ECLI:EU:C:2022:858

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

8 November 2022 (*)

(References for a preliminary ruling – Area of freedom, security and justice – Detention of third-country nationals – Fundamental right to liberty – Article 6 of the Charter of Fundamental Rights of the European Union – Conditions governing the lawfulness of detention – Directive 2008/115/EC – Article 15 – Directive 2013/33/EU – Article 9 – Regulation (EU) No 604/2013 – Article 28 – Review of the lawfulness of detention and of the continuation of a detention measure – Ex officio review – Fundamental right to an effective judicial remedy – Article 47 of the Charter of Fundamental Rights)

In Joined Cases C-704/20 and C-39/21,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Raad van State (Council of State, Netherlands) and the rechtbank Den Haag, zittingsplaats ’s-Hertogenbosch (District Court, The Hague, sitting in ’s-Hertogenbosch, Netherlands), made by decisions of 23 December 2020 and 26 January 2021, respectively, received at the Court on 23 December 2020 and 26 January 2021, in the proceedings,

Staatssecretaris van Justitie en Veiligheid

v

C,

B (C-704/20),

and

X

v

Staatssecretaris van Justitie en Veiligheid (C-39/21),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, C. Lycourgos (Rapporteur), E. Regan and L.S. Rossi, Presidents of Chambers, M. Ilešič, J.-C. Bonichot, I. Jarukaitis, A. Kumin, N. Jääskinen, N. Wahl, M. Gavalec, Z. Csehi and O. Spineanu-Matei, Judges,

Advocate General: J. Richard de la Tour,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 1 March 2022,

after considering the observations submitted on behalf of:

– C and B, by P.H. Hillen, advocaat,

– X, by C.F. Wassenaar, advocaat,

– the Netherlands Government, by K. Bulterman and P. Huurnink, acting as Agents,

– the European Commission, by A. Azéma, C. Cattabriga and G. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 June 2022,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 15 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), Articles 9 and 21 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96) and Articles 6 and 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), read in conjunction with Articles 6, 24 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The requests have been made in proceedings between, on the one hand, B, C and X, who are third-country nationals, and, on the other, the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands; 'the State Secretary') concerning the lawfulness of detention measures in respect of those three persons.

Legal context

European Union law

Directive 2008/115

3 Article 1 of Directive 2008/115, entitled '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 [EU] law as well as international law, including refugee protection and human rights obligations.’

4 Article 3 of that directive, entitled ‘Definitions’, provides:

‘For the purpose of this Directive the following definitions shall apply:

…

(9) “vulnerable persons” means minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.’

5 Paragraph 3 of Article 4 of that directive, which is entitled ‘More favourable provisions’, states:

‘This Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive.’

6 Article 15 of Directive 2008/115, headed ‘Detention’, stipulates:

‘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 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.'

Directive 2013/33

7 Article 1 of Directive 2013/33, entitled 'Purpose', provides:

'The purpose of this Directive is to lay down standards for the reception of applicants for international protection … in Member States.'

8 Article 2 of that directive, entitled 'Definitions', states:

'For the purpose of this Directive:

…

(h) "detention": means confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement;

…'

9 Article 8 of that directive, entitled 'Detention', is worded as follows:

'1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant in accordance with Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [(OJ 2013 L 180, p. 60)].

2. When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.

3. An applicant may be detained only:

(a) in order to determine or verify his or her identity or nationality;

(b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;

(c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory;

(d) when he or she is detained subject to a return procedure under Directive [2008/115], in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;

(e) when protection of national security or public order so requires;

(f) in accordance with Article 28 of Regulation [No 604/2013].

The grounds for detention shall be laid down in national law.

4. Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law.'

10 Article 9 of Directive 2013/33, entitled 'Guarantees for detained applicants', provides:

'1. An applicant shall be detained only for as short a period as possible and shall be kept in detention only for as long as the grounds set out in Article 8(3) are applicable.

Administrative procedures relevant to the grounds for detention set out in Article 8(3) shall be executed with due diligence. Delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention.

2. Detention of applicants shall be ordered in writing by judicial or administrative authorities. The detention order shall state the reasons in fact and in law on which it is based.

3. Where detention is ordered by administrative authorities, Member States shall provide for a speedy judicial review of the lawfulness of detention to be conducted *ex officio* and/or at the request of the applicant. When conducted *ex officio*, such review shall be decided on as speedily as possible from the beginning of detention. When conducted at the request of the applicant, it shall be decided on as speedily as possible after the launch of the relevant proceedings. To this end, Member States shall define in national law the period within which the judicial review *ex officio* and/or the judicial review at the request of the applicant shall be conducted.

Where, as a result of the judicial review, detention is held to be unlawful, the applicant concerned shall be released immediately.

4. Detained applicants shall immediately be informed in writing, in a language which they understand or are reasonably supposed to understand, of the reasons for detention and the procedures laid down in national law for challenging the detention order, as well as of the possibility to request free legal assistance and representation.

5. Detention shall be reviewed by a judicial authority at reasonable intervals of time, *ex officio* and/or at the request of the applicant concerned, in particular whenever it is of a prolonged duration, relevant circumstances arise or new information becomes available which may affect the lawfulness of detention.

6. In cases of a judicial review of the detention order provided for in paragraph 3, Member States shall ensure that applicants have access to free legal assistance and representation. This shall include, at least, the preparation of the required procedural documents and participation in the hearing before the judicial authorities on behalf of the applicant.

…'

11 Article 21 of Directive 2013/33, headed 'General principle', provides:

'Member States shall take into account the specific situation of vulnerable persons such as minors …'

Regulation No 604/2013

12 Article 1 of Regulation No 604/2013, which is entitled 'Subject matter', states:

'This Regulation lays down 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 …'

13 Article 6 of that regulation, entitled 'Guarantees for minors', provides, in paragraph 1 thereof:

'The best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation.'

14 Article 28 of that regulation, entitled 'Detention', provides:

'1. Member States shall not hold a person in detention for the sole reason that he or she is subject to the procedure established by this Regulation.

2. When there is a significant risk of absconding, Member States may detain the person concerned in order to secure transfer procedures in accordance with this Regulation, on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.

3. Detention shall be for as short a period as possible and shall be for no longer than the time reasonably necessary to fulfil the required administrative procedures with due diligence until the transfer under this Regulation is carried out.

Where a person is detained pursuant to this Article, the period for submitting a take charge or take back request shall not exceed one month from the lodging of the application. The Member State

carrying out the procedure in accordance with this Regulation shall ask for an urgent reply in such cases. Such reply shall be given within two weeks of receipt of the request. Failure to reply within the two-week period shall be tantamount to accepting the request and shall entail the obligation to take charge or take back the person, including the obligation to provide for proper arrangements for arrival.

Where a person is detained pursuant to this Article, the transfer of that person from the requesting Member State to the Member State responsible shall be carried out as soon as practically possible, and at the latest within six weeks of the implicit or explicit acceptance of the request by another Member State to take charge or to take back the person concerned …

When the requesting Member State fails to comply with the deadlines for submitting a take charge or take back request or where the transfer does not take place within the period of six weeks referred to in the third subparagraph, the person shall no longer be detained. …

4. As regards the detention conditions and the guarantees applicable to persons detained, in order to secure the transfer procedures to the Member State responsible, Articles 9, 10 and 11 of Directive [2013/33] shall apply.'

Netherlands law

The Vw

15 Article 59(1)(a) of the wet tot algehele herziening van de Vreemdelingenwet (Vreemdelingenwet 2000) (Law on foreign nationals of 2000) of 23 November 2000 (*Stb*. 2000, No 495), as amended with effect from 31 December 2011 for the purpose of transposing Directive 2008/115 into Netherlands law ('the Vw'), provides that, 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 State Secretary with a view to his or her removal from the territory of the Netherlands.

16 Article 59a of the Vw states that foreign nationals to whom Regulation No 604/2013 applies may, in compliance with Article 28 of that regulation, be detained with a view to their transfer to the Member State responsible for examining their application for international protection lodged in the Netherlands.

17 Article 59b of the Vw provides that certain foreign nationals who have applied for a residence permit may be detained if such detention is necessary to establish the identity or nationality of the applicant or to obtain further information necessary for the assessment of the application, in particular if there is a risk of the foreign national absconding.

18 Article 91(2) of the Vw is worded as follows:

'If the [Raad van State (Council of State), ruling on appeal] considers that a complaint raised is not capable of leading to annulment, it may confine itself to that assessment in the grounds of its decision.'

19 Article 94 of the Vw is worded as follows:

'1. Where [the State Secretary] has taken a decision imposing a measure involving deprivation of liberty referred to in Articles … 59, 59a and 59b, he or she shall notify the [court with jurisdiction] thereof no later than the twenty-eighth day following service of that decision, unless the foreign

national has by then brought an appeal. As soon as the court has been notified, the foreign national shall be deemed to have lodged an appeal against the decision imposing a measure involving deprivation of liberty. That appeal shall also seek an award of compensation.

…

4. The court shall forthwith set the date for a hearing. The hearing shall take place no later than 14 days after receipt of the application or the notice. …

…

6. If the court before which proceedings are brought finds that the application or enforcement of the measure concerned is contrary to this Law or, after weighing up all the interests involved, that the measure is not justified, it shall uphold the appeal. In those circumstances, the court shall order that the measure be lifted or that the conditions of its enforcement be varied.

…'

The Awb

20 Article 8:69 of the wet houdende algemene regels van bestuursrecht (Algemene wet bestuursrecht) (Law laying down general rules of administrative law) (General Law on Administrative Law) of 4 June 1992 (*Stb*. 1992, No 315), in the version applicable to the disputes in the main proceedings ('the Awb'), provides:

'1. The court before which proceedings are brought shall give its ruling on the basis of the action, the documents produced, the preliminary investigation and the consideration of the case at the hearing.

2. The court shall supplement the pleas in law of its own motion.

3. The court may supplement the facts of its own motion.'

21 Under Article 8:77 of the Awb:

'1. The written decision shall contain:

…

b. the grounds for the decision;

…'

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

The proceedings concerning B and C (C-704/20)

22 B, an Algerian national, expressed his intention to apply for international protection in the Netherlands. By decision of 3 June 2019, the State Secretary detained him under Article 59b of the Vw for the purpose of establishing his identity and of obtaining the information necessary to assess that application.

23 B brought an action against that decision before the rechtbank Den Haag, zittingsplaats ’s-Hertogenbosch (District Court, The Hague, sitting in ’s-Hertogenbosch, Netherlands).

24 By judgment of 18 June 2019, that court, without ruling on the pleas raised in support of that action, upheld that action on a ground not raised by B, being that the State Secretary had not acted with due diligence. The court therefore ordered that the detention measure in respect of B be lifted and awarded compensation to him.

25 C is a national of Sierra Leone. By decision of 5 June 2019, the State Secretary, on the basis of Article 59a of the Vw, detained C for the purpose of his transfer to Italy pursuant to Regulation No 604/2013.

26 C brought an action against that decision before the rechtbank Den Haag, zittingsplaats ’s-Hertogenbosch (District Court, The Hague, sitting in ’s-Hertogenbosch).

27 By judgment of 19 June 2019, that court dismissed C’s pleas as unfounded, but upheld that action, on the ground that the State Secretary had not organised the transfer of the person concerned to Italy with due diligence. The court therefore ordered that the detention measure in respect of C be lifted and awarded compensation to C.

28 The State Secretary brought an appeal against the judgments referred to in paragraphs 24 and 27 of this judgment before the Raad van State (Council of State, Netherlands). The latter asks the Court of Justice to rule on the argument put forward by B and C, and by certain courts in the Netherlands, that EU law requires the courts to examine of their own motion all the conditions that a detention measure must satisfy in order to be lawful.

29 As regards specifically EU law, the referring court states, first of all, that B and C were lawfully resident in the Netherlands when they were detained. While taking the view, in consequence, that the relevant rules on detention are, in this instance, those set out in Directive 2013/33 and Regulation No 604/2013, the referring court seeks moreover to have Directive 2008/115 taken into account in the examination of the question referred.

30 The referring court goes on to explain that all detention provided for by those EU legal instruments falls within the scope, in the Netherlands, of administrative procedural law, which does not in principle allow the Netherlands courts to examine of their own motion whether the detention measure in question satisfies conditions pertaining to lawfulness which the person concerned has not claimed to have been infringed. The only exception to that principle concerns the review of compliance with rules of public policy, such as those relating to jurisdiction and access to justice.

31 The referring court observes that there are numerous conditions governing the lawfulness of a detention measure in respect of a third-country national. Those conditions relate inter alia to the arrest of the person concerned, checks relating to his or identity, nationality and right of residence, his or her right to consular, legal and linguistic assistance, his or her rights of defence, the existence of a risk of absconding or of evading checks, the prospect of removal or transfer of the person concerned, the diligence shown by the State Secretary, the signature and date of the adoption of that detention measure, and whether that measure is consistent with the principle of proportionality.

32 That court takes the view that an obligation for the courts to examine of their own motion all those conditions pertaining to lawfulness does not arise from EU law. According to that court, it is apparent from the judgment of 7 June 2007, *van der Weerd and Others* (C-222/05 to C-225/05,

EU:C:2007:318), that EU law does not require the courts to review of their own motion, in proceedings relating to the lawfulness of an administrative measure, compliance with the rules of EU law, unless those rules occupy, in the EU legal order, a position comparable to rules of public policy or it is impossible for the parties to put forward a plea alleging infringement of EU law in the proceedings concerned. According to that court, the conditions relating to detention are not of the same rank as national rules of public policy and, in the Netherlands, a foreign national is able to raise pleas alleging infringement of the conditions governing the lawfulness of the detention measure to which he or she is subject.

33 That court goes on to state that, in accordance with the principle of procedural autonomy, the Member States are entitled to prohibit national courts from raising, of their own motion, facts or pleas in law in the context of judicial review of detention measures adopted in respect of third-country nationals.

34 That prohibition does not undermine the principle of effectiveness, since those third-country nationals have expeditious and free access to justice and may raise whatever pleas they wish.

35 Nor does that prohibition undermine the principle of equivalence. In that regard, the referring court states that its interpretation of the scope of Article 8:69(2) and (3) of the Awb concerns all administrative procedures and not specifically those relating to detention measures. According to that interpretation, paragraph 2 of that article would imply that the court must give legal expression to the pleas raised by an individual and paragraph 3 of that article that the court is not obliged to confine itself to the facts as presented by the parties. However, the parties are expected to produce prima facie evidence, and the court may subsequently try to supplement that evidence, for example by calling witnesses.

36 The referring court adds that the safeguards specifically provided for in relation to detention by Directive 2008/115, Directive 2013/33 and Regulation No 604/2013 have been implemented by the Netherlands legislature, in particular in Article 94 of the Vw. That provision ensures that any detention measure is subject to judicial review.

37 In those circumstances, the Raad van State (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does [EU] law, more particularly Article 15(2) of [Directive 2008/115] and Article 9 of [Directive 2013/33], read in conjunction with Article 6 of the [Charter], require a court of its own motion (*ex officio*) to assess whether all the conditions pertaining to detention have been met, including those where the foreign national has not disputed that compliance occurred, despite having had the opportunity to do so?'

The proceedings concerning X (C-39/21)

38 X is a Moroccan national born in 1973. By decision of 1 November 2020, the State Secretary detained him on the basis of Article 59(1)(a) of the Vw, which forms part of the provisions by which Directive 2008/115 was transposed into Netherlands law. That detention measure was said to have been justified by the protection of public policy, on account of the risk that X would avoid checks and prevent his removal.

39 By judgment of 14 December 2020, the rechtbank Den Haag, zittingsplaats 's-Hertogenbosch (District Court, The Hague, sitting in 's-Hertogenbosch), dismissed the appeal brought by X against that detention measure.

40 On 8 January 2021, X brought an appeal before the rechtbank Den Haag, zittingsplaats ’s-Hertogenbosch (District Court, The Hague, sitting in ’s-Hertogenbosch) against the continuation of that detention measure. In support of his action, X argued that there was no prospect of removal within a reasonable time.

41 The referring court states that it is required to assess the lawfulness of that continuation only in respect of the period beginning on 8 December 2020. The lawfulness of X’s detention during the period prior to that date was assessed in its judgment of 14 December 2020.

42 That court seeks guidance on the requirements, stemming from EU law, relating to the intensity of the judicial review of the lawfulness of detention measures.

43 In that regard, the referring court states that actions brought by third-country nationals against detention measures adopted by the Secretary of State fall within the scope of Netherlands administrative law and that Article 8:69(1) of the Awb requires the court before which proceedings are brought to give its ruling on the basis of the action, the documents produced, the preliminary investigation and the consideration of the case at the hearing.

44 According to the referring court, it is true that that rule is qualified by paragraphs 2 and 3 of that article, according to which the court is to supplement the pleas in law of its own motion and may supplement the facts of its own motion. However, the Raad van State (Council of State) has adopted a particularly strict interpretation of those paragraphs, whereby the only power of examination of the court’s own motion is to review compliance with the rules on jurisdiction, access to justice and the right to a fair trial. Thus, in the context of the substantive examination of the lawfulness of a detention measure, the court is prohibited from raising matters of law or of fact of its own motion. That prohibition applies equally where the person concerned is a vulnerable person, such as a minor.

45 The referring court states that, where a court hearing an action brought against a detention measure nevertheless raises matters of law or of fact of its own motion, the State Secretary appeals as a matter of course against the judgment of that court to the Raad van State (Council of State) and is always successful.

46 The referring court states that, in the present case, it has, for the period beginning on 8 December 2020, a half-page interview report and a monitoring report, dated 8 January 2021, in the format of a form setting out the specific measures which the Netherlands authorities have taken to remove the person concerned.

47 That court considers that it is impossible to glean from such a brief file all the relevant facts for assessing whether the continuation of the detention measure concerned is lawful. It states that, in the main proceedings, it wishes in particular to ascertain whether the Netherlands authorities duly examined the possibility of applying a less coercive measure. It would also like to ascertain which services exist in the detention facility in order to help X to deal with the addictive condition from which he suffers and which he has mentioned in his action.

48 Since it is not empowered to examine such matters of its own motion, the referring court considers that it has been denied the opportunity to assess the lawfulness of the continuation of the detention measure concerned in the light of all the relevant information. Such a situation could be regarded as incompatible with the fundamental right to an effective remedy enshrined in Article 47 of the Charter, especially since it is not possible to appeal against judgments relating to the continuation of the detention measures. In order for judicial protection to be effective in this type of

case, it is necessary, according to that court, for the courts seised to be able to ensure full respect for the fundamental right to liberty enshrined in Article 6 of the Charter.

49 The referring court moreover observes that, as regards the obligation to state reasons laid down in Article 8:77(1)(b) of the Awb, there is an exception set out in Article 91(2) of the Vw, to the effect that the Raad van State (Council of State), hearing an appeal against judgments relating to detention, may rule by means of an abridged statement of reasons, which is essentially confined to stating that the person concerned has not raised any grounds of complaint that are well founded.

50 According to the referring court, such an exception deprives the persons concerned of their right to an effective remedy. It maintains that Article 47 of the Charter should be interpreted as meaning that access to justice, in matters relating to immigration law, also includes the right to a reasoned decision on the substance by the court ruling at second and last instance.

51 In those circumstances, the rechtbank Den Haag, zittingsplaats ’s-Hertogenbosch (District Court, The Hague, sitting in ’s-Hertogenbosch) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Having regard to Article 47 of [the Charter], read in conjunction with Article 6 of the Charter and Article 53 of the Charter and in the light of Article 15(2)(b) of [Directive 2008/115], Article 9(3) of [Directive 2013/33] and Article 28(4) of [Regulation No 604/2013], are the Member States permitted to structure the judicial procedure for challenging the detention of a foreign national ordered by the authorities in such a way as to prohibit the courts from carrying out an *ex officio* review and assessment of all aspects of the lawfulness of the detention and, where a court finds of its own motion that the detention is unlawful, from ordering that the unlawful detention be ended and the foreign national released immediately? If the [Court] finds that such national legislation is incompatible with EU law, does that then also mean that, if the foreign national applies to the court for his or her release, that court is always required to carry out an active and thorough *ex officio* review and assessment of all the facts and factors relevant to the lawfulness of the detention measure concerned?

(2) Having regard to Article 24(2) of the Charter, read in conjunction with Article 3(9) of [Directive 2008/115], Article 21 of [Directive 2013/33] and Article 6 of [Regulation No 604/2013], does the answer to Question 1 differ if the foreign national detained by the authorities concerned is a minor?

(3) Does the right to an effective remedy guaranteed by Article 47 of the Charter, read in conjunction with Article 6 of the Charter and Article 53 of the Charter and in the light of Article 15(2)(b) of [Directive 2008/115], Article 9(3) of [Directive 2013/33] and Article 28(4) of [Regulation No 604/2013], mean that, where a foreign national requests a court of any instance to end the detention measure to which he or she has been subject and order his or her release, that court must give an adequate substantive statement of reasons for any decision on that request, if the remedy is otherwise structured in the same manner as it is in this Member State? If the Court of Justice considers a national legal practice in which the court of second, and therefore highest, instance may confine itself to ruling without giving any substantive reasons to be incompatible with EU law, having regard to the way in which the legal remedy is otherwise structured in this Member State, does that then mean that such a power for the court of second and therefore highest instance in asylum and ordinary immigration cases must also be regarded as being incompatible with EU law, in the light of the vulnerable position of the foreign national, the considerable importance of immigration procedures and the fact that, in contrast to all other administrative procedures, in terms of legal protection, those procedures contain the same weak procedural guarantees for the foreign

national as the detention procedure? Having regard to Article 24(2) of the Charter, are the answers to these questions different if the foreign national challenging a decision of the authorities concerning matters of immigration law is a minor?'

Procedure before the Court

52 Under Article 107(1) of the Rules of Procedure of the Court, a reference for a preliminary ruling which raises one or more questions concerning the areas of freedom, security and justice may, at the request of the referring court or tribunal or, exceptionally, of the Court's own motion, be dealt with under the urgent preliminary ruling procedure.

53 In Case C-39/21, since X was in detention and was therefore deprived of his liberty on the date on which the request for a preliminary ruling was made by the rechtbank Den Haag, zittingsplaats 's-Hertogenbosch (District Court, The Hague, sitting in 's-Hertogenbosch), that court requested that that procedure be applied.

54 On 25 February 2021, the Fifth Chamber of the Court decided, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, to grant that request to apply the urgent preliminary ruling procedure in Case C-39/21.

55 On account of the partial connection between Cases C-704/20 and C-39/21, that chamber decided of its own motion to apply that procedure also in Case C-704/20.

56 It also decided that those cases should be referred to the Court with a view to being assigned to the Grand Chamber.

57 Those cases were, moreover, joined for the purposes of the written and oral parts of the procedure and the judgment.

58 On 31 March 2021, the rechtbank Den Haag, zittingsplaats 's-Hertogenbosch (District Court, The Hague, sitting in 's-Hertogenbosch) informed the Court that it had terminated X's detention by interlocutory decision of 26 March 2021.

59 In the light of that information, the Court found that the conditions laid down for the application of the urgent preliminary ruling procedure were no longer satisfied and decided that Cases C-704/20 and C-39/21 should be dealt with under the ordinary procedure.

60 The rechtbank Den Haag, zittingsplaats 's-Hertogenbosch (District Court, The Hague, sitting in 's-Hertogenbosch) subsequently informed the Court that it had awarded compensation to X by decision of 26 April 2021 on the ground that his detention was unlawful and that it had caused him loss. However, pending the Court's answers to the questions referred for a preliminary ruling, that court stayed the proceedings as to whether X is entitled to a higher amount of compensation.

Consideration of the questions referred

Admissibility

61 Questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling from a national court only where it is quite obvious

that the interpretation of EU law sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 19 May 2022, *Spetsializirana prokuratura (Trial of an absconded accused person)*, C-569/20, EU:C:2022:401, paragraph 20 and the case-law cited).

62 In Case C-39/21, the issue of the detention of a minor, to which the rechtbank Den Haag, zittingsplaats 's-Hertogenbosch (District Court, The Hague, sitting in 's-Hertogenbosch) refers in its second question, is hypothetical. It is clear from the order for reference in that case that X, who was born in 1973 and is therefore an adult, is the only person concerned by the proceedings which gave rise to that reference for a preliminary ruling.

63 To answer the second question referred for a preliminary ruling in Case C-39/21 would therefore be of no use to the referring court for the purpose of resolving the dispute in the main proceedings in that case, but would amount to the Court giving an advisory opinion. That second question referred is therefore inadmissible.

64 As regards, moreover, the third question referred for a preliminary ruling in Case C-39/21, it should be noted that that question relates, in essence, to whether the national court which rules, where relevant, on appeal in a case concerning the review of the lawfulness of a detention measure may confine itself to setting out an abridged statement of reasons.

65 As is apparent from the information summarised in paragraphs 40 and 48 of this judgment from the order for reference in Case C-39/21, the rechtbank Den Haag, zittingsplaats 's-Hertogenbosch (District Court, The Hague, sitting in 's-Hertogenbosch) will rule at first and last instance on whether to continue the detention measure to which X has been subject.

66 Although that court has indeed stated, in its observations summarised in paragraphs 49 and 50 of the present judgment, that Netherlands law allows an appeal to be brought before the Raad van State (Council of State) against a detention order, the fact remains that the question of the extent of the latter's obligation to state reasons in such a situation is purely hypothetical in the context of the proceedings pending before the rechtbank Den Haag, zittingsplaats 's-Hertogenbosch (District Court, The Hague, sitting in 's-Hertogenbosch), which concern, at first and last instance, whether to continue the detention measure concerned.

67 Consequently, an answer from the Court to the third question referred for a preliminary ruling in Case C-39/21 is not justified by a need inherent in the effective resolution of the dispute pending before the referring court in that case (see, to that effect, judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 44 and the case-law cited).

68 It should also be pointed out that, notwithstanding the partial connection between Cases C-704/20 and C-39/21, and the decision to join those two cases, the third question referred in Case C-39/21 cannot be examined in the context of the examination of the request for a preliminary ruling in Case C-704/20.

69 It must in that regard be recalled that, in the context of the preliminary ruling procedure provided for in Article 267 TFEU, it is solely for the national court or tribunal before which the dispute has been brought, and which is responsible for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for and the relevance of the questions which it submits to the Court (judgment of 6 October 2021, *Consorzio*

Italian Management and Catania Multiservizi, C-561/19, EU:C:2021:799, paragraph 35 and the case-law cited). That settled case-law would be disregarded if the Court were to agree to answer a question by which the referring court does not seek an interpretation of EU law for the purpose of resolving the case pending before it, but seeks to supplement a request for a preliminary ruling made by another court.

70 It follows that the third question referred in Case C-39/21 is also inadmissible.

Substance

71 By the question referred in Case C-704/20 and the first question referred in Case C-39/21, which it is appropriate to examine together, the referring courts ask, in essence, whether Article 15(2) and (3) of Directive 2008/115, Article 9(3) and (5) of Directive 2013/33 and Article 28(4) of Regulation No 604/2013, read in conjunction with Articles 6 and 47 of the Charter, must be interpreted as meaning that a judicial authority's review of compliance with the conditions governing the lawfulness of the detention of a third-country national which derive from EU law must lead that authority to raise of its own motion any failure to comply with a condition governing lawfulness which has not been invoked by the person concerned.

72 In that regard, it should be recalled in the first place that any detention of a third-country national, whether under Directive 2008/115 in the context of a return procedure as a result of an illegal stay, under Directive 2013/33 in the context of the processing of an application for international protection, or under Regulation No 604/2013 in the context of the transfer of an applicant for such protection to the Member State responsible for examining his or her application, constitutes a serious interference with the right to liberty enshrined in Article 6 of the Charter (see, to that effect, judgments of 15 March 2017, *Al Chodor*, C-528/15, EU:C:2017:213, paragraph 40, and of 25 June 2020, *Ministerio Fiscal (Authority likely to receive an application for international protection)*, C-36/20 PPU, EU:C:2020:495, paragraph 105).

73 As Article 2(h) of Directive 2013/33 provides, a detention measure consists in the confinement of a person within a particular place. It is apparent from the wording, origin and context of that provision, the scope of which can, moreover, be transposed to the concept of 'detention' in Directive 2008/115 and in Regulation No 604/2013, that detention requires the person concerned to remain permanently within a restricted and closed perimeter, thus isolating that person from the rest of the population and depriving him or her of his or her freedom of movement (see, to that effect, judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraphs 217 to 225).

74 The purpose of detention measures, within the meaning of Directive 2008/115, Directive 2013/33 and Regulation No 604/2013, is not the prosecution or punishment of criminal offences, but the achievement of the objectives pursued by those instruments with regard to return, examination of applications for international protection and transfer of third-country nationals, respectively.

75 In view of the gravity of that interference with the right to liberty enshrined in Article 6 of the Charter and of the importance of that right, the power of the competent national authorities to detain third-country nationals is strictly circumscribed (see, to that effect, judgment of 30 June 2022, *Valstybės sienos apsaugos tarnyba and Others*, C-72/22 PPU, EU:C:2022:505, paragraphs 83 and 86 and the case-law cited). A detention measure may thus be ordered or extended only in compliance with the general and abstract rules laying down the conditions and procedures

governing such a measure (see, to that effect, judgment of 10 March 2022, *Landkreis Gifhorn*, C-519/20, EU:C:2022:178, paragraph 62).

76 The general and abstract rules laying down, as common EU standards, the conditions pertaining to detention are set out in Article 15(1), (2), second subparagraph, (4), (5) and (6) of Directive 2008/115, Article 8(2) and (3) and Article 9(1), (2) and (4) of Directive 2013/33 and Article 28(2), (3) and (4) of Regulation No 604/2013. Those rules are without prejudice to the rules, in other provisions of those instruments, which lay down the conditions pertaining to detention in certain situations which are not relevant in the cases in the main proceedings, such as those relating to the detention of minors.

77 Those rules provided for in Directive 2008/115, Directive 2013/33 and Regulation No 604/2013, on the one hand, and the provisions of national law implementing them, on the other, are the rules, arising from EU law, which lay down the conditions governing the lawfulness of detention, including in the light of Article 6 of the Charter.

78 In particular, the third-country national concerned cannot, as the first subparagraph of Article 15(1) of Directive 2008/115, Article 8(2) of Directive 2013/33 and Article 28(2) of Regulation No 604/2013 specify, be detained where a less coercive measure can be applied effectively.

79 Where it is apparent that the conditions governing the lawfulness of detention identified in paragraph 77 of this judgment have not been or are no longer satisfied, the person concerned must, as the EU legislature indeed expressly states in the fourth subparagraph of Article 15(2) and (4) of Directive 2008/115 and the second subparagraph of Article 9(3) of Directive 2013/33, be released immediately.

80 That is the case, in particular, where it is found that the procedure for return, for examination of the application for international protection or for transfer, as the case may be, is no longer being carried out with due diligence.

81 As regards, in the second place, the right of third-country nationals detained by a Member State to effective judicial protection, it is settled case-law that, under Article 47 of the Charter, the Member States must ensure effective judicial protection of rights which individuals derive from EU law (see, to that effect, judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 142).

82 As regards detention, common EU standards on judicial protection are set out in the third subparagraph of Article 15(2) of Directive 2008/115 and Article 9(3) of Directive 2013/33. The latter provision also applies, pursuant to Article 28(4) of Regulation No 604/2013, in the context of the transfer procedures governed by that regulation.

83 According to those provisions, which give concrete form, in the sphere in question, to the right to effective judicial protection safeguarded in Article 47 of the Charter (judgment of 14 May 2020, *Országos Idegenrendézeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 289), each Member State must provide, where detention has been ordered by an administrative authority, for a 'speedy' judicial review, either *ex officio* or at the request of the person concerned, of the lawfulness of that detention.

84 As regards the continuation of a detention measure, Article 15(3) of Directive 2008/115 and Article 9(5) of Directive 2013/33, which is also applicable, on the basis of Article 28(4) of

Regulation No 604/2013, in the context of the transfer procedures governed by that regulation, require periodic review or supervision. Under those provisions, such review or supervision must occur 'at reasonable intervals of time' and concern whether the conditions governing the lawfulness of the detention continue to be met. In the case of detention covered by Directive 2013/33 or Regulation No 604/2013, that periodic supervision must in all cases be carried out by a judicial authority, since Directive 2008/115 requires supervision by such an authority of reviews if the period of detention is prolonged.

85 Since the EU legislature requires, without exception, that supervision that the conditions governing the lawfulness of the detention are satisfied must be effected 'at reasonable intervals of time', the competent authority is required to carry out that supervision of its own motion, even if the person concerned does not request it.

86 As is apparent from all those provisions, the EU legislature has not confined itself to establishing common substantive standards, but has also established common procedural standards, the purpose of which is to ensure that, in each Member State, there is a system which enables the competent judicial authority to release the person concerned, where appropriate after an examination of its own motion, as soon as it is apparent that his or her detention is not, or is no longer, lawful.

87 In order that such a system of protection effectively ensures compliance with the strict conditions which a detention measure covered by Directive 2008/115, Directive 2013/33 or Regulation No 604/2013 is required to satisfy in order to be lawful, the competent judicial authority must be in a position to rule on all matters of fact and of law relevant to the review of that lawfulness. To that end, it must be able to take into account the facts stated and the evidence adduced by the administrative authority which ordered the initial detention. It must also be able to take into account any facts, evidence and observations which may be submitted to it by the person concerned. Furthermore, that authority must be able to consider any other element that is relevant for its decision should it so deem necessary. The powers which it has in the context of an examination can under no circumstances be confined just to the matters adduced by the administrative authority (see, to that effect, judgments of 5 June 2014, *Mahdi*, C-146/14 PPU, EU:C:2014:1320, paragraphs 62 and 64, and of 10 March 2022, *Landkreis Gifhorn*, C-519/20, EU:C:2022:178, paragraph 65).

88 As the Advocate General in essence observed in point 95 of his Opinion, in view of the importance of the right to liberty, the gravity of the interference with that right which the detention of persons on grounds other than the prosecution or punishment of criminal offences represents and of the requirement, highlighted by the common rules laid down by the EU legislature, of a high level of judicial protection which enables compliance with the imperative need to release such a person, where the conditions governing the lawfulness of detention are not, or are no longer, satisfied, the competent judicial authority must take into consideration all the elements, in particular the facts, brought to its knowledge, as supplemented or clarified in the context of procedural measures which it deems necessary to adopt on the basis of its national law, and, on the basis of these elements, raise, where appropriate, the failure to comply with a condition governing lawfulness arising from EU law, even if that failure has not been raised by the person concerned. That requirement is without prejudice to the obligation, for the judicial authority thus called upon to raise of its own motion such a condition governing lawfulness, to invite each party to express its views on that condition in accordance with the adversarial principle.

89 In that regard, it cannot, in particular, be accepted that, in Member States where detention orders are taken by an administrative authority, judicial review does not encompass the judicial

authority's determination, on the basis of the elements referred to in the previous paragraph of this judgment, of whether a condition governing lawfulness, failure to comply with which has not been raised by the person concerned, has been satisfied, whereas, in Member States where detention orders must be made by a judicial authority, that authority must carry out such a determination of its own motion on the basis of those elements.

90 The interpretation set out in paragraph 88 of this judgment ensures that judicial protection of the fundamental right to liberty is guaranteed effectively in all Member States, whether they provide for a system in which the detention order is taken by an administrative authority subject to judicial review or a system in which that decision is taken directly by a judicial authority.

91 That interpretation is not invalidated by the case-law of the Court cited by the Raad van State (Council of State), according to which, in the light of the principle that in a dispute, it is for the parties to take the initiative, EU law does not require national courts to raise of their own motion pleas alleging infringement of provisions of EU law where examination of those pleas would oblige them to go beyond the ambit of the dispute defined by the parties themselves by relying on facts and circumstances other than those on which the party with an interest in application of those provisions has based its claim (see, inter alia, judgments of 14 December 1995, *van Schijndel and van Veen*, C-430/93 and C-431/93, EU:C:1995:441, paragraphs 21 and 22; of 7 June 2007, *van der Weerd and Others*, C-222/05 to C-225/05, EU:C:2007:318, paragraphs 35 and 36; and of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 145).

92 The strict circumscription, established by the EU legislature, of detention and the continuation of a detention measure leads to a situation which is not similar in every respect to administrative proceedings, in which the initiative and delimitation of the dispute lie with the parties.

93 Accordingly, the obligation on the judicial authorities responsible for reviewing the lawfulness of detention measures to raise, of their own motion, on the basis of the elements mentioned in paragraph 88 of the present judgment, disregard of a condition governing the lawfulness of such a measure under EU law applies irrespective of the case-law cited in paragraph 91 of this judgment and of the question, raised by the Raad van State (Council of State) in the light of the judgment of 7 June 2007, *van der Weerd and Others* (C-222/05 to C-225/05, EU:C:2007:318, paragraphs 29 to 31), whether the relevant legal provisions are of a public policy nature.

94 In the light of all the foregoing, the answer to the question referred in Case C-704/20 and to the first question referred in Case C-39/21 is that Article 15(2) and (3) of Directive 2008/115, Article 9(3) and (5) of Directive 2013/33 and Article 28(4) of Regulation No 604/2013, read in conjunction with Articles 6 and 47 of the Charter, must be interpreted as meaning that a judicial authority's review of compliance with the conditions governing the lawfulness of the detention of a third-country national which derive from EU law must lead that authority to raise of its own motion, on the basis of the material in the file brought to its attention, as supplemented or clarified during the adversarial proceedings before it, any failure to comply with a condition governing lawfulness which has not been invoked by the person concerned.

Costs

95 Since these proceedings are, for the parties to the main proceedings, a step in the actions before the national courts, the decisions on costs are a matter for those courts. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Article 15(2) and (3) 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, Article 9(3) and (5) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, and Article 28(4) 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, read in conjunction with Articles 6 and 47 of the Charter of Fundamental Rights of the European Union,

must be interpreted as meaning that a judicial authority's review of compliance with the conditions governing the lawfulness of the detention of a third-country national which derive from EU law must lead that authority to raise of its own motion, on the basis of the material in the file brought to its attention, as supplemented or clarified during the adversarial proceedings before it, any failure to comply with a condition governing lawfulness which has not been invoked by the person concerned.

[Signatures]

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* Language of the case: Dutch.