



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

19 July 2012*

(Area of freedom, security and justice — Regulation (EC) No 562/2006 — Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) — Articles 20 and 21 — Abolition of border control at internal borders — Checks within the territory — Measures having an equivalent effect to border checks — National legislation authorising checks of identity, nationality and residence status by officials responsible for border surveillance and monitoring of foreign nationals in a 20 kilometre area extending from the common border with other State parties to the Convention implementing the Schengen Agreement — Checks intended to combat illegal residence — Legislation laying down certain conditions and guarantees concerning, inter alia, the frequency and intensity of the checks)

In Case C-278/12 PPU,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Raad van State (Netherlands), made by decision of 4 June 2012, received at the Court on 8 June 2012, in the proceedings

Atiqullah Adil

v

Minister voor Immigratie, Integratie en Asiel,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, U. Lõhmus, A. Ó Caoimh (Rapporteur), A. Arabadjiev and C.G. Fernlund, Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the request by the referring court of 4 June 2012, received at the Court on 8 June 2012, that the reference for a preliminary ruling be dealt with under an urgent procedure pursuant to Article 104b of the Rules of Procedure of the Court,

having regard to the decision of 11 June 2012 of the Second Chamber to grant that application,

having regard to the written procedure and further to the hearing on 5 July 2012,

after considering the observations submitted on behalf of:

— Mr Adil, by E.S. van Aken, advocaat,

* Language of the case: Dutch.

- the Netherlands Government, by C. Wissels and M. Bulterman, acting as Agents,
- the Czech Government, by J. Vlášil, acting as Agent,
- the German Government, by T. Henze and N. Graf Vitzthum, acting as Agents,
- the French Government, by S. Menez, acting as Agent,
- the European Commission, by D. Maidani and G. Wils, acting as Agents,

after hearing the Advocate General,

gives the following

Judgment

- 1 The reference for a preliminary ruling concerns the interpretation of Articles 20 and 21 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1).
- 2 This reference has been made in proceedings between Mr Adil, who claims to be a third-country national and who has been placed in detention, owing to the unlawful nature of his situation in Netherlands territory, after having been stopped during a check carried out in the Netherlands in the frontier area with Germany, and the Minister voor Immigratie, Integratie en Asiel (Minister for Immigration, Integration and Asylum) concerning the lawfulness of that check and, consequently, of his detention.

Legal context

European Union law

Protocol (No 19) on the Schengen acquis

- 3 Under the preamble to Protocol (No 19) on the Schengen acquis integrated into the framework of the European Union, annexed to the Treaty of Lisbon (OJ 2010 C 83, p. 290):

‘The High Contracting Parties,

noting that the Agreements on the gradual abolition of checks at common borders signed by some Member States of the European Union in Schengen on 14 June 1985 and on 19 June 1990, as well as related agreements and the rules adopted on the basis of these agreements, have been integrated into the framework of the European Union by the Treaty of Amsterdam of 2 October 1997;

desiring to preserve the Schengen acquis, as developed since the entry into force of the Treaty of Amsterdam, and to develop this acquis in order to contribute towards achieving the objective of offering citizens of the Union an area of freedom, security and justice without internal borders;

...

have agreed upon the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union’.

- 4 Article 2 of that protocol states:

‘The Schengen acquis shall apply to the Member States referred to in Article 1, without prejudice to Article 3 of the Act of Accession of 16 April 2003 or to Article 4 of the Act of Accession of 25 April 2005. The Council will substitute itself for the Executive Committee established by the Schengen agreements.’

The Convention implementing the Schengen Agreement

- 5 The Schengen acquis comprises, inter alia, the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19), signed at Schengen on 19 June 1990 (‘the CISA’).

- 6 Pursuant to Article 2 of the CISA, which concerned the crossing of internal borders:

‘1. Internal borders may be crossed at any point without any checks on persons being carried out.

...

3. The abolition of checks on persons at internal borders shall not affect the provisions laid down in Article 22, or the exercise of police powers throughout a Contracting Party’s territory by the competent authorities under that Party’s law, or the requirement to hold, carry and produce permits and documents provided for in that Party’s law.

...’

- 7 Article 2 of the CISA was repealed as from 13 October 2006, in accordance with Article 39(1) of Regulation (EC) No 562/2006.

Regulation No 562/2006

- 8 Recitals 1 and 14 in the preamble to Regulation No 562/2006 are worded as follows:

‘(1) The adoption of measures under Article 62(1) of the [EC] Treaty with a view to ensuring the absence of any controls on persons crossing internal borders forms part of the Union’s objective of establishing an area without internal borders in which the free movement of persons is ensured, as set out in Article 14 of the [EC] Treaty.

...

(14) This Regulation is without prejudice to checks carried out under general police powers, ... and to national law on carrying travel or identity documents or to the requirement that persons notify the authorities of their presence on the territory of the Member State in question.’

- 9 The first paragraph of Article 1 of Regulation No 562/2006 states:

‘This Regulation provides for the absence of border control of persons crossing the internal borders between the Member States of the European Union.’

10 According to Article 2(1) and 2(9) to (11) of Regulation No 562/2006:

‘For the purposes of this Regulation the following definitions shall apply:

(1) “internal borders” means:

(a) the common land borders, including river and lake borders, of the Member States;

...

(9) “border control” means the activity carried out at a border, in accordance with and for the purposes of this Regulation, in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance;

(10) “border checks” means the checks carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or authorised to leave it;

(11) “border surveillance” means the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks’.

11 Article 3 of Regulation No 562/2006 provides:

‘This Regulation shall apply to any person crossing the internal or external borders of Member States, without prejudice to:

(a) the rights of persons enjoying the Community right of free movement;

(b) the rights of refugees and persons requesting international protection, in particular as regards non-refoulement.’

12 Article 20 of Regulation No 562/2006, headed ‘Crossing internal borders’, provides:

‘Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.’

13 Article 21 of Regulation No 562/2006, headed ‘Checks within the territory’, provides:

‘The abolition of border control at internal borders shall not affect:

(a) the exercise of police powers by the competent authorities of the Member States under national law, insofar as the exercise of those powers does not have an effect equivalent to border checks; that shall also apply in border areas. Within the meaning of the first sentence, the exercise of police powers may not, in particular, be considered equivalent to the exercise of border checks when the police measures:

(i) do not have border control as an objective;

(ii) are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime;

- (iii) are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders;
- (iv) are carried out on the basis of spot-checks;
- (b) security checks on persons carried out at ports and airports by the competent authorities under the law of each Member State, by port or airport officials or carriers, provided that such checks are also carried out on persons travelling within a Member State;
- (c) the possibility for a Member State to provide by law for an obligation to hold or carry papers and documents;
- (d) the obligation on third-country nationals to report their presence on the territory of any Member State ...'

Netherlands law

- 14 According to Article 6 of the 1993 police law (Politiewet):

'The following policing activities shall be assigned to the royal mounted police [Koninklijke Marechaussee], unless otherwise provided by or in accordance with other laws:

...

- (f) activities assigned by or in accordance with the [Law on foreign nationals of 2000 (Vreemdelingenwet 2000; "the law on foreign nationals")],
 - (g) the combating of human trafficking and fraud relating to identity or travel documents ...'
- 15 Under Article 50(1) of the law on foreign nationals, the officials responsible for border surveillance and for monitoring foreign nationals have the power to stop persons in order to establish their identity, nationality and residence status, either on the basis of facts and circumstances which, measured by objective criteria, give rise to a reasonable suspicion that such persons are illegally resident or in order to combat illegal residence of persons after they have crossed the border.
- 16 According to the order for reference, the mobile security monitoring checks ('Mobiel Toezicht Veiligheid'; 'MTV checks') are based on Article 50(1) of the law on foreign nationals.
- 17 Article 50(6) of that law provides that further rules on the application of Article 50(1) are to be laid down by general administrative order.
- 18 The general administrative measure concerning the right to stop persons in the course of MTV checks is the decree on foreign nationals of 2000 (Vreemdelingenbesluit 2000; 'decree of 2000').
- 19 Amended following the judgment in Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, Article 4.17a of the decree of 2000, which entered into force on 1 June 2011, states:
- '1. The competence, referred to in Article 50(1) of the [law on foreign nationals], as part of the effort to combat illegal residence following crossing of borders, to stop persons for the purpose of determining their identity, nationality and residence status, shall be exercised exclusively in the context of the monitoring of foreign nationals:
- (a) at airports on the arrival of flights from the Schengen area;

- (b) in trains for at most thirty minutes after crossing the common land border with Belgium or Germany or, if during that period the second station after the border crossing has not yet been reached, up to at most the second station after the border crossing;
 - (c) on roads and waterways in an area of up to 20 kilometres from the common land border with Belgium or Germany.
2. The monitoring referred to in subsection 1 shall be carried out on the basis of information or data gained from experience regarding illegal residence following the crossing of borders. In addition, monitoring may be carried out to a limited degree with a view to acquiring information on such illegal residence.
3. The monitoring referred to in subsection 1(a) shall be exercised at most seven times per week in respect of flights on the same route, on a maximum of one-third of the total number of planned flights per month on that route. In the context of that control, only some of the passengers on a flight shall be stopped.
4. The monitoring referred to in subsection 1(b) shall be carried out daily on a maximum of two trains per route and on a maximum of eight trains in total, and in a maximum of two train compartments per train.
5. The monitoring referred to in subsection 1(c) shall be carried out on the same road or waterway for a maximum of 90 hours per month and a maximum of six hours per day. In the context of that monitoring, only some of the passing vehicles shall be stopped.'
- 20 The order for reference states that, in the explanatory note concerning that amendment to Article 4.17a of the decree of 2000, the following points were highlighted:
- 'This amendment to the decree [of 2000] seeks to provide the necessary safeguards so that the monitoring of foreign nationals in order to combat illegal residence after persons have crossed the border ... does not have an effect equivalent to border checks within the meaning of [Regulation No 562/2006]. This is to give effect to the judgment of the Court of Justice of 22 June 2010 [*Melki and Abdeli*] and the judgment of the Raad van State of 28 December 2010 and to make mobile monitoring consistent with Article 21(a) of [Regulation No 562/2006].'

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

- 21 Mr Adil, who claims to be an Afghan national, was stopped on 28 March 2012 during an MTV check carried out by the royal mounted police when he was a passenger in a Eurolines bus. He was stopped on a section of the A67/E34 motorway coming from Germany, in the territory of the municipality of Venlo (Netherlands).
- 22 The report on the stops, transfer and detention of 28 March 2012 states that the MTV check was carried out, in accordance with Article 4.17a of the decree of 2000, on the basis of information or experience regarding the illegal residence of persons after they have crossed the border, that it took place within an area 20 kilometres from the land border with Germany, that, at that location, one or more checks were carried out in March, lasting 54 hours and 38 minutes in total, that, at that location, on the day of the stop, one or more checks were carried out lasting one hour and that, during those checks, two vehicles, forming part of the traffic passing at that location, were actually stopped.
- 23 By decision of 28 March 2012, Mr Adil was placed in detention pursuant to the law on foreign nationals.

- 24 Before the Rechtbank 's-Gravenhage (District Court, The Hague), Mr Adil contested the lawfulness of the stop carried out in his regard and the decision to detain him, on the ground that the MTV check carried out amounted to a border check prohibited by Article 20 of Regulation No 562/2006. He claimed *inter alia* that, when the check was carried out, there was no reasonable suspicion of illegal residence.
- 25 According to the documents annexed to the order for reference and to the observations submitted to the Court by the Netherlands Government, Mr Adil, after he was stopped, applied for asylum. Following a search in the Eurodac database, established by Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (OJ 2000 L 316, p. 1), it also became evident that he had already applied for asylum in Norway. Before the Rechtbank 's-Gravenhage, Mr Adil also questioned the way in which his asylum claim had been examined.
- 26 By judgment of 16 April 2012, the Rechtbank 's-Gravenhage declared Mr Adil's action to be unfounded.
- 27 That court based its decision *inter alia* on a judgment of the Raad van State (Council of State) of 5 March 2012 according to which MTV checks do not infringe Regulation No 562/2006, thereby upholding an earlier judgment by it of 20 October 2011. In its judgement of 5 March 2012, the Raad van State found that Article 21 of Regulation No 562/2006 provides a non-exhaustive list of the circumstances in which the exercise of the police powers may not be considered equivalent to the exercise of border checks, within the meaning of Article 20 of that regulation.
- 28 On 23 April 2012, Mr Adil appealed against the judgment of the Rechtbank 's-Gravenhage to the administrative law division of the Raad van State.
- 29 According to the order for reference, courts in the Netherlands are not in agreement concerning the compatibility of MTV checks with Articles 20 and 21 of Regulation No 562/2006.
- 30 By decision of 7 February 2012, the Rechtbank Roermond (District Court, Roermond) (criminal law division), referring to the Raad van State's abovementioned judgments concerning the lawfulness of MTV checks, held that the case-law to date was insufficiently clear on the question whether the safeguards contained in Article 4.17a of the Vb 2000 satisfied the requirements laid down in *Melki and Abdeli*. The Rechtbank Roermond, which found that the wording of that provision does not take any account of the behaviour of the person concerned or of the specific circumstances which could give rise to a risk of breach of public order, made a reference for a preliminary ruling to the Court. The case concerned is Case C-88/12 *Jaoo*, currently pending before the Court.
- 31 Similarly, the Gerechtshof 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch) (criminal law division) held in a judgment of 11 May 2012 that an MTV check, even if carried out in accordance with Article 4.17a of the decree of 2000, has an effect equivalent to a border check and therefore infringes Regulation No 562/2006. According to that court, MTV checks are not based on specific facts or circumstances which give rise to a suspicion of illegal residence. They are carried out exclusively in response to an intention to cross or the act of crossing a border and aim to establish whether the conditions for authorising a person to enter or leave the territory of the Member State concerned are satisfied.

32 The Raad van State accordingly decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

- ‘1. Must Article 21 of [Regulation No 562/2006] be interpreted as precluding the exercise of a national power, as conferred in Article 50 of the [Law on foreign nationals] and set out in greater detail in Article 4.17a of the [Decree of 2000], to carry out checks on persons in areas behind internal borders with a view to establishing whether those persons satisfy the requirements for lawful residence laid down by the Member State concerned?
2. (a) Does Article 21 of [Regulation No 562/2006] preclude national checks, such as those referred to in Article 50 of the [law on foreign nationals], from being carried out on the basis of general information and experience regarding the illegal residence of persons at the place where the check is to be made, as referred to in Article 4.17a(2) of the [decree of 2000], or should there be specific indications, when such checks are carried out, that an individual on whom checks are to be made is illegally resident in the Member State concerned?
- b) Does Article 21 of [Regulation No 562/2006] preclude such a check from being carried out with a view to obtaining the general information and experience-based data regarding illegal residence referred to in (a) above, if this occurs to a limited extent?
3. Must Article 21 of [Regulation No 562/2006] be interpreted as meaning that the restriction of the power to carry out checks in such a way as that described in a statutory rule such as Article 4.17a [of the decree of 2000] constitutes a sufficient safeguard for the purpose of ensuring that a check cannot in fact have the effect of a border check prohibited by Article 21 of [Regulation No 562/2006]?’

The urgent procedure

- 33 In its order for reference of 4 June 2012, the Raad van State requested that the present reference for a preliminary ruling be dealt with under the urgent procedure pursuant to Article 23a of the Statute of the Court of Justice of the European Union and Article 104b of the Court’s Rules of Procedure.
- 34 Justifying that request, the referring court stated that, having been stopped in the Netherlands, in the frontier area with Germany, Mr Adil was in custody and the answer to the questions referred was relevant for the purposes of ruling on his detention. It also stated that a number of cases concerning similar acts of detention are pending before various Netherlands courts.
- 35 The Second Chamber of the Court decided, on 11 June 2012, on the Judge-Rapporteur’s proposal and after hearing the Advocate General, to grant the referring court’s request that the reference for a preliminary ruling be dealt with under the urgent procedure.

The questions referred for a preliminary ruling

- 36 As a preliminary point, it should be noted that no information concerning Mr Adil’s asylum applications was provided by the Raad van State in its order for reference and no question was asked concerning the consequences of those applications for his detention.
- 37 The questions referred by that court concern only the interpretation of Regulation No 562/2006.
- 38 By those questions, which should be examined together, the referring court asks, in essence, whether Articles 20 and 21 of Regulation No 562/2006 must be interpreted as not precluding national legislation such as that at issue in the main proceedings, which permits officials responsible for border

surveillance and monitoring of foreign nationals to carry out checks, in a geographic area 20 kilometres from the land border between a Member State and the State parties to the CISA, with a view to establishing whether the persons stopped satisfy the requirements for lawful residence applicable in the Member State concerned, when those checks are based on general information and experience regarding the illegal residence of persons at the places where the checks are to be made, when they may also be carried out to a limited extent in order to obtain such general information and experience-based data in that regard, and when the carrying out of those checks is subject to certain limitations concerning, inter alia, their intensity and frequency.

Observations submitted to the Court

- 39 Mr Adil maintains that the Netherlands legislation does not satisfy the conditions laid down by Article 21 of Regulation No 562/2006. First, that legislation forms part of national immigration law and not the law concerning the prevention and sanctioning of crimes and is, in practice, applied exclusively by the officials specifically responsible for border surveillance and the monitoring of foreign nationals. Second, he submits that MTV checks, in contrast to checks carried out in the remainder of national territory, which require there to be a reasonable suspicion of illegal residence, are based exclusively on crossing of the border and have the same objective as border controls. Finally, Mr Adil submits that the limitation on the intensity of MTV checks, provided for under Netherlands legislation, cannot prevent those checks from being, in practice, equivalent to border checks.
- 40 The Czech Government considers that, contrary to the checks which were the subject of the case giving rise to the judgment in *Melki and Abdeli*, MTV checks have the objective of border checks within the meaning of Article 10(2) of Regulation No 562/2006. According to that government, controls on persons following their crossing of the border which have the objective of protecting that border from illegal immigration fall within the scope of the checks at internal borders prohibited by Article 20 of Regulation No 562/2006. Accordingly, it is not necessary to examine whether the Netherlands legislation provides the guarantees as required by *Melki and Abdeli*.
- 41 The Netherlands, German and French Governments and the European Commission consider, by contrast, that Article 21 of Regulation No 562/2006 does not preclude national legislation from providing for checks such as MTV checks which take place in a frontier area, aim to combat illegal immigration and are subject to more detailed rules and limitations with regard to their implementation.
- 42 Those governments state first that the principal objective of MTV checks is to combat illegal residence and not to check whether a person is entitled to enter Netherlands territory. Article 21 of Regulation No 562/2006 does not preclude such an objective. Although the combating of illegal residence is not explicitly listed among the objectives of checks carried out within the territory of the Member States and allowed by that provision, the use of the words ‘in particular’ in that provision indicates clearly that that list is not exhaustive. The police measures compatible with Article 21 of Regulation No 562/2006 can therefore have objectives other than the maintenance of public security and the combating of cross-border crime.
- 43 With regard to the basis for MTV checks, the Netherlands Government submits, with reference to the wording of Article 21(a) of Regulation No 562/2006, that police measures may be based on general information and experience of the police services. According to paragraph 74 of *Melki and Abdeli*, specific evidence that a person checked is residing unlawfully in the Member States is not required.
- 44 The Commission maintains that the selectivity of the checks, meaning that only some of the persons crossing the border are checked, makes it more probable that those checks are not equivalent to border checks. Owing to that selectivity, the checks are clearly distinct from systematic checks at the external frontiers.

- 45 With regard to the fact that the MTV checks carried out in the frontier area can be distinguished from the checks carried out in the remainder of the national territory, the Netherlands, German and French Governments and the Commission maintain that such a distinction is allowed under the terms of Article 21(a) of Regulation No 562/2006, as can be seen from *Melki and Abdeli*. That distinction is in fact reasonable taking into account the objective of the checks, that is to say the combating of illegal residence, and the fact that, in order to be effective, those checks must take into account the special nature of frontier areas.
- 46 The Netherlands Government and the Commission consider that Article 21 of Regulation No 562/2006 also does not preclude limited checks which aim to collect additional information concerning changes to the routes or new routes usually followed by illegal immigrants. The Commission states, however, that the two types of checks referred to must be carried out in strict accordance with the conditions laid down by law.
- 47 Finally, the Netherlands, German and French Governments and the Commission also claim that the framework applicable to the power to carry out checks, provided for in Article 4.17a of the decree of 2000, which determines, inter alia, the conditions regarding the intensity and frequency of the checks, is sufficient to guarantee that, in practice, the checks cannot have an equivalent effect to border checks prohibited by Article 21 of Regulation No 562/2006. The Netherlands Government states, in that regard, that in order to ensure that only some of the passing vehicles are stopped, the actual stopping of vehicles is carried out on the basis of profiling or sample stops. It follows that the checks are planned and implemented in a manner clearly different from systematic checks carried out on persons at the external frontiers.

The Court's reply

- 48 It should be recalled that Article 67(2) TFEU, which falls within Title V of the FEU Treaty concerning the area of freedom, security and justice, provides that the Union is to ensure the absence of internal border controls for persons. Article 77(1)(a) TFEU states that the Union is to develop a policy with a view to ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders.
- 49 As is apparent from recital 1 in the preamble to Regulation No 562/2006, the abolition of internal border controls forms part of the Union's objective, stated in Article 26 TFEU, of establishing an area without internal borders in which the free movement of persons is ensured.
- 50 That aspect of the absence of internal border controls was implemented by the European Union legislature by adopting, pursuant to Article 62 EC (now Article 77 TFEU), Regulation No 562/2006 which seeks, according to Recital 22 in its preamble, to build on the Schengen *acquis*. That regulation establishes, in Title III, a Community scheme on the crossing of internal borders.
- 51 Article 20 of Regulation No 562/2006 provides that internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out. According to Article 2(10) of that regulation, 'border checks' means the checks carried out at border crossing points to ensure that persons may be authorised to enter the territory of the Member States or authorised to leave it.
- 52 Article 72 TFEU provides that Title V of the FEU Treaty is not to affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

- 53 In that regard, Article 21(a) of Regulation No 562/2006 provides that the abolition of border control at internal borders is not to affect the exercise of police powers by the competent authorities of the Member States under national law, in so far as the exercise of those powers does not have an effect equivalent to border checks; that is also to apply in border areas.
- 54 That provision of Regulation No 562/2006 makes clear that the exercise of police powers may not, in particular, be considered equivalent to the exercise of border checks when the police measures do not have border control as an objective, are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime, are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders and are carried out on the basis of spot-checks.
- 55 With regard to checks, such as MTV checks, based on Article 50(1) of the law on foreign nationals and carried out in accordance with the conditions set out in Article 4.17a of the decree of 2000, it must inter alia be considered that they are not carried out 'at borders' or when the border is crossed, but within the national territory (see, to that effect, *Melki and Abdeli*, paragraph 68).
- 56 It follows that, contrary to what is argued by the Czech Government, those checks are not border checks prohibited by Article 20 of Regulation No 562/2006 but checks within the territory of a Member State, covered by Article 21 of the regulation.
- 57 It must next be examined whether checks within the territory, devised and carried out like MTV checks, are in any event prohibited under Article 21(a) of Regulation No 562/2006. That would be the case if those checks proved, in fact, to have an equivalent effect to border checks (*Melki and Abdeli*, paragraph 69).
- 58 In that regard, Article 50(1) of the law on foreign nationals provides for checks to be carried out specifically in border areas and for checks in the remainder of the national territory. According to the information contained in the file submitted to the Court and clarified at the hearing, while those two checks share the objective of combating illegal residence, checks carried out outside the frontier area must be based on a reasonable suspicion of illegal residence. In the context of MTV checks carried out in accordance with Article 4.17a of the decree of 2000, persons may be stopped on the basis of information or experience regarding illegal residence following crossing of the border and without such a suspicion.
- 59 In the first place, with regard to the objective of the Netherlands legislation providing for MTV checks, Article 21(a) of Regulation No 562/2006 states that the exercise of police powers may not, in particular, be considered equivalent to the exercise of border checks when one or more of the conditions referred to by it are satisfied, among which are the condition laid down in Article 21(a)(i), according to which the police powers do not have border control as an objective.
- 60 In the present case, it is apparent from the information submitted to the Court — to be verified by the national court — that the objectives pursued by the MTV checks can be distinguished in certain essential respects from those pursued by border checks.
- 61 According to Article 2(9) to (11) of Regulation No 562/2006, border checks serve, first, to ensure that persons may be authorised to enter the territory of the Member State or authorised to leave it and, second, to prevent persons from circumventing those checks (see *Melki and Abdeli*, paragraph 71). The checks concerned may be carried out systematically.
- 62 By contrast, the checks provided for under the Netherlands legislation seek to establish the identity, nationality and/or residence status of the person stopped in order, principally, to combat illegal residence. The checks concerned are selective and aim to detect persons whose presence is unlawful

and to deter illegal immigration, the objective of those checks being pursued throughout Netherlands territory even if, in frontier areas, special provisions apply with regard to the carrying out of those checks.

- 63 According to Article 21(c) of Regulation No 562/2006, the possibility for a Member State to provide in its national law for an obligation to hold or carry papers and documents is not affected by the abolition of border control at internal borders (see, to that effect, *Melki and Abdeli*, paragraph 71).
- 64 The fact that the identity checks based on Article 50(1) of the law on foreign nationals and carried out in accordance with Article 4.17a of the decree of 2000 aim mainly to combat illegal residence after crossing of the border and that Article 21(a) of Regulation No 562/2006 does not refer specifically to that objective, also does not mean that there is an objective of border control contrary to Article 21(a)(i).
- 65 First, as the Netherlands Government and the Commission inter alia pointed out, Article 21(a) of Regulation No 562/2006 provides neither an exhaustive list of the conditions which must be satisfied by police measures in order not to be considered as equivalent to border checks, nor an exhaustive list of the objectives which those police measures may pursue. That interpretation is confirmed by use of the words 'in particular' in the second sentence of Article 21(a) of Regulation No 562/2006 and in Article 21(a)(ii).
- 66 Second, neither Article 79(1) and (2)(c) TFEU - which provides for the development, by the European Union, of a common immigration policy aimed at ensuring, inter alia, the prevention of illegal immigration and unauthorised residence - nor Regulation No 562/2006, rules out Member State powers in the field of combating illegal immigration and unauthorised residence, even if it is clear that Member States must adapt their laws in that field in order to comply with European Union law (see, to that effect, Case C-329/11 *Achughbabian* [2011] ECR I-12695, paragraphs 30 and 33). The provisions of Article 21(a) to (d) of Regulation No 562/2006 and the wording of Article 72 TFEU confirm that the abolition of internal border controls has not affected the responsibilities of the Member States with regard to the maintenance of law and order and the safeguarding of internal security.
- 67 It follows that the objective of combating illegal residence pursued by the Netherlands legislation does not render the MTV checks at issue in the main proceedings equivalent to border checks prohibited by Article 21(a) of Regulation No 562/2006.
- 68 Compliance with European Union law and, in particular, Articles 20 and 21 of Regulation No 562/2006, must be ensured by setting up and complying with a framework of rules guaranteeing that the practical exercise of that power, consisting in carrying out identity controls, in the context of combating illegal residence and cross-border crime linked to illegal immigration, cannot have an effect equivalent to border checks (*Melki and Abdeli*, paragraphs 73 and 74).
- 69 In the second place, the fact that the territorial scope of the powers to carry out checks under national law, such as the Netherlands legislation, is limited to a border area does not suffice, in itself, to warrant the conclusion that the exercise of those powers has an equivalent effect, within the meaning of Article 21(a) of Regulation No 562/2006, in view of the wording and objectives of Article 21(a) (*Melki and Abdeli*, paragraph 72). The first sentence of that provision refers expressly to the exercise of police powers by the competent authorities of the Member States under national law, also in border areas.
- 70 It is true that, in relation to controls carried out on roads or waterways, the Court has held that the fact that the national provision at issue lays down specific rules regarding its territorial scope might be evidence of the existence of an equivalent effect, within the meaning of Article 21(a) of Regulation No 562/2006. However, given such evidence, compliance by those controls with that provision must be

ensured by the details and limitations contained in the framework for the practical exercise of the police powers enjoyed by the Member States, a framework which should be such as to avoid such an equivalent effect (see, to that effect, *Melki and Abdeli*, paragraph 72).

- 71 In the third place, contrary to what is argued by Mr Adil and the Czech Government, the fact that the MTV checks carried out in a border area do not depend on it first being shown that there is reasonable suspicion of illegal residence, in contrast to the identity checks for that purpose carried out in the remainder of the national territory, does not mean that the first mentioned checks must be regarded as having an effect equivalent to border checks.
- 72 According to Article 21(a)(ii) of Regulation No 562/2006, police measures based on general police information and experience regarding possible threats to public security may not be considered as having such an effect.
- 73 Furthermore, as can be seen from the observations of the German Government, the Commission's proposal seeking to require the same detailed rules and objectives with regard to the checks carried out by Member States within their territory was not accepted by the European Union legislature. The absence in Article 21(a) of Regulation No 562/2006 of a requirement that police checks in a border area be the same as those carried out in the entirety of the national territory is also confirmed by the fact that, by contrast, there is an explicit requirement to have the same checks under Article 21(b), with regard to security checks carried out at ports and airports.
- 74 In addition, in paragraph 74 of *Melki and Abdeli*, the Court already acknowledged that national legislation could confer a specific power on police authorities to carry out identity checks limited to a border area without being in breach of Article 21(a) of Regulation No 562/2006, provided that certain detailed rules and limitations are laid down and complied with.
- 75 It must however be stated that, the more extensive the evidence of the existence of a possible equivalent effect, within the meaning of Article 21(a) of Regulation No 562/2006, apparent from the objective pursued by the checks carried out in a border area, from the territorial scope of those checks and from the existence of a distinction between the basis of those checks and that of those carried out in the remainder of the territory of the Member State concerned, the greater the need for strict detailed rules and limitations laying down the conditions for the exercise by the Member States of their police powers in a border area and for strict application of those detailed rules and limitations, in order not to imperil the attainment of the objective of the abolition of internal border controls set out in Articles 3(2) TEU, 26(2) TFEU and 67(1) TFEU, and provided for in Article 20 of Regulation No 562/2006.
- 76 The framework required in that regard must be sufficiently clear and precise to enable the need for the checks and the checks actually authorised themselves to be checked.
- 77 With regard to that framework requirement, it should, first, be recalled that, as is apparent from paragraphs 60 to 67 above, the objectives pursued by MTV checks can be distinguished in certain essential respects from those pursued by border checks.
- 78 Second, it must be held that MTV checks are based, in accordance with Article 21(a)(ii) of Regulation No 562/2006, on general police information and experience regarding illegal residence after the crossing of a border. Police measures aimed at combating illegal residence, whether they fall under the concept of public order or public security, may, as is clear from paragraph 65 above, fall within the terms of that provision. The obligation to base MTV checks on such information and experiences should moreover contribute to the selectivity of the controls carried out.

- 79 Third, MTV checks are executed, in conformity with Article 21(a)(iii), of Regulation No 562/2006, in a manner clearly distinct from systematic checks on persons at the external borders of the European Union.
- 80 MTV checks may be carried out on roads and waterways in the common border area with Belgium and Germany, pursuant to Article 4.17a(5) of the decree of 2000, only for a limited number of hours per month and per day and only on some of the vehicles passing along those roads and waterways.
- 81 According, moreover, to the information provided by the Netherlands Government — to be verified by the referring court — the checks are carried out, in practice, either on the basis of profiling or on the basis of sample stops. The profiles depend on the information or data showing an increased risk of illegal residence or cross-border crime on certain routes, at certain times or on the basis of the type and other characteristics of the vehicles.
- 82 The detailed rules and limitations put in place by national legislation, such as Article 4.17a of the Decree of 2000, in order to define the intensity, frequency and selectivity of the checks which may be carried out, are such as to ensure that the practical exercise of the police powers granted under Netherlands law does not result — contrary to Article 21(a) of Regulation No 562/2006 — in checks which have an equivalent effect to border checks.
- 83 With regard to checks carried out in order to obtain information concerning illegal residence after crossing of the border, Article 4.17a(2) of the decree of 2000 provides that those ‘information’ checks may be carried out only to a limited degree.
- 84 Replying to a question asked at the hearing, the Netherlands Government and the Commission pointed out that those ‘information’ checks must also comply with the detailed rules and limitations set out in the decree of 2000 in response to the judgment in *Melki and Abdeli*. The Commission noted in particular that those checks must comply with the time restrictions laid down in Article 4.17a(5) of the decree of 2000, that is to say, 6 hours per day and a maximum of 90 hours per week. In addition, those checks may not be greater in number than the MTV checks which are the subject of question (2)(a) referred for a preliminary ruling.
- 85 Since only the national court enjoys jurisdiction to interpret national law, it is for it to establish whether that is the case.
- 86 Provided that those two types of MTV checks are carried out in compliance with the provisions of the framework provided for under Article 4.17a of the decree of 2000, it should be noted, first, that they are selective and thus not systematic like border checks and, second, that they are police measures applied on the basis of spot-checks, as required by Article 21(a)(iv) of Regulation No 562/2006.
- 87 Accordingly, it must be considered that, on the basis of the information in the Court’s possession, national law such as the Netherlands legislation at issue in the main proceedings provides detailed rules and limitations concerning the exercise of the police powers it confers on the competent authorities of the Member State concerned. Furthermore, those detailed rules and limitations are capable of affecting the intensity and frequency of the checks which may be carried out in the border area by those authorities and seek to guide the discretion enjoyed by them in the practical application of their powers.
- 88 In the light of the foregoing considerations, the answer to the questions referred for a preliminary ruling is that Articles 20 and 21 of Regulation No 562/2006 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which enables officials responsible for border surveillance and the monitoring of foreign nationals to carry out checks, in a geographic area 20 kilometres from the land border between a Member State and the State parties to the CISA, with a view to establishing whether the persons stopped satisfy the requirements for lawful residence

applicable in the Member State concerned, when those checks are based on general information and experience regarding the illegal residence of persons at the places where the checks are to be made, when they may also be carried out to a limited extent in order to obtain such general information and experience-based data in that regard, and when the carrying out of those checks is subject to certain limitations concerning, inter alia, their intensity and frequency.

Costs

- ⁸⁹ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Articles 20 and 21 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which enables officials responsible for border surveillance and the monitoring of foreign nationals to carry out checks, in a geographic area 20 kilometres from the land border between a Member State and the State parties to the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 19 June 1990, with a view to establishing whether the persons stopped satisfy the requirements for lawful residence applicable in the Member State concerned, when those checks are based on general information and experience regarding the illegal residence of persons at the places where the checks are to be made, when they may also be carried out to a limited extent in order to obtain such general information and experience-based data in that regard, and when the carrying out of those checks is subject to certain limitations concerning, inter alia, their intensity and frequency.

[Signatures]