Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 2 June 2022 [1]

Case C-241/21

I.L.
v
Politsei- ja Piirivalveamet

(Request for a preliminary ruling from the Riigikohus (Supreme Court, Estonia))

(Reference for a preliminary ruling – Directive 2008/115/EC – Return of illegally staying third-country nationals – Article 15(1) – Detention for the purpose of removal – Grounds – Addition – Real risk that the person concerned will commit a criminal offence, the investigation and punishment of which may substantially impede the execution of the removal process)

I. Introduction

1. This request for a preliminary ruling from the Riigikohus (Supreme Court, Estonia) concerns the interpretation of Article 15(1) of Directive 2008/115/EC. [2]

2. The request has been made in proceedings brought by I.L., a national of the Republic of Moldova, in respect of whom the Politsei- ja Piirivalveamet (Police and Border Guard Board; 'the PPA') issued an order obliging him to leave Estonia, against the decision to have him placed in a detention facility until his removal. He challenges the lawfulness of the grounds provided, namely that there is a real risk that, while at liberty and prior to removal, he will commit a criminal offence, the investigation and punishment of which may substantially impede the execution of the removal process.

3. In this Opinion, I will set out the reasons why I take the view that Member States are not permitted to base the detention of illegally staying third-country nationals on grounds relating to the objective of ensuring the effectiveness of the return procedure provided for in Directive 2008/115, or to justify that detention based on the risk that the procedure will be postponed because the person concerned is likely to commit acts constituting criminal offences.

[1] Original language: French.

[2] Directive 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).

II. Legal framework

A. European Union law

4. Under Article 3(7) of Directive 2008/115, risk of absconding means 'the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond'.

5. Article 15(1), which is included in Chapter IV of that directive, entitled 'Detention for the purpose of removal', provides:

'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.'

B. Estonian law

6. Paragraph 6[8] of the väljasõidukohustuse ja sissesõidukeelu seadus (Law on forced departure and the prohibition on entry),[3] of 21 October 1998, entitled 'Risk of absconding of foreign nationals', is worded as follows:

'The adoption of an order to leave the territory of Estonia or to have a foreign national placed in a detention facility shall require the assessment of the risk of absconding of the person concerned. A foreign national poses a risk of absconding if:

(1) he or she has not left the territory of Estonia or the territory of a Member State of the Schengen area after the expiry of the time limit for voluntary departure set in the order to leave the territory;

(2) he or she has submitted false information or falsified documents when applying for a legal stay in Estonia, applying for an extension thereof, applying for Estonian nationality, applying for international protection or applying for identity documents;

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

(4) he or she has repeatedly committed intentional offences or has committed a criminal offence for which he or she received a custodial sentence;

[3] RT I 1998, 98, 1575; 'the VSS'). The version applicable in the main proceedings is the VSS of 27 June 2020 (RT I, 17.06.2020, 3), in force until 14 July 2021.

(5) he or she has not complied with the supervision measures applied in his or her regard to ensure compliance with the obligation to leave the territory;

(6) he or she has informed the [PPA] or the Kaitsepolitseiamet (Estonian Internal Security Agency) of his or her intention not to comply with the obligation to leave the territory, or the administrative authority concludes from his or her attitude and behaviour that he or she does not wish to comply with the obligation to leave the territory;

(7) he or she has entered Estonia during the period of validity of the entry ban imposed in his or her regard;

(8) he or she has been detained for illegally crossing Estonia's external border and he or she has not been issued a permit or right to stay in Estonia;

(9) he or she has left the designated place of residence or the territory of a Member State of the Schengen area without permission;

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

7. Paragraph 7^2 of the VSS, entitled 'Fixing the time limit to comply with the obligation to leave the territory', provides:

'…

(2) It is possible not to set a time limit for voluntary departure and the obligation to leave the territory may be enforced immediately if:

1) the foreign national presents a risk of absconding;

…

4) the foreign national poses a threat to public order or national security;

…'

8. Under point 2 of Paragraph 7^3 of the VSS, 'the obligation to leave the territory issued in respect of a foreign national shall be enforced by means of his detention and removal from Estonia'.

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

'(1) A foreign national may be detained in accordance with subparagraph 2 if the supervision measures provided for in this law cannot be applied effectively. The detention must observe the principle of proportionality and take into account, in each case, any relevant factors relating to the person concerned.

(2) A foreign national may be detained if the application of the supervision measures provided for in this law does not ensure effective compliance with the obligation to leave the territory and, in particular, if:

(1) there is a risk of absconding;

(2) the foreign national fails to comply with the obligation to cooperate, or

(3) the foreign national is not in possession of the documents required for return or there is a delay in obtaining them from the receiving country or country of transit.

…'

III. The facts of the dispute in the main proceedings and the question referred for a preliminary ruling

10. I.L., a national of the Republic of Moldova, born in 1993 in Russia, was staying in Estonia on the basis of a visa exemption. On 12 October 2020, he was apprehended on suspicion of inflicting physical pain on his cohabiting partner and on another woman and causing harm to their health.

11. By judgment of 13 October 2020, the Harju Maakohus (Court of First Instance, Harju, Estonia) found I.L. guilty of physical abuse in accordance with the Estonian Criminal Code, but he was acquitted of the charge of threatening behaviour alleged by his partner. The final sentence imposed by the judgment of the Court of First Instance on I.L. was imprisonment for one year, one month and 28 days with a probationary period of two years. The court released the person concerned from custody immediately.

12. On the same day, the PPA prematurely terminated I.L.'s visa-exempted stay and re-arrested him on the premises of the Harju Maakohus (Court of First instance, Harju), in accordance with point 1 of Paragraph 15(2) of the VSS.

13. That decision took into account the attitude of I.L. towards the offence committed and his behaviour after the sentencing, on the basis of which there were grounds to believe that he may abscond prior to his removal, despite his undertaking to depart voluntarily and his request for voluntary departure to be ordered.

14. Accordingly, on the same day, the PPA issued an order obliging I.L. to leave Estonia immediately pursuant to points 1 and 4 of Paragraph 7^2 of the VSS, as he was staying there without a legal basis. The order was enforceable.

15. By order of 15 October 2020, granting the request of the PPA, the Tallinna Halduskohus (Administrative Court, Tallinn, Estonia) granted authorisation for I.L. to be placed in a detention facility until his removal, but not beyond 15 December 2020, I.L. was removed from the Republic of Estonia to Moldova on 23 November 2020.

16. That detention order was upheld by order of 2 December 2020 of the Tallinna Ringkonnakohus (Court of Appeal, Tallinn, Estonia), ruling on the appeal brought by I.L. requesting that the order of the Administrative Court be set aside and his release be ordered.

17. The referring court, hearing an appeal against the order of the Court of Appeal, Tallinn by which I.L. requests that that order declaring his placement in a detention facility to be lawful be set aside, considers, in the first place, that the person concerned cannot be placed in a detention facility because of a risk of absconding pursuant to point 1 of Paragraph 15(2) of the VSS. It points out that the criteria to be met for there to be a risk of absconding are exhaustively provided for in Paragraph 6^8 of the VSS and must be examined in the light of the circumstances of each case. The referring court considers that the conditions for applying the criteria set out in points 1 and 4 of that paragraph have not been met in the present case. In that regard, the referring court notes the lack, on the one hand, of a written return decision setting a time limit for the voluntary departure of the person concerned and, on the other, of a final judgment convicting the person concerned at the time the detention order was issued.

18. Moreover, the referring court clarifies that point 6 of Paragraph 6^8 of the VSS is not applicable either, on the ground that it cannot automatically be concluded from the statements made at the hearing in the proceedings for the issuance of a return decision that the person concerned does not intend to comply with the administrative act, if there are no further circumstances pointing to a risk that he will abscond prior to removal. Nor is a risk of absconding apparent, in the present case, from the desire expressed by the person concerned at the hearing before the Administrative Court to recover the belongings that he had left with his cohabiting partner and to receive the remuneration to be paid by his employer.

19. In the second place, the referring court states that it is conceivable that the facts under consideration correspond to the ground referred to in Article 15(1)(b) of Directive 2008/115, the wording of which differs from that of points 2 and 3 of Paragraph 15(2) of the VSS, which transpose Article 15 of that directive, but that, notwithstanding the direct effect of that directive, a person's rights cannot be directly restricted on the basis of a directive.

20. Consequently, the referring court submits that the lawfulness of the detention of I.L. depends on the interpretation of Paragraph 15(2) of the VSS and the expression 'in particular, if' preceding points 1 to 3 setting out the grounds for detention. Considering it to be, on the basis of that wording, a non-exhaustive illustrative list, the referring court takes the view that I.L. could be detained on the basis of the general provision set out in Paragraph 15(2) of the VSS. The detention of the person concerned could thus be justified by the fact that 'effective compliance with the obligation to leave the territory' may be compromised. The lawfulness of that measure must also be assessed in accordance with the principles laid down in Paragraph 15(1) of the VSS.

21. In that regard, the referring court notes that, in view of the temporal proximity between the events and the nature of the offence committed by I.L., there was sufficient reason to believe that he might make another attempt to resolve the conflict that had arisen with his cohabiting partner. Therefore, the referring court considers that there was a real risk that I.L., while at large, would commit a criminal offence before being removed. The delivery of a judgment finding that the person concerned had committed a criminal offence and possible subsequent execution of the sentence are likely to postpone his removal indefinitely and thereby make it considerably more difficult to remove him from the territory. Furthermore, owing to I.L.'s personal and material circumstances, it was not possible to ensure that successful removal could be carried as effectively by means of the supervision measures provided for in Paragraph 10(2) of the VSS.

22. However, in so far as Paragraph 15 of the VSS seeks to transpose Article 15(1) of Directive 2008/115, the referring court has doubts as to its interpretation, on the ground that the Court has not yet ruled on whether one of the grounds listed in that provision must exist or whether

the objective of ensuring effective removal is sufficient to justify detention if there is a real risk that the person concerned will commit a criminal offence which may substantially impede the execution of the removal process.

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

'Is the first sentence of Article 15(1) of [Directive 2008/115] to be interpreted as meaning that Member States may keep in detention a third-country national in respect of whom there is a real risk that, while at liberty and prior to removal, he or she will commit a criminal offence, the investigation and punishment of which may substantially impede the execution of the removal process?'

24. Written observations were submitted by the Estonian and Spanish Governments and by the European Commission. They also presented oral argument at the hearing on 17 March 2022.

IV. Analysis

25. By its question referred for a preliminary ruling, the referring court asks whether Article 15(1) of Directive 2008/115 must be interpreted as meaning that the detention of an illegally staying third-country national may be justified if there is a real risk that the person concerned will commit a criminal offence which may impede the effective execution of the removal process.

26. That question arises from the finding of the referring court that the situation at issue in the main proceedings does not permit the detention of the person concerned to be justified on the basis of the risk of absconding provided for in the VSS.

27. In view of the written observations submitted in that regard by the Estonian [4] and Spanish [5] Governments, I note, first, that it is not for the Court to challenge the assessment of the facts and the interpretation of national legislation by the referring court. [6]

28. Second, the discussion should not concern the application of Article 15(1)(b) of Directive 2008/115 either on the ground the principle of legal certainty precludes directives from being able by themselves to create obligations for individuals. [7] A directive cannot therefore be relied upon per se as against individuals. [8] However, such a finding is without prejudice to the requirement for all authorities of a Member State, in applying national law, to interpret it as far as possible in the light of the wording and purpose of directives in order to achieve the result pursued by those directives, and that those authorities are thus able to rely on a directive-compliant interpretation of national law against individuals. [9]

4 The Estonian Government considers that the referring court's finding that the person concerned presents no risk of absconding is unsubstantiated.

5 The Spanish Government observed that, from its point of view, the ground referred to in Article 15(1)(b) of Directive 2008/115 does authorise detention in the circumstances in question.

6 See judgment of 10 June 2021, *Ultimo Portfolio Investment (Luxembourg)* (C-303/20, EU:C:2021:479, paragraph 25).

7 Conversely, see, with regard to the first sentence of Article 16(1) of that directive, judgment of 10 March 2022, *Landkreis Gifhorn* (C-519/20, EU:C:2022:178, paragraph 100; 'the judgment in *Landkreis Gifhorn*').

8 See judgments of 26 February 1986, *Marshall* (152/84, EU:C:1986:84, paragraph 48), and of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 108).

9 See judgments of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408, paragraphs 42 and 45, and the case-law cited), and of 26 February 2019, *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraphs 114 and 115).

29. For reasons relating to the scope of the first sentence of Article 15(1) of Directive 2008/115 that I am now about to set out, Member States must define precisely the grounds which justify detention, whether or not they are provided for in that directive.

A. Whether or not the grounds for detention provided for in Article 15(1) of Directive 2008/115 are exhaustive

30. I take the view, like all the parties that have submitted observations, that the wording of that provision requires that it be considered that Directive 2008/115 sets out, by way of example, grounds for the detention of an individual who is the subject of a return procedure. Those grounds are the risk of absconding or avoiding or hampering the preparation of return or the removal process. In my opinion it is sufficient to note that the expression 'in particular' precedes the list of grounds for detention set out in Article 15(1)(a) and (b) of that directive [10] and clearly indicates that the list is not exhaustive.

31. The EU legislature's decision is justified by the purpose of Directive 2008/115, which imposes the obligation on Member States to take all necessary measures to ensure the return of illegally staying third-country nationals. [11]

32. That analysis of the scope of Article 15(1) of Directive 2008/115 is consistent with the Court's case-law on the interpretation of the first sentence of Article 8(3) of Directive 2013/33/EU, [12] according to which each of the grounds that may justify the detention of an applicant for international protection, listed exhaustively in that provision, meets a specific need and is self-standing. [13]

33. The same is true of Article 28(1) and (2) of Regulation (EU) No 604/2013, [14] which provides for a single ground for detention, namely the significant risk of the person concerned absconding. [15]

34. Consequently, Member States are free to adopt grounds for detention other than those referred to in Article 15(1) of Directive 2008/115 and to define the criteria for applying them, provided that they meet the objectives pursued by that directive.

[10] With regard to the consistency of other language versions with the Estonian language version, see, in particular, the German, Spanish, Italian, Polish and English language versions that I have been able to verify. See, also, Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks (OJ 2017 L 339, p. 83, in particular p. 140, point 13.1, paragraphs 1 and 2; 'the Return Handbook'), which states that 'these two concrete cases [referred to in Article 15(1)(a) and (b) of Directive 2008/115] cover the main scenarios encountered in practice that justify detention in view of preparing and organising return and carrying out the removal process'.

[11] See judgment of 24 February 2021, *M and Others (Transfer to another Member State)* (C-673/19, EU:C:2021:127, paragraph 28).

[12] Directive 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).

[13] See judgment of 17 December 2020, *Commission v Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:1029, paragraph 168 and the case-law cited).

[14] Regulation 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), also called 'the Dublin III Regulation'.

[15] See judgment of 13 September 2017, *Khir Amayry* (C-60/16, EU:C:2017:675, paragraph 25). The Court noted that Member States may not detain a person in order to secure transfer procedures for the sole reason that that person is subject to the procedure established by that regulation.

35. In that regard, the Court has consistently held that that directive seeks to establish an effective removal and repatriation policy with full respect for the fundamental rights and dignity of the persons concerned. [16]

36. The Court also notes that the provisions of Chapter IV of that directive strictly regulate any detention falling within the scope of that directive, in such a way as to ensure the observance both of the principle of proportionality with regard to the means used and objectives pursued and of the fundamental rights of the third-country nationals concerned. [17]

37. It is in this context that the referring court asks, in essence, whether national legislation which, for the purpose of justifying detention, merely states the objective of ensuring the effective execution of an obligation to leave the territory, without, moreover, providing for specific criteria, is consistent with the first sentence of Article 15(1) of Directive 2008/115.

B. The determination of grounds for detention by each Member State

38. Owing to the lack of precision in Directive 2008/115 regarding the limits within which the Member States may add grounds for detention to those set out in Article 15(1) of that directive, or even amend them, the answer to the question posed by the referring court arises from a teleological interpretation of that provision, which makes it possible to identify the applicable principles and conditions for their implementation.

39. I take the view that several principles should guide the choice made by Member States. First, the requirement, at the beginning of Article 15(1) of Directive 2008/115, to have primary recourse to less coercive measures reflects the intention of the EU legislature, set out in recital 16 thereof, that the use of detention should be strictly limited. [18] In that regard, the Court has held that 'the order in which the stages of the return procedure established by Directive 2008/115 are to take place corresponds to a gradation of the measures to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility; the principle of proportionality must be observed throughout those stages'. [19]

40. Thus, it is only where, in the light of an assessment of each specific situation, the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned that the Member States may deprive that person of his or her liberty and detain him or her [20] and such a decision must be based on objective criteria. [21]

16 See, in particular, judgment in *Landkreis Gifhorn* (paragraph 39), and my Opinion of 3 March 2022 in *Sofiyska rayonna prokuratura and Others (Trial of an accused person removed from the territory)* (C-420/20, EU:C:2022:157, points 80 and 81).

17 See judgment in *Landkreis Gifhorn* (paragraph 40).

18 So far as concerns the principle that detention is a measure to be taken only as a last resort, see the European references recalled in my Opinion in *Landkreis Gifhorn* (C-519/20, EU:C:2021:958, point 34). See, also, annex to Resolution 73/195 adopted by the General Assembly of the United Nations on 19 December 2018, entitled 'Global Compact for Safe, Orderly and Regular Migration', also called the 'Marrakech Compact on Migration', which asks States to 'use migration detention only as a measure of last resort and work towards alternatives' (Objective 13).

19 Judgment of 28 April 2011, *El Dridi* (C-61/11 PPU, EU:C:2011:268, paragraph 41). See, also, judgment of 17 December 2020, *Commission v Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:1029, paragraph 248 and the case-law cited).

20 See judgment in *Landkreis Gifhorn* (paragraph 37 and the case-law cited).

21 See judgment of 2 July 2020, *Stadt Frankfurt am Main* (C-18/19, EU:C:2020:511, paragraph 38).

41. In that regard, the Court has noted that 'when ordered for the purpose of removal, the detention of an illegally staying third-country national is intended only to ensure an effective return procedure and has no punitive objective.[22]

42. Second, the detention decision, constituting a serious interference with the right to liberty, enshrined in Article 6 of the Charter of Fundamental Rights of the European Union,[23] is subject to compliance with strict safeguards, namely the existence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness.[24] Thus, if the execution of a measure depriving a person of liberty is to be in keeping with those conditions, that means, in particular, that there can be no element of bad faith or deception on the part of the authorities.[25]

43. The Court has held, with regard to the risk of absconding, that the objective criteria which must be defined by national law so that the authorities concerned may determine the existence of such a risk, provide the necessary guarantees, in so far as the discretion of those authorities is exercised within a framework of certain predetermined limits. Accordingly, those criteria must be defined by an act which is binding and foreseeable in its application.[26]

44. Third, the Court has held, in the judgment of 30 November 2009, *Kadzoev*,[27] that the possibility of detaining a person on grounds of public order and public safety cannot be based on Directive 2008/115.[28]

45. As noted by the Estonian Government, that interpretation was set out in a particular case concerning the duration of detention in the absence of a reasonable prospect of removal of the person which removes the legal basis for the detention. However, the decision of the Grand Chamber of the Court of Justice to exclude such grounds was formulated in general terms. It is based on the strict limitation of having recourse to the deprivation of individual liberty, in line with other provisions of Directive 2008/115 which provide for grounds based on public policy reasons, unlike Article 15(1) of that directive.[29]

22 Judgment in *Landkreis Gifhorn* (paragraph 38).

23 See judgment in *Landkreis Gifhorn* (paragraph 41).

24 See judgments of 15 March 2017, *Al Chodor* (C-528/15, EU:C:2017:213, paragraphs 38 and 40), and of 17 September 2020, *JZ (Custodial sentence in the case of an entry ban)* (C-806/18, EU:C:2020:724, paragraph 41), the latter being the most recent to cite the judgment of the European Court of Human Rights of 21 October 2013, *Del Río Prada v. Spain* (CE:ECHR:2013:1021JUD 004275009, § 125), to which the Court usually refers. As regards the constant reminder, in the Court's case-law relating to the return procedure for third-country nationals, that detention is strictly regulated in order to ensure observance of the fundamental rights of the third-country nationals concerned, see, in particular, judgments of 28 April 2011, *El Dridi* (C-61/11 PPU, EU:C:2011:268, paragraph 42); of 5 June 2014, *Mahdi* (C-146/14 PPU, EU:C:2014:1320, paragraph 55); of 7 June 2016, *Affum* (C-47/15, EU:C:2016:408, paragraph 62); and of judgment in *Landkreis Gifhorn* (paragraph 40 and the case-law cited).

25 See, in particular, judgment of 15 March 2017, *Al Chodor* (C-528/15, EU:C:2017:213, paragraph 39).

26 See judgment of 15 March 2017, *Al Chodor* (C-528/15, EU:C:2017:213, paragraphs 41 and 42), interpreting the concept of 'risk of absconding' on the basis of the definition set out in Article 2(n) of Regulation No 604/2013, which refers to national law as regards the definition of objective criteria of a risk of absconding. Its wording is, in essence, identical to that of the definition set out in Article 3(7) of Directive 2008/115.

27 C-357/09 PPU, EU:C:2009:741.

28 See paragraph 70 of that judgment.

29 In Directive 2008/115, reference is expressly made to reasons of public policy or national security in Article 6(2), with regard to the return decision, in Article 7(4), relating to conditions for refusal or reduction of a period for voluntary departure (see judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraphs 50 to 52, and paragraphs 60 and 62), and in Article 11(2) and (3), so far as concerns entry bans.

46. I take the view that it can already be inferred from the general binding framework that I have described that Member States may supplement the provisions of Article 15(1) of Directive 2008/115 by providing for other grounds for detention precisely defined by law, which are based on objective, specific, real and current elements. [30]

47. Furthermore, I believe that such evidential requirements may be inferred from the ground for detention set out in Article 15(1)(a) of that directive, namely the risk of absconding, as defined in Article 3(7) of that directive, and that set out in Article 15(1)(b), namely the person concerned 'avoiding' or 'hampering' the preparation of return or the removal process. That wording implies that they are recognised and identified risks. In the absence of tangible evidence, it was not therefore intended to take into account solely the intention of the person concerned.

48. It is not in line with the principle of legal certainty to accept that the detention of an illegally staying third-country national can be decided on the basis of imprecise grounds, not based on objective, pre-established criteria set out in a binding act in respect of which it is possible to foresee how they will be applied.

49. Consequently, I agree with the Commission's analysis that the first sentence of Article 15(2) of the VSS does not constitute a sufficient legal basis to justify detention.

50. That provision is worded as follows: 'A foreign national may be detained if the application of the supervision measures provided for in this law *does not ensure effective compliance with the obligation to leave the territory* and, in particular, if …'. [31] That reference to a failure to ensure the effective execution of the obligation to leave the territory does not therefore amount to a specific ground for detention, such as the risk of absconding or the failure to cooperate on the part of the person concerned, as set out by way of example following that phrase in points 1 and 2 respectively. That reference merely reiterates the essential condition for having recourse to detention measures, which already appears in Article 15(1) of the VSS, namely the ineffectiveness of supervision measures to ensure compliance with the obligation to leave the territory.

51. Furthermore, the existence of a real risk that the person concerned will commit a criminal offence before being removed cannot make up for the vagueness of the general ground for detention.

52. On one hand, such a criterion has no legal basis. To consider that an examination on a case-by-case basis may be sufficient to justify detention on the basis of the objective pursued, as suggested during the hearing by the Spanish Government in support of the arguments put forward by the Estonian Government, cannot be accepted because that would amount to adding a new ground for detention to the first subparagraph of Article 15(1) of Directive 2008/115, which does not meet the requirement of legal certainty. [32]

53. On the other, the concept of '*risk that the person concerned will commit* a criminal offence' before being removed, which justifies the detention, raises serious questions.

[30] See, in that regard, the Return Handbook (p. 92 and 93), which sets out the criteria that may indicate the existence of a risk of absconding and recalls the possibility for Member States to qualify under national legislation certain objective circumstances as constituting a rebuttable presumption.

[31] Emphasis added.

[32] Although detention decisions should be adopted on a case-by-case basis in accordance with the conduct of the person concerned, they should nevertheless be based on objective criteria. See 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 274 and the case-law cited), and judgment in *Landkreis Gifhorn* (paragraph 37).

54. It must, in my opinion, be noted that the order for reference does not concern a criminal offence which has or is alleged to have been committed by the person concerned, but rather an offence which could be. It therefore relates to the likelihood that an offence is committed in the near future.

55. That situation is very different to those on the basis of which the Court has ruled while criminal proceedings are ongoing, either at the investigation stage or at the judgment stage, by setting, moreover, strict requirements [33] and which assume that the offence has already been committed. According to my understanding of the situation at issue, there is also no question of using as a criterion the existence of preparatory acts for the commission of an offence or specific evidence that the person concerned poses a serious threat to the life and limb of others or to specific property. [34]

56. I observe, in the first place, that the objective of the ground adopted by the Estonian authorities is not to prevent the person concerned from evading the removal measure imposed on him, but rather to prevent the removal measure from being delayed or hampered by the criminal proceedings following the commission of the offence. [35] In that situation, the person concerned will remain under the supervision of the relevant authorities. Moreover, it is difficult to imagine – even if not impossible – that the person concerned manifests an intention to commit an offence for the sole purpose of hampering the removal process. It is also for that reason that I consider the suggestion made by the Spanish Government, in its written observations, to refer to Article 15(1)(b) of Directive 2008/115, must be disregarded.

57. In the second place, nothing is more subjective than the *risk* of a breach of a social norm punishable as a criminal offence, to which all individuals are subject, even if a criminal conviction has been handed down or executed. I take the view that the risk of committing an offence, or even repeating it, is guesswork if it is not based on material facts, unlike, for example, the risk of absconding or hampering the removal process. It seems to me that an assessment of the likelihood that the person concerned will commit an offence, as suggested by the Commission in its written submissions, or an assessment based on the seriousness of the offence, according to the view taken by the Spanish Government at the hearing, is not consistent with the requirement of legal certainty and is, moreover, ineffective if it is not based on clear criteria and solid and reliable evidence.

58. Having received the oral observations submitted in response to the Court's questions relating to the identification of criteria, I was able to note the difficulty of outlining general standards. In those circumstances, it is not for the authority responsible for executing the return process to

[33] See judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraphs 50 to 52, and paragraphs 60 and 62), concerning the interpretation of Article 7(4) of Directive 2008/115, relating to conditions for refusal or reduction of a period for voluntary departure, including the existence of a risk to public policy. The Court held that the concept of 'risk to public policy' presupposes '*in addition to the perturbation of the social order which any infringement of the law involves*, a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (paragraph 60). Furthermore, it stated that with regard to the assessment of that threat, *in the case of a third-country national who is suspected, or has been criminally convicted, of an act punishable* as a criminal offence under national law, the nature and the seriousness of that act and the time which has elapsed since it was committed may be relevant matters (paragraph 62). See, also, so far as concerns the existence of such a threat to justify detention for the purpose of removal being carried out in prison accommodation, judgment of 2 July 2020, *Stadt Frankfurt am Main* (C-18/19, EU:C:2020:511, paragraphs 45 and 46).

[34] See, by way of illustration, on the likelihood that the person concerned would commit an attack examined at the stage of the removal order, judgment of 2 July 2020, *Stadt Frankfurt am Main* (C-18/19, EU:C:2020:511, paragraphs 14 and 15).

[35] Such logic could justify detention on other recurring grounds, for example, a risk of suicide or any other foreseeable serious health risk that could lead to the person concerned being hospitalised – in the short or long term – which would automatically delay his removal.

carry out the assessment, at the time of removal, of dangerousness of the individual or whether there is a real risk that the alleged breach will be repeated, but rather the authority responsible for instituting criminal proceedings.

59. In the third place, vigilance is called for in order not to circumvent the exclusion of a justification based on reasons of public order, where, moreover, that assessment is made at the stage of the decision to grant a period for voluntary departure. [36]

60. In this instance, this was the case for I.L. His particular situation also illustrates the possible confusion between elements useful for the detention process and elements useful for criminal proceedings. I.L. was placed in a detention facility on the basis of death threats he made against his cohabitating partner, even though he was not convicted in that regard. In addition, it is not specified whether measures to prevent recidivism were in favour of the victim by the criminal courts.

61. In the light of all the foregoing, I take the view that the interpretation of Article 15(2) of the VSS, as envisaged by the referring court, in so far as it is based on the finding that there is a real risk that a third-country national will commit a criminal offence before being removed, is not in line with Article 15(1) of Directive 2008/115.

62. Having heard the concerns raised by the parties at the hearing, I fully acknowledge the effects, in practice, of such an analysis, based on the requirement to define by law specific criteria, where, failing a decision of the criminal courts providing for or resulting in the return of the third-country national concerned, [37] successive infringements of criminal law could occur. I take the view that Member States should be able to overcome such difficulties by having recourse to both criminal and social supervision.

63. It seems possible to me, on the one hand, that in criminal matters, measures to protect the victim or person threatened could have a dissuasive effect on the perpetrator of the offence, especially in cases of domestic violence for which preventive measures have been implemented in many Member States.

64. On the other, those measures have, in general, the advantage of being combined with different forms of social support, which constitute alternatives to detention. [38] In addition, such an arrangement could guarantee that the removal process is executed under conditions that respect the dignity of the person concerned, [39] where, as in the present case, that person expresses the need for his personal effects and to be paid salary arrears.

[36] See points 44 and 45 of this Opinion. Moreover, that aspect of the question was considered by the Commission in the Return Handbook (p. 140, paragraph 3). It is stated therein that 'it is not the purpose of Article 15 [of Directive 2008/115] to protect society from persons which constitute a threat to public policy or security. The legitimate aim to protect the society should be addressed by other pieces of legislation, in particular criminal law, criminal administrative law and legislation covering the ending of legal stay for public order reasons. … If the past behaviour/conduct of the person concerned allows drawing the conclusion that the person will probably not act in compliance with the law and avoid return, this may justify the decision that there is a risk of absconding'.

[37] I note, in that regard, that pursuant to Article 2(2)(b) of Directive 2008/115, Member States may decide not to apply that directive to third-country nationals who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures. At the hearing of oral argument, the Estonian government did not inform the Court that it had exercised that discretion.

[38] However, the Estonian government has not provided any information in response to the Court's written question in that regard. The referring court merely stated that 'taking into account the circumstances characterising the appellant's person (age, state of health), behaviour and circumstances (connection to Estonia, lack of a place of permanent residence), it was not possible to ensure that successful removal could be carried out as effectively by means of other supervision measures (Paragraph 10(2) of the VSS)'.

[39] With regard to that requirement, see recital 2 of Directive 2008/115 and, in particular, judgment in *Landkreis Gifhorn* (paragraph 39 and the case-law cited).

V. Conclusion

65. In the light of all the foregoing considerations, I propose that the Court should answer the question referred by the Riigikohus (Supreme Court, Estonia) as follows:

Article 15(1) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals must be interpreted as precluding the detention of an illegally staying third-country national from being based on grounds relating to the need to ensure the effectiveness of the return procedure, in the absence of a legal provision that satisfies requirements relating to clarity, predictability, accessibility and, in particular, protection against arbitrariness, providing that the detention is justified by the need to prevent an offence from being committed.