JUDGMENT OF THE COURT (Second Chamber)

10 September 2013 (*)

(Visas, asylum, immigration and other policies related to free movement of persons – Immigration policy – Illegal immigration and illegal residence – Repatriation of illegal residents – Directive 2008/115/EC – Return of illegally staying third-country nationals – Removal process – Detention measure – Extension of detention – Article 15(2) and (6) – Rights of the defence – Right to be heard – Infringement – Consequences)

In Case C-383/13 PPU,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Netherlands), made by decision of 5 July 2013, received at the Court on the same date, in the proceedings

M. G.,

N. R.

v

Staatssecretaris van Veiligheid en Justitie,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, G. Arestis, J.-C. Bonichot (Rapporteur), A. Arabadjiev and J.L. da Cruz Vilaça, Judges,

Advocate General: M. Wathelet,

Registrar: M.-A. Gaudissart, head of unit,

having regard to the referring court's request of 5 July 2013, received at the Court on the same date, that the reference for a preliminary ruling be dealt with under the urgent procedure pursuant to Article 107 of the Rules of Procedure,

having regard to the decision of the Second Chamber of 11 July 2013 to grant that request,

having regard to the written procedure and further to the hearing on 8 August 2013,

after considering the observations submitted on behalf of:

– Mr G., by N.C. Blomjous and M. Strooij, advocaten,

– Mr R., by L.M. Weber and R.M. Seth Paul, advocaten,

– the Netherlands Government, by J. Langer and M. Bulterman, acting as Agents,

– the Polish Government, by K. Pawłowska and M. Arciszewski, acting as Agents,

– the European Commission, by M. Condou-Durande, A. Bouquet and R. Troosters, acting as Agents,

after hearing the Advocate General,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 15(6) 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) and of Article 41(2)(a) of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between Mr G. and Mr R., on the one hand, and the Staatssecretaris van Veiligheid en Justitie (State Secretary for Security and Justice), on the other, concerning the lawfulness of decisions extending the term of detention measures adopted in their regard for the purpose of removal.

Legal context

European Union legislation

3 Recitals 11, 13 and 16 in the preamble to Directive 2008/115 state:

'(11) A common minimum set of legal safeguards on decisions related to return should be established to guarantee effective protection of the interests of the individuals concerned. …

…

(13) The use of coercive measures should be expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued. … Member States should be able to rely on various possibilities to monitor forced return. …

…

(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.'

4 Article 1 of Directive 2008/115 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 2 of Directive 2008/115 provides:

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

…’

6 Under Article 15 of Directive 2008/115:

‘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.

2. Detention shall be ordered by administrative or judicial authorities.

Detention shall be ordered in writing with reasons being given in fact and in law.

When detention has been ordered by administrative authorities, Member States shall:

(a) either provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention,

(b) or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings. In such a case Member States shall immediately inform the third-country national concerned about the possibility of taking such proceedings.

The third-country national concerned shall be released immediately if the detention is not lawful.

3. In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

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 12 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.'

Netherlands legislation

7 Under Article 2:1(1) of the General Law on Administration (Algemene wet bestuursrecht), every person may, for the protection of his interests, in dealings with administrative authorities, be assisted or be represented by an authorised person.

8 Under Article 4:8(1) of that law, an administrative body must give an interested party the opportunity to put forward his views before it takes a decision to which the interested party, who did not request that decision, may be expected to object, if (i) that decision relies on information relating to facts and interests which concern the interested party and (ii) the information concerned was not provided by the interested party himself.

9 Under Article 59(1)(a) of the Law on Foreign Nationals of 2000 (Vreemdelingenwet 2000; 'the Vw 2000'), if required in the interests of public policy or national security, a foreign national who is not lawfully resident may be placed in detention by the Staatssecretaris van Veiligheid en Justitie with a view to his deportation.

10 Under Article 59(5) of the Vw 2000, the duration of the detention referred to in Article 59(1) thereof may not exceed six months.

11 Under Article 59(6) of the Vw 2000, the period referred to in paragraph 5 thereof may be extended by a further period of 12 months in cases where, despite all reasonable efforts, the deportation is likely to last longer because of a lack of cooperation by the foreign national with regard to his deportation or because the documents required from third countries for that purpose are still outstanding.

12 Under Article 94(4) of the Vw 2000, the Rechtbank (District Court) may declare an action brought against the detention measure to be well founded if it takes the view that the application of the measure is contrary to the Vw 2000 or, on weighing up all interests involved, that it is not reasonably justified. In such a case, the Rechtbank will order that the measure be lifted.

13 Under Article 106(1) of the Vw 2000, if the Rechtbank orders that a detention measure be lifted, or if the detention is lifted before the request to have the measure lifted is dealt with, the Rechtbank may award damages to the foreign national which are payable by the State.

14 Under Article 106(2), paragraph 1 of that article is to apply *mutatis mutandis* if the Administrative Jurisdiction Division of the Raad van State (Council of State) orders that the detention measure be lifted.

15 Under Article 5.1a(1) of the Decree on Foreign Nationals of 2000 (Vreemdelingenbesluit 2000), a foreign national who is not lawfully resident may be placed in detention in the interests of public policy or national security if:

‘(a) there is a risk that the foreign national will abscond,

or

(b) the foreign national avoids or hampers the preparation of return or the deportation process.’

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

16 On 24 October and 11 November 2012, respectively, the Netherlands authorities placed Mr G. and Mr R. in detention in the context of a removal procedure. By separate extension decisions of 19 and 29 April 2013, the term of the detention measures imposed on them was extended by a maximum of 12 months, on the ground, inter alia, of a lack of cooperation on the part of the foreign nationals in the removal procedure.

17 Mr G. and Mr R. each brought court proceedings challenging the decision to extend their respective detention. By judgments of 22 and 24 May 2013, the Rechtbank Den Haag (The Hague District Court), court of first instance, found that the rights of the defence had been infringed, but rejected the claimants’ actions, on the ground that the infringement in question did not give rise to annulment of the extension decisions. Mr G. and Mr R. lodged appeals against those judgments before the Raad van State.

18 According to that court, the circumstances of the dispute in the main proceedings come within the scope of Directive 2008/115. Moreover, it is not disputed that the rights of the defence were infringed, since the parties concerned were not properly heard, under the conditions provided for by national law, before the adoption of the extension decisions.

19 The Raad van State states that, under Netherlands law, the courts determine the legal consequences of such an infringement, taking into account the interests served by the extension of detention, and that they are therefore not required to annul an extension decision adopted without the party concerned being heard beforehand if the interest served by keeping the party concerned in detention is considered to be a priority.

20 The referring court is uncertain, however, whether such case-law is in accordance with European Union law. It also states that, under Netherlands law, if a national court holds that a detention decision must be annulled, the competent authorities cannot adopt a new decision and that the party concerned must be immediately released.

21 In those circumstances the Raad van State decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does infringement by the national administrative authority of the general principle of respect for the rights of the defence, which is also given expression in Article 41(2) of [the Charter], in the course of the preparation of an extension decision within the terms of Article

15(6) of Directive 2008/115 …, automatically and in all cases mean that the detention must be lifted?

(2) Does that general principle of respect for the rights of the defence leave scope for a weighing up of interests in which, in addition to the seriousness of the infringement of that principle and the interests of the foreign national adversely affected thereby, the interests of the Member State served by the extension of the detention measure are also taken into account?'

Consideration of the questions referred

The urgent procedure

22 On the basis of Article 267 TFEU and of Article 107 of the Rules of Procedure, the Raad van State requested that the present reference for a preliminary ruling be dealt with under the urgent preliminary ruling procedure.

23 The referring court justified that request by stating that the third-country nationals at issue in the proceedings before it are in detention and that their situation falls within the scope of Title V of the TFEU, relating to the policy area of freedom, security and justice. If the answer to the first question were to be in the affirmative, the detention measures would have to be lifted immediately. If the answer to the first question is in the negative, this means that there is in fact scope for the interests to be weighed up and the Raad van State should undertake such an exercise and thoroughly examine whether or not that weighing up of interests should lead to the lifting of the detention measures.

24 In that respect, it must be observed, first, that the present reference for a preliminary ruling concerns the interpretation of Directive 2008/115, which is covered by Part Three, Title V, of the TFEU. It is therefore amenable to being dealt with under the urgent preliminary ruling procedure provided for in Article 23a of the Statute of the Court of Justice of the European Union and Article 107 of the Rules of Procedure.

25 It must be observed, secondly, that, as the referring court points out, the claimants in the main proceedings are currently deprived of liberty, and the resolution of the main proceedings may result in that deprivation of liberty being immediately brought to an end.

26 In the light of the foregoing, the Second Chamber of the Court decided, on 11 July 2013, on the Judge-Rapporteur's proposal and after hearing the Advocate General, to grant the referring court's request that the reference for a preliminary ruling be dealt with under the urgent procedure.

The questions referred

27 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether European Union law, in particular Article 15(2) and (6) of Directive 2008/115, must be interpreted as meaning that where, in an administrative procedure, the extension of a detention measure has been decided in breach of the right to be heard, the detention must be brought to an end immediately or if the national court responsible for assessing the lawfulness of that extension decision may maintain the detention where, after weighing the interests in question, it considers that the detention is still justified.

28 It must be pointed out that the referring court regards it as established that, in the disputes before it, the right to be heard was not respected when the extension decisions were adopted. Therefore, in the present urgent preliminary ruling procedure, the Court need not adjudicate on the circumstances in which, under European law, there is an infringement of the obligation to ensure the right to be heard, but need only indicate to the referring court the consequences, under European Union law, of such an infringement.

29 In that respect, it must be noted that, in Chapter III thereof, entitled 'Procedural Safeguards', Directive 2008/115 lays down the formal requirements for decisions on removal, which are inter alia to be issued in writing and give reasons, and requires Member States to put in place effective remedies against those decisions. In Chapter IV, concerning detention for the purpose of removal, the directive provides inter alia, in Article 15(2), that detention is to be ordered by administrative or judicial authorities, in writing with reasons being given in fact and in law for the detention decision, and specifies the conditions of judicial review of that decision where it is ordered by administrative authorities. The final sub-paragraph of Article 15(2) of Directive 2008/115 provides, moreover, that the third-country national is to be released immediately if the detention is not lawful.

30 It must also be noted that, although Article 15(6) of Directive 2008/115 provides that, where certain substantive conditions are fulfilled, Member States may extend the period of detention for the purpose of removal for a limited period not exceeding a further 12 months in accordance with national law, that provision does not contain any procedural rules.

31 Therefore, although the drafters of Directive 2008/115 thus intended to provide a detailed framework for the safeguards granted to the third-party nationals concerned as regards both the removal decision and the detention decision, they did not, however, specify whether, and under what conditions, observance of the right to be heard of those third-country nationals was to be ensured, nor did they specify the consequences of an infringement of that right, apart from the general requirement for release if the detention is not lawful.

32 It is settled case-law that the rights of the defence, which include the right to be heard and the right to have access to the file, are among the fundamental rights forming an integral part of the European Union legal order and enshrined in the Charter of Fundamental Rights of the European Union (see, to that effect, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and Others* v *Kadi* [2013] ECR I-0000, paragraphs 98 and 99 and the case-law cited). It is also true that observance of those rights is required even where the applicable legislation does not expressly provide for such a procedural requirement (see, to that effect, Case C-277/11 *M.* [2012] ECR I-0000, paragraph 86 and the case-law cited).

33 However, the Court has held that fundamental rights, such as observance of the rights of the defence, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (Case C-28/05 *Dokter and Others* [2006] ECR I-5431, paragraph 75).

34 Further, the question whether there is an infringement of the rights of the defence must be examined in relation to the specific circumstances of each particular case (see, to that effect, Case C-110/10 P *Solvay* v *Commission* [2011] ECR I-10439, paragraph 63), including

the nature of the act at issue, the context of its adoption and the legal rules governing the matter in question (*Commission* v *Kadi*, paragraph 102 and the case-law cited).

35 Thus, when they take measures which come within the scope of European Union law, the authorities of the Member States are, as a rule, subject to the obligation to observe the rights of the defence of addressees of decisions which significantly affect their interests. Where, as in the main proceedings, neither the conditions under which observance of the third-country nationals' right to be heard is to be ensured, nor the consequences of the infringement of that right, are laid down by European Union law, those conditions and consequences are governed by national law, provided that the rules adopted to that effect are the same as those to which individuals in comparable situations under national law are subject (principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights of defence conferred by the European Union legal order (principle of effectiveness) (see, to that effect, inter alia, Case C-349/07 *Sopropé* [2008] ECR I-10369, paragraph 38, and Case C-452/09 *Iaia and Others* [2011] ECR I-4043, paragraph 16).

36 None the less, while the Member States may allow the exercise of the rights of the defence of third-country nationals under the same rules as those governing internal situations, those rules must comply with European Union law and, in particular, must not undermine the effectiveness of Directive 2008/115.

37 The Member States must therefore take account of the case-law concerning observance of the rights of the defence in conjunction with the scheme of Directive 2008/115 when, in the exercise of their procedural autonomy, they determine the conditions under which observance of the right to be heard of illegally-staying third-country nationals is to be ensured and act upon an infringement of that right.

38 As regards the questions raised by the referring court, it must be noted that, according to European Union law, an infringement of the rights of the defence, in particular the right to be heard, results in annulment only if, had it not been for such an irregularity, the outcome of the procedure might have been different (see, to that effect, inter alia, Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 31; Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraph 101; Case C-141/08 *Foshan Shunde Yongjian Housewares & Hardware* v *Council* [2009] ECR I-9147, paragraph 94; Case C-96/11 P *Storck* v *OHIM* [2012] ECR I-0000, paragraph 80).

39 It follows that not every irregularity in the exercise of the rights of the defence in an administrative procedure extending the detention of a third-country national with a view to his removal will constitute an infringement of those rights. Consequently, nor will every breach of, in particular, the right to be heard systematically render the decision taken unlawful, for the purposes of the final sub-paragraph of Article 15(2) of Directive 2008/115, and therefore not every such breach will automatically require the release of the third-country national concerned.

40 To make such a finding of unlawfulness, the national court must – where it considers that a procedural irregularity affecting the right to be heard has occurred – assess whether, in the light of the factual and legal circumstances of the case, the outcome of the administrative procedure at issue could have been different if the third-country nationals in question had

been able to put forward information which might show that their detention should be brought to an end.

41 Not to recognise that the national court has such a power of assessment, and to require that every infringement of the right to be heard automatically brings about the annulment of the decision extending the detention and the lifting of that measure, even though such a procedural irregularity might actually have had no impact on that extension decision and the detention fulfils the substantive conditions laid down in Article 15 of Directive 2008/115, would be liable to undermine the effectiveness of the directive.

42 It should be borne in mind that, first, according to recital 2 in the preamble to Directive 2008/115, that directive is intended to establish 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. Likewise, according to recital 13 in the preamble to that directive, the use of coercive measures should be expressly subject not only to the principle of proportionality, but also to the principle of effectiveness, with regard to the means used and objectives pursued.

43 Second, the removal of any illegally staying third-country national is a matter of priority for the Member States, in accordance with the scheme of Directive 2008/115 (see, to that effect, Case C-329/11 *Achughbabian* [2011] ECR I-0000, paragraph 38).

44 The national court's review of an alleged infringement of the right to be heard during an administrative procedure adopting a decision to extend a detention measure, as provided for in Article 15(6) of Directive 2008/115, must therefore consist in ascertaining, in the light of all of the factual and legal circumstances of each case, whether the infringement at issue actually deprived the party relying thereon of the possibility of arguing his defence better, to the extent that the outcome of that administrative procedure could have been different.

45 In view of the foregoing, the answer to the questions referred is that European Union law, in particular Article 15(2) and (6) of Directive 2008/115, must be interpreted as meaning that, where the extension of a detention measure has been decided in an administrative procedure in breach of the right to be heard, the national court responsible for assessing the lawfulness of that extension decision may order the lifting of the detention measure only if it considers, in the light of all of the factual and legal circumstances of each case, that the infringement at issue actually deprived the party relying thereon of the possibility of arguing his defence better, to the extent that the outcome of that administrative procedure could have been different.

Costs

46 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:

European Union law, in particular Article 15(2) and (6) 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 meaning that, where the extension of a detention measure has been decided in an administrative procedure in breach of the right to be heard, the national court responsible for assessing the lawfulness of that extension decision may order the lifting of the detention measure only if it considers, in the light of all of the factual and legal circumstances of each case, that the infringement at issue actually deprived the party relying thereon of the possibility of arguing his defence better, to the extent that the outcome of that administrative procedure could have been different.

[Signatures]

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* Language of the case: Dutch.