

JUDGMENT OF THE COURT (Grand Chamber)

22 June 2010 (*)

(Article 67 TFEU – Freedom of movement for persons – Abolition of border control at internal borders – Regulation (EC) No 562/2006 – Articles 20 and 21 – National legislation authorising identity checks in the area between the land border of France with States party to the Convention Implementing the Schengen Agreement and a line drawn 20 kilometres inside that border)

In Joined Cases C- 188/10 and C- 189/10,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Cour de cassation (France), made by decisions of 16 April 2010, received at the Court on the same day, in proceedings against

Aziz Melki (C-188/10),

Sélim Abdeli (C-189/10),

THE COURT (Grand Chamber),

(...)

gives the following

Judgment

- 1 These references for a preliminary ruling concern the interpretation of Articles 67 TFEU and 267 TFEU.
- 2 The references have been made in the course of two sets of proceedings brought against Mr Melki and Mr Abdeli respectively – both of whom are of Algerian nationality – seeking the extension of their detention in premises not falling within the control of the prison service.

Legal context

European Union law

- 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; ‘Protocol No 19’):

‘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.’

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 (Luxembourg) on 19 June 1990 (‘the CISA’), Article 2 of which concerned the crossing of internal borders.

6 Under Article 2(1) to (3) of the CISA:

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

2. However, where public policy or national security so require a Contracting Party may, after consulting the other Contracting Parties, decide that for a limited period national border checks appropriate to the situation shall be carried out at internal borders. If public policy or national security require immediate action, the Contracting Party concerned shall take the necessary measures and at the earliest opportunity shall inform the other Contracting Parties thereof.

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 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).

8 Under Article 2, points 9 to 11, of that regulation:

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

...

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’.
- 9 Article 20 of Regulation No 562/2006, entitled ‘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.’
- 10 Article 21 of that regulation, entitled ‘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, in so far 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;
- ...
- (c) the possibility for a Member State to provide by law for an obligation to hold or carry papers and documents;
- ...’
- National law*
- (...)
- The Code of Criminal Procedure
- 15 Article 78-2 of the Code of Criminal Procedure (code de procédure pénale), in the version in force at the material time, provides:
- ‘Senior police officers and, upon their orders and under their responsibility, the police officers and assistant police officers referred to in Articles 20 and 21-1 may ask any person to prove his identity by any means, where one or more

plausible reasons exist for suspecting that:

- the person has committed or attempted to commit an offence;
- or the person is preparing to commit a “crime” [most serious criminal offence] or a “délit” [less serious offence];
- or the person is likely to provide information useful for the investigation in the event of a “crime” or a “délit”;
- or the person is the subject of inquiries ordered by a judicial authority.

On the public prosecutor’s written recommendations for the purposes of the investigation and prosecution of offences specified by him, the identity of any person may also be checked, in accordance with the same rules, in the places and for a period of time determined by the public prosecutor. The fact that the identity check uncovers offences other than those referred to in the public prosecutor’s recommendations shall not constitute a ground for invalidating the related proceedings.

The identity of any person, regardless of his behaviour, may also be checked pursuant to the rules set out in the first paragraph, to prevent a breach of public order, in particular, an offence against the safety of persons or property.

In an area between the land border of France with the States party to the Convention signed at Schengen on 19 June 1990 and a line drawn 20 kilometres inside that border, and in the publicly accessible areas of ports, airports and railway or bus stations open to international traffic, designated by order, the identity of any person may also be checked, in accordance with the rules provided for in the first paragraph, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled. Where that control takes place on board an international train, it may be carried out on the section of the journey between the border and the first stop situated beyond the 20 kilometres from the border. However, on international trains on lines with particular service characteristics the control may also be carried out between that stop and a stop situated within the next 50 kilometres. Those lines and those stops shall be designated by Ministerial order. Where there is a section of motorway starting in the area referred to in the first sentence of this paragraph and the first motorway tollbooth is situated beyond the 20 kilometre line, the control may also take place up to that first tollbooth, on parking areas and on the site of that tollbooth and the adjoining parking areas. The tollbooths concerned by this provision shall be designated by order. The fact that the identity check reveals an offence other than the non-observance of the aforementioned obligations shall not constitute a ground for invalidating the related proceedings.

...’

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

- 16 Mr Melki and Mr Abdeli, Algerian nationals unlawfully present in France, were subject to a police control, pursuant to Article 78-2, fourth paragraph, of the Code

of Criminal Procedure, in the area between the land border of France with Belgium and a line drawn 20 kilometres inside that border. On 23 March 2010, they were each made the subject of a deportation order from the Prefect and a decision for continued detention.

- 17 Before the juge des libertés et de la détention (Judge deciding on provisional detention), to which the Prefect had made an application for extension of that detention, Mr Melki and Mr Abdeli disputed the lawfulness of the check made on them and raised the issue of the constitutionality of Article 78-2, fourth paragraph, of the Code of Criminal Procedure, on the ground that that provision prejudices the rights and freedoms guaranteed by the Constitution.
- 18 By two orders of 25 March 2010, the juge des libertés et de la détention ordered, first, that the question whether Article 78-2, fourth paragraph, of the Code of Criminal Procedure prejudices the rights and freedoms guaranteed by the Constitution be submitted to the Cour de Cassation and, second, that the detention of Mr Melki and Mr Abdeli be extended by 15 days.
- 19 According to the referring court, Mr Melki and Mr Abdeli claim that Article 78-2, fourth paragraph, of the Code of Criminal Procedure is contrary to the Constitution, given that the French Republic's commitments resulting from the Treaty of Lisbon have constitutional value in the light of Article 88-1 of the Constitution, and that that provision of the Code of Criminal Procedure, in so far as it authorises border controls at the borders with other Member States, is contrary to the principle of freedom of movement for persons set out in Article 67(2) TFEU, which provides that the European Union is to ensure the absence of internal border controls for persons.
- 20 The referring court considers, first, that the issue arises whether Article 78-2, fourth paragraph, of the Code of Criminal Procedure is consistent both with European Union Law ('EU law') and with the Constitution.
- 21 Second, the Cour de cassation infers from Articles 23-2 and 23-5 of Order No 58- 1067, and from Article 62 of the Constitution, that courts adjudicating on the substance, like itself, are denied, by the effect of Organic Law No 2009-1523 which introduced those articles into Order No 58- 1067, the opportunity to refer a question to the Court of Justice of the European Union for a preliminary ruling, where a priority question on constitutionality has been referred to the Conseil constitutionnel.
- 22 As it takes the view that its decision on whether to refer the priority question on constitutionality to the Conseil constitutionnel depends on the interpretation of EU law, the Cour de cassation decided, in both cases which are pending, to stay proceedings and to refer the following questions to the Court for a preliminary ruling:
 - '1. Does Article 267 [TFEU] preclude legislation such as that resulting from Article 23-2, paragraph 2, and Article 23- 5, paragraph 2, of Order No 58- 1067 of 7 November 1958, created by Organic Law No 2009-1523 of 10 December 2009, in so far as those provisions require courts to

rule as a matter of priority on the submission to the Conseil constitutionnel of the question on constitutionality referred to them, inasmuch as that question relates to whether domestic legislation, because it is contrary to European Union law, is in breach of the Constitution?

2. Does Article 67 [TFEU] preclude legislation such as that resulting from Article 78-2, paragraph 4, of the Code of Criminal Procedure, which provides that “in an area between the land border of France with the States party to the Convention signed at Schengen on 19 June 1990 and a line drawn 20 kilometres inside that border, and in the publicly accessible areas of ports, airports and railway or bus stations open to international traffic, designated by order, the identity of any person may also be checked, in accordance with the rules provided for in the first paragraph, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are observed. Where that control takes place on board an international train, it may be carried out on the section of the journey between the border and the first stop situated beyond the 20 kilometres from the border. However, on international trains on lines with particular service characteristics the control may also be carried out between that stop and a stop situated within the next 50 kilometres. Those lines and those stops shall be designated by Ministerial order. Where there is a section of motorway starting in the area referred to in the first sentence of this paragraph and the first motorway tollbooth is situated beyond the 20 kilometre line, the control may also take place up to that first tollbooth, on parking areas and on the site of that tollbooth and the adjoining parking areas. The tollbooths concerned by this provision shall be designated by order”.’

(...)

The questions referred for a preliminary ruling

(...)

The second question

- 58 By its second question, the referring court seeks to know, in essence, whether Article 67 TFEU precludes national legislation which permits police authorities, within an area of 20 kilometres from the land border of a Member State with States party to the CISA, to check the identity of any person in order to ascertain whether he fulfils the obligations laid down by law to hold, carry and produce papers and documents.

Observations submitted to the Court

- 59 Mr Melki and Mr Abdeli are of the opinion that Articles 67 TFEU and 77 TFEU provide, purely and simply, that there should be no internal border controls and that the Treaty of Lisbon, on that basis, made freedom of movement for persons absolute, irrespective of the nationality of the persons concerned. Accordingly, that freedom of movement precludes a restriction such as that provided for in

Article 78- 2, fourth paragraph, of the Code of Criminal Procedure, which authorises the national authorities to carry out systematic identity checks in border areas. Furthermore, they seek an order that Article 21 of Regulation No 562/2006 is invalid, on the ground that it infringes in itself the absolute nature of the right to come and go as enshrined in Articles 67 TFEU and 77 TFEU.

- 60 The French Government contends that the national provisions at issue in the main proceedings are justified by the need to combat a specific type of criminality at border crossings and along borders which present specific risks. The identity checks carried out on the basis of Article 78- 2, fourth paragraph, of the Code of Criminal Procedure fully comply with Article 21(a) of Regulation No 562/2006. Their purpose is to establish the identity of a person, either in order to prevent the commission of offences or disruption to public order, or to seek the perpetrators of an offence. Those controls are also based on general information and police experience which have shown the particular benefit of checks in those areas. They are carried out on the basis of police information – coming from earlier police inquiries or from information obtained in the context of cooperation between the police forces of different Member States – which guide the placement and timing of the control. Those controls are not fixed, permanent or systematic. On the contrary, they are carried out as spot checks.
- 61 The German, Greek, Netherlands and Slovak Governments also propose a negative reply to the second question, pointing out that, even after the entry into force of the Treaty of Lisbon, non- systematic police checks in border areas are still permissible in compliance with the conditions laid down in Article 21 of Regulation No 562/2006. Those governments claim, inter alia, that identity checks in those areas, pursuant to the national legislation at issue in the main proceedings, are distinguishable by their purpose, their content, the way they are carried out and their effect from border control for the purpose of Article 20 of Regulation No 562/2006. Those checks can be authorised pursuant to the provisions of Article 21(a) or (c) of that regulation.
- 62 By contrast, the Czech Government and the Commission consider that Articles 20 and 21 of Regulation No 562/2006 preclude national legislation such as that at issue in the main proceedings. The checks under that legislation constitute disguised border controls which cannot be authorised under Article 21 of Regulation No 562/2006, given that they are only permitted in border areas and are subject to no condition other than that the person checked be in one of those areas.

The Court's reply

- 63 (...)
- 66 The Community legislature implemented the principle of the absence of internal border controls by adopting, pursuant to Article 62 EC, Regulation No 562/2006 which seeks, according to Recital 22 in the preamble to that regulation, to build on the Schengen *acquis*. That regulation establishes, in Title III, a Community scheme on the crossing of internal borders, replacing Article 2 of the CISA as from 13 October 2006. The applicability of that regulation has not been affected

by the entry into force of the Treaty of Lisbon. Protocol No 19 annexed thereto expressly provides that the Schengen *acquis* remains applicable.

- 67 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. Under Article 2, point 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.
- 68 As regards the controls provided for in Article 78- 2, fourth paragraph, of the Code of Criminal Procedure, it must be observed that they are carried out not ‘at borders’ but within the national territory and they do not depend on movement across the border by the person checked. In particular, they are not carried out at the time when the border is crossed. Thus, those controls constitute not border checks prohibited under Article 20 of Regulation No 562/2006, but checks within the territory of a Member State, covered by Article 21 of that regulation.
- 69 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. It follows that controls within the territory of a Member State are, pursuant to Article 21(a), prohibited only where they have an effect equivalent to border checks.
- 70 The exercise of police powers may not, under the second sentence of that provision, 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, lastly, are carried out on the basis of spot-checks.
- 71 In relation to the question whether the exercise of the control powers granted by Article 78- 2, fourth paragraph, of the Code of Criminal Procedure has an effect equivalent to border checks, it must be held, first, that the objective of the control under that provision is not the same as that of border control within the meaning of Regulation No 562/2006. The objective of that border control, according to Article 2, points 9 to 11, of that regulation, is, 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 border checks. By contrast, the national provision in question relates to checking whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled. The possibility for a Member State to provide for such obligations in its national law is not, pursuant to Article 21(c) of Regulation No 562/2006, affected by the abolition of border control at internal borders.
- 72 Second, the fact that the territorial scope of the power granted by the national provision at issue in the main proceedings is limited to a border area does not

suffice, in itself, to find that the exercise of that power has an equivalent effect within the meaning of Article 21(a) of Regulation No 562/2006, in view of the wording and objective of Article 21. However, as regards controls on board an international train or on a toll motorway, the national provision at issue in the main proceedings lays down specific rules regarding its territorial scope, a factor which might constitute evidence of the existence of such an equivalent effect.

- 73 Furthermore, Article 78- 2, fourth paragraph, of the Code of Criminal Procedure, which authorises controls irrespective of the behaviour of the person concerned and of specific circumstances giving rise to a risk of breach of public order, contains neither further details nor limitations on the power thus conferred – in particular in relation to the intensity and frequency of the controls which may be carried out on that legal basis – for the purposes of preventing the practical application of that power, by the competent authorities, from leading to controls with an effect equivalent to border checks within the meaning of Article 21(a) of Regulation No 562/2006.
- 74 In order to comply with Articles 20 and 21(a) of Regulation No 562/2006, interpreted in the light of the requirement of legal certainty, national legislation granting a power to police authorities to carry out identity checks – a power which, first, is restricted to the border area of the Member State with other Member States and, second, does not depend upon the behaviour of the person checked or on specific circumstances giving rise to a risk of breach of public order – must provide the necessary framework for the power granted to those authorities in order, *inter alia*, to guide the discretion which those authorities enjoy in the practical application of that power. That framework must guarantee that the practical exercise of that power, consisting in carrying out identity controls, cannot have an effect equivalent to border checks, as evidenced by, in particular, the circumstances listed in the second sentence of Article 21(a) of Regulation No 562/2006.
- 75 In those circumstances, the answer to the second question referred is that Article 67(2) TFEU, and Articles 20 and 21 of Regulation No 562/2006, preclude national legislation which grants to the police authorities of the Member State in question the power to check, solely within an area of 20 kilometres from the land border of that State with States party to the CISA, the identity of any person, irrespective of his behaviour and of specific circumstances giving rise to a risk of breach of public order, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled, where that legislation does not provide the necessary framework for that power to guarantee that its practical exercise cannot have an effect equivalent to border checks.

(...)