**The legality of the detention of third-country nationals in order to ensure the passing back to the Member State where they enjoy international protection**

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# 1 Introduction

This expert opinion was written at the request of lawyers H. Postma and J.P van Mulken, who represent two of the three applicants in case C-673/19. The expert opinion concerns the legality of the detention of third-country nationals in one Member State in order to secure their passing back to another Member State in which they enjoy international protection. It has been formulated in light of a question for a preliminary ruling submitted by the Dutch Administrative Jurisdiction Division of the Council of State of the Netherlands (hereinafter: Council of State) to the Court of Justice of the European Union (hereinafter: CJEU).[1] The referring question of the Council of State, the highest administrative court of the Netherlands, principally asks for clarification regarding the application of the Return Directive to the detention in cases of third-country nationals, who enjoy international protection in another Member State.[2]

## 1.1 Facts of the Case

The case concerns the detention of three third-country nationals (applicant M, applicant A and applicant T), who have received refugee status in respectively Bulgaria, Spain and Germany.[3] They all have subsequently applied for international protection in the Netherlands. Their applications have been declared inadmissible on the ground that another Member State had granted international protection (Article 33(2)(a) of the Procedures Directive[4]). The Dutch authorities have ordered the three applicants to go back to the Member State where they had received international protection. None of the applicants complied with this order. The Secretary of State placed the applicants in detention in order to pass the applicants back to Bulgaria, Spain and Germany.

All three applicants appealed the detention decision before the District Court. They argued that there was no legal basis for their detention because the Secretary of State had failed to take a return decision. In the cases of *M.*[5] and *A.*[6], the District Court dismissed this argument and declared the appeal unfounded. In the case of *T.*, the District Court ruled that it is unclear whether national law provides a legal basis for the detention.[7] The detention of applicant *T.* was held unlawful and compensation was consequently granted.

The Secretary of State and applicants *M.* and *A.* appealed the District Court's judgment before the Council of State. The Council of State decided to refer the following question to the CJEU:

> Does 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), in particular Articles 3, 4, 6 and 15 thereof, preclude a foreign national who enjoys international protection in another EU Member State from

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[1] Council of State 4 September 2019, ECLI:NL:RVS:2019:3053.

[2] 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 [2008] OJ L 348/98 (Return Directive).

[3] Council of State 4 September 2019, ECLI:NL:RVS:2019:3053, para 1.

[4] 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 [2013] OJ L 180 (Procedures Directive).

[5] District Court Rotterdam 17 October 2018, NL18.18150.

[6] District Court Groningen 7 December 2018, NL18.22539.

[7] District Court Zwolle 18 December 2018, NL18.20591.

being detained under national law, given that the purpose of the detention is removal to that other Member State and, for that reason, an instruction to depart to the territory of that Member State had initially been issued but no return decision was subsequently taken?

## 1.2 Proposed directions by the Council of State

The Council of State argues that there are two possible interpretations of the Return Directive. The Council of State first elaborates upon the possibility that the Return Directive is not applicable at all in this situation. In the view of the Council of State, this would mean that the procedure of passing back illegally staying third-country nationals to their Member State of residence, including the use of detention, falls wholly within the competence of the Member States.[8]

The second option envisaged by the Council of State is that the Return Directive does apply in this situation. National legislation can also be applied in these cases, but only if it is more favourable for third-country nationals. Moreover, the national legislation should be compatible with the Return Directive.[9]

## 1.3 Return, removal and passing back

In this expert opinion, we distinguish the notions of 'return', 'removal' and 'passing back'. 'Return', as clarified by Article 3(3) of the Return Directive, must be taken to mean return to either the applicant's country of origin, a country of transit or another third country. Under Article 3(5) of the Return Directive, 'removal' means the enforcement of the obligation to return. In the situation at hand in this case, the applicants were ordered to go back to another Member State, where they enjoyed international protection. Returning the applicants to their respective countries of origin would be in breach of the principle of *non-refoulement*.[10] They were thus not ordered to 'return' or subjected to 'removal'. For this reason, this expert opinion uses the term 'passing back' in order to describe the enforcement of the order to go back to the Member State where the applicants enjoyed international protection, in accordance with the European Commission's (Commission) recommendation.[11]

## 1.4 Outline of the expert opinion

This expert opinion will first briefly set out the national legal framework in section 2. Section 3 will argue that illegally staying third-country nationals, who are detained to secure their passing back to the Member State where they enjoy international protection, fall within the personal scope of the Return Directive. Member States detaining them in order to pass them back to the Member State where they enjoy international protection, therefore act within the scope of EU law. However, the Return Directive does not provide standards for the detention of third-country nationals in this particular case. Therefore, it leaves Member States scope to provide a legal basis for the detention of third-country nationals in this particular case in national legislation. As Member States act within the

[8] ABRvS 4 September 2019, ECLI:NL:RVS:2019:3053, para 5.17.
[9] Ibid, para 5.17.
[10] Arts 5 and 9(1)(a) Return Directive explicitly mention the respect for this principle in removal cases.
[11] European Commission, 'Annex to the Commission Recommendation establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks' COM (2017) 6505, p 90.

scope of EU law by detaining these persons in order to enforce their departure, national law should be in conformity with the fundamental rights set out in the Charter of Fundamental Rights of the European Union (hereinafter: The Charter).

Section 4 will examine the requirements that the Charter sets for the lawful detention of third-country nationals in order to ensure the passing back to the Member State where they enjoy international protection. The right to liberty guaranteed by Article 6 of the Charter is particularly relevant, and we will flesh out the way in which the Charter permits limitations to this right. We also argue that the interpretation of the right to liberty in this context should be informed by the standards that the European legislator has set for lawful detention of third-country nationals in the Return Directive, the Reception Conditions Directive[12] and the Dublin Regulation. Section 5 will draw conclusions and propose an answer to the preliminary question.

[12] 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 (recast) OJ L 180/96.

# 2 Dutch Legal Framework

This section will discuss the relevant provision of Dutch law regarding return, removal, passing back and detention.

## 2.1 Return, removal and passing back

Article 62a (1) Aliens Act 2000 requires the Secretary of State to inform third-country nationals, who do not or no longer have lawful residence, of the obligation to leave the Netherlands voluntarily. He also has to notify them of the period, within which they must comply with the obligation to leave. This rule does not apply, if the third-country national holds a valid residence permit or other authorisation to stay, issued by another Member State. According to Article 62a(3) Aliens Act 2000, the third-country national shall then be instructed to go immediately to the territory of the Member State concerned. This article also provides that a return decision shall be issued against such third-country national, if he does not comply with this order or if his immediate departure is required on grounds of public policy or national security.

Article 63(1) Aliens Act 2000 lays down the conditions for removal. Foreign nationals, who do not have lawful residence and who have not left the Netherlands voluntarily within the period for voluntary return, may be removed.

Implementing guidelines for the legislation can be found in Paragraph A3/2 of the Aliens Act implementation guidelines 2000 (*Vreemdelingencirculaire 2000*). Until 1 January 2019, these guidelines provided that the official in charge of border control or the supervision of foreign nationals will not issue a return decision, if such issuing conflicts with international obligations (prohibition of *refoulement*).[13] Therefore, a return decision was not taken with regard to *M., A.* and *T.* Currently, the implementing guidelines read differently: if the very character of the residence rights granted in another Member State entails that effecting the return decision would violate *non-refoulement*, the return decision itself will mention that it will not be effected, or that it will not be effected with regard to one or more specific countries.

## 2.2 Detention

In Dutch law the standards for the detention of foreign nationals with a view to their deportation are laid down in Articles 59 and further of the Aliens Act 2000. Article 59(1) of the Aliens Act 2000 provides that a foreign national can be detained 'with a view to removal', if this is required in the interest of public order or national security'. This provision applies to foreign nationals who are staying illegally on Dutch territory (and to those who have legal stay during a pending procedure for residence rights). Public interest and national security in the sense of this provision require detention if there is a risk of absconding, or if the third-country national avoids or hampers the preparation of return or the removal process, according to Article 5.1a para 1 Aliens Decree. Article 5.1b para 1 Aliens Decree contains criteria for believing that a risk of absconding exists or that the third-country national avoids or hampers the return or removal. These legal provisions are an implementation of Article 15 Return Directive.

[13] See for the old text: http://cmr.jur.ru.nl/CMR/Vc/Vc2013/DeelA/A3/2/ <accessed 16 December 2019>.

Article 59(2) of the Aliens Act 2000 stipulates that if the documents necessary for the 'return' of the foreign national are available, or will be available within a short period of time, the interest of public order will be presumed to demand the detention of the foreign national. This is only different, if the foreign national enjoyed previous lawful residence because he had a residence permit. Article 59(2) thus applies a presumption or a legal fiction: a ground for detention exists as soon as the necessary documents for return are available. As such, this provision does not align with the grounds for detention as provided by Article 15 of the Return Directive. It is currently only used with regard to securing the passing over of third-country nationals that are staying illegally in the Netherlands but enjoy international protection in another Member State. The provision dates from before the entry into force of the Return Directive.[14] For the application of this provision, it is not necessary that there are indications for a risk of absconding. The legal fiction that it employs has been justified by the Dutch legislator by referring to the need that exists in practice to detain foreign nationals, if the necessary documents for their removal are available.[15]

Foreign nationals can appeal the decision to detain them before the district court. If the appeal is well-founded, the court orders the release. Article 106 Aliens Act 2000 states that the court may grant the foreign national compensation, if it rules that the appeal is well-founded and has ordered the release.

[14] The lawyers in the cases at issue mentioned that the representative of the Secretary of State at the hearing of the Council of State on 18 February 2019 stated that Article 59(2) Aliens Act 2000 is about to be removed, since it does not comply with the Return Directive, in particular not with Article 15 of the Return Directive. According to the State Secretary an assumption as stipulated in Article 59(2) Aliens Act 2000 does comply with the grounds set out in Article 15 of the Return Directive.

[15] *Kamerstukken II* 1998/99 26732, nr 3 p 60.

# 3 Scope of Directive 2008/115/EC

This section will address the question whether the detention of third country-nationals in order to ensure their being passed back to the Member State where they enjoy international protection, is covered by the Return Directive. If the Return Directive contains no specific provisions allowing for detention in these cases, it should be examined whether Member States have retained their competence to provide standards concerning this type of detention in national legislation, and to what extent EU law applies and sets standards to these national rules and their application.
In order to answer these questions, we will first address the material scope of the Return Directive and its delimitation with EU asylum law, setting out that the Return Directive does not provide a basis for detention in the case of *M., A.* and *T*. (section 3.1). We then turn to the personal scope of the Return Directive in order to argue that Member States nonetheless clearly act within the scope of EU law when applying national legislation to this group of third-country nationals (section 3.2). This entails that their detention needs to be in conformity with the requirements of the Charter (section 3.3.).

## 3.1 Illegal stay and non-refoulement

The objective of the Return Directive is to lay down minimum common standards regarding the procedure of return, removal and repatriation of third-country nationals 'in a humane manner and with full respect for their fundamental rights and dignity'.[16] The aim of the Directive is to end illegal stay.[17] Moreover, its provisions are to be interpreted, as stated in recital 2 thereto, with full respect for the fundamental rights and dignity of the persons concerned. Article 6(1) of the Return Directive obliges the Member State to issue a return decision once the third-country national's illegal stay has been established. Return in the sense of the Return Directive means departure to: a country of origin, or a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted. According to Article 8 of the Return Directive, Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted or if the obligation to return has not been complied with within the period for voluntary departure.

With regard to the delimitation of the asylum acquis and the Return Directive, the CJEU has ruled that the Return Directive provisions do not apply to an applicant for international protection until the application is rejected in first instance.[18] Once the request for international protection has been rejected, the stay can no longer be considered legal. Hence, an asylum seeker falls under the scope of the Return Directive 'as soon as his application for international protection is rejected at first instance by the determining authority, irrespective of the existence of an authorisation to remain pending the outcome of an appeal against that rejection'.[19] A return decision may be adopted against such a third-country national, either after rejection of the asylum application, or together with it in a single

[16] Recital 2 and 9 Preamble Return Directive.
[17] See CJEU Case C-290/14 *Celaj* [2015] Opinion of AG Szpunar, para 57.
[18] CJEU Case C-534/11 *Arslan* [2013], para 49.
[19] CJEU Case C-181/16 *Gnandi* [2018] paras 46 and 47.

administrative act.[20] Importantly however, a return decision *cannot be enforced*, if that would entail removal to a State where there is a serious risk that the third-country national would be subjected to inhuman or degrading treatment.[21] From *Gnandi* it can be inferred that as long as there exists such a risk of refoulement all the legal effects of the return decision should be suspended, which means that the period for voluntary departure cannot begin to run, and that detention on the basis of the Return Directive cannot be applied.[22] In the present case, parties agree that return would violate *non-refoulement*, and Article 15 of the Return Directive can thus not provide a basis for the detention of *M., A.* and *T.* Moreover, after the rejection of the asylum applications had become final, detention on the basis of the Reception Conditions Directive is also not possible. Hence, EU law does not provide a basis for detention in the cases of *M., A.* and *T*.

Article 6(2) of the Return Directive offers only a partial solution to this situation. It provides that third-country nationals staying illegally on the territory of a Member State and holding a valid residence permit or other authorisation offering a right to stay issued by another Member State, shall be required to go to the territory of that other Member State immediately. If they fail to do this, the Member State must issue a return decision. However, as set out above, enforcement of the return decision in this case would violate the prohibition of *refoulement*. The EU legislator has accordingly not provided explicit legislation for this particular situation. We will now turn to the question what this means for the exercise of national competences.

### 3.2 Personal Scope of the Return Directive

The Council of State seems to allow for only two possibilities in cases such as those of *M., A.* and *T*. It suggests that either the Return Directive applies to cases such as theirs, in which case it asks the CJEU to clarify whether this instrument precludes detention in the absence of a return decision, *or* that it does not apply. In the first scenario, the Council of State wants to know whether their detention is reconcilable with the Return Directive, possibly as a more favourable provision of national law in the sense of Article 4(2) of the Directive. In the second scenario, it suggests that Member States enjoy exclusive competence to regulate the passing back and detention of illegally staying third-country nationals, who enjoy international protection in another Member State. We propose a third solution, arguing that while the Return Directive does not provide a specific procedure for cases such as those at hand, this does not mean that Member States are not bound by EU law. Persons staying illegally on the territory of a Member State who enjoy international protection in another Member State are covered by the personal scope of the Return Directive. Hence, Member States' legislation with regard to these persons falls within the scope of EU law.

[20] There seems to be no *obligation* to adopt a return decision, as is usually the case for illegally staying third country nationals, in view of the possibility to grant an authorisation to stay in Article 6(4) RD. See CJEU Case C-38/14 *Zaizoune* [2015]. It could be argued that the term 'may' could also be read to refer to the discretionary power of the Member States to choose the type of administrative return procedure: separate decisions or combined; and not to the obligation to issue a return decision as such.

[21] CJEU Case C-562/13 *Abdida* [2014].

[22] Thus, the asylum seeker is not under an obligation to leave the territory of the Member States, which was one of reasons AG Mengozzi argued *against* including this group under the scope of the Return Directive. See CJEU Case C-181/16 *Gnandi* [2018], Additional opinion AG Mengozzi.

Article 2(1) of the Return Directive states that the Directive covers all 'third-country nationals staying illegally on the territory of a Member State'.[23] The term 'third-country national' refers to 'any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty and who is not a person enjoying the Community right of free movement, as defined in Article 2(5) of the Schengen Borders Code'.[24] It follows from Article 3(1) of the Return Directive that the term 'illegal stay' refers to the continued presence of a third-country national who either does not or no longer fulfils the conditions of entry.[25] Such conditions of entry are set out in Article 5 of the Schengen Borders Code[26] or in national legislation. Exceptions to the personal scope of the Return Directive are provided in Article 2(2) and are exhaustive. This is also apparent from the CJEU's judgment in *Affum*, where it considered:

> Since third-country nationals who, like Ms Affum, have entered the territory of a Member State illegally and who, on that basis, are regarded as staying there illegally therefore fall, under Article 2(1) of Directive 2008/115, and without prejudice to Article 2(2), within the directive's scope, they must be subject to the common standards and procedures laid down by the directive for the purpose of their removal, as long as their stay has not, as the case may be, been regularised.'[27]

More specifically, the CJEU clarifies in *Affum* that applicants falling under the application of Article 6(3) Return Directive (i.e. those whose transferal to another Member State is done under a bilateral agreement) cannot be considered exempt from the scope of the Return Directive:

> Article 6(3) of Directive 2008/115 cannot be interpreted as laying down an exception to the directive's scope, which would be additional to those set out in Article 2(2) and would enable the Member States to exclude illegally staying third-country nationals from the common return standards and procedures when they are taken back, pursuant to an agreement or arrangement existing on the date of the directive's entry into force, by a Member State other than the one in which they have been apprehended.[28]

Effectively, this means that the bilateral agreement made between the Member States cannot *displace* the safeguards and common standards dispersed throughout the Return Directive.[29] The specific procedure of 'passing back' may be governed by an external piece of legislation, but Member States clearly act within the scope of EU law seeing that these third-country nationals are covered by

[23] Under Art 2(2) Return Directive, the Member State has the option to exclude two specific categories of people from the scope of the Directive. These are, respectfully, those subject to a refusal ban in accordance with Article 13 of the Schengen Borders Code and those subject to return as a criminal law sanction. Neither of these situations are applicable to our case. The exclusion contained in Art 2(3) Return Directive is likewise inapplicable in our case, since it concerns persons enjoying the Community Right of free movement, defined in Art 2(5) of the Schengen Borders Code as Union citizens or third-country nationals, by virtue of an international agreement, enjoying the equivalent rights of free movement. See Section 2.2 for more detail.
[24] Art 3(1) Return Directive.
[25] See also Recital 5 Return Directive.
[26] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders OJ L 77 (Schengen Borders Code).
[27] This phrase has been underlined at the discretion of the authors of this paper.
[28] CJEU Case C-47/15 *Affum* [2016] para 82.
[29] Ibid, para 87.

the personal scope of the Return Directive. Arguably, the same consideration shall apply to the situation mentioned in Article 6(2) Return Directive, at issue in the case at hand. The fact that a Member State may refrain from issuing a return decision to a third-country national, because he enjoys international protection in another Member State, does not mean that measures taken in order to ensure the passing back of this third country-national to this Member State do not fall within the scope of EU law. This reading is also in line with the CJEU's judgment in *Achughbabian*. In this case the CJEU clarified the notion that an area of law falling within the competence of the Member States (in that case the rules of criminal procedure) 'may nonetheless be affected by EU law'.[30] Specifically, Member States 'must adjust their legislation in that area in order to ensure compliance with EU law'.[31]

It should thus be concluded that a third-country national staying illegally in one Member State, who enjoys international protection in another Member State is covered by the personal scope of the Return Directive. Accordingly, measures taken by the first Member State to enforce their departure to the Member State where they enjoy international protection fall within the scope of EU law.

This conclusion is moreover bolstered by the fact that it is precisely European harmonisation in the area of asylum law that has resulted in the inadmissibility of the applications for asylum by *M., A.* and *T*., and thus in their illegal stay in the Netherlands. It would be paradoxical if it was argued that a Member State, which decides to not examine an application for asylum because international protection has been granted by another Member State *on the basis of EU asylum law*, and subsequently enforces the decision to depart to that other Member State, does *not* act within the scope of EU law. This is even more so, because the obligation to respect *non-refoulement* is not only found in EU asylum law but also codified in the Return Directive.

### 3.3 Legality of detention measures based on national law

We have seen above that the Return Directive does not provide a legal basis for the detention of third-country nationals in order to pass them back to another Member State, let alone that it provides common standards for such detention. The question thus arises whether a Member State is allowed to detain third-country nationals in order to pass them back. The Council of State made clear in its judgment that it would consider it undesirable if the Return Directive precludes any form of forced passing back to another Member State.[32]

It may be derived from the CJEU's judgment in *Achughbabian* that Member States are allowed to apply detention measures to enforce the passing back to another Member State. In its preliminary reference the Council of State refers to paragraph 28 of *Achughbabian*, where the CJEU reiterated that the Return Directive is 'not designed to harmonise in their entirety the national rules on the stay of foreign nationals.'[33] Moreover, the CJEU considered:

> Since the common standards and procedures established by Directive 2008/115 concern only the adoption of return decisions and the implementation of those decisions, it should also be pointed out that that directive does not preclude a third-country national being placed in detention with a view to determining whether or not his stay is lawful.[34]

[30] Ibid, para 33.
[31] Ibid, para 33.
[32] See ABRvS 4 September 2019, ECLI:NL:RVS:2019:3053 para 5.6.
[33] CJEU Case C-329/11 *Achughbabian* [2012].
[34] Ibid., para 29.

The Council of State derives from this consideration that the Directive allows for national rules concerning situations which are not covered by the Directive. In *Achughbabian,* the CJEU mentions instances where national law may provide for the detention of third-country nationals. These include 'detention with a view to determining whether or not the stay is lawful'[35] and 'imprisonment of a third-country national to whom the return procedure established by the said directive has been applied and who is staying illegally in that territory with no justified ground for non-return'[36]. This indicates that the Directive also allows for a detention measure to ensure the passing back of a third-country national to another Member State. Such detention measure may be necessary in order to enforce the passing back to another Member State in the meaning of Article 6(2) of the Return Directive, in the situation where the enforcement of 'return' in the sense of the Return Directive is not possible.

### 3.4 Limits to national acts that fall within the scope of EU law: The Charter

Even though the Return Directive does not provide common standards for the detention of third-country nationals with a view to ensure their passing back to the Member State where they enjoy international protection, the sending Member State is bound by EU Law. As we have argued above, the procedures applied to third-country nationals in this situation fall within the scope of EU law. This includes their detention, which in the Netherlands is based upon Article 59(2) Aliens Act 2000.[37] According to the Secretary of State, Article 59(2) Aliens Act 2000 is specifically and exclusively used for the detention of third-country nationals in this situation. Hence, if the Secretary of State detains third-country nationals on the basis of Article 59(2) Aliens Act 2000, he is implementing EU law in the sense of Article 51(1) Charter. National rules concerning such detention may not violate fundamental rights laid down in the Charter.

The Charter stipulates in Article 51(1) that whenever Member States are implementing EU law, the Charter becomes applicable. In *Åkerberg Fransson,* the CJEU equalised implementation of EU law to 'falling within the scope of EU law'.[38] If the Member States act within the scope of EU law (i.e. by enacting national legislation falling within the scope of EU law), the CJEU must 'provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights, the observance of which the Court ensures.'[39]

This expert opinion concluded in section 3.2 that measures to enforce the passing back of a third-country national to another Member State fall within the scope of EU law. This means that the Charter applies to such measures. The fact that a Member State has discretion to make use of such measures,[40] or that national legislation did not intend to implement EU law[41] is irrelevant, as long as

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[35] Ibid.

[36] Ibid., para 50. See also CJEU Case C-290/14 *Celaj* [2015] for an example of a case concerning precisely this situation.

[37] CJEU Case C-329/11 *Achughbabian* [2012] para 31.

[38] CJEU Case C-617/10 *Åklagaren v Åkerberg Fransson* [2013] para 20. See also CJEU Case C-198/13 *Julian Hernández and Others* [2014] para 37.

[39] CJEU Case C-617/10 *Åklagaren v Åkerberg Fransson* [2013] para 19.

[40] CJEU Case C-384/05 *Piek v. Ministerie van Landbouw, Natuurbeheer en Visserij* [2007] para 32.

[41] CJEU Case C-555/07 *Kücükdeveci v Swedex GmbH & Co. KG*, [2014] para 25, CJEU, C-218/15, *Paoletti and Others v. Procura della Repubblica*, [2016] para 18. See also: European Union Agency for Fundamental Rights,

the particular national legislation falls within the 'material, personal and temporal scope of Union legal acts.'[42]

More favourable national provisions may be qualified as *not* being an implementation of Union law.[43] However, the detention with a view to the passing back of third-country nationals to the Member State where they enjoy international protection, does not concern a 'more favourable national provision. The Return Directive simply does not provide for a specific procedure with regard to this category, but instead merely prohibits the enforcement of return. Finally, national acts aimed 'to guarantee the application and effectiveness of EU law' should be recognized as an implementation of EU law. These measures are used for 'sanctioning, remedies and enforcement'.[44] As was already mentioned in section 3.3, the detention measure concerned in the cases at hand follows from the application of the EU asylum acquis and the Return Directive.

*Handbook on Applying the Charter of Fundamental Rights of the European Union in Law and Policymaking at National Level,* Publications Office of the European Union, Luxembourg (2018) p 59.

[42] CJEU C-555/07 *Kücükdeveci v Swedex GmbH & Co. KG*, [2014] para 25. See also: European Union Agency for Fundamental Rights, *Handbook on Applying the Charter of Fundamental Rights of the European Union in Law and Policymaking at National Level,* Publications Office of the European Union, Luxembourg (2018) p 59.

[43] Ibid., p 51.

[44] Ibid., p 64.

### 3.5 Conclusion

It should thus be concluded that detention measures with a view to the passing back of third-country nationals to the Member State, where they enjoy international protection, fall within the scope of EU law. However, the Directive nor other EU legislation provides common standards for such detention. It may be derived from *Achughbabian* that this does not mean that Member States are not allowed to impose such measures. However, the national rules governing these detention measures may not undermine the aim of the Return Directive and should comply with the fundamental rights laid down in the Charter. The next section will examine which standards for detention measures in this particular case follow from the Charter.

# 4. Lawful detention under the Charter

In this section we argue that the detention of illegally staying third-country nationals in order to pass them back to a Member State where they enjoy international protection should comply with the requirements for a lawful deprivation of liberty as provided for by the Charter. As will be set out below, a *presumption* or *legal fiction* that public order *requires* the detention of a third-country national if the necessary documentation for his departure is available, does not comply with these requirements. We have seen that in the Netherlands, Article 59(2) Aliens Act 2000 provides the legal basis for the detention of third-country nationals who have been ordered to go to the Member State where they enjoy international protection. Under this provision, the interest of public order will be presumed to demand the detention of the illegally staying third-country national, if the documents necessary for departure are available, or will be available within a short period of time. The third-country national will not be detained, if and when he indicates that he wishes to leave the Netherlands and he has the opportunity to do so.

### 4.1 Relevant Provisions of the Charter

By detaining illegally staying third-country nationals in order to secure their departure to the Member State where they enjoy international protection, a Member State provides for a limitation on the exercise of the fundamental right to liberty enshrined in Article 6 of the Charter.[45] This section will examine which precise standards follow from this provision. For this purpose, the expert opinion will consider the CJEU's case law concerning Article 6 in the context of detention of foreign nationals. Moreover, it will refer to provisions regarding the detention of third country nationals in the Return Directive, the Reception Conditions Directive and the Dublin Regulation. These provisions contain requirements for lawful detention in the context of immigration procedures and can be used as interpretative standards in the case at hand, seeing that the EU legislator considered himself bound to these requirements when providing a legal basis for such detention.

## 4.2 Lawful Immigration Detention under EU law

Article 52(1) sets out the principles that need to be met in order to limit the exercise of the rights and freedoms by the Charter. Any limitation

> must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Moreover, in so far as the Charter contains rights, which correspond to rights guaranteed by the ECHR, Article 52(3) of the Charter provides that the meaning and scope of those rights must be the same as those laid down by the ECHR. It specifies that EU law may provide more extensive protection. For the

[45] CJEU Case C-528/15 *Al Chodor* [2017] para 36, and CJEU Case C-601/15 PPU *J.N. v. Staatssecretaris van Veiligheid en Justitie* [2016] para 49.

purpose of interpreting Article 6 of the Charter, account must therefore be taken of Article 5 of the ECHR as the minimum threshold of protection.

In *Al Chodor* the CJEU considered that the Charter requires that detention is subject to compliance with strict safeguards, namely 'the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness'.[46] It may be argued that a legal provision, which contains a presumption in favour of detention, does not meet the requirements of Article 6 Charter. EU law requires authorities to assess the proportionality and necessity of detention in each and every individual case. This requirement flows directly from Article 52(1) of the Charter and the principle of proportionality, which has been recognised as a general principle of EU law.[47] In *K. v Staatssecretaris* and *J.N. v. Staatssecretaris,* the CJEU has set out the elements of the principle of proportionality under EU law in the context of detention.[48] It held that this principle requires that the detention measure:

1. serves a legitimate purpose;
2. has a rational connection with the legitimate purpose;
3. is necessary;
4. is proportionate *stricto sensu*.

In the case at hand, the purpose of the detention measure is the passing back of irregularly staying third-country nationals to the Member State where they enjoy international protection. In the light of the purpose of the Return Directive (to end the illegal stay), this can be considered to meet the objectives of general interest recognised by the Union. Moreover, as argued above, the ending of their legal stay, the order to depart and the ensuing detention in order to pass them over to the Member State where they enjoy international protection, is clearly linked to the functioning of the common European asylum system.

Furthermore, in the applicants' cases, there is a rational connection between the use of detention and their passing back to the Member States where they enjoy international protection. The detention measure serves the enforcement of their departure to these Member States. However, it is doubtful whether the application of a provision, which contains a presumption in favour of detention is capable of meeting the requirements of necessity and proportionality *stricto sensu*. For this reason, this expert opinion will focus on these requirements.

### 4.3 Necessity and Proportionality

It may be argued that the only fact that the Member State has ordered a third-country national to go back to the Member State where he enjoys international protection, is not sufficient to impose a detention measure. There must be individual circumstances, which render the detention measure 'strictly necessary'.[49] If the aim of the detention is to enforce the passing back of the third-country national to the Member State where he enjoys international protection, there must accordingly be a

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[46] CJEU Case C-528/15 *Al Chodor* [2017] para 40.

[47] V Moreno-Lax, 'Beyond *Saadi v UK:* Why The "Unnecessary" Detention of Asylum Seekers Is Inadmissible Under EU law' *Human Rights and International Legal Discourse* (2011), pp 166-206.

[48] CJEU Case C-18/16 *K. v Staatssecretaris van Veiligheid en Justitie* [2017] paras 37-49, CJEU C-601/15 PPU *J.N. v. Staatssecretaris van Veiligheid en Justitie* [2016] paras 53-69. See also A Barak *Proportionality: Constitutional Rights and their Limitations* (Cambridge, Cambridge University Press, 2012).

[49] CJEU Case C-601/15 PPU *J.N. v. Staatssecretaris van Veiligheid en Justitie* [2016] para 56.

risk of absconding. The EU legislator has included this requirement explicitly in Article 15 of the Return Directive, which requires that there is ‘a risk of absconding’ or that the third-country national ‘avoids or hampers the preparation of return or the removal process’. Similarly, The Dublin Regulation prevents that an asylum applicant is detained for merely being subject to the Dublin Regulation procedures.[50] It requires that there is a ‘significant risk of absconding’.[51] The Return Directive and the Dublin Regulation define the risk of absconding as ‘the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond’.[52]

The Reception Conditions Directive does not allow detention of an asylum seeker for the sole reason that he has applied for international protection in the Member State.[53] Detention under the Reception Conditions Directive generally does not aim at ensuring that the asylum seeker leaves the territory of the Member State, but instead ensures the adequate processing of the asylum claim or the protection of public order or national security.[54] Therefore, most conditions for this type of detention relate to the asylum procedure and the existence of a risk for public order or national security. However, if detention of applicants for international protection aims to ensure the removal of the asylum applicant from the territory of the Member State, it similarly requires a risk of absconding.[55] The application of a provision, which contains a legal fiction that public order requires detention if documents needed for departure are available, foregoes the requirement of an individualised assessment whether there exists a ground for detention in a particular case.

Even where a risk of absconding exists, the requirement of necessity also entails that the legislator has to choose – of all those means that may advance the legitimate purpose concerned – the measure which would least limit the fundamental right in question. Accordingly, detention can only be used, if the purpose cannot equally be achieved through the use of other, less intrusive means. This implies that Member States always need to consider alternatives to detention first. This also follows from Article 15 Return Directive, Article 28(2) Dublin Regulation and 8(2) Reception Conditions Directive, which provide that a detention measure is only allowed, if no other sufficient but less coercive measures can be applied effectively in a specific case. While Article 59(c) Aliens Act has transposed these provisions stating that detention will only be applied if no less coercive measures can be applied effectively, there is no indication that the Secretary of State carries out such an assessment when detaining third-country nationals under Article 59(2) Aliens Act 2000 in order to pass them back to the Member State where they enjoy international protection. Instead, the mere availability of the necessary documents seems to provide sufficient justification for the use of detention in these procedures.

The proportionality principle *stricto sensu* requires that a proper relation exists between the benefits gained by the public when the purpose is fulfilled and the harm caused to the fundamental right of the individual. This requires an individual assessment of individual circumstances, more specifically focusing on conditions of vulnerability. Again, this requirement seems difficult to reconcile with the application of a legal provision, which contains a legal presumption in favour of detention.

[50] Art 28(1) Dublin Regulation.
[51] Art 28(2) Dublin Regulation.
[52] Art 3(7) Return Directive and Art 2(n) Dublin Regulation.
[53] Art 8(1) Reception Conditions Directive.
[54] Art 8(3) Reception Conditions Directive.
[55] Art 8(3)(d) Reception Conditions Directive.

## 5 Conclusion and answer to the preliminary question

This expert opinion concerned the legality of the detention of third-country nationals in one Member State in order to secure their passing back to another Member State where they enjoy international protection. Article 6(2) of the Return Directive states that third-country nationals staying illegally on the territory of a Member State and holding a valid residence permit or other authorisation offering a right to stay issued by another Member State, shall be required to go to the territory of that other Member State immediately. If they fail to do this, the Member State must issue a return decision. However, in the cases at hand the return decision cannot be enforced, because this would violate the prohibition of *refoulement*. The EU legislator has not provided explicit legislation for this particular situation.

It was argued in section 3 of this expert opinion that Member States are nevertheless bound by EU law when they detain third country nationals who are staying illegally in one Member State, in order to pass them back to another Member State the Member State where they enjoy international protection. This argument is based amongst others on the CJEU's judgments in *Affum*[56] and *Achughbabian*[57]. Moreover, it may be derived from the CJEU's judgment in *Achughbabian*[58] that Member States are allowed to apply detention measures based on national law to enforce the passing back to another Member State. National rules governing these detention measures may not undermine the aim of the Return Directive and should comply with the fundamental rights laid down in the Charter.

Finally, section 4 examined which requirements follow from the right to freedom guaranteed by Article 6 of the Charter. It was argued that the interpretation of the right to liberty in this context should be informed by the standards that the European legislator has set for the lawful detention of third-country nationals in the Return Directive, the Reception Conditions Directive and the Dublin Regulation. The expert opinion contended that the only fact that the Member State has ordered a third-country national to go back to the Member State where he enjoys international protection, is not sufficient to impose a detention measure. There must be individual circumstances, which render the detention measure necessary.

It may be derived from the detention provisions in the Return Directive, the Reception Conditions Directive and the Dublin Regulation that detention, which aims to ensure departure to another Member State may only be applied, if there is a risk of absconding. Moreover, even where a risk of absconding exists, the requirement of necessity also entails that the legislator has to choose the measure which would least limit the fundamental right in question.[59] Accordingly, detention can only be used if the purpose cannot equally be achieved through the use of other, less intrusive means. Finally, the proportionality principle *stricto sensu* requires that a proper relation exists between the benefits gained by the public when the purpose is fulfilled and the harm caused to the fundamental right of the individual. This requires an individual assessment of individual circumstances, more specifically focusing on conditions of vulnerability.

In the Netherlands, the detention of third-country nationals who enjoy international protection in another Member State is based on Article 59(2) of the Aliens Act 2000. It stipulates that if the documents necessary for the 'return' of the foreign national are available, or will be available

[56] CJEU Case C-47/15 *Affum* [2016].
[57] CJEU Case C-329/11 *Achughbabian* [2012].
[58] Ibid.
[59] CJEU Case C-601/15 PPU *J.N. v. Staatssecretaris van Veiligheid en Justitie* [2016] para 56.

within a short period of time, the interest of public order will be presumed to demand the detention of the foreign national. While Article 59(c) Aliens Act 2000 states that detention will only be applied, if no less coercive measures can be applied effectively, there is no indication that the Secretary of State carries out such an assessment when detaining third-country nationals under Article 59(2) Aliens Act 2000. Instead, the mere availability of the necessary documents seems to provide sufficient justification for the use of detention in these procedures.

**We thus ask the CJEU to consider to answer the question referred to by the CJEU as follows:**

Directive 2008/115/EC does not preclude Member States to detain a third-country national who enjoys international protection in another EU Member State under national law, given that the purpose of the detention is the enforcement of the order to depart to that other Member State. Such detention should respect the right to liberty as guaranteed by Article 6 of the Charter of Fundamental Rights of the European Union. This means that it should not be applied solely as a result of the third-country national's illegal stay. The detention needs to be based on the existence of objective reasons to believe that a risk of absconding exists and should be necessary and proportionate in the individual case.