Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

22 June 2021 *

(Reference for a preliminary ruling – Citizenship of the Union – Articles 20 and 21 TFEU – Directive 2004/38/EC – Right of citizens of the Union and their family members to move and reside freely within the territory of the Member States – Decision to terminate a person's residence on grounds of public policy – Preventive measures to avoid any risk of the person concerned absconding during the period allowed for that person to leave the territory of the host Member State – National provisions similar to those applicable to third-country nationals under Article 7(3) of Directive 2008/115/EC – Maximum period of detention for the purpose of removal – National provision identical to that applicable to third-country nationals)

In Case C-718/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour constitutionnelle (Constitutional Court, Belgium), made by decision of 18 July 2019, received at the Court on 27 September 2019, in the proceedings

Ordre des barreaux francophones et germanophone,

Association pour le droit des Étrangers ASBL,

Coordination et Initiatives pour et avec les Réfugiés et Étrangers ASBL,

Ligue des Droits de l'Homme ASBL,

Vluchtelingenwerk Vlaanderen ASBL

v

Conseil des ministres,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Prechal, M. Vilaras, E. Regan (Rapporteur) and N. Piçarra, Presidents of Chambers, M. Safjan, D. Šváby, S. Rodin, F. Biltgen, K. Jürimäe, C. Lycourgos, P.G. Xuereb, L.S. Rossi and I. Jarukaitis, Judges,

Advocate General: A. Rantos,

Registrar: R. Schiano, Administrator,

* Language of the case: French

having regard to the written procedure and further to the hearing on 16 November 2020,

after considering the observations submitted on behalf of:

– Association pour le droit des Étrangers ASBL, Coordination et Initiatives pour et avec les Réfugiés et Étrangers ASBL, Ligue des Droits de l'Homme ASBL and Vluchtelingenwerk Vlaanderen ASBL, by M. Van den Broeck, advocaat, and by P. Delgrange and S. Benkhelifa, avocates,

– the Belgian Government, by L. Van den Broeck, M. Jacobs and C. Pochet, acting as Agents, and by D. Matray, C. Decordier, S. Matray and C. Piront, avocats, and T. Bricout, advocaat,

– the Danish Government, by J. Nymann-Lindegren, P. Jespersen and M.S. Wolff, acting as Agents,

– the Spanish Government, by J. Rodríguez de la Rúa Puig, acting as Agent,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by A. Azéma and E. Montaguti, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 February 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 20 and 21 TFEU and of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).

2 The request has been made in proceedings between Ordre des barreaux francophones et germanophone, Association pour le droit des Étrangers ASBL, Coordination et Initiatives pour et avec les Réfugiés et Étrangers ASBL, Ligue des Droits de l'Homme ASBL and Vluchtelingenwerk Vlaanderen ASBL, on the one hand, and the Conseil des ministres (Council of Ministers, Belgium), on the other, concerning national legislation which applies to Union citizens and their family members (i) measures similar to those applicable to third-country nationals in order to avoid any risk of their absconding during the period allowed for them to leave the territory of the host Member State following the adoption of a return decision, and (ii) a maximum period of detention for the purpose of removal identical to that applicable to third-country nationals.

Legal context

European Union law

Directive 2004/38

3 Recitals 1 to 3 and 31 of Directive 2004/38 are worded as follows:

'(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the [FEU] Treaty and to the measures adopted to give it effect.

(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the [FEU] Treaty.

(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

…

(31) This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. …'

4 Article 3 of that directive, entitled 'Beneficiaries', provides in paragraph 1:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.'

5 Article 4 of that directive, entitled 'Right of exit', provides in paragraph 1:

'Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.'

6 According to Article 27 of that directive, entitled 'General principles':

'1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

…

4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.'

7 Article 30 of Directive 2004/38, entitled 'Notification of decisions', provides:

'1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.

…

3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.'

Directive 2008/115/EC

8 Recitals 2, 4 and 24 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98) are worded as follows:

'(2) The Brussels [(Belgium)] European Council of 4 and 5 November 2004 called for the establishment of 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.

…

(4) Clear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well managed migration policy.

…

(24) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.'

9 Article 1 of that directive, 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 [EU] law as well as international law, including refugee protection and human rights obligations.'

10 Article 2 of that directive, entitled 'Scope', provides in paragraph 3:

'This Directive shall not apply to persons enjoying the [right] of free movement as defined in Article 2(5) of the Schengen Borders Code.'

11 Article 6 of that directive, entitled 'Return decision', provides in paragraph 1:

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

12 Article 7 of Directive 2008/115, entitled 'Voluntary departure', provides in paragraph 3:

'Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure.'

13 Chapter IV of that directive, entitled 'Detention for the purpose of removal', contains Articles 15 to 18.

14 Article 15 of that directive, entitled 'Detention', provides:

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

(a) there is a risk of absconding or

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

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

…

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.'

Belgian law

15 Article 44*ter* of the loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Law of 15 December 1980 on the admission, residence, establishment and removal of foreign nationals) (*Moniteur belge* of 31 December 1980, p. 14584), in the version in force at the material time ('the Law of 15 December 1980'), provides:

'§ 1. Where a Union citizen or a member of his or her family does not have, or no longer has, the right to reside within the territory, the Minister or a person delegated by the Minister may issue an order requiring him or her to leave the territory, pursuant to the first paragraph of Article 7.

Where the Minister or a person delegated by the Minister proposes to issue an order to leave the territory, he or she shall take account of the period of residence of the Union citizen or family member within the territory of the Kingdom, his or her age, state of health, family and economic situation, social and cultural integration into the Kingdom and the extent of his or her links with the country of origin.

§ 2. The order to leave the territory issued to a Union citizen or to a member of his or her family shall specify the period within which he or she must leave the territory of the Kingdom. Save in duly substantiated cases of urgency, that period shall be not less than one month from notification of the decision.

The period referred to in the first subparagraph may be extended by the Minister or a person delegated by the Minister where:

1° voluntary return cannot take place within that period; or

2° an extension is justified by the particular circumstances of the situation of the person concerned.

An application for an extension of the time allowed to leave the territory of the Kingdom must be made by the Union citizen or the member of his or her family to the Minister or a person delegated by the Minister.'

16 Articles 28 to 31 of the loi du 24 février 2017, modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers afin de renforcer la protection de l'ordre public et de la sécurité nationale (Law of 24 February 2017 amending the Law of 15 December 1980 on the admission, residence, establishment and removal of foreign nationals

in order to enhance protection of public policy and national security) (*Moniteur belge* of 19 April 2017, p. 51890) ('the Law of 24 February 2017'), inserted into the Law of 15 December 1980 Articles 44*quater* to 44*septies*, which are worded as follows:

'Article 44*quater*. The Union citizen or the member of his or her family cannot be forcibly removed as long as the period referred to in Article 44*ter* has not expired.

In order to avoid any risk of absconding during the period referred to in Article 44*ter*, the Union citizen or the member of his or her family may be required to comply with preventive measures. The King is authorised to determine those measures by decree debated in the Council of Ministers.

Article 44*quinquies* § 1. The Minister or a person delegated by the Minister shall take all the measures necessary to enforce the order to leave the territory where:

1° the Union citizen or the member of his or her family has not been given a time limit by which to leave the territory of the Kingdom;

2° the Union citizen or the member of his or her family has not left the territory of the Kingdom within the period granted to that person;

3° before the expiry of the period within which the Union citizen or family member is required to leave the territory of the Kingdom, he or she presents a risk of absconding, has failed to comply with the preventive measures imposed or represents a threat to public policy or national security.

§ 2. Where the Union citizen or the member of his or her family objects to his or her removal or presents a risk of dangerousness when being removed, he or she shall be forcibly returned, with an escort if necessary. Coercive measures may then be used in relation to that person, in compliance with Articles 1 and 37 of the loi du 5 août 1992 sur la fonction de police (Law of 5 August 1992 on policing) [(*Moniteur belge* of 22 December 1992, p. 27124)].

Where the removal is effected by air, the measures shall be taken in accordance with the Common Guidelines on removals by air annexed to [Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders (OJ 2004 L 261 p. 28)].

§ 3. By decree debated in the Council of Ministers, the King shall designate the entity responsible for supervising forced returns and shall determine the arrangements for that supervision. That entity shall be independent of the removal authorities.

Article 44*sexies*. Where justified by the circumstances of each case, the Minister or a person delegated by the Minister may temporarily postpone the removal and shall inform the person concerned.

In order to avoid any risk of absconding, the Union citizen or the member of his or her family may be required to comply with preventive measures. The King is authorised to determine those measures by decree debated in the Council of Ministers.

The Minister or a person delegated by the Minister may, in those situations, place the Union citizen or the member of his or her family under house arrest for the period necessary to carry out that measure.

Article 44*septies*. § 1. Where required for reasons of public policy, national security or public health, and unless other less coercive measures can be applied effectively, Union citizens and members of their families may, in order to ensure that the removal measure is carried out, be held for the period strictly necessary to carry out the measure, which may not exceed two months.

The Minister or a person delegated by the Minister may nevertheless extend the period for which the person is held by two-month periods, where the procedures necessary for removal of the foreign national have been undertaken within seven working days of the Union citizen or the member of his or her family being held, have been pursued with all due diligence and there is still a possibility of effectively removing the person concerned within a reasonable time.

After a first extension, the decision to extend the period of holding may be taken only by the Minister.

After five months, the Union citizen or the member of his or her family must be released. Where required in order to safeguard public policy or national security, the period of holding may be extended by one month each time, although the total period of holding may not exceed eight months.

§ 2. The Union citizen or the member of his or her family referred to in Paragraph 1 may appeal against the decision to hold him or her, in accordance with Article 71 et seq.'

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

17 Two actions for annulment in whole or in part of the Law of 24 February 2017 were brought before the Cour constitutionnelle (Constitutional Court, Belgium), the first, by Ordre des barreaux francophones et germanophone, and the second, by Association pour le droit des Étrangers, Coordination et Initiatives pour et avec les Réfugiés et Étrangers, Ligue des Droits de l'Homme and Vluchtelingenwerk Vlaanderen. The two cases were joined by the referring court.

18 According to the information provided in the order for reference, the purpose of that law is to establish an effective removal policy in respect of Union citizens and members of their families, ensuring that it is humane and fully respects their fundamental rights and dignity. The provisions of that law, which also seek to guarantee a removal regime for Union citizens and their family members that is no less favourable than that for third-country nationals, thus serve to clarify the measures that may be taken in respect of Union citizens and their family members to ensure their removal from Belgium.

19 In the first place, the referring court has doubts as to the compatibility with EU law of national provisions under which preventive measures may be imposed on Union citizens or members of their families – to whom an order to leave Belgium on grounds of public policy has been issued – during the period allowed for them to leave Belgium or during an extension of that period in order to avoid any risk of the person concerned absconding. Those provisions authorise the King to

determine those measures by decree debated in the Council of Ministers and state that the competent Minister ('the Minister') or a person delegated by the Minister may place the individual concerned under house arrest where removal is temporarily postponed.

20 The applicants in the main proceedings claim, in particular, that EU law precludes the imposition of measures on Union citizens and their family members to avoid the risk of their absconding during the period allowed for them to leave the territory of the host Member State or during an extension of that period.

21 In that regard, the referring court notes that Directive 2008/115, which is applicable only to third-country nationals, does provide for the possibility of such measures being imposed, whereas Directive 2004/38, applicable to Union citizens and their family members, does not. According to the *travaux préparatoires* relating to the national provisions at issue in the main proceedings, the provisions aimed at avoiding the risk of absconding do not transpose Directive 2008/115 into Belgian law but are largely based on it.

22 Whatever the type of measures concerned, they necessarily affect the rights and freedoms of the Union citizen or family member concerned because their very purpose is to prevent that person from absconding and thus from possibly travelling to a different Member State, and, ultimately, to ensure that person's forced departure from Belgian territory.

23 Admittedly, the referring court notes, it is apparent from the case-law of the Court in the judgment of 14 September 2017, *Petrea* (C-184/16, EU:C:2017:684), that EU law does not preclude a decision to expel a Union citizen from being adopted by the same authorities and according to the same procedure as a decision to return an illegally staying third-country national where the measures transposing Directive 2004/38 into national law are more favourable to that Union citizen. However, the national provisions at issue in the main proceedings are not intended to designate the authority competent to take an expulsion decision in respect of Union citizens and their family members and do not cover procedural provisions, but concern restrictions on the fundamental rights of Union citizens and their family members that are not provided for by Directive 2004/38.

24 Consequently, the referring court has doubts as to whether the provisions of Directive 2008/115 on measures aimed at avoiding the risk of absconding in the case of the removal of a third-country national are applicable by analogy to Union citizens.

25 In the second place, the referring court questions the compatibility with EU law of national provisions that allow Union citizens and their family members who have not complied with an expulsion decision taken on grounds of public policy or public security to be kept in detention, to ensure that that decision is enforced, more particularly, for a maximum period of eight months where detention is required in order to safeguard public policy or public security.

26 The applicants in the main proceedings complain, in particular, that the national provision concerned establishes periods of detention that are excessively long and, therefore, disproportionate, and that it fails to establish clear criteria for determining objectively the period necessary to enforce the expulsion decision and what amounts to diligent treatment by the authority responsible for enforcing that decision.

27 The referring court indicates that the national provision concerned reproduces, in relation to Union citizens and their family members, the rules laid down in national law in relation to third-country nationals. The provision in question thus establishes that Union citizens and their family members will be treated in exactly the same way as third-country nationals, in particular as regards the maximum period of detention for the purpose of removal of the individual concerned.

28 The question also arises as to whether the national legislation at issue in the main proceedings is compatible with the freedom of movement guaranteed to Union citizens and their family members under Articles 20 and 21 TFEU and Directive 2004/38, from which it could be inferred that the period of time for which they may be kept in detention is limited to the time strictly necessary to enforce the expulsion decision.

29 In those circumstances the Cour constitutionnelle (Constitutional Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must EU law, in particular Articles 20 and 21 [TFEU] and [Directive 2004/38], be interpreted as precluding national legislation according to which the provisions that apply to Union citizens and members of their families are similar to those which, in respect of third-country nationals, transpose Article 7(3) of [Directive 2008/115], that is to say, provisions according to which Union citizens and members of their families can be obliged to comply with preventive measures designed to prevent any risk of absconding during the period given to those persons in which to leave the territory following adoption of a decision to terminate residence on grounds of public policy or during an extension of that period?

(2) Must EU law, in particular Articles 20 and 21 [TFEU] and [Directive 2004/38], be interpreted as precluding national legislation according to which a provision that applies to Union citizens and members of their families who have not complied with a decision terminating residence on grounds of public policy or public security is identical to that applied to third-country nationals in the same situation in relation to the maximum period of detention for the purposes of removal, that is to say, eight months?’

Consideration of the questions referred

30 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether Articles 20 and 21 TFEU and Directive 2004/38 must be interpreted as precluding national legislation:

– which applies to Union citizens and their family members, during the period allowed for them to leave the territory of the host Member State following the adoption of an expulsion decision taken against them on grounds of public policy or during an extension of that period, provisions aimed at avoiding the risk of those individuals absconding that are similar to provisions which, as regards third-country nationals, are designed to transpose Article 7(3) of Directive 2008/115 into national law, and

– which applies to Union citizens and their family members who, after the expiry of the period allowed for them to leave the territory or an extension of that period, have not complied with an expulsion decision taken against them on grounds of public policy or public security, a detention measure for a maximum period of detention of eight months for the purpose of

removal, that period being identical to that applicable, in national law, to third-country nationals who have not complied with a return decision issued on such grounds pursuant to Article 6(1) of Directive 2008/115.

31 As a preliminary point, it must be recalled that, under Article 27(1) of Directive 2004/38, Members States may restrict the freedom of movement and residence of Union citizens and their family members, including on grounds of public policy and public security. Although the questions referred concern situations in which an expulsion decision is adopted on the basis of that provision, they do not relate to examination of such a decision by reference to EU law, but to examination of measures aimed at ensuring its enforcement.

32 It is nevertheless necessary to answer the questions referred by considering, in the first place, whether Articles 20 and 21 TFEU and Directive 2004/38 preclude the very existence of national rules applicable in the context of the enforcement of a decision to expel Union citizens and their family members where such rules are identical or similar in content to provisions aimed at transposing, into national law, Directive 2008/115 in relation to the return of illegally staying third-country nationals. If that is not the case, it will be necessary to assess, in the second place, whether the particular measures laid down by the provisions at issue in the main proceedings are capable of constituting restrictions on the freedom of movement and residence and, if so, in the third place, whether such restrictions can be justified.

Concerning the application to Union citizens and their family members of national provisions identical or similar in content to those applicable to third-country nationals

33 It should be recalled that Chapter VI of Directive 2004/38 lays down, inter alia, rules relating to the expulsion of Union citizens and their family members only. However, that directive does not make specific provision for the possibility of Member States adopting measures aimed at avoiding the risk of such Union citizens or family members absconding during the period allowed for them to leave the territory of the host Member State or during an extension of that period, nor does it make specific provision for the possibility of the individuals concerned being kept in detention if they fail to comply with an expulsion decision within that period or an extension of that period.

34 In the absence of rules of EU law, it is for the Member States to lay down rules enabling them to adopt measures to ensure that expulsion decisions based on Article 27 of Directive 2004/38 are enforced, provided that this is not precluded by any provisions of EU law (see, to that effect, judgment of 14 September 2017, *Petrea*, C-184/16, EU:C:2017:684, paragraph 52).

35 It is only if they comply with that condition that Member States may use as a basis the provisions of Directive 2008/115, in particular by Article 7(3) and Articles 15 to 18 thereof, in adopting, on the one hand, measures aimed at avoiding the risk of Union citizens and their family members absconding during the period allowed for them to leave the territory of the host Member State or during an extension of that period, and, on the other, measures for their detention in the event of their non-compliance with an expulsion decision during that period or any extension of it.

36 Article 7(3) of that directive provides for Member States to be able to impose obligations on a third-country national in order to avoid the risk of that individual absconding during the period for voluntary departure, the obligations expressly set out to that effect being to report regularly to the authorities, to deposit an adequate financial guarantee, to submit documents or to stay at a certain place. Similarly, an entire chapter of that directive, Chapter IV, entitled ‘Detention for the purpose of removal’, which comprises Articles 15 to 18 of the directive, provides that a

third-country national may be kept in detention for the purpose of removal and establishes a detailed framework for the safeguards granted to third-country nationals as regards both the removal decision and the detention decision (see, to that effect, judgment of 10 September 2013, *G. and R.*, C-383/13 PPU, EU:C:2013:533, paragraph 31).

37 More specifically, Article 15(5) of Directive 2008/115 states, inter alia, that the period of detention may not exceed six months, whereas Article 15(6) of that directive provides that Member States may not extend the period referred to in Article 15(5) of that directive except for a limited period not exceeding a further 12 months in cases where, regardless of all their reasonable efforts, the removal operation is likely to last longer owing to a lack of cooperation by the third-country national concerned or delays in obtaining the necessary documentation from third countries.

38 In the present case, it is apparent from the file available to the Court that the aim of the national legislation at issue in the main proceedings is to guarantee a removal regime for Union citizens and their family members that is no less favourable than that for third-country nationals. As regards, more specifically, the national provisions aimed at avoiding the risk of individuals absconding, these are based to a large extent on the provisions of Directive 2008/115. The national provision relating to the detention of individuals for the purpose of removal reproduces the rules laid down in national law for third-country nationals and thus establishes that Union citizens and their family members will be treated in exactly the same way as third-country nationals who are subject to a return procedure under that directive, in particular as regards the maximum period of detention for the purpose of removal of the person concerned.

39 Consequently, while the mere existence of national rules, provided for by the host Member State, that are applicable in the context of the enforcement of a decision to expel Union citizens and their family members and that are based on the rules applicable to the return of third-country nationals whose purpose is to transpose Directive 2008/115 into national law is not, in itself, contrary to EU law, such rules must nevertheless comply with EU law. In accordance with the referring court's request of the Court of Justice, those rules must be examined in the light of the specific provisions applicable to Union citizens and their family members in relation to free movement and residence, that is to say, Articles 20 and 21 TFEU and the provisions of Directive 2004/38.

Concerning the existence of restrictions on the freedom of movement and residence

40 As regards, in the first place, preventive measures aimed at avoiding the risk of Union citizens and their family members absconding during the period allowed for them to leave the territory of the host Member State or during an extension of that period, it must be observed that these are not defined in the national legislation at issue in the main proceedings, except for the possibility of the individual concerned being placed under house arrest in the event of removal being temporarily postponed. As to other measures, the King is authorised to determine these by decree debated in the Council of Ministers.

41 However, it is apparent from the actual wording of the questions referred that the measures that may be imposed in that context are similar to those provided for in Article 7(3) of Directive 2008/115 and set out in paragraph 36 of the present judgment. It should be noted that, in so far as such measures are specifically designed to limit the movements of the person concerned, they necessarily have the effect of restricting that person's freedom of movement and residence during the period allowed for leaving the territory of the host Member State, particularly when the person has been placed under house arrest.

42 As regards, in the second place, the possibility of keeping Union citizens and their family members in detention for the purpose of removal for a maximum of eight months, it must be noted, as the Advocate General did in point 88 of his Opinion, that such a measure constitutes by its very nature a restriction on the freedom of movement and residence of the individual concerned.

43 Admittedly, Union citizens and their family members who, after the period allowed for leaving the territory or the extension of that period has expired, have failed to comply with an expulsion decision taken against them on grounds of public policy or public security, cannot rely on a right of residence, under Directive 2004/38, in the territory of the host Member State while that decision continues to have effect (see, by analogy, judgment of 22 June 2021, *Staatssecretaris van Justitie en Veiligheid (Effects of an expulsion decision)*, C-719/19, paragraph 104). However, the existence of such a decision does not in any way alter the restrictive nature of a detention measure, which places limitations on an individual's movements beyond those arising from the expulsion decision itself, restricting the opportunities for the individual concerned to stay and to move freely outside the territory of the host Member State throughout the period of that individual's detention. Such a detention measure thus constitutes a restriction on the right of exit laid down in Article 4(1) of Directive 2004/38, which expressly provides that all Union citizens with a valid identity card or passport have the right to leave the territory of a Member State to travel to another Member State (judgment of 10 July 2008, *Jipa*, C-33/07, EU:C:2008:396, paragraph 19).

44 Consequently, it must be held that national provisions such as those at issue in the main proceedings, that is to say, those providing for the possibility of imposing preventive measures aimed at avoiding the risk of the person concerned absconding as well as that relating to the maximum period of the person's detention for the purpose of removal, constitute restrictions on the freedom of movement and residence of Union citizens and their family members, as laid down in Article 20(2)(a) and Article 21(1) TFEU and as set out in the provisions of Directive 2004/38.

Concerning the existence of any justification for the restrictions on the freedom of movement and residence

45 As to whether there might be any justification for restrictions such as those identified in the preceding paragraph, it must be pointed out that, as is apparent from the wording of Articles 20 and 21 TFEU, the right of Union citizens and their family members to move and reside freely within the territory of the Member States is not unconditional but may be subject to limitations and conditions imposed by the FEU Treaty and by the measures adopted to give it effect (see, to that effect, judgment of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 55 and the case-law cited).

46 In that regard, it must be borne in mind that, as is apparent from paragraphs 30 and 31 of the present judgment, the questions put by the referring court start from the premiss that the expulsion decision was adopted on grounds of public policy or public security, in accordance with Article 27(1) of Directive 2004/38.

47 It follows that, so far as the case in the main proceedings is concerned, the measures aimed at ensuring that such a decision is enforced, that is to say, measures aimed at avoiding the risk of a Union citizen or a member of that person's family absconding and measures for the detention of that person for a period of up to eight months, must be assessed in the light of Article 27 of Directive 2004/38. Article 27(2) of that directive makes clear that, in order to be justified, measures restricting the right to movement and residence of Union citizens and their family

members that are taken, in particular, on grounds of public policy or public security must comply with the principle of proportionality and must be based exclusively on the personal conduct of the individual concerned.

48 As regards, in the first place, the measures at issue in the main proceedings that are aimed at avoiding the risk of a person absconding during the period allowed for that person to leave the territory of the host Member State or during an extension of that period, as is apparent from paragraph 18 of the present judgment, the purpose of those measures is to establish an effective removal policy in respect of Union citizens and their family members.

49 A measure aimed at avoiding the risk of a person absconding in circumstances such as those recalled in paragraph 46 of the present judgment necessarily contributes to the protection of public policy, in so far as it is aimed, ultimately, at ensuring that a person who is considered to represent a threat to public policy in the host Member State is expelled from the territory of that State, and thus relates to the purpose of the expulsion decision itself.

50 Moreover, as the European Commission argues, there is nothing in the wording of Article 27(1) of Directive 2004/38 to exclude the possibility that measures restricting the freedom of movement and residence referred to in that provision may be applied during the period allowed for the person to leave the territory of the host Member State following the adoption of an expulsion decision taken against that person or during an extension of that period.

51 It follows that measures aimed at avoiding the risk of the person concerned absconding, such as those to which the questions referred relate, must be regarded as restricting the freedom of movement and residence of that person 'on grounds of public policy' within the meaning of Article 27(1) of Directive 2004/38; they are therefore capable, in principle, of being justified under that provision.

52 In addition, those measures cannot be considered contrary to Article 27 of Directive 2004/38 solely on the ground that they, and the measures which, as regards third-country nationals, are intended to transpose Article 7(3) of Directive 2008/115 into national law, are similar. In both cases, the objective of the measures is to avoid the person concerned absconding and thus, ultimately, to ensure that the expulsion or return decision taken against that person is enforced effectively.

53 However, not only do Directives 2004/38 and 2008/115 not have the same purpose, but the beneficiaries of the first enjoy a status and rights entirely different from those that may be relied upon by the beneficiaries of the second.

54 In particular, as the Court has repeatedly held and as is apparent from recitals 1 and 2 of Directive 2004/38, citizenship of the Union confers on each Union citizen a primary and individual right to move and to reside freely within the territory of the Member States, subject to the limitations and restrictions laid down by the Treaties and the measures adopted to give them effect, freedom of movement for persons being, moreover, one of the fundamental freedoms of the internal market, as affirmed in Article 45 of the Charter of Fundamental Rights (see, to that effect, judgment of 5 May 2011, *McCarthy*, C-434/09, EU:C:2011:277, paragraph 27 and the case-law cited).

55 Furthermore, as is apparent from recital 3 of Directive 2004/38, the directive seeks to facilitate the exercise of the primary and individual right to move and to reside freely within the territory of the Member States that is conferred directly on Union citizens by the FEU Treaty, and is intended in particular to strengthen that right (see, to that effect, judgment of 5 May 2011, *McCarthy*, C-434/09, EU:C:2011:277, paragraph 28 and the case-law cited).

56 In addition, since freedom of movement for individuals is one of the foundations of the European Union, the provisions laying it down must be given a broad interpretation, whereas exceptions to and derogations from that freedom must be interpreted strictly (see, to that effect, judgments of 3 June 1986, *Kempf*, 139/85, EU:C:1986:223, paragraph 13, and of 10 July 2008, *Jipa*, C-33/07, EU:C:2008:396, paragraph 23).

57 In view of the fundamental status of Union citizens, measures aimed at avoiding the risk of absconding which may be imposed in the context of the expulsion of Union citizens and their family members on grounds of public policy or public security cannot be less favourable than measures provided for under national law to avoid the risk of third-country nationals absconding, during the period for voluntary departure, where such third-country nationals are subject to a return procedure under Directive 2008/115 on grounds of public policy or public security (see, by analogy, judgment of 14 September 2017, *Petrea*, C-184/16, EU:C:2017:684, paragraphs 51, 54 and 56). While it seems to follow from the file available to the Court that less favourable treatment is not at issue in the main proceedings in this case and that both categories of persons are in a comparable situation as regards the risk of absconding, that is an assessment which it is for the referring court to make.

58 Last, as the Commission maintains, in order to assess the proportionate nature of a measure aimed at avoiding the risk of absconding in a particular case, it is necessary also to take into consideration the nature of the threat to public policy that justified the adoption of the decision to expel the individual concerned. In the event that several measures are capable of achieving the stated objective, preference should be given to the least onerous.

59 As regards, in the second place, the possibility of keeping a Union citizen or a member of that citizen's family in detention for the purpose of removal, for a maximum of eight months, if the individual concerned does not leave the host Member State within the period allowed or an extension of that period, the eight-month period being identical to that applicable, under national law, to third-country nationals subject to a return procedure under Directive 2008/115, it must be observed that, as is apparent from paragraphs 30 and 31 of the present judgment, the circumstances envisaged in that respect in the questions referred are those of a Union citizen or family member who has not complied, within the period allowed or an extension of that period, with an expulsion decision taken against that Union citizen or family member on grounds of public policy or public security. Furthermore, according to the relevant provision of national law, detention for the period of eight months may be ordered only where required in order to safeguard public policy or national security. In that respect, it is apparent from the order for reference that the concept of 'national security' within the meaning of that provision corresponds to the concept of 'public security' provided for in Article 27(1) of Directive 2004/38.

60 While the detention provided for under the national provision concerned appears, therefore, to be based on reasons that may restrict the freedom of movement and residence of a Union citizen or a member of his or her family in accordance with Article 27(1) of Directive 2004/38, such detention must also be proportionate to the objective pursued. That means that it must be established that

the period of detention provided for in the national legislation at issue in the main proceedings is proportionate to the objective, set out in paragraphs 18 and 48 of the present judgment, of establishing an effective removal policy in respect of Union citizens and their family members.

61 In this case, it must be observed that the national legislation at issue in the main proceedings does indeed regulate the circumstances in which a Union citizen or member of his or her family may be held in detention for the purpose of removal for a maximum of eight months, and various procedural safeguards are expressly laid down for that purpose.

62 In particular, it is apparent from the observations of the Belgian Government that, initially, the period of detention cannot exceed two months and is expressly subject, inter alia, to the condition that there should be no other less coercive measures that could be applied effectively in order to ensure that the removal measure is implemented. The possibility of extending the duration of that detention by periods of two months is also subject to a number of conditions, in particular that the necessary steps be taken to remove the person concerned with all due diligence and that there should still be a possibility of effectively removing that person within a reasonable time. After the first extension, a decision to extend the period of the person's detention may be taken only by the Minister. Finally, if, after five months, the Union citizen or family member has to be released, the period of detention may be extended, by one month each time, where required in order to safeguard public policy or national security, although the total period for which the person concerned is kept in detention may not exceed eight months.

63 It is also apparent that the detention of a Union citizen or family member for the maximum period of eight months laid down in the national provision at issue in the main proceedings requires an individual examination of the specific situation of the person concerned, in order to ensure that that detention does not exceed the time strictly necessary to enforce the removal decision and that the grounds of public policy or public security justify that person's detention.

64 However, the framework thus laid down by the national legislation at issue in the main proceedings does not justify the existence, as such, of provisions laying down a maximum period of detention, such as that at issue in the main proceedings, which applies for the purposes of the removal of Union citizens and their family members where this is ordered on grounds of public policy or public security, and which is identical to the maximum period applicable to the removal of third-country nationals under the provisions adopted for the purposes of transposing Directive 2008/115 into national law.

65 As regards specifically the duration of the removal procedure, Union citizens and members of their families who, in that capacity, fall within the scope of Directive 2004/38 are not in a comparable situation to that of third-country nationals who are covered by Directive 2008/115.

66 In particular, as the Advocate General also noted in point 94 of his Opinion, the Member States have systems of cooperation and facilities in the context of the expulsion of a Union citizen or family member to another Member State that they do not necessarily have in the context of the removal of a third-country national to a third country. As the Commission correctly pointed out at the hearing, relations between Member States, which are based on the duty of sincere cooperation and the principle of mutual trust, should not give rise to the same difficulties as those which may arise where there is cooperation between Member States and third countries.

67 Similarly, the practical difficulties involved in organising the return journey of the individual concerned when Union citizens and family members are being expelled should generally not be the same as those involved in organising the return journey for third-country nationals to a third country, in particular where that return involves a third country that is not readily accessible by air.

68 Furthermore, it should, as a general rule, take less time to establish the nationality of Union citizens and members of their families who are subject to an expulsion procedure under Directive 2004/38 than that required to establish the nationality of illegally staying third-country nationals who are subject to a return procedure under Directive 2008/115. Not only do the systems of cooperation between the Member States make it easier to verify the nationality of Union citizens and their family members but, as the Commission also argued at the hearing, if a person is subject to the application of the provisions of Directive 2004/38, that means, in principle, that that person has already been identified as a national of a Member State or as a member of the family of a Union citizen whose nationality is known.

69 In addition, the return of a Union citizen to the territory of the Member State of origin may, in some circumstances, also be facilitated by Article 27(4) of Directive 2004/38, according to which the Member State which issued the passport or identity card must allow the holder of such a document who has been expelled on grounds, inter alia, of public policy or public security from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.

70 It must be added that, as is apparent from Article 15(6) of Directive 2008/115, even where a third-country national is being removed under Directive 2008/115, the period of detention for the purpose of removal may not exceed six months unless, regardless of all the reasonable efforts of the host Member State, the removal operation is likely to last longer owing to a lack of cooperation by the third-country national concerned or delays in obtaining the necessary documentation from third countries.

71 Irrespective of the conditions under which the detention for a maximum period of eight months of a third-country national who is subject to a return procedure under Directive 2008/115 may be regarded as complying with EU law, it follows from the specific conditions set out in the preceding paragraph that it is precisely the practical difficulties relating, in particular, to obtaining necessary documentation from third countries that are likely, in principle, to justify the detention of the individuals concerned for such a period.

72 It is apparent from the considerations set out in paragraphs 66 to 71 of the present judgment that Union citizens and their family members who, in that capacity, come within the scope of Directive 2004/38 are not in a comparable situation to that of third-country nationals who are subject to a return procedure under Directive 2008/115 as regards the duration of the removal procedure, with the result that there is no justification for treating all those individuals in the same way as regards the maximum period of detention for the purpose of removal. It follows that a maximum period of detention for Union citizens and their family members who, in that capacity, come within the scope of Directive 2004/38, such as the maximum period provided for in the legislation at issue in the main proceedings, goes beyond what is necessary to achieve the objective pursued.

73 In the light of all of the above, the answer to the questions referred is that Articles 20 and 21 TFEU and Directive 2004/38 must be interpreted as:

– not precluding national legislation which applies to Union citizens and their family members, during the period allowed for them to leave the territory of the host Member State following the adoption of an expulsion decision taken against them on grounds of public policy or during an extension of that period, provisions aimed at avoiding the risk of absconding that are similar to provisions whose purpose is, as regards third-country nationals, to transpose Article 7(3) of Directive 2008/115 into national law, provided that the former provisions respect the general principles laid down in Article 27 of Directive 2004/38 and are no less favourable than the latter provisions;

– precluding national legislation which applies to Union citizens and their family members who, after the expiry of the period allowed for them to leave the territory or an extension of that period, have not complied with an expulsion decision taken against them on grounds of public policy or public security, a detention measure for a maximum period of detention of eight months for the purpose of removal, that period being identical to that applicable, in national law, to third-country nationals who have not complied with a return decision issued on such grounds pursuant to Article 6(1) of Directive 2008/115.

Costs

74 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Articles 20 and 21 TFEU and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, must be interpreted as:

– **not precluding national legislation which applies to Union citizens and their family members, during the period allowed for them to leave the territory of the host Member State following the adoption of an expulsion decision taken against them on grounds of public policy or during an extension of that period, provisions aimed at avoiding the risk of absconding that are similar to provisions whose purpose is, as regards third-country nationals, to transpose Article 7(3) 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 into national law, provided that the former provisions respect the general principles laid down in Article 27 of Directive 2004/38 and are no less favourable than the latter provisions;**

– **precluding national legislation which applies to Union citizens and their family members who, after the expiry of the period allowed for them to leave the territory or an extension of that period, have not complied with an expulsion decision taken against them on**

grounds of public policy or public security, a detention measure for a maximum period of detention of eight months for the purpose of removal, that period being identical to that applicable, in national law, to third-country nationals who have not complied with a return decision issued on such grounds pursuant to Article 6(1) of Directive 2008/115.

[Signatures]