Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

5 June 2014*

(Visas, asylum, immigration and other policies related to free movement of persons — Directive 2008/115/EC — Return of illegally staying third-country nationals — Article 15 — Detention — Extension of detention — Obligations of the administrative or judicial authority — Review by a judicial authority — Third-country national without identity documents — Obstacles to implementation of a removal decision — Refusal of the embassy of the third country concerned to issue an identity document enabling the third-country national to be returned — Risk of absconding — Reasonable prospect of removal — Lack of cooperation — Whether the Member State concerned is under an obligation to issue a temporary document relating to the status of the person concerned)

In Case C-146/14 PPU,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Sofia-grad (Bulgaria), made by decision of 28 March 2014, received at the Court on 28 March 2014, in the proceedings concerning

Bashir Mohamed Ali Mahdi,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, C.G. Fernlund, A. Ó Caoimh (Rapporteur), C. Toader and E. Jarašiūnas, Judges,

Advocate General: M. Szpunar,

Registrar: M. Aleksejev, Administrator,

having regard to the request of the referring court of 28 March 2014, received at the Court on 28 March 2014, that the reference for a preliminary ruling be dealt with under the urgent procedure, in accordance with Article 107 of the Court's Rules of Procedure,

having regard to the decision of the Third Chamber of 8 April 2014 to grant that request,

having regard to the written procedure and further to the hearing on 12 May 2014,

after considering the observations submitted on behalf of:

— the Bulgarian Government, by E. Petranova and D. Drambozova, acting as Agents,

— the direktor na Direktsia 'Migratsia' pri Ministerstvo na vatreshnite raboti, by D. Petrov, acting as Agent,

* Language of the case: Bulgarian.

— the European Commission, by M. Condou-Durande and S. Petrova, acting as Agents,

after hearing the Advocate General,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 15 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).

2 The reference has been made in administrative-law proceedings brought by the direktor of the Direktsia 'Migratsia' pri Ministerstvo na vatreshnite raboti (Director of the Directorate for Migration at the Ministry of the Interior; 'the direktor'), in which the Administrativen sad Sofia-grad (Sofia City Administrative Court) is requested to rule of its own motion on the continuation of the detention of Mr Mahdi, a Sudanese national being held at that directorate's special detention facility for foreign nationals in Busmantsi (Bulgaria) ('the Busmantsi detention facility') in the district of Sofia.

Legal context

European Union law

3 Directive 2008/115 was adopted on the basis in particular of Article 63(3)(b) EC (now Article 79(2)(c) TFEU). Recitals 6, 11 to 13, 16, 17 and 24 in the preamble to the directive state:

'(6) Member States should ensure that the ending of illegal stay of third-country nationals is carried out through a fair and transparent procedure. According to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay. …

…

(11) A common minimum set of legal safeguards on decisions related to return should be established to guarantee effective protection of the interests of the individuals concerned. The necessary legal aid should be made available to those who lack sufficient resources. Member States should provide in their national legislation for which cases legal aid is to be considered necessary.

(12) The situation of third-country nationals who are staying illegally but who cannot yet be removed should be addressed. Their basic conditions of subsistence should be defined according to national legislation. In order to be able to demonstrate their specific situation in the event of administrative controls or checks, such persons should be provided with written confirmation of their situation. Member States should enjoy wide discretion concerning the form and format of the written confirmation and should also be able to include it in decisions related to return adopted under this Directive.

(13) The use of coercive measures should be expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued. Minimum safeguards for the conduct of forced return should be established …

…

(16) The use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient.

(17) Third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law. …

…

(24) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union [“the Charter”].’

4 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.’

5 Article 3 of Directive 2008/115, headed ‘Definitions’, states:

‘For the purpose of this Directive the following definitions shall apply:

…

7. “risk of absconding” means the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond;

…’

6 Article 6(4) of the Directive provides:

‘Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay.’

7 Under Article 15 of Directive 2008/115, which is entitled ‘Detention’:

‘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.

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 12 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.'

Bulgarian law

8 Directive 2008/115 was transposed into Bulgarian law by the Law on foreign nationals in the Republic of Bulgaria (Zakon za chuzhdentsite v Republika Bulgaria, DV No 153 of 23 December 1998), in the version applicable at the material time (DV No 108 of 17 December 2013; 'the Law on foreign nationals').

9 Article 44(5) of the Law on foreign nationals provides:

'Where there are obstacles to the foreign national immediately leaving the territory or entering another country, that national shall be required, by order of the authority which adopted the coercive measure, to report each week to the local office of the Ministry of the Interior, in accordance with the rules laid down by the decree implementing the present law, unless the obstacles to implementation of the measure ordering deportation or expulsion have been overcome and measures have been adopted with a view to his imminent removal.'

10 Under Article 44(6) of the Law on foreign nationals, where a coercive administrative measure cannot be applied to a third-country national whose identity it has not been possible to establish, where that national hinders implementation of the order imposing that measure or where there is a clear risk of him absconding, the authority which adopted the measure may order the foreign national to be placed in a detention facility in order that his deportation from the Republic of Bulgaria or his expulsion may be arranged.

11 Article 44(8) of the Law on foreign nationals is worded as follows:

'Detention shall continue as long as the conditions set out in paragraph 6 are met but may not exceed six months. The competent authorities … shall, of their own motion, verify once a month, jointly with the direktor, … that the conditions for detention are fulfilled. Exceptionally, where the person concerned refuses to cooperate with the competent authorities, or where there is a delay in obtaining the documents essential for deportation or expulsion, the period of detention may be extended to 12 months. Where, having regard to the particular circumstances of the case, it is found that, for legal or technical reasons, there is no longer a reasonable prospect of removing the foreign national, the person concerned shall be released immediately.'

12 Under Article 46a(1) of the Law on foreign nationals, an action may be brought, in accordance with the rules laid down by the Code of Administrative Procedure (Administrativnoprotsesualen kodeks), against the order for placement in a detention facility, within 14 days of the actual placement.

13 Article 46a(2) of that law provides:

'A court before which an action has been brought under the previous paragraph shall hear the case in open court and shall give its decision within one month from the start of the proceedings. The person concerned shall not be obliged to enter an appearance. An appeal may be brought against the decision of the court hearing the case at first instance before the Vărhoven administrativen sad [(Supreme Administrative Court)], which shall give judgment within a period of two months.'

14 Article 46a(3) and (4) of the Law on foreign nationals is worded as follows:

'3. Every six months the director of the detention facility for foreign nationals shall present a list of the foreign nationals who have been detained there for more than six months owing to obstacles to their removal from Bulgarian territory. The list is to be sent to the administrative court of the place where the detention facility is located.

4. At the end of each period of six months' detention in a detention facility, the court, considering the case *in camera*, shall determine, either of its own motion or on the application of the foreign national concerned, whether the period of detention is to be extended, replaced by other measures, or terminated. An appeal may be brought against the court's decision in accordance with the rules laid down by the Code of Administrative Procedure.'

15 According to point 4c of paragraph 1 of the Supplementary Provisions to the Law on foreign nationals, 'a risk that a third-country national who is the subject of a coercive administrative measure may abscond' is established where, taking account of certain matters of fact, there is reason to believe that the foreign national concerned will attempt to circumvent implementation of the measure ordered. In that respect, those provisions specify that the matters that may constitute such a risk are the fact that the foreign national concerned cannot be found at his stated address, the existence in his regard of previous breaches of public order or previous convictions, notwithstanding his rehabilitation, the fact that he has failed to leave the country within the period prescribed for his voluntary departure, the fact that he has clearly shown that he is not complying with the measure imposed on him, the fact

that he is in possession of forged documents, or has no documents at all, the fact that he has provided incorrect information, that he has already absconded in the past and/or that he has not complied with an entry ban.

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

16 Mr Mahdi was arrested on 9 August 2013 at a border post in Bregovo in Bulgaria. He did not have any identity documents but presented himself as Bashir Mohamed Ali Mahdi, a Sudanese national.

17 By an order made the same day, Mr Mahdi was made the subject of a coercive administrative measure for 'deportation' and a second such measure 'banning a foreign national from entering Bulgaria'.

18 On the following day, 10 August 2013, Mr Mahdi was taken pursuant to those orders to the Busmantsi detention facility pending implementation of the coercive administrative measures, that is to say, until such time as documents permitting him to travel outside Bulgaria were obtained.

19 On 12 August 2013, Mr Mahdi signed, before the Bulgarian administrative authorities, a statement whereby he consented to return voluntarily to Sudan.

20 On 13 August 2013, the direktor sent a letter to the Embassy of the Republic of the Sudan informing it of the measures which had been taken in respect of Mr Mahdi and of his detention in the Busmantsi detention facility.

21 Subsequently, at a date not specified in the documents before the Court, a meeting took place between an embassy official and Mr Mahdi in the course of which that official confirmed Mr Mahdi's identity but refused to issue him with an identity document permitting him to travel outside Bulgaria. That refusal was apparently based on the fact that Mr Mahdi was not willing to return to Sudan. Mr Mahdi then stated to the Bulgarian authorities that he did not wish to return voluntarily to Sudan. The official of the Embassy of the Republic of the Sudan appears to have confirmed to the referring court that, in those circumstances, it was impossible to issue a travel document if Mr Mahdi was not prepared to return of his own free will to his country of origin.

22 On 16 August 2013, Ms Ruseva, a Bulgarian national, swore an affidavit that Mr Mahdi would be provided with accommodation and his own means of support during his stay in Bulgaria and requested that the direktor arrange for Mr Mahdi's release against provision of security. That statement was checked and validated by the police on 26 August 2013.

23 On 27 August 2013, the direktor suggested to his superior that, in view of Ms Ruseva's affidavit, Mr Mahdi's detention order should be revoked and that a less coercive measure — namely 'reporting every month to the local office of the Ministry of the Interior for his place of residence' — should be adopted in his regard until the obstacles to implementing the decision to deport him were removed.

24 On 9 September 2013, that proposal was rejected on the grounds that Mr Mahdi had not entered Bulgaria legally, that he was not in possession of a residence permit, that he had been refused refugee status by the National Agency for Refugees on 29 December 2012 and that he had committed a criminal offence by crossing the border between Bulgaria and Serbia other than at the places prescribed for that purpose.

25 No action was brought either against the detention order or against the refusal to replace that order with the less restrictive measures which the direktor had proposed.

26 It is apparent from the order for reference that no identity document which would allow Mr Mahdi to travel outside Bulgaria has, as of yet, been issued by the Embassy of the Republic of the Sudan and that Mr Mahdi is still being held in the Busmantsi detention facility.

27 The case in the main proceedings was commenced, around 9 February 2014 and at the end of an initial six-month period of detention, when a letter from the direktor was lodged requesting the referring court to order of its own motion, on the basis of Article 46a(3) and (4) of the Law on foreign nationals, an extension of Mr Mahdi's detention.

28 The referring court explains that, under Article 46a(3) and (4) of the Law on foreign nationals, a list of the third-country nationals who have remained in a detention facility for more than six months owing to obstacles to their removal from Bulgaria is presented every six months by the head of the detention facility concerned to the administrative court in whose jurisdiction the detention facility is located. At the end of each six-month period in a detention facility, the administrative court rules of its own motion, *in camera*, on whether the person concerned should remain in detention, whether alternative measures should be adopted or whether that person should be released.

29 In that regard, the referring court raises the question, inter alia, of the compatibility with EU law, and in particular with the requirements laid down by Directive 2008/115, of the administrative procedure provided for under Bulgarian law for reviewing placement in a detention facility.

30 According to the referring court, the nature of the review which it may carry out varies depending on whether it is acting as a judicial authority or as an administrative authority. In particular, when it hears and determines a case as a judicial authority, it is unable to rule on the merits of the case and re-examine the initial decision to place a person in a detention facility, since, under Bulgarian procedural law, its role is limited to reviewing the grounds for extending the detention of the person concerned as set out in the direktor's letter initiating proceedings such as those before it. The referring court also raises questions as to the risk of a third-country national absconding in a case such as that before it, where the person concerned, who has no identity documents, has stated to the Bulgarian authorities that he does not wish to return to his country of origin. The referring court also raises queries concerning the third-country national's conduct. In that regard, it asks whether the fact that the person concerned does not have any identity documents can be regarded as a lack of cooperation in the context of the removal procedure. Having regard to all those circumstances, the referring court has doubts as to whether the extension of Mr Mahdi's detention is justified.

31 In those circumstances, the Administrativen sad Sofia-grad decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 15(3) and (6) of Directive 2008/115, in conjunction with Articles 6 and 47 of the Charter, concerning the right to a judicial review and effective judicial protection, to be interpreted as meaning that:

(a) where an administrative authority is obliged under the national law of a Member State to conduct a monthly review of detention without there being an express obligation to adopt an administrative measure and where it has to submit to the court *ex officio* a list of third-country nationals detained beyond the statutorily prescribed maximum length of the initial detention owing to obstacles to removal, the administrative authority is obliged, on the expiry of the period laid down in the individual decision to detain for the first time, either to adopt an express detention review measure having regard to the grounds for an extension of detention provided for under EU law or to release the person in question;

(b) where the national law of the Member State in question provides for the courts to have the power, on the expiry of the maximum period for initial detention laid down under national law, to order an extension of the period of detention for removal purposes, to replace

detention with a less coercive measure or to order the release of the third-country national, the court is obliged, in a situation such as that in the main proceedings, to examine the legality of a detention review measure that gives the legal and factual reasons for the need to extend the period of detention and the length thereof by deciding on the merits on the continuation of detention, its replacement or the release of the person in question;

(c) it permits the court, having regard to the grounds for an extension of detention provided for under EU law, to examine the legality of a detention review measure that only gives reasons for which the decision to remove a third-country national cannot be implemented, by deciding the merits of the dispute in a decision on the continuation of detention, its replacement or the release of the person in question solely on the basis of facts stated and evidence adduced by the administrative authority and facts and objections stated by the third-country national?

(2) Is Article 15(1) and (6) of Directive 2008/115 to be interpreted, in a situation such as that obtaining in the main proceedings, as meaning that the autonomous reason for extending detention provided for under national law, namely that "the person in question … [has] no identity documents", is permissible from the point of view of EU law as subsumable under both cases mentioned in Article 15(6) of the directive where, under the national law of the Member State, because of those circumstances it can be assumed that there is reason to believe that the person in question will attempt to circumvent implementation of the removal decision, which in turn presents a risk of absconding within the meaning of the law of that Member State?

(3) Are paragraphs 1(a) and (b) and 6 of Article 15 of Directive 2008/115, in conjunction with recitals 2 and 13 in the preamble to the directive with regard to respect for the fundamental rights and dignity of third-country nationals and the application of the principle of proportionality, to be interpreted in a situation such as that obtaining in the main proceedings as permitting the conclusion that there is a reasonable risk of absconding owing to the fact that the person in question has no identity documents, has crossed the state boundary illegally and has said that he will not return to his country of origin, even though he has previously completed a statement as to his voluntary return and provided correct details of his identity, when these circumstances fall within the concept of a "risk of absconding" in the case of the addressee of a return decision within the meaning of the directive, which is defined under national law as reason to believe, based on the facts, that the person in question will attempt to circumvent implementation of the return decision?

(4) Are paragraphs 1(a) and (b), 4 and 6 of Article 15 of Directive 2008/115, in conjunction with recitals 2 and 13 in the preamble to the directive with regard to respect for the fundamental rights and dignity of third-country nationals and the application of the principle of proportionality, to be interpreted in a situation such as that obtaining in the main proceedings as meaning that:

(a) the third-country national does not demonstrate cooperation in the preparation of implementation of the decision to return him to his country of origin if he states verbally to an embassy official of that country that he does not wish to return to his country of origin even though he has previously completed a statement as to his voluntary return and provided correct details of his identity, and there are delays in obtaining the necessary documentation from the third country and there is a reasonable prospect of implementation of the return decision, if in these circumstances the embassy of that country does not issue the document necessary for the person in question to travel to his country of origin even though it has confirmed that person's identity;

(b) in the event of the release of a third-country national on account of the absence of a reasonable prospect of implementation of a removal decision where that third-country national has no identity documents, has crossed the state border illegally and states that he does not wish to return to his country of origin, it is to be assumed that the Member State is under an obligation to issue a temporary document on the status of the person in question if the embassy of the country of origin does not in these circumstances issue the document required for the person in question to travel to his country of origin even though it has confirmed that person's identity?'

The urgent procedure

32 The Administrativen sad Sofia-grad has requested that this reference for a preliminary ruling be dealt with under the urgent preliminary ruling procedure provided for in Article 107 of the Rules of Procedure of the Court of Justice.

33 The referring court has stated, as reasons for its request, that the third-country national in the case before it is being detained and that his situation falls within the scope of the provisions of Title V of the FEU Treaty which concern the area of freedom, security and justice. In view of Mr Mahdi's situation, the Court's answer to the questions referred for a preliminary ruling will have a decisive influence on whether Mr Mahdi is to remain in the Busmantsi detention facility or whether he must be released. The referring court indicates that a decision on the extension of Mr Mahdi's detention should be taken as quickly as possible.

34 In that regard, the Court notes, first, that this request for a preliminary ruling concerns the interpretation of Directive 2008/115, which falls under Title V of Part Three of the FEU Treaty. It is therefore amenable to being dealt with under the urgent preliminary ruling procedure provided for in Article 23a of the Statute of the Court of Justice of the European Union and Article 107 of the Court's Rules of Procedure.

35 Secondly, as the referring court points out, Mr Mahdi is currently deprived of liberty and resolution of the case before it may result in his immediate release.

36 In the light of the foregoing, the Third Chamber of the Court decided, on the proposal of the Judge-Rapporteur and after hearing the Advocate General, to grant the referring court's application for this request for a preliminary ruling to be dealt with under the urgent procedure.

Consideration of the questions referred

Question 1(a)

37 By question 1(a), the referring court seeks to ascertain whether Article 15(3) and (6) of Directive 2008/115, read in the light of Articles 6 and 47 of the Charter, must be interpreted as meaning that the decision adopted by a competent authority, on expiry of the maximum period allowed for the initial detention of a third-country national, on the further course to take concerning the detention, must be in the form of a written measure that includes the reasons in fact and in law for that decision.

38 The Court observes first of all that, in accordance with Article 79(2) TFEU, the objective of Directive 2008/115 is, as is apparent from recitals 2 and 11 in the preamble thereto, 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.

39 The procedures for returning illegally staying third-country nationals which are established by Directive 2008/115 thus form the common standards and procedures in Member States for returning those nationals. The Member States enjoy, in a number of respects, a discretion with regard to the implementation of the provisions of the directive in the light of the particular features of national law.

40 Recital 6 in the preamble to Directive 2008/115 states that the Member States should ensure that the ending of the illegal stay of third-country nationals is carried out through a fair and transparent procedure. That recital also states that, according to general principles of EU law, decisions taken under Directive 2008/115 should be adopted on a case-by-case basis and be based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay.

41 Under Article 15(2) of Directive 2008/115, the initial detention of a third-country national, which may not exceed six months, must be ordered by administrative or judicial authorities, in writing with reasons being given in fact and in law for the detention decision (see, to that effect, *G. and R.*, C-383/13 PPU, EU:C:2013:533, paragraph 29).

42 Under Article 15(6) of Directive 2008/115, an initial period of detention may be extended, in accordance with national law, for a limited period not exceeding a further 12 months where certain substantive conditions are fulfilled. Any period of detention which exceeds six months must be regarded, pursuant to Article 15(5), as prolonged detention for the purposes of Article 15(3) of the directive.

43 Furthermore, Article 15(3) of Directive 2008/115 provides that detention of a third-country national must, in every case, be reviewed at reasonable intervals of time, either on application of the person concerned or *ex officio*. In the case of prolonged detention, reviews must be subject to the supervision of a judicial authority.

44 It follows from those provisions that the only requirement expressly provided for in Article 15 of Directive 2008/115 as regards adoption of a written measure is the requirement set out in paragraph 2 thereof, namely that detention must be ordered in writing with reasons being given in fact and in law. The requirement that a decision be adopted in writing must be understood as necessarily covering all decisions concerning extension of detention, given that (i) detention and extension of detention are similar in nature since both deprive the third-country national concerned of his liberty in order to prepare his return and/or carry out the removal process and (ii) in both cases the person concerned must be in a position to know the reasons for the decision taken concerning him.

45 According to the case-law of the Court, the obligation to communicate those reasons is necessary both to enable the third-country national concerned to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court having jurisdiction, and also to put that court fully in a position to carry out the review of the legality of the decision in question (see, to that effect, *Heylens and Others*, 222/86, EU:C:1987:442, paragraph 15, and *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 337).

46 Any other interpretation of Article 15(2) and (6) of Directive 2008/115 would mean that challenging the legality of a decision extending detention would be more difficult for a third-country national than challenging the legality of an initial detention decision, which would undermine the fundamental right to an effective remedy.

47 It should be made clear, however, that the provisions of Article 15 of Directive 2008/115 do not require the adoption of a written 'review measure' to use the term employed by the referring court in question 1(a). The authorities which carry out the review of a third-country national's detention at

regular intervals pursuant to the first sentence of Article 15(3) of the directive are therefore not obliged, at the time of each review, to adopt an express measure in writing that states the factual and legal reasons for that measure.

48 Nevertheless, it must be stated that if the authority dealing with a review procedure at the end of the maximum period for initial detention allowed by Article 15(5) of Directive 2008/115 takes a decision on the further course to take concerning the detention, it is obliged to adopt a written reasoned decision. In such a case, the review of the detention and the decision on the further course to take concerning the detention occur in the same procedural stage. Consequently, that decision must fulfil the requirements of Article 15(2) of Directive 2008/115.

49 However, it is not clear either from the order for reference or from the submissions made by the Bulgarian Government at the hearing whether the list sent by the direktor to the referring court at the end of the maximum period allowed for initial detention includes a decision on the further course to take concerning Mr Mahdi's detention. If it is found that, by means of that list, the direktor took a decision on, inter alia, the extension of the detention, that list must also fulfil the requirements set out in paragraph 48 of this judgment. It is for the referring court to carry out the necessary verifications in that regard. Such a decision must, in every case, be subject to supervision by a judicial authority in accordance with Article 15(3) of Directive 2008/115.

50 It should also be recalled that, according to settled case-law, in the absence of EU rules concerning the procedural requirements relating to a detention-review measure, the Member States remain competent, in accordance with the principle of procedural autonomy, to determine those requirements, whilst at the same time ensuring that the fundamental rights are observed and that the provisions of EU law relating to that measure are fully effective (see, by analogy, *N.*, C-604/12, EU:C:2014:302, paragraph 41).

51 Accordingly, EU law does not preclude national legislation from providing, in compliance with those principles, that the authority which reviews the detention of a third-country national at reasonable intervals, in accordance with the first sentence of Article 15(3) of Directive 2008/115, must adopt, on the conclusion of each review, an express measure containing the factual and legal reasons justifying the measure adopted. Such an obligation would arise solely under national law.

52 In view of the foregoing, the answer to question 1(a) is that Article 15(3) and (6) of Directive 2008/115, read in the light of Articles 6 and 47 of the Charter, must be interpreted as meaning that any decision adopted by a competent authority, on expiry of the maximum period allowed for the initial detention of a third-country national, on the further course to take concerning the detention must be in the form of a written measure that includes the reasons in fact and in law for that decision.

Question 1(b) and (c)

53 By question 1(b) and (c), the referring court asks, in essence, whether Article 15(3) and (6) of Directive 2008/115, in conjunction with Articles 6 and 47 of the Charter, must be interpreted as meaning that the 'supervision' that has to be undertaken by a judicial authority dealing with an application for extension of the detention of a third-country national must permit that authority to decide, on a case-by-case basis, on the merits of whether the detention of the third-country national concerned should be extended, whether detention may be replaced with a less coercive measure or whether the person concerned should be released, that authority thus having power to take into account the facts stated and evidence adduced by the administrative authority as well as any observations that the third-country national may submit.

54 It must first of all be noted that the Court has already held that Article 15 of Directive 2008/115 is unconditional and sufficiently precise, so that no other specific elements are required for it to be implemented by the Member States (see, to that effect, *El Dridi*, C-61/11 PPU, EU:C:2011:268, paragraph 47).

55 As is apparent from recitals 13, 16, 17 and 24 of Directive 2008/115, every detention ordered which is within the scope of the directive is strictly circumscribed by the provisions of Chapter IV thereof so as to ensure, on the one hand, compliance with the principle of proportionality with regard to the means used and objectives pursued and, on the other, observance of the fundamental rights of the third-country nationals concerned.

56 Secondly, as has been pointed out in paragraph 43 of this judgment, it is clear from the wording of Article 15(3) of Directive 2008/115 that a review of any prolonged detention of a third-country national must be subject to the 'supervision' of a judicial authority. Thus, a judicial authority which is deciding on the possibility of extending an initial period of detention must 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.

57 Article 15(3) of Directive 2008/115 does not, however, specify the nature of this examination. It is thus appropriate to recall the rules deriving from Article 15 which apply in a procedure such as that at issue before the referring court and which must, therefore, be taken into account by a judicial authority in the course of its examination.

58 In the first place, it follows from the substantive conditions set out in Article 15(6) of Directive 2008/115 that the initial period of detention may be extended only when, regardless of all the reasonable efforts of the Member State concerned, the removal operation is likely to last longer because of either a lack of cooperation by the third-country national concerned or delays in obtaining the necessary documentation from the third country. Such an extension must be decided upon in accordance with national law and may not, under any circumstances, exceed a further 12 months.

59 In the second place, Article 15(6) of Directive 2008/115 should be read in conjunction with Article 15(4) which makes it clear that when it appears that a reasonable prospect of removal no longer exists for legal or other considerations or when the conditions laid down in Article 15(1) of the directive no longer exist, detention of the third-country national concerned ceases to be justified and that person must be released immediately.

60 So far as the first requirement under Article 15(4) of that directive is concerned, the Court has already stated that, for it to be possible to consider that there is a 'reasonable prospect of removal' within the meaning of that provision, there must, at the time of the national court's review of the lawfulness of detention, be a real prospect that the removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6) of Directive 2008/115 (see, to that effect, *Kadzoev*, C-357/09 PPU, EU:C:2009:741, paragraph 65).

61 The second requirement under Article 15(4) of Directive 2008/115 entails re-examining the substantive conditions set out in Article 15(1) of the directive which have formed the basis for the initial decision to detain the third-country national concerned. The authority determining whether that person's detention should be extended or whether he should be released must thus ascertain (i) whether other sufficient but less coercive measures than detention can be applied effectively in a specific case, (ii) whether there is a risk of the third-country national absconding and (iii) whether he is avoiding or hampering the preparation of his return or the removal process.

62 It follows that a judicial authority deciding upon an application for the extension of detention must be able to rule on all relevant matters of fact and of law in order to determine, in the light of the requirements set out in paragraphs 58 to 61 of this judgment, whether an extension of detention is justified, which requires an in-depth examination of the matters of fact specific to each individual case. Where the detention that was initially ordered is 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 ruling on an application for extension of detention must be able to take into account both the facts stated and the evidence adduced by the administrative authority and any observations that may be submitted by the third-country national. Furthermore, that authority 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.

63 Any other interpretation of Article 15 of Directive 2008/115 would result in paragraphs 4 and 6 thereof being rendered ineffective and would deprive of all substance the examination by a judicial authority which the second sentence of Article 15(3) of the directive requires, thereby jeopardising the achievement of the objectives pursued by the directive.

64 Consequently, the answer to question 1(b) and (c) is that Article 15(3) and (6) of Directive 2008/115 must be interpreted as meaning that the 'supervision' that has to be undertaken by a judicial authority dealing with an application for extension of the detention of a third-country national must permit that authority to decide, on a case-by-case basis, on the merits of whether the detention of the third-country national concerned should be extended, whether detention may be replaced with a less coercive measure or whether the person concerned should be released, that authority thus having power to take into account the facts stated and evidence adduced by the administrative authority which has brought the matter before it, as well as any facts, evidence and observations which may be submitted to the judicial authority in the course of the proceedings.

Questions 2 and 3

65 By questions 2 and 3, which it is appropriate to consider together, the referring court asks, in essence, whether Article 15(1) and (6) of Directive 2008/115 must be interpreted as precluding national legislation such as that at issue in the main proceedings, pursuant to which an initial six-month period of detention may be extended solely because the third-country national concerned has no identity documents and, accordingly, there is a risk of him absconding.

66 It should first be observed that the concept of 'risk of absconding' is defined in Article 3(7) of Directive 2008/115 as the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond.

67 Second, the fact that such a risk exists is one of the reasons expressly specified in Article 15(1) of Directive 2008/115 as justification for keeping in detention a third-country national who is the subject of a return procedure in order to prepare the return or carry out the removal process. As has been observed in paragraph 61 of this judgment, that provision makes clear that recourse may be had to such detention only when other sufficient but less coercive measures cannot be applied effectively in a specific case.

68 Third, as has been recalled in paragraph 58 of this judgment, extension of detention may, under Article 15(6) of Directive 2008/115, be ordered only if the removal operation is likely to last longer owing either to a lack of cooperation by the third-country national concerned or to delays in obtaining the necessary documentation from third countries, no mention being made of the fact that the person concerned has no identity documents.

69 Furthermore, as has been stated in paragraph 61 of this judgment, any decision on the extension of the detention of a third-country national and, thus, on the existence of the circumstances described in Article 15(6) of Directive 2008/115 must be preceded by a re-examination of the substantive conditions which formed the basis for the initial decision to detain the third-country national concerned. That calls for an assessment by the judicial authority, in the course of the examination required under the second sentence of Article 15(3) of the directive, of the circumstances which gave rise to the initial finding that there was a risk of the third-country national absconding.

70 Moreover, as has already been stated by the Court, any assessment relating to the risk of the person concerned absconding must be based on an individual examination of that person's case (see *Sagor*, C-430/11, EU:C:2012:777, paragraph 41). Furthermore, as stated in recital 6 in the preamble to Directive 2008/115, decisions taken under the directive should be adopted on a case-by-case basis and based on objective criteria.

71 In the present case, it is apparent from the order for reference that Bulgarian law provides, in point 4c of paragraph 1 of the Supplementary Provisions to the Law on Foreign Nationals that there is shown to be a risk that a third-country national who is the subject of a coercive administrative measure may abscond where, taking account of certain facts, there is reason to believe that the person concerned will attempt to circumvent implementation of the measure ordered. The objective factors which may constitute such a risk are set out in point 4c and include, inter alia, the fact that the person concerned has no identity documents.

72 It is therefore for the referring court to assess the facts surrounding the situation of the third-country national concerned in order to determine, in the re-examination of the conditions laid down in Article 15(1) of Directive 2008/115, whether, as the direktor suggested in the case in the main proceedings, a less coercive measure may be applied effectively to that person and, should that not prove possible, to determine whether there continues to be a risk of that person absconding. Only in the last-mentioned case may the referring court take into account the lack of identity documents.

73 Accordingly, the fact that the third-country national concerned has no identity documents cannot, on its own, be a ground for extending detention under Article 15(6) of Directive 2008/115.

74 Consequently, the answer to questions 2 and 3 is that Article 15(1) and (6) of Directive 2008/115 must be interpreted as precluding national legislation such as that at issue in the main proceedings, pursuant to which an initial six-month period of detention may be extended solely because the third-country national concerned has no identity documents. It is for the referring court alone to undertake an individual assessment of the facts and circumstances of the case in question in order to determine whether a less coercive measure may be applied effectively to that third-country national or whether there is a risk of him absconding.

Question 4(a)

75 By question 4(a), the referring court asks whether Article 15(6)(a) of Directive 2008/115 must be interpreted as meaning that a third-country national who, in circumstances such as those in issue in the main proceedings, has not obtained an identity document which would have made it possible for him to be removed from the Member State concerned demonstrates a 'lack of cooperation' within the meaning of that provision.

76 So far as Mr Mahdi's situation is concerned, it is undisputed that he has no identity documents and that the Embassy of the Republic of the Sudan has refused to issue him with a document which would make it possible to implement the removal decision.

77 Thus, by question 4(a) the Court is requested to state whether the refusal of the Embassy of the Republic of the Sudan to issue Mr Mahdi with identity documents may be imputed to him, following his statement that he did not wish to return to his country of origin. If the answer is in the affirmative, the Court is asked to clarify whether Mr Mahdi's conduct may be treated as a lack of cooperation on his part, for the purposes of Article 15(6) of Directive 2008/115, which would justify extending the period of his detention for a further period not exceeding 12 months.

78 In this regard, it must be observed that is for the national court to ascertain the facts which have given rise to the dispute before it and to establish the consequences which they have for the judgment which it is required to deliver (see, inter alia, *WWF and Others*, C-435/97, EU:C:1999:418, paragraph 32, and *Danosa*, C-232/09, EU:C:2010:674, paragraph 33).

79 In the division of jurisdiction between the Courts of the European Union and the national courts, it is in principle for the national court to determine whether the factual conditions triggering the application of a rule of EU law are satisfied in the case pending before it, while the Court, when giving a preliminary ruling, may, where appropriate, provide clarification to guide the national court in its interpretation (see, to that effect, *Haim*, C-424/97, EU:C:2000:357, paragraph 58; *Vatsouras and Koupatantze*, C-22/08 and C-23/08, EU:C:2009:344, paragraph 23; and *Danosa*, EU:C:2010:674, paragraph 34).

80 In those circumstances, the Court must answer the questions concerning the interpretation of EU law which have been referred for a preliminary ruling, whilst leaving to the referring court the task of establishing the specific elements of the case before it and, in particular, of determining whether the lack of identity documents can be attributed solely to the fact that Mr Mahdi withdrew the statement concerning his voluntary return (see, by analogy, *Danosa*, EU:C:2010:674, paragraph 36).

81 In this connection, it is to be noted that Mr Mahdi, as appears from the order for reference, cooperated with the Bulgarian authorities so far as disclosure of his identity and the removal process were concerned. He did, however, withdraw the statement concerning his voluntary return.

82 The Court observes that the concept of 'lack of cooperation' within the meaning of Article 15(6) of Directive 2008/115 requires that the authority which is determining an application for extension of the detention of a third-country national examine, on the one hand, that person's conduct during the initial period of detention in order to establish whether he has failed to cooperate with the competent authorities as regards implementation of the removal operation and, on the other, the likelihood of the removal operation lasting longer than anticipated because of the conduct of the person concerned. If the removal of the third-country national is taking, or has taken, longer than anticipated for another reason, no causal link may be established between the latter's conduct and the duration of the operation in question and therefore no lack of cooperation on his part can be established.

83 Furthermore, Article 15(6) of Directive 2008/115 requires that, before it considers whether the third-country national concerned has shown that he has failed to cooperate, the authority concerned should be able to demonstrate that the removal operation is lasting longer than anticipated, despite all reasonable efforts: that means that, in the case before the referring court, the Member State in question should have sought, and should still actively be seeking, to secure the issue of identity documents for the third-country national.

84 It follows that, in order to confirm that the Member State concerned has made reasonable efforts to carry out the removal operation and that there is a lack of cooperation on the part of the third-country national concerned, a detailed examination of the factual matters relating to the whole

of the initial detention period is necessary. Such an examination is a question of fact which, as has already been recalled, falls outside the jurisdiction of the Court in proceedings under Article 267 TFEU and is a matter for the national court (*Merluzzi*, 80/71, EU:C:1972:24, paragraph 10).

85 In view of the foregoing, the answer to question 4(a) is that Article 15(6)(a) of Directive 2008/115 must be interpreted as meaning that a third-country national who, in circumstances such as those in issue in the main proceedings, has not obtained an identity document which would have made it possible for him to be removed from the Member State concerned may be regarded as having demonstrated a 'lack of cooperation' within the meaning of that provision only if an examination of his conduct during the period of detention shows that he has not cooperated in the implementation of the removal operation and that it is likely that that operation lasts longer than anticipated because of that conduct, a matter which falls to be determined by the referring court.

Question 4(b)

86 By question 4(b), the referring court asks whether Article 15 of Directive 2008/115 must be interpreted as meaning that a Member State can be obliged to issue an autonomous residence permit or other authorisation conferring a right to stay to a third-country national who has no identity documents and who has not obtained such documentation from his country of origin, after a national court has released the person concerned on the ground that there is no longer a reasonable prospect of removal within the meaning of Article 15(4) of that directive.

87 As is clear from the objective of Directive 2008/115, described in paragraph 38 of this judgment, the purpose of the directive is not to regulate the conditions of residence on the territory of a Member State of third-country nationals who are staying illegally and in respect of whom it is not, or has not been, possible to implement a return decision.

88 However, Article 6(4) of Directive 2008/115 enables the Member States to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. Similarly, recital 12 in the preamble to the directive states that the Member State should provide third-country nationals who are staying illegally but who cannot yet be removed with written confirmation of their situation. The Member States enjoy wide discretion concerning the form and format of the written confirmation.

89 In view of the foregoing, the answer to question 4(b) is that Directive 2008/115 must be interpreted as meaning that a Member State cannot be obliged to issue an autonomous residence permit, or other authorisation conferring a right to stay, to a third-country national who has no identity documents and has not obtained such documentation from his country of origin, after a national court has released the person concerned on the ground that there is no longer a reasonable prospect of removal within the meaning of Article 15(4) of that directive. However, that Member State must, in such a case, provide the third-country national with written confirmation of his situation.

Costs

90 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Third Chamber) hereby rules:

1. **Article 15(3) and (6) 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 the light of Articles 6 and 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that any decision adopted by a competent authority, on expiry of the maximum period allowed for the initial detention of a third-country national, on the further course to take concerning the detention must be in the form of a written measure that includes the reasons in fact and in law for that decision.**

2. **Article 15(3) and (6) of Directive 2008/115 must be interpreted as meaning that the 'supervision' that has to be undertaken by a judicial authority dealing with an application for extension of the detention of a third-country national must permit that authority to decide, on a case-by-case basis, on the merits of whether the detention of the third-country national concerned should be extended, whether detention may be replaced with a less coercive measure or whether the person concerned should be released, that authority thus having power to take into account the facts stated and evidence adduced by the administrative authority which has brought the matter before it, as well as any facts, evidence and observations which may be submitted to the judicial authority in the course of the proceedings.**

3. **Article 15(1) and (6) of Directive 2008/115 must be interpreted as precluding national legislation such as that at issue in the main proceedings, pursuant to which an initial six-month period of detention may be extended solely because the third-country national concerned has no identity documents. It is for the referring court alone to undertake an individual assessment of the facts and circumstances of the case in question in order to determine whether a less coercive measure may be applied effectively to that third-country national or whether there is a risk of him absconding.**

4. **Article 15(6)(a) of Directive 2008/115 must be interpreted as meaning that a third-country national who, in circumstances such as those in issue in the main proceedings, has not obtained an identity document which would have made it possible for him to be removed from the Member State concerned may be regarded as having demonstrated a 'lack of cooperation' within the meaning of that provision only if an examination of his conduct during the period of detention shows that he has not cooperated in the implementation of the removal operation and that it is likely that that operation lasts longer than anticipated because of that conduct, a matter which falls to be determined by the referring court.**

5. **Directive 2008/115 must be interpreted as meaning that a Member State cannot be obliged to issue an autonomous residence permit, or other authorisation conferring a right to stay, to a third-country national who has no identity documents and has not obtained such documentation from his country of origin, after a national court has released the person concerned on the ground that there is no longer a reasonable prospect of removal within the meaning of Article 15(4) of that directive. However, that Member State must, in such a case, provide the third-country national with written confirmation of his situation.**

[Signatures]