Reports of Cases

ORDER OF THE COURT (First Chamber)

3 June 2021 *

(Reference for a preliminary ruling – Article 99 of the Rules of Procedure of the Court of Justice – Immigration and asylum policy – International protection – Directive 2013/33/EU – Point (d) of the first subparagraph of Article 8(3) – Detention of applicants for international protection – Applicant detained subject to a return procedure under Directive 2008/115/EC and in respect of whom 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 – Objective criteria on which such grounds may be based – Applicant who has already had the opportunity to access the asylum procedure)

In Case C-186/21 PPU,

REQUEST for a preliminary ruling under Article 267 TFEU from the Upravno sodišče (Administrative Court, Slovenia), made by decision of 15 March 2021, received at the Court on 25 March 2021, in the proceedings

J.A.

v

Republika Slovenija,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, L. Bay Larsen, C. Toader, M. Safjan (Rapporteur) and N. Jääskinen, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to rule by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

* Language of the case: Slovenian.

Order

1 This request for a preliminary ruling concerns the interpretation of point (d) of the first subparagraph of Article 8(3) 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).

2 The request has been made in proceedings between J.A. and the Republika Slovenija (Republic of Slovenia) concerning his administrative detention in the context of an application for international protection.

Legal context

EU law

Directive 2008/115/EC

3 Article 1 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98) provides:

‘This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.’

4 Article 6(1) of that directive is worded as follows:

‘Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5.’

5 Under Article 15(1) of that directive:

‘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.’

Directive 2013/33

6 Recitals 15 and 20 of Directive 2013/33 state:

‘(15) The detention of applicants should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection, particularly in accordance with the international legal obligations of the Member States and with Article 31 of the Geneva Convention. Applicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the [principles] of necessity and proportionality with regard to both … the manner and the purpose of such detention. Where an applicant is held in detention he or she should have effective access to the necessary procedural guarantees, such as [a] judicial remedy before a national judicial authority.

…

(20) In order to better ensure the physical and psychological integrity of the applicants, detention should be a measure of last resort and may only be applied after all non-custodial alternative measures to detention have been duly examined. Any alternative measure to detention must respect the fundamental human rights of applicants.’

7 Article 8 of that directive, entitled ‘Detention’, provides:

‘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:

…

(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;

…

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

…’

Slovenian law

8 It follows from the third indent of Article 84(1) of the Zakon o mednarodni zaščiti (Law on international protection) of 4 March 2016 (Uradni list RS, No 16/17; 'the ZMZ-1') that the competent authority may order that an applicant for international protection be placed in compulsory detention at a reception centre for asylum seekers when he or she is subject to administrative detention pursuant to the Zakon o tujcih (Law on foreign nationals) of 16 June 2011 (Uradni list RS, No 1/18) for the purpose of implementing and enforcing a return or removal procedure, and there are reasonable grounds to believe that that applicant is making the application merely in order to delay or frustrate removal although he or she has already had the opportunity to lodge such an application at an earlier stage.

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

9 J.A. is a national of Bosnia and Herzegovina who, on an unspecified date, lodged in Slovenia an application for international protection, which was rejected by a decision of 24 February 2020 that became final on 11 January 2021 and enforceable on 11 February 2021.

10 While the procedure relating to that application was still ongoing, J.A. was sentenced, by judgment of 6 November 2018 of the Okrožno sodišče v Ljubljani (Regional Court, Ljubljana, Slovenia), to a term of imprisonment of one year for threatening behaviour, assault and damage to the property of others. On appeal, the Višje sodišče v Ljubljani (Court of Appeal, Ljubljana, Slovenia), by judgment of 23 May 2019, sentenced J.A. to a term of imprisonment of one year and three months and imposed an ancillary penalty of exclusion from the national territory for a period of three years. J.A. was still serving his custodial sentence in a prison when the decision rejecting his application for international protection became enforceable on 11 February 2021.

11 After completing his custodial sentence, J.A. was handed over to the Slovenian police authorities and informed them that he wished to lodge a new application for international protection. According to the registration form drawn up by those authorities on 27 February 2021, J.A. referred, in that context, to death threats made against him in his country of origin.

12 J.A. was taken to the reception centre for asylum seekers in Ljubljana (Slovenia) and, after lodging a new application for international protection, received oral notification of his administrative detention.

13 On 1 March 2021, the Ministrstvo za notranje zadeve Republike Slovenije (Ministry of the Interior of the Republic of Slovenia; 'the Ministry of the Interior') formally adopted a decision, on the basis of the third indent of Article 84(1) of the ZMZ-1, ordering that J.A. be detained at the Detention Facility for Foreign Nationals in Postojna (Slovenia) from 27 February 2021 until such date as the grounds for detention should cease to exist, although the detention was due to end on 27 May 2021, without prejudice to the possibility of a one-month extension. The reason for that decision was that J.A. was already subject to detention under the Law on foreign nationals on account of the return procedure initiated against him and there were reasonable grounds to believe that the new application for international protection had been made merely in order to delay or frustrate his removal, although J.A. had had the opportunity to make such an application at an earlier stage.

14 In that regard, the Ministry of the Interior considered that J.A. had expressed his intention to submit a new application for international protection only when it became clear that the process for his removal from Slovenian territory was going to be initiated in order to enforce the ancillary penalty of exclusion from the national territory. Indeed, as soon as the decision rejecting his first application for international protection became enforceable, J.A. could have informed the officials at the prison where he was serving his custodial sentence of his intention to make such an application. The Ministry of the Interior thus concluded from this that J.A. had lodged his application merely in order to delay or frustrate the implementation of his removal from Slovenian territory, which is supported by the fact that he did not specify, in support of his new application, any new facts or evidence as compared with those relied on in the context of his first application for international protection.

15 J.A. has brought an action against the decision of the Ministry of the Interior before the Upravno sodišče (Administrative Court, Slovenia). He submits that his detention cannot be based on the third indent of Article 84(1) of the ZMZ-1, since that provision lays down no objective criteria for assessing whether he has expressed his intention to lodge a new application for international protection merely in order to delay the enforcement of his removal from Slovenian territory.

16 On 11 March 2021, the referring court made an interim order, at J.A.'s request, requiring that, pending delivery of a final decision on the merits of the action or, at the latest, until expiry of the time limit referred to in the decision of the Ministry of the Interior, the person concerned be detained at the reception centre for asylum seekers in Ljubljana.

17 While requesting that the Court of Justice apply the urgent preliminary ruling procedure under Article 107 of the Rules of Procedure, the referring court explains that the outcome of J.A.'s action depends on the interpretation of point (d) of the first subparagraph of Article 8(3) of Directive 2013/33, which the third indent of Article 84(1) of the ZMZ-1 transposes into national law.

18 In that regard, the referring court questions whether, in providing that a person in J.A.'s situation must have already had the opportunity to apply for international protection, the third indent of Article 84(1) of the ZMZ-1 lays down an 'objective criterion' for the purposes of point (d) of the first subparagraph of Article 8(3) of Directive 2013/33.

19 In that context, the referring court states that, because the term 'including' is used in point (d) of the first subparagraph of Article 8(3) of Directive 2013/33, it could be argued that the fact 'that he or she already had the opportunity to access the asylum procedure', as referred to in that provision, constitutes an 'objective criterion' for the purposes of that provision, corresponding to the criterion laid down in the third indent of Article 84(1) of the ZMZ-1. In those circumstances, the fact that the Slovenian legislature did not lay down any other objective criteria in the latter provision can have no effect whatsoever in a case where, as here, the national authorities have relied exclusively on the existence of that objective criterion in order to justify the detention decision.

20 If that interpretation is not accepted, the referring court questions whether the national legislature, when transposing Directive 2013/33, should, for reasons of legal predictability and compliance with the principles of non-discrimination and equal treatment, and in the light of recital 15 of that directive, have set out, in a binding, clear and general provision, the objective criteria, in addition to the prior finding that the person concerned has had the opportunity to lodge an application for international protection, on the basis of which the national authorities

may conclude that there are reasonable grounds to believe that the applicant is making the application for international protection merely in order to delay or frustrate [the enforcement of] the return decision. The referring court points out that, on the basis of that approach, the decision of the Ministry of the Interior at issue in the main proceedings should be annulled on the ground that the ZMZ-1 does not specifically define the objective criteria which the national authorities must take into account.

21 In those circumstances the Upravno sodišče (Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must [point (d) of the first subparagraph of Article 8(3) of Directive 2013/33] be construed as meaning that the term “including” expressly includes, among the objective criteria, the fact that “[the person concerned has] already had the opportunity to access the asylum procedure”?

(2) If the answer to that question is in the negative, must [point (d) of the first subparagraph of Article 8(3) of Directive 2013/33] be construed as meaning that, in the circumstances set out above, detention is permissible only on the basis of predetermined objective criteria and of a prior finding that the applicant for international protection has already had the opportunity to lodge an application for international protection, so that it can be concluded that there are reasonable grounds to believe that that application was made merely in order to delay or frustrate the enforcement of a return decision?’

The urgent preliminary ruling procedure

22 The referring court has requested that the present reference for a preliminary ruling be dealt with under the urgent preliminary ruling procedure provided for in Article 107 of the Rules of Procedure of the Court of Justice.

23 In support of that request, the referring court argues that J.A. is in administrative detention and that his continuing detention depends on the outcome of the dispute in the main proceedings.

24 In that regard, it should be stated, in the first place, that the reference for a preliminary ruling concerns the interpretation of Directive 2013/33, which comes under Title V of Part Three of the FEU Treaty, on the area of freedom, security and justice. The reference is therefore capable of being dealt with under the urgent preliminary ruling procedure.

25 As regards, in the second place, the condition relating to urgency, it should be emphasised that that condition is satisfied, in particular, when the person concerned is currently deprived of his or her liberty and when his or her continuing detention depends on the outcome of the dispute in the main proceedings. In that regard, the situation of the person concerned must be assessed as it stood at the time when consideration was given to whether the reference should be dealt with under the urgent procedure (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 99 and the case-law cited).

26 According to settled case-law, the placing of a third-country national in a detention centre, whether in the course of his or her application for international protection or with a view to his or her removal, constitutes a measure that deprives the person concerned of his or her liberty

(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 100 and the case-law cited).

27 In the present case, it is apparent from the order for reference that the applicant in the main proceedings has been deprived of his liberty since his detention was ordered in relation to his application for international protection and that his continuing detention depends on the outcome of the dispute in the main proceedings, inasmuch as the annulment of the decision of the Ministry of the Interior would be likely to put an end to his detention.

28 In the light of those considerations, it is appropriate to grant the referring court's request that the present reference for a preliminary ruling be dealt with under the urgent preliminary ruling procedure.

Consideration of the questions referred

29 Pursuant to Article 99 of its Rules of Procedure, where the reply to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law or where the answer to such a question admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

30 That provision must be applied in the present case.

The first question

31 By its first question, the referring court asks, in essence, whether point (d) of the first subparagraph of Article 8(3) of Directive 2013/33 is to be interpreted as meaning that the fact that an applicant for international protection has already had the opportunity to access the asylum procedure constitutes an objective criterion for the purposes of that provision.

32 In that regard, it should be recalled that, according to Article 8(1) of Directive 2013/33, Member States may not hold a person in detention for the sole reason that he or she has made an application for international protection.

33 In addition, Article 8(2) of that directive provides that detention may be applied only when it proves necessary, on the basis of an individual assessment of each case and if other less coercive alternative measures cannot be applied effectively. It follows that the national authorities may not place an applicant for international protection in detention without having previously determined, on a case-by-case basis, whether such detention is proportionate to the aims which it pursues, that determination requiring them to ensure, in particular, that detention is used only as a last resort (see, to that effect, judgments of 17 December 2020, *Commission* v *Hungary (Reception of applicants for international protection)*, C-808/18, EU:C:2020:1029, paragraph 175 and the case-law cited, and 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 258 and the case-law cited).

34 Moreover, it follows from the Court's settled case-law that the first subparagraph of Article 8(3) of Directive 2013/33 lists exhaustively the various grounds that may justify detention and that each of those grounds meets a specific need and is self-standing (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).

35 As regards, more specifically, the ground for detention referred to in point (d) of the first subparagraph of Article 8(3) of Directive 2013/33, that provision states that an applicant for international protection may be detained on the basis of that directive when he or she is already detained subject to a return procedure under Directive 2008/115, in order to prepare his or her 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.

36 The ground for detention referred to in point (d) of the first subparagraph of Article 8(3) of Directive 2013/33 is thus subject to two separate cumulative conditions. It is necessary, first, that the applicant for international protection is already subject to detention for the purposes of removal under Chapter IV of Directive 2008/115 and, secondly, that there are reasonable grounds, based on objective criteria, to believe that the applicant is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision.

37 As regards the objective criteria on which the competent authorities of the Member States must base their reasonable grounds under point (d) of the first subparagraph of Article 8(3) of Directive 2013/33, it should be noted that that provision, although it does not define the concept of 'objective criteria', provides an example of a criterion which may be relied on by those authorities, namely the fact that the applicant for international protection has already had the opportunity to access the asylum procedure.

38 The use in that provision of the term 'including', which in ordinary usage is synonymous with 'such as', 'for example', 'inter alia', 'in particular' or 'like', indicates unambiguously that the EU legislature wished to provide an example of an objective criterion on which the competent national authorities may rely to substantiate that there are reasonable grounds to believe that the applicant is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision.

39 Therefore, the fact that the applicant for international protection has already had the opportunity to access the asylum procedure must be regarded as one of the objective criteria on which the competent national authorities may rely to substantiate that there are reasonable grounds to believe that the person concerned is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision.

40 Having regard to all the foregoing considerations, the answer to the first question is that point (d) of the first subparagraph of Article 8(3) of Directive 2013/33 must be interpreted as meaning that the fact that an applicant for international protection has already had the opportunity to access the asylum procedure constitutes an objective criterion for the purposes of that provision.

The second question

41 Since the second question was raised in the event of the first question being answered in the negative, there is no need to answer it.

Costs

42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

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

Point (d) of the first subparagraph of Article 8(3) 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 must be interpreted as meaning that the fact that an applicant for international protection has already had the opportunity to access the asylum procedure constitutes an objective criterion for the purposes of that provision.

[Signatures]