

IARMJ Brdo Conference 12 and 13 September 2022

Session 4, 12 September 2022:

Highlights of contentious procedural and material law issues of European character in national case law on migration and/or asylum

The Netherlands (by Cassandra Lange):

Article 47 Charter: Ubi ius, ibi remedium

Detention of foreign nationals; *ex officio* assessment conditions pertaining to detention by the national Judge?

Article 15(2) of the Return Directive 2008/115/EC

Article 9 of the Reception Directive 2013/33/EU

Article 6 and 47 Charter

Reference for a preliminary ruling by the Council of State, Administrative Law Division, of The Netherlands, decision of 23 December 2020, *CJEU C-704/20 pending*:

Does European Union law require a court of its own motion (*ex officio*) to assess whether all the conditions pertaining to detention have been met, including those where the foreign national has not disputed that compliance occurred, despite having had the opportunity to do so?

Reference for a preliminary ruling by the District Court The Hague, sitting in 's Hertogenbosch, The Netherlands, decision of 26 January 2021, *CJEU C-39/21 pending*:

Are the Member States permitted to structure the judicial procedure for challenging the detention of a foreign national ordered by the authorities in such a way as to prohibit the courts from carrying out an *ex officio* review and assessment of all aspects of the lawfulness of the detention and, where a court finds of its own motion that the detention is unlawful, from ordering that the unlawful detention be ended and the foreign national released immediately?

If the CJEU finds that such national legislation is incompatible with EU law, does that then also mean that, if the foreign national applies to the court for his or her release, that court is always required to carry out an active and thorough *ex officio* review and assessment of all the facts and factors relevant to the lawfulness of the detention?

Conclusion Advocate-General J. Richard De La Tour of 21 June 2022 in joined cases *C-704/20 and C-39/21*. The Advocate-General proposes the following answers:

The national court responsible for reviewing the lawfulness of the detention or continued detention of a third-country national must verify, on the basis of the factual and legal elements it considers relevant, whether the general and abstract rules governing its conditions and procedures have been complied with, irrespective of the legal grounds and arguments put forward by the third-country national in support of his appeal. Those same provisions preclude a national procedural rule which, as a result, prevents that court from carrying out such a review of its own motion and from releasing a third-country national, even if it finds that such detention is contrary to EU law.

Judgement expected by the end of the year.