



## Reports of Cases

### JUDGMENT OF THE COURT (Fourth Chamber)

1 October 2015\*

(Reference for a preliminary ruling — Area of freedom, security and justice — Directive 2008/115/EC — Return of illegally staying third-country nationals — Return decision accompanied by an entry ban of three years' duration — Breach of an entry ban — Third-country national previously removed — Sentence of imprisonment in case of new unlawful entry into the national territory — Compatibility)

In Case C-290/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale di Firenze (Italy), made by decision of 22 May 2014, received at the Court on 12 June 2014, in the criminal proceedings against

**Skerdjan Celaj,**

THE COURT (Fourth Chamber),

composed of L. Bay Larsen (Rapporteur), President of the Chamber, K. Jürimäe, J. Malenovský, M. Safjan and A. Prechal, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Italian Government, by G. Palmieri, acting as Agent, and L. D'Ascia, avvocato dello Stato,
- the Czech Government, by M. Smolek and J. Vlácil, acting as Agents,
- the German Government, by T. Henze, acting as Agent,
- the Greek Government, by M. Michelogiannaki, acting as Agent,
- the Norwegian Government, by E. Widsteen and K. Moen, acting as Agents,
- the Swiss Government, by E. Bichet, acting as Agent,
- the European Commission, by M. Condou-Durande and A. Aresu, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 April 2015,

\* Language of the case: Italian.

gives the following

### Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).
- 2 The request has been made in criminal proceedings instituted against Mr Celaj, an Albanian national, following his entry into Italian territory in breach of an entry ban in that territory of three years' duration.

### Legal context

#### *The Convention relating to the Status of Refugees*

- 3 The Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, vol. 189, p. 150, No 2545 (1954)), entered into force on 22 April 1954. It was supplemented by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967, which itself entered into force on 4 October 1967 ('the Geneva Convention').
- 4 Article 31(1) of the Geneva Convention states:

'The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.'

#### *Directive 2008/115*

- 5 Recitals 1, 4, 14 and 23 in the preamble to Directive 2008/115 are worded as follows:
  - '(1) The Tampere European Council of 15 and 16 October 1999 established a coherent approach in the field of immigration and asylum, dealing together with the creation of a common asylum system, a legal immigration policy and the fight against illegal immigration.
  - ...
  - (4) Clear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well managed migration policy.
  - ...
  - (14) The effects of national return measures should be given a European dimension by establishing an entry ban prohibiting entry into and stay on the territory of all the Member States. ...
  - ...
  - (23) Application of this Directive is without prejudice to the obligations resulting from the Geneva Convention ...'

6 Article 1 of that directive, which is headed ‘Subject matter’, provides:

‘This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.’

7 Article 8 of the said directive, headed ‘Removal’, provides:

‘1. Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7.

2. If a Member State has granted a period for voluntary departure in accordance with Article 7, the return decision may be enforced only after the period has expired, unless a risk as referred to in Article 7(4) arises during that period.

3. Member States may adopt a separate administrative or judicial decision or act ordering the removal.

4. Where Member States use — as a last resort — coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force. They shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned.

5. In carrying out removals by air, Member States shall take into account the Common Guidelines on security provisions for joint removals by air annexed to Decision 2004/573/EC

6. Member States shall provide for an effective forced-return monitoring system.’

8 Article 11 of the same directive reads as follows:

‘1. Return decisions shall be accompanied by an entry ban:

- (a) if no period for voluntary departure has been granted, or
- (b) if the obligation to return has not been complied with.

In other cases return decisions may be accompanied by an entry ban.

...’

*Italian law*

- 9 Article 13(13) of Legislative Decree No 286 consolidating the provisions regulating immigration and the rules relating to the status of foreign nationals (decreto legislativo n. 286 — Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero), of 25 July 1998 (Ordinary Supplement to GURI No 191 of 18 August 1998) (‘Legislative Decree No 286/1998’), provides:

‘A foreign national against whom a removal order has been made may not re-enter the territory of the State without special authorisation issued by the Ministry for the Interior [ministro dell’Interno]. In the event of infringement, the foreign national shall be liable to a term of imprisonment of between one and four years and shall be expelled by immediate deportation. ...’

- 10 Article 13(13b) of Legislative Decree No 286/1998 stipulates:

‘Where the offences referred to in paragraphs 13 and 13a are committed, the arrest of the offender shall be mandatory, even when the offender is not caught in *flagrante delicto*, and the expedited procedure shall be followed.’

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

- 11 Mr Celaj was arrested on 26 August 2011 in Italian territory by law enforcement officers of Pontassieve (Italy) for attempted robbery. For that offence, he was sentenced to a term of imprisonment and a fine by a judgment which became final on 15 March 2012 (the sentence being suspended).
- 12 On 17 April 2012, Mr Celaj was subject to a deportation order made by the Prefect of Florence (Prefetto di Firenze) and a removal order issued by the chief of police of Florence (Questore di Firenze), accompanied by an entry ban of three years’ duration.
- 13 In his decision, the Prefect of Florence stated that the option of voluntary repatriation had to be excluded, given that Mr Celaj had not made a request to that end and that there was a risk of his absconding. Deportation did not occur, however, for technical reasons. Consequently, the competent Italian authorities ordered Mr Celaj to leave the national territory immediately, warning him that, if he failed to do so, he would incur the penalties provided for by law. Mr Celaj nevertheless continued to remain in Italian territory, his presence recorded by the Italian authorities on 27 July, 1 August and 30 August 2012.
- 14 On 4 September 2012 Mr Celaj presented himself spontaneously at the border police station at Brindisi (Italy) and left Italian territory.
- 15 Subsequently, Mr Celaj re-entered Italian territory. On 14 February 2014, he was identified by law enforcement officers at San Piero a Sieve railway station (Italy). They arrested him for breach of Article 13(13) of Legislative Decree No 286/1998.
- 16 The public prosecutor’s office then brought criminal law proceedings against Mr Celaj before the Tribunale di Firenze (District Court, Florence) and sought a sentence of imprisonment of eight months on the basis of Article 13 of Legislative Decree No 286/1998.
- 17 Mr Celaj’s lawyer contended that the latter must be acquitted on the ground that Directive 2008/115 precludes that national legislation and that, accordingly, the acts no longer constituted a criminal offence

- 18 In those circumstances, the Tribunale di Firenze decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

‘Do the provisions of Directive 2008/115 preclude a Member State’s legislation which provides for the imposition of a sentence of imprisonment of up to four years on an illegally staying third-country national who, having been returned to his country of origin neither as a criminal law sanction nor as a consequence of a criminal law sanction, has re-entered the territory of the State in breach of a lawful re-entry ban but has not been the subject of the coercive measures provided for by Article 8 of Directive 2008/115 with a view to his swift and effective removal?’

### **Consideration of the question referred for a preliminary ruling**

- 19 By its question, the referring court is essentially asking whether Directive 2008/115 must be interpreted as precluding legislation of a Member State which provides for the imposition of a prison sentence on an illegally staying third-country national who, after having been returned to his country of origin in the context of an earlier return procedure, unlawfully re-enters the territory of that State in breach of an entry ban.
- 20 It is important at the outset to bear in mind 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. Therefore, that directive does not preclude, in principle, the law of a Member State from classifying the unlawful re-entry of a third-country national in breach of an entry ban as an offence and laying down criminal law sanctions to deter and penalise such an infringement (see, by analogy, judgments in *Achughbajian*, C-329/11, EU:C:2011:807, paragraph 28, and *Sagor*, C-430/11, EU:C:2012:777, paragraph 31).
- 21 According to settled case-law, a Member State may not apply criminal law rules liable to jeopardise the attainment of the objectives pursued by that directive and thus to deprive it of its effectiveness (judgment in *Sagor*, C-430/11, EU:C:2012:777, paragraph 32 and the case-law cited).
- 22 In that regard, it should be pointed out that Directive 2008/115 was adopted on the basis of point (3)(b) of the first paragraph of Article 63 EC, now Article 79(2)(c) TFEU, which provides for the adoption of measures in the area of illegal immigration and unauthorised residence.
- 23 According to recitals 1 and 4 of Directive 2008/115, read in the light of Article 79 TFEU, the implementation of a return policy is an integral part of the development, by the European Union, of a common immigration policy aimed at ensuring, inter alia, the prevention of illegal immigration and enhanced measures to combat it.
- 24 Article 11(1) of Directive 2008/115 provides for the possibility and, in certain cases, the obligation, for the competent authorities of the Member States to couple return decisions with an entry ban, that measure being intended, in the wording of recital 14 of that directive, to give a European dimension to the effects of national return measures.
- 25 Directive 2008/115 must be interpreted as not, in principle, precluding the possibility of Member States adopting legislation which lays down criminal law sanctions for the unlawful re-entry of a third-country national.
- 26 It is true that, according to the case-law of the Court, the common standards and procedures established by Directive 2008/115 would be undermined if, after establishing that a third-country national is staying illegally, the Member State were to preface the implementation of the return decision, or even the adoption of that decision, with a criminal prosecution which could lead to a term of imprisonment during the course of the return procedure, in so far as such a step would risk

delaying the removal (see, to that effect, judgments in *El Dridi*, C-61/11 PPU, EU:C:2011:268, paragraph 59; *Achughbabian*, C-329/11, EU:C:2011:807, paragraphs 37 to 39 and 45; and *Sagor*, C-430/11, EU:C:2012:777, paragraph 33).

- 27 However, the criminal proceedings at issue in the main proceedings involve the situation of an illegally staying third-country national to whom the common standards and procedures established by Directive 2008/115 were applied in order to put an end to his first illegal stay in the territory of a Member State and who then re-enters the territory of that State in breach of an entry ban.
- 28 Thus, the circumstances of the case in the main proceedings are clearly distinct from those in the cases that led to the judgments in *El Dridi* (C-61/11 PPU, EU:C:2011:268) and *Achughbabian* (C-329/11, EU:C:2011:807) in which illegally staying third-country nationals of the third countries concerned were subject to a first return procedure in the Member State in question.
- 29 Furthermore, the Court has already held that Directive 2008/115 does not preclude penal sanctions being imposed, following national rules of criminal procedure, on third-country nationals to whom the return procedure established by that directive has been applied and who are illegally staying in the territory of a Member State without there being any justified ground for non-return (judgment in *Achughbabian*, C-329/11, EU:C:2011:807, paragraph 48).
- 30 There is thus all the more reason to consider that Directive 2008/115 does not exclude the possibility for Member States to lay down criminal law sanctions against illegally staying third-country nationals for whom the application of the procedure established by that directive resulted in their being returned and who then re-enter the territory of a Member State in breach of an entry ban.
- 31 Nevertheless, in so far as the situation of the third-country national concerned, which led to the removal preceding the new unlawful entry into the territory of a Member State, fell within the scope of Directive 2008/115, the imposition of a criminal law sanction, such as that at issue in the main proceedings, is admissible only on the condition that the entry ban issued against that national complies with Article 11 of that directive, a matter which is for the referring court to determine.
- 32 The imposition of such a criminal law sanction is moreover subject to full observance both of fundamental rights, particularly those guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (see, to that effect, judgment in *Achughbabian*, C-329/11, EU:C:2011:807, paragraph 49), and, as the case may be, of the Geneva Convention, in particular Article 31(1) thereof.
- 33 Having regard to the foregoing considerations, the answer to the question asked is that Directive 2008/115 must be interpreted as not, in principle, precluding legislation of a Member State which provides for the imposition of a prison sentence on an illegally staying third-country national who, after having been returned to his country of origin in the context of an earlier return procedure, unlawfully re-enters the territory of that State in breach of an entry ban.

### **Costs**

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

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

**Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals must be interpreted as not, in principle, precluding legislation of a Member State which provides for the imposition of a prison sentence on an illegally staying third-country national who, after having been returned to his country of origin in the context of an earlier return procedure, unlawfully re-enters the territory of that State in breach of an entry ban.**

[Signatures]