

## European Union, CJEU, Case C-601/15 PPU J.N, Judgement of 15 February 2016

Deciding bodies and decisions  
CJEU,

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Area of law  
Asylum and Immigration

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### Subject matter

Validity of Article 8(3)(e) of the Recast Reception Conditions Directive, providing for detention of asylum seekers on the ground of protecting national security or public order, with the right to liberty as enshrined in Article 6 of the EU Charter and Article 5(1)(f) ECHR; national legislation requiring the re-start of the return procedure if asylum application is submitted; detention of asylum seeker who was previously issued a removal order with entry ban - can return procedure be suspended by multiple applications for international protection?

### Core issues:

The Dutch Council of State asked the Court of Justice to consider the validity of Article 8(3) (e) of the Recast Reception Conditions Directive (2013/33/EU) in the light of Article 6 of the Charter. The preliminary question was addressed in a dispute concerning the decision of placing him in detention, while his fourth asylum application was processed. Mr N was already in detention following criminal offences and violation of previous entry ban. According to the public authorities, Mr N. was detained on grounds of protecting national security or public order, given that he had been convicted of several criminal offences and was suspected of having committed others. (para. 30) Before the District Court of the Hague and in appeal before the Dutch Council of State, Mr N challenged the conformity of his detention with Article 5(1)(f) ECHR second limb, whereby detention of a TCN may be justified only by the fact that action is being taken against him with a view to deportation or extradition. Additionally, he emphasised that under the Recast Reception Conditions Directive he is lawfully resident until the finalisation of his asylum application. It should be noted that Article 5(1)(f) ECHR sets out the legal requirements for two types of immigration detention which are seen as justified limitation of the right to liberty: 1) asylum detention under the first limb – ‘to prevent his effecting an unauthorised entry into the country;’ and 2) detention for the purpose of removal, where ‘action is taken with a view to deportation or extradition.’, under the second limb of Article 5(1)(f) ECHR.

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### Summary Facts Of The Case

The CJEU starts its preliminary ruling by addressing the role of the ECHR and the jurisprudence of

the Strasbourg Court. This was due to the fact that the Dutch Council of State argued that the requirements set out by the ECtHR in *Nabil and others v Hungary* should be taken into account pursuant to Article 52(3) EU Charter for the purpose of interpreting Article 6 EU Charter, and also the applicant challenged the validity of Article 8(3)(e) of the Recast Reception Conditions Directive directly on the basis of Article 5(1)(f) ECHR. The CJEU recalled that the EU is not directly bound by the ECHR, instead these rights should be taken into consideration as an interpretative tool only and not as a direct standard of legality review of EU secondary legislation.

Secondly, the CJEU recognised that detention of asylum seekers for the purpose of public order and security is a limitation of the exercise of the right to liberty as enshrined in Article 6 of the EU Charter. (para. 49) It then continued to assess the legality of the limitation in light of the requirements laid down by Article 52(2) EU Charter. The Court found the legality requirement satisfied, since the limitation derives from a directive. Furthermore, it regards the objectives pursued by the provision in question – the protection of national security and public order – as objectives of general interest recognized by the EU that also contribute to the protection of the rights and freedoms of others. (para. 57) The limitation was held to not go beyond what it is necessary, since the grounds for detention have to be provided for in national law, the use of detention is subject to an individual assessment of the case, and only after it has been proved that no other less coercive measure can effectively be applied. (para. 61) The Court underlined that the Directive provides for sufficient procedural safeguards against arbitrary deprivation of liberty. The CJEU recalled its previous conclusions from the *Zh and O* case (another preliminary ruling referred by the Dutch Council of State), whereby it held as a legality requirement for considering an individual a threat to national security or public order: ‘only if the applicant’s individual conduct represents a genuine, present and sufficiently serious threat, affecting a fundamental interest of society or the internal or external security of the Member State concerned (see, to that effect, judgment in T., C?373/13, EU:C:2015:413, paragraphs 78 and 79).’ (para. 67)

In the last paragraphs, the CJEU assessed the principle of proportionality *in concreto* in relation to the Dutch law. It considered that the national authorities were right in considering that the individual conduct of Mr N which could be seen as representing a serious threat to public policy, public security or national security, within the meaning of Article 11(2) of the Return Directive, could also justify ‘detention on grounds relating to the protection of national security or public order, within the meaning of point (e) of the first subparagraph of Article 8(3) of Directive 2013/33. It is none the less necessary to verify that the principle of proportionality was strictly observed when such detention was ordered and that those reasons continue to be valid.’

The Court also made clear that the pending expulsion order could not be completely discontinued during assessment of Mr N’s asylum application. In fact, this would require the Dutch courts to disapply national law, in order to ensure the effectiveness of the Returns Directive (i.e the expulsion of irregular migrants). The basis of this obligation is, according to the CJEU, the duty of sincere cooperation which requires the Member States to ensure an effective removal policy, which implies an obligation of Member States to carry out the removal as soon as possible.

In conclusion the CJEU worryingly dismissed the argument that the ECtHR jurisprudence, in particular *Nabil and others v Hungary*, prohibits detention under Article 8(3)(e) RC Directive on the ground that Article 5 (1)(f) ECHR does not prohibit such a detention of an asylum seeker ‘in respect of whom a return decision accompanied by an entry ban was adopted prior to the lodging of an application for international protection’ (para. 78). The CJEU seems to ignore that the only permitted ground for detention under Article 5(1)(f) ECHR is with a view to deportation, and only as long as there is a reasonable prospect of removal. The CJEU concluded that consideration of

Article 8 paragraph 3(e) has disclosed no factors affecting its validity in the light of Articles 6 and 52 of the Charter. (para. 82)

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[Relation to the scope of the Charter](#)  
Article 6 - Right to liberty and security

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