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Press and Information

Judgment in Joined Cases C-924/19 PPU and C-925/19 PPU
FMS and Others v Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendeszeti Főigazgatóság

The placing of asylum seekers or third-country nationals who are the subject of a return decision in the Röszke transit zone at the Serbian-Hungarian border must be classified as 'detention'

If, following judicial review of the lawfulness of such detention, it is established that the persons concerned have been detained for no valid reason, the court hearing the case must release them with immediate effect

In the judgment in Országos Idegenrendézeti Żigazgatóság Dél-alföldi Regionális Igazgatóság (C-924/19 PPU and C-925/19 PPU), delivered on 14 May 2020 in the context of the urgent preliminary ruling procedure, the Grand Chamber of the Court ruled on a number of questions relating to the interpretation of Directives 2008/115[1] ('the "Return" Directive'), 2013/32[2] ('the "Procedures" Directive') and Directive 2013/33 [3] ('the "Reception" Directive'), in relation to the Hungarian legislation on the right to asylum and the return of illegally staying third-country nationals.

In the present case, Afghan nationals (Case C-924/19 PPU) and Iranian nationals (Case C-925/19 PPU), who arrived in Hungary via Serbia, lodged applications for asylum from the Röszke transit zone, on the Serbian-Hungarian border. Pursuant to Hungarian law, those applications were dismissed as inadmissible and decisions requiring the applicants to return to Serbia were adopted. However, Serbia refused to readmit the persons concerned into its territory, on the ground that the conditions set out in the Agreement on readmission concluded with the EU[4] were not met. Following that decision of Serbia, the Hungarian authorities did not examine the substance of the applications referred to above, but amended the country of destination mentioned in the initial return decisions, replacing it with the respective country of origin of the persons concerned. Those persons then lodged objections against the amending decisions which were rejected. Although no provision is made for such a remedy under Hungarian law, the applicants brought an action before a Hungarian court for annulment of the decisions rejecting their objections to those amending decisions and to have the asylum authority ordered to conduct a new asylum procedure. They also brought actions for failure to act relating to their detention and continuing presence in the Röszke transit zone. They were first obliged to stay in the sector of that transit zone reserved for applicants for asylum before being required, several months later, to stay in the sector of that zone that is reserved for third-country nationals whose asylum applications have been rejected, the sector which they are currently in.

In the first place, the Court examined the situation of the persons concerned in the Röszke transit zone, in the light of the rules governing both the detention of applicants for international protection (the 'Procedures' and 'Reception' Directives) and that of illegally staying third-country nationals ('the Return Directive'). In that regard, the Court first held that **detaining the persons concerned in that transit zone must be regarded as a detention measure.** In reaching that conclusion, it

[1] 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] 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).
[3] 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).
[4] Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation, annexed to the Council Decision of 8 November 2007 (OJ 2007 L 334, p. 45).

stated that the concept of 'detention', which has the same meaning in the context of the various directives cited above, refers to a coercive measure which presupposes the deprivation, and not a mere restriction, of the freedom of movement of the person concerned and isolates that person from the rest of the population, by requiring him or her to remain at all times within a limited and closed area. According to the Court, **the conditions prevailing in the Röszke transit zone amount to a deprivation of liberty, inter alia because the persons concerned cannot lawfully leave that zone of their own free will in any direction whatsoever.** In particular, **they may not leave that zone for Serbia since such an attempt (i) would be considered unlawful by the Serbian authorities and would therefore expose them to penalties and (ii) might result in their losing any chance of obtaining refugee status in Hungary.**

The Court then examined whether that detention complies with the requirements imposed by EU law. As regards the requirements related to detention, the Court held that, under Article 8 of the 'Reception' Directive and Article 15 of the 'Return' Directive respectively, **neither an applicant for international protection nor a third-country national who is the subject of a return decision may be detained solely on the ground that he or she cannot meet his or her own needs.** It added that Articles 8 and 9 of the 'Reception' Directive and Article 15 of the 'Return' Directive respectively **preclude an applicant for international protection or a third-country national who is the subject of a return decision from being detained without the prior adoption of a reasoned decision ordering that detention and without the need for and proportionality of such a measure having been examined.**

The Court also provided clarification on the requirements related to the continuation of detention and, more specifically, to the duration of detention. As regards applicants for international protection, it held that Article 9 of the 'Reception' Directive does not require Member States to lay down a maximum period for continuing to detain such applicants. However, their national law must ensure that the detention lasts only for as long as the ground for detention remains applicable and that the administrative procedures associated with that ground are executed diligently. By contrast, in the case of third-country nationals who are the subject of a return decision, it is apparent from Article 15 of the 'Return' Directive that their detention - even where it is extended - may not exceed 18 months and may be maintained only as long as removal arrangements are ongoing and are executed with due diligence.

Furthermore, as regards the detention of applicants for international protection in the particular context of a transit zone, it is also necessary to take account of Article 43 of the 'Procedures' Directive. It follows from that provision that Member States may require applicants for international protection to stay at their borders or in one of their transit zones in order, inter alia, to examine, before taking a decision on the rights of entry of those applicants into their territory, whether their applications are admissible. A decision must nevertheless be adopted within four weeks, failing which the Member State concerned must grant the applicant the right to enter its territory and process his or her application according to the ordinary procedure of civil law. Therefore, although the Member States may, in the context of a procedure referred to in that Article 43, detain applicants for international protection who present themselves at their borders, **that detention may not under any circumstances exceed four weeks from the date on which the application was lodged.**

Lastly, the Court held that **the lawfulness of a detention measure**, such as the detention of a person in a transit zone, **must be amenable to judicial review** under Article 9 of the 'Reception' Directive and Article 15 of the 'Return' Directive respectively. Therefore, in the absence of national rules providing for such a review, the principle of the primacy of EU law and the right to effective judicial protection require the national court hearing the case to declare that it has jurisdiction to rule on the matter. Moreover, if, following its review, the national court considers that the detention measure at issue is contrary to EU law, **that court must be able to substitute its decision for that of the administrative authority which adopted the measure and order the immediate release of the persons concerned, or possibly an alternative measure to detention.**

Furthermore, an applicant for international protection whose detention, which has been found to be unlawful, has ended must be able to rely on the material reception conditions to which he or she is

entitled during the examination of his or her application. In particular, it is apparent from Article 17 of the 'Reception' Directive that, if the applicant has no means of subsistence, he or she is entitled to either a financial allowance enabling him or her to find accommodation, or to housing in kind. To that end, Article 26 of the 'Reception' Directive requires that such an applicant be able to bring an action before a court aimed at guaranteeing that right to accommodation, that court having the possibility of granting interim measures pending its final decision. If no other court has jurisdiction under national law, the principle of primacy of EU law and the right to effective judicial protection require, once again, the court seised to declare that it has jurisdiction to hear the action aimed at guaranteeing that right to accommodation.

In the second place, the Court ruled on the jurisdiction of the national court to hear an action for annulment brought by the persons concerned against the decisions rejecting their objections to the amendment of the country of return. In that regard, the Court stated that a decision amending the country of destination mentioned in the initial return decision is so substantial that it must be regarded as a new return decision. Under Article 13 of the 'Return' Directive, the addressees of such a decision must then have an effective remedy against it, which must also be consistent with the right to effective judicial protection guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). To that end, the Court observed that, although Member States may make provision for return decisions to be challenged before authorities other than judicial authorities, the addressee of a return decision adopted by an administrative authority must however, at a certain stage of the procedure, be able to challenge its lawfulness before at least one judicial body. In the present case, the Court observed that the persons concerned could challenge the decisions taken by the aliens policing authority amending their country of return only by lodging an objection before the asylum authority and that no subsequent judicial review was guaranteed. The asylum authority, which operates under the authority of the minister for policing, is part of the executive, so that it does not satisfy the condition of independence required of a court for the purpose of Article 47 of the Charter. In such circumstances, the principle of the primacy of EU law, as well as the right to effective judicial protection, require the national court hearing the case to declare that it has jurisdiction to hear the action seeking to challenge a return decision amending the initial country of destination, by disapplying, if necessary, any national provision which might prohibit it from doing so.

In the third place, the Court examined the ground of inadmissibility laid down in the Hungarian legislation used to justify the rejection of the applications for asylum. That legislation allows such rejection where the applicant has arrived in Hungary via a country classified as a 'safe transit country' in which he or she is not exposed to persecution or to a risk of serious harm, or in which a sufficient degree of protection is guaranteed. Recalling its recent case-law,[5] the Court stated that such a ground is contrary to Article 33 of the 'Procedures' Directive, before specifying the consequences thereof for the asylum procedure, in so far as the rejection of the asylum applications of the persons concerned, which is based on that unlawful ground, has already been confirmed by a final judicial decision. According to the Court, in such a case, it is apparent from the 'Procedures' Directive, in conjunction, in particular, with Article 18 of the Charter, which guarantees the right to asylum, that the authority which has rejected the asylum applications is not required to review them of its own motion. However, the persons concerned may still lodge a new application, which will be classified as a 'subsequent application' for the purpose of the 'Procedures' Directive. In that regard, although Article 33 of that directive provides that a subsequent application which does not refer to any new elements or findings may be regarded as inadmissible, the existence of a judgment of the Court finding that a ground of inadmissibility provided for in national legislation is contrary to EU law must be regarded as a new element. In addition, more generally, the Court held that the ground of inadmissibility provided for in Article 33 of that directive is not applicable where the asylum authority finds that the definitive rejection of the first application for asylum was contrary to EU law. That is necessarily the case where that conflict arises, as in the present case, from a judgment of the Court of Justice or where it has been found incidentally by a national court.

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[5] Case: C-564/18 Bevándorlási és Menekültügyi Hivatal (Tompa).

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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