Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 31 January 2013 [1]

Case C-534/11

Mehmet Arslan
v
Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie

(Request for a preliminary ruling from the Nejvyšší správní soud (Czech Republic))

(Third-country national — Illegal stay — Detention for the purpose of removal — Directive 2008/115/EC — Application for international protection — Directive 2005/85/EC — Directive 2003/9/EC — Abuse of rights)

I – Introduction

1. This request for a preliminary ruling, lodged at the Registry of the Court on 20 October 2011, concerns in particular the interpretation of Article 2(1) of in conjunction with recital 9 in the preamble to Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2] ('the Return Directive') and on the relation between those provisions and Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status. [3]

2. The request has been made in proceedings between Mr Arslan, a Turkish national, and the Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie (Police Force of the Czech Republic, Regional Police Directorate of the Ústí nad Labem Region, Foreigners Police Section) ('the defendant in the main proceedings'). Mr Arslan entered and stayed in the Czech Republic without appropriate authorisation. The defendant in the main proceedings decided to detain him for a period of 60 days with a view to his administrative removal. Mr Arslan brought an action before the Czech courts against the decision taken by the defendant in the main proceedings to extend his detention for a further 120 days. Mr Arslan claims that at the time the decision to extend his detention was taken there was no longer any reasonable prospect of his removal before the expiry of the maximum

1 — Original language: French.
2 — OJ 2008 L 348, p. 98.
3 — OJ 2005 L 326, p. 13.

detention period under national law, which is 180 days. In his view, that period would necessarily be exceeded as a result of his application for international protection ('application for asylum')[4] and of his intention to have recourse to, and exhaust, all the procedural and judicial remedies available in the context of that application.

3. The referring court seeks to ascertain, first, whether or not the Return Directive applies to an illegally staying third-country national who makes an application for asylum within the meaning of Directive 2005/85 and, secondly, whether such an application necessarily puts an end to his detention for the purpose of removal on the basis of the Return Directive.

4. With those questions as the background, the request for a preliminary ruling raises the issue that the asylum provisions might be used as a tool to render application of the Return Directive ineffective.

II – Legal context

A – *European Union law*

1. The Return Directive

5. Recital 9 in the preamble to the Return Directive reads:

'In accordance with [Directive 2005/85], a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force.'

6. Article 2(1) of the Return Directive provides:

'This Directive applies to third-country nationals staying illegally on the territory of a Member State.'

7. Article 3(2) of the Return Directive defines 'illegal stay' as 'the presence on the territory of a Member State of a third-country national who does not fulfil, or no longer fulfils the conditions … for entry, stay or residence in that Member State'.

8. Article 5 of the Return Directive provides that Member States must respect the principle of non-refoulement enshrined in Article 33 of the Geneva Convention,[5] including when implementing that directive.

9. Article 6(1) of the Return Directive provides that 'Member States shall issue a return decision to any third-country national staying illegally on their territory …'.

4 — Article 2(b) of Directive 2005/85 defines 'application' or 'application for asylum' as 'an application made by a third-country national or stateless person which can be understood as a request for international protection from a Member State under the (Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 89, p. 150, No 2545 (1954)), which entered into force on 22 April 1954, and supplemented by the Protocol relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967 ("the Geneva Convention")]. Any application for international protection is presumed to be an application for asylum, unless the person concerned explicitly requests another kind of protection that can be applied for separately'. In the present Opinion, I shall use the terms 'application for asylum' and 'asylum seeker'. See also Article 2(b) of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18).

5 — Article 33, entitled 'Prohibition of expulsion or return ("refoulement")', provides in paragraph 1: 'No Contracting State may expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

10. Article 9(1)(a) of the Return Directive provides that Member States are to postpone removal when it would violate the principle of non-refoulement.

11. Article 15 of the Return Directive provides:

‘1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

(a) there is a risk of absconding, or

(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

…

4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further 12 months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

(a) a lack of cooperation by the third-country national concerned, or

(b) delays in obtaining the necessary documentation from third countries.’

2. Directive 2005/85

12. Directive 2005/85 lays down minimum standards for granting and withdrawing refugee status. In essence, it governs the making of applications for asylum, the procedure for processing such applications, and the rights and obligations of asylum seekers throughout that procedure.

13. Article 7 of Directive 2005/85 provides:

‘1. Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. This right to remain shall not constitute an entitlement to a residence permit.

2. Member States can make an exception only where, in accordance with Articles 32 and 34, a subsequent application will not be further examined or where they will surrender or extradite, as appropriate, a person either to another Member State pursuant to obligations in accordance with a European arrest warrant or otherwise, or to a third country, or to international criminal courts or tribunals.’

14. Article 18 of Directive 2005/85 provides:

‘1. Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum.

2. Where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review.’

15. Article 23(4) of Directive 2005/85 provides:

‘Member States may also provide that an examination procedure … be prioritised or accelerated if:

…

(g) the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his/her claim clearly unconvincing in relation to his/her having been the object of persecution referred to in Directive 2004/83/EC [6]; or

…

(j) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/her removal; or

…

(l) the applicant entered the territory of the Member State unlawfully or prolonged his/her stay unlawfully and, without good reason, has either not presented himself/herself to the authorities and/or filed an application for asylum as soon as possible, given the circumstances of his/her entry …

…’

3. Directive 2003/9

16. Article 7 of Directive 2003/9 provides:

‘1. Asylum seekers may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive.

2. Member States may decide on the residence of the asylum seeker for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application.

3. When it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law.

…’

6 — Council directive of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12).

B – *Czech law*

17. The Return Directive was transposed into Czech law essentially by an amendment to Law No 326/1999 on the residence of foreigners in the Czech Republic ('the Law on Foreigners').

18. Under Paragraph 124(1) of that law, the police are 'entitled to detain a foreigner over 15 years of age on whom notice has been served of the initiation of administrative removal proceedings, whose administrative removal has already been finally decided on, or on whom a prohibition of entry has been imposed by another Member State of the European Union which is valid for the territory of the Member States of the European Union, where the imposition of a special measure for the purpose of leaving the country is insufficient', and at least one of the conditions set out in Paragraph 124(1)(b) and (e) has been met, namely 'there is a danger that the foreigner might frustrate or impede the enforcement of a decision on administrative removal' and 'the foreigner is registered in the information system of the Contracting States'.

19. Paragraph 125(1) of the Law on Foreigners provides that the detention period must not, in principle,[7] exceed 180 days.

20. Paragraph 127 of the Law on Foreigners provides:

'1. Detention must be terminated without undue delay:

(a) where the grounds for detention no longer exist,

…

(d) if the foreigner is granted asylum or subsidiary protection, or

(e) if the foreigner is granted a long-term residence permit for the purpose of protection in the country.

2. The submission of an application for international protection during the period of detention is not a ground for ending the detention.'

21. Directive 2005/85 was transposed into Czech law essentially by an amendment to Law No 325/1999 on asylum. Paragraph 85a of that law provides:

'1. When a declaration for purposes of international protection is made, the validity of a long-term visa or long-term residence permit granted under the relevant specific legislation ceases.

2. The legal status of a foreigner arising from his being held in a detention centre is not affected by any declaration for purposes of international protection or by the making of an application for international protection (Paragraph 10).

3. A foreigner who has made a declaration for purposes of international protection or has made an application for international protection is, subject to the conditions set out in the specific legislation, required to remain in the detention centre.'

7 — Paragraph 125(2) of the Law on Foreigners provides for exceptions where that period may be exceeded. According to the referring court, none of those exceptions applies in the case of Mr Arslan.

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

22. On 1 February 2011 Mr Arslan was arrested by a Czech police patrol unit and placed in detention. On 2 February 2011 a decision was issued for his removal. By a decision of 8 February 2011, Mr Arslan's period of detention was extended to 60 days on the ground, inter alia, that in view of his past conduct it might be presumed that he would attempt to frustrate the enforcement of the removal decision. The decision stated that Mr Arslan, who holds a Turkish identity card, had entered the Schengen area concealed and that he had stayed in Austria and subsequently in the Czech Republic without a travel document or visa. The decision also stated that Mr Arslan had already been stopped for questioning in Greece in 2009 in possession of a false passport, had been deported to his country of origin and had been registered in the Schengen Information System as a person to be refused entry into States in the Schengen area from 26 January 2010 to 26 January 2013.

23. On 8 February 2011, that is to say, seven days after being placed in detention and six days after the decision was taken to remove him, but on the same day that the decision extending the period of his detention to 60 days was taken, Mr Arslan submitted an application for asylum to the Czech authorities.

24. On 25 March 2011 the defendant in the main proceedings decided to extend Mr Arslan's detention by a further 120 days on the ground that the extension was necessary for the preparations for enforcement of the decision to remove him, in view of the fact that while his application for asylum was being considered the removal decision was not enforceable. According to the decision of 25 March 2011, Mr Arslan had made his application for asylum with the intention of making enforcement of the removal decision more difficult. The decision also disclosed that the Turkish Embassy had not yet issued an emergency travel document for Mr Arslan, which also hampered enforcement of the removal decision.

25. Mr Arslan brought an action before the Krajský soud v Ústí nad Labem (Regional Court, Ústí nad Labem, Czech Republic) against the decision of 25 March 2011, claiming that at the time that decision was taken, in view of his application for asylum, there was no longer any reasonable prospect that his removal could still take place within the maximum detention period of 180 days laid down by the Law on Foreigners. Mr Arslan further indicated his intention, in the event of his application for asylum being refused by the Ministry of the Interior, to contest the Ministry's decision by bringing an action, which would by law have suspensive effect. He also raised the possibility, in the event of that action being dismissed, of bringing an appeal on a point of law before the Nejvyšší správní soud (Supreme Administrative Court), which would likewise have suspensive effect.

26. Given the usual length of judicial proceedings in such matters, Mr Arslan took the view that it was unrealistic that the administrative removal decision could be enforced within the abovementioned period of 180 days. In those circumstances, he considered that the decision of 25 March 2011 extending his detention was contrary to Article 15(1) and (4) of the Return Directive and the case-law of the European Court of Human Rights relating to Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.[8]

27. According to Mr Arslan, the decision at issue was unlawful not because it infringed the right of asylum but because an essential condition for his detention, namely a reasonable prospect of removal before the end of the maximum period of detention, was not met.

8 — Article 5, entitled 'Right to liberty and security', provides that '… Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law …'.

28. The Krajský soud dismissed the action by judgment of 27 April 2011, ruling that Mr Arslan's argument was 'purely self-serving and speculative', since it could not be ruled out that the procedure of applying for asylum, including any judicial proceedings, would be completed within the period set by the decision of 25 March 2011. Mr Arslan brought an appeal on a point of law before the referring court, putting forward in essence the same arguments as those relied on at first instance.

29. By decision of 12 April 2011, the Ministry of the Interior rejected Mr Arslan's application for asylum. Mr Arslan brought an action against that decision.

30. On 27 July 2011, that is to say, almost the date on which the period set by the decision contested by Mr Arslan expired, the Czech authorities terminated Mr Arslan's detention 'as the grounds for detention no longer existed'. [9]

31. The referring court asks whether Article 2(1) of the Return Directive should be interpreted as meaning that the detention of a foreigner for the purpose of return must be terminated if he applies for asylum and, at the same time, there are no reasons for extending the detention other than to prepare the return and/or carry out the removal process. [10] The referring court is inclined towards an affirmative answer, taking the view that detention can be extended only if a new detention decision is issued, based not on the Return Directive but on another provision which specifically allows an asylum seeker to be detained. However, the referring court also considers that that view might encourage abuse of asylum procedures.

32. The referring court also observes that the Czech legislature by no means agrees either with that interpretation or with the interpretation put forward by Advocate General Mazák in his View in the *Kadzoev* case. [11]

33. In those circumstances, the Nejvyšší správní soud decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 2(1) of, in conjunction with recital 9 in the preamble to, [the Return Directive] be interpreted as meaning that the directive does not apply to a third-country national who has applied for international protection within the meaning of … Directive [2005/85]?

(2) If the answer to the first question is in the affirmative, must the detention of a foreigner for the purpose of return be terminated if he applies for international protection within the meaning of Directive [2005/85] and there are no other reasons to keep him in detention?'

IV – Procedure before the Court of Justice

34. In its order for reference, the Nejvyšší správní soud applied for the Court to adjudicate in this case under an accelerated procedure, pursuant to the first paragraph of Article 104a of the Rules of Procedure of the Court applying at the relevant time. The referring court explained, inter alia, that although Mr Arslan's detention had ended on 27 July 2011 it was still appropriate to deal with the present case under an accelerated procedure in view of the existence of a large number of similar cases of foreigners being held in detention or of detention cases which would not fail to arise in the near future.

35. That application was dismissed by order of the President of the Court of 10 January 2012.

9 — These words come from the order for reference and refer to Paragraph 127(1)(a) of the Law on Foreigners (see point 20 above).

10 — See Article 15(1) of the Return Directive.

11 — Case C-357/09 PPU [2009] ECR I-11189.

36. Written observations were submitted by the Czech, German, French, Slovak and Swiss Governments and the European Commission. The Czech, German and French Governments and the Commission presented oral argument at the hearing on 7 November 2012.

V – Analysis

A – *Admissibility of the questions referred*

37. The French Government expresses doubts as to the admissibility of the referring court's first question, since it is not apparent from the order for reference that Mr Arslan was challenging the applicability of the Return Directive on the ground that he had made an application for asylum. It would appear rather that the question at issue is whether, where that directive is applied to an asylum seeker, the condition for keeping him in detention, namely the existence of a reasonable prospect of removal, continues to be met. The French Government considers that it is not clear that the first question is necessary in order for the referring court to be able to settle the dispute. In those circumstances, the first question is hypothetical.

38. According to settled case-law, where questions submitted by national courts concern the interpretation of a provision of European Union law, the Court is, in principle, obliged to give a ruling.[12] However, the Court cannot give a preliminary ruling where it is quite obvious that the interpretation of a provision of European Union law sought by a national court bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical and the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[13]

39. The function entrusted to the Court of Justice in the preliminary ruling procedure is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions.[14]

40. Like the French Government, I consider that the first question referred is hypothetical, since the outcome of the dispute in the main proceedings does not depend on the Court's answer to that question.

41. In that regard, it is clear from the order for reference that Mr Arslan is by no means challenging the reasoning for the decision to carry out his administrative removal and place him in detention for that purpose. He relies solely on the fact that on the date of the decision to extend his detention there was already a compelling reason, irrespective of his status as an asylum seeker, to end that detention, since there was no longer any reasonable prospect of enforcing the decision to remove him before the expiry of the maximum detention period laid down in the national legislation. I would point out that, according to the order for reference, Mr Arslan even argued before the national courts that the national provisions should be interpreted solely in the light of Article 15(1) and (4) of the Return Directive.

12 — See Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraph 20.

13 — See, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39; Case C-466/04 *Acereda Herrera* [2006] ECR I-5341, paragraph 48; and Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 25.

14 — See, inter alia, Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 32, and Case C-478/07 *Budějovický Budvar* [2009] ECR I-7721, paragraph 64.

42. Moreover, it is also apparent from the order for reference lodged at the Court Registry on 20 October 2011 that Mr Arslan's detention had already ended by that date 'as the grounds for detention no longer existed'. It should be noted that on 27 July 2011, the date on which Mr Arslan's detention ended, the maximum detention period of 180 days under Paragraph 125(1) of the Law on Foreigners was practically at an end.

43. Furthermore, it is apparent from the documents before the Court and from the hearing that Mr Arslan immediately absconded and disappeared once he was released from detention on 27 July 2011. He has not moreover taken part in the present preliminary ruling proceedings.

44. In the light of the fact that the proceedings before the referring court relate to an action brought against the decision of the defendant in the main proceedings of 25 March 2011 to extend Mr Arslan's detention and that, in view of the facts set out in points 42 and 43 above, his detention has ended, I consider that it would not be possible to glean from the answer to the questions referred any factors necessary for an interpretation of European Union law which the referring court might usefully apply in order to resolve, in accordance with that law, the dispute before it.[15] My view is supported by the fact that the referring court justified its application for an accelerated procedure by the existence or imminence of a large number of similar cases.

45. I therefore consider the questions referred by the referring court to be inadmissible.

46. However, I should like to submit to the Court the following observations on the substance of the questions referred, in case the Court should decide to answer those questions.

B – *Substance of the questions referred*

1. Arguments

47. The Czech Government considers that although the Court held in *Kadzoev* that detention for the purpose of removal and detention of an asylum seeker fall under different legal rules, that judgment does not exclude a person detained under the rules of the Return Directive from being detained under the same rules after an application for asylum has been made.

48. Given that there must be substantial grounds for the detention of a foreigner for the purpose of removal, the Czech Government considers that the purpose of the Return Directive would be seriously undermined if such a person were to be exempt from the rules of that directive and avoid detention ordered in pursuance of that directive by merely lodging an application for asylum. In such a case, submission of an application for asylum would be a 'magic formula' which a person detained under the rules of the Return Directive could use to 'open the door' easily and be released from detention.

49. The Czech Republic considers that persons detained under the Return Directive should continue to fall within the scope of that directive even after an application for asylum has been made. That would not preclude such persons from falling also within the substantive and procedural scope of provisions applicable to asylum seekers.

15 — See, to that effect, Case 132/81 *Vlaeminck* [1982] ECR 2953, paragraph 13.

50. The German Government considers that it is apparent from Articles 2(1) and 3(2) of and recital 9 in the preamble to the Return Directive that that directive is not applicable to third-country nationals who have made an application for asylum for so long as the asylum procedure is in progress. According to the German Government, a third-country national who has applied for protection under Directive 2005/85 is entitled to stay in the Member State under Article 7(1) of that directive.

51. In the view of the German Government, it is for the Member States to determine the conditions under which an asylum seeker may be placed in detention. It considers that Article 18 of Directive 2005/85 does not preclude the detention of a third-country national, and that Articles 2(k), 6(2), 13(2) and 14(8) of Directive 2003/9 also presume that an asylum seeker may be held in detention.

52. The German Government considers that, in order for the return procedure to be effective, it is necessary in some cases for it to be possible for third-country nationals who have been detained for purposes of return or removal to be kept in detention even when they apply for asylum during their detention. According to that government, the submission of unfounded applications for asylum would be encouraged if submission of such applications necessarily led to the release of illegally staying third-country nationals. The German Government points out that Article 15 of the Return Directive allows detention for purposes of return or removal only on strict conditions, practically as a last resort under the return procedure.

53. The Slovak Government considers that the objective of the Return Directive would be undermined if it was not possible to prevent a person staying illegally from absconding by detaining that person on grounds of, and on the basis of, the Return Directive even after an application for asylum had been made. In the view of that government, that could justify keeping a third-country national in detention under the rules of the Return Directive after the submission of an application for asylum. Even if that were not so, the Slovak Republic is of the view that it is essential that the competent authorities should, after an application for asylum has been submitted during detention for the purpose of return, have an appropriate period for assessing the possibility of detaining the person concerned on the basis of the asylum directives and of domestic law.

54. The French Government considers that it is for the European Union legislature to ensure a fair balance between respect for the principle of non-refoulement and the objectives of preventing and combating illegal immigration.

55. The French Government considers that the principle of non-refoulement is also put into effect in the Return Directive, inter alia, in Article 2, interpreted in the light of recital 9 in the preamble to the directive. However, that government is of the view that Article 2 of the Return Directive, seen in the light of the directive as a whole and of Directives 2003/9 and 2005/85, must be interpreted as meaning that the Return Directive may apply to illegally staying third-country nationals who have submitted an application for asylum, provided that the safeguards conferred by the national asylum rules in accordance with Directives 2003/9 and 2005/85 are respected and, where respect for the principle of non-refoulement so requires, enforcement of the removal decision is postponed. Moreover, placing an asylum seeker in detention, or maintaining his detention, is conditional both on compliance with the principle of proportionality, in the light of Article 15(1) of the Return Directive, and on the existence of a reasonable prospect of removal, in pursuance of Article 15(4) of that directive.

56. The Swiss Government and the Commission consider that, under Article 2(1) of and recital 9 in the preamble to the Return Directive, an asylum seeker ceases to come within the scope of that directive, until a final negative decision has been made on his application for asylum. The Swiss Government and the Commission contend that if a third-country national who is detained on the basis of the Return Directive submits an application for asylum, detention ordered on the basis of that directive must be terminated.

57. According to the Commission, the legal status of the person concerned, as an asylum seeker, is then governed essentially by Directives 2003/9 and 2005/85. It is therefore only under those directives that an asylum seeker may be detained. The Commission also considers that detention of the person concerned, as an asylum seeker, cannot continue unless a new detention decision is taken, based on the provisions of asylum legislation that allow the detention of asylum seekers.

2. Analysis

58. Before I answer the questions raised by the referring court, it should be noted, as a preliminary point, that the guiding principle of non-refoulement enshrined in Article 33 of the Geneva Convention applies not only to Directive 2005/85 but also to the Return Directive.

59. Although the European Union legislature adopted the Return Directive in order to put in place a policy to combat illegal immigration, and return constitutes a necessary element of a well-managed migration policy,[16] Member States may lawfully return illegally staying third-country nationals only where the asylum rules are respected, in particular the principle of non-refoulement.[17] Indeed, Article 5 of the Return Directive provides that Member States must respect the principle of non-refoulement when implementing that directive. Moreover, under Article 9 of the Return Directive, Member States must postpone removal, inter alia, when it would violate the principle of non-refoulement.[18]

60. As regards detention under Article 15 of the Return Directive, it is apparent from the wording of that provision that detention is only by way of an exception and is a last resort. It may be imposed only where other less coercive measures are insufficient and if certain strict criteria are and continue to be met.[19] In that regard, a third-country national may be detained only where he 'is the subject of return procedures in order to prepare the return and/or carry out the removal process', and 'there is a risk of absconding' or he 'avoids or hampers the preparation of return' or the smooth progress of 'the removal process'. Detention of the person concerned must be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.[20] Detention must be ordered in writing by the administrative or judicial authorities, with reasons being given in fact and in law. Where there is no longer any reasonable prospect of removal before the expiry of the maximum detention period, detention ceases to be justified and the person concerned must be released immediately.[21]

16 — See recital 4 in the preamble to the Return Directive. According to Articles 6 and 8 of the Return Directive, and save in a few exceptional cases listed in that directive, Member States must issue a return decision against any third-country national staying illegally on their territory and take all necessary measures to enforce the return decision. See, to that effect, Case C-61/11 PPU *El Dridi* [2011] ECR I-3015, paragraph 59, in which the Court held that the objective pursued by the Return Directive was the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals.

17 — See recital 8 in the preamble to the Return Directive.

18 — See also recital 23 in the preamble to the Return Directive, which provides that '[a]pplication of [the Return Directive] is without prejudice to the obligations resulting from the Geneva Convention …'.

19 — I am of the view that detention under the Return Directive is also strictly governed by the principle of proportionality. According to recital 16 in the preamble to the Return Directive, '[t]he use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient'.

20 — According to Article 15(5) and (6) of the Return Directive, detention may not exceed six months, with the possibility of extension for a period not exceeding a further 12 months in cases where the removal operation is likely to last longer owing to a lack of cooperation by the person concerned, or delays in obtaining the necessary documentation from third countries. I would point out that the Czech legislature limited the maximum detention period to 180 days (subject to what is stated in footnote 7 concerning exceptions where that period may be exceeded).

21 — Where detention has been ordered by administrative authorities, Member States must provide for a speedy judicial review of the lawfulness of detention. The person concerned must be released immediately if the detention is not lawful. See Article 15(2) of the Return Directive.

a) First question

61. By its first question, the referring court asks the Court of Justice in essence whether the Return Directive still applies to a third-country national who has made an application for asylum.

62. According to Article 2(1) of the Return Directive, that directive applies only to third-country nationals staying illegally on the territory of a Member State. Article 3(2) of the Return Directive defines 'illegal stay' as the presence on the territory of a Member State of a third-country national who does not fulfil, or no longer fulfils, the conditions for entry, stay or residence in that Member State. It is apparent from Article 7(1) of and recital 13 in the preamble to Directive 2005/85 that an asylum seeker has the right to remain in the Member State pending the examination of his application, even though he is not entitled to a residence permit.

63. Although that right to remain is provided for in Article 7(1) of Directive 2005/85 'for the sole purpose of the procedure', the fact remains that it is only in very limited circumstances set out in Article 7(2) that the right to remain may be restricted by Member States.

64. The intention of the European Union legislature to exempt an asylum seeker, at least temporarily, from the application of the Return Directive is also clear from recital 9 in the preamble to the Return Directive, which provides that a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application or a decision ending his right of stay as an asylum seeker has entered into force.[22] Consequently, the situation of a third-country national who has made an application for asylum is, in principle, governed only by the framework of rules relating to the right of asylum.[23]

65. However, without prejudice to respect for the guiding principle of non-refoulement, the obligations resulting from the Geneva Convention, and fundamental rights more generally,[24] I consider that my view must be qualified where there is clear and consistent evidence that the framework of rules for the granting of asylum is being used as a tool to render application of the Return Directive ineffective, to the extent of creating an abuse of the right of asylum.[25]

66. This point will be examined in the context of the answer to the second question.

67. In the light of the foregoing, I consider that the Court's answer to the first question should be that, save where there is an abuse of rights, the Return Directive no longer applies to a third-country national who has made an application for asylum for so long as the procedure relating to that application is in progress.

22 — I note that in point 82 of his View in *Kadzoev*, Advocate General Mazák stated that 'a third-country national who has applied for asylum does not fall — or, as the case may be, ceases to fall — within the scope of the Return Directive for as long as the process of examining his asylum application is ongoing'.

23 — See, to that effect, the View of Advocate General Mazák in *Kadzoev*, point 84.

24 — See recitals 23 and 24 in the preamble to the Return Directive.

25 — In that regard, I note that at a meeting held within the Council of the European Union on 24 November 2011 concerning the Amended proposal for a directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (COM(2011) 320 final), it was suggested that Article 8(3) of that proposal should be amended by the addition of a provision providing for detention of an asylum seeker, where he is already being detained on the basis of the Return Directive in order to prepare his removal and/or carry out the removal process, and the purpose of his application for asylum is solely to delay or frustrate enforcement of the return decision. I note, however, that that suggestion appears neither in the current text of the proposal dated 1 June 2011, nor a fortiori in substantive law.

b) The second question

68. By its second question, which I must answer since my reply to the first question is, in principle, affirmative, the referring court seeks to ascertain whether the detention of a third-country national for the purpose of return must consequently be terminated if he makes an application for asylum and there are no other reasons to extend that detention. [26]

69. I consider that it follows directly from my answer to the first question that, where there is no abuse of rights, the detention of a third-country national under the Return Directive must be terminated if he makes an application for asylum, for so long as the procedure relating to that application is in progress. The Return Directive is no longer applicable, at least temporarily, in that situation. Furthermore, it is apparent from Article 7(1) of Directive 2003/9 that asylum seekers may, in principle, move freely within the territory of the host Member State or within an area assigned to them by that Member State.

70. Before I consider the issue of abuse of rights, the question arises whether a third-country national who has applied for asylum may be detained, or kept in detention, under other legal provisions, namely the framework of rules relating to asylum.

71. Although the situation of the person concerned is in principle no longer governed by the Return Directive but by the provisions relating to asylum, it is apparent from Article 7(3) of Directive 2003/9 that Member States may confine an applicant to a particular place in accordance with their national law, when it proves necessary, for example for legal reasons or reasons of public order. [27] It is clear that that provision does not require Member States to adopt national rules concerning the detention of asylum seekers, but leaves it open to them to adopt rules in that regard. Moreover, despite a general reference to 'legal reasons or reasons of public order', there is no harmonisation with regard to the specific criteria for detaining an asylum seeker.

72. It follows that an asylum seeker can be detained only where the national law on asylum provides for that possibility [28] and lays down the relevant conditions. That said, Article 18(1) of Directive 2005/85 provides that Member States may not detain a person for the sole reason that he is an applicant for asylum, and Article 18(2) provides that where an applicant for asylum is held in detention Member States must ensure that there is a possibility of speedy judicial review.

26 — An illegally staying third-country national who has made an application for asylum might possibly be detained, for example, under provisions of national criminal law if he is suspected of having committed, or has committed, an offence. See *El Dridi*, paragraphs 53 to 55 and the case-law cited.

27 — See *Kadzoev*, paragraph 42. It should be pointed out that under Article 2(k) of Directive 2003/9, 'detention' is defined as 'confinement of an asylum seeker by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement'. However, even though it is still a matter of deprivation of liberty, 'detention for the purpose of removal governed by [the Return Directive] and detention of an asylum seeker in particular under Directives 2003/9 and 2005/85 and the applicable national provisions thus fall under different legal rules' (see *Kadzoev*, paragraph 45). Moreover, 'a period during which a person has been held in a detention centre on the basis of a decision taken pursuant to the provisions of national and Community law concerning asylum seekers may not be regarded as detention for the purpose of removal within the meaning of Article 15 of [the Return Directive]' (see *Kadzoev*, paragraph 48).

28 — In the absence of national provisions, which appears to be the case in the Czech Republic, a Member State cannot rely directly on Article 7(3) of Directive 2003/9 in order to detain an asylum seeker. See, by analogy, Case C-321/05 *Kofoed* [2007] ECR I-5795, paragraphs 42 and 45.

73. Although it is undisputed that detention for the purpose of removal governed by the Return Directive and detention of an asylum seeker fall under different legal rules,[29] I consider that, in order not to render national provisions adopted in accordance with Article 7(3) of Directive 2003/9 ineffective, and by analogy with the reasoning of the Court in *Achughbabian*,[30] the national authorities must have a short period, limited to what is strictly necessary, to adopt a decision to detain the person concerned based on national asylum provisions,[31] before terminating his detention under the Return Directive.

74. It remains for me to analyse the question of the possible abuse of rights.

75. It is clear from the case-law of the Court that European Union law cannot be relied on for abusive or fraudulent ends and that national courts may, case by case, take account – on the basis of objective evidence – of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of European Union law. The national courts must nevertheless assess such conduct in the light of the objectives pursued by those provisions.[32]

76. A finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved. It requires, secondly, a subjective element consisting in the intention to obtain an advantage from the European Union rules by creating artificially the conditions laid down for obtaining it. It is for the national court to establish the existence of those two elements, evidence of which must be adduced in accordance with the rules of national law, provided that the effectiveness of European Union law is not thereby undermined.[33]

77. Recital 1 in the preamble to Directive 2005/85 states that the common policy on asylum has been introduced for those who, forced by circumstances, 'legitimately' seek protection in the European Union.[34] Clearly, a mere application for asylum by a third-country national held in detention on the basis of the Return Directive cannot on its own give rise to a presumption of abuse of the right of asylum, even though such detention is itself exceptional and subject to very strict criteria.[35] Since it is the liberty[36] of the person concerned that is at stake here, the individual and specific circumstances of each case must be carefully examined in detail by the national courts in order to draw a distinction between 'taking advantage of a possibility conferred by law and an abuse of rights'.[37]

29 — See *Kadzoev*, paragraph 45.

30 — Case C-329/11 [2011] ECR I-12695, paragraphs 30 and 31.

31 — Adopted in accordance with Article 7(3) of Directive 2003/9.

32 — See Case C-212/97 *Centros* [1999] ECR I-1459, paragraphs 24 and 25, and Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 42.

33 — See, to that effect, Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, paragraphs 52 to 54.

34 — Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1) and Directives 2003/9 and 2004/83 also 'refer, in their first recitals, to the fact that a common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, *legitimately* seek protection in the Community' (emphasis added). See Joined Cases C-411/10 and C-493/10 *N.S. and Others* [2011] ECR I-13905, paragraph 14.

35 — See point 60 above.

36 — The European Court of Human Rights recognised that it was possible for a State to detain an asylum seeker in certain circumstances in its judgment of 29 January 2008 in *Saadi v. the United Kingdom*. In that case, the Grand Chamber of the Court interpreted, inter alia, the first limb of Article 5(1)(f) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides for an exception to the right to liberty in the case of 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country …'.

37 — See the Opinion of Advocate General Sharpston in Case C-542/09 *Commission* v *Netherlands* [2012] ECR, point 127. See also the Opinion of Advocate General Kokott in *Kofoed*, point 58.

78. As part of that examination, the referring court could take into consideration, inter alia, the following evidence in the present case:

— Mr Arslan's previous illegal entries into the territories of several Member States without any mention of an application for asylum;

— the fact that Mr Arslan clearly stated that in seeking asylum his intention was to bring about an end to his detention through demonstrating that, by using all the remedies having suspensive effect that the procedure of applying for asylum could offer him, his detention would necessarily extend beyond the maximum period allowed by national law, which removed from the outset any reasonable prospect of the removal process succeeding; and

— the fact that Mr Arslan immediately disappeared following his release and, as may be inferred from the observations made at the hearing by the Czech Government, did not continue the procedure of applying for asylum.

79. In a case of abuse of the right of asylum, although the person concerned can be kept in detention under the Return Directive and preparations for his removal can continue, it is on the strict conditions that removal will not be enforced until the asylum procedure is completed, that the principle of non-refoulement applies in full, and that the application for asylum is examined and processed in accordance with all the rules laid down, in particular by Directive 2005/85, in compliance with all the safeguards granted to asylum seekers in that regard. That means also that maintenance of the person concerned in detention on the basis of the Return Directive must comply with all the safeguards provided for in Articles 15 to 18 of that directive, including in respect of the maximum period of detention. [38]

80. I would also point out that Member States have the option of applying an accelerated or prioritised procedure to applications for asylum, under Article 23(4) of Directive 2005/85, where certain conditions are met. [39]

81. In the light of the foregoing, I propose that the Court should give the following answer to the second question referred for a preliminary ruling:

— The detention of a third-country national on the basis of the Return Directive must be terminated when he makes an application for asylum, for so long as the procedure relating to that application is in progress;

— Article 7(3) of Directive 2003/9 allows a Member State to make provision in its national asylum law, subject to certain conditions, for an asylum seeker to be confined to a particular place, when it proves necessary, for example for legal reasons or reasons of public order. In that situation, the national authority has a short period, limited to what is strictly necessary, to adopt a decision to detain the person concerned on the basis of national asylum provisions, before terminating his detention on the basis of the Return Directive;

38 — See Article 15(5) and (6) of the Return Directive concerning the maximum period of detention, and paragraph 57 of *Kadzoev*, in which the Court interpreted those provisions strictly and ruled that 'Article 15(5) and (6) of [the Return Directive] must be interpreted as meaning that the period during which execution of the decree of deportation was suspended because of a judicial review procedure brought against that decree by the person concerned is to be taken into account in calculating the period of detention for the purpose of removal, where the person concerned continued to be held in a detention facility during that procedure'. The Member States have the option to adopt more favourable provisions in respect of the maximum period of detention. See, to that effect, Article 4 and Article 15(5) and (6) of the Return Directive. I would point out that it is apparent from the documents before the Court that the Czech Republic did not avail itself of the possibility offered by Article 15(5) and (6) of the Return Directive to provide for a maximum period of detention of 18 months, but provided for a shorter period, namely a maximum total of 180 days.

39 — As regards the circumstances at issue in the main proceedings, I consider that in similar cases the provisions of Article 23(4)(g), (j) and (l) of Directive 2005/85 might possibly be relied upon by national authorities in order to accelerate or prioritise the processing of applications for asylum.

— In a case of abuse of the right of asylum, that is to say, where there is clear and consistent evidence that the framework of rules for the granting of asylum is being used as a tool to render application of the Return Directive ineffective, the person concerned can be kept in detention under that directive and all preparations for his removal can continue, provided that removal is not enforced until the asylum procedure is completed, that the principle of non-refoulement applies in full, and that the application for asylum is examined and processed in accordance with all the rules laid down, in particular by Directive 2005/85, in compliance with all the safeguards granted to asylum seekers in that regard. That means also that maintenance of the person concerned in detention on the basis of the Return Directive must comply with all the safeguards provided for in Articles 15 to 18 of that directive, including in respect of the maximum period of detention.

VI – Conclusion

82. In the light of all the foregoing, I propose that the Court answer the questions referred by the Nejvyšší správní soud as follows:

— Except in cases of abuse of rights, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals no longer applies to a third-country national who has made an application for asylum for so long as the procedure relating to that application is in progress. The detention of a third-country national on the basis of Directive 2008/115 must therefore be terminated when he makes an application for asylum, for so long as the procedure relating to that application is in progress;

— Article 7(3) of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers allows a Member State to make provision in its national asylum law, subject to certain conditions, for an asylum seeker to be confined to a particular place, when it proves necessary, for example for legal reasons or reasons of public order. In that situation, the national authority has a short period, limited to what is strictly necessary, to adopt a decision to detain the person concerned on the basis of national asylum provisions, before terminating his detention on the basis of Directive 2008/115;

— In a case of abuse of the right of asylum, that is to say, where there is clear and consistent evidence that the framework of rules for the granting of asylum is being used as a tool to render application of Directive 2008/115 ineffective, the person concerned can be kept in detention under that directive and all preparations for his removal can continue, provided that removal will not be enforced until the asylum procedure is completed, that the principle of non-refoulement applies in full, and that the application for asylum is examined and processed in accordance with all the rules laid down, in particular by Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, in compliance with all the safeguards granted to asylum seekers in that regard. That means also that maintenance of the person concerned in detention on the basis of Directive 2008/115 must comply with all the safeguards provided for in Articles 15 to 18 of that directive, including in respect of the maximum period of detention.