Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 27 February 2020[1]

Case C-18/19

WM
v
Stadt Frankfurt am Main

(Request for a preliminary ruling
from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Reference for a preliminary ruling — Area of freedom, security and justice — Directive 2008/115/EC — Common standards and procedures in Member States for returning illegally staying third-country nationals — Article 16(1) — Detention for the purpose of removal — Detention in prison accommodation — Third-country national representing a serious threat to public policy or public security — Principles of effectiveness and proportionality — Minimum safeguards — Possibility of detention in prison accommodation with persons held on remand — Article 15 — Judicial review — Charter of Fundamental Rights of the European Union — Articles 1 to 4, 6 and 47)

1. In what circumstances is it acceptable for a third-country national awaiting removal to be both legally and physically detained? More specifically, can such a third-country national be detained in prison accommodation, and not in a specialised facility as laid down in Article 16(1) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals,[2] on the ground that he represents a serious threat to the life and limb of others or to significant internal security interests?

2. Those are, in essence, the questions raised by Case C-18/19.

3. The Court is thus asked to clarify, once again, the conditions in which Member States are required to ensure the detention of third-country nationals awaiting removal pursuant to Directive 2008/115.

4. The present case is of a sensitive nature because it intertwines the question of the handling of illegal immigration and that of the understanding of the situation of individuals regarded as dangerous.

1 Original language: French.

2 OJ 2008 L 348, p. 98.

I. Legal context

A. EU law

5. Article 1 of Directive 2008/115, which is entitled 'Subject matter', provides:

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

6. Article 15 of Directive 2008/115, which is entitled 'Detention', provides:

'1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member State may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

(a) there is a risk of absconding or

(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

2. Detention shall be ordered by administrative or judicial authorities.

Detention shall be ordered in writing with reasons being given in fact and in law.

When detention has been ordered by administrative authorities, Member States shall:

(a) either provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention;

(b) or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings. In such a case Member States shall immediately inform the third-country national concerned about the possibility of taking such proceedings.

The third-country national concerned shall be released immediately if the detention is not lawful.

3. In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or *ex officio*. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

(a) a lack of cooperation by the third-country national concerned, or

(b) delays in obtaining the necessary documentation from third countries.'

7. Article 16 of Directive 2008/115, which is entitled 'Conditions of detention', states:

'1. Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners.

2. Third-country nationals in detention shall be allowed — on request — to establish in due time contact with legal representatives, family members and competent consular authorities.

3. Particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided.

4. Relevant and competent national, international and non-governmental organisations and bodies shall have the possibility to visit detention facilities, as referred to in paragraph 1, to the extent that they are being used for detaining third-country nationals in accordance with this Chapter. Such visits may be subject to authorisation.

5. Third-country nationals kept in detention shall be systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations. Such information shall include information on their entitlement under national law to contact the organisations and bodies referred to in paragraph 4.'

8. Article 18 of the directive, which is entitled 'Emergency situations', reads as follows:

'1. In situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, … take urgent measures in respect of the conditions of detention derogating from those set out in Articles 16(1) and 17(2).

2. When resorting to such exceptional measures, the Member State concerned shall inform the Commission. It shall also inform the Commission as soon as the reasons for applying these exceptional measures have ceased to exist.

3. Nothing in this Article shall be interpreted as allowing Member States to derogate from their general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under this Directive.'

B. German law

9. Paragraph 62a of the Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Law on the residence, economic activity and integration of foreign nationals in the federal territory), in the version thereof of 25 February 2008 (BGBl. I, p. 162), as amended by the Gesetz zur besseren Durchsetzung der Ausreisepflicht (Law to improve the enforcement of forced departure) of 20 July 2017 (BGBI. I, p. 2780) ('the AufenthG') provides:

'(1) Detention for the purpose of removal shall take place in principle in specialised detention facilities. If there is no specialised detention facility in the federal territory or if the foreign national poses a serious threat to the life and limb of others or to significant internal security interests, detention may take place in other prison accommodation; in those circumstances, the persons detained for the purpose of removal shall be accommodated separately from ordinary prisoners …

(2) Persons detained for the purpose of removal shall be allowed to contact their legal representatives, their family members, the competent consular authorities and the relevant relief and support organisations.

…

(4) Employees of the relevant relief and support organisations shall be allowed to visit persons detained for the purpose of removal on request.

(5) Persons detained for the purpose of removal shall be informed of their rights and obligations and of the rules in force within the facility.'

II. The dispute in the main proceedings and the question referred for a preliminary ruling

10. WM, who was born in 1980, is a Tunisian national who was residing in Germany. By decision of 1 August 2017, the competent ministry of the *Land* of Hesse (Germany) ordered his removal to Tunisia on the basis of Paragraph 58a(1) of the AufenthG,[3] on the ground that he represented a particular threat to national security.

11. According to the referring court, the ministry found, by that order, that WM represented such a threat in the light, inter alia, of his personality, his conduct, his radical Islamist views, his classification as a trafficker and recruiter for the Islamic State terrorist organisation by the intelligence services and his activities for that same organisation in Syria.

12. WM lodged an appeal against the order of 1 August 2017 with the Bundesverwaltungsgericht (Federal Administrative Court, Germany) and also made an application for interim relief seeking the suspension of the order's enforcement before that same court. By order of 19 September 2017, that court dismissed the application for interim relief on the ground that it was sufficiently likely that WM would commit a terrorist attack in Germany.

3 Paragraph 58a(1) of the AufenthG reads as follows: 'The supreme *Land* authority may issue a removal order for a foreign national without a prior expulsion order based on the assessment of facts, in order to avert a particular threat to the security of the Federal Republic of Germany or a terrorist threat. The removal order shall be immediately enforceable; a notice of intention to deport shall not be required.'

13. By order of 18 August 2017, the Amtsgericht (Local Court, Germany) ordered, at the request of the competent foreign nationals department, that WM be detained for the purpose of removal in prison accommodation until 23 October 2017, pursuant to Paragraph 62a(1) of the AufenthG. [4]

14. WM lodged an appeal against that order with the Landgericht (Regional Court, Germany), which, by order of 24 August 2017, dismissed it. WM lodged an appeal on a point of law against the latter order with the referring court seeking a declaration of the unlawfulness of his detention in respect of the period from 18 August to 23 October 2017.

15. His detention for the purpose of removal was subsequently extended several times. Appeals against those extensions are pending before the Bundesgerichtshof (Federal Court of Justice).

16. On 9 May 2018, WM was removed to Tunisia.

17. In that context, the referring court asks whether Article 16(1) of Directive 2008/115 allows a Member State to keep illegally staying third-country nationals who represent a serious threat to the life and limb of others or to national security in detention for the purpose of removal in prison accommodation, separated from ordinary prisoners.

18. It is in those circumstances that the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Does Article 16(1) of Directive 2008/115 preclude national provisions under which custody awaiting deportation may be enforced in an ordinary custodial institution if the foreign national poses a significant threat to the life and limb of others or to significant internal security interests, in which case the detainee awaiting deportation is accommodated separately from prisoners serving criminal sentences?' [5]

III. Procedure before the Court

19. The order for reference dated 22 November 2018 was received at the Court Registry on 11 January 2019.

20. Written observations were submitted by WM, the German and Swedish Governments and the European Commission within the time limit set pursuant to Article 23 of the Statute of the Court of Justice of the European Union.

4 The order for reference does not specify whether another order has been adopted, previously or concurrently, specifically regarding the detention of the person concerned in the light of the grounds provided for in Article 15(1)(a) and (b) of Directive 2008/115 or whether that sole order of 18 August 2017 of the Amtsgericht (District Court) covers both the detention and the determination of a specific method of enforcing the measure, namely the imprisonment of the migrant concerned, based on a separate statement of reasons. It is established that Paragraph 62a(1) of the AufenthG, upon which the order at issue is based, does not reproduce the detention conditions defined in Article 15 of Directive 2008/115. In any event, I note that the request for a preliminary ruling does not concern the conditions governing detention, as laid down in that article, but rather the conditions for enforcing the detention specified in Article 16 of the directive. Lastly, I would observe that the proposal for a Directive of the European Parliament and of the Council of 12 September 2018 on common standards and procedures in Member States for illegally staying third-country nationals (COM(2018) 634 final), which is still pending, provides for a new ground for detention, namely the situation of a third-country national who constitutes a risk to public policy, public security or national security.

5 The term used by the referring court is '*Strafgefangenen*', which is contained in Paragraph 62a(1) of the AufenthG and designates as a general rule detainees sentenced, according to a final judgment, to a term of imprisonment, as opposed to the term '*Untersuchungsgefangene*', which corresponds to detainees held on remand.

IV. Analysis

A. Continued existence of the dispute in the main proceedings

21. It is clear from both the wording and the scheme of Article 267 TFEU that a national court or tribunal is not empowered to bring a matter before the Court by way of a reference for a preliminary ruling unless a case is pending before it, in which it is called upon to give a decision that is capable of taking account of the Court's ruling. Consequently, the Court is required to verify, of its own motion, the continued existence of the dispute in the main proceedings.[6]

22. In the present case, it is apparent from the documents before the Court that, following the dismissal, by the order of 24 August 2017 of the Landgericht (Regional Court), of his appeal against the order placing him in detention in ordinary prison accommodation, WM lodged an appeal on a point of law against the latter order before the referring court seeking a declaration of the unlawfulness of his detention. According to the German Government,[7] WM claims that the detention order is unlawful because Paragraph 62a of the AufenthG is contrary to Article 16(1) of Directive 2008/115.

23. It is established that WM was removed to Tunisia on 9 May 2018, prior to the submission of the request for a preliminary ruling on 22 November 2018.

24. In paragraph 8 of the order for reference, the Bundesgerichtshof (Federal Court of Justice) states that, pursuant to point 3 of the first sentence of Paragraph 70(3) of the Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (Law on proceedings in family matters and in matters of non-contentious jurisdiction) ('the FamFG'), the appeal is permissible under Paragraph 62 of the FamFG and it is also admissible (Paragraph 71 of the FamFG); whether or not it is well founded depends in essence on the answer given by the Court to the question referred for a preliminary ruling.

25. It should be recalled that it is not for the Court, in the context of a reference for a preliminary ruling, to rule on the interpretation of provisions of domestic law.[8] Thus, having regard to the information provided by the referring court, it must be held that the dispute in the main proceedings is still pending before that court and that a reply from the Court to the question referred remains useful for resolving that dispute. An answer must therefore be given in response to the request for a preliminary ruling.[9]

6 Judgment of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraph 31).

7 Paragraph 7 of the observations of the German Government.

8 Judgment of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraph 34).

9 In the case which gave rise to the judgment of 17 July 2014, *Pham* (C-474/13, EU:C:2014:2096), the factual and legal circumstances were comparable to the present case: it concerned a third-country national who had been detained in prison accommodation in Germany on the basis of Paragraph 62(1) of the AufenthG, in the version thereof applicable at the time, and then deported to Vietnam. Following that removal, the Bundesgerichtshof (Federal Court of Justice) had referred a question to the Court for a preliminary ruling concerning the interpretation of Article 16 of Directive 2008/115; the judgment cited above stated that the action before the Bundesgerichsthof (Federal Court of Justice) sought a declaration that the rights of the detained person had been impaired by the orders relating to the extension of her detention in the prison. Paragraph 10 of the judgment states: 'According to the Bundesgerichtshof [Federal Court of Justice], in view of the infringement of a particularly important fundamental right, appeals against a measure involving a deprivation of liberty are admissible even after the measure has been carried out, because the person concerned has a legitimate interest in the measure involving the deprivation of liberty being declared unlawful even after its implementation'. Although the latter clarification does not appear in the order for reference, it unquestionably underlies the considerations of the Bundesgerichtshof (Federal Court of Justice) concerning the permissibility of the appeal in the present case.

B. Applicability of Article 16 of Directive 2008/115

26. The Swedish Government considers, primarily, that Article 16(1) of Directive 2008/115 does not apply to a situation such as that in the main proceedings. In that regard, it points out that, under Article 72 TFEU, which provides that the European Union's common policy on immigration is not to 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, those States remain competent to adopt effective security measures within the context of the detention of an illegally staying third-country national for the purpose of removal.

27. In the present case, the Swedish Government takes the view that the national legislation at issue in the main proceedings is necessary to maintain law and order and to safeguard the internal security of the Federal Republic of Germany within the meaning of Article 72 TFEU.

28. That line of argument, which is not supported by the German Government and is contested by the Commission, cannot be accepted, since the national provision at issue in the main proceedings does indeed fall, in my view, within the scope of Directive 2008/115.

29. The extent of the scope of Directive 2008/115 must be assessed taking into account the general scheme of that directive, which was adopted in particular on the basis of Article 63(3)(b) EC, a provision reproduced in Article 79(2)(c) TFEU which is contained in Part Three, Title V of the TFEU on the 'area of freedom, security and justice'. [10]

30. As is apparent from both its title and Article 1, Directive 2008/115 establishes 'common standards and procedures' which must be applied by each Member State for returning illegally staying third-country nationals. It follows from that expression, but also from the general scheme of that directive, that the Member States may depart from those standards and procedures only as provided for therein, inter alia in Article 2. [11]

31. Article 2(1) of Directive 2008/115, which defines the scope of that directive, provides that it applies to third-country nationals staying illegally on the territory of a Member State. The concept of an 'illegal stay' is defined in Article 3(2) of that directive as 'the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State'. It follows from that definition that any third-country national who is present on the territory of a Member State without fulfilling the conditions for entry, stay or residence there is, by virtue of that fact alone, staying there illegally, without such presence being subject to a condition requiring a minimum duration or an intention to remain on that territory. [12]

32. Pursuant to Article 2(2) of Directive 2008/115, Member States have the option not to apply that directive in clearly and exhaustively listed cases, namely:

– third-country nationals who are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State;

– third-country nationals who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.

10 That title includes Article 72 TFEU, which states that 'this Title 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'.

11 See, by analogy, judgment of 28 April 2011, *El Dridi* (C-61/11 PPU, EU:C:2011:268, paragraph 32).

12 Judgment of 7 June 2016, *Affum* (C-47/15, EU:C:2016:408, paragraph 48).

33. There is nothing in the documents before the Court to suggest that the situation of the applicant in the main proceedings is covered by either of the two abovementioned derogations.

34. In the observations of the applicant in the main proceedings and in the German Government's response to the request for information made to it, reference is made to a procedure for the purpose of extradition to Tunisia including detention, a procedure which was terminated by decision of the Prosecutor General of Frankfurt am Main (Germany) in November 2016. In addition, the order for reference mentions the cancellation by the Bundesgerichtshof (Federal Court of Justice) of an arrest warrant issued in January 2017 against the person concerned, who was suspected of supporting a foreign terrorist group, and the subsequent termination of the period of remand being served by the applicant in the main proceedings; the cancellation decision at issue dates back to 17 August 2017. A criminal law sanction was therefore not imposed on the person concerned.

35. Whilst it is true that it is impossible to determine on the basis of the order for reference whether the applicant in the main proceedings was initially staying in Germany legally, it is established that, by decision of 1 August 2017, the competent ministry of the *Land* of Hesse ordered his removal to Tunisia on the basis of Paragraph 58a(1) of the AufenthG, with that return decision, within the meaning of Directive 2008/115, constituting a priori an administrative decision adopted in respect of the illegal stay of the person concerned and not a criminal law sanction or a consequence of such a sanction.

36. Any right to stay of the person concerned therefore ceased with effect from that decision, followed, on 18 August 2017, by the decision to detain him in prison accommodation adopted on the basis of the national legislation at issue in the main proceedings, that is to say Paragraph 62a(1) of the AufenthG, which is intended to transpose Article 16(1) of Directive 2008/115 into the German legal system.

37. It thus appears that the situation of the applicant in the main proceedings does indeed fall within the scope of Directive 2008/115 and, more specifically, of Article 16(1) of that directive, which provides that detention is to take place as a matter of priority in a specialised facility.

38. The Swedish Government's mere reliance on Article 72 TFEU cannot be enough to disapply Directive 2008/115 in the present case, even though reference is essentially made in the national legislation at issue in the main proceedings to the concept of a particular threat to national security.

39. According to the Court's settled case-law, although it is for Member States to take the appropriate measures to ensure their internal and external security, it does not follow that such measures are entirely outside the scope of EU law.[13]

13 Judgment of 15 December 2009, *Commission* v *Denmark* (C-461/05, EU:C:2009:783, paragraph 51 and the case-law cited).

40. The issue of the protection of public policy, public security and national security is expressly taken into account in Article 6(2), Article 7(4), Article 11(2) and (3) and Article 12(1) of Directive 2008/115,[14] without however constituting a ground for derogation from the application of that directive. Those provisions also reflect the intention of the EU legislature to take account of the powers reserved to the Member States in the area of illegal immigration and illegal stays as defined in Article 72 TFEU, with the situation taken as a whole reflecting a 'coexistence'[15] of powers between the Union and the Member States in that area.

41. Article 72 TFEU cannot be interpreted, as the Swedish Government asks the Court to do, as affording the Member States the ability purely and simply to disapply Directive 2008/115, and more specifically Article 16 thereof, which would be liable to impair the binding nature of EU law and its uniform application.[16]

42. Account must be taken of that provision of primary law, first, when adopting EU acts under Title V of the TFEU on the 'area of freedom, security and justice', with a failure to do so on the part of the EU legislature potentially leading, where appropriate, to a declaration made on the basis of that provision that such an act is invalid and, second, when interpreting those acts, as I will explain below in relation to Article 16 of Directive 2008/115.

43. Finally, it should be recalled that, notwithstanding the fact that neither Article 63(3)(b) EC, a provision which was reproduced in Article 79(2)(c) TFEU, nor Directive 2008/115, adopted inter alia on the basis of that provision of the EC Treaty, precludes the Member States from having competence in criminal matters in the area of illegal immigration and illegal stays, they must adjust their legislation in that area in order to ensure compliance with EU law. In particular, those States may not apply rules, even criminal law rules, which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness.[17]

44. It is the duty of the Member States, following from Article 4(3) TEU, to take any appropriate measure to ensure fulfilment of the obligations arising from Directive 2008/115 and to refrain from any measure which could jeopardise the attainment of the objectives of that directive. It is important that the national provisions applicable must not be capable of compromising the proper application of the common standards and procedures introduced by the directive.[18]

45. It therefore take the view that the Swedish Government's argument alleging that Article 16 of Directive 2008/115 does not apply should be rejected and that it is necessary to determine whether the national legislation at issue, which provides for a possibility of imprisoning a third-country national awaiting removal, is capable of compromising the proper application of the common standards and procedures introduced by that directive and, thereby, of jeopardising the objectives of the directive.

14 Those provisions allow a return decision to be adopted in respect of illegally staying third-country nationals who hold a valid residence permit or other authorisation offering a right to stay issued by another Member State (Article 6(2) of Directive 2008/115), a period for voluntary departure not to be granted or reduced to fewer than seven days (Article 7(4) of Directive 2008/115), an entry ban not to be imposed or the length of such a ban to be increased (Article 11(2) and (3) of Directive 2008/115) and the reasons in fact for return decisions, entry-ban decisions and decisions on removal to be limited (Article 12(1) of Directive 2008/115).

15 See Opinion of Advocate General Sharpston in *Commission* v *Poland (Temporary relocation mechanism for persons seeking international protection)*, *Commission* v *Hungary (Temporary relocation mechanism for persons seeking international protection)* and *Commission* v *Czech Republic (Temporary relocation mechanism for persons seeking international protection)* (C-715/17, C-718/17 and C-719/17, EU:C:2019:917, point 212). In that Opinion (points 202 to 223), the Advocate General rightly states that 'Article 72 TFEU most obviously serves to remind the EU legislature of the need to make appropriate provision, in any secondary legislation enacted under Title V, for Member States to be able to discharge those responsibilities' but that, when exercising those responsibilities in a particular area, the Member States must comply with the rules of EU law.

16 Judgment of 15 December 2009, *Commission* v *Denmark* (C-461/05, EU:C:2009:783, paragraph 51 and the case-law cited).

17 Judgment of 28 April 2011, *El Dridi* (C-61/11 PPU, EU:C:2011:268, paragraphs 54 and 55).

18 Judgment of 6 December 2011, *Achughbabian* (C-329/11, EU:C:2011:807, paragraph 43).

C. Interpretation of Article 16 of Directive 2008/115

46. According to settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part. [19]

47. It is therefore necessary to undertake a literal, systematic and teleological interpretation of Article 16(1) of Directive 2008/115, taking into account the Court's existing case-law relating to that act. [20]

48. In that connection, it is important to note that the first sentence of Article 16(1) of Directive 2008/115 lays down the principle that the detention of illegally staying third-country nationals for the purpose of removal is to take place in specialised detention facilities. The second sentence of that provision lays down a derogation from that principle, which, as such, must be interpreted strictly. [21]

1. Literal interpretation

49. It is established that the second sentence of Article 16(1) of Directive 2008/115 is not couched in identical terms in all the language versions. That provision states, in the German version, that, 'where a Member State does not have specialised detention facilities and prison accommodation must be used, the third-country nationals in detention shall be kept separated from ordinary prisoners'. In the other language versions, which are consistent in nature, the provision refers not to the absence of specialised detention facilities, but to the fact that a Member State 'cannot' provide accommodation for those third-country nationals in such facilities; [22] nor does that provision specify the reasons why a Member State might find itself unable to do so. [23]

50. In addition, as the Court has held, a single differing language version cannot take precedence over the other language versions, [24] and therefore attention should be focused on the general scheme of the legislation containing the provision concerned as well as the objective pursued by the EU legislature. [25] I also note that although the language versions, other than the German-language version, are liable to afford greater discretion to the national authorities, they do nevertheless express a restrictive approach to the derogation from the principle of detention in a specialised facility, with Member States having to be in a situation of compulsion (in the present case, that of having no choice other than to proceed with detention in prison accommodation).

51. In any event, a literal interpretation of Article 16(1) of Directive 2008/ 115 is incapable of providing an unequivocal response to the question submitted by the referring court.

19 Judgment of 10 September 2014, *Ben Alaya* (C-491/13, EU:C:2014:2187, paragraph 22 and the case-law cited).

20 The Court has already twice had occasion to rule on the interpretation of Article 16(1) of Directive 2008/115 as regards the detention arrangements provided for in German law, it being observed that the legislation at issue in the present case was introduced only after those judgments. In the judgment of 17 July 2014, *Bero and Bouzalmate* (C-473/13 and C-514/13, EU:C:2014:2095), the Court found that a Member State with a federal structure is required, as a rule, to detain persons in specialised detention facilities, even if the competent federated state does not have such facilities. In the judgment of 17 July 2014, *Pham* (C-474/13, EU:C:2014:2096), the Court took the view that national legislation providing for the detention of illegally staying third-country nationals in prison accommodation together with ordinary prisoners is incompatible with Directive 2008/115, and that the consent of the third-country nationals to such detention is irrelevant in that regard.

21 Judgment of 17 July 2014, *Bero and Bouzalmate* (C-473/13 and C-514/13, EU:C:2014:2095, paragraph 25).

22 Judgment of 17 July 2014, *Bero and Bouzalmate* (C-473/13 and C-514/13, EU:C:2014:2095, paragraph 26).

23 The German-language version of Article 16(1) of Directive 2008/115 clearly explains the argument put forward by the German Government (paragraphs 10 to 13 of its observations) that the national legislation at issue is not covered by the derogation provided for in the *second sentence* of Article 16(1) of the directive, since the issue in question is not that there is no specialised detention facility, that is to say a case of impossibility, but rather that it is a lawful derogation from the principle laid down in the *first sentence* of Article 16(1) of that directive. That argument disregards the structure and therefore the meaning of the provision cited above which lays down, in a clearly defined structure, a principle and an exception thereto in, respectively, the first and second sentence of Article 16(1) of Directive 2008/115; the compatibility of the national legislation at issue must necessarily be assessed in the light of the wording of the second sentence of Article 16(1).

24 Judgment of 17 July 1997, *Ferriere Nord* v *Commission* (C-219/95 P, EU:C:1997:375, paragraph 15).

25 Judgment of 3 April 2008, *Endendijk* (C-187/07, EU:C:2008:197).

2. Systematic interpretation

52. Having considered the detention measure in the light of the general scheme of Directive 2008/115, more specific consideration will have to be given to the relationship between Articles 16 and 18 of the directive and to the use, in that act but also in other directives, of the concepts of 'public policy' and 'public security'.

(a) The detention measure

53. It should be noted that, where a third-country national, such as WM, is deemed to be staying in a Member State illegally and, in accordance with Article 2(1) of Directive 2008/115, therefore falls within the scope of that directive, he must be subject to the common standards and procedures laid down therein for the purpose of his removal. [26]

54. Directive 2008/115 sets out in detail the procedure to be applied by each Member State for returning illegally staying third-country nationals and fixes the order in which the various stages of that procedure should take place. [27]

55. The order in which the stages of the return procedure established by Directive 2008/115 are to take place corresponds to a gradation of the measures to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility; the principle of proportionality must be observed throughout those stages. Even the use of the latter measure, which is the most serious constraining measure allowed by the directive under a forced removal procedure, is strictly regularised, pursuant to Articles 15 and 16 of that directive, inter alia in order to ensure observance of the fundamental rights of the third-country nationals concerned. [28]

56. In that regard, under the second subparagraph of Article 15(1) of Directive 2008/115, the measure involving a deprivation of liberty must be for as short a period as possible and maintained only as long as removal arrangements are in progress and executed with due diligence. Under Article 15(3) and (4), such a deprivation of liberty is subject to review at reasonable intervals of time and is to be terminated when it appears that a reasonable prospect of removal no longer exists. Article 15(5) and (6) fixes the maximum duration of detention at 18 months, a limit which is imposed on all Member States. [29]

57. With regard to the conditions of detention, minimum safeguards are provided for in Articles 16 and 17 of Directive 2008/115. [30] Article 16 of that directive requires that the persons concerned are placed as a matter of priority in a specialised facility and, in any event, separated from ordinary prisoners, receive information about their rights and obligations during the period of detention, and may establish contact with relevant and competent national, international and non-governmental organisations and bodies. Article 17 of the directive provides for a special, more favourable scheme governing the detention of vulnerable persons, namely unaccompanied minors and families.

26 See, to that effect, judgment of 7 June 2016, *Affum* (C-47/15, EU:C:2016:408, paragraph 61).

27 Judgment of 28 April 2011, *El Dridi* (C-61/11 PPU, EU:C:2011:268, paragraph 34).

28 Judgment of 28 April 2011, *El Dridi* (C-61/11 PPU, EU:C:2011:268, paragraphs 41 and 42).

29 Judgment of 28 April 2011, *El Dridi* (C-61/11 PPU, EU:C:2011:268, paragraph 40).

30 See, to that effect, judgment of 7 June 2016, *Affum* (C-47/15, EU:C:2016:408, paragraph 62).

58. It thus appears that, although conceived as a measure of last resort, the deprivation of the liberty of a third-country national awaiting removal forms an integral part of the arrangements established by the EU legislature for the purposes of ensuring the smooth conduct of the return procedures laid down in Directive 2008/115, the objective of which is specifically to ensure an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.

59. The EU legislature also provided, in unequivocal fashion, that the deprivation of liberty could take place within ordinary prison accommodation. That observation, even if it is regarded as being a truism, must be borne in mind when assessing the compatibility of the national legislation at issue with EU law.

60. Furthermore, the Court has observed that it is only where, in the light of an assessment of each specific situation, the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned that the Member States may deprive that person of his liberty and detain him.[31]

61. That clarification unquestionably points to the account taken of the individual conduct of the migrant concerned in assessment of the effectiveness of return procedures and, more specifically, indicates that that migrant may be made subject to a measure involving a deprivation of liberty. The national legislation at issue provides for a coercive measure necessarily based on an assessment of the individual circumstances of the third-country nationals concerned for the purposes of determining the potential threat posed by them.

(b) The relationship between Articles 16 and 18 of Directive 2008/115

62. Although they are separated and do not appear continuously in the wording of Directive 2008/115, Articles 16 and 18 of that directive are quite clearly linked and must be read together, with the wording of the latter article explaining that it is an exception to the former. Thus, where a Member State is faced with 'emergency situations', as described in Article 18 of Directive 2008/115, it is able to derogate from the principle that detention is carried out in a specialised facility because it is physically impossible for it to give effect to that principle.

63. The question raised is whether Article 18 of Directive 2008/115 has 'exhausted' the possible grounds for derogation from that principle.

64. The fact that 'emergency situations', as defined in Article 18 of Directive 2008/115, is the sole ground for derogation expressly laid down by the EU legislature to detention in a specialised facility as a matter of priority does not necessarily mean that it is an exclusive ground. As Advocate General Bot observed in his Opinion in *Bero and Bouzalmate*,[32] it seems impossible to answer the abovementioned question in the affirmative on the basis of the wording of Directive 2008/115.

65. Although a literal analysis of Article 18 of Directive 2008/115 does indeed reveal a connection with Article 16(1), the scope of that reference is limited, in my view, simply to stating the rule which may be temporarily disapplied, namely placement in a specialised detention facility, in the event of the sudden arrival of a large number of migrants representing an emergency situation. The sole purpose of the reference to Article 16(1) of Directive 2008/115 is to specify one of the circumstances triggered by the

31 Judgment of 28 April 2011, *El Dridi* (C-61/11 PPU, EU:C:2011:268, paragraph 39).
32 C-473/13, C-474/13 and C-514/13, EU:C:2014:295.

occurrence of an emergency situation, in addition to an extension of the periods for judicial review, as provided for in the third subparagraph of Article 15(2) of that directive, and the possibility of breaching the obligation to provide separate accommodation to families, as set out in Article 17(2) of the directive. [33]

66. I would point out, moreover, that the current Article 18 of Directive 2008/115 did not appear in the Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals of 1 September 2005. [34] However, that proposal did already contain an Article 15(2) which was worded almost identically to Article 16(1), that is to say it provided for a possible derogation from the principle of placement in a specialised detention facility, without specifying the grounds for such derogation. The legislative process therefore led to Article 18 being introduced into Directive 2008/115, which may be seen as the intention of the legislature to formalise, first, a specific ground for derogation as concerning the sensitive issue for Member States of a mass influx of illegal migrants into their territory and, second, the consequences for the application of Directive 2008/115 of the difficulties created by such a situation.

67. It must be stated that, following the introduction of Article 18 into Directive 2008/115, Article 16(1) of Directive 2008/115 has remained unchanged, retaining its general wording.

68. It is further important to note that, in Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks, [35] the following is stated: 'the derogation foreseen in Article 16(1) of Directive [2008/115] may be applied when unforeseen peaks in the number of detainees caused by unpredictable quantitative fluctuations inherent to the phenomenon of irregular migration (not yet reaching the level of an "emergency situation" expressly regulated in Article 18 of Directive [2008/115]) cause a problem …'. A ground for derogation from detention as a matter of priority in a specialised facility distinct from that set out in Article 18 of Directive 2008/115, which is therefore in no way exclusive, is thus clearly envisaged.

69. Lastly, I am of the view that, given the autonomy of Article 18 of Directive 2008/115 and the fact that the ground for derogation from placement in a specialised detention facility contained therein is not exclusive, it does not appear to me that that provision has to serve as a mandatory reference when determining the characteristics of a situation that may be relied on by a Member State as the basis for enforcing detention in prison accommodation.

(c) The concepts of 'public policy' and 'public security'

70. It should be recalled that the national legislation at issue provides for the possibility of detaining in prison accommodation a migrant awaiting removal who represents 'a serious threat to the life and limb of others' or to 'significant internal security issues'. In my view, that form of words quite clearly reflects the account taken of reasons connected with public policy or public security.

33 Article 17(2) of Directive 2008/115 provides that families detained pending removal are to be provided with separate accommodation guaranteeing adequate privacy.

34 COM(2005) 391 final.

35 OJ 2017 L 339, p. 83.

71. Those two concepts are very familiar in EU law, since reasons of public policy or public security are put forward in various directives to justify giving effect to a derogation from a fundamental freedom or a fundamental right, thus constituting a public policy or public security exception. A systematic approach to Article 16(1) of Directive 2008/115 entails analysing that provision not only in the light of the act of which it forms part but also of the various directives referring to those concepts which are regularly interpreted by the Court.

72. In that regard, it is apparent from the Court's settled case-law that a Union citizen who has exercised his or her right to free movement and certain members of that citizen's family can be regarded as posing a threat to public policy only if their individual conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society of the Member State concerned. The concept of 'threat to public policy [*ordre public*]' has subsequently been interpreted in the same way in the context of a number of directives, including Directive 2008/115, governing the situation of third-country nationals who are not part of a Union citizen's family. [36]

73. As regards the concept of 'public security', it is apparent from the Court's case-law that that concept covers both a Member State's internal and external security, and that, therefore, a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security. [37] The Court has also held that the fight against crime in connection with dealing in narcotics as part of an organised group [38] or against terrorism [39] is included within the concept of 'public security'. In that context, the Court has required demonstration of individual conduct representing a genuine, present and sufficiently serious threat affecting the internal or external security of the Member State concerned. [40]

74. However, the Court has very recently stated that any reference by the EU legislature to the concept of a 'threat to public policy' does not necessarily have to be understood as referring exclusively to individual conduct representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society of the Member State concerned. Thus, with regard to the kindred concept of a 'threat to public security', the Court has stated that, in the context of Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, [41] that concept must be interpreted more broadly than it is in the case-law relating to persons enjoying the right of free movement and that it may cover inter alia potential threats to public security. In order to define the scope of the concept of a 'threat to public policy', the Court has therefore taken the view that it is necessary to take into account the wording of the provision of EU law referring to that concept, its context and the objectives pursued by the legislation of which it forms part. [42]

75. In the light of the foregoing, I am of the view that the public policy and public security grounds to which the national legislation refers may justify a derogation from the placement of the migrant in a specialised detention facility laid down, as a matter of priority, in Article 16(1) of Directive 2008/115, provided that the conduct of the migrant concerned is such as to indicate the existence of a genuine,

36 Judgment of 12 December 2019, *E.P. (Threat to public policy)* (C-380/18, EU:C:2019:1071, paragraphs 29 and 30).

37 See, to that effect, judgments of 23 November 2010, *Tsakouridis* (C-145/09, EU:C:2010:708, paragraphs 43 and 44); of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraphs 65 and 66); and of 2 May 2018, *K. and H.F. (Right of residence and alleged war crimes)* (C-331/16 and C-366/16, EU:C:2018:296, paragraph 42).

38 See, to that effect, judgment of 23 November 2010, *Tsakouridis* (C-145/09, EU:C:2010:708, paragraphs 45 and 46).

39 See, to that effect, judgment of 26 November 2002, *Oteiza Olazabal* (C-100/01, EU:C:2002:712, paragraph 35).

40 Judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 67) concerning point (e) of the first subparagraph of Article 8(3) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96).

41 OJ 2004 L 375, p. 12.

42 Judgment of 12 December 2019, *E.P. (Threat to public policy)* (C-380/18, EU:C:2019:1071, paragraphs 31 to 33).

present and sufficiently serious threat affecting one of the fundamental interests of society or the internal or external security of the Member State concerned. The fact that the concepts of 'public policy' or 'public security' are not expressly mentioned in that article, unlike in other provisions of that same directive, cannot invalidate that conclusion.

76. It is important to note that the Member States enjoy, in a number of respects, a discretion with regard to the implementation of the provisions of Directive 2008/115 in the light of the particular features of national law.[43] In addition, as clarified above, Article 16(1) of Directive 2008/115 must be interpreted in the light of Article 72 TFEU, which provides for a reserved power for Member States in order to maintain law and order and safeguard internal security. Accordingly, the fact that the concepts of 'public policy' or 'public security' are not expressly mentioned in Article 16(1) of Directive 2008/115 does not mean that, when determining the conditions for a derogation from the placement of a migrant in a specialised detention facility pending his removal, a Member State cannot rely on considerations concerning one of the fundamental interests of society or internal or external security.

77. In contextual terms, it should be recalled that the question of protecting public policy, public security and national security is explicitly taken into account in Article 6(2), Article 7(4), Article 11(2) and (3) and Article 12(1) of Directive 2008/115, without however those concepts being defined in that directive. The Court has held that the concept of a 'risk to public policy', as set out in Article 7(4) of the directive, presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.[44] The requirement of such a threat, as the basis for reducing or abolishing the period for voluntary departure, applies a fortiori to justify the most serious constraining measure, namely detention in prison accommodation, by way of derogation from the principle of placement in a specialised facility. Any other solution would introduce inconsistency into Directive 2008/115.

78. With regard to the main objective of Directive 2008/115, it consists, as is apparent from recitals 2 and 4 of that directive, in establishing an effective removal and repatriation policy that fully respects the fundamental rights and dignity of the persons concerned.[45] In those circumstances, since detention in a specialised facility is the rule, the second sentence of Article 16(1) must be interpreted strictly[46] and the leeway which it affords to the Member States must not be used by them in a way which would undermine the objective of that directive and its effectiveness.

79. It thus appears that, where the decision to detain a third-country national awaiting removal in prison accommodation is based on the existence of a threat to public policy or public security, which presupposes, in any event, in addition to the perturbation of the social order which any infringement of the law involves, the existence of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society or the internal or external security of the Member State concerned, such a decision might be consistent with EU law.

80. In that regard, in its interpretation of Article 7(4) of Directive 2008/115, the Court has found that the mere suspicion that a third-country national may commit an act punishable as a criminal offence under national law may, together with other factors relating to the case in question, be used as a basis for a finding that he poses a risk to public policy within the meaning of that provision; the self-same solution is adopted in the event of a criminal conviction.[47] The Court has clarified that a specific appraisal of the interests inherent in protecting public policy within the meaning of that provision

43 Judgment of 5 June 2014, *Mahdi* (C-146/14 PPU, EU:C:2014:1320, paragraph 39).

44 Judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraph 60 and the case-law cited).

45 Judgments of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraph 48), and of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 75 and the case-law cited).

46 Judgment of 17 July 2014, *Bero and Bouzalmate* (C-473/13 and C-514/13, EU:C:2014:2095, paragraph 25).

47 Judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraphs 51 and 52).

does not necessarily coincide with the appraisals which form the basis of a criminal conviction and, even more importantly in my view, that 'any factual or legal matter relating to the situation of the third-country national concerned which may throw light on whether his personal conduct poses such a threat' is relevant in an assessment of the concept of a 'risk to public policy'. [48]

81. In my view, that very general form of words reflects the Court's empirical and open approach to the demonstration of the existence of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. In those circumstances, it appears to me that the mere finding that an offence has not been committed, that a criminal conviction has not been handed down, or even that there is no suspicion that an offence has been committed, is incapable of ruling out automatically the fact that the individual concerned may be regarded as a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society or the internal or external security of the Member State concerned.

82. Although the points of fact upon which the assessment of the existence of that threat turns will have to be examined by the referring court, the Court can provide guidance on the factors to be taken into consideration as part of such an examination.

83. It is clear from the documents before the Court that the situation taken into consideration for the purposes of ordering detention in prison accommodation [49] seems to be that of a radicalised individual exhibiting signs that he poses a risk and who is known as such by the competent security services; that risk is such as to arouse suspicion of criminal intent, in the sense that he is likely to carry out violent acts against other people or contrary to the higher interests of the State in furtherance of a terrorist agenda.

84. Although the reality of the acts of international terrorism attributable to the organisation at issue in the case in the main proceedings is indisputable and justifies the ability of a Member State to invoke the protection of public policy or public security, the referring court has to examine the role actually played by the third-country national concerned in the context of his support for that organisation and assess the degree of seriousness of the risk to public security or public policy arising from the conduct of the person concerned and, more specifically, from his personal responsibility in the acts carried out by that organisation. [50]

85. It is clear from the request for a preliminary ruling that, for the purposes of ordering WM's detention in prison accommodation, the competent national body had a priori documentary evidence, that is to say documents substantiating the reality of the alleged conduct of the person concerned and his determination to commit an offence and, more specifically, to carry out an attack in the territory of the Federal Republic of Germany. [51] That fact is relevant to the assessment of whether the person

48 Judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraphs 51, 52, 59 and 61).

49 Although the request for a preliminary ruling does not provide a detailed explanation of the grounds for the decision of the Amtsgericht (District Court) of 18 August 2017 ordering that WM be detained in prison accommodation, there can be no doubt that the situation described in points 10 to 12 of this Opinion was taken into account in finding there to be a serious threat to the life and limb of others or to significant internal security interests within the meaning of Paragraph 62a(1) of the AufenthG. The German Government's response to the request for information mentions the fact that, from 15 August to 26 September 2016, WM served the remainder of an alternative penalty of 43 days' imprisonment for assault and battery with intent, a conviction which is not covered by the order for reference and does not seem to have been taken into account as a basis for the decision at issue.

50 In the judgment of 24 June 2015, *T.* (C-373/13, EU:C:2015:413), the Court held that the mere fact that a refugee supported a terrorist organisation cannot automatically mean that his residence permit is revoked. It once again rejected any automatic causal reasoning based on a single relevant fact, requiring instead an 'individual assessment of the specific facts' both with regard to the activity of the organisation in question and the conduct of the person concerned.

51 The prevention of terrorist acts currently represents a major policy challenge and sometimes prompts national authorities to penalise the stage prior to the commission of a terrorist act, thereby blurring the traditional distinction between administrative and judicial policy. The approach traditionally adopted in criminal law is, however, that the mere intention to commit an offence is not punishable (*cogitationis poenam nemo patitur*). Even though the national legislation concerned does not fall within the scope of criminal law, since the measure at issue is administrative in nature and has no punitive character, the — objectively delicate — assessment of the risk posed by the individual concerned in the light of his psychological profile and his criminal intent must be conducted with the greatest rigour, having gathered specific, reliable and corroborating evidence, the accuracy and relevance of which are to be determined by the referring court.

concerned posed a threat to public policy or public security since it is concerned with the credibility of the suspicion borne by WM and it may therefore throw light on the issue of whether his personal conduct posed a risk to the public policy or public security of the Federal Republic of Germany when the decision to detain him in prison accommodation was taken. [52]

86. Finally, it is for that court to ascertain, having regard to the principle of proportionality that the measure to be taken was required to observe, whether the conduct of the national concerned poses a genuine and *present* risk to the public policy or the public security of the Member State, and therefore to determine whether the threat that the person concerned might possibly have constituted in the past for the public policy or the public security of the Federal Republic of Germany still existed at the date on which the decision at issue in the main proceedings was taken; [53] that determination must likewise be made when assessing whether a person should be kept in detention. [54]

3. Teleological interpretation

87. It should be observed that, in accordance with Article 79(2) TFEU, the objective of Directive 2008/115, as is apparent from recitals 2 and 11 of that directive, is to establish an effective removal and repatriation policy, based on common standards and common legal safeguards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity. [55] The purpose of Article 16(1) of Directive 2008/115 can clearly be inferred from the guiding principle expressed by the EU legislature in Article 1 of that directive and in the abovementioned recitals.

88. As is clear from recitals 13, 16, 17 and 24 of Directive 2008/115, any detention ordered within the scope of that directive is strictly regulated by the provisions of Chapter IV of the directive so as to guarantee, first, respect for the principle of proportionality with regard to the means used and objectives pursued [56] and, second, respect for the fundamental rights of the third-country nationals concerned. [57] In addition, according to recital 13 of the same directive, the use of coercive measures should be expressly subject not only to the principle of proportionality, but also to the principle of effectiveness. [58]

89. In those circumstances, it is necessary to establish whether the placement of a migrant awaiting removal in ordinary prison accommodation, on the basis of the consideration that the migrant poses a serious threat to the life and limb of others or to significant legal interests of internal security, is a measure consistent with the principles of effectiveness and proportionality, and which respects the fundamental rights of the person concerned.

52 Judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraph 64).

53 Judgments of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraph 57); of 24 June 2015, *T.* (C-373/13, EU:C:2015:413, paragraph 92); and of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 73).

54 See, by analogy, judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 67).

55 Judgments of 5 June 2014, *Mahdi* (C-146/14 PPU, EU:C:2014:1320, paragraph 38), and of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraph 48).

56 In particular, as the Court has already held, respect for the principle of proportionality must be observed throughout all stages of the return procedure established by the directive, which necessarily includes that concerned with detention including the stage relating to the return decision, in the course of which the Member State concerned must rule on the grant of a period for voluntary departure pursuant to Article 7 of that same directive (see, to that effect, judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraph 49).

57 Judgment of 5 June 2014, *Mahdi* (C-146/14 PPU, EU:C:2014:1320, paragraph 55).

58 Judgment of 10 September 2013, *G. and R.* (C-383/13 PPU, EU:C:2013:533, paragraph 42).

(a) Respect for the principle of effectiveness

90. Although Directive 2008/115 promotes the voluntary departure of a third-country national staying illegally in the territory of a Member State, it does provide for the use of coercive measures to ensure the achievement of its objective, namely the enforcement of the return decision. The coercive measure of last resort is the deprivation of personal liberty in the form of the detention of the person concerned which may, exceptionally, take place in ordinary prison accommodation in accordance with Article 16(1) of Directive 2008/115.

91. The national legislation at issue in the main proceedings therefore provides for a measure which clearly forms part of the arrangements established by that directive to ensure that the return procedures are effective; the nature of the grounds which may be relied upon by a Member State to justify such imprisonment derogating from the principle of detention in a specialised facility is immaterial from the perspective of assessment of the principle of effectiveness. It is also established that the national measure at issue is a coercive measure, within the meaning of Article 8(1) and (4) of Directive 2008/115, which contributes to the enforcement of a return decision and, therefore, to the implementation of the directive.

92. Moreover, the very object of the specialised detention facilities is to facilitate all the steps that allow the individual to be returned swiftly and effectively to his country of origin whilst respecting the rights afforded to him, in particular as regards contact between a migrant awaiting removal and the competent consular authorities as provided for in Article 16(2) of Directive 2008/115 or non-governmental organisations responsible for supporting migrants in detention. Enforcement of detention in prison accommodation must not therefore compromise such communication otherwise the effectiveness of the directive is undermined; this is for the referring court to determine.

(b) Respect for the principle of proportionality

93. It should be recalled that, in accordance with Article 52(1) of the Charter of Fundamental Rights of the European Union ('the Charter'), any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be imposed on the exercise of those rights and freedoms, in the present case the right to freedom enshrined in Article 6 of the Charter, 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.

94. Since the limitation at issue has its origin in Paragraph 62a(1) of the AufenthG, it has a legal basis. That provision does not affect the essence of the right to liberty enshrined in Article 6 of the Charter. It does not render the guarantee of that right less secure and, as is apparent from its wording, it allows a migrant to be detained in prison accommodation only on the basis of his individual conduct and under the exceptional circumstances referred to in the same provision.[59]

95. Given that the objective pursued by the national legislation at issue is the protection of national security and public policy, it must be held that a measure enforcing detention in prison accommodation which is based on that legislation meets a priori a legitimate objective of general interest recognised by the European Union.

59 See, by analogy, judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 52).

96. As regards the proportionality of the interference with the right to liberty that has been found to exist, it should be recalled that the principle of proportionality requires, according to settled case-law, that measures are appropriate in order to attain the objectives legitimately pursued by the legislation at issue and do not exceed the limits of what is necessary to achieve those objectives; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the burdens imposed must not be disproportionate to the aims pursued. [60]

97. In that regard, the detention in prison accommodation of a third-country national is, by its very nature, an appropriate measure for protecting the public from the threat which the conduct of such a person represents and is thus suitable for attaining the objective pursued by the national legislation at issue in the main proceedings. [61]

98. As for the necessity of the measure, it is important to note that the wording of Paragraph 62a of the AufenthG sets out the strict rules governing the use of the measure at issue, namely both the requirement of a 'serious' threat to the life and limb of others or to 'significant' legal interests of internal security posed by the person concerned and the absolute respect for the condition relating to the separation of that person from other ordinary prisoners.

99. The national provision at issue corresponds to a specific measure for enforcing detention, which is itself strictly regulated by Articles 15 and 16 of Directive 2008/115, in the case of a last-resort option in the context of the return procedure. In that connection, the purpose of the maximum period provided for in Article 15(5) and (6) of Directive 2008/115 is to limit the deprivation of the liberty of third-country nationals in forced removal situations: detention must be for as short a period as possible and maintained only as long as removal arrangements are in progress and executed with due diligence in accordance with Article 15(1), which is for the referring court to assess.

100. The strict circumscription of the power of the competent national authorities to detain a third-country national awaiting removal in prison accommodation is also ensured by the interpretation which the case-law of the Court gives to the concepts of 'national security' and 'public policy'. [62]

101. Thus, placing or keeping a migrant awaiting removal in detention in prison accommodation is, in view of the requirement of necessity, justified on the ground of a threat to national security or public policy only if the applicant's individual conduct represents a genuine, present and sufficiently serious threat, affecting a fundamental interest of society or the internal or external security of the Member State concerned; [63] this is for the national court to determine in the circumstances set out in points 79 to 86 above.

102. As has been stated previously, a measure is necessary where the legitimate objective pursued cannot be attained by an equally appropriate but less restrictive measure. [64]

60 See judgments of 11 July 1989, *Schräder HS Kraftfutter* (265/87, EU:C:1989:303, paragraph 21); of 12 July 2001, *Jippes and Others* (C-189/01, EU:C:2001:420, paragraph 81); and of 9 March 2010, *ERG and Others* (C-379/08 and C-380/08, EU:C:2010:127, paragraph 86). See also, to that effect, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 91).

61 See, by analogy, judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 55).

62 Judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 64).

63 Judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 67).

64 See, to that effect, judgment of 26 September 2013, *Dansk Jurist- og Økonomforbund* (C-546/11, EU:C:2013:603, paragraph 69).

103. In view of the characteristics of the specialised detention facilities [65] and the obligation on the national authorities to protect detained persons, [66] enforcement of detention in such facilities does not appear to me to be appropriate where that measure concerns an individual posing a serious threat to the life and limb of others or to significant legal interests of internal security. Viewed from the perspective both of preventing the risk of that individual fleeing and of protecting the physical well-being of the staff working in those facilities and of other detainees, the requirement of security cannot, in those circumstances, be regarded as satisfied.

104. Specialised detention facilities, the operating conditions of which mirror community living arrangements, are not designed to take account of specific security needs particular to certain especially dangerous individuals. [67] Incorporating those needs into specialised facilities without changing their structure would necessarily entail the overall tightening of the security arrangements to the detriment of freedom of movement within the facility of other detainees who do not pose, a priori, any risk and therefore the introduction of a prison environment for all. The alternative of creating a special unit within those specialised detention facilities specifically to manage a particularly dangerous individual seems to me to give rise to a disproportionate organisational burden and disproportionate cost in view of the low number of individuals concerned as compared with all the third-country nationals who are the subject of a return procedure involving detention.

105. Nor is the national provision at issue disproportionate in relation to the objectives sought, in that it is the result of a fair balance struck between the general interest objective pursued, namely the protection of national security and public policy, and the interference with the right to liberty occasioned by a detention measure enforced in prison accommodation; the right to dignity of the individual concerned must be observed absolutely. Such a provision cannot form the basis for measures ordering detention without the competent national authorities having previously determined, on a case-by-case basis, whether the threat that the persons concerned represent to national security or public policy corresponds at least to the gravity of the interference with the liberty of those persons that such measures entail and whether their right to dignity is fully observed. [68]

(c) Respect for the minimum safeguards in Directive 2008/115 and for fundamental rights

106. As has been stated above, the purpose of Article 16(1) of Directive 2008/115 can be understood solely in a manner compatible and consistent with the rights enshrined in the Charter and more specifically in Articles 1 to 4 thereof, which guarantee respect for human dignity and the right to life and to integrity of the person and prohibit inhuman and degrading treatment. Those references are necessarily read into the reference to fundamental rights contained in Article 1 of Directive 2008/115.

65 In addition to the minimum safeguards laid down in Articles 15, 16 and 17 of Directive 2008/115, various documents which constitute a non-binding legal source, namely the 'Twenty guidelines on forced return' adopted on 4 May 2005 by the Committee of Ministers of the Council of Europe, the European rules on prisons and the Union guidelines on the treatment of migrants in detention as well as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) standards, define conditions of detention of migrants awaiting removal; those conditions must differ to the greatest extent possible from those of a normal prison environment, whether in terms of the actual configuration of the accommodation or the rules governing the operation of the facilities, with an overall focus being placed on community living and the concept of 'living without freedom'. The European Court of Human Rights ('ECtHR') relies on those texts to draw up a non-exhaustive list of the criteria by the yardstick of which it assesses the adequacy of the place, conditions and regime of detention (see Opinion of Advocate General Bot in *Bero and Bouzalmate*, C-473/13, C-474/13 and C-514/13, EU:C:2014:295, points 87 and 88).

66 Applying Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, the ECtHR has clarified that people who are incarcerated are in a vulnerable position and the authorities are obliged to protect them, inter alia against the violent or inappropriate conduct of fellow detainees (ECtHR, 15 January 2019, *Gjini v. Serbia*, CE:ECHR:2019:0115JUD000112816).

67 Paragraph 28 of Chapter IV, which is devoted to the detention of foreign nationals, of the standards of the CPT states that, '… in certain exceptional cases, it might be appropriate to hold an immigration detainee in a prison, because of a known potential for violence'.

68 See, by analogy, judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraphs 68 and 69).

107. Accordingly, as Advocate General Bot made clear in his Opinion in *Bero and Bouzalmate*,[69] Article 16(1) of Directive 2008/115 and, more generally, the provisions dealing specifically with the conditions of detention of foreign nationals awaiting removal may be applied in practice and in accordance with those provisions only if they ensure the observance of those values.

108. It is therefore in the light, first, of the requirements of Directive 2008/115 and, second, of the fundamental rights proclaimed in the Charter that it is necessary to determine whether, in circumstances such as those at issue in the case in the main proceedings, the detention of WM in prison accommodation respects the rights afforded to him in the European Union.

(1) The minimum safeguards in Directive 2008/115

109. The specific minimum safeguards provided for in Directive 2008/115 in favour of third-country nationals awaiting removal include the conditions of detention laid down in Article 16 of that directive, which are to be observed by national procedures.

110. Comparison of the wording of that provision with the text of Paragraph 62a(1) of the AufenthG reveals that all the safeguards provided for in the directive are expressly reproduced in that national provision, with the notable exception of the obligation to pay attention to the situation of vulnerable persons and to provide emergency health care and the essential treatment of illness.[70]

111. It is, in any event, for the referring court to ensure that all the safeguards relating to the conditions of detention laid down in Article 16 of Directive 2008/115 are actually observed when a detainee is imprisoned. That assessment is particularly necessary and important in the light of the relatively laconic wording of those guarantees, and it is important to have regard to the actual scope of the requirements contained in the provision cited above. In that connection, it appears to me necessary to make certain observations further to the German Government's response to the request for information made to it by the Court.

112. First, the information explaining the rules governing the prison accommodation and specifying the rights and obligations of the third-country nationals detained therein must, in my view, be communicated in the languages commonly used by the persons concerned. I note that the German Government's response does not contain any information about compliance with that duty to provide information to the detainees, which must include inter alia mention of the detainee's right to contact relevant and competent national, international and non-governmental organisations and bodies.[71]

113. Secondly, it is clear from the German Government's response that the individual detained 'was allowed from time to time to have 30-minute monitored telephone conversations with his close relatives'; the length of those conversations increased to one hour fortnightly with effect from 4 October 2017 and then to a weekly 30-minute monitored telephone conversation from 1 December 2017. Those strict rules governing communication with close relatives may raise difficulties in the light of the wording of Article 16(2) of Directive 2008/115, which refers to contact between the detainees and their family members being established 'in due time' and above all 'on request'. The

69 C-473/13, C-474/13 and C-514/13, EU:C:2014:295, point 82.

70 It is highly likely that such considerations are incorporated into the regulation, organisation and operation of prisons. I note, in this regard, that particular attention was paid to WM within the detention facility following recommendations from the 'psychological service' when he was found to be physically agitated or, on the contrary, withdrawn. The person concerned was also subject to a psychiatric examination at the start of his detention and received, initially on a daily basis and then at greater intervals, visits from the psychological service in order to prevent his condition from deteriorating. Those factors show that the detainee received medical care, meaning that the view may be taken, a priori, that the provision of emergency health care and the essential treatment of illness, at the very least illness of a non-serious nature, could be guaranteed in the prison accommodation.

71 Furthermore, the German Government's response refers to the regular care provided to WM by the prison's 'social services'; it is unclear from that designation whether it may cover a national 'non-governmental' organisation or body within the meaning of Article 16(4) of Directive 2008/115.

joint use of those two expressions reflects, in my view, the intention of the EU legislature to strike a fair balance between the rules governing the operation of an entity (a specialist detention facility or a prison), which are necessarily focused on managing a particular community in a secure context, and the safeguards granted to each detainee allowing them to remain in contact with their family.[72]

114. Thirdly, reference is made in the German Government's response to contact between the detainee and persons held on remand, for the purpose of delivering meals to his cell, and, with effect from 4 October 2017, as part of one hour's free time spent in the company of some other 'appropriate' detainees. That situation raises certain problems connected with the interpretation of the wording of Article 16(1) of Directive 2008/115.

115. In that regard, the Court takes the view that is clear from the wording of that provision that it lays down an unconditional obligation requiring illegally staying third-country nationals to be kept separated from ordinary prisoners when a Member State cannot provide accommodation for those third-country nationals in specialised detention facilities. It has added that, first, the obligation requiring illegally staying third-country nationals to be kept separated from ordinary prisoners is not coupled with any exception and constitutes a guarantee of observance of the rights which have been expressly accorded by the EU legislature to those third-country nationals in the context of the conditions of detention in prison accommodation for the purpose of removal and, second, is more than just a specific procedural rule for carrying out the detention of third-country nationals in prison accommodation and constitutes a substantive condition for that detention, without observance of which the latter would, in principle, not be consistent with the directive.[73]

116. Even though it is possible to accept that it is the intention of the Court that Article 16(1) of Directive 2008/115 is interpreted strictly,[74] questions remain as to the exact scope of that obligation to keep ordinary prisoners separated, specifically as regards the meaning to be given to the latter expression. As part of its observations, the Commission points to the difference between the German version of the provision cited above, which uses the term '*Strafgefangenen*', which generally designates detainees sentenced to a term of imprisonment and is included in the question referred for a preliminary ruling, and other language versions, in particular the English- ('ordinary prisoners'), French- ('*prisonniers de droit commun*'), Spanish- ('*presos ordinarios*'), Italian- ('*detenuti ordinari*') and Estonian- ('*tavalistest vangidest*') language versions, which appear to cover persons held on remand.

117. Commission Recommendation 2017/2338 states the following: 'the term "ordinary prisoners" covers both convicted persons and prisoners on remand: this is confirmed by Guideline 10, paragraph 4 of the "[Twenty] Guidelines on forced return" of the Committee of Ministers of the [Council of Europe], which explicitly highlights that "persons detained pending their removal from the territory should not normally be held together with ordinary prisoners, convicted or on remand". Detainees must therefore also be separated from prisoners on remand'.

72 Although it is perfectly understandable and acceptable that a migrant posing a genuine, present and sufficiently serious threat to the internal or external security of the Member State concerned or affecting one of the fundamental interests of society cannot have a mobile telephone or use the means of communication made available to him at any time of day or night, an authoritarian time quota imposed on a right of communication, which is reduced to a right exercisable fortnightly, weekly or even arbitrarily at the whim of the prison administration, does not appear compatible with the requirements and the purpose of Article 16 of Directive 2008/115. By contrast, the fact that those telephone conversations are monitored seems to me to be appropriate given the particular profile of the migrant concerned.

73 Judgment of 17 July 2014, *Pham* (C-474/13, EU:C:2014:2096, paragraphs 17, 19 and 21).

74 The reasons stated by the Court in the judgment of 17 July 2014, *Pham* (C-474/13, EU:C:2014:2096) give rise, in my view, to a question regarding a contextual interpretation of Article 16 of Directive 2008/115. As has already been stated, that provision must be read in conjunction with Article 18 of that directive, which provides that a Member State may take urgent measures 'in respect of the conditions of detention derogating from those set out in Article 16(1) of the Directive'; that general wording can cover not only the enforcement of detention in specialised facilities but also, as a necessary consequence, the obligation to keep ordinary prisoners separated from migrants specifically detained in prison accommodation in the context of urgent measures. The validity of the use of the qualifier 'unconditional', when applied to the obligation to keep illegally staying third-country nationals separated from ordinary prisoners, appears to me to be uncertain.

118. It should be recalled that Directive 2008/115 intends to take account of the 'Twenty guidelines on forced return' of the Committee of Ministers of the Council of Europe, to which reference is made in recital 3 of the directive, which should a priori mean that the concept of 'ordinary prisoners' is interpreted as including convicted persons and those on remand.

119. However, that solution does not appear to me to be entirely convincing in theory or in practice.

120. Detention as a matter of priority in a specialised facility and the obligation to keep ordinary prisoners separated during the exceptional imprisonment of a migrant awaiting removal stem from the consideration that the persons to be returned are not 'criminals' and must therefore be treated differently from them, since the detention measure is purely administrative in nature. If the view may rightly have been taken that that requirement of separation directly contributed to respect for the human dignity and fundamental rights of a migrant who has not committed any crime or even any offence,[75] the latter finding likewise applies to persons held on remand who have yet to be convicted and benefit from the presumption of innocence.[76] The situation appears difficult, at least from a legal perspective, in the case of an 'unsavoury' detainee.

121. In practical terms, a strict application of the separation requirement risks leading to a situation which is at least paradoxical, in that the prevention of any contact with prisoners, regardless of their criminal status, has the consequence of placing the migrant in a form of isolation, which may be an affront to his dignity, whereas that requirement was conceived with a view to protecting the person concerned.[77] The question becomes even more complex when consideration is given to the particular profile of the migrant concerned, who was imprisoned pending his removal on account of the threat he poses, which is quite clearly not the profile taken into account when Article 16 of Directive 2008/115 was drafted. Thus, the risk to the physical well-being of people who may come into contact with that migrant, who was lawfully detained such as to justify his detention in prison accommodation, appears to argue in favour of the absolute prohibition on any communication with prisoners, both convicted prisoners and those awaiting trial, out of concern — on this occasion — to protect those prisoners.

122. At this point, consideration must be given to whether there is any affront to the dignity of a migrant awaiting removal who is imprisoned and, in accordance with the provision cited above, denied any contact with 'ordinary prisoners'.

(2) Respect for human dignity and prohibition of inhuman or degrading treatment

123. The meaning and the scope of Article 4 of the Charter, which corresponds to Article 3 ECHR, are, in accordance with Article 52(3) of the Charter, the same as those laid down by the ECHR.[78]

124. As regards the prohibition of inhuman or degrading treatment or punishment, laid down in Article 4 of the Charter, it is absolute in that it is closely linked to respect for human dignity, the subject of Article 1 of the Charter. That the right guaranteed by Article 4 of the Charter is absolute is confirmed by Article 3 ECHR. As is stated in Article 15(2) ECHR, no derogation is possible from Article 3 ECHR.[79] Articles 1 and 4 of the Charter and Article 3 ECHR enshrine one of the

75 Opinion of Advocate General Bot in *Bero and Bouzalmate* (C-473/13, C-474/13 and C-514/13, EU:C:2014:295, point 99).

76 See Article 48 of the Charter and Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, p. 1).

77 It is admittedly possible to envisage the situation in which several migrants awaiting removal are imprisoned simultaneously and can therefore participate in a free-time activity or go for a walk together, without the complaint alleging infringement of Article 16(1) of Directive 2008/115 being raised. It is highly likely that that scenario, although not theoretical, is statistically marginal.

78 See, to that effect, judgment of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218, paragraph 91).

79 Judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 85 and 86).

fundamental values of the Union and its Member States. That is why, in any circumstances, including those of the fight against terrorism and organised crime, the ECHR prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned. [80]

125. It follows from the case-law of the ECtHR that Article 3 ECHR imposes, on the authorities of the State on whose territory an individual is detained, a positive obligation to ensure that any prisoner is detained in conditions which guarantee respect for human dignity, that the way in which detention is enforced does not cause the individual concerned distress or hardship of an intensity exceeding the unavoidable level of suffering that is inherent in detention, and that, having regard to the practical requirements of imprisonment, the health and well-being of the prisoner are adequately protected. [81]

126. The methods of enforcement taken into account in assessing whether there is inhuman or degrading treatment include holding the person concerned in solitary confinement. In that regard, the ECtHR has stated: 'complete sensory isolation, coupled with total social isolation, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason. On the other hand, the prohibition of contacts with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment'. The ECtHR has also clarified that, when assessing conditions of detention, account must be taken of the cumulative effects of those conditions, which prompts it to consider, in addition to the physical conditions of the accommodation in cells, the duration of the period of solitary confinement. [82]

127. The competent authority hearing an action challenging a decision to detain a migrant awaiting removal in prison accommodation is therefore obliged to assess, on the basis of information that is objective, reliable, specific and properly updated and having regard to the standard of protection of fundamental rights guaranteed by EU law, whether there are substantial grounds to believe that the individual concerned is subject to inhuman or degrading treatment on account of the conditions of his detention. [83]

128. Although the facts upon which that assessment turns will have to be examined by the referring court, the Court can provide guidance on the factors to be taken into consideration as part of such an examination.

129. It is apparent from the German Government's response [84] that the conditions of detention of the migrant concerned do not appear, on the basis of the documents before the Court and barring evidence adduced to the contrary by the applicant in the main proceedings, to point to inhuman or degrading treatment, as defined in points 125 and 126 above, particularly since the person concerned was not held in solitary confinement as he was able to communicate with others in the outside world and within the prison, in particular with detainees awaiting trial.

80 Judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 87).

81 Judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 90 and the ECtHR case-law cited).

82 ECtHR, 4 July 2006, *Ramirez Sanchez v. France* (CE:ECHR:2006:0704JUD005945000, §§ 119 and 123 and the case-law cited).

83 See, by analogy, judgments of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218, paragraph 90), and of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 88 and 89).

84 WM was incarcerated in the Frankfurt am Main I prison facility, a level 1 security, ordinary remand centre without a 'high-security wing'. The person concerned was placed in individual cells categorised as 'ordinary' or specifically monitored, that is to say cells from which dangerous objects have been removed and which are under video surveillance. He was entitled to one hour a day of free time in the company of other detainees awaiting trial, including time outside, and one shower each day and he had the opportunity to play sport once a week and to purchase food products. In addition to contact with the health service, social services, close relatives, lawyers of the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees, Germany), WM also received regular visits from an imam. Furthermore, there are no reports of any harmful consequences for the health of the person concerned associated with his detention. That information contradicts the content of the observations submitted on behalf of the applicant in the main proceedings which refer to a detainee who was denied contact with other detainees and with the outside world.

130. In the light of the case-law of the ECtHR on the prohibition solely of complete sensory isolation, coupled with total social isolation, the view could be taken that the abovementioned conclusion that there was no inhuman or degrading treatment would remain valid even if the migrant concerned had no contact at all with ordinary prisoners, irrespective of their criminal status since, in such circumstances, the situation of the person concerned could be classified only as partial and relative isolation. [85]

131. A strict interpretation of Article 16(1) of Directive 2008/115 and of the requirement of separation contained therein, based on an understanding of the concept of 'ordinary prisoners' which includes both convicted persons and persons held on remand, could therefore be adopted without jeopardising the necessary respect for the fundamental rights of the imprisoned migrant awaiting removal, subject to an assessment of the cumulative effects of the conditions of detention.

132. It seems to me, however, that such reasoning is overly theoretical and suffers from excessive inflexibility, in the sense that it leads to a system which operates in a purely mechanical fashion and omits a specific examination of each individual situation, which is however necessary by virtue of the principle of proportionality and is regularly required by the Court when interpreting the provisions of Directive 2008/115. The example of the dispute in the main proceedings seems to me, in that regard, particularly illuminating with respect to that scheme, which may culminate in solutions verging on aberrations, since the mere finding of contact between a person held on remand, who is responsible for delivering meals to the cells, and the migrant concerned would be sufficient to constitute a breach of the requirement of separation. A requirement of separation construed too strictly means that there can be no contact at all, even occasional contact, which is virtually untenable.

133. In addition, holding the migrant in solitary confinement, even if his isolation is partial and relative solely by virtue of the prohibition on contact with all ordinary prisoners, by its very nature deprives the person concerned of access to those sporting and cultural activities and opportunities for paid work which are offered collectively to the other detainees, thus rendering punitive a measure intended to be entirely non-punitive and giving rise to unjustified discrimination to the detriment of the migrant having regard to the conditions of his stay in the prison accommodation. [86]

134. It is therefore necessary to establish a fair balance between the need to prevent any risk of discriminatory, inhuman or degrading treatment of the migrants detained in prison accommodation and the need to ensure, in accordance with the wording of Article 16 of Directive 2008/115, that those migrants are kept separated from ordinary prisoners, with a view to protecting the physical and mental well-being of the migrants, in addition to the well-being of the prison population and the prison officers in the case of migrants posing a threat to public policy or public security. That balance, which is difficult to strike, could, in my view, be based on two factors.

135. The first involves considering that the concept of 'ordinary prisoners' must be interpreted as excluding persons held on remand, who are presumed innocent. The second is to adopt a system under which the migrant concerned is accommodated in individual cells, with contact with persons on remand permissible in the context of the abovementioned group activities run by prison officers who are fully aware of the reality of day-to-day prison life and taking into the account the reason for detention, the objective pursued and the personality and conduct of the migrant concerned. That solution, which is theoretically conceivable, appears to me to be desirable in practice.

85 ECtHR, 4 July 2006, *Ramirez Sanchez v. France* (CE:ECHR:2006:0704JUD005945000 § 135). However, when assessing the cumulative effects of the conditions of detention, consideration would have to be given to the period of detention spent in relative isolation, as the case may be combined with the length of an earlier period of detention relating to criminal proceedings.

86 It is important to note that the maximum duration of the detention period provided for in Article 15(5) and (6) of Directive 2008/115 is 18 months. WM was detained at the Frankfurt am Main prison facility for 8 months and 21 days.

(3) The right to liberty and to an effective remedy

136. It is important to note, as a preliminary point, that Article 16 of Directive 2008/115 does not refer to the adoption of a specific decision regarding the detention of a migrant awaiting removal in prison accommodation. In reality, in the case of a particular method of enforcing a detention measure, it is necessary, in the light of the general scheme of Directive 2008/115, which must be taken into account when interpreting its provisions,[87] to refer to Article 15 of that act.

137. Article 15 of Directive 2008/115 lays down strict substantive conditions for detention and maintaining detention and defines the process of judicial review associated with the adoption of those measures.

138. It follows from Article 15 of Directive 2008/115 that detention may be ordered by an administrative or judicial authority, and that Member States are required either to provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention or to grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention is to be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings, with the third-country national concerned being released immediately if the detention is deemed to be unlawful.

139. Regardless of whether it is ordered by an administrative or a judicial authority, the detention is to be reviewed, pursuant to Article 15(3) of Directive 2008/115, at reasonable intervals of time on application by the third-country national or *ex officio*, with provision made for judicial supervision in the case of a prolonged detention period. In that regard, the Court has held that a review of any prolonged detention of a third-country national must be subject to the supervision of a judicial authority, which must, where it is deciding on the possibility of extending an initial period of detention, carry out an examination of the detention even if the authority which brought the matter before it has not expressly requested it to do so and even if the detention of the third-country national concerned has already been reviewed by the authority which made the initial detention order.[88]

140. It should be recalled that any interpretation of Directive 2008/115 must, as is apparent from recital 24 and Article 1 thereof, be consistent with the fundamental rights and principles recognised, in particular, by the Charter. As regards, more specifically, the remedies against decisions related to detention, as set out in Article 15 of Directive 2008/115, the characteristics of such remedies must be determined in a manner that is consistent with Article 6 of the Charter on the right to liberty of every person and with Article 47 of the Charter, which provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article.[89]

141. The view must therefore be taken that a judicial authority deciding upon an application for detention or for the extension of the measure, coupled with enforcement of the measure in prison accommodation on account of the risk to public policy or public security posed by the migrant concerned, must be able to rule on all relevant matters of fact and of law in order to determine

87 Judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453, paragraph 57).

88 Judgment of 5 June 2014, *Mahdi* (C-146/14 PPU, EU:C:2014:1320, paragraph 56).

89 See, by analogy, judgment of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraphs 51 and 52).

whether the measure applied for is justified in the light of the requirements laid down in Article 15 of Directive 2008/115 and those connected with proof of the existence of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society or the internal or external security of the Member State concerned. [90]

142. Where the detention is not justified or no longer justified in the light of those requirements, the judicial authority having jurisdiction must be able to substitute its own decision for that of the administrative authority or, as the case may be, the judicial authority which ordered the initial detention and to take a decision on whether to order an alternative measure or the release of the third-country national concerned. To that end, the judicial authority must be able to take into account both the facts stated and the evidence adduced by the administrative authority which ordered the initial detention and any observations that may be submitted by the third-country national concerned. Furthermore, it must be able to consider any other element that is relevant for its decision should it so deem necessary. Accordingly, the powers of the judicial authority in the context of an examination can under no circumstances be confined just to the matters adduced by the administrative authority concerned. [91]

143. Any other interpretation of Article 15 of Directive 2008/115 would result in paragraphs 1, 2, 4 and 6 thereof and Article 16(1) being rendered ineffective and would deprive of all substance the judicial review required by Article 15 of that directive, thereby jeopardising the achievement of the objectives pursued by the directive. [92]

144. In addition, the provisions of Article 15 of Directive 2008/115 must be read not only in the light of Articles 6 and 47 of the Charter but also the provisions of the ECHR to which the Charter refers; the corresponding rights in the present case are enshrined in Articles 5 (right to liberty and security), 6 (right to a fair trial) and 13 (right to an effective remedy) ECHR. [93]

145. In that context, the view must be taken that the application for individual review made by the migrant concerned, as provided for in the first sentence of Article 15(3) of Directive 2008/115, must, in order to ensure compliance with the requirements under Articles 6 and 47 of the Charter, allow for the examination, at an early stage and regardless of whether the time limit fixed for an *ex officio* review of the detention has not expired, of the conditions of detention of the person concerned for the purposes of establishing whether there has been any affront to the dignity of that person contrary to Articles 1 to 4 of the Charter, read in conjunction with Article 3 ECHR.

146. It is for the referring court to undertake the checks required vis-à-vis compliance with the minimum safeguards provided for in Directive 2008/115 and with the fundamental rights of the third-country national detained in prison accommodation in the light of the guidance set out above.

90 See, by analogy, judgments of 5 June 2014, *Mahdi* (C-146/14 PPU, EU:C:2014:1320, paragraph 62); of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraph 57); of 24 June 2015, *T.* (C-373/13, EU:C:2015:413, paragraph 92); and of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraphs 67 and 73).

91 See, by analogy, judgment of 5 June 2014, *Mahdi* (C-146/14 PPU, EU:C:2014:1320, paragraph 62).

92 See, by analogy, judgment of 5 June 2014, *Mahdi* (C-146/14 PPU, EU:C:2014:1320, paragraph 63).

93 It follows from the case-law of the ECtHR that the existence of the remedy required must be sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required (ECtHR, 11 October 2007, *Nasroulloiev v. Russia*, CE:ECHR:2007:1011JUD000065606, § 86, and ECtHR, 5 April 2011, *Rahimi v. Greece*, CE:ECHR:2011:0405JUD000868708, §§ 120 and 121, concerning a lack of access to a judicial remedy because the relevant brochure was not written in a language understood by the applicant), be available at an early stage during the detention period, and both be implemented by an independent and impartial judicial body and be capable of leading, where appropriate, to the release of the person concerned (ECtHR, 20 June 2002, *Al-Nashif v. Bulgaria*, CE:ECHR:2002:0620JUD005096399, § 92, and ECtHR, 11 October 2007, *Nasroulloiev v. Russia*, CE:ECHR:2007:1011JUD000065606, § 86) or, at the very least, appropriate redress together with an improvement of the physical conditions of detention (ECtHR, 21 May 2015, *Yengo v. France*, CE:ECHR:2015:0521JUD005049412, §§ 58 to 62).

147. In that regard, it is apparent from the order for reference and from the German Government's response that decisions to detain an individual and to extend the measure are generally taken by a court, and that the migrant concerned is able to bring an action against such judicial decisions. It is also stated that the maximum duration of the initial period of detention is fixed at 6 months, with the possibility of extension by a maximum of 12 months. When asked about the judicial review arrangements, the German Government stated that the decision ordering or extending a deprivation of liberty must be annulled *ex officio* before the expiry of the time limit stipulated where the ground for the deprivation of liberty no longer exists, and that the person concerned or the authority may also apply for the deprivation of liberty to be terminated, with the court ruling on that application by means of an order which is open to challenge.

148. It must be observed that the documents before the Court are not sufficiently substantiated to determine accurately the procedural rules governing the actions that may be brought by the third-country national concerned or to provide the referring court with further guidance in that respect.

V. Conclusion

149. In the light of the foregoing considerations, I propose that the Court should answer the question referred for a preliminary ruling by the Bundesgerichtshof (Federal Court of Justice, Germany) as follows:

Article 16 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, read in conjunction with Article 15 of that directive and in the light of Articles 1 to 4, 6 and 47 of the Charter of Fundamental Rights of the European Union is to be interpreted as not precluding national legislation which allows for the detention in prison accommodation of a third-country national awaiting removal who poses a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, or the internal or external security of the Member State concerned, which is for the competent national authority to ascertain, subject to a prohibition of contact with convicted detainees.

It is likewise for the competent national authority, before which an action is brought relating to the decision to detain or extend the detention of a third-country national awaiting removal in prison accommodation, to examine specifically and in detail the conditions of detention of that third-country national in order to ensure compliance both with the principles of effectiveness and proportionality and with the minimum safeguards provided for in Article 16 of Directive 2008/115 as well as with the fundamental rights of the third-country national, as enshrined in Articles 1 to 4, 6 and 47 of the Charter of Fundamental Rights.