would commit a criminal offence – Consequences of the establishment of the offence and the imposition of a penalty – Complication of the removal process – Article 6 of the Charter of Fundamental Rights of the European Union – Restriction of the fundamental right to liberty – Requirement of a legal basis – Requirements of clarity, predictability and accessibility – Protection against arbitrariness)

In Case C-241/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Riigikohus (Supreme Court, Estonia), made by decision of 30 March 2021, received at the Court on 14 April 2021, in the proceedings

I. L.

v

Politsei- ja Piirivalveamet,

THE COURT (Second Chamber),

composed of A. Prechal (Rapporteur), President of the Chamber, J. Passer, F. Biltgen, N. Wahl and M.L. Arastey Sahún, Judges,

Advocate General: J. Richard de la Tour,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 17 March 2022,

after considering the observations submitted on behalf of:

– the Estonian Government, by N. Grünberg and M. Kriisa, acting as Agents,

– the Spanish Government, by A. Ballesteros Panizo and M.J. Ruiz Sánchez, acting as Agents,

– the European Commission, by C. Cattabriga, L. Grønfeldt and E. Randvere, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 June 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 15(1) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

2 The request has been made in proceedings between I. L., a Moldovan national residing in Estonia who was subject to an order to leave the country, and the Politsei- ja Piirivalveamet (Police and Border Guard Board, Estonia, 'the PPA'), concerning a decision by which the PPA ordered I. L.'s detention on the ground that there was a genuine risk that he would commit a criminal offence, the establishment and punishment of which would be likely to complicate the removal process considerably.

Legal context

European Union law

3 Recitals 16 and 17 of Directive 2008/115 state:

'(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 According to Article 3(7) of that directive 'risk of absconding' means 'the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond'.

5 Article 15(1) of that directive provides:

'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.'

Estonian law

6 Paragraph 6^8 of the Väljasõidukohustuse ja sissesõidukeelu seadus (Law on forced departure and the prohibition on entry) of 21 October 1998 (RT I 1998, 98, 1575), in the version applicable to the dispute in the main proceedings ('the VSS'), entitled 'Risk of Absconding Foreign National', reads as follows:

'The adoption of an order to leave the country or the detention of a foreign national gives rise to an assessment of the risk of him or her absconding. A foreign national presents a risk of absconding where:

(1) he or she did not leave Estonia or a Member State party to the Schengen Agreement after the expiry of the period for voluntary departure laid down in the order to leave the territory;

(2) he or she has provided false information or falsified documents when applying for legal residence in Estonia, applying for extension of legal residence, applying for Estonian citizenship, applying for international protection or applying for identity documents;

(3) there is a legitimate doubt as to his or her identity or nationality;

(4) he or she has repeatedly committed intentional offences or has committed a criminal offence for which he or she has been sentenced to a term of imprisonment;

(5) he or she has failed to comply with the surveillance measures taken against him or her in order to ensure compliance with the order to leave the territory;

(6) he or she has informed the [PPA] or the Kaitsepolitseiamet (Internal Security Agency, Estonia) of his or her intention not to comply with the order to leave the territory, or the administrative authority reaches that conclusion in view of the foreign national's attitude and behaviour;

(7) he or she entered Estonia during the period of validity of the entry ban against him or her;

(8) he or she is detained for illegally crossing the external border of Estonia and has not been granted permission or the right to stay in Estonia;

(9) he or she left the designated place of residence or another Member State of the Schengen Agreement without authorisation;

(10) the order to leave the territory issued to the foreign national becomes enforceable by virtue of a court decision.'

7 Paragraph 15 of the VSS, entitled 'Detention of foreign nationals and removal arrangements', provides:

‘(1) Foreign nationals may be detained under subparagraph 2 below if the supervision measures provided for in this Law cannot be effectively applied. Detention must be in accordance with the principle of proportionality and must take into account, in each case, the circumstances relevant to the foreign national.

(2) The foreign national may be placed in detention when the application of the surveillance measures provided for by this Law does not guarantee the effective execution of the order to leave the territory and, in particular, when:

(1) there is a risk of absconding, or

(2) the foreign national does not comply with his or her duty to cooperate; or

(3) the foreign national is not in possession of the documents necessary for the return journey or those documents are slow to arrive from the host or transit country.

…’

The dispute in the main proceedings and the question referred for a preliminary ruling

8 I. L. is a Moldovan national who was resident in Estonia on the basis of a visa exemption.

9 On 12 October 2020, I. L. was detained on suspicion of inflicting physical pain and causing harm to the health of his partner and another woman.

10 By judgment of 13 October 2020, the Harju Maakohus (District Court, Harju, Estonia) found I. L. guilty of the offence of bodily harm and sentenced him to one year, one month and 28 days imprisonment with a probationary period of two years. However, that court ordered his release.

11 On the same day, the PPA prematurely terminated I. L.’s stay in Estonian territory and ordered his detention at the Harju Maakohus (District Court, Harju). The PPA justified the latter decision by the presence of a ‘risk of absconding’ within the meaning of Paragraph 15(2)(1) of the VSS. The detention report states that the person concerned was detained in view of his attitude to the criminal offence committed and his post-conviction behaviour. According to the PPA, there were reasons to believe, in those circumstances, that the person concerned might seek to evade removal, despite his promise to leave the country voluntarily and his request for an order for voluntary departure.

12 The PPA also ordered I. L. to leave Estonian territory on the grounds that he was residing there illegally.

13 By an order of 15 October 2020, granting the application of the PPA, the Tallinna Halduskohus (Administrative Court, Tallinn, Estonia) authorised I. L.’s placement in a detention centre until the date of his removal, which could not be extended beyond 15 December 2020.

14 By an order of 2 December 2020, the Tallinna Ringkonnakohus (Court of Appeal, Tallin, Estonia) dismissed the action for annulment brought by I. L. against the order of the Tallinna Halduskohus (Administrative Court, Tallinn).

15 In the meantime, on 23 November 2020, I. L. was removed to Moldova.

16 I. L. appealed to the Riigikohus (Supreme Court, Estonia) to have the order of the Tallinna Ringkonnakohus (Court of Appeal, Tallinn) set aside and to have his detention declared unlawful. In his appeal, I. L. stated that he would be entitled to bring an action for damages against the PPA if the Riigikohus (Supreme Court) ruled that his detention was unlawful.

17 The national court states that the dispute in the main proceedings relates solely to the whether I. L.'s detention was authorised.

18 Contrary to the PPA's assessment, that court considers that I. L.'s detention could not be ordered on the basis of a 'risk of absconding' within the meaning of Paragraph 15(2)(1) of the VSS. In that regard, that court states that none of the situations listed in Paragraph 6^8 of that law, the purpose of which is to define the concept of 'risk of absconding', match the circumstances of the main proceedings.

19 As regards, in particular, the criterion laid down in Paragraph 6^8 (4) of the VSS, which refers to the case of a criminal conviction with the imposition of a term of imprisonment, the referring court states that that presupposes the existence of a final decision. However, the decision sentencing I. L. only became final after the decision of the Tallinna Halduskohus (Administrative Court, Tallinn) to authorise his detention.

20 The referring court added that the detention could not be based on Paragraph 15(2)(2) and (3) of the VSS either, which refer, respectively, to a failure to cooperate and the absence of the necessary documents for the return journey.

21 Therefore, the referring court considers that the lawfulness of I. L.'s detention depends on whether the list in Paragraph 15(2) of the VSS is exhaustive.

22 According to a first interpretation, the three grounds for detention set out in Paragraph 15(2) of the VSS are exhaustive. Since none of those three grounds is applicable to I. L., his detention must be regarded as being unlawful.

23 According to a second interpretation, those grounds are not exhaustive, but illustrate a general criterion, namely the risk that the effective enforcement of the removal would be compromised, which derives from Paragraph 15(2), first sentence, of the VSS.

24 The referring court considers that the circumstances of the main proceedings could indeed entail such a risk, inasmuch as there was a genuine risk that I. L. would seek to resolve the conflict between him and his former partner and, on that occasion, that he would commit another criminal offence. However, the establishment and punishment of such an offence by a court decision and, where appropriate, the enforcement of the sentence imposed, would result in the enforcement of his removal being postponed indefinitely.

25 That court questions the compatibility of such an interpretation with Article 15(1) of Directive 2008/115.

26 In particular, that court wonders whether Article 15(1) of Directive 2008/115 may be interpreted as authorising detention on the basis of the general criterion identified above, namely the risk that the effective enforcement of the removal would be compromised, or whether one of the two grounds explicitly set out in that provision must be satisfied.

27 In those circumstances, the Riigikohus (Supreme Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is the first sentence of Article 15(1) of [Directive 2008/115] to be interpreted as meaning that Member States may detain a third-country national who, while at liberty prior to removal, presents a real risk of committing a criminal offence the establishment and punishment of which is likely to complicate the removal process considerably?’

Consideration of the question referred

28 By its question, the referring court asks, in substance, whether Article 15(1) of Directive 2008/115 must be interpreted as authorising a Member State to order the detention of an illegally staying third-country national solely on the basis of a general criterion based on the risk that the enforcement of the removal would be compromised, without one of the specific grounds for detention provided for and clearly defined by the legislation intended to transpose that provision into national law being satisfied.

29 According to the explanations provided to the Court, the referring court finds that none of the specific grounds for detention provided for in Paragraph 15(2) of the VSS, which is intended to transpose Article 15(1) of Directive 2008/115 into Estonian law, based on the presence of a risk of absconding, a failure to cooperate and the absence of the documents necessary for the return journey, is satisfied in the circumstances of the case in the main proceedings. That court considers, to the contrary, that the general criterion identified in the question referred, namely the risk that the effective enforcement of the removal would be compromised, is satisfied in so far as there was a genuine risk that the person concerned would commit a criminal offence, the establishment and punishment of which would have been likely to result in the removal being postponed indefinitely.

30 It must be observed that, under Article 15(1) of Directive 2008/115, the detention of the person concerned is permitted solely in order to ‘prepare the return and/or carry out the removal process’.

31 In that regard, the Court has held that it is only where, in the light of an assessment of each specific situation, the enforcement of the return decision, in the form of removal, risks being compromised by the conduct of the person concerned that the Member States may deprive that person of his or her liberty and detain him or her (judgment of 10 March 2022, *Landkreis Gifhorn*, C-519/20, EU:C:2022:178, paragraph 37 and the case-law cited).

32 It follows that, where it is ordered for the purpose of removal, the detention of an illegally staying third-country national is intended only to ensure the effectiveness of the return procedure and does not pursue any punitive purpose (judgment of 10 March 2022, *Landkreis Gifhorn*, C-519/20, EU:C:2022:178, paragraph 38).

33 Thus, a detention measure ordered by a Member State on the basis of national legislation implementing Article 15(1) of Directive 2008/115 must satisfy a general criterion based on the risk that the effective enforcement of the removal would be compromised.

34 That is not to say, however, that Article 15(1) of Directive 2008/115 must be understood as meaning that the general criterion per se establishes a ground for detention and allows a Member State to order a detention measure on that basis alone.

35 Article 15(1) of Directive 2008/115 explicitly provides for two grounds for detention based, on the one hand, on the presence of a risk of absconding as defined in Article 3(7) thereof and, on the other hand, on the fact that the person concerned avoids or hinders the preparation of the return or removal procedure.

36 It is true, as the Advocate General pointed out in points 30 to 34 of his Opinion, that it follows from the first sentence of Article 15(1) of Directive 2008/115, and specifically from the words 'in particular', that those two grounds are not exhaustive. Therefore, Member States may provide for other specific grounds for detention, in addition to the two grounds explicitly set out in that provision.

37 That being so, it must be stated that the possibility conferred on the Member States of adopting additional grounds for refusal is strictly limited both by the requirements deriving from Directive 2008/115 itself and by those arising from the protection of fundamental rights, and in particular the fundamental right to freedom enshrined in Article 6 of the Charter of Fundamental Rights of the European Union ('the Charter').

38 In that regard, it must be observed, first of all, that, as set out in paragraphs 30 to 33 of the present judgment, a detention order may be made only in the event that the enforcement of the return decision in the form of removal is likely to be compromised by the conduct of the person concerned and must have as its sole objective the effectiveness of the return procedure.

39 In the present case, it must be held that a general criterion, such as that identified in the question referred, based on the risk that the effective enforcement of the removal may be compromised, satisfies that requirement.

40 Second, the use of detention for the purpose of removal should be limited and subject to the principle of proportionality, as provided for in recital 16 of Directive 2008/115.

41 It must be recalled that Directive 2008/115 seeks to establish an effective removal and repatriation policy that fully respects the fundamental rights and dignity of the persons concerned (judgment of 10 March 2022, *Landkreis Gifhorn*, C-519/20, EU:C:2022:178, paragraph 39 and the case-law cited).

42 Thus, any detention covered by that directive is strictly circumscribed by the provisions of Chapter IV of that directive, so as to ensure, on the one hand, compliance with the principle of proportionality with regard to the means used and objectives pursued and, on the other, observance of the fundamental rights of the third-country nationals concerned (judgment of 10 March 2022, *Landkreis Gifhorn*, C-519/20, EU:C:2022:178, paragraph 40 and the case-law cited).

43 It follows that the addition of a further ground of detention by a Member State cannot, under any circumstances, cover a situation in which the application of less coercive measures, in particular those which respect the fundamental rights of the persons concerned, is sufficient to guarantee the effectiveness of the return procedure.

44 As regards, in particular, the requirements arising from the protection of the fundamental right to freedom, enshrined in Article 6 of the Charter, reference should be made to the judgment of 15 March 2017, *Al Chodor* (C-528/15, EU:C:2017:213).

45 In that judgment, the Court observed that Article 28 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms

for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31), by authorising the detention of an applicant in order to guarantee the transfer procedures provided for by that regulation where there is a non-negligible risk of that applicant absconding, provides for a limitation of the exercise of the fundamental right to liberty (judgment of 15 March 2017, *Al Chodor*, C-528/15, EU:C:2017:213, paragraph 36).

46 Similarly, by authorising the detention of a third-country national who is the subject of return proceedings, in order to prepare for return and/or carry out removal, Article 15(1) of Directive 2008/115 provides for a limitation of the fundamental right to liberty enshrined in Article 6 of the Charter.

47 In that regard, it is clear from Article 52(1) of the Charter that any limitation on the exercise of that right must be provided for by law and must respect the essence of that right and be subject to the principle of proportionality. 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, signed in Rome on 4 November 1950 ('the ECHR), Article 52(3) of the Charter provides that the meaning and scope of those rights must be the same as those laid down by the ECHR, while specifying that EU law may provide more extensive protection. For the purposes of interpreting Article 6 of the Charter, account must therefore be taken of Article 5 ECHR, as the minimum threshold of protection (judgment of 15 March 2017, *Al Chodor*, C-528/15, EU:C:2017:213, paragraph 37).

48 As regards the requirements that the legal basis for a limitation on the right to liberty must meet, the Court noted, in the light of the judgment of the European Court of Human Rights of 21 October 2013, *Del Río Prada v. Spain* (CE:ECHR:2013:1021JUD004275009), that a national law authorising a deprivation of liberty must, in order to meet the requirements of Article 52(1) of the Charter, be sufficiently accessible, precise and foreseeable in its application so as to avoid any danger of arbitrariness (judgment of 15 March 2017, *Al Chodor*, C-528/15, EU:C:2017:213, paragraph 38, and see, to that effect, judgment of 17 September 2020, *JZ (Imprisonment in the event of a ban on entry)*, C-806/18, EU:C:2020:724, paragraph 41).

49 In that connection, the Court has also held that the objective of the safeguards relating to liberty, such as those enshrined in both Article 6 of the Charter and Article 5 ECHR, consists, in particular, in the protection of the individual against arbitrariness. Thus, if the execution of a measure depriving a person of liberty is to be consistent with the objective of protecting the individual from arbitrariness, that means, in particular, that there can be no element of bad faith or deception on the part of the authorities (judgments of 15 March 2017, *Al Chodor*, C-528/15, EU:C:2017:213, paragraph 39, and of 12 February 2019, *TC*, C-492/18 PPU, EU:C:2019:108, paragraph 59).

50 It follows from the foregoing that the detention of a third-country national who is subject to a removal procedure, constituting a serious interference with his or her right to liberty, is subject to compliance with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness (judgment of 15 March 2017, *Al Chodor*, C-528/15, EU:C:2017:213, paragraph 40).

51 In the present case, as regards the requirement of a legal basis, it must be observed that the restriction on the right to liberty, in the circumstances of the case in the main proceedings, is based on Paragraph 15 of the VSS, that is to say, a legislative provision of national law intended to implement Article 15(1) of Directive 2008/115.

52 That being the case, the question arises as to whether the other guarantees mentioned above are observed in the situation mentioned in the question referred, where the person concerned is detained solely on the basis of a general criterion based on the risk that the effective enforcement of the removal would be compromised, without one of the specific grounds for detention laid down by that provision of national law being satisfied.

53 In accordance with the case-law referred to in paragraphs 47 to 49 of the present judgment, it must be held in that respect, that the individual discretion of the authorities concerned should be exercised within a framework of certain predetermined limits. Accordingly, it is essential that the criteria which define the basis for detention are defined clearly by an act which is binding and foreseeable in its application. (see, to that effect, judgment of 15 March 2017, *Al Chodor*, C-528/15, EU:C:2017:213, paragraph 42).

54 It must be held that a general criterion based on the risk that the effective enforcement of the removal would be compromised does not satisfy the requirements of clarity, predictability and protection against arbitrariness, as the European Commission has rightly argued. By reason of its lack of precision, in particular as regards the determination of the factors to be taken into account by the competent national authorities for the purposes of assessing the existence of the risk on which it is based, such a criterion does not enable the persons concerned to foresee, with the necessary degree of certainty, in what circumstances they might be placed in detention. For the same reasons, such a criterion does not offer those persons adequate protection against arbitrariness.

55 In light of the foregoing considerations, the answer to the question referred is that Article 15(1) of Directive 2008/115 must be interpreted as not permitting a Member State to order the detention of an illegally staying third-country national solely on the basis of a general criterion based on the risk that the effective enforcement of the removal would be compromised, without satisfying one of the specific grounds for detention provided for and clearly defined by the legislation implementing that provision in national law.

Costs

56 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 (Second Chamber) hereby rules:

Article 15(1) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals,

must be interpreted as not permitting a Member State to order the detention of an illegally staying third-country national solely on the basis of a general criterion based on the risk that the effective enforcement of the removal would be compromised, without satisfying one of the specific grounds for detention provided for and clearly defined by the legislation implementing that provision in national law.

[Signatures]

* Language of the procedure: Estonian.