



Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE

delivered on 9 June 2022¹

Case C-69/21

X

v

Staatssecretaris van Justitie en Veiligheid

(Request for a preliminary ruling
from the rechtbank Den Haag, zittingsplaats 's-Hertogenbosch (District Court, The Hague, sitting
in 's-Hertogenbosch, Netherlands))

(Reference for a preliminary ruling – Border controls, asylum and immigration –
Immigration policy – Directive 2008/115/EC – Return of illegally staying third-country
nationals – National who is suffering from a serious illness and is the subject of a return
procedure – Medical treatment for pain relief – Treatment is not available in the country of
origin – Refusal to postpone removal – Charter of Fundamental Rights of the European
Union – Article 4 – Right not to be subjected to inhuman and degrading treatment –
Article 7 – Right to respect for private life)

1. In the present case, the Court is asked about the conditions under which the state of health of a third-country national may preclude the enforcement of his removal under Directive 2008/115/EC.²
2. The Court has already held, in the judgment in *MP (Subsidiary protection of a person previously a victim of torture)*,³ that Article 4 of the Charter of Fundamental Rights of the European Union ('the Charter') may, in principle, constitute a limit on the enforcement of a removal order for the purposes of Directive 2008/115. In the present case, having regard to its case-law and that of the European Court of Human Rights ('the ECtHR'), the Court is called upon to provide clarification of the criterion used in that judgment in order to identify the threshold of severity beyond which a violation of the prohibition of inhuman and degrading treatment may occur.
3. In particular, the Court is called upon to rule in the present case on whether, first, an increase in the pain experienced by a third-country national as a result of his removal, without any change in the symptoms of his illness, is such as to characterise a 'deterioration' or a 'decline' in the state

¹ Original language: French.

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).

³ Judgment of 24 April 2018 (C-353/16, EU:C:2018:276; 'the judgment in *MP (Subsidiary protection of a person previously a victim of torture)*').

of health of that foreign national within the meaning of the relevant case-law and, secondly, the Member States are entitled to lay down a strict period within which that deterioration or decline must occur.

4. Moreover, the Court will have to decide on the legal criteria to be applied in the event of a conflict between the enforcement of the removal of a third-country national and his right to respect for his private life, as set out in Article 7 of the Charter, by determining whether that national's state of health must be taken into account as a component of his private life.

I. Legal framework

A. European Union law

5. Articles 1, 5 and 9 of Directive 2008/115 and Articles 4, 7 and 19(2) of the Charter are relevant to the present case.

B. Netherlands law

6. Article 64 of the Vreemdelingenwet 2000 (Law of 2000 on foreign nationals; 'the Law on foreign nationals') provides:

'Removal shall be postponed as long as the state of health of the foreign national or of a member of his or her family prevents him or her from travelling.'

7. The Vreemdelingendecreet 2000 (Circular of 2000 on foreign nationals; 'the Circular on foreign nationals') provides:

'...

7. No deportation on health grounds

7.1. General provisions

The [Immigratie- en naturalisatiedienst (IND) (Immigration and Naturalisation Service, Netherlands)] may grant the postponement of departure under Article 64 of the [Law on foreign nationals] where:

- from a medical point of view, the foreign national is unable to travel; or
- there is a real risk of a violation of Article 3 of the [Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ("the ECHR")] on medical grounds.

7.1.1. The foreign national is unable to travel

The foreign national shall be granted a postponement of departure under Article 64 of the [Law on foreign nationals] if the [Bureau Medische Advisering (BMA) (Medical Advice Bureau of the Ministry of Security and Justice, Netherlands)] indicates that, from a medical point of view, the state of health of the foreign national or of a member of his or her family prevents him or her from travelling.

...

7.1.3. Real risk of a violation of Article 3 ECHR on medical grounds

The foreign national shall be granted a postponement of departure under Article 64 of the [Law on foreign nationals] where there is a real risk of a violation of Article 3 ECHR on medical grounds.

There is a real risk of a violation of Article 3 ECHR only where:

- it is apparent from the BMA's opinion that it is highly likely that the absence of medical treatment will cause a medical emergency; and
- the necessary medical treatment is not available in the country of origin or permanent residence; or
- if medical treatment is available, it appears that it is manifestly not accessible.

Medical emergency

The IND defines a medical emergency as a situation in which the foreign national suffers from a condition which, according to current medical and scientific knowledge, if left untreated, will result in death, disability or other serious psychological or physical harm within three months.

...'

II. Facts of the dispute, the procedure in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

8. X is a Russian national who was born in 1988. At the age of 16, he developed a rare form of blood cancer for which he is currently receiving treatment in the Netherlands. His medical treatment consists inter alia of phlebotomy and the administration of medicinal cannabis for pain management. The administration of that cannabis-based treatment is not authorised in Russia.

9. On 31 October 2013, X lodged a first application for asylum in the Netherlands. However, the Staatssecretaris van Justitie en Veiligheid considered that the Kingdom of Sweden was responsible for processing that application. That decision has become final.

10. On 13 December 2013, X requested, pursuant to Article 64 of the Law on foreign nationals, that his removal be postponed because of his medical issues. The defendant rejected that request by decision of 24 December 2013, which has also become final.

11. On 19 May 2016, X lodged a new application for asylum in the Netherlands, the period within which he could be transferred to Sweden having expired. In support of that application, X claimed that the medical treatment he had received in Russia caused him side effects and that he had subsequently discovered that taking medicinal cannabis was more suited to his condition. Since the use of cannabis is not permitted in his country of origin, he had grown cannabis plants for medicinal purposes, which had caused him such problems that he now required international protection. In that application, X had also again requested that his removal be postponed pursuant to Article 64 of the Law on foreign nationals.

12. After receiving the opinion of the BMA, by decision of 29 March 2018, the Secretary of State rejected X's application for asylum taking the view that the problems which the applicant claimed to have faced in Russia were not credible. The Secretary of State also decided that the applicant could not obtain an ordinary residence permit and refused to grant his request to suspend the enforcement of his obligation to return, pursuant to Article 64 of the Law on foreign nationals.

13. By judgment of 20 December 2018, confirmed by the Raad van State (Council of State, Netherlands) on 28 March 2019, the rechtbank Den Haag zittingsplaats 's-Hertogenbosch (District Court, The Hague, sitting in 's-Hertogenbosch Netherlands) partially annulled that decision. Thus, while it confirmed that X could not claim refugee status or subsidiary protection, it ordered the Secretary of State to re-examine both X's argument based on his right to obtain a residence permit on the basis of Article 8 ECHR and his request for the application of Article 64 of the Law on foreign nationals.

14. On 19 February 2020, the Secretary of State again refused to grant X a residence permit for a limited duration, under Article 8 ECHR, and to postpone his removal. By the same act, the Secretary of State adopted a return decision ordering X to leave the territory of the Netherlands within four weeks.

15. X brought an action against that decision before the referring court. He considers that he should be issued with a residence permit under Article 8 ECHR or, at the very least, his removal should be postponed under Article 64 of the Law on foreign nationals. In that regard, he submits that the treatment of pain using cannabis is so essential to him that he would no longer be able to lead a decent life if that treatment was discontinued. He states, in particular, that, in the event of his treatment being discontinued, the pain would be so great that he would no longer be able to sleep or eat, which would have not only physical but also psychological consequences, making him depressed and suicidal.

16. The referring court notes at the outset that, in accordance with Netherlands legislation, removal may be postponed where, from a medical point of view, the foreign national is unable to travel or there is a real risk of a violation of Article 3 ECHR on medical grounds. The latter assumes that it is apparent from the BMA's opinion that, first, discontinuing medical treatment will in all probability result in a 'medical emergency' and, secondly, appropriate treatment is not available in the country of origin or the foreign national will not be able to access it.

17. In the context of the asylum procedure initiated on 19 May 2016, X submitted various medical documents in order to substantiate his claim that his health problems are such as to justify the suspension of his removal.

18. In its opinions issued at the request of the Secretary of State, the BMA stated inter alia that although, without phlebotomy, it could be expected that X would face a short-term medical emergency, that treatment was nevertheless available in Russia. However, the BMA considered that, since the medicinal effect of cannabis has not been demonstrated, it was impossible to take a position on the medical consequences of discontinuing cannabis-based treatment. The BMA also noted that there were no reports of pain-related disorders that would lead to fears of X dying or becoming dependant on others to perform everyday activities. The BMA therefore considered that it could not be claimed that the use of cannabis prevents the occurrence of a short-term medical emergency. Lastly, the BMA stated that there are sufficient alternative painkillers that could be administered to X.

19. According to the referring court, it is apparent, however, from the information submitted by X that the doctors treating him consider that medicinal cannabis is the only adequate treatment to combat the pain and that other analgesics are contraindicated. Moreover, that court takes the view that X has demonstrated to the requisite legal standard that medicinal cannabis-based treatment is prescribed and used only when other pain relief has been proven to be not only ineffective but has also been contraindicated.

20. The referring court also notes that no appropriate treatment for pain, including medicinal cannabis, was available in X's country of origin. Therefore, if he is not granted a postponement of removal, his treatment for pain will be discontinued and he will be in increased pain. In that regard, that court points out that X has submitted information which shows that the pain is just bearable when treated with medicinal cannabis. However, it cannot be determined from that information whether the increase in pain caused by discontinuing his treatment will lead to a worsening of the symptoms of his illness, even though it is likely, on the basis of the information available to the referring court, that that will not be the case.

21. Before requesting a medical opinion on the increase in pain intensity which X might experience if he is no longer treated with medicinal cannabis, the referring court therefore considers it necessary to establish, by an interpretation of EU law, the legal framework governing the consideration of such a factor.

22. In that regard, the referring court notes, in the first place, that the Court has not yet interpreted Article 19(2) of the Charter, read in conjunction with Articles 1 and 4 thereof, in order to determine whether medical grounds may preclude the removal of a third-country national where the symptoms of his illness are unlikely to worsen, but the intensity of his pain will increase considerably, if he were to return, on the ground that appropriate medical treatment is not available in his country of origin.

23. In the second place, that court observes that, according to the settled case-law of the Raad van State (Council of State), which relies on a rapid deterioration in the person's state of health within the meaning of the judgment in *Paposhvili v. Belgium*,⁴ only the medical consequences that occur within a period of three months after discontinuation of the medical treatment must be taken into account to determine whether a medical emergency will arise if the treatment is discontinued. According to the referring court, the ECtHR did not set an explicit deadline in that judgment. It therefore considers it necessary to determine whether the consequences of discontinuing the

⁴ ECtHR, 13 December 2016, CE:ECHR:2016:1213JUD004173810 ('the judgment in *Paposhvili*').

medical treatment of a third-country national who is seriously ill if he is returned to his country of origin may fall within the scope of Article 4 of the Charter only if they occur within a period of three months, irrespective of the nature of the illness and irrespective of the medical treatment.

24. In the third place, the referring court notes that the Raad van State (Council of State) has held that Article 64 of the Law on foreign nationals also requires an examination of whether the removal order, as such, in respect of a third-country national who has a particularly serious mental or physical condition may lead to a real risk of a violation of Article 3 ECHR. However, that assessment is made only when examining whether that foreign national is able to travel, with the result that the BMA has never been asked whether medical consequences may result from the mere removal and those consequences are not taken into account in order to establish whether a ‘medical emergency’, within the meaning of the Circular on foreign nationals, precludes such removal where the medical treatment that that national receives is not available or is not accessible in the country of origin.

25. In the context of such a review, that court considers that it will be difficult for an increase in psychological consequences, such as a risk of suicide, to prevent removal even though it may cause a medical emergency.

26. In the fourth place, the referring court considers that it is necessary to determine whether the medical situation of a national and the fact that he is receiving medical treatment in the Member State in which he resides may constitute an aspect of private life which must be respected in accordance with Article 7 of the Charter and Article 8 ECHR.

27. In the present case, X submits that his medical treatment falls within the scope of respect for his private life and precludes his removal.

28. In those circumstances, the referring court asks whether the competent authorities of a Member State must examine whether a right of residence must be granted, by virtue of the right to respect for private life, to a third-country national on account of his serious medical problems and the medical treatment he is receiving in that State and whether respect for that national’s private life is a factor to be taken into consideration for the purposes of deciding on his application for a postponement of the removal order to which he is subject.

29. In those circumstances, the rechtbank Den Haag, zittingsplaats ’s-Hertogenbosch (District Court, The Hague, sitting in ’s-Hertogenbosch Netherlands) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘(1) Can a significant increase in pain intensity due to a lack of medical treatment, while the clinical picture remains unchanged, constitute a situation which is contrary to Article 19(2) of the [Charter] ..., read in conjunction with Articles 1 and 4 thereof, if no postponement of the departure obligation resulting from [Directive 2008/115] ... is permitted?
- (2) Is the setting of a fixed period within which the consequences of the lack of medical treatment must materialise in order to constitute a medical obstacle to an obligation to return resulting from [Directive 2008/115] compatible with Article 4 of the Charter, read in conjunction with Article 1 of the Charter? If the setting of a fixed period is not contrary to EU law, is a Member State then permitted to set a general period that is the same for all possible medical conditions and all possible medical consequences?

- (3) Is a determination that the consequences of expulsion should be assessed solely in terms of whether, and under what conditions, the foreign national can travel, compatible with Article 19(2) of the Charter, read in conjunction with Articles 1 and 4 thereof, and [Directive 2008/115]?
- (4) Does Article 7 of the Charter, read in conjunction with Articles 1 and 4 thereof, and in the light of [Directive 2008/115], require that the medical condition of the foreign national and the treatment he is undergoing in the Member State be assessed when determining whether private life considerations should result in permission to stay being granted? Does Article 19(2) of the Charter, read in conjunction with Articles 1 and 4 thereof, and in the light of [Directive 2008/115], require that private life and family life, as referred to in Article 7 of the Charter, be taken into account when assessing whether medical problems may constitute an obstacle to expulsion?
30. Written observations have been submitted by X, the Netherlands Government and the European Commission.
31. The same parties were heard at the hearing held on 7 March 2022.

III. Analysis

A. The Court's jurisdiction and the admissibility of the questions referred for a preliminary ruling

32. The Netherlands Government submits, in the first place, that the questions referred for a preliminary ruling are inadmissible in so far as they have been referred prematurely by the national court. Since Directive 2008/115 applies only where the third-country national concerned is staying illegally, the interpretation of that directive, read in conjunction with the Charter, is not, according to that government, necessary for the resolution of the dispute in the main proceedings since the referring court must first establish whether X is entitled to obtain a residence permit in the Netherlands.

33. To dismiss that argument, it is sufficient to point out that, according to the Court's settled case-law, national courts are free to refer matters to the Court *at whatever stage of the proceedings they consider appropriate*,⁵ and therefore a reference for a preliminary ruling cannot be regarded as inadmissible merely because it was made at an early stage of the national proceedings. Moreover, the Court has already agreed to answer questions referred to it by a national court before that court has examined whether the dispute could be resolved under national legislation alone.⁶

34. In the second place, the Netherlands Government considers that the second question referred for a preliminary ruling is inadmissible in so far as it concerns the legality of a strict time limit applicable for the purposes of assessing the deterioration in the state of health of any third-country national in the event of enforcement of his removal, even though that time limit is not a decisive factor for the resolution of the dispute in the main proceedings.

⁵ See, inter alia, judgment of 26 June 2019, *Addiko Bank* (C-407/18, EU:C:2019:537, paragraphs 35 and 39).

⁶ Judgment of 29 October 2020, *Veselibas ministrija* (C-243/19, EU:C:2020:872, paragraph 63).

35. That argument cannot be accepted. The return decision adopted against X was based *inter alia* on it being ruled out that a short-term medical emergency would occur if he were returned. There is no doubt that, in accordance with the applicable Netherlands legislation, the existence of a medical emergency is assessed in the light of the three-month period provided for in the Circular on foreign nationals. I would add that the question of the legality of that period becomes all the more crucial given that it is apparent from the order for reference, contrary to the claims made by the Netherlands Government in its written observations, that X's pain is linked to the illness from which he suffers and that no alternative treatment to alleviate his pain exists in Russia, his country of origin.

36. In the third place, and lastly, the Netherlands Government considers that the Court lacks jurisdiction to rule on the fourth question referred for a preliminary ruling in so far as it concerns whether a right of residence may be derived from Article 8 ECHR. According to that government, that question would also be inadmissible if the referring court were to seek to ascertain whether Article 7 of the Charter requires Member States to grant a right of residence to any third-country national in X's situation.

37. I must again express my disagreement with the arguments put forward by the Netherlands Government. First, it is common ground that that question does not relate to Article 8 ECHR, but to Article 7 of the Charter. Secondly, the question of whether a right of residence must be granted to that third-country national falls within the scope of the examination of the substance of the fourth question referred for a preliminary ruling.⁷

38. I therefore consider that the Court has jurisdiction to hear the present reference for a preliminary ruling and that it is admissible in its entirety.

B. Substance

1. The first and second questions

39. By its first two questions, the referring court asks, in essence, whether Directive 2008/115, read in conjunction with Article 4 and Article 19(2) of the Charter, must be interpreted as meaning that it does not preclude a third-country national, who is seriously ill and staying illegally on the territory of a Member State, from being subject to a removal order where, on account of the legal unavailability in his country of origin of the only effective analgesic treatment, he will be exposed to a significant increase in his pain, without any change in the other symptoms of his illness, or, at the very least, where such a significant increase in his pain will occur more than three months after his return to his country of origin.

(a) Preliminary observations

40. As a preliminary point, it should be noted that, according to the information provided by the referring court, X, the third-country national concerned, cannot claim refugee status, subsidiary protection or an ordinary residence permit in the Netherlands. X is staying illegally, in accordance with Article 3(2) of Directive 2008/115, in so far as he is present on the territory of the Netherlands without fulfilling the conditions of entry as set out in Article 5 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union code

⁷ See judgment of 29 March 2012, *3M Italia* (C-417/10, EU:C:2012:184, paragraph 23).

on the rules governing the movement of persons across borders (Schengen Borders Code)⁸ or other conditions for entry, stay or residence in that Member State. It follows that the situation of X is subject to the provisions of that directive.

41. In particular, that directive requires the Member States to issue a return decision to any third-country national staying illegally (Article 6) and to take all necessary measures to enforce that decision if that third-country national does not depart voluntarily (Article 8). Since the execution of national return procedures constitutes the implementation of Directive 2008/115 for the purposes of Article 51 of the Charter, the Charter is applicable in the present case.

42. By reason of the fact that X is suffering from a serious illness, the referring court considers that the enforcement of his removal may be precluded by Article 4 of the Charter ('No one shall be subjected to torture or to inhuman or degrading treatment or punishment') and Article 19(2) thereof ('No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to ... inhuman or degrading treatment ...'). Since that prohibition is reaffirmed, in essence, in Article 5 of Directive 2008/115, reference must be made, in the first two questions as reformulated, to that provision, read in conjunction with Article 4 and Article 19(2) of the Charter.

43. As stated in the explanations relating to the Charter,⁹ the right in Article 4 of the Charter is the right guaranteed by Article 3 ECHR, whereas Article 19(2) of the Charter reflects the relevant case-law from the ECtHR regarding Article 3 ECHR. It follows, in accordance with Article 52(3) of the Charter, that the meaning and scope of those two provisions must be the same as the meaning and scope laid down by the ECHR in Article 3, unless this would affect the autonomy of EU law and of the Court.

44. The question as to whether, and possibly under what conditions, Article 4 and Article 19(2) of the Charter¹⁰ preclude the removal by a Member State of a third-country national who is seriously ill and is staying illegally therefore depends on an examination of the judgments of the ECtHR in *N. v. the United Kingdom*¹¹ and *Paposhvili* and the judgments of the Court, which are largely dependent on the principles established by the ECtHR, in *Abdida, C. K. and Others*¹² and *MP (Subsidiary protection of a person previously a victim of torture)*. That examination will enable the applicable legal criterion to be identified in order to determine whether that removal complies with the prohibition of inhuman and degrading treatment.

45. Before I start my analysis, it is necessary briefly to explain why the case-law of the Court arising from the judgments in *N.S. and Others*, *Jawo* and *Ibrahim and Others*,¹³ which transposed the guidance from the judgment of the ECtHR in *M.S.S. v. Belgium and Greece*,¹⁴ is not applicable to the circumstances of the case in the main proceedings, as was argued by all interested parties at the hearing.

⁸ OJ 2016 L 77, p. 1.

⁹ OJ 2007 C 303, p. 17.

¹⁰ For the sake of simplicity, in the remainder of this Opinion I shall refer only to Article 4 of the Charter, since Article 19(2) thereof is an application in the event of removal of the prohibition of inhuman and degrading treatment enshrined in Article 4.

¹¹ ECtHR, 27 May 2008, CE:ECHR:2008:0527JUD002656505.

¹² Judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453), and of 16 February 2017, *C. K. and Others* (C-578/16 PPU, EU:C:2017:127).

¹³ Judgments of 21 December 2011, *N.S. and Others* (C-411/10 and C-493/10, EU:C:2011:865); of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218); and of 19 March 2019, *Ibrahim and Others* (C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219).

¹⁴ ECtHR, 21 January 2011, CE:ECHR:2011:0121JUD003069609.

46. In those judgments, the Court held that the transfer of an applicant for international protection from one Member State to another disregards the prohibition of inhuman and degrading treatment where that person is ‘wholly dependent on State support’ and that ‘the indifference of the authorities of [the latter State] would result in [that person] finding himself, irrespective of his wishes and personal choices, in a *situation of extreme material poverty* that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that *undermines his physical or mental health* or puts him in a state of degradation incompatible with human dignity’.¹⁵

47. There is little doubt, in my view, that, having regard to the absolute nature of Article 4 of the Charter, that criterion may also be used where a Member State intends to return an illegally staying third-country national to his country of origin. It should be noted, however, that, in the present case, X merely maintains that his return to Russia would seriously damage his health and at no point does he claim that he is wholly dependent on State support and, if returned to Russia, he would find himself in a situation of ‘extreme material poverty’ on account of the indifference of the authorities of that country. It seems to me that the abovementioned case-law requires the existence of a causal link between that extreme material poverty caused by the indifference of the national authorities concerned and the deterioration in the state of health of the person concerned. Such case-law does not therefore apply to the present case.

(b) Article 3 ECHR as a guarantee against refoulement in the case-law of the ECtHR

48. The finding that paved the way for the assessment of the conformity with Article 3 ECHR of removal measures adopted by public authorities against persons suffering from a serious illness appears in the judgment in *D. v. the United Kingdom*.¹⁶ In that judgment, the ECtHR held that the examination of an expulsion measure under Article 3 ECHR cannot be made conditional on the fact that the risk to the individual subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities in the receiving country. In its view, there is nothing to prevent it from examining situations where the source of the risk stems from factors which cannot engage either directly or indirectly the responsibility of those public authorities or which, taken alone, do not in themselves infringe the provisions of that article.

49. That approach was developed in the judgment in *Pretty v. the United Kingdom*, according to which: ‘The suffering which flows from naturally occurring illness ... may be covered by Article 3 [ECHR], where it is, or risks being, *exacerbated* by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible’.¹⁷

50. With regard to a decision to expel an individual with AIDS, the ECtHR held, in its judgment in *D. v. the United Kingdom*, that the enforcement of that decision would expose that individual to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment within the meaning of Article 3 ECHR. In that regard, it noted that, although aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of the host State in order to continue to benefit from medical and social assistance provided to them by that State, the violation of Article 3 ECHR was motivated by the ‘very exceptional circumstances’ of the case at issue and the ‘compelling humanitarian considerations’ which were

¹⁵ Judgments of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218, paragraph 92), and of 19 March 2019, *Ibrahim and Others* (C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, paragraph 90). Emphasis added.

¹⁶ ECtHR, 2 May 1997, CE:ECHR:1997:0502JUD003024096, §§ 49 and 50.

¹⁷ ECtHR, 29 April 2002, CE:ECHR:2002:0429JUD000234602, § 52. Emphasis added.

at stake.¹⁸ The ECtHR took account inter alia of the fact that the addressee of the expulsion decision was reaching the final stages of his terminal illness and that the abrupt withdrawal of the medical services provided in the host State and the lack of appropriate treatment in his country of origin would reduce his life expectancy and cause him acute mental and physical suffering.¹⁹

51. In the case of *N. v. the United Kingdom*,²⁰ the ECtHR was asked, in essence, to set that threshold at a lower level, by adopting a broader interpretation of the concept of ‘very exceptional circumstances’.

52. That case concerned the expulsion of an HIV-positive person who was in a stable condition as a result of the medical treatment she had received in the host State. It was not disputed, however, that, if that treatment was discontinued, the person concerned’s state of health would have deteriorated rapidly and she would have died within a few years following a period of discomfort and suffering. In that regard, the applicant claimed, first, that she was unable to afford the necessary medication for such treatment in her country of origin, Uganda, and, secondly, that her family who lived there were neither willing nor able to care for her if she was seriously ill.

53. The ECtHR nevertheless considered that the high threshold of seriousness established in the judgment in *D. v. the United Kingdom* and applied in its subsequent case-law had to be maintained.²¹

54. In order to establish whether the case *N. v. the United Kingdom* was marked by very exceptional circumstances, it thus focused on the gravity of the applicant’s medical condition at the moment of the intended removal without carrying out a detailed consideration of whether the required treatment and care would be available in practice to the applicant in the receiving country. More specifically, the ECtHR considered that the fact that the applicant was not, at the time when the judgment was delivered, critically ill and was fit to travel was such as to exclude the existence of ‘very exceptional circumstances’ and, therefore, a violation of Article 3 ECHR. For the purposes of such an assessment, the fact that, if she were removed to Uganda, the person concerned’s condition would deteriorate and in particular her life expectancy would fall was, in that court’s view, irrelevant.²²

55. More recently, the ECtHR took the view, in its judgment in *Paposhvili*, that the application of Article 3 ECHR only in cases where the person facing expulsion is close to death, which had been its practice since the judgment in *N. v. the United Kingdom*,²³ has deprived aliens who are seriously ill, but whose condition is less critical, of the benefit of that provision. The requirement to ensure the effectiveness of Article 3 ECHR thus required, in its view, the expression ‘other very exceptional cases’ to be interpreted as meaning that the protection enshrined in that provision must also be afforded to those persons.²⁴

56. More specifically, the ECtHR held that ‘other very exceptional cases’ should also be understood to refer to ‘situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of

¹⁸ ECtHR, 2 May 1997, *D. v. the United Kingdom*, CE:ECHR:1997:0502JUD003024096, § 54.

¹⁹ Ibid., §§ 50 to 52.

²⁰ ECtHR, 27 May 2008, CE:ECHR:2008:0527JUD002656505.

²¹ Ibid., § 43.

²² Ibid., §§ 50 and 51.

²³ ECtHR, 27 May 2008, CE:ECHR:2008:0527JUD002656505.

²⁴ Judgment in *Paposhvili*, §§ 181 and 183.

dying, would face a *real* risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a *serious, rapid and irreversible* decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy'.²⁵

57. In that case, the applicant was suffering from an extremely serious illness. According to the information he had provided, his state of health had stabilised as a result of the treatment he received in Belgium and, if that treatment had to be discontinued, his life expectancy, based on the average, would have been less than six months. The ECtHR took the view that the applicant's claims that that treatment was not available in his country of origin and that there was no guarantee that he would have access to other forms of treatment for his illness available in that country were credible.²⁶ A violation of Article 3 ECHR could therefore be established, according to the ECtHR, in the absence of any assessment by the competent national authorities of the risk facing the applicant in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia.²⁷

58. The criterion used in the judgment in *Paposhvili* to determine whether the enforcement of a removal order against a seriously ill person constitutes inhuman or degrading treatment within the meaning of Article 3 ECHR has most recently been confirmed by the Grand Chamber of the ECtHR in the case of *Savran v. Denmark*.²⁸

59. The scope of that criterion must be clarified. While this certainly implies a broadening of the scope of Article 3 ECHR, resulting from the definition of a threshold of severity allowing for the inclusion of persons who are not close to death among the beneficiaries of the protection afforded by that article, the ECtHR has been particularly keen to highlight the *relative* nature of that extension,²⁹ as is apparent in particular from three factors. First, it reiterated that the cases in which Article 3 ECHR precludes the enforcement of the removal of a seriously ill person are 'very exceptional'. Secondly, it stated that those situations 'correspond to a high threshold for the application of Article 3 [ECHR] in cases concerning the removal of aliens suffering from serious illness'. Thirdly the threshold of severity which it has set implies that the decline in the state of health of the person subject to a removal order is not only 'serious' and 'irreversible', but also 'rapid'. Whereas the first two elements are essential elements of the harm risked, where there is a purely potential violation of the ECHR,³⁰ even if it is foreseeable, the latter element is explained only by the intention to limit as far as possible the circle of individuals who can benefit from the protection provided for in Article 3 ECHR.

(c) Article 4 of the Charter as a guarantee against refoulement in the case-law of the Court

60. As regards the relevant case-law of the Court, it should be noted that the Court has on four occasions expressly identified the criterion to be applied in order to determine whether the forced removal of a seriously ill person constitutes inhuman and degrading treatment within the meaning of Article 3 ECHR.

²⁵ Ibid., § 183. Emphasis added.

²⁶ Ibid., §§ 194 to 198.

²⁷ Ibid., §§ 205 and 206.

²⁸ ECtHR, 7 December 2021, CE:ECHR:2021:1207JUD005746715.

²⁹ See, to that effect, Mavronicola, N., 'Specifying the *Non-Refoulement* Duty under Article 3 ECHR', *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs*, Hart Publishing, Oxford, 2021, p. 181.

³⁰ ECtHR, 7 July 1989, *Soering v. the United Kingdom*, CE:ECHR:1989:0707JUD001403888, § 90.

61. In *Abdida*, the Court considered, in the light of the judgment of the ECtHR in *N. v. the United Kingdom*,³¹ that the enforcement of a return decision entailing the removal of a third-country national suffering from a serious illness to a country in which appropriate treatment is not available infringes Article 4 of the Charter in very exceptional cases. It also stated that those very exceptional cases are characterised by the seriousness and irreparable nature of the harm that may be caused by the removal of a third-country national to a country in which there is a serious risk that he will be subjected to inhuman or degrading treatment. In order for an appeal to be effective in respect of a return decision, the Court states that the remedy must have suspensive effect, since the enforcement of that decision would expose that national to a *serious risk of grave and irreversible deterioration in his state of health*.³² That criterion was then repeated in the judgment in *CPAS de Seraing*.³³

62. In *C. K. and Others*, the Court was asked whether the transfer from Slovenia to Croatia, within the framework of the Dublin system, of an asylum seeker with a particularly serious psychiatric condition, namely post-natal depression and periodic suicidal tendencies, constituted inhuman and degrading treatment within the meaning of Article 4 of the Charter.

63. In that regard, the Court first of all stated that, in the light of the case-law of the ECtHR, it could not be ruled out that the transfer of an applicant may, in itself, result, for the person concerned, in a real risk of inhuman or degrading treatment, irrespective of the quality of the reception and the care available in the Member State concerned.³⁴

64. In respect of the criterion to be applied in order to determine whether there has been an infringement of Article 4 of the Charter in that situation, the Court held that the transfer of an asylum seeker constitutes inhuman and degrading treatment if it results in a *real and proven risk of a significant and permanent deterioration in the state of health* of that person.³⁵ It then added that once the asylum seeker has provided objective evidence which is sufficient to demonstrate the particularly serious nature of his state of health and the significant and irreversible consequences of a transfer on his health, it is for the competent national authorities to examine that evidence by taking into consideration *all* the consequences that might arise from the transfer, and not considering only the consequences of physically transporting the asylum seeker.³⁶

65. That approach was confirmed and applied in the context of Directive 2008/115 by the Grand Chamber of the Court in its judgment in *MP (Subsidiary protection of a person previously a victim of torture)*. The Court was called upon to rule on the question of whether subsidiary protection should be granted to a national who has been tortured by the authorities of his country of origin and suffers severe psychological after-effects which, in the event of him being returned to his country of origin, could be substantially aggravated.

³¹ ECtHR, 27 May 2008, *N. v. the United Kingdom*, CE:ECHR:2008:0527JUD002656505.

³² Judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453, paragraphs 45 to 50).

³³ Judgment of 30 September 2020 (C-402/19, EU:C:2020:759, paragraph 36).

³⁴ Judgment of 16 February 2017, *C. K. and Others* (C-578/16 PPU, EU:C:2017:127, paragraphs 68 and 71 to 73).

³⁵ Judgment of 16 February 2017, *C. K. and Others* (C-578/16 PPU, EU:C:2017:127, paragraph 74).

³⁶ Judgment of 16 February 2017, *C. K. and Others* (C-578/16 PPU, EU:C:2017:127, paragraphs 75 and 76).

66. In examining that question, it noted, *inter alia*, that, according to the case-law of the ECtHR on the removal of persons who are seriously ill, the suffering resulting from removal must reach a minimum level of severity in order to give rise to a violation of Article 3 ECHR and recalled that that assessment is carried out by the ECtHR by applying the criterion set out in the judgment in *Paposhvili*.³⁷

67. At that stage of its reasoning, it was reasonable to expect the Court to adopt that criterion by stating that it must also be used to define the situations in which Article 4 of the Charter precludes the removal of a seriously ill person. However, the next paragraph of the judgment in *MP (Subsidiary protection of a person previously a victim of torture)* states that: ‘Similarly, Article 4 of the Charter must be interpreted as meaning that the removal of a third country national with a particularly serious mental or physical illness constitutes inhuman and degrading treatment ... where such removal would result in a *real and demonstrable risk of significant and permanent deterioration in the state of health of the person concerned*’.³⁸

68. The criterion applied here, which the Court had already used in its judgment in *C. K. and Others*,³⁹ differs from that resulting from the judgment in *Paposhvili*. While it is true that the expression ‘significant and permanent deterioration’ appears to be semantically equivalent to a ‘serious ... and irreversible decline’, it must nevertheless be noted that that criterion does not require either that the deterioration in the person concerned’s state of health results in ‘intense suffering’ or a ‘significant reduction in life expectancy’, or that such deterioration is also ‘rapid’. On that last point, the Court stated that the application of that criterion involves the consideration of ‘*all* the significant and permanent consequences that might arise from the removal’.⁴⁰

69. It follows that the Court intended to set the relevant threshold of severity for the application of Article 4 of the Charter in those types of cases at a level below that required by Article 3 ECHR according to the judgment in *Paposhvili*, and therefore the former precludes the removal of a seriously ill person in a wider range of situations than the latter. In other words, that case-law of the Court reflects a more protective choice of interpretation of the right not to be subjected to inhuman and degrading treatment.

70. That choice, moreover, falls within the scope of the Court’s powers. While it is true that Article 52(3) of the Charter requires that the rights recognised in it that correspond to the rights guaranteed by the ECHR are understood as having the same meaning and the same scope as the latter, it is now common ground that, so long as the ECHR does not constitute a legal instrument which has been formally incorporated into EU law, the requirement of consistency pursued by that provision cannot adversely affect the autonomy of EU law and that of the Court itself. It follows that the Court may legitimately confer on those rights a different meaning and scope from the rights enshrined in the ECHR, provided its interpretation leads to a higher level of protection than that guaranteed by the ECHR,⁴¹ which has been achieved in this case.

³⁷ Judgment in *MP (Subsidiary protection of a person previously a victim of torture)*, paragraphs 36 to 40.

³⁸ Judgment in *MP (Subsidiary protection of a person previously a victim of torture)*, paragraph 41. Emphasis added.

³⁹ Judgment of 16 February 2017 (C-578/16 PPU, EU:C:2017:127).

⁴⁰ Judgment in *MP (Subsidiary protection of a person previously a victim of torture)* paragraphs 41 and 42. Emphasis added. See also judgment of 16 February 2017, *C. K. and Others* (C-578/16 PPU, EU:C:2017:127, paragraph 76).

⁴¹ Judgments of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 47); of 14 September 2017, *K.* (C-18/16, EU:C:2017:680, paragraph 50); and of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraphs 22 and 23). See, also, my Opinion in Joined Cases *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:294, points 148 and 149).

71. That reading of the judgment in *MP (Subsidiary protection of a person previously a victim of torture)* is supported by the fact that, in that judgment, the expression ‘similarly’ links the criterion laid down by the Court to the reference to the criterion resulting from the judgment in *Paposhvili*, since the use of such an expression demonstrates, by definition, a relationship of similarity and not of substantial equivalence.

(d) Application to the case in the main proceedings

72. As a preliminary point, it should be recalled that, as is clear from the order for reference, X suffers from a particularly serious illness requiring specific medical treatment. It is undisputed that, if he were expelled, X could nevertheless obtain that treatment since it is available and accessible in Russia. However, in the event of removal, X would no longer have access to the cannabis-based treatment which he has been prescribed by the doctor and which is currently administered to him for the purposes of managing the pain caused by his illness as that treatment is not authorised in Russia. Although it seems unlikely that discontinuing that treatment would cause an aggravation of his illness, the referring court considers that, in the light of the relevant documentation produced by the applicant in the main proceedings, discontinuing the treatment would lead to an increase in the suffering experienced by X since all the other analgesic treatments that could be administered to him in Russia are inappropriate.

73. In those circumstances, the question arises as to whether the finding of increased suffering may, *on its own*, be capable of characterising a ‘deterioration in the state of health’ for the purposes of applying the case-law of the Court recalled in the previous section of this Opinion. I consider that the answer must necessarily be in the affirmative. It must be recalled that that case-law is based on the premiss, set out by the ECtHR, that the mere suffering caused by an illness, whether naturally occurring or not, may be covered by Article 3 ECHR if it is, or risks being, exacerbated by treatment, such as removal, for which the authorities can be held responsible.⁴² Moreover, it is observed that nothing else in the Court’s case-law is such as to justify an interpretation that Article 4 of the Charter is applicable only where the increase in suffering resulting from removal is accompanied by a change in the person concerned’s symptoms. By way of illustration, Article 4 of the Charter was applied in the judgment in *MP (Subsidiary protection of a person previously a victim of torture)* on the ground that the expulsion of the applicant would have had the effect of aggravating his psychological suffering, irrespective of any change in the symptoms of severe post-traumatic stress disorder and serious depression from which he suffered.⁴³

74. I have taken due account of the concerns expressed in the course of the proceedings by the Netherlands Government that, in view of the subjective nature of pain, mere allegations by the person to whom the removal order is addressed should not be regarded as sufficient to find an infringement of Article 4 of the Charter. I therefore invite the Court to take this opportunity to make it expressly clear, as the ECtHR did in its judgment in *Paposhvili*, that it is for that national to adduce evidence capable of demonstrating that there are *substantial* grounds for believing that, if that measure were to be implemented, he would be exposed to a real risk of inhuman and degrading treatment.⁴⁴

⁴² See judgments of 16 February 2017, *C. K. and Others* (C-578/16 PPU, EU:C:2017:127, paragraph 68) and *MP (Subsidiary protection of a person previously a victim of torture)*, paragraphs 38 and 39.

⁴³ See judgment in *MP (Subsidiary protection of a person previously a victim of torture)*, paragraph 43.

⁴⁴ Judgment in *Paposhvili*, § 186.

75. Moreover, the removal of that national would be incompatible with Article 4 of the Charter only if the threshold of severity established by the case-law of the Court is reached. It is therefore necessary to ascertain whether the removal of X would result in a real and proven risk of a *significant* and *permanent* deterioration in his state of health.

76. Although such an examination, which is largely dependent on the factual circumstances of the case, is a matter for the referring court when assessing the results of the expert's report ordered in the main proceedings, the evidence in the file makes it possible, in my view, to make the following observations.

77. It follows from the order for reference, first, that X has produced documents showing that he is suffering from a serious illness which causes, inter alia, migraines, stomach aches and pain in his neck, back, muscles and nerves and that that pain is currently made just bearable as a result of the administration of a medicinal cannabis-based treatment. In addition, X states that discontinuing the medicinal cannabis-based treatment would mean an increase in pain such that he would no longer be able to sleep or eat and that the permanent nature of that pain would, in the long term, give rise to psychological consequences in the form of depressive and suicidal thoughts. Secondly, it is also apparent from the order for reference that that treatment, which is the only adequate treatment to combat X's pain, since the alternatives are even contraindicated, is not legally available in Russia.

78. If all of those factors were established, the referring court should, in my opinion, conclude that X's removal cannot, in the present case, be enforced on the ground that it would result in a real and proven risk of a *significant* and *permanent* deterioration in his state of health.⁴⁵

79. With regard to the second part of the first two questions, as reformulated, I would point out that the question whether the worsening of X's pain resulting from his possible removal to his country of origin would occur 'rapidly' following the enforcement of that removal is irrelevant for the purposes of determining whether the threshold of severity is reached and if, therefore, Article 4 of the Charter is infringed.

80. Whereas the judgment in *Paposhvili* required that the decline in the person's state of health be not only 'serious' and 'irreversible' but also 'rapid', the Court confined itself, in its autonomous interpretation of Article 4 of the Charter, to requiring, as discussed above, that the decline in the state of health as a result of removal must be significant and permanent.

81. I do not believe that the Court should align its more protective interpretation with that of the ECtHR.

82. In that regard, it must be borne in mind that, as is clear from the longest-standing case-law of the ECtHR, that court is entitled to assess whether the removal of a foreign national is such as to infringe the right not to be subjected to inhuman and degrading treatment on account of the suffering that is likely to result from that removal in the receiving country, even though this is a violation of the ECHR which has not yet been proven. That interpretation is necessary, according to that court, in order to ensure the effectiveness of that right as an absolute right and a fundamental value of democratic societies, since the harm resulting from the removal would be serious and irreparable.⁴⁶

⁴⁵ Unless the Russian legislation is amended, that deterioration would appear, in fact, to be permanent.

⁴⁶ ECtHR, 7 July 1989, *Soering v. the United Kingdom*, CE:ECHR:1989:0707JUD001403888, § 91.

83. That said, the retention by the Court, in its forthcoming judgment, of also that requirement of rapidity of the occurrence of the harm (in the present case, the rapidity of the decline in health) would, in my view, risk being interpreted as a mitigation of the absolute nature of the right enshrined in Article 4 of the Charter, on account of a balancing exercise between that right and the power of the Member States to control the entry and residence of third-country nationals on their territory. Indeed, it is precisely the concern better to guarantee the absolute character of that provision which, in my view, has led the Court to pursue, in its case-law, a higher level of protection of the right not to be subjected to inhuman and degrading treatment.⁴⁷

84. The foregoing considerations necessarily imply that that Article 4 of the Charter precludes a national practice, such as that at issue in the main proceedings, of setting a strict time limit within which the significant and permanent increase in the pain suffered by the foreign national subject to removal should necessarily occur.

85. I therefore propose that the Court should answer the first two questions, as reformulated, to the effect that Article 5 of Directive 2008/115, read in conjunction with Article 4 and Article 19(2) of the Charter, must be interpreted as precluding a third-country national, who is seriously ill and staying illegally on the territory of a Member State, from being subject to a removal order where, on account of the legal unavailability in his country of origin of the only effective analgesic treatment, he will be exposed to a significant and permanent increase in his pain. The period within which such an increase will occur is irrelevant for the purposes of that assessment.

86. Finally, it should be recalled that, if the referring court were to consider that X cannot be returned to Russia on the ground that his removal would expose him to a real risk of inhuman and degrading treatment, within the meaning of Article 4 of the Charter, his removal would have to be postponed under Article 9(1)(a) of Directive 2008/115.

87. The postponement of that removal cannot have the consequence, in my view, of rendering ineffective the return decision adopted by the competent Netherlands authority, as the Commission stated at the hearing.⁴⁸ I do not see how such a consequence could be considered to follow from the judgment in *CPAS de Seraing*,⁴⁹ even though the Court held, in that judgment, that the issue of granting automatic suspensive effect necessarily concerns the decision ordering the person's return and, possibly, the removal decision which accompanies it.⁵⁰

88. As the Netherlands Government pointed out at the hearing, it should be noted that, even if removal were to be deferred, there is no reason why the return decision, which establishes that the stay is illegal, should lose its effect, particularly since the Court has already ruled that when confronted with a third-country national who is staying illegally, Member States are obliged to adopt a return decision in respect of him since 'it would be contrary both to the purpose of Directive 2008/115 ... and to the wording of Article 6 of that directive to tolerate the existence of

⁴⁷ Judgments of 16 February 2017, *C. K. and Others* (C-578/16 PPU, EU:C:2017:127, paragraph 59), and in *MP (Subsidiary protection of a person previously a victim of torture)* (paragraph 36).

⁴⁸ I am aware that such an interpretation would strengthen the legal protection of third-country nationals in a situation of 'long-term removability' since they are, in principle, excluded from the enjoyment of many socio-economic rights on account of the illegal nature of their stay. However regrettable their situation may be, this does not permit an incorrect reading of Directive 2008/115.

⁴⁹ Judgment of 30 September 2020 (C-402/19, EU:C:2020:759).

⁵⁰ Judgment of 30 September 2020, *CPAS de Seraing* (C-402/19, EU:C:2020:759, paragraphs 43 to 48). See also judgment of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraph 56).

an intermediate status of third-country nationals who are in the territory of a Member State without any right or residence permit ... but in respect of whom there is no valid return decision'.⁵¹

2. *The third question*

89. By its third question, the referring court asks, in essence, whether Article 5 of Directive 2008/115, read in conjunction with Article 4 and Article 19(2) of the Charter, must be interpreted as precluding the consequences of the removal order on the state of health of a third-country national from being taken into account solely when determining whether and, if so, under what conditions, that person is fit to travel.

90. More specifically, it is apparent from the order for reference that, under Netherlands law, the medical consequences that may arise from a removal order are examined in the opinion issued by the BMA only in so far as they occur when the removal in the strict sense is being enforced, without account being taken of the psychological medical consequences which may arise as a result of the unavailability or inaccessibility, in the receiving country, of the treatment needed to mitigate those medical consequences.

91. From a strictly legal point of view, the referring court's doubts appear to relate to the applicability of the legal framework arising from the judgment in *C. K. and Others*,⁵² which was delivered in the area of the Dublin system, in the context of Directive 2008/115. The national court is well aware of the fact that that judgment sets out the obligations which a Member State must fulfil in order to be able to carry out the transfer of a third-country national who has suicidal tendencies. However, it considers that the obligations imposed by the Court concern only the conditions for that national to travel, which is explained by the fact that the State carrying out the transfer may, under the principle of mutual trust on which the Dublin system is based, assume that the treatment available in the other Member States is sufficient to treat the illness from which that national suffers.

92. It should be noted at the outset that the general and absolute nature of Article 4 of the Charter, the compliance with which is essentially required by Article 5 of Directive 2008/115, means that the legal framework established in the judgment in *C. K. and Others* is, in principle, also applicable to the transfer of a person to a third country, such as a removal carried out under Directive 2008/115. Transposed into the latter context, that legal framework is based on the following principles.

93. The removal of a third-country national with a particularly serious mental or physical illness constitutes, *in itself*, inhuman and degrading treatment where it results in the real and proven risk of a significant and permanent deterioration in his state of health.⁵³

94. It is for the competent national authorities to eliminate any serious doubts as to the impact of that removal on the state of health of the person concerned, by taking into consideration 'all the significant and permanent consequences' arising from that removal. That means that the Member State carrying out the removal must not only organise that removal in such a way that all the treatment necessary is guaranteed to the third-country national during his physical

⁵¹ Judgment of 3 June 2021, *Westerwaldkreis* (C-546/19, EU:C:2021:432, paragraph 57).

⁵² Judgment of 16 February 2017 (C-578/16 PPU, EU:C:2017:127).

⁵³ See judgment of 16 February 2017, *C. K. and Others* (C-578/16 PPU, EU:C:2017:127, paragraph 73).

transfer to the State of destination, by him being accompanied by adequate medical staff, but it must *also* ensure that, upon his arrival in that State, that national is able to receive the necessary medical care to avoid any real risk of a significant and permanent worsening of his state of health.⁵⁴

95. In the light of those considerations, I propose that the Court should answer the third question referred for a preliminary ruling to the effect that Article 5 of Directive 2008/115, read in conjunction with Article 4 and Article 19(2) of the Charter, must be interpreted as precluding the consequences of the removal order on the state of health of a third-country national from being taken into account solely when determining whether and, if so, under what conditions, that person is fit to travel. Those consequences must also be assessed when verifying whether, upon arrival in the State of destination, that national will be able to receive the necessary medical care to avoid any real risk of a significant and permanent worsening of his state of health.

3. *The fourth question*

96. By the fourth question, the referring court asks, in the first place, whether Directive 2008/115, read in conjunction with Articles 1, 4 and 7 of the Charter, must be interpreted as meaning that the serious medical problems of a third-country national staying illegally on the territory of a Member State and the health care he receives must be taken into account in order to determine whether that Member State is obliged to grant him a right to stay.

97. It should be noted that the Court has already held that ‘Directive 2008/115 concerns only the return of illegally staying third-country nationals and is thus not designed to harmonise in their entirety Member State rules on the stay of foreign nationals’ and that ‘the common standards and procedures established by Directive 2008/115 concern only the adoption of return decisions and the implementation of those decisions’.⁵⁵ That means that the conditions relating to the recognition of a right of residence for third-country nationals are not governed by that directive, but fall within the competence of the national legislature.

98. In that regard, it is important to add that Article 6(4) of that directive does not grant the Member States an option of legislating by virtue of EU law, but merely recognises the power which they have *under national law* to grant a right of residence, inter alia on humanitarian grounds, in order to clarify the relationship between such a right and the return decision.⁵⁶

99. The exercise of that power does not therefore constitute an implementation of EU law for the purposes of Article 51 of the Charter, and therefore the question whether an application for a residence permit must be granted cannot be assessed in the light of its provisions. Reliance on the Charter, and in particular on Article 7 thereof, read in conjunction with Directive 2008/115, could not under any circumstances lead to X being granted a right of residence under EU law.

⁵⁴ See judgment of 16 February 2017, *C. K. and Others* (C-578/16 PPU, EU:C:2017:127, paragraphs 76 and 81 to 85).

⁵⁵ Judgment of 8 May 2018, *K.A. and Others (Family reunification in Belgium)* (C-82/16, EU:C:2018:308, paragraph 44).

⁵⁶ See, in that regard, judgments of 10 July 2014, *Julián Hernández and Others* (C-198/13, EU:C:2014:2055, paragraph 44), and of 19 November 2019, *TSN and AKT* (C-609/17 and C-610/17, EU:C:2019:981, paragraphs 49 and 50).

100. In the second place, the fourth question referred by the national court seeks, in essence, to determine whether Directive 2008/115, read in conjunction with Articles 1, 4 and 19(2) of the Charter, must be interpreted as meaning that the Member States must take account of the state of health of a third-country national, as a component of his private life, when examining whether his removal should be postponed.

101. Unlike the first two questions referred for a preliminary ruling, this question does not refer to the state of health of a third-country national in order to establish whether the enforcement of the removal of that national may amount to inhuman or degrading treatment. State of health is mentioned only as a component of private life. Articles 1, 4 and 19(2) of the Charter therefore do not appear to be relevant for the purposes of answering the present question.

102. An obligation to respect the right to private and family life may, in my view, be inferred from Article 5(b) of Directive 2008/115, in accordance with which Member States must take due account of family life when implementing that directive.

103. The Court has recently held that the objective of Article 5 of Directive 2008/115 is to ensure, in the context of the return procedure established by it, *respect for a number of fundamental rights*.⁵⁷ That finding implies, first, that the expression ‘family life’ must be read as referring to the right to private and family life, as enshrined in Article 7 of the Charter, and, secondly, that the obligation to take due account of that right is not fulfilled simply by taking into account the relevant elements of the private and family life of the third-country national concerned, as the Netherlands Government stated at the hearing.⁵⁸ In the latter regard, the judgment in *K.A. and Others (Family reunification in Belgium)*, which was cited by the Netherlands Government at the hearing, is not capable of justifying a contrary interpretation since, in that judgment, the Court merely held that the consideration of those details by the competent national authorities, when they are provided to them by the person concerned, is a necessary prerequisite for the adoption of a return decision.⁵⁹

104. In the light of those considerations, I am of the opinion that the present question should be examined by the Court from the perspective of Article 5(b) of Directive 2008/115, read in conjunction with Article 7 of the Charter, and of Article 9 of that directive (‘Postponement of removal’).

105. The referring court should therefore first be provided with the legal framework governing the assessment by the competent national authorities of the lawfulness of the enforcement of X’s removal having regard to the right to respect for his private life, specifying whether and, if so, under what conditions, X’s state of health must be taken into account in that regard.⁶⁰

⁵⁷ Judgment of 11 March 2021, *État belge (Return of the parent of a minor)* (C-112/20, EU:C:2021:197, paragraph 35).

⁵⁸ It should be noted that the use by the EU legislature of the expression ‘take due account of’ instead of ‘respect’, the latter verb being used solely by reference to the principle of non-refoulement, does not invalidate such a reading. That difference in wording can be explained, in my view, by the fact that the principle of non-refoulement cannot, because of its *absolute* nature, be subject to limitations, unlike rights such as the right to private and family life or the best interests of the child. Thus, the competent authorities of every Member State will have to take due account of the right to private and family life of a third-country national who is subject to a return procedure when assessing whether the limitations to that right, as resulting from the enforcement of a removal order, are legitimate and proportionate.

⁵⁹ Judgment of 8 May 2018 (C-82/16, EU:C:2018:308, paragraphs 102 to 104).

⁶⁰ However, the ‘family life’ aspect will not be examined in this Opinion since X confirmed at the hearing that his application is not based on the existence of family ties in the Netherlands.

106. Contrary to what was argued at the hearing by the Netherlands Government, that assessment must necessarily be carried out by the competent national authorities when they examine an application for a postponement of removal such as that at issue in the main proceedings, irrespective of whether the matter is routinely considered by those authorities when assessing residence applications.

107. With regard to the right to respect for private life, it should be recalled that, under Article 52(3) of the Charter, Article 7 thereof must in principle be interpreted in such a way as to give it the same meaning and scope as Article 8 ECHR, which makes it necessary to look at the case-law of the ECtHR relating to that provision.

108. It follows from that case-law that, in order to establish a breach of Article 8 ECHR in the present case, the competent national authority must carry out a proportionality assessment consisting of weighing up X's right to respect for private life and the power of the Netherlands State to expel aliens who do not satisfy the conditions for entry and residence on its territory.

109. There is little doubt that, first, the possible enforcement of X's removal to Russia would amount to an interference with his right to respect for his private life⁶¹ and, secondly, such a measure has its legal basis in national legislation (Article 64 of the Law on foreign nationals, as interpreted in point A/37 of the Circular on foreign nationals) and pursues one of the 'legitimate aims' listed in Article 8(2) ECHR ('prevention of disorder'). In those circumstances, the latter provision requires it to be verified whether the measure in question is necessary, in a democratic society, to attain the objective pursued, which, according to the ECtHR, takes the form of an examination of proportionality.⁶²

110. The essential features of that examination have been mainly identified by the ECtHR in cases which combine illegal immigration and the right to respect for family life. In its judgment in *Pormes v. the Netherlands*, the ECtHR stated, however, that the principles formulated and the factors taken into account in those cases may be applied *mutatis mutandis* to the situation of an alien who has established ties amounting to private life in the territory of a State during his period of unlawful stay.⁶³ That implies the following.

111. The scope of the right to respect for private life depends, in principle, on the specific situation of the foreign national and the public interest. Unless the foreign national is classified as a 'settled migrant', as he has been granted a residence permit in the host State, 'very serious reasons' are not required in order for that State's right to expel the foreign national to take precedence over his right to respect for his private life.⁶⁴

112. If the foreign national concerned had established a private life in the host State at a time when he was aware that his status under the immigration rules was such that the continuation of that private life within that State would from the outset be *precarious*, the expulsion of that foreign national would be liable to amount to a breach of Article 8 ECHR only 'in exceptional circumstances'.⁶⁵

⁶¹ See, inter alia, ECtHR, 7 December 2021, *Savran v. Denmark*, CE:ECHR:2021:1207JUD005746715, § 179.

⁶² See, inter alia, ECtHR, 18 October 2006, *Üner v. the Netherlands*, CE:ECHR:2006:1018JUD004641099, § 54.

⁶³ ECtHR, 14 December 2020, CE:ECHR:2020:0728JUD002540214, § 8.

⁶⁴ Ibid., §§ 52, 53 and 59. The status of 'settled migrant' is not therefore a condition for the applicability of the right to respect for private life, but an element which determines the level of protection to be afforded to that right in a given situation.

⁶⁵ Ibid., §§ 57 and 58.

113. The relevant factors for balancing the right to respect for private life and the public interest are the extent of social, cultural and family ties in the host State and in the receiving country as well as factors relating to immigration control or considerations of public order weighing in favour of expulsion.⁶⁶ This is a non-exhaustive list which does not exclude the consideration of other factors relating to the particular circumstances of the case, such as medical factors.⁶⁷ Medical factors concern the applicant's state of health and changes which are likely to arise if the removal order is implemented.⁶⁸

114. It is important to note that, according to the ECtHR, health must be viewed as a component of private life since the concept of 'private life', which must be understood broadly and does not lend itself to an exhaustive definition, covers also the physical and psychological integrity of a person.⁶⁹ With regard to moral integrity, the ECtHR has already stated that safeguarding mental health is an indispensable precondition to effective enjoyment of the right to respect for private life, which is understood as a right 'to identity and personal development' and 'to establish and develop relationships with other human beings and the outside world'.⁷⁰ It seems to me to be reasonable to take the view that physical integrity also constitutes such a precondition.

115. In that regard, I would point out that the ECtHR does not rule out the possibility that treatment which cannot be classified as 'inhuman or degrading' within the meaning of Article 3 ECHR may nonetheless impair physical and psychological integrity to the point of infringing that article from the perspective of private life. Following that approach, it essentially took the view, in the judgment in *Paposhvili*, that the removal of a foreign national may constitute a violation of Article 8 ECHR when no breach of Article 3 ECHR can be found.⁷¹

116. In particular, where a situation arises in which removal would risk worsening the state of health of the person concerned to the extent that he would no longer be able to develop ties amounting to private life, those medical factors may carry significant weight in the balancing exercise to be carried out in order to determine whether that removal is proportionate.

117. If it were to follow from an examination of proportionality in that regard that there is a risk that the right to respect for the private life of a third-country national might be infringed as a result of his removal, the obligation to interpret any secondary legislation in conformity with fundamental rights, as reaffirmed in recital 24 of Directive 2008/115, would require the conclusion that the removal cannot be enforced.

118. That does not mean, however, that postponement of removal should necessarily be granted under Article 9(1) of that directive. Under that provision, postponement of removal is mandatory only if its enforcement would infringe the principle of non-refoulement (point (a)) or in the event that suspensory effect is granted to the appeal brought against the removal decision (point (b)). As regards the first situation, it does not concern the right to respect for private life. As to the second, it cannot be ruled out a priori that the interference in the right to respect for private life, in the event of the enforcement of the removal of a third-country national who is seriously ill, may be

⁶⁶ Ibid., §§ 56 and 58.

⁶⁷ See, in that regard, ECtHR, 7 December 2021, *Savran v. Denmark*, CE:ECHR:2021:1207JUD005746715, § 184.

⁶⁸ Ibid., § 192

⁶⁹ See, inter alia, ECtHR, 25 June 2019, *Nicolae Virgiliu Tănase v. Romania*, CE:ECHR:2019:0625JUD004172013, § 126.

⁷⁰ See, inter alia, ECtHR, 7 December 2021, *Savran v. Denmark*, CE:ECHR:2021:1207JUD005746715, § 172, which refers, in that regard, to the judgment of 6 February 2001, *Bensaid v. the United Kingdom*, CE:ECHR:2001:0206JUD004459998, § 47.

⁷¹ Judgment in *Paposhvili*, § 225.

regarded as ‘serious and irreparable’ in accordance with the judgment in *Abdida*⁷² and may therefore justify giving the remedy suspensive effect. I must admit, however, that I find it difficult to imagine a situation in which that would be the case.

119. In its written observations, the Commission submits that medical factors which do not lead to a situation that is contrary to the principle of non-refoulement, but which, because of their less serious nature, are relevant only as components of the right to respect for the private life of a third-country national who is subject to a removal order, may be taken into account by the Member States, in accordance with Article 9(2) of Directive 2008/115, when determining the *timing* of the removal.

120. I do not share that view. It seems clear to me that the option to postpone removal, conferred on the Member States by Article 9(2)(a) of that directive, concerns situations in which the ‘physical state or mental capacity’ of the third-country national concerned makes the physical transfer of that person to his country of origin inappropriate or impossible on the date originally envisaged. If that physical state or mental capacity was attributable to a violation of that national’s right to respect for private life, that situation would appear rather in Article 9(1), which provides for a mandatory postponement of removal in two situations in which enforcement of the removal would be likely to infringe a fundamental right.⁷³

121. Consequently, it must be recognised that Directive 2008/115 makes no reference to the legal consequences of a finding by the competent national authorities that the enforcement of removal would amount to infringing the right of a third-country national to respect for his private life. There is no provision in Directive 2008/115 governing such consequences, which are therefore a matter for the national legislature.

122. In the light of all of those considerations, I propose that the Court should answer the fourth question referred for a preliminary ruling to the effect that Article 5(b) of Directive 2008/115, read in conjunction with Article 7 of the Charter, and Article 9 of that directive must be interpreted as meaning that the Member States may take account of the state of health of a third-country national, as a component of his private life, when examining whether the enforcement of his removal is liable to infringe that national’s right to respect for private life, the legal consequences of any finding of infringement being a matter for the national legislature.

IV. Conclusion

123. In the light of all the foregoing, I propose that the Court should answer the questions referred for a preliminary ruling by the rechtbank Den Haag, zittingsplaats ’s-Hertogenbosch (District Court, The Hague, sitting in ’s-Hertogenbosch, Netherlands), as reformulated, as follows:

- (1) Article 5 of Directive 2008/115 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, read in conjunction with Article 4 and Article 19(2) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding a third-country national who is seriously ill and staying illegally on the territory of a Member State from being subject to a removal order where, on account of the legal

⁷² See judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453, paragraph 50).

⁷³ The right not to be subjected to inhuman and degrading treatment and the right to effective judicial protection.

unavailability in his country of origin of the only effective analgesic treatment, he will be exposed to a significant and permanent increase in his pain. The period within which such an increase will occur is irrelevant for the purposes of that assessment.

- (2) Article 5 of Directive 2008/115, read in conjunction with Article 4 and Article 19(2) of the Charter, must be interpreted as precluding the consequences of the removal order on the state of health of a third-country national from being taken into account solely when determining whether and, possibly under what conditions, that person is fit to travel. Those consequences must also be assessed when verifying whether, upon arrival in the State of destination, that national will be able to receive the necessary medical care to avoid any real risk of a significant and permanent worsening of his state of health.
- (3) Article 5(b) of Directive 2008/115, read in conjunction with Article 7 of the Charter, and Article 9 of that directive must be interpreted as meaning that the Member States may take account of the state of health of a third-country national, as a component of his private life, when examining whether the enforcement of his removal is liable to infringe that national's right to respect for private life, the legal consequences of any finding of infringement being a matter for the national legislature.