

Analysis



Giulia Raimondo

“Against Arbitrariness: Defining the Grounds for Detention of Irregular Migrants (*I.L. v Politsei- ja Piirivalveamet*, C-241/21)”

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Introduction

On 6 October 2022, the Court of Justice delivered its preliminary ruling originating from a request made by the Estonian Supreme Court. The case before it concerned a third-country national who was ordered to leave the territory of Estonia and had been detained for those purposes ([C-241/21](#)). The ruling addresses critical issues regarding the reasons for and lawfulness of detaining irregular migrants in return procedures.

Decision to withdraw residence permit and detain third-country national

The applicant, a Moldovan national residing in Estonia, was sentenced to one year, one month and 28 days in prison for committing a criminal offence against his partner. The District Court hearing the case decided to release him, but then the immigration administrative authority withdrew his residence permit in the country and ordered his detention based on a risk of absconding. The applicant appealed against this

decision to the Supreme Court. The latter ruled that his detention could not be justified based on any of the grounds listed in the domestic law transposing the Return Directive [2008/115](#), namely a risk of absconding, a failure to cooperate or the absence of the necessary documents for the journey. However, the Supreme Court did find there was a risk that the applicant would commit another criminal offence, which if successfully prosecuted would result in the indefinite postponement of his removal. Ultimately, the risk of a repeated criminal offence would hamper the effective enforcement of the return procedure.

The referring court thus asked the Court of Justice whether the list of grounds for detention enumerated in national law should be interpreted as exhaustive, or as illustrating a general need to ensure the effective enforcement of return procedures. In other words, is Article 15 of the Return Directive to be teleologically interpreted in light of the ultimate objective of implementing an effective return and repatriation policy?

Despite the non-exhaustive nature of Article 15, the Court of Justice clarified that the Member States are forbidden from detaining irregular migrants based on a general criterion concerning the risk of compromising the effective execution of the removal. Any deprivation of liberty should comply with strict safeguards, namely the presence of a clear legal basis, accessibility and protection against arbitrariness.

Analysis

The present case constitutes yet another example of the blurred lines concerning return and criminal proceedings to which irregular migrants are subject. In this respect, the Court of Justice reiterated that detention for removal purposes is intended only to ensure the effectiveness of the return procedure and does not have any punitive purpose ([C-241/21](#), para 32; see also [C-519/20](#) para 38).

Member States are allowed to detain third-country nationals subject to return procedures unless ‘other sufficient but less coercive measures can be applied effectively in a specific case’ (Article 15(1), Return Directive). Detention may only be resorted to if it appears, after an individual assessment, that ‘the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned’ ([C-61/11 PPU](#), para 39). In addition, promoting voluntary departure is one of the central principles of the Return Directive. Yet the Court of Justice does not mention it in the case at hand.

The general objective of effective enforcement of removals does not imply an unfettered state discretion regarding the grounds for detention.

Under Article 15 of the Return Directive, detention is possible if there is a risk of absconding or if the third-country national concerned avoids or hampers the return process.

Following the [Advocate General’s Opinion](#), the Court of Justice maintained that the list of permissible detention grounds established in Article 15 of the Return Directive is not exhaustive. Member States can adopt other grounds for detention in addition to the two explicitly set out in that provision ([C-241/21](#), para 36). However, where the Member States provide additional grounds for detention, they must comply with the Return Directive, the EU Charter of Fundamental Rights and the European Convention on Human Rights.

The detention of third-country nationals for return purposes constitutes a serious interference with those individuals’ right to liberty. As such, it must comply with strict safeguards, namely the existence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness ([C-241/21](#), para 50; [C-528/15](#), para 40).

A teleological interpretation of the Return Directive should focus on the principles of proportionality and legal certainty rather than on the effectiveness of the return procedure. Accordingly, the detention of third-country nationals in an irregular situation is subordinated to the lack of less coercive measures. Where a decision to detain is taken, it should be based on precise and objective grounds, established and clearly defined in a binding legal provision, which must be predictable in its application.

Implications

The non-exhaustive character of the grounds for detention included in Article 15 of the Return Directive contrasts with the aim of promoting voluntary return and might hamper further harmonisation. Nevertheless, this preliminary ruling reinforces the protection of irregular migrants against arbitrary detention as it requires all Member States to define clear, foreseeable, and accessible grounds for detention in return procedures, in line with [EU](#) and [international human rights law](#). This seems even more crucial in light of the current proposed [recast Return Directive](#), which extends the grounds for detention of irregular migrants in return procedures and shortens the term for voluntary departure.

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