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Judgment of the Court in Joined Cases C-704/20 and C 39/21 | Staatssecretaris van Justitie en Veiligheid  
(*Ex officio* review of detention)

### **A national court is required to ascertain of its own motion whether a detention measure taken in respect of an illegally staying foreign national or an asylum seeker is lawful**

*It follows from EU law <sup>1</sup> that the adoption of a measure detaining, or continuing the detention of, a foreign national who has lodged an application for international protection or who is staying illegally in the territory of a Member State is subject to compliance with a set of conditions relating to lawfulness*

Nationals of Algeria, Morocco and Sierra Leone have challenged detention measures taken in respect of them before the Netherlands courts.

The Netherlands Council of State and the District Court of The Hague, sitting in 's-Hertogenbosch, have asked the Court whether EU law requires courts to review of their own motion any failure to comply with a condition governing the lawfulness of a detention measure which has not been invoked by the person concerned.

In today's judgment, the Court recalls, first of all, that any detention of a third-country national, whether in the context of a return procedure as a result of an illegal stay, of the processing of an application for international protection or of the transfer of an applicant for such protection to the Member State responsible for examining his or her application, constitutes a serious interference with the right of that national to liberty enshrined in Article 6 of the Charter of Fundamental Rights of the European Union.

Consequently, where it is apparent that the conditions governing the lawfulness of detention have not been or are no longer satisfied, the person concerned must be released immediately. That is the case, in particular, where it is found that the procedure for return, for examination of the application for international protection or for transfer, as the case may be, is no longer being carried out with due diligence, or that the detention measure is not, or is no longer, proportionate.

The Court goes on to state that, in relation to detention of foreign nationals, the EU legislature has not confined itself to establishing common substantive standards, but has also established, in the light of the principle of effective judicial protection, common procedural standards, the purpose of which is to ensure that, in each Member State, there is a system which enables the competent judicial authority to release the person concerned, where appropriate after an examination of its own motion, as soon as it is apparent that his or her detention is not, or is no longer, lawful.

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<sup>1</sup> In particular, 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), and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96), read in conjunction with Article 6 of the Charter of Fundamental Rights (right to liberty).

It follows that the judicial authority competent to review the lawfulness of a detention measure must take into consideration all the elements, in particular the facts, brought to its knowledge, as supplemented or clarified in the context of procedural measures which it deems necessary to adopt on the basis of its national law, and, on the basis of these elements, raise, where appropriate, the failure to comply with a condition governing lawfulness arising from EU law, even if that failure has not been raised by the person concerned. That requirement is without prejudice to the judicial authority's obligation to invite each party to express its views on that condition in accordance with the adversarial principle.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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