ECLI:EU:C:2020:511

Provisional text

JUDGMENT OF THE COURT (First Chamber)

2 July 2020 (*)

(Reference for a preliminary ruling — Area of freedom, security and justice — Directive 2008/115/EC — Common standards and procedures in Member States for returning illegally staying third-country nationals — Conditions of detention — Article 16(1) — Detention in prison accommodation for the purpose of removal — Third-country national who poses a serious threat to public policy or public security)

In Case C-18/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 22 November 2018, received at the Court on 11 January 2019, in the proceedings

WM

v

Stadt Frankfurt am Main,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, R. Silva de Lapuerta (Rapporteur), Vice-President of the Court, M. Safjan, L. Bay Larsen and C. Toader, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– WM, by S. Basay-Yildiz, Rechtsanwältin,

– the German Government, by J. Möller and R. Kanitz, acting as Agents,

– the Swedish Government, initially by A. Falk, C. Meyer-Seitz, H. Shev, J. Lundberg and H. Eklinder, and subsequently by Olof Simonsson, C. Meyer-Seitz, H. Shev and H. Eklinder, acting as Agents,

– the European Commission, by C. Cattabriga and M. Wasmeier, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 February 2020,

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 was made in proceedings between WM, a Tunisian national, and Stadt Frankfurt am Main (City of Frankfurt am Main, Germany), concerning the lawfulness of a decision taken against him to detain him in prison accommodation for the purpose of removal.

Legal context

European Union law

3 Recitals 2 and 4 of Directive 2008/115 read as follows:

‘(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.

...

(4) Clear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well-managed migration policy.’

4 According to Article 1 of that directive:

‘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 2 of that directive provides:

‘1. This Directive applies to third-country nationals staying illegally on the territory of a Member State.

2. Member States may decide not to apply this Directive to third-country nationals who:

(a) are subject to a refusal of entry in accordance with Article 13 of [Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1)] or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State;

(b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.

…’

6 Article 7(4) of that directive is worded as follows:

‘If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.’

7 Article 8 of Directive 2008/115 states:

‘1. Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7.

...

4. Where Member States use — as a last resort — coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force. They shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned.

…’

8 Article 15 of Directive 2008/115, headed ‘Detention’, provides, in paragraph 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.'

9 Article 16 of that directive, headed 'Conditions of detention', states:

'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.

2. Third-country nationals in detention shall be allowed — on request — to establish in due time contact with legal representatives, family members and competent consular authorities.

3. Particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided.

4. Relevant and competent national, international and non-governmental organisations and bodies shall have the possibility to visit detention facilities, as referred to in paragraph 1, to the extent that they are being used for detaining third-country nationals in accordance with this Chapter. Such visits may be subject to authorisation.

5. Third-country nationals kept in detention shall be systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations. Such information shall include information on their entitlement under national law to contact the organisations and bodies referred to in paragraph 4.'

10 Article 17(2) of that directive is worded as follows:

'Families detained pending removal shall be provided with separate accommodation guaranteeing adequate privacy.'

11 Article 18(1) of that directive provides:

'In situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, decide to allow for periods for judicial review longer than those provided for under the third subparagraph of Article 15(2) and to take urgent measures in respect of the conditions of detention derogating from those set out in Articles 16(1) and 17(2).'

German law

12 Paragraph 58a(1) of the Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Law on the residence, economic activity and integration of foreign nationals in the federal territory) of 30 July 2004 (BGBl. 2004 I, p. 1950), ('the AufenthG'), provides:

‘The supreme *Land* authority may issue a removal order for a foreign national without a prior expulsion order based on the assessment of facts, in order to avert a particular threat to the security of the Federal Republic of Germany or a terrorist threat. The removal order shall be immediately enforceable; a notice of intention to deport shall not be required.’

13 Paragraph 62a(1) of the AufenthG states:

‘Detention for the purpose of removal shall take place in principle in specialised detention facilities. If there is no specialised detention facility in the federal territory or if the foreign national poses a serious threat to the life and limb of others or to significant internal security interests, detention may take place in other prison accommodation; in those circumstances, the persons detained for the purpose of removal shall be accommodated separately from ordinary prisoners. …’

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

14 WM is a Tunisian national who was residing in Germany. By order of 1 August 2017, the competent ministry of the *Land* of Hesse (Germany) ordered his removal to Tunisia on the basis of Paragraph 58a(1) of the AufenthG, on the ground that he posed a particular threat to national security, in particular, in view of his personality, his conduct, his radical Islamist views and his classification as ‘a trafficker and recruiter for the Islamic State terrorist organisation’ by the intelligence services and his activities for that organisation in Syria.

15 WM lodged an appeal with the Bundesverwaltungsgericht (Federal Administrative Court, Germany) against the order of 1 August 2017 and submitted an application for interim relief seeking suspension of the enforcement of that order. By order of 19 September 2017, that court dismissed the application for interim relief on the ground that it was sufficiently likely that WM would commit a terrorist attack in Germany.

16 By order of 18 August 2017, the Amtsgericht Frankfurt am Main (Local Court, Frankfurt am Main, Germany) ordered, at the request of the competent foreign nationals department, that WM be detained, for the purpose of removal, in prison accommodation until 23 October 2017, pursuant to Paragraph 62a(1) of the AufenthG.

17 WM lodged an appeal against that order with the Landgericht Frankfurt am Main (Regional Court, Frankfurt am Main, Germany), which, by order of 24 August 2017, dismissed it. WM lodged an appeal on a point of law against that order with the Bundesgerichtshof (Federal Court of Justice, Germany) seeking a declaration of the unlawfulness of his detention in respect of the period from 18 August 2017 to 23 October 2017.

18 On 9 May 2018, WM was removed to Tunisia.

19 In that context, the referring court asks whether Article 16(1) of Directive 2008/115 allows a Member State to detain an illegally staying third-country national in prison accommodation for the purpose of removal, separated from ordinary prisoners, not because of a lack of specialised detention centres in that Member State, but on the ground that that foreign national poses a serious threat to the life and limb of others or to national security.

20 According to the referring court, the outcome of the dispute before it depends on the interpretation of Article 16(1) of Directive 2008/115.

21 In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does Article 16(1) of [Directive 2008/115] preclude national provisions under which custody awaiting deportation may be enforced in an ordinary custodial institution if the foreign national poses a significant threat to the life and limb of others or to significant internal security interests, in which case the detainee awaiting deportation is accommodated separately from prisoners serving criminal sentences?’

Consideration of the question referred

22 By its question, the referring court asks, in essence, whether Article 16(1) of Directive 2008/115 must be interpreted as precluding national legislation which allows an illegally staying third-country national to be detained in prison accommodation for the purpose of removal, separated from ordinary prisoners, on the ground that he poses a serious threat to the life and limb of others or to national security.

Rationae materiae applicability of Directive 2008/115

23 The Swedish Government disputes that Article 16 of Directive 2008/115 is applicable to the case in the main proceedings. It submits that, under Article 72 TFEU, the European Union’s common immigration policy, of which Directive 2008/115 forms part, is not to affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security, so that Member States remain competent to adopt effective security measures as regards the detention of illegally staying third-country nationals for the purpose of removal. According to the Swedish Government, Paragraph 62a(1) of the AufenthG is necessary to maintain law and order and to safeguard internal security in Germany.

24 In that regard, it must be borne in mind, as the Advocate General observed in point 29 of his Opinion, that the extent of the scope of Directive 2008/115 must be determined taking into account the general scheme of that directive, which was adopted in particular on the basis of Article 63, first paragraph, point (3)(b) EC, a provision which is reproduced in Article 79(2)(c) TFEU which is contained in Title V of Part Three of the FEU Treaty, on the ‘area of freedom, security and justice’.

25 In accordance with Article 2(1) thereof, Directive 2008/115 applies to third-country nationals staying illegally in the territory of a Member State. Article 2(2) specifies the circumstances under which Member States may decide not to apply that directive. However, there is nothing in the case file before the Court to suggest that the circumstances of the applicant in the main proceedings are covered by one of the situations envisaged in Article 2(2) of that directive.

26 It is apparent that the situation of the applicant in the main proceedings in respect of whom a decision has been taken to detain him in prison accommodation, on the basis of Paragraph 62a(1) of the AufenthG, which is intended to transpose Article 16(1) of Directive 2008/115 into the German legal system, does indeed fall within the scope of that directive and, more specifically, of Article 16(1) of that directive.

27 In the present case, mere reliance on Article 72 TFEU cannot be sufficient to preclude the application of Directive 2008/115, even though the national legislation at issue in the main proceedings makes reference to the existence of a serious threat to the life and limb of others or to significant internal security interests as the basis for detention in prison accommodation.

28 According to settled case-law, although it is for the Member States to adopt appropriate measures to ensure law and order on their territory and their internal and external security, it does not follow that such measures fall entirely outside the scope of EU law (judgment of 2 April 2020, *Commission* v *Poland and Others (Temporary mechanism for the relocation of applicants for international protection)*, C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paragraph 143).

29 Article 72 TFEU, which provides that Title V of the FEU Treaty is not to affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security, cannot be read in such a way as to confer on Member States the power not to apply a provision of EU law, in this case Article 16 of Directive 2008/115, based on no more than reliance on those responsibilities (see, to that effect, judgment of 2 April 2020, *Commission* v *Poland and Others (Temporary mechanism for the relocation of applicants for international protection)*, C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paragraphs 145 and 152).

30 In those circumstances, it must be held that the case in the main proceedings falls within the scope of Directive 2008/115 and the question referred must be answered.

Substance

31 The Court has held 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 (judgment of 17 July 2014, *Bero and Bouzalmate*, C-473/13 and C-514/13, EU:C:2014:2095, paragraph 25).

32 Furthermore, the Court has held that the wording of the second sentence of Article 16(1) of Directive 2008/115 is not couched in identical terms in all the language versions. That provision states, in the German version, that, ‘where 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 (judgment of 17 July 2014, *Bero and Bouzalmate*, C-473/13 and C-514/13, EU:C:2014:2095, paragraph 26).

33 According to settled case-law, where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the general scheme and the purpose of the rules of which it forms part (judgment of 14 May 2019, *M and Others (Revocation of refugee status)*, C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraph 88 and the case-law cited).

34 As regards, in the first place, the general scheme of Directive 2008/115, the first sentence of Article 16(1) of that directive requires that the third-country nationals concerned be detained, ‘as a rule’, in specialised detention facilities. The use of those words makes it apparent that Directive 2008/115 permits exceptions to that general rule.

35 Article 18 of Directive 2008/115, headed ‘Emergency situations’, provides, in paragraph 1, that, in situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation

persists, take urgent measures in respect of the conditions of detention derogating from those set out in Articles 16(1) and 17(2) of Directive 2008/115.

36 Although those emergency measures apply only in the exceptional circumstances listed in Article 18(1) of that directive, it must be stated that, as the Advocate General observed, in essence, in points 64 and 69 of his Opinion, it does not follow from the wording or the general scheme of that directive that those situations constitute the only grounds which may be relied on by Member States by way of derogation from the principle that third-country nationals detained for the purpose of removal must be accommodated in specialised facilities referred to in the first sentence of Article 16(1) of Directive 2008/115.

37 As regards, in the second place, the purpose of Directive 2008/115, it is intended, as is apparent from recitals 2 and 4 of that directive, to establish an effective removal and repatriation policy that fully respects the fundamental rights and dignity of the persons concerned (judgment of 19 June 2018, *Gnandi*, C-181/16, EU:C:2018:465, paragraph 48 and the case-law cited).

38 Furthermore, it must be noted that every detention ordered which is within the scope of Directive 2008/115 is strictly circumscribed by the provisions of Chapter IV thereof 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 5 June 2014, *Mahdi*, C-146/14 PPU, EU:C:2014:1320, paragraph 55). According to recital 6 of Directive 2008/115, decisions taken under that directive should be adopted on a case-by-case basis and based on objective criteria (judgment of 5 June 2014, *Mahdi*, C-146/14 PPU, EU:C:2014:1320, paragraph 70).

39 It follows from the foregoing that the second sentence of Article 16(1) of that directive authorises the Member States, in exceptional circumstances, and other than in those expressly referred to in Article 18(1) of Directive 2008/115, to detain illegally staying third-country nationals in prison accommodation, for the purpose of removal, where, owing to the particular facts of the case, they cannot comply with the objectives pursued by that directive by detaining them in specialised facilities.

40 In the present case, Paragraph 62a(1) of the AufenthG provides that detention for the purpose of removal is to take place, in principle, in specialised detention facilities and, in exceptional cases, in prison accommodation if the foreign national poses a serious threat to the life and limb of others or to significant internal security interests. In that case, foreign nationals detained for the purpose of removal are to be accommodated separately from ordinary prisoners.

41 The grounds given in that legislation to justify detention for the purpose of removal being carried out in prison accommodation are therefore caught by public policy and public security. Such a threat may justify, in exceptional cases, the detention of a third-country national, for the purpose of removal, in prison accommodation, separated from ordinary prisoners, pursuant to the second sentence of Article 16(1) of Directive 2008/115, for the purpose of ensuring the smooth progress of the removal procedure, in accordance with the objectives pursued by that directive.

42 In that context, it should be noted that, while Member States essentially retain the freedom to determine the requirements of public policy in accordance with their national needs, which may vary from one Member State to another and from one era to another, the fact still remains that, in the European Union context and particularly when relied upon as a justification for derogating from an obligation designed to ensure that the fundamental rights of third-country nationals are respected when they are removed from the European Union, those requirements must be interpreted strictly,

so that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union (see, to that effect, judgment of 11 June 2015, *Zh. and O.*, C-554/13, EU:C:2015:377, paragraph 48).

43 As regards the interpretation of the concept of 'risk to public policy', as referred to in Article 7(4) of Directive 2008/115, the Court has held that that concept presupposes, in any event, the existence, in addition to the disturbance of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (judgment of 11 June 2015, *Zh. and O.*, C-554/13, EU:C:2015:377, paragraph 60).

44 As regards the concept of 'public security', it is apparent from the Court's case-law that this concept covers both the internal security of a Member State and its external security and that, consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security (judgment of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 66).

45 As the Advocate General noted in point 77 of his Opinion, the requirement of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society as the basis for reducing or dispensing with the period for voluntary departure of the third-country national under Article 7(4) of Directive 2008/115 applies a fortiori to justify detention in prison accommodation under the second sentence of Article 16(1) of Directive 2008/115.

46 Thus, the detention of a third-country national in prison accommodation for the purpose of removal under the second sentence of Article 16(1) of Directive 2008/115 is therefore justified on the ground of a threat to public policy or public security only if the applicant's individual conduct represents a genuine, present and sufficiently serious threat, affecting one of the fundamental interests of society or the internal or external security of the Member State concerned (see, to that effect, judgment of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 67).

47 It is for the referring court to ascertain whether those conditions are satisfied in the main proceedings.

48 In the light of all of the foregoing considerations, the answer to the question referred is that Article 16(1) of Directive 2008/115 must be interpreted as not precluding national legislation which allows an illegally staying third-country national to be detained in prison accommodation for the purpose of removal, separated from ordinary prisoners, on the ground that he poses a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society or the internal or external security of the Member State concerned.

Costs

49 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 (First 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 not precluding national legislation which allows an illegally staying third-country national to be detained in prison accommodation for the purpose of removal, separated from ordinary prisoners, on the ground that he poses a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society or the internal or external security of the Member State concerned.

[Signatures]

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* Language of the case: German.