



Reports of Cases

VIEW OF ADVOCATE GENERAL
SHARPSTON
of 9 July 2012¹

Case C-278/12 PPU

A. Adil

v

Minister voor Immigratie, Integratie en Asiel

(Reference for a preliminary ruling from the Raad van State (Netherlands))

(Area of freedom, security and justice — Schengen Borders Code — Checks equivalent to border checks)

1. Mr Adil, who comes from Afghanistan, was stopped on 28 March 2012 by the Koninklijke Marechaussee² in the course of a mobile security monitoring check ('Mobiël Toezicht Veiligheid'; 'MTV check') when travelling on a bus coming from Germany, in the area extending up to 20 kilometres from the land border of the Netherlands with Germany. The other passengers were also stopped. According to the order for reference, a number of checks were carried out that day over a one-hour period during which two vehicles — and thus a small proportion of the vehicles passing by — were in fact halted.

2. The Netherlands authorities carried out that MTV check on the basis of Article 50 of the Law on foreign nationals of 2000 (Vreemdelingenwet 2000; 'the Vw 2000') and, as stated in the minutes of 28 March 2012, in accordance with Article 4.17a of the Decree on foreign nationals of 2000 (Vreemdelingenbesluit 2000; 'the Vb 2000').³ By decision of 28 March 2012, Mr Adil was placed in administrative detention.⁴ According to the national case file, when he was stopped, Mr Adil informed the Koninklijke Marechaussee of his intention to apply for asylum. Information concerning asylum applications and illegal immigration, generated by the Eurodac database,⁵ revealed a link between Mr Adil and Norway. His application for asylum was accordingly passed, on 5 April 2012, to the Norwegian authorities and is being examined there.

1 — Original language: French.

2 — At the hearing, the Netherlands Government explained that the Koninklijke Marechaussee is responsible inter alia for the protection of the Royal Family, guarding the Central Bank, surveillance of the external frontiers and monitoring of foreign nationals.

3 — By decree of 30 May 2011, which entered into force on 1 June 2011, Article 4.17a was incorporated into the Vb 2000. The Vb 2000 lays down the provisions for the implementation of the Vw 2000.

4 — Under Article 59(1)(b) of the Vw 2000.

5 — Council Regulation of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (OJ 2000 L 316, p. 1).

3. Mr Adil contested the lawfulness of his detention on the ground that the MTV check, to which he was subject, amounted to a border check and was, therefore, contrary to Regulation (EC) No 562/2006 ('the Schengen Borders Code'),⁶ concerning the crossing of the territory of the State parties to the Convention implementing the Schengen Agreement ('Schengen Convention').⁷

4. On 16 April 2012, the Rechtbank 's-Gravenhage, declared Mr Adil's action contesting the decision of 28 March 2012 to be unfounded and rejected his claim for damages. Mr Adil then appealed against that judgment to the administrative law division of the Raad van State (Netherlands), claiming that the Rechtbank wrongly held that the stop carried out was lawful and failed to take into account the fact that, at the time of the MTV check, there was no reasonable suspicion of illegal residence.

5. The question raised by this reference for a preliminary ruling from the Raad van State is in essence whether Article 21(a) of the Schengen Borders Code, which sets out the principle of the prohibition on checks equivalent to border checks, precludes the national legislation on MTV checks. The referring court asks the Court, in essence, to clarify the interpretation it gave in its judgment in *Melki and Abdeli*.⁸

6. The Court held in that case that, in order to comply with Article 21(a) of the Schengen Borders Code, 'national legislation granting a power to police authorities to carry out identity checks — a power which, first, is restricted to the border area of the Member State with other Member States and, second, does not depend upon the behaviour of the person checked or on specific circumstances giving rise to a risk of breach of public order — must provide the necessary framework for the power granted to those authorities in order, inter alia, to guide the discretion which those authorities enjoy in the practical application of that power'.⁹ The Court also held that the necessary framework 'must guarantee that the practical exercise of that power, consisting in carrying out identity controls, cannot have an effect equivalent to border checks, as evidenced by, in particular, the circumstances listed in the second sentence of Article 21(a) of [the Schengen Borders Code]'.¹⁰

Legal framework

European Union law

The treaties

7. Article 3(2) TEU provides:

'The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.'

6 — Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1).

7 — Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 190, as amended. Articles 2 to 8 of the Schengen Convention were repealed by the Schengen Borders Code. See Article 39(1) of the Schengen Borders Code.

8 — Joined Cases C-188/40 and C-189/10 [2010] ECR I-5667.

9 — *Melki and Abdeli*, paragraph 74.

10 — *Melki and Abdeli*, paragraph 74.

8. Under Article 67 TFEU:

‘1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.

...’

9. Article 72 TFEU provides:

‘This Title [on the area of freedom, security and justice] shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.’

10. According to Article 77 TFEU:

‘1. The Union shall develop a policy with a view to:

(a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;

...’

11. Article 79(1) TFEU states:

‘The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.’

Schengen Borders Code

12. The Schengen Borders Code constitutes a development of the provisions of the Schengen acquis concerning the crossing of borders contained inter alia in the relevant provisions of the Schengen Convention¹¹ and its common manual.¹²

13. According to the first paragraph of Article 1 of the Schengen Borders Code, that regulation ‘provides for the absence of border control of persons crossing the internal borders between the Member States of the European Union.’

11 — See note 7.

12 — OJ 2002 C 313, p. 97, as amended and finally repealed by the Schengen Borders Code. See Article 39(2)(a) of the Schengen Borders Code.

14. Article 2 of the Schengen Borders Code provides:

‘For the purposes of this Regulation the following definitions shall apply:

- (1) “internal borders” means:
 - (a) the common land borders, including river and lake borders, of the Member States;
 - (b) the airports of the Member States for internal flights;
 - (c) sea, river and lake ports of the Member States for regular ferry connections;
- (2) “external borders” means the Member States’ land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders;

...

- (9) “border control” means the activity carried out at a border, in accordance with and for the purposes of this Regulation, in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance;
- (10) “border checks” means the checks carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or authorised to leave it;
- (11) “border surveillance” means the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks;

...’

15. Article 3 of the Schengen Borders Code provides that it ‘shall apply to any person crossing the internal or external borders of Member States’.

16. Article 20 of the Schengen Borders Code, headed ‘Crossing internal borders’, provides:

‘Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.’

17. Article 21 of the Schengen Borders Code, entitled ‘Checks within the territory’, states:

‘The abolition of border control at internal borders shall not affect:

- (a) the exercise of police powers by the competent authorities of the Member States under national law, insofar as the exercise of those powers does not have an effect equivalent to border checks; that shall also apply in border areas. Within the meaning of the first sentence, the exercise of police powers may not, in particular, be considered equivalent to the exercise of border checks when the police measures:
 - (i) do not have border control as an objective;

- (ii) are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime;
 - (iii) are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders;
 - (iv) are carried out on the basis of spot-checks;
- (b) security checks on persons carried out at ports and airports by the competent authorities under the law of each Member State, by port or airport officials or carriers, provided that such checks are also carried out on persons travelling within a Member State;
 - (c) the possibility for a Member State to provide by law for an obligation to hold or carry papers and documents;
 - (d) the obligation on third-country nationals to report their presence on the territory of any Member State ...'

Netherlands legislation

18. Article 50 of the Vw 2000 provides:

'1. Officials charged with surveillance of borders and the monitoring of foreign nationals may, either on the basis of facts and circumstances which, assessed according to objective criteria, give rise to a reasonable assumption of illegal residence or as part of the effort to combat illegal residence following crossing of borders, stop persons for the purpose of determining their identity, nationality and status with reference to the right of residence. ... The documents which a foreign national must have at his disposal to determine his identity, nationality and status with reference to the right of residence are laid down by a General Administrative Order.

...'

19. Under Article 4.17a of the Vb 2000:

'1. The competence, referred to in Article 50(1) of the law, as part of the effort to combat illegal residence following crossing of borders, to stop persons for the purpose of determining their identity, nationality and status with reference to the right of residence, shall be exercised exclusively in the context of the monitoring of foreign nationals:

- a. at airports on the arrival of flights from the Schengen area;
- b. in trains for at most 30 minutes after crossing the common land border with Belgium or Germany or, if during that period the second station after the border crossing has not yet been reached, up to at most the second station after the frontier crossing;
- c. on roads and waterways in an area of up to 20 kilometres from the common land border with Belgium or Germany.

2. The monitoring referred to in subsection 1 shall be carried out on the basis of information or data gained from experience regarding illegal residence following the crossing of borders. In addition, monitoring may be carried out to a limited degree with a view to acquiring information on such illegal residence.

3. The monitoring referred to in subsection 1(a) shall be exercised at most seven times per week in respect of flights on the same route, on a maximum of one third of the total number of planned flights per month on that route. In the context of that control, only some of the passengers on a flight shall be stopped.

4. The monitoring referred to in subsection 1(b) shall be carried out daily on a maximum of two trains per route and on a maximum of eight trains in total, and in a maximum of two train compartments per train.

5. The monitoring referred to in subsection 1(c) shall be carried out on the same road or waterway for a maximum of 90 hours per month and a maximum of 6 hours per day. In the context of that monitoring, only some of the passing means of transport shall be stopped.’

20. According to the explanatory note regarding that provision:¹³

‘This amendment to the decree on foreign nationals seeks to provide the necessary safeguards so that the monitoring of foreign nationals in order to combat illegal residence after persons have crossed the border (“mobile monitoring”) does not have an effect equivalent to border checks within the meaning of the Schengen Borders Code. This is to give effect to the judgment of the Court of Justice of 22 June 2010 [Joined Cases C-188/10 and C-189/10 *Melki and Abdeli*] and the judgment of the Raad van State of 28 December 2010 and to make mobile monitoring consistent with Article 21(a) of the Schengen Borders Code.’

The reference for a preliminary ruling

21. The present case is one of a series of cases in which the Raad van State, the supreme administrative court, and other administrative and criminal courts of the Netherlands, have examined the question whether the system of monitoring established by Article 50(1) of the Vw 2000 as implemented by Article 4.17a of the Vb 2000 contains sufficient safeguards so as to ensure that the checks concerned are not to be regarded as a border check within the meaning of Article 20 of the Schengen Borders Code or as a check equivalent to a border check within the meaning of Article 21(a) of the Schengen Borders Code.

22. According to the Raad van State, Article 4.17a was inserted into the Vb 2000 following its judgment of 28 December 2010 holding that the Netherlands legislation on MTV checks then in force provided for a power whose exercise might in practice have an effect equivalent to a border check.

23. The Raad van State has subsequently held on a number of occasions that Article 4.17a of the Vb 2000 is in conformity with Article 21(a) of the Schengen Borders Code as interpreted by the Court in *Melki and Abdeli*. Thus, in its judgment of 20 October 2011, the Raad van State held that it did not follow from that case that Article 4.17a should have taken into account the behaviour of the person concerned or specific circumstances giving rise to a risk of breach of public order. In its judgment of 5 March 2012, the Raad van State decided, in the light of the wording ‘may not, in particular’ in Article 21(a) of the Schengen Borders Code, to interpret that provision to the effect that the police powers in question are limited to situations where public order considerations are at stake. In the same judgment, the Raad van State also held that it was not decisive that the individual perceived the check as being a border check. By contrast, the very limited number of road vehicles or trains actually checked might be a relevant factor.

¹³ — Explanatory note concerning the decree of 30 May 2011; see note 3.

24. Notwithstanding that case-law, on 20 February 2012 the Rechtbank Roermond (criminal law division) made a reference to the Court for a preliminary ruling, asking in particular whether Articles 20 and 21 of the Schengen Borders Code precluded the system of MTV checks put in place by Article 4.17a of the Vb 2000.¹⁴ Furthermore, it is apparent from the order for reference of the Raad van State that, by judgment of 11 May 2012, the Gerechtshof 's-Hertogenbosch (criminal law division) also held that an MTV check, even if carried out in conformity with Article 4.17a of the Vb 2000, has an effect equivalent to a border check within the meaning of Article 21(a) of the Schengen Borders Code when:

- the power is not based on concrete facts or circumstances which give rise to a suspicion of illegal residence;
- the power is exercised exclusively in response to an intention to cross or the crossing of the border;
- the check seeks to establish whether the conditions for authorising a person to enter or leave the territory of the Member State concerned are satisfied.

25. Faced with this inconsistent case-law of the Netherlands courts, the Raad van State decided to stay the proceedings in the present case and to refer the following questions to the Court for a preliminary ruling:

- (1) Must Article 21 of the Schengen Borders Code be interpreted as precluding the exercise of a national power, such as that conferred in Article 50 of the [Vw 2000] and set out in greater detail in Article 4.17a of the [Vb 2000], to carry out checks on persons in areas behind internal borders with a view to establishing whether those persons satisfy the requirements for lawful residence laid down by the Member State concerned?
- (2)
 - (a) Does Article 21 of the Schengen Borders Code preclude national checks, such as those referred to in Article 50 of the [Vw 2000], from being carried out on the basis of general information and experience regarding the illegal residence of persons at the place where the check is to be made, as referred to in Article 4.17a(2) of the [Vb 2000], or should there be specific indications, when such checks are carried out, that an individual on whom checks are to be made is illegally resident in the Member State concerned?
 - (b) Does Article 21 of the Schengen Borders Code preclude such a check from being carried out with a view to obtaining the general information and experience-based data regarding illegal residence referred to in (a) above, if this occurs to a limited extent?
- (3) Must Article 21 of the Schengen Borders Code be interpreted in such a way that the restriction of the power to carry out checks in such a way as that described in a statutory rule such as Article 4.17a of the [Vb 2000] constitutes a sufficient safeguard for the purpose of ensuring that a check cannot in fact have the effect of a border check prohibited by Article 21 of the Schengen Borders Code?

The procedure before the Court

26. On 4 June 2012, the Raad van State requested that the Court rule in the present case under the urgent preliminary ruling procedure ('urgent procedure'), contemplated by Article 267(4) TFEU, pursuant to Article 23a of the Statute of the Court of Justice of the European Union and Article 104b of the Rules of Procedure.

¹⁴ — See Case C-88/12 *Jaao* (pending). In that case, the referring court did not request that either the urgent preliminary ruling procedure or the accelerated procedure be applied.

27. Justifying its request, the Raad van State states that the case raises questions concerning the area of freedom, security and justice and that the answers to the questions referred are relevant to its decision as to Mr Adil's administrative detention. The order for reference does not allude to Mr Adil's asylum application.¹⁵

28. Taking this information into account, the Second Chamber of the Court decided, on 11 June 2012, to grant the referring court's request and to initiate the urgent procedure.

29. Written observations were lodged by the Netherlands Government, the European Commission and Mr Adil's legal representative. The same parties, together with the Czech, German and French Governments, were represented at the hearing on 5 July 2012.

30. At the hearing, the factual context for Mr Adil's administrative detention, in particular the grounds for it, was amplified and thus clarified. It is apparent from the observations of the Netherlands Government that Mr Adil was placed in detention in the context of his submission of an asylum application and because of the risk that, were he not detained, he might circumvent monitoring by the authorities while his asylum application was examined. Since Mr Adil's detention does not depend on whether he was lawfully stopped, but apparently only on the treatment of his asylum application, it is no longer clear what effect the Court's answers to the questions referred will have on his detention.

31. That leads me to make the following observations.

32. The urgent procedure was put in place expressly and solely because it is absolutely essential to deal with certain types of cases — in particular those in which the Court's answer to the questions referred determines whether a person has been lawfully placed in custody — 'with the minimum of delay'.¹⁶ It is an exceptional procedure which should be initiated only for cases which really must be resolved urgently. It requires the Court to make concentrated use of both judicial and administrative resources. For that reason, if the procedure is requested too often it will encroach upon the Court's remaining case load. Self-evidently the urgent procedure should not be sought, for example, in order to obtain a speedier reply where that is not justified by the underlying facts.

33. For those reasons, the urgent procedure should be requested only where the grounds for doing so are clearly present. Thus, the national court must set out in its order for reference all the legal and factual elements which show that the matter is urgent and that the urgent procedure is justified. That obligation on the national court is the counterpart to the principles of solidarity and cooperation which govern the relations between the national courts and our Court. The national court must not omit any points which may be relevant to the Court's consideration of whether it is necessary to treat its reference pursuant to this exceptional procedure.

Analysis

Preliminary remarks

34. The questions referred for a preliminary ruling by the referring court concern only Article 21(a) of the Schengen Borders Code. Nevertheless, given the close connection between that provision and Article 20 of the Schengen Borders Code, the latter should also be borne in mind when answering those questions. Article 21(a) is indeed the essential complement to Article 20 and makes the

¹⁵ — See paragraph 2 above.

¹⁶ — Last sentence of Article 267 TFEU. The Court considers that the urgent procedure may appropriately be used for certain other limited categories of cases (such as those concerning the abduction of children). See information note on references from national courts for a preliminary ruling (OJ 2011 C 160, p. 1; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:160:0001:0005:EN:PDF>).

prohibition of border controls effective. In that regard, the assessment is comparable to that carried out, in particular, in the context of the free movement of goods, where — taking into account the practical effects of the legislation at issue on a case-by-case basis — a restriction may be held to be either a quantitative restriction on imports or a measure of equivalent effect thereto.

35. In essence, the question posed by the present case is whether Articles 20 and 21(a) of the Schengen Borders Code preclude national legislation conferring on the authorities concerned the power to carry out a check such as the MTV check. In my opinion, the three questions referred for a preliminary ruling may be dealt with together.

36. According to the order for reference, Article 50(1) of the Vw 2000 permits the officials responsible for border surveillance and the officials responsible for monitoring foreign nationals, that is the Koninklijke Marechaussee, to stop persons in order to establish their identity, nationality and residence status, in response to a risk of illegal residence. Under the terms of that provision, that risk may, in the first instance, be identified on the basis of facts and circumstances which, measured by objective criteria, give rise to a reasonable suspicion of illegal residence. At the hearing, the Netherlands Government confirmed that, in principle, every stop made within the territory is carried out on that basis.

37. Second, Article 50(1) of the decree of 2000 also provides that such a stop may be carried out ‘in order to combat illegal residence of persons after they have crossed the border’. The framework provided for in Article 4.17a of the Vb 2000 refers only to the latter type of control, and the questions referred to the Court address that type alone, given that Mr Adil was stopped in the course of an MTV check when he was on a bus on the A67/E34 motorway close to the border. My analysis will therefore focus on the provisions of the Netherlands legislation concerning that type of check.

38. Finally, contrary to what is argued by Mr Adil’s legal representative, I consider that it is clear from the wording of Articles 20 and 21 of the Schengen Borders Code that those provisions do not in any way restrict Member States’ right to decide which authorities are entitled to exercise police powers. Equally, it is for the Member States to choose the legal basis and the framework for those powers, be that immigration law or the law on foreign nationals or criminal law. It is only when exercising those powers that compliance with EU law must, as appropriate, be ensured.

The abolition of border checks and of police measures having equivalent effect

39. Article 20 of the Schengen Borders Code ensures that persons are not subject to any controls when crossing internal borders and establishes an area within which the free movement of persons is guaranteed. It lays down the principle that any person, irrespective of their nationality, may cross the internal borders between the Member States subject to the Schengen acquis at any point without a border check being carried out.¹⁷

40. Article 21 confirms, within the limits provided for, Member States’ right to exercise police powers, to carry out security checks at ports and airports, to provide in their national law for an obligation to hold or carry identity papers and documents and to oblige third-country nationals to report their presence on their territory.

¹⁷ — According to Article 2(9) of the Schengen Borders Code, a ‘border control’ is ‘the activity carried out at a border, in accordance with and for the purposes of the [Schengen Borders Code], in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance’.

41. Article 21(a) of the Schengen Borders Code contains two sentences. According to the first sentence, abolition of border control shall not affect the competence of the Member States to exercise police powers on their territory, including in border areas, in so far as the exercise of those powers does not have an effect equivalent to that of border checks. The Schengen Borders Code therefore prohibits not only border checks but also measures having an equivalent effect thereto.

42. The second sentence, which contains ‘in particular’ points (i) to (iv), elaborates on the principle stated in the first sentence by listing the circumstances in which the practical exercise of the competence conferred *may not* have an effect equivalent to border checks.

43. On a literal reading of the text, I consider that the list of circumstances in Article 21(a) of the Schengen Borders Code is neither exhaustive nor cumulative.

44. In that regard, I endorse the Commission’s position that a police measure which satisfies all the conditions contained in Article 21(a)(i) to (iv) of the Schengen Borders Code probably cannot have an effect equivalent to a border check. By contrast, the mere fact that not all those conditions are satisfied does not necessarily preclude the exercise of police powers from being in conformity with Articles 20 and 21 of the Schengen Borders Code. As the Commission rightly states in its observations, the second sentence of Article 21(a) of the Schengen Borders Code seems to state as much explicitly, because the circumstances listed there are preceded by the words ‘in particular’. I nevertheless consider the condition in Article 21(a)(i) to be fundamental. In my opinion, it is difficult to conceive that a police measure whose objective is equivalent to that of a border check is not prohibited by Articles 20 and 21 of the Schengen Borders Code.

45. Although the legislator provided that internal frontiers may be crossed at any point without there being border checks (Article 20) or measures of equivalent effect (Article 21), neither Article 20 nor 21 guarantees that any person who has crossed an internal border may from then on move within the territory of a Member State and reside there without being subject to police measures. In particular, the scope of those provisions cannot be extended so as to prohibit a Member State from exercising police powers on its territory.

46. The Court considered the interpretation of Articles 20 and 21(a) of the Schengen Borders Code in *Melki and Abdeli* in the context of a question concerning the compatibility of certain provisions of French law with EU law. The national law permitted the police authorities to check anyone’s identity, notably, within a 20 kilometre area extending from the land border of France with the States parties to the Schengen Convention. The objective of the power at issue in those cases was to check compliance with the obligations to hold, carry and present identity papers and documents provided for under national law.

47. How then did the Court interpret those provisions?

48. First, the Court adopted a strict interpretation of the scope of Article 20 of the Schengen Borders Code. Where one or more of the elements of the definition of a ‘border check’ — that is to say, the measure in question, the place where the check is carried out, when it is carried out or its objective — is missing, the check does not fall within the scope of that provision.

49. In that case, the objective of the check in question did not correspond to that of a border check within the meaning of Article 2(9) to (11) of the Schengen Borders Code¹⁸ and the check was not carried out when the border was crossed but was a check within the territory of a Member State.¹⁹ Therefore, the check in question did not fall within the scope of Article 20.

18 — *Melki and Abdeli*, paragraph 71.

19 — *Melki and Abdeli*, paragraph 68.

50. I completely agree with that assessment.

51. I would accept that, in principle, such a formal interpretation may entail the risk that the Member States may circumvent the prohibition on checks at the internal border by relocating the checks a few kilometres behind the border. However, Article 20 of the Schengen Borders Code cannot be read separately from its immediate context, that is to say, Article 21 of the Schengen Borders Code, which provides that the abolition of checks at *the internal borders* does not affect in principle the exercise of police powers *within the territory*, provided that the exercise of those powers does not have an effect equivalent to that of border checks and, consequently, does not undermine the principle set out in Article 20. Article 21(a) ensures, inter alia, the effectiveness of the principle laid down in Article 20. Were the scope of Article 20 interpreted more broadly, there would be a risk not only of altering the wording of Article 2(10) (definition of ‘border check’) but of encroaching upon Article 21(a).

52. Moreover, a broader interpretation would mean that, under Article 20 of the Schengen Borders Code, the Member States would be prevented from using police measures to combat illegal residence in part of their territory, that is to say, in border areas where, it seems to me, such measures might be both necessary and effective.

53. Secondly, the Court stated in *Melki and Abdeli* that while the check at issue did not amount to a border check within the meaning of Article 20 and the definitions in Article 2(9) to (11) of the Schengen Borders Code, it was nevertheless necessary to consider whether there was a risk that the exercise of the police powers as set out in the national legislation might jeopardise the principle stated in Article 20 of the Schengen Borders Code. In other words, was that check a disguised border check and, therefore, prohibited by the first sentence of Article 21(a) of the Schengen Borders Code?

54. In that regard, the Court accepted that, were the controls in question carried out, for example, on a toll motorway, their territorial scope of application might constitute evidence of the existence of such an equivalent effect.²⁰ By contrast, the Court rejected the argument that the fact that the territorial scope was limited to a border area was sufficient, in itself, to find that the exercise of that power had an equivalent effect.

55. The Court then carefully examined the wording of the national legislation at issue in order to determine whether it contained elements that would prove that the exercise of police powers ran the risk of producing an effect equivalent to that of a border check. It held that there was such a risk because, first, the power was limited to the border area and, second, it could be exercised irrespective of the behaviour of the person checked and of specific circumstances giving rise to a risk of breach of public order.

56. Thirdly, the Court held that Article 21(a) of the Schengen Borders Code required national law to ‘provide a framework’ for the powers conferred on national authorities: details concerning those powers and limitations thereto should be laid down in order to exclude the possibility that the powers might be exercised so as to give rise to such an effect. The necessary framework ‘must guarantee that the practical exercise of that power, consisting in carrying out identity checks, cannot have an effect equivalent to border checks, as evidenced by, in particular, the circumstances listed in the second sentence of [the Schengen Borders Code].’²¹ In those cases, the national legislation did not make the discretionary power subject to any detailed rules or limitations.²² Thus, Articles 20 and 21 of the Schengen Borders Code precluded such national legislation.

20 — *Melki and Abdeli*, paragraph 72.

21 — *Melki and Abdeli*, paragraph 74.

22 — *Melki and Abdeli*, paragraph 73.

57. The Court underlined the connection between the requirement that a framework be put in place, on the one hand, and ‘in particular, the circumstances listed in the second sentence of Article 21(a) of [the Schengen Borders Code]’, on the other hand. Thus, while not explicitly adopting the Advocate General’s position in his View in those cases — that is to say that ‘those four sets of circumstances are listed merely by way of example’ and that the question ‘must be examined on a case-by-case basis’²³ — the Court held that such circumstances were particularly relevant even if they were not the only elements which could constitute such a framework.

58. Taking the above considerations into account, I now turn to the specific issue of a check such as the MTV check and will discuss the characteristics of that check as set out in the order for reference.

Is a check such as the MTV check a border check or a police measure having an equivalent effect thereto?

59. The MTV check contributes to the combating of illegal residence and concerns in particular third-country nationals who have already entered the Schengen area, lawfully or unlawfully, but do not have or no longer enjoy a right of residence on Netherlands territory. The check is carried out on roads within an area extending 20 kilometres from the land border of the Netherlands with Germany and Belgium. Its aim is to ensure that the persons stopped are entitled to remain on the territory and not to determine whether they should be authorised to enter or leave it. It follows that the MTV check is executed neither at the border nor when the border is crossed, and that it does not have the same objective as that of a border check.

60. The MTV check thus does not fall within the scope of Article 20 of the Schengen Borders Code.

61. However, were the practical exercise of the power under Article 50(1) of the Vw 2000 not subject to the additional conditions contained in Article 4.17a of the Vb 2000, it might well jeopardise the principle stated in Article 20 of the Schengen Borders Code.

62. The check is carried out specifically on the roads near the border. It seems to me reasonable to suppose that, the shorter the distance between the location of the check and the border, the greater the risk that the check will be equivalent in practice to a border check. However, the proximity of a border cannot itself determine the effect of the check. Checking a person strolling through the centre of Venlo — a town in the Netherlands near the border with Germany — is not necessarily the same as stopping a passenger on board a bus coming from Germany travelling on an international highway and which has not yet mingled with local traffic on the way to Venlo.

63. There is also a link between checking a person’s identity, nationality and residence status and border checks. In order to ensure that a person is authorised to enter the territory of a Member State, it is normal to check his identity and nationality and to establish whether entry conditions have been met: those are the essential prerequisites for granting a right of residence to that person.

64. However, Article 4.17a of the Vb 2000 provides for a relatively detailed framework for the exercise of the powers conferred by Article 50(1) of the Vw 2000. Is that framework sufficient to make the MTV checks compatible with EU law?

65. In my opinion, the answer to that question should be ‘yes’.

23 — View of Advocate General Mazák in *Melki and Abdeli*, paragraph 44.

66. First, I note that the objective of the police measures authorised by Article 50(1) of the Vw 2000 and by Article 4.17a of the Vb 2000 is not the exercise of border controls. The objective of a check such as an MTV check is both to detect persons whose presence is illegal and, by its very existence, to deter illegal immigration notwithstanding the absence of border controls.

67. The check in question is not triggered by the intention to cross a border or by the crossing of a border irrespective of all other considerations, but by the plain facts of life. It is manifestly the case that certain third country nationals either enter the Schengen area unlawfully or remain there without having the right to do so. That is why Article 50(1) of the Vw 2000 authorises stops throughout the territory, including in border areas.

68. The objective of a border check is to ensure that persons who do not have a right of entry are not allowed to enter the territory. By contrast, a check such as an MTV check aims to identify persons who, irrespective of the lawfulness of their entry into the Schengen area, do not have, or no longer enjoy, a right of residence. Following such a stop, it may be necessary to apply the provisions of national law concerning, inter alia, checks relating to illegal residence, the treatment of immigrants and the return of such persons. In so far as those fields are affected by European Union law, the Member States are obliged to adapt their legislation in order to ensure compliance with it.²⁴ Such effects of a check on the territory of a Member State, including in a border area, are clearly distinct from those of a border check.

69. Secondly, Article 4.17a(2) of the Vb 2000 provides that the stops authorised by Article 50(1) of the Vw 2000 are based on information or experience regarding illegal residence after the crossing of borders. To a limited degree, checks may also be carried out with a view to acquiring information on illegal residence following the crossing of borders.

70. It is apparent from the Netherlands Government's observations that the checks are carried out on the basis of profiles created from information or data showing an increased risk, first, of cross-border crime on certain routes and, second, of the presence of persons whose situation is unlawful in view of their residence status,²⁵ at specific times as well as on the basis of the type and colour of their vehicle. That information is reassessed continuously. The routes, type and colour of the vehicles, their country of registration, when the checks are carried out and when the vehicles pass vary in accordance with the information gathered on the risks of illegal residence.²⁶

71. That approach is in my view compatible with Article 21(a)(ii) of the Schengen Borders Code.

72. The wording of that provision, especially the use of the words 'in particular' and the reference to the concept of 'public security', does not rule out the possibility that the information and experience gathered may relate not only to cross-border crime but also to illegal residence. I would like to emphasise again in that regard that what is decisive is the fact that the *objective* of the control in question is not the same as that of a border control. With the exception of that limitation, Article 21(a) does not prescribe objectives which authorise the Member States to put in place police powers.

24 — See, for example, Case C-329/11 *Achughbabian* [2011] ECR I-12695, paragraphs 28 to 33.

25 — I note that the framework provided for under Article 4.17a of the Vb 2000 concerns all types of controls on routes in the frontier areas and not only those carried out on the part of the international highway connecting the border between the Netherlands and Germany or Belgium at the first place on Netherlands territory where the international traffic mingles with national traffic.

26 — At the hearing, the Netherlands Government confirmed that, at the material time, such information was not obtained from cameras which recorded the number plates of each passing vehicle, installed on the routes in the border areas; the situation is the same now. Without taking a position on the possible compatibility with EU law of using such a method in order to gather information, I consider that method is not relevant to the question whether a check such as the MTV check is equivalent to a border check. It is not the recording of the data as such but the framework for the authorised checks which matters. The fact that there is camera surveillance does not, as such, affect the question whether there is a border check.

73. Contrary to the view taken by Mr Adil's legal representative, I consider that Article 21(a) of the Schengen Borders Code does not preclude the legislation at issue from permitting controls which are not triggered by the behaviour of the person concerned or specific circumstances which might indicate a public order risk. That, it seems to me, was also the view taken by the Court in *Melki and Abdeli*.²⁷

74. Article 21(a) of the Schengen Borders Code does not contain any provision requiring a Member State to exercise its police powers uniformly in the entirety of its national territory. The wording of Article 21(a) — unlike that of Article 21(b) — does not constitute any basis for a strict parallelism between controls carried out in frontier areas and checks made in the remainder of the territory.²⁸

75. I therefore consider that it is fully legitimate that the *modus operandi* of the exercise of police powers be adapted to the nature of the possible dangers or risks which justify their exercise. If a Member State finds that it is more likely to be able to identify illegal residents in border areas, Article 21(a) does not prevent it from responding as it sees fit, provided that the response does not have the effect of a border check.

76. Article 4.17a(2) of the Vb 2000 also provides that the checks may be triggered, subject to the limits set out in that provision, by the need to obtain information on unlawful residence following the crossing of borders. Their objective — that is, to identify new practices and new routes and to ensure the reliability of information already gathered — requires that those checks (just like the other checks) be carried out as spot-checks and thus in conformity with Article 21(a)(iv) of the Schengen Borders Code. Moreover, at the hearing the Commission also suggested (without being contradicted by the other parties) that the number of checks made in order to obtain information may not surpass the number of checks carried out on the basis of information or experience regarding illegal residence following a crossing of the border.

77. Thirdly, according to Article 4.17a(5) of the Vb 2000, the duration of the periods during which MTV checks, whatever their basis, may be carried out on the same road may not exceed 90 hours per month and a maximum of 6 hours per day.

78. I take the view that such a limitation would not in itself constitute a sufficient framework because it would not rule out the possibility that, during that period, every vehicle would be halted and every person stopped. However, the second sentence of Article 4.17a(5) of the Vb 2000 specifies that only some of the passing means of transport may be stopped. That provision thus clearly prevents the authorities from stopping every vehicle. By contrast, it does not guarantee selective checks, given that in theory it would authorise the stopping of 99% of all vehicles. However, the vast majority of those vehicles would not be stopped because, pursuant to Article 4.17a(2) of the Vb 2000, the MTV checks have to be carried out on the basis of information or experiences regarding illegal residence, which justify only selective stops.²⁹

79. It is thus apparent that the framework set up by Article 4.17a of the Vb 2000 does ensure that, in practice, the number of vehicles and persons checked during the periods laid down in Article 4.17a of the Vb 2000 is limited and variable and that the checks are not carried out in a systematic manner.

27 — See *Melki and Abdeli*, paragraphs 73 and 74.

28 — Indeed, the Commission's proposal to introduce such parallelism was rejected by the European Parliament and the Council: see Article 19(a) of the Proposal for a Council Regulation establishing a Community Code on the rules governing the movement of persons across borders (COM(2004) 391 final).

29 — Furthermore, the Netherlands Government stated at the hearing that the number of authorities appointed to carry out such checks and the resources placed at their disposal are limited.

80. In the light of all the foregoing considerations, I consider that a framework such as that laid down in Article 4.17a of the Vb 2000 satisfies the four conditions set out in Article 21(a)(i) to (iv) of the Schengen Borders Code and ensures that the practical exercise of a power such as that conferred by Article 50(1) of the Vw 2000 on the Koninklijke Marechaussee cannot have an effect equivalent to border checks.

Conclusion

81. Accordingly, I am of the opinion that the Court should reply to the questions referred as follows:

Article 21 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) must be interpreted as not precluding national legislation of a Member State which permits persons in a vehicle travelling on a road in a border area to be stopped in order to check their identity, nationality and residence status, in so far as that legislation lays down a framework such as that provided for in Article 4.17a of the Decree on foreign nationals of 2000 ('Vreemdelingenbesluit 2000') to prevent those stops from having an effect equivalent to border checks.

That provision does not preclude, in particular, national legislation from providing that such stops may be based either on general information and experience-based data regarding illegal residence, without any requirement that they be triggered by the behaviour of the person concerned or specific circumstances showing a risk to public order, or on the need to obtain information on illegal residence following the crossing of the border.