OPINION OF ADVOCATE GENERAL
BOT
delivered on 30 April 2014 (1)

Joined Cases C-473/13 and C-514/13

Adala Bero (C-473/13)
v
Regierungspräsidium Kassel

(Request for a preliminary ruling from the Bundesgerichtshof (Germany))

and
Ettayebi Bouzalmate (C-514/13)
v
Kreisverwaltung Kleve

(Request for a preliminary ruling from the Landgericht München (Germany))

(Area of freedom, security and justice — Directive 2008/115/EC — Common standards and procedures for returning illegally staying third-country nationals — Detention measure for the purpose of removal — Conditions and regime of detention — Article 16(1) — Detention in specialised detention facilities — National legislation providing for detention in a prison of the Land when the latter does not have specialised detention facilities — Whether compatible)

and

Case C-474/13

Thi Ly Pham
v
Stadt Schweinfurt, Amt für Meldewesen und Statistik

(Request for a preliminary ruling from the Bundesgerichtshof (Germany))

(Area of freedom, security and justice — Directive 2008/115/EC — Common standards and procedures for returning illegally staying third-country nationals — Detention measure for the purpose of removal — Conditions and regime of detention — Article 16(1) — Detention in a prison — Obligation to separate the person concerned from ordinary prisoners — No separation because the person concerned has waived that guarantee — Whether compatible)

I – Introduction

1. May a third-country national awaiting removal be detained in prison on the ground that, in the Land responsible for carrying out his detention, there exist no specialised facilities such as those referred to in Article 16(1) of Directive 2008/115/EC ('the Directive' or 'Directive 2008/115')? (2)

2. Moreover, may that national consent to be detained with ordinary prisoners and thereby waive the right to be separated from them conferred on him by that provision?

3. Those are, in essence, the questions raised by Joined Cases C-473/13 and C-514/13 and by Case C-474/13.

4. The Court is, accordingly, invited to clarify the conditions in which Member States, in the present case the Federal Republic of Germany, must detain third-country nationals awaiting removal under the directive.

5. In accordance with Article 79(2) TFEU, the objective of the directive is to establish an effective removal and repatriation policy, based on common standards and legal safeguards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity. (3)

6. It follows from recitals 13 and 16 in the preamble to the Directive and from the wording of Article 15(1) thereof that the Member States must carry out the removal using the least coercive measures possible. In order to ensure effective return procedures, the Directive therefore provides for a gradation of the measures, which goes from the measure that allows the person concerned the most liberty, namely: granting a period for his voluntary departure, to the measures most restrictive of that liberty, namely: detention in a specialised facility. It is only where, in the light of an assessment of each specific situation, the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned that the Member States may deprive that person of his liberty and detain him. (4)

7. The latter measure is the most serious constraining measure allowed under the directive under a forced removal procedure. (5) It is, in principle, a measure of last resort. (6) It is therefore strictly regulated by the EU legislature in the context of Chapter IV of the Directive, so as to guarantee, first, observance of the principle of proportionality with regard to the means used and objectives pursued and, secondly, observance of the fundamental rights of the nationals concerned. (7)

8. It is in that context that Article 16(1) of the Directive provides, in its French version, as follows:

'La rétention s'effectue en règle générale dans des centres de rétention spécialisés. *Lorsqu'un État*

membre ne peut les placer dans un centre de rétention spécialisé et doit les placer dans un établissement pénitentiaire, *les ressortissants de pays tiers placés en rétention sont séparés des prisonniers de droit commun.*' ['Detention shall take place as a rule in specialised detention facilities. *Where a Member State cannot provide accommodation* in a specialised detention facility and is obliged to resort to prison accommodation, *the third-country nationals in detention shall be kept separated from ordinary prisoners*.'] (8)

9. Article 16(1) of the Directive thus imposes two requirements on the Member States relating to the conditions and regime of detention.

10. First, detention must take place in a specialised facility with appropriate living conditions and, secondly, when it must exceptionally take place in a prison, the Member State must ensure the separation of that national from ordinary prisoners, the latter requirement being inviolable, since mandatory irrespective of the place of detention.

11. However, each of those requirements is only partly satisfied in Germany.

12. It must be pointed out that, in accordance with Paragraphs 83 and 84 of the Basic Law of the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland, 'the Basic Law'), it is for the federated States (Bundesländer) to carry out detentions ordered for the purpose of the removal of illegally staying third-country nationals.

13. However, of the sixteen Länder which make up the Federal Republic of Germany, ten do not have specialised detention facilities, with the result that third-country nationals awaiting removal are detained in prisons and subject, in some cases, to the same rules and restrictions as ordinary prisoners. (9)

14. Thus, in Case C-473/13, Ms Adala Bero, who is a Syrian national, was placed in detention from 6 January to 2 February 2011 in the prison of the city of Frankfurt-am-Main, Hesse having no specialised detention facility that could accommodate women. It is clear from the observations submitted by Ms Bero that she was not separated from ordinary prisoners or persons held on remand.

15. In Case C-514/13, Mr Ettayebi Bouzalmate, who is a Moroccan national, was detained from 14 July 2013 in a separate area of the Munich city prison, for lack of specialised detention facilities in Bavaria, for a period of three months. (10)

16. Finally, in Case C-474/13, Ms Thi Ly Pham, who is a Vietnamese national, was placed in detention from 29 March to 10 July 2012 in the Nuremberg city prison (Bavaria) and, furthermore, consented to be detained with ordinary prisoners.

17. It is clear from the observations submitted by Ms Pham that she signed the following pre-formulated written declaration:

'Pham Thi Ly, in detention

I declare that I consent to be detained with prisoners.

Nuremberg, 30 March 2012

Signature'

18. Those detentions were all ordered on the basis of Paragraph 62a(1) of the Law on the residence, economic activity and integration of foreigners in the federal territory [Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz)], of 30 July 2004, (11) the purpose of which is to transpose into German law Article 16(1) of the directive.

19. Paragraph 62a(1) of the Aufenthaltsgesetz is worded as follows:

'Detention for the purpose of removal shall take place, as a rule, in specialised detention facilities. *Where a Land does not have a specialised detention facility,* detention may take place in other prisons in that Land; in such cases, persons detained pending their removal must be separated from other prisoners'. (12)

20. In the case in the main proceedings, the Bundesgerichtshof (Joined Cases C-473/13 and C-474/13) and the Landgericht München (Case C-514/13) raise the question of the lawfulness of the detention in the light of the principles laid down in Article 16(1) of the Directive.

21. Cases C-473/13 and C-514/13 were joined for the purposes of the written procedure and the judgment, because the questions referred were the same. Insofar as Case C-474/13 is closely linked with those joined cases, I have chosen to deliver a common Opinion.

A – *Joined Cases C-473/13 and C-514/13*

22. In Joined Cases C-473/13 and C-514/13, the Bundesgerichtshof and the Landgericht München raise the question of the nature of the grounds on which a Member State may order the detention in prison of an illegally staying migrant.

23. The national courts ask, in particular, whether Paragraph 62a(1) of the Aufenthaltsgesetz is compatible with the principles underlying Article 16(1) of the Directive and raise the question, *inter alia*, of whether it is appropriate to take into account the federal structure of Germany and the powers reserved to each of the federated States for the purpose of implementing those principles.

24. Indeed, the German legislation expressly authorises the competent Land to detain third-country nationals awaiting removal in prisons in situations in which '[it] does not have a specialised detention facility'.

25. Accordingly, both the Bundesgerichtshof and the Landgericht München decided to stay proceedings and refer a question to the Court for a preliminary ruling. The questions they raise in that context are, in essence, identical.

26. In Case C-473/13, the Bundesgerichtshof refers the following question:

'Does Article 16(1) of [the d]irective … also require a Member State to carry out detentions for the purpose of removal as a rule in specialised detention facilities when such facilities exist in only one part of the federal subdivisions of that Member State but not in others?'

27. In Case C-514/13, the Landgericht München worded its question as follows:

'Does it follow from Article 16(1) of [the d]irective … that a Member State is required, as a rule, to detain a person for the purposes of removal in a specialised detention facility if such facilities exist only in a part of the federal structure of the State, but not in another part in which the detention is carried out

in accordance with the provisions governing the federal structure of that Member State?'

28. Observations have been submitted by the parties to the main proceedings, the German, Netherlands, Swedish and Swiss Governments, and the European Commission.

B – *Case C-474/13*

29. Case C-474/13 arises in the same context as Joined Cases C-473/13 and C-514/13. It raises, however, the issue of the scope to be given to the requirement to separate illegally staying migrants from ordinary prisoners, referred to in Article 16(1) of the Directive. I would point out that the person concerned was detained for a period of three months in the prison of the city of Nuremberg and also consented to be detained with ordinary prisoners.

30. In this case, the Bundesgerichtshof asks, consequently, whether such detention is lawful under Article 16(1) of the Directive, in view of the consent given by the person concerned.

31. The Bundesgerichtshof has therefore stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Is it consistent with Article 16(1) of [the d]irective … to place a pre-deportation detainee in accommodation together with prisoners if he consents to such accommodation?'

32. Observations have been submitted by the parties to the main proceedings, the German and Netherlands Governments and the Commission.

C – *The significance of the questions*

33. The three references for a preliminary ruling raise a genuine issue of principle concerning the conditions of detention of migrants awaiting removal provided for in Article 16(1) of the Directive.

34. Raising the issue of the detention of migrants awaiting return gives rise to images of a reality too often shown in heart-rending images in the news. Taken as a whole, it raises the problem of the adequacy of the system established at the level of the European Union. Merely observing that system leads to the conclusion that the broad logic of the principles adopted results in an imbalance between the Member States. Some of them, because of their geographical location, must bear a heavier burden than others and the resulting economic impact cannot be disregarded.

35. However, through the application of fundamental principles of law, the European Court of Human Rights and the Court in turn have, in judgments which everyone is aware of, (13) pointed out that the system presently in force may not lead to an outcome in which the entire burden is borne solely by the Member States directly faced with massive inflows of migrants.

36. Indeed, before the judgments in question were delivered, the straightforward application of the provisions of EU law resulted, willy-nilly, in a position more comfortable for some Member States than for others.

37. Both courts therefore pointed out that facility should yield to the necessity of observing fundamental rights.

38. I should now like to invite the Court to adopt an approach similar in spirit in the cases presently before it.

39. Under the influx of migrants, detention pending removal has become extremely important. The reasons for that distressing situation are multiple and well known. They fall within the scope of the foreign policy of the Member States and the European Union, an area that is reserved to them.

40. Nevertheless, the legal requirements for a detention order and the substantive requirements for its enforcement are subject to judicial review.

41. The legal requirements for detention orders are not at issue here. The substantive requirements for the enforcement of those orders are, however, central to the issue raised.

42. The Directive quite clearly states that a detention order is a measure of last resort. It states that such an order has an entirely subsidiary nature connected with the necessity of ensuring the migrant's removal. The Directive therefore makes it particularly clear that the situation of a migrant whose only fault lies in his destitution and whose only crime is to try to escape it, even at the price of senseless risks for a wholly uncertain result, is the opposite of that of an offender. This fundamental characteristic can only be reflected in the enforcement regime for the measure which, itself, must also be distinguished from the enforcement of a sentence.

43. It should be pointed out, at this juncture, that prisons, which are either penal establishments answering specific purposes related to the very notion of penalty, or remand centres, are not to be confused with the specialised detention centres provided for by the Directive. A person is held in prison in two cases only, either before being tried or in order to serve a criminal penalty, each of those cases being part of a procedure attaching to a serious criminal offence.

44. Before trial, detention is intended only for specific reasons which presuppose as a basic condition that there are met in one person all the circumstances making it likely, or probable, that he has committed all the elements of an offence of a certain level of seriousness, and in addition there must be factors to do with the nature of the act committed, the circumstances of its commission, the lack of guaranteed representation of the person prosecuted, the necessity of preserving evidence and of preventing influence being brought to bear on witnesses, and factors to do with the personality of the person prosecuted, that make it essential that he should be held where he can be brought before the courts.

45. Pre-trial detention therefore meets, in particular, the need to prevent contact with third parties or to prevent escape. It necessarily follows that, even for establishments or areas of establishments for persons who have not yet been tried, the detention regime imposed takes into account those basic objectives. The resulting obligations may in no circumstances allow, within those facilities, the free movement of persons who are there against their will, or the free access of third parties or freedom of contact with the outside, since it is specifically in order to prevent such contact that detention regimes were designed.

46. That is all the more true of establishments or areas of establishments for convicted prisoners in relation to whom one of the main, and moreover legitimate, concerns of the prison administration is to prevent their escape, mass movements and attacks on staff. That those matters are taken into account is clearly reflected in the rules applicable to prisoners and the way in which such establishments are run.

47. Regardless of the foregoing considerations, the general rule of operation of such establishments is based on the separation — reflected in the allocation to different establishments or different areas of the same establishment — of men, women and minors.

48. With regard to minors, it should be borne in mind that their detention is, in principle, always an exceptional measure which therefore presupposes that it applies to minors who either are close to the age of majority or present a difficult psychological profile and, at all events, that they have committed serious acts.

49. It is therefore having regard, first, to that information and, secondly, to the requirements of the Directive and of the Charter of Fundamental Rights of the European Union ('the Charter') that it is necessary to examine whether the application of such regimes to migrants in detention pending their return observes the rights that are conferred on them in the European Union.

50. In this Opinion, I shall discuss the reasons why, in my view, a third-country national awaiting removal may not be held in a prison on the ground that, in the Land responsible for carrying out his detention, there are no specialised facilities such as those referred to in Article 16(1) of the Directive.

51. I shall also argue that that national may not be held together with ordinary prisoners on the pretext that he has waived his right under that provision to be separated from the latter.

II – The legal context

52. Recitals 11, 13, 16, 17 and 24 in the preamble to the Directive state:

'(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. ...

...

(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. … Member States should be able to rely on various possibilities to monitor forced return.

...

(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. Without prejudice to the initial apprehension by law-enforcement authorities, regulated by national legislation, detention should, as a rule, take place in specialised detention facilities.

...

(24) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter … .'

53. Article 1 of the Directive 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.'

54. Article 4 of the Directive, entitled 'More favourable provisions', provides, at paragraph 3, as follows:

'This Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive.'

55. The last subparagraph of Article 15(2) of the Directive states that '[t]he third-country national concerned shall be released immediately if the detention is not lawful'.

56. Article 16(1) of the Directive, entitled 'Conditions of detention', is worded as follows:

'Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners.'

57. Article 17(2) and (3) of the Directive provides:

'2. Families detained pending removal shall be provided with separate accommodation guaranteeing adequate privacy.

3. Minors in detention shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education.'

58. Finally, Article 18 of the Directive, entitled 'Emergency situations', provides as follows:

'1. In situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, … take urgent measures in respect of the conditions of detention derogating from those set out in Articles 16(1) and 17(2).

2. When resorting to such exceptional measures, the Member State concerned shall inform the Commission. It shall also inform the Commission as soon as the reasons for applying these exceptional measures have ceased to exist.

3. Nothing in this Article shall be interpreted as allowing Member States to derogate from their general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under this Directive.'

III – Preliminary observations

59. At the outset, I would note that, as is clear from the information provided by the Bundesgerichtshof in Case C-473/13, the Directive had not been transposed into German law when Ms Bero was placed in detention on 6 January 2011.

60. Indeed, Paragraph 62a of the Aufenthaltsgesetz entered into force on 26 November 2011, that is to say, after the release of the person concerned. That provision was therefore not applicable in the

context of the proceedings brought against Ms Bero. However, she may rely on Article 16(1) of the Directive, insofar as, at the date of her detention, the period allowed for transposition of the Directive, fixed in the first sub-paragraph of Article 20(1) thereof, had expired on 24 December 2010.

61. According to settled case-law, when a Member State fails to transpose a directive by the end of the period prescribed or fails to transpose the directive correctly, the provisions of that directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise may be relied on by individuals against the State. As the Court noted in *El Dridi*, (14) that is true of Articles 15 and 16 of the Directive, which are unconditional and sufficiently precise, so that no other specific elements are required for them to be implemented by the Member States. (15)

IV – My analysis of Article 16(1) of the Directive

62. Each of the questions which is referred to the Court presupposes, for the purposes of its examination, a common interpretation of the wording and purpose of Article 16(1) of the Directive.

A – *The wording of Article 16(1) of the Directive*

63. I shall pay particular attention to the French and German versions of Article 16(1) of the Directive. Indeed, there is a substantial difference between those two language versions, which has clearly had an impact on the wording used by the German legislature in its national law transposing the Directive.

64. As regards the first sentence of Article 16(1) of the Directive, this lays down the principle that '[d]etention shall take place as a rule in specialised detention facilities'.

65. The principle is worded in clear, consistent terms in all the EU languages. (16) I am therefore convinced that the EU legislature intended to lay down the principle that the Member States are required to set up specialised detention facilities for the purpose of the detention of third-country nationals awaiting removal, subject to special exceptions.

66. The rigour of that principle is, however, mitigated by use of the expression 'as a rule', which presupposes particular exceptions.

67. The Union legislature has introduced an exception to that principle in the second sentence of Article 16(1) of the Directive. (17)

68. Thus, in the French version of that provision, third-country nationals awaiting removal may be detained in prisons '[l]orsqu'un État membre *ne peut* les placer un centre de rétention spécialisé' (18) or, in its English version, '[w]here a Member State *cannot* provide accommodation in a specialised detention facility'. (19)

69. However, the German version of that provision introduces a significant difference from those two versions as regards the circumstances in which a Member State may derogate from the principle laid down in the first sentence of Article 16(1) of the Directive. Indeed, it authorises detention in prison '[w]here there *are no* specialised detention facilities in a Member State' (20) ('Sind in einem Mitgliedstaat solche speziellen Hafteinrichtungen nicht vorhanden').

70. That version has an effect, in part only, on the text of the German legislation transposing Article 16(1) of the Directive. Paragraph 62a(1) of the Aufenthaltsgesetz, it will be recalled, provides as follows:

‘Detention for the purpose of removal shall take place, as a rule, in specialised detention facilities. *Where a Land does not have* a specialised detention facility, detention may take place in other prisons in that Land’. (21)

71. The fact remains that the scope of the grounds on which a Member State may derogate from the principle established and, therefore, the scope of the exception itself were substantially altered by the combined effect of the German version and the transposition into the German legal order of the second sentence of Article 16(1) of the Directive.

72. Before I examine whether the transposing law is consistent with EU law, the question must be considered whether the German version of that provision, characterised by use of the expression ‘where there *are no* specialised detention facilities’, (22) may legitimately serve as the basis for an interpretation justifying the measures taken in the case in the main proceedings.

73. It is, in my view, clear that the German version of the second sentence of Article 16(1) of the Directive is incorrect.

74. First, the versions of that provision, and in particular the versions of the phrase ‘where a Member State *cannot*’, (23) in all the other EU languages are the same and are modelled on the French and English versions of the provision. As the Court has held, one divergent language version cannot prevail alone against the other language versions. (24)

75. Secondly, it is clear from the settled case-law of the Court that, in order to ensure uniform interpretation and application of a provision, the version of which in one language of the Union differs from those laid down in the other languages, that provision should be interpreted in the light not only of the general scheme of the provision of which it forms part, but also of the purpose pursued by the EU legislature. (25)

76. However, the German version of the second sentence of Article 16(1) of the Directive, and in particular the use of the phrase ‘where there *are no* specialised detention facilities’, (26) deprives of all effectiveness the principle which the EU legislature established in the first sentence of Article 16(1) of the Directive and undoubtedly undermines the objectives that it is intended to pursue.

77. Indeed, there can be no doubt that the EU legislature intended to compel the Member States to set up specialised detention facilities for the purpose of the removal of illegally staying migrants. Therefore, and contrary to the opinion expressed by the German Government, it is absolutely clear that the EU legislature did not intend to allow those States to rely on the lack of those facilities in their territory to derogate from the principle laid down.

78. If that were the case, it would be tantamount to making the construction of facilities adapted to the specific nature of detention a purely potestative condition left entirely to the discretion of Member States. On this view, the expression ‘where a Member State *cannot*’, (27) used in Article 16(1) of the Directive, should then be interpreted as covering situations in which a ‘Member State does not wish to’, the meaning which that phrase would then have.

79. It would also effectively amount to discouraging Member States from constructing specialised detention facilities by allowing them to order the detention of illegally staying migrants in prisons — which is, however, a purely exceptional solution within the general scheme of the Directive — and, finally, to excusing a serious infringement by the Member States of their obligations under not only the Directive, but also their international commitments.

80. I consider, therefore, that the German version of the second sentence of Article 16(1) of the Directive, under which a Member State may order detention in prison when there are no specialised detention facilities in its territory, must be disregarded for the purpose of analysing the questions referred.

B – *The purpose of Article 16(1) of the Directive*

81. The purpose of Article 16(1) of the Directive can be inferred from the guiding principle expressed in Article 1 thereof, which can be understood only in accordance with and in a manner consistent with Article 1 of the Charter. That provision of primary legislation, the applicability of which is not be called into question here, provides that '[h]uman dignity is inviolable [and that it] must be respected and protected.' That reference to human dignity is therefore necessarily encompassed by the references to fundamental rights included in Article 1 of the directive.

82. Accordingly, Article 16(1) of the Directive and, more generally, the provisions dealing specifically with the conditions of detention of foreigners awaiting removal may be applied in practice and in accordance with those provisions only if they ensure the observance of for those values.

83. It is therefore, in my view, in order to satisfy those rules that Article 16(1) of the Directive made the detention of a third-country national awaiting removal subject to two important principles relating to the conditions and regime of detention. First, detention must take place in a specialised facility with appropriate living conditions and, secondly, if it must exceptionally take place in a prison, the Member State must ensure the separation of that national from ordinary prisoners, the latter requirement being inviolable, since mandatory irrespective of the place of detention.

84. Moreover, and still in accordance with the references made in Article 1 of the directive, the EU legislature is transposing here the case-law of the European Court of Human Rights. That case-law requires the place, regime and conditions of detention of illegally staying migrants to be 'adequate' so as not to compromise the rights laid down in Articles 3, 5 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'). (28)

85. The EU legislature is also transposing the tenth and eleventh of the 'Twenty guidelines on forced return' which the Committee of Ministers of the Council of Europe adopted on 4 May 2005, and to which the directive refers in recital 3 in its preamble.

86. The tenth guideline requires, in paragraph 1 thereof, that persons detained pending removal should 'normally' be accommodated in facilities specifically designated for that purpose, offering material conditions and a regime appropriate to their legal situation. (29) It also requires, in paragraph 4, those persons not to be held together with ordinary prisoners, whether convicted or on remand. As regards the eleventh guideline, it requires, in paragraphs 2 to 4, that families be provided with separate accommodation guaranteeing adequate privacy and provided with the personnel and facilities which take into account the needs of children, allowing them, in particular, to have access to education and to engage in recreational activities. (30)

87. To that end, the European Court of Human Rights has drawn up a non-exhaustive list of the criteria by the yardstick of which it assesses the adequacy of the place, conditions and regime of detention. (31)

88. First, the design and arrangement of the facilities must, wherever possible, avoid giving the

impression of a prison environment. Those facilities must next be provided with staff having suitable qualifications, particularly some linguistic and medical knowledge. Those facilities must be clean and provide sufficient living space for the number of people likely to be detained there. In particular, they must have non-mixed shared rooms and personal hygiene facilities freely accessible and in sufficient numbers. They must also have an area and facilities necessary for catering and a freely accessible telephone. The facility must also have medical equipment and a room set aside for visits by family members and consular staff. It must also have an education and leisure area and in particular an area for open-air exercise. Finally, if the facility should have to cater for families, the European Court of Human Rights requires the bedrooms to be specially adapted for the detention of young children with secure childcare facilities. (32)

89. It was in the light of those criteria that the European Court of Human Rights ruled that prison is not an 'appropriate' or 'suitable' place for the accommodation and detention of third-country nationals awaiting removal.

90. The requirements laid down by the European Court of Human Rights and transposed by the EU legislature are based on the nature and the purpose of the detention measure.

91. Such a measure is therefore very clearly different, in essence, from a punitive measure. Its purpose is not to punish the migrant for a crime or offence he has committed, but to prepare for his removal from the Member State concerned. In the context of the Directive, the EU legislature also took care not to use the terms 'custody' or 'imprisonment' with respect to the migrant. It states, moreover, in Article 15 of the Directive, that the detention can be ordered only against persons who are subject to a removal process and must only contribute towards implementing that removal. (33) Finally, in the context of Directive 2003/9/EC, (34), the EU legislature defines detention as meaning 'confinement of an asylum seeker by a Member State within a particular place, where the applicant *is deprived of his or her freedom of movement*'. (35)

92. Accordingly, detention does not constitute a penalty imposed following the commission of a criminal offence and its objective is not to correct the behaviour of the person concerned so that he can, in due course, be reintegrated into society. Any idea of penalising behaviour is, moreover, missing from the rationale forming the legal basis of the detention measure. It must not be overlooked that, at that stage, a migrant awaiting removal is not caught by any criminal statute, or be forgotten that, even if the Member State concerned classifies, as the Court recognises it has a legitimate right to do, the act of unlawfully entering its territory as a 'criminal offence', the Court has also held that the potentially criminal nature of that conduct must yield to the priority that must be given to removal. (36)

93. There is, consequently, no legitimate reason for that detention to take place in prison conditions and under a prison regime.

94. If the first obligation for the Member States is to ensure respect for human dignity, in accordance with Article 1 of the Charter, then the first aspect of that guarantee entails not making men, women and children awaiting removal look like criminals, which is in itself prejudicial to that dignity, by treating them as such.

95. The second aspect of that guarantee requires, therefore, their detention in conditions appropriate to their legal situation and a guarantee, in accordance with the principle of proportionality, (37) that the detailed rules for detention do not subject them to the constraints inherent in the prison system, which clearly make it impossible to comply with the rules and observe the principles laid down by the Directive and the provisions it transposes or to respect the fundamental

rights which inform the Directive. This presupposes putting in hand a regime and material conditions appropriate to their legal status and capable of meeting their specific needs, in particular those of the most vulnerable. This is the case with Article 17(2) and (3) of the directive, which provide that families detained pending removal are to be provided with appropriate accommodation and that minors must have access to education and be able to engage in appropriate activities, provisions which, furthermore, merely reflect, at this point, Articles 7, 14(1) and 24 of the Charter.

96. A logical and necessary consequence of the foregoing is the requirement to detain the persons concerned in facilities specially adapted to the nature of the detention. In that regard, the Directive describes the minimum requirements to be fulfilled by that detention, except where even less stringent requirements are applied.

97. It is clear that prison does not make it possible to satisfy those requirements, because it is quite simply intended for a purpose other than that of detention pending removal. Indeed, the material conditions are certainly inappropriate, in particular for the accommodation of families and children. The internal rules of operation make the prison atmosphere ever present, since outings are timed, the security presence is strong, monitoring is constant and absolute charge is taken. (38) To this must be added the precariousness, overcrowding, stress, insecurity and hostile environment of prisons and it must be remembered that the administrative constraints inherent in that type of facility tend to limit the administrative and legal steps that migrants might undertake.

98. Following the same logic and if detention should exceptionally take place in a prison, the Directive demands the separation of migrants from ordinary prisoners.

99. In turn, that requirement of separation directly contributes to respect for the human dignity and fundamental rights of one who has not committed any crime or even any offence. It makes it possible to ensure that, even within the prison facility, the detention of a migrant awaiting removal differs from the serving of a sentence. The requirement of separation also makes it possible to ensure that that detention takes place in conditions and under a regime appropriate to the legal situation of the migrant and proportionate to the purpose of the detention. Finally, it makes it possible to avert risks connected with the criminalisation of certain migrants and to avoid the violence related to the prison environment that could affect the most vulnerable individuals.

100. To my mind, this entails the strict separation of migrants from ordinary prisoners by establishing a separate unit completely isolated from the rest of the prison, offering no possibility of communication with persons convicted or remanded in custody. In the first sub-paragraph of Article 15(2) of its proposal for a directive of 1 September 2005, (39) the Commission required, moreover, that the Member States ensure that third-country nationals 'are *permanently physically* separated from ordinary prisoners'. (40) And rightly.

101. However, it seems to me that the operating rules of the prison administration preclude the application of the principles laid down by the directive, for reasons relating, in particular, to the legitimate security requirements inherent in the operation of such establishments. If contact were allowed between ordinary prisoners and foreign detainees whilst providing the latter with the flexible regime required by the provisions, in particular as regards contact with the exterior, this would entail the risk that, through such contact, convicted prisoners might themselves forge external contacts with consequences easy to imagine. So I am not at all astonished to find, through the observations submitted in particular by the Munich prison — if my understanding of them is correct –, that foreign detainees are in fact subject to the prison regime and not to a specially adapted regime complying with the requirements of the Directive. This cannot, however, be criticised as a fault of the prison administration

itself, for, for reasons, in particular, of safety, which I have just noted, it cannot do otherwise. Therefore, it is actually the logic and imperatives of the system itself which are, by their very nature, incompatible with the requirements of the directive and make it impossible to apply the Directive in a prison environment.

102. In my view, there is therefore no doubt that, in the light of the purpose of the requirements laid down by the EU legislature in Article 16(1) of the Directive, the EU legislature did indeed intend to exclude from the prison system third-country nationals awaiting removal by requiring each Member State, on the one hand, to establish specialised detention facilities in their territory and, on the other hand, to ensure the separation of third-country nationals awaiting removal from ordinary prisoners when they exceptionally order detention in a prison.

103. That being said, it is appropriate now to analyse in detail each of the questions referred in Joined Cases C-473/13 and C-514/13 and Case C-474/13.

V – Examination of the questions

A – *Preliminary remarks*

104. In order properly to understand the context of the present references for a preliminary ruling, it is important to note the following matters.

105. I would point out, first, that, in accordance with Articles 83 and 84 of the Basic Law, it is for the Länder to carry out detentions ordered for the purpose of the removal of illegally staying third-country nationals.

106. However, of the sixteen Länder which make up the Federal Republic of Germany, ten do not have specialised detention facilities. (41) In those circumstances and with the exception of situations in which some Länder rely on mutual administrative assistance, third-country nationals awaiting removal are detained in prisons and are subject, in some cases, to the same rules and restrictions as ordinary prisoners or persons held on remand.

107. That situation was condemned by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of the Council of Europe ('the CPT') in the context of a report delivered on 22 February 2012. (42)

108. Secondly, the separation of migrants awaiting removal from ordinary prisoners is not guaranteed in all the prisons in the territory and in particular as regards the detention of women and children. (43) That is clear not only from the observations submitted by the German Government, but also from the national case-law.

109. By an Order of 20 September 2011, the Landgericht Leipzig (Saxony) annulled, on the basis of Article 16(1) of the Directive, the detention of a Tunisian national, in that he was sharing a cell with a convicted person. (44) According to the report drawn up by the CPT on 22 February 2012, the prison of Leipzig had, at that time, no special units for the accommodation of third-country nationals awaiting removal. (45)

110. By an Order of 21 August 2012, the Landgericht Traunstein (Bavaria) also annulled the detention of a minor awaiting removal on the ground that he was detained in a facility for young offenders. (46) The Munich city prison has, in fact, a separate unit only for the accommodation of adult males. As stated by the Federal Republic of Germany in its response to the CPT, minors are therefore detained in

the juvenile detention facility, together with young offenders. (47) As for female migrants, they are held in the prison facility for women. That situation also occurs in the Länder of Baden-Württemberg, Hesse (48) and Saxony. (49)

111. Quite apart from being illegal, such a situation is shocking too. After all, pregnant women and minors are particularly vulnerable and require particular attention on the part of the authorities because of their condition, their age and their state of dependency, concerning which neither the legislature of the Union, in Article 17(2) of the Directive, nor the European Court of Human Rights, in its case-law, is prepared to compromise. (50)

112. Thirdly, as regards the arrangement of the units, if special wings are adapted, the fact remains that usually, during meals, walks or treatment in the infirmary, the migrants can mingle with ordinary prisoners. So, according to the observations submitted by the prison of Munich in Case C-514/13, persons in administrative detention are not separated from ordinary prisoners during the admission process and visits, or in the various waiting rooms (medical examinations, transfers) or when they stay in the infirmary. Mr Bouzalmate thus spent twelve days in the common prison hospital following his suicide attempt.

113. Finally, in most Länder, the detention of illegally staying migrants appears to take place in accordance with the general requirements laid down by the Law on the enforcement of sentences and measures of rehabilitation and precautionary detention of 16 March 1976 and, in particular, in accordance with the rules laid down in Paragraphs 3 to 49, 51 to 121, 171, 173 to 175 (rules concerning clothing, shopping and at work), 178(3) (special rule for minors) and 179 to 187. (51)

114. That summary having been set out, it is now appropriate to address the different cases.

B – *Joined Cases C-473/13 and C-514/13*

115. By their question, the national courts ask the Court, in essence, whether Article 16(1) of the Directive must be interpreted as precluding legislation of a Member State which, in the light of its federal structure, allows the federated States to place third-country nationals awaiting removal in prison when there are no specialised detention facilities in the territory of the competent federated State.

116. I would state, here and now, that the question whether the Directive requires, and if so within what period, the immediate building of a minimum number of detention centres does not, to my mind, fall within the context of the present questions. The issues raised by those questions centre on the individual cases submitted to the Court and amount, in fact, to asking whether a Member State may, without pleading extraordinary situations, make a rule of the exception in the second sentence of Article 16(1) of the Directive.

117. I would recall, in fact, that Ms Bero was held in a prison because there were in the Land of Hesse no specialised detention facilities capable of accommodating women. It is also clear from the observations submitted by Ms Bero that she was not separated from ordinary prisoners and persons held on remand.

118. As for Mr Bouzalmate, he was held in a separate area of the Munich city prison, the Land of Bavaria not having any specialised detention facilities.

119. In their order for reference, the Bundesgerichtshof and the Landgericht München ask whether such ground, invoking the federal structure of Germany, may legitimately be relied upon under Article 16(1) of the Directive.

120. On the one hand, they argue that the national authorities must ensure the detention of third-country nationals awaiting removal in specialised facilities regardless of where they are situated in national territory. They consider that there is therefore no need to take into account the powers reserved to each of the federated States for the purpose of implementing the principles laid down in Article 16(1) of the Directive. In such a situation, the detention of the persons concerned would therefore be contrary to the requirements of the Directive.

121. On the other hand, the national courts point out that, under Article 4(2) TEU, the Union must respect the federal structure of the Member States.

122. In its observations, the German Government recalls that Article 4(2) TEU in fact requires the legislature of the Union to respect the national identity of Member States inherent in their fundamental political and constitutional structures, as regards local and regional autonomy included. Therefore, it considers that, under the division of competences organised by the Basic Law, the Länder should be free to determine whether, and to what extent, they must create and manage specialised detention facilities, having regard to their size, their geographical situation and the number of persons detained for the purpose of removal and should also be free to decide, where appropriate, whether to establish administrative cooperation with other Länder. Therefore, the German Government maintains that the administrative sovereignty of a Land would be compromised if the latter could not place migrants awaiting removal in a prison within its purview on the ground that elsewhere in the national territory there are specialised detention facilities.

123. In the light of those factors, the German Government therefore considers that the exception referred to in the second sentence of Article 16(1) of the Directive must cover the situation in which a Member State is faced with a lack of specialised detention facilities in the territory of the competent federal State, but is nevertheless required to respect the division of powers established by the institutional rules of the State.

124. It is true that, under the second sentence of Article 16(1) of the Directive, a Member State may order the detention of an illegally staying migrant in a prison in situations where it ‘cannot’ detain him in a specialised detention facility. However, that provision does not further specify the grounds which would make it impossible for a Member State to do so.

125. In those circumstances, does the EU legislature leave it to the discretion of every Member State to determine the grounds on which an individual may be detained, not in specialised detention facilities, but in prison?

126. The German and Netherlands Governments give the answer ‘Yes’ to that question. In their interpretation, they avoid linking Article 16 with Article 18 of the Directive, though Article 18 clarifies Article 16 most particularly, to the point that the two articles must, in my view, be read in conjunction one with the other; moreover, the wording of Article 18 clearly states that it derogates from Article 16.

127. Thus, Article 16(1) of the Directive lays down a principle, the carrying out of detention in a specialised facility, and provides for a derogation, when the Member State cannot do so.

128. Article 18 of the Directive expressly provides for the situation in which such a derogation is conceivable, namely: when the Member State is faced with ‘emergency situations’, the expression which is the title of that article.

129. At this point, moreover, it is possible here and now to raise the question why the EU legislature

expressly provided for a derogation based on the emergency of a situation if such a derogation were as natural and normal as claimed by the German and Netherlands Governments. What would be permitted for reasons of administrative convenience should be permitted *a fortiori* in emergency situations without there being any need for the Directive to specify this.

130. Clearly, therefore, in the scheme of the Directive, it is necessary to regulate strictly the grounds that may relied on by the Member States for the purpose of ordering detention in prison, not only because this involves the most serious measure restrictive of freedom allowed under the Directive, but also because it involves a derogation and it is therefore necessary to point out the limits of the latitude given to the Member States laid down by the Directive itself in order to ensure its effectiveness.

131. Emergency situations such as those defined in Article 18 of the Directive therefore constitute the only ground expressly provided for by the EU legislature for derogating from the obligation to place detainees in a specialised detention centre. Pursuant to that provision, the Member State may adopt urgent measures derogating from the principles set out in Articles 16(1) and 17(2) of the Directive when an unforeseen heavy burden is placed on the capacity of its detention facilities or on its administrative or judicial staff on account of an exceptionally large number of third-country nationals to be returned.

132. Is that the only ground that may be relied on?

133. The wording of the Directive does not seem to me to allow that question to be answered in the affirmative. However, it is possible to infer from that wording the nature of the circumstances that would be necessary if a Member State were to be able to invoke them for such purposes.

134. Indeed, Article 18(2) of the Directive expressly describes the derogations provided for in Article 18(1) as 'exceptional measures' and provides that, in such circumstances, the Commission must be informed of the start and the end of the measures in question.

135. It seems clear to me that only exceptional circumstances satisfying criteria of urgency or seriousness similar to those referred to in Article 18 of the Directive can justify exceptional measures requiring review in principle by the Commission.

136. I consider, therefore, that except in emergency situations to do with the influx of migrants, a Member State may order the detention in prison of a third-country national only if there are exceptional and legitimate grounds, such as those alleging necessity, showing uncontestably that the weighing up of interests requires that solution. When a Member State is facing difficulties related to the detention of migrants awaiting removal, it seems to me that it must indicate, assessing every case individually, the reasons why detention in a prison is required, on the understanding that such detention must guarantee the separation of the migrant from ordinary prisoners. It must, furthermore, give reasons for its decision with regard to the circumstances of the case and fulfil the obligations imposed on it by Article 18(2) of the Directive. It also seems to me, even though the Commission did not accept this idea at the hearing, that it must be possible for the migrant to bring proceedings, administrative at least, against the detention decision.

137. Accordingly, it is in the light of those considerations based on a simple reading of the wording of the provision itself, that I shall examine in turn the reasons given by the competent national authorities in the cases in the main proceedings and those given by the Governments of the Member States in their observations.

1. The reasons given by the Regierungspräsidium Kassel (Case C-473/13) and the Kreisverwaltung Kleve (Case C-514/13)

138. In Joined Cases C-473/13 and C-514/13, the competent national authorities rely on the powers reserved to each of the Länder and on the actual wording of Paragraph 62a(1) of the Aufenthaltsgesetz to justify the detentions at issue. That provision, as I have shown, confers on each of the Länder the right to order the detention of illegally staying migrants in prisons, when those Länder do not have in their territory specialised detention facilities.

139. It should be borne in mind that ten Länder do not have such facilities. It is therefore clear from the documents produced by the national court in Case C-514/13 that persons placed in administrative detention in Bavaria have been automatically detained, since 1 January 2012, in the prisons of Aschaffenburg, Munich or Nuremberg (52).

140. However, detaining an illegally staying migrant in a prison on the pretext that there are no specialised detention facilities in part of the territory of the Member State is not, in my view, an acceptable reason, for it does not in any case satisfy the criteria defined above. Indeed, that situation is in no way the result of a situation such as that expressly described in Article 18 of the Directive or one satisfying criteria of urgency or seriousness similar to those referred to in that provision. In fact, the impression which emerges is that there are no specialised detention facilities quite simply because they have not been built in some Länder and the capacity of existing accommodation facilities has not been used.

141. Moreover, it does not seem to me that the federal structure of the Member State is an obstacle to application of the principles of the directive.

142. In that regard, it is important to recall two essential principles of the case-law of the Court.

143. First, the Court has consistently held that a Member State may not invoke national provisions or practices stemming from its federal organisation in order to justify any failure to fulfil obligations prescribed by a Directive. (53) Thus, according to settled case-law, it is not for the EU institutions to take into account or even to rule on the division of competences by the institutional rules proper to each Member State, or on the obligations which may be imposed on the authorities of the federal State and those of the federated States respectively. (54)

144. Consequently, once a Member State has a specialised detention facility in its territory, with sufficient accommodation capacity, it must order the detention of the person concerned in that facility, and the federal organisation of that State and the geographical situation of that facility are of little importance.

145. Secondly, Member States must adjust their legislation so as to ensure observance of the fundamental rights of individuals. In particular, those States may not apply rules, even of criminal law, capable of jeopardising the attainment of the objectives pursued by a directive and so of depriving it of its effectiveness. According to the wording of the second and third subparagraphs of Article 4(3) TEU, the Member States ‘shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union’ and, in particular, ‘shall … refrain from any measure which could jeopardise the attainment of the Union’s objectives’, including those pursued by directives. That obligation is imposed on all the authorities of the Member States,‘(55) whether the authorities of the federal State or those of the federated States when a Member State is organised on a federal basis.

146. In Germany, the powers relating to the implementation of EU law are shared between the federal State and the federated States. It must, however, be pointed out that, in accordance with Paragraph 35(1) of the Basic Law, all the authorities of the federal State and the federated States are to provide mutual legal and administrative assistance, and that this does not compromise the administrative sovereignty of the Länder relied on by the German Government in its observations.

147. In accordance with that provision, Paragraph 5(1)(2) of the German Law on non-contentious administrative proceedings (Verwaltungsverfahrensgesetz) allows the authorities of the federated States to submit requests for mutual administrative assistance when one federated State is prevented from adopting administrative measures on the basis of, *inter alia*, the lack of necessary facilities or the lack of staff.

148. Saarland has accordingly entered into an administrative cooperation agreement allowing it to place third-country nationals awaiting removal in the specialised facility of Ingelheim located in Rhineland-Palatinate. Of the 152 places available in that facility, 50 are put at the disposal of Saarland. (56) Hamburg also concluded a cooperation agreement to ensure the detention of women and minors in specialised facilities located in the territory of Brandenburg. (57) That also seems to be the case with the Länder of Saxony and Schleswig-Holstein which, on the basis of the cooperation agreement with Brandenburg, place migrants in the specialised detention facilities of Berlin-Köpenick and Eisenhüttenstadt. (58)

149. In Case C-514/13, the national court also expressly envisaged the use of mutual administrative assistance. Indeed, it is clear from the procedural documents of 10, 12 and 13 September 2013 that it expressly requested the authorities of Rhineland-Palatinate to place the person concerned in the specialised detention facility of Ingelheim. It is to be noted that that request was accepted before being rejected following the attempted suicide of the person concerned.

150. It seems to me, therefore, that the federal structure of Germany does not preclude the placing of illegally staying migrants in specialised detention facilities, even in cases where the competent Land does not have such facilities in its territory.

151. Indeed, in such a case, it seems to me that the measures relating to mutual administrative assistance, and in particular cooperation agreements between the various federated States, make it possible to ensure compliance with Article 16(1) of the Directive while respecting the federal structure of Germany.

2. The reasons given by the Governments of the Member States in their observations

a) The migrant's interests and welfare

152. According to the German and Netherlands Governments, there are circumstances in which the migrant's interests and welfare would require his detention in a prison, thus justifying a derogation from the principles set out in the second sentence of Article 16(1) of the Directive. That detention would constitute a 'more favourable measure' for the purposes of Article 4(3) of the Directive, allowing the competent national authorities to provide a 'personalised solution' in the migrant's interests for the purposes of recital (6) in the preamble to the Directive. (59)

153. The German Government states that, because of the average period of detention of ordinary prisoners, clearly longer than that of migrants, prisons offer a wider and more extensive range of activities, leisure and care than that provided in specialised detention facilities and better supervision too

in terms of safety. Minors detained in facilities for young offenders could thus benefit from the specific care and teaching provided in those detention facilities for minors and participate, should they so wish, in activities with persons of the same age. As for persons having a particular condition, they could receive medical care not necessarily offered in specialised detention facilities. Finally, persons representing a risk to the safety of others could be better monitored because of the structure of the prison and supervised by qualified staff.

154. Moreover, according to the German Government, the detention of a migrant in a local prison would avoid the disadvantages related to the geographical distance of detention facilities. First of all, it would make it possible to ensure the effectiveness of the removal procedure. Next, it would save the migrant having to travel long distances and would facilitate not only continued contact with family and friends but also steps taken in any legal procedures. Finally, if a member of the family were held in the prison, the detention of the migrant in the same establishment would make it possible to reunite those family members.

155. I note that some of those arguments were raised by the Federal Republic of Germany in the answer which it provided to the CPT following the report of 22 February 2012. (60)

156. I consider that those arguments are highly dubious, with the exception, no doubt, of that concerning persons posing a risk to the safety of others, for whom the reference to the theory of a state of necessity seems to me expedient.

157. Although Article 5 of the Directive indeed requires Member States to take into account the best interests of the child, family life and the state of health of the person concerned when they implement the directive, it is clear that this is not to the effect suggested by the German and Netherlands Governments in their observations.

158. It true that there are situations in which it is preferable to be in a prison rather than in a detention facility. They are precisely those described by the EU legislature in Article 18 of the Directive or others similar to them in seriousness or urgency. Apart from those cases, it seems to me difficult to argue that detention in a prison may constitute a ‘more favourable measure’ or represent a ‘personalised solution’ for one awaiting removal, whether he is a minor or sick. To do so once again disregards the function of imprisonment which is designed as an instrument of punishment intended to ensure retribution for the offence committed.

159. In that regard, it is clear that Member States cannot rely on Article 4(3) of the Directive to order such a detention.

160. Although that provision allows Member States to adopt or maintain provisions more favourable to illegally staying third-country nationals than those of the Directive, provided that such provisions are compatible with it, the Court pointed out, in *El Dridi*, (61) that the Directive does not allow those States to apply stricter standards in the area that it governs. (62)

161. However, it is clear that detention in a prison not only constitutes a stricter measure than those referred to in the context of forced removal, but also infringes the principles laid down by the Directive if that detention is not accompanied by the guarantees required by Article 16(1) thereof.

162. I shall now set out the arguments put forward by the German and Netherlands Governments in their observations.

163. First, minors detained in a facility for young offenders could benefit from specific care and

teaching and participate in activities with persons of the same age. What care is this? While young persons placed in a facility for young offenders, therefore offenders, are admittedly in need of care falling within the scope of psychological supervision, I do not see why young migrants should, by definition, need it, not being offenders?

164. What I see there is the migrant being treated as if he were an offender, the very fact of his being placed in the minors' unit leading to the separation of child from parents that the Directive specifically seeks to avoid. I cannot find in this any echo of Articles 1 and 24 of the Charter, particularly of Article 24(3) which provides that 'every child shall have the right to maintain on a regular basis a personal relationship with both his or her parents'.

165. Furthermore, while the Directive provides that minors must be able to participate in activities suitable to their age, particularly sports and recreational activities, I very much doubt that the Union legislature could have had it in mind to make them take part in activities with young offenders, precisely because of the dangers of criminalisation that such a situation is liable to create.

166. Secondly, the claim that migrants suffering from a particular illness could benefit, in prisons, from appropriate medical care not necessarily available in detention facilities. It is clear that not every detention facility can be required to provide comprehensive health care. However, and in accordance with Article 16(3) of the Directive, I would point out that they must provide emergency health care and essential treatment of illness. If a health condition requires extensive treatment, I doubt that it is possible for prisons to be used as a place of hospitalisation. Quite clearly, moreover, beyond a certain level of severity, detainees themselves must receive care provided outside the establishment.

167. Thirdly, it is argued that detaining a migrant in the prison of the local Land would enable him to maintain contact with his family and friends. Such separation necessarily comes about inasmuch as the migrant is to be removed, and the fact of his relations being close by would not enable him to make use of provisions that might authorise him to remain in the territory of the Union.

168. Fourthly, moving the migrant to a far-off, specialised centre would damage the efficiency of the removal procedure. This argument is not, in my view, acceptable inasmuch as it is the very purpose of the specialised detention centre to facilitate all steps that make it possible to ensure that the individual is swiftly and efficiently returned to his country of origin in observance of the rights conferred on him.

169. Fifthly, a migrant could be detained in the same prison in which other members of his family are detained. I do not see why such detention would not be possible in a specialised detention facility where family reunification is the rule in accordance with Article 17(2) of the directive? This requirement of keeping families together seems to me, on the other hand, to mark the way in which the detention regime differs essentially from the custody regime and, in consequence, to prohibit recourse to the latter. In this regard, the constraints attaching to the regime of imprisonment in cells with timed meals and tasks, exceedingly short 'exercise' hours and sometimes having to wear a uniform, appear to me to be illustrated perfectly by the observations of the prison of Munich.

b) The costs associated with the establishment of specialised detention facilities and the costs linked to transfers to distant detention facilities

170. The German Government observes that it would be prohibitively expensive to establish in each Land specialised detention facilities for all the persons concerned, that is to say, men, women and minors, especially given the relatively low number of those persons, and in particular of women and children. (63) It also considers that the Member State must enjoy some flexibility in the arrangement of

those facilities, since the number of people to be detained is not stable and the period of their detention is no more than a few weeks to a few months.

171. The Netherlands, Swedish and Swiss Governments also rely on the heavy and disproportionate burden which could be involved in transferring a migrant and members of the responsible authorities over long distances to geographically distant detention facilities, which would cause delays and constitute a disproportionate obstacle to carrying out the return procedure. In that regard, the Netherlands Government specifically refers to the situation in which a Member State is likely to find itself when specialised detention facilities have no available places or are temporarily closed.

172. I understand that a Member State may be confronted with a problem of overcrowding in its detention facilities at a time when administrative detention is very widespread and it is also forced to close some of them because of, for example, alteration and renovation works. All the same, we must not lose sight of the fact that imprisoning migrants whose situation is irregular may well, in the same way, lead to the overcrowding of those establishments which would of itself give rise to significant costs. To my knowledge, many are the Member States that complain of endemic overcrowding in prisons.

173. I understand too that transfer to specialised detention facilities can involve costs and call for arrangements to be made, even when the removal procedure is shortly to be put in hand. Now, no Member State could have imagined or even argued, when adopting the directive, that the obligations and principles it lays down were to be given effect without any expense. On this head, it must also be held that placing migrants in prison is itself very costly in terms of space and of fitting out premises. It demands the thorough restructuring of certain quarters of those establishments in order for the detention regime to be in keeping with the rules of the Directive. Consequently, the savings claimed by the Member States seem to me to be quite illusory. Lastly, I should be interested to know the respective costs, for the same number of places, of a prison and of detention facilities.

174. In view of all those matters, I consider, therefore, that, with the exception of the emergency situations expressly referred to in Article 18 of the Directive, only exceptional circumstances satisfying criteria of urgency or seriousness similar to those referred to in that provision or relating to necessity can warrant a Member State's being constrained to derogate from the principle laid down in the first sentence of Article 16(1) of the Directive and to order the detention of a third-country national awaiting removal in prison.

175. In my view, none of the grounds relied on in the main proceedings is of that nature.

176. In view of all those considerations, I consider, therefore, that Article 16(1) of the Directive must be interpreted as precluding legislation of a Member State that, in the light of its federal structure, allows the federated States to detain in prison third-country nationals awaiting removal when there are no specialised detention facilities in the territory of the competent federated State.

C – *Case C-474/13*

177. In Case C-474/13, the Bundesgerichtshof asks the Court, in essence, whether, under Article 16(1) of the Directive, a Member State need not separate a third-country national detained in prison for the purpose of his removal from ordinary prisoners on the ground that the migrant consented to that arrangement. (64)

178. In other words, can a migrant detained for the purpose of his removal consent to being treated in

the same way as an offender or a criminal?

179. In its order for reference, the Bundesgerichtshof considers that the person concerned should be able to consent to be detained with ordinary prisoners because of the 'opportunity for contact with compatriots or people of the same age'. It argues, moreover, that the requirement of separation is intended only to improve the situation of the person concerned and that the waiver of such a requirement does not affect the essence of human dignity, the enforcement of a sentence not, in itself, being detrimental to human dignity.

180. The national court points out, however, that, under Article 16(1) of the Directive, the EU legislature provides no exception to the requirement of separation. Moreover, it asks whether there is not a risk of the requirement's being circumvented inasmuch as 'the authorities involved regularly make the people concerned sign pre-formulated declarations of consent or urge them to consent'.

181. In their observations, the Stadt Schweinfurt, Amt für Statistik und Meldewesen and the German and Netherlands Governments consider that such a practice is compatible with Article 16(1) of the Directive.

182. They rely, in essence, on the migrant's interests and welfare, which require, in certain circumstances, derogation from the requirement of separation laid down by that provision. Being accommodated with ordinary prisoners would improve his situation and, therefore, satisfy the objective of that provision.

183. According to the German Government, that accommodation would, in particular, allow the person concerned 'to make social contacts with compatriots during detention', a view shared by the Netherlands Government, and facilitate visits by relatives and close friends. That accommodation would thus help to avoid the social isolation which the person concerned would face in a detention facility because of its geographical distance and the small number of people of the same nationality and speaking the same language in detention facilities. According to the German Government, such a situation would be more difficult to deal with than the disadvantages relating to accommodation with convicted persons. Moreover, the German Government argues that respect for human dignity does not prevent a migrant awaiting removal from being detained with ordinary prisoners, in the same conditions as the latter. On the contrary, observance of that principle entails respecting the wishes expressed by the person concerned to be detained with prisoners of the same nationality.

184. To conclude, they all argue that such a practice is capable of constituting a more favourable measure for the person concerned than a strict requirement of separation. According to the Netherlands Government, that practice is, therefore, in accordance with Article 4(3) of the Directive and would, for the purposes of recital 6 in the preamble to the Directive, make it possible to 'develop tailor-made solutions in the foreigner's interest'.

185. I firmly reject that interpretation and I think that it is clearly necessary to answer in the negative the question referred by the Bundesgerichtshof.

186. In its question, the national court refers to the situation in which the person concerned has 'consented' to be accommodated with ordinary prisoners by drawing up a written declaration of consent. However, the verb 'to consent' ('einwilligen' in German) implies a previous request. In the context of Case C-474/13, that presupposes that the competent national authorities first 'asked' the person concerned, in one form or another, to waive that guarantee.

187. It is clear from the observations submitted by Ms Pham that she signed the following pre-formulated written declaration:

‘Pham Thi Ly, in detention

I declare that I consent to be detained with prisoners.

Nuremberg, 30 March 2012

Signature’

188. In the light of the information at my disposal, I feel that the action taken by the national authorities was not motivated by the interests of Ms Pham, still less by any wish she may have expressed concerning the conditions of her detention. Nothing in the case-file, and still less the declaration signed by Ms Pham, makes it possible to assert that she expressly requested to be detained with compatriots. On the contrary, it is clear from the information at my disposal that she was not proficient in German and that, on 31 March 2012, only three female Vietnamese nationals were incarcerated in one of the 37 prisons in Bavaria. I consider that the action by the authorities was actually taken because of the lack of facilities capable of accommodating Ms Pham, and that those authorities, moreover, proposed no alternative to her detention.

189. It seems to me hard to accept that, quite apart from the distress which a migrant experiences in the light of his forced removal and the weakness of his position, a Member State may, in one way or another, ask him to waive a guarantee that EU law expressly confers on him on the ground that that State does not have the infrastructure necessary to detain him in specialised facilities or, where appropriate, to separate him from ordinary prisoners.

190. Once again, to concede that Member States need not trouble to separate a migrant from ordinary prisoners on the ground that he has consented to being with them would enable the national authorities to circumvent the requirement referred to in Article 16(1) of the Directive and, in the end, excuse a serious infringement by those States of their obligations under the Directive and their international commitments.

191. In Case C-474/13, it therefore seems clear to me that such consent could not constitute a valid ground for the Member State to derogate from the requirement of separation in Article 16(1) of the Directive.

192. The wording of the second sentence of Article 16(1) of the Directive is perfectly clear and forms the basis, I would point out, of an unconditional and precise requirement. The EU legislature provides for no exception to the requirement of separation, so that a Member State may not, on the basis of the Directive, derogate from that principle, except in the emergency situations referred to in Article 18 thereof.

193. Moreover, the objectives of the Directive, which I shall not repeat, clearly militate against such a practice.

194. When a Member State considers that it need not separating migrants awaiting removal from ordinary offenders, it is engaging in conduct not only contrary to the purpose of the Directive, that is to say, to return them in a humane, dignified manner, in full observance of their fundamental rights, (65) but also disproportionate to the purpose of the detention.

195. Indeed, that State seeks to place the detention of a third-country national awaiting removal on the same footing as a measure enforcing a sentence, so that the illegally staying migrant is treated in the same way as a criminal, being detained in a place, in conditions and under a regime identical to those reserved to ordinary prisoners.

196. I can certainly share the view of the Bundesgerichtshof when it states as a principle that the enforcement of a sentence is not in itself detrimental to human dignity. The serving by a convicted person of a sentence lawfully imposed and lawfully delivered is, for him, by paying his debt to society, even a way of regaining his dignity as a citizen. However, is it possible without reservation to express the same view in relation to Ms Pham, who is placed in the situation of a person serving a sentence even though she is innocent of any offence under ordinary law? It seems to me that such a parallel cannot be drawn here.

197. Moreover, it seems to me more than hazardous, in the light of fundamental rights, to argue that detention within a prison makes it possible to 'improve the situation' of the migrant and thus overturn the principles set out in Article 16(1) of the Directive by claiming to protect the interests and dignity of an illegally staying migrant. Moreover, as I have noted in points 159 to 161 of this Opinion, such a practice is not to be justified under Article 4(3) of the Directive, for the measure involved is, in itself, much stricter than that provided for by the EU legislature.

198. Accordingly, I in no way support the view expressed by the national court in its order for reference, that the person concerned may waive that guarantee when there is, for example, 'the opportunity for contact with compatriots or people of the same age', a view which the Netherlands Government also shares. A prison is not a holiday club or even a social club. Moreover, when I examine the statistics compiled by the Land of Bavaria concerning the nationality of inmates as at 31 March 2012, the date on which Ms Pham was placed in detention, throughout the territory (66) (that is 37 prisons, 9 of which primarily accommodate women), (67) I note that only three detainees were of Vietnamese nationality, 7 were of African origin — which includes 57 countries and as many languages and dialects — and none was of Chinese, Iraqi, Lebanese or yet Albanian origin. The opportunity would, at all events, seem somewhat rare.

199. Lastly, I question the value of Ms Pham's consent, having regard to the context in which it was given.

200. First of all, it is clear from the observations submitted by Ms Pham that she did not have sufficient language proficiency in German to understand the declaration that she signed and everything would suggest that that declaration was not translated.

201. Furthermore, the waiver in question is given in a situation of profound imbalance between the authorities responsible for carrying out the detention and the illegally staying migrant. It must not be overlooked that a person placed in detention for the purpose of removal is in a position of weakness vis-à-vis the authorities and it is conceivable that he gives his consent under pressure, however slight. As noted by the national court in its order for reference, 'the authorities involved regularly make the people concerned sign pre-formulated declarations of consent or urge them to consent'.

202. It is also necessary to take into account the psychological deprivation which the migrant is likely to experience during his detention and the difficulties which he may encounter, because of his language, for example, in acquainting himself with the rights conferred on him. Many are those who do not, at that stage, have the means to obtain legal assistance and who will not be fully aware of their rights at the very time when they are invited to waive them. Many will not discern the meaning and consequences of

a declaration to that effect. That is why the Court cannot run the risk of recognising that consent given in such circumstances has any legal value.

203. Furthermore, because the situation offered to Ms Pham constituted, for the reasons set out, a worsening of her lot, it seems that, in order for her rights to be observed, she ought to have been assisted by a legal advisor. It is apparent from the observations made at the hearing that she was assisted by a lawyer at a later stage of the proceedings.

204. Therefore and in the light of all those considerations, I consider that Article 16(1) of the Directive must be interpreted as precluding a Member State from considering that it need not separate a third-country national detained for the purpose of his removal in prison from ordinary prisoners on the grounds that he consented to being placed with them.

VI – Conclusion

205. In the light of the above considerations, I propose that the Court should answer the questions referred as follows:

1) In Joined Cases C-473/13 and C-514/13:

> Article 16(1) 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 must be interpreted as precluding legislation of a Member State that, in the light of its federal structure, allows the federated States to detain in prison third-country nationals awaiting removal when there are no specialised detention facilities in the territory of the competent federated State.

2) In Case C-474/13:

> Article 16(1) 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 must be interpreted as precluding a Member State from considering that it need not separate a third-country national detained for the purpose of his removal in prison from ordinary prisoners on the grounds that he has consented to being placed with them.

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1 – Original language: French.

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2 – Directive 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, ‘the directive’).

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3 – See Article 1 of the directive and recitals (2) and (11) in the preamble thereto.

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4 – *El Dridi*, C-61/11 PPU, EU:C:2011:268, paragraphs 39 and 41.

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5 – *Ibid*., paragraph 42.

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6 – In the judgment of *Popov* v *France* of 19 January 2012, the European Court of Human Rights accordingly held that ‘placement in administrative detention [is] a measure of last resort for which no alternative [is] available’ (§ 119). See, also, Resolution 1707 (2010), in which the Parliamentary Assembly of the Council of Europe points out that ‘detention of … irregular migrants shall be exceptional and only used after first reviewing all other alternatives and finding that there is no effective alternative’ (paragraph 9.1.1).

7 – See, respectively, recitals (13), (16), (17) and (24) in the preamble to the directive.

8 – Emphasis added.

9 – They are the Länder of Hamburg, Hesse, Baden-Württemberg, Bavaria, Mecklenburg-Western Pomerania, Lower Saxony, North Rhine-Westphalia, Saxony, Saxony-Anhalt and Thuringia. However, there are specialised detention facilities in the following Länder: Berlin, Schleswig-Holstein, Rhineland-Palatinate and Saarland acting in cooperation, Brandenburg and Bremen.

10 At the hearing we learned that the order placing Mr Bouzalmate in detention had been annulled.

11 – BGBl. 2004 I, p. 1950.

12 – Emphasis added.

13 See, in particular, S.D. v Greece ECHR, judgment in *S.D. v Greece*, of 11 June 2009; *Popov v France* and *Aden Ahmed v Malta*, of 23 July 2013.

14 – EU:C:2011:268.

15 – Paragraphs 46 and 47 and the case-law cited.

16 – In Czech, ‘Zajištění se zpravidla vykonává ve zvláštních zajišťovacích zařízeních’; in German, ‘Die Inhaftierung erfolgt grundsätzlich in speziellen Hafteinrichtungen’; in English, ‘Detention shall take place as a rule in specialised detention facilities’; in Finnish, ‘Säilöönotto tapahtuu yleensä erityisissä säilöönottolaitoksissa’; in Italian, ‘Il trattenimento avviene di norma in appositi centri di permanenza temporanea’; in Dutch, ‘Voor bewaring wordt in de regel gebruik gemaakt van speciale inrichtingen voor bewaring’; or yet in Polish, ‘Przetrzymywanie odbywa się z reguły w specjalnych ośrodkach detencyjnych’.

17 – See, also, the exception referred to in Article 18 of the directive, to which I shall return.

18 – Emphasis added.

19 – *Ibid*.

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20 – *Ibid*.

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21 – *Ibid*.

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22 – *Ibid*.

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23 – *Ibid*.

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24 – See, *inter alia*, *Ferriere Nord* v *Commission*, C-219/95 P, EU:C:1997:375, paragraph 15.

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25 – See, *inter alia*, *Endendijk*, C-187/07, EU:C:2008:197, paragraph 22 *et seq*.

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26 – Emphasis added.

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27 – *Ibid*.

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28 – It is well established in the case-law of the European Court of Human Rights that any deprivation of liberty must, in addition to falling within one of the exceptions set out in Article 5(1)(a) to (f) of the ECHR, be 'lawful' (see, *inter alia*, *Popov* v *France*, cited above, § 118 and the case-law cited). To that end, the European Court of Human Rights requires the existence of some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention (*ibid*.).

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29 – See, also, the eighth of the Ten guiding principles governing the circumstances in which the detention of asylum seekers and irregular migrants may be legally permissible, in which the Parliamentary Assembly of the Council of Europe points out that the place, conditions and regime of detention must be appropriate, and the issue paper 'The Human Rights of Irregular Migrants in Europe' [CommDH/IssuePaper(2007)1, Title III(ii)].

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30 Along the same lines, the Parliamentary Assembly of the Council of Europe, in the second of its 15 European rules governing minimum standards of conditions of detention for migrants and asylum seekers requires detainees to be accommodated in centres specifically designed for the purpose of immigration detention and not in prisons. In its fifth and sixth rules, it also demands that the material conditions for detention, and the detention regime, should be appropriate to the individual's legal and factual situation.

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31 – See, also, the explanations on the tenth and eleventh of the Twenty guidelines on forced return of the Council of Europe.

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32 – See *Popov* v *France*, cited above.

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33 – The EU legislature is thereby transposing the case-law of the European Court of Human Rights according to which any deprivation of liberty can be consistent with Article 5(1)(f) of the ECHR only if it is carried out for the purpose of enforcement of deportation proceedings and is proportionate to that aim (see judgment of the European Court of Human Rights in *Chahal* v *United Kingdom* of 15 November 1996, Reports of Judgments and Decisions 1996-V, § 112 and 113, and *Popov* v *France*, cited above, § 140).

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34 – Council Directive of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18).

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35 – Article 2(k) of Directive 2003/9. Emphasis added.

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36 See *El Dridi*, paragraph 59.

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37 – See recitals 13 and 16 in the preamble to the Directive.

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38 – See, in that regard, the observations of the prison of Munich in Annex 2 to the order for reference in Case C-514/13.

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39 – COM(2005) 391 final.

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40 – Emphasis added.

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41 Since these references for preliminary rulings were made, the situation would seem to have changed. Thus, it appears from a decision of the Ministry of the Interior of the Land of Bavaria, adopted in November 2013, that the prison at Mühldof-am-Inn has now been restructured so as to set up a specialised detention centre capable of holding 82 persons, 14 of them women, pending their removal. This establishment was chosen because it is geographically close to Munich airport (see article in the Wochenblatt newspaper of 14 November 2013, entitled ‘Aus Mühldorfer ‘Kuschelknast” wird Bayerns einziges “Abschiebe-Gewahrsam”’).

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42 – Report to the German Government on the visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 November to 7 December 2010 [CPT/Inf (2012) 6, paragraph 33].

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43 – It is clear from the Response of the German Government to the Report of the CPT of 22 February 2012 (Response of the German Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Germany from 25 November to 2 December 2010 [CPT/Inf (2012) 7] that migrants awaiting removal are detained in prison in separate units, segregated from the rest of the establishment, in the Länder of Brandenburg, Bremen,

Rhineland-Palatinate, North Rhine-Westphalia and Lower Saxony (p. 23 and 24).

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44 – LG Leipzig — 07 T 104/11.

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45 – See CPT/Inf (2012) 6, paragraph 31.

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46 – LG Traunstein — 4 T 3104/12.

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47 – ‘As a general rule, minors are not detained pending deportation. This is the case only in severely limited exceptional cases, and the principle of proportionality is strictly adhered to. As a rule, minors are placed in the custody of the youth welfare office’ [CPT/Inf (2012) 7, p. 24].

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48 – See the reply of Hesse in Annex 3a to the order for reference in Case C-514/13, which states that ‘[w]ith regard to adult females and young people and children of both sexes, because they are few in number it is not possible to create suitable detention facilities. When such persons must be placed in administrative detention, it is provided in the prisons of Frankfurt am Main III (for women) and in juvenile detention facilities’ (free translation).

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49 – See the reply of Saxony in Annex 3a of the order for reference in Case C-514/13, which refers to its answer to question 49 of the parliamentary request of 5 September 2012 (Drucksache 17/10597), which states that ‘[c]oncerning the detention of adult females, due to the low number of women in detention (usually only one woman), it takes place — in the interests of avoiding total isolation — within the prison of Chemnitz, in a unit reserved for persons held on remand’ (p. 114, free translation).

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50 – See, also, the order of the Bundesgerichtshof of 7 March 2012 (V ZB 41/12), in which the Supreme Court expressly refers to the separation of minors in detention from ordinary prisoners and emphasises the importance of the requirements laid down in Article 17(3) to (5) of the directive.

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51 – See the answers of the various Länder to question 52 of the parliamentary request of 5 September 2012, referred to above (pp. 124 to 127).

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52 – See Annex 3a to the order for reference in Case C-514/13.

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53 – See *Commission* v *Germany*, C-67/05, EU:C:2005:791, paragraph 9 and case-law cited.

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54 – See, *inter alia*, *Commission* v *Germany*, C-8/88, EU:C:1990:241, paragraph 13.

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55 – See *Impact*, C-268/06, EU:C:2008:223, paragraph 85 and case-law cited. See also, in that regard, the order of the Court in *Région wallonne* v *Commission*, C-95/97, EU:C:1997:184, paragraph 7.

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56 – See Annex 3b to the order for reference in Case C-514/13.

57 – See the reply of Hamburg in Annex 3a to the order for reference in Case C-514/13.

58 – See p. 3 of the French version of the observations of Ms Bero.

59 – Paragraph 29 *et seq*. of the observations of the Netherlands Government.

60 – See CPT/Inf (2012) 7. According to the Federal Republic of Germany, detention in a prison would make it possible, in certain situations, to have common facilities and personnel and to detain the individuals concerned in a place relatively close to their 'residence' (p. 24). See also the response of Hesse in Annex 3a to the order for reference in Case C-514/13, which states that '[s]pecialised detention facilities are not provided for in Hesse and nor are they necessary' (free translation).

61 – EU:C:2011:268.

62 – Paragraph 33.

63 – In its response to the report drawn up by the CPT, the Federal Republic of Germany also referred to economic arguments related to the establishment of specialised facilities and considered that, given the relatively low number of people actually in detention, the present system may be termed appropriate [CPT/Inf (2012) 7, p. 24]. See also response of Hesse in Annex 3a to the order for reference in Case C-514/13, which states that '[s]pecialised detention facilities are not provided for in Hesse and nor are they necessary' (free translation).

64 – That detention was also ordered by the authorities of Bavaria on the basis of Paragraph 62a(1) of the Aufenthaltsgesetz. Nothing in the case-file indicates why Ms Pham could not be detained in a specialised detention facility. Nevertheless, and given the evidence available to the Court in Joined Cases C-473/13 and C-514/13, it appears to me that that detention in prison is justified by the absence of specialised detention facilities in Bavaria. Insofar as that justification cannot, in my view, be accepted in the light of the requirements laid down in Article 16(1) of the directive, such detention is, therefore, illegal. However, in the event that that detention is justified on a legitimate ground, the question of whether it is lawful arises, insofar as the person concerned was accommodated with ordinary prisoners following her consent.

65 – See recitals 13, 16, 17 and 24 in the preamble to the Directive.

66 – Bayerisches Landesamt für Statistik und Datenverarbeitung — Strafvollzugsstatistik in Bayern 2012, Stichtagerhebung zum 31. März (Kennziffer B VI 6 j 2012, p. 10).

67 – See Internet address http://www.justizvollzug-bayern.de/JV/Anstalten/Zustaendigkeiten.