Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 18 May 2017 [1]

Case C-225/16

Mossa Ouhrami

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands))

(Area of freedom, security and justice — Return of illegally staying third-country nationals — Directive 2008/115/EC — Article 11(2) — Historic entry ban — Starting point — Public policy derogation to the five years' maximum length of entry ban)

1. In this reference from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), the referring court seeks guidance on 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 [2] ('the Return Directive') and in particular Article 11 thereof.

2. The request has been made in the context of an appeal brought by a third-country national against his conviction and imprisonment for the offence of being present in the territory of the Member State concerned (the Netherlands), knowing that he had been declared an undesirable third-country national against whom a decision had been taken requiring him to leave the national territory and imposing a 10-year entry ban on his (re)entry. Whether the conviction is upheld or quashed turns on whether the 'historic entry ban' (that is, an entry ban imposed before the entry into force of the Return Directive) [3] was still in force when the third-country national was prosecuted. The answer to that question depends on the point in time at which an entry ban is deemed to commence and the effect (if any) which the Return Directive has on the duration of a historic entry ban in the particular circumstances of the case.

1 Original language: English.

2 OJ 2008 L 348, p. 98.

3 This is the term used by the European Commission in the Commission Recommendation of 1 October 2015 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return related tasks, C(2015) 6250 final, Annex, p. 64, and in the Communication from the Commission to the Council and the European Parliament on EU Return Policy, 28 March 2014, COM(2014) 199 final, p. 27.

European Union law

The Schengen acquis

3. The Schengen area[4] is founded upon the Schengen Agreement of 1985,[5] by which the States signatory agreed to abolish all internal borders and to establish a single external frontier. Within the Schengen area, common rules and procedures are applied in relation to, inter alia, border controls.

4. The Schengen Information System ('the SIS') was established under Article 92 of the Convention implementing the Schengen Agreement ('the CISA').[6] It has since been replaced by the SIS II which allows the Member States to obtain information relating to alerts for the purpose of refusing entry or stay to third-country nationals.[7]

5. Article 24 of Regulation No 1987/2006 concerns the conditions for issuing alerts on refusal of entry or stay. It provides that:

'1. Data on third-country nationals in respect of whom an alert has been issued for the purposes of refusing entry or stay shall be entered on the basis of a national alert resulting from a decision taken by the competent administrative authorities or courts …

2. An alert shall be entered where the decision referred to in paragraph 1 is based on a threat to public policy or public security or to national security which the presence of the third-country national in question in the territory of a Member State may pose. …

…

3. An alert may also be entered when the decision referred to in paragraph 1 is based on the fact that the third-country national has been subject to a measure involving expulsion, refusal of entry or removal which has not been rescinded or suspended, that includes or is accompanied by a prohibition on entry or, where applicable, a prohibition on residence, based on a failure to comply with national regulations on the entry or residence of third-country nationals.

…'

6. Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals builds upon the Schengen *acquis* and aims to ensure greater effectiveness in enforcing expulsion decisions.[8] Recital 5 notes that cooperation between Member States on return of third-country nationals cannot be sufficiently achieved at Member State level. The directive therefore aims to make possible the recognition of expulsion decisions issued by one Member State against a third-country national present within the territory of another Member State.[9]

4 The Schengen *acquis* as referred to in Article 1(2) of Council Decision 1999/435/EC of 20 May 1999 (OJ 2000 L 239, p. 1). The 'Schengen area' comprises most EU States, except for Bulgaria, Croatia, Cyprus, Ireland, Romania and the United Kingdom. Iceland, Norway, Switzerland and Liechtenstein have also joined the Schengen Area.

5 Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 13).

6 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19).

7 Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) (OJ 2006 L 381, p. 4), recital 10. The SIS II is in operation in all EU Member States and Associated Countries that are part of the Schengen area. Bulgaria, Ireland, Romania and the United Kingdom only operate the SIS II within the context of law enforcement cooperation.

8 OJ 2001 L 149, p. 34, see recital 3. That directive was followed by Council Decision 2004/191/EC of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals (OJ 2004 L 60, p. 55).

9 Article 1.

The Return Directive

7. The Return Directive traces its origins to two European Councils. The first, held in Tampere on 15 and 16 October 1999, established a coherent approach in immigration and asylum.[10] The second, the Brussels European Council of 4 and 5 November 2004, called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.[11] The Return Directive, promulgated as a result of those policies, lays down a horizontal set of rules applicable to all third-country nationals who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State.[12] The common standards and procedures introduced by the Return Directive must be applied in accordance with, inter alia, fundamental rights as general principles of EU law.[13]

8. An overarching aim of the Return Directive is to establish clear, transparent and fair rules required 'to provide for an effective return policy as a necessary element of a well-managed migration policy'. The expulsion of an illegally staying third-country national from a Member State's territory should be carried out through a fair and transparent procedure.[14] In accordance with general principles of EU law, decisions taken under the Return Directive should be adopted on a case-by-case basis and founded on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay.[15] It is however legitimate for Member States to return illegally staying third-country nationals, provided that fair and efficient asylum systems are in place which fully respect the principle of *non-refoulement*.[16]

9. Recital 14 is particularly important. It states that:

'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. The length of the entry ban should be determined with due regard to all relevant circumstances of an individual case and should not normally exceed five years. In this context, particular account should be taken of the fact that the third-country national concerned has already been the subject of more than one return decision or removal order or has entered the territory of a Member State during an entry ban.'

10. The following definitions in Article 3 are relevant:

'…

1. "third-country national" means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty and who is not a person enjoying the [EU] right of free movement, as defined in Article 2(5) of the Schengen Borders Code;

2. "illegal stay" means the presence on the territory of a Member State of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State;

10 Recital 1.
11 Recital 2.
12 Recital 5.
13 Recital 24 and Article 1.
14 Recital 4.
15 Recital 6.
16 Recital 8.

3. “return” means the process of a third-country national going back — whether in voluntary compliance with an obligation to return, or enforced — to:

   – his or her country of origin, or

   – a country of transit in accordance with [EU] or bilateral readmission agreements or other arrangements, or

   – another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted;

4. “return decision” means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return;

5. “removal” means the enforcement of the obligation to return, namely the physical transportation out of the Member State;

6. “entry ban” means an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision;

…’

11. The Member States retain the right to adopt more favourable provisions provided these are compatible with the Return Directive. [17]

12. Article 6(1) requires Member States to issue a return decision to any third-country national staying illegally within their territory. [18] Article 6(6) gives Member States the possibility to adopt a decision on the ending of a legal stay together with a return decision and/or a decision on a removal and/or entry ban in a single administrative or judicial decision or act as provided for in their national legislation. [19]

13. Article 11 provides that:

‘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.

2. The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security.

3. Member States shall consider withdrawing or suspending an entry ban where a third-country national who is the subject of an entry ban issued in accordance with paragraph 1, second subparagraph, can demonstrate that he or she has left the territory of a Member State in full compliance with a return decision.

17 Article 4.

18 That obligation is without prejudice to the limited exceptions listed in Article 6(2) to (5). None of those exceptions appear to be relevant to the national proceedings giving rise to the present reference.

19 Without prejudice to the procedural safeguards available under Chapter III and under other relevant provisions of EU law and national law.

…’

National law

14. Under Article 67(1) of the Vreemdelingenwet 2000 (Law on Foreign Nationals; ‘the Vw’) a third-country national[20] may be declared undesirable, insofar as is relevant here: (i) if he is not lawfully resident in the Netherlands and if he has repeatedly committed acts punishable under the Vw; (ii) if he has been convicted by a judgment which has become final for an offence in respect of which he is liable to a sentence of imprisonment of three years or more; or (iii) if he represents a danger to public policy or national security. These conditions are alternative.

15. Under Article 68 of the Vw, the declaration of undesirability will be lifted at the request of the third-country national if he has stayed outside the Netherlands for an uninterrupted period of 10 years during which none of the grounds referred to in Article 67(1) of the Vw has arisen.

16. The Vw was amended in order to transpose the Return Directive into the national legal order. Article 61(1) of the Vw provides that a third-country national who is not, or is no longer, legally resident must leave the Netherlands voluntarily within the period laid down in Article 62 or Article 62c of the Vw. Article 62(1) of the Vw further provides that, after a return decision has been issued against him, the third-country national must leave the Netherlands voluntarily within four weeks.

17. Articles 66a(1) of the Vw and 6.5a(5) of the Vreemdelingenbesluit 2000 (Decree on Foreign Nationals 2000; ‘the Vb’) were adopted specifically in order to transpose Article 11 of the Return Directive into national law.

18. According to Article 66a(1) of the Vw, an entry ban will be issued against a third-country national who has not left the Netherlands voluntarily within the applicable period. Under Article 66a(4) of the Vw, the entry ban will be issued for a specified period, which should not exceed five years, unless the third-country national represents a serious threat to public policy, public security or national security. That period is to be calculated from the date on which the third-country national actually left the Netherlands.

19. Under Article 66a(7) of the Vw a third-country national to whom an entry ban applies cannot be lawfully resident, inter alia: (i) if he has been convicted by a judgment which has become final for an offence in respect of which he is liable to a sentence of imprisonment of three years or more; (ii) if he represents a danger to public order or national security; or (iii) if he represents a serious threat to public policy, public security or national security.

20. Under Article 197 of the Wetboek van Strafrecht (Code of Criminal Law; ‘the Sr’), in its version applicable at the material time, a third-country national who remains in the Netherlands, while knowing or having serious reason to suspect that he has been declared an undesirable third-country national pursuant to a statutory regulation, is liable, inter alia, to a term of imprisonment not exceeding six months. Under the current version of the same article, a third-country national who remains in the Netherlands, while knowing or having serious reason to suspect that he has been declared an undesirable third-country national pursuant to a statutory regulation or that an entry ban has been imposed on him pursuant to Article 66a(7) of the Vw, is likewise liable to, inter alia, a term of imprisonment not exceeding six months.

20 The Dutch legislation uses the term ‘foreign national’. In my analysis in this Opinion I shall refer to such a person as a ‘third-country national’ (the term used in the Return Directive).

21. Under Article 6.6(1) of the Vb, in the version applicable at the material time, a request for the lifting of the declaration of undesirability will be granted provided that the third-country national was not subject to criminal prosecution and declared undesirable, inter alia, as a result of violent crimes or drug-related crimes and provided that, since the declaration of undesirability, he has left and stayed outside the Netherlands for 10 consecutive years.

Facts, procedure and questions referred

22. Mr Ouhrami is probably an Algerian national. He entered the Netherlands in 1999 but he has never held a residence permit. Over the period 2000 to 2002 he was convicted on five occasions for offences of aggravated theft, handling stolen property and possession of hard drugs and sentenced to a total of approximately 13 months' imprisonment.

23. By Decision of 22 October 2002 ('the Minister's decision') the Minister voor Vreemdelingenzaken en Immigratie (Minister for Immigration and Integration) ruled on those grounds that Mr Ouhrami represented a danger to public order and declared him to be an undesirable third-country national. The Minister's decision reads as follows:

'The person concerned has been sentenced to a total of over 6 months' unconditional imprisonment. In view of this it is believed that the person concerned, who is not lawfully resident in the Netherlands within the meaning of Article 8(a) to (e) or (l) of the Vw, represents a danger to public order.

…

Legal consequences of that decision

…

Having regard to the provisions of Article 6.6(1) of the Vb, the person concerned, because he was declared undesirable under Article 67 of the Vw on the basis of, inter alia, a drugs-related offence, should remain outside the Netherlands for 10 consecutive years from the moment he was declared undesirable and left the Netherlands.'

24. The Minister's decision was served on Mr Ouhrami on 17 April 2003. He did not challenge it. The Minister's decision became final on 15 May 2003.

25. Although he knew he had been declared an undesirable third-country national, Mr Ouhrami remained in Amsterdam in 2011 and 2012 contrary to the Minister's decision.[21] That is a punishable offence under Article 197 of the Sr and Mr Ouhrami was sentenced to eight months' imprisonment.

26. On appeal, Mr Ouhrami argued before the Gerechtshof Amsterdam (Court of Appeal, Amsterdam, the Netherlands) that the return procedure laid down in the Return Directive had not been exhausted.

27. That court examined the return procedure followed in Mr Ouhrami's case. It noted that: (i) the Dienst Terugkeer en Vertrek (Repatriation and Departure Service) had conducted 26 departure interviews with him; (ii) he had repeatedly been referred to the authorities of Algeria, Morocco and Tunisia, but that no positive report was forthcoming from any of those countries; (iii) various investigations were conducted through Interpol, particularly with regard to fingerprints; (iv) efforts were made to conduct a language analysis with him; (v) the Repatriation and Departure Service's

21 The order for reference provides no information as to Mr Ouhrami's whereabouts between 2003 and 2011. At the hearing his representative stated that to the best of his knowledge Mr Ouhrami had never left the Netherlands.

procedures with regard to repatriation had been exhausted; but (vi) all of the above had not resulted in the repatriation of Mr Ouhrami because he had not cooperated in any way. On the basis of those elements, the Gerechtshof Amsterdam (Court of Appeal, Amsterdam), in its judgment of 22 November 2013, ruled that the return procedure had been exhausted and that the prison sentence imposed on Mr Ouhrami was not therefore contrary to the Return Directive. It did, however, reduce that sentence to two months' imprisonment.

28. Mr Ouhrami appealed on a point of law to the referring court. Without challenging the ruling that the return procedure has been exhausted, he argued that the Minister's decision adopted in 2002 declaring him to be an undesirable third-country national should be deemed to be an entry ban that entered into force when it was issued or, at the latest, when he became aware of it. Since Article 11(2) of the Return Directive provides that the duration of an entry ban should not normally exceed five years, it followed that the entry ban was no longer in force in 2011/2012.

29. The referring court notes that according to this Court's case-law, a decision of undesirability adopted before the entry into force of the Return Directive is to be regarded as equivalent to an entry ban as defined in Article 3(6) of that directive, and that, in accordance with Article 11(2) thereof, its normal maximum duration may not exceed five years.[22] The question then arises as to when that period commences. According to Article 66a(4) of the Vw, the duration of an entry ban is to be calculated from the date on which the third-country national actually left the Netherlands.

30. Against that background, the referring court asks whether Article 11(2) of the Return Directive governs not only the duration of an entry ban but also the point in time at which the ban commences. It expresses the view that, by its very nature, an entry ban is relevant only after the third-country national has left the country.

31. The referring court observes that if the starting point for the entry ban is other than the moment of departure from the national territory, questions arise as to whether the Minister's decision still had legal effects when the prison sentence was imposed on Mr Ouhrami.

32. In those circumstances the Hoge Raad (Supreme Court) decided to stay the proceedings and seek guidance on the following questions:

'(1) Must Article 11(2) of the Return Directive be interpreted as meaning that the period of five years mentioned therein is to be calculated:

(a) from the moment at which the entry ban (or, with retroactive effect, the equivalent declaration of undesirability) was issued, or

(b) with effect from the date on which the person concerned actually left the territory of — essentially — the Member States of the European Union, or

(c) from some other point in time?

(2) For the purposes of applying the relevant transitional provisions, must Article 11(2) of the Return Directive be interpreted as meaning that decisions taken before that directive entered into force, the legal effect of which is that the addressee must remain outside the Netherlands for 10 consecutive years, where the entry ban was determined having regard to all the relevant circumstances of the individual case and was open to challenge on legal grounds, can no longer

22 See judgment of 19 September 2013, *Filev and Osmani*, C-297/12, EU:C:2013:569, paragraph 26 et seq.

have any legal effect if, at the time by which that directive had to be transposed or at the time at which it was established that the person to whom that decision was addressed was present in the Netherlands, the duration of that entry ban exceeded the period laid down in that provision?'

33. Written observations were submitted on behalf of Mr Ouhrami, Denmark, the Netherlands, Switzerland and the European Commission. With the exception of Switzerland, all the above made oral submissions at the hearing on 16 March 2017.

Assessment

Preliminary observations

34. The Return Directive constitutes a development of the Schengen *acquis* in relation to third-country nationals who do not fulfil or no longer fulfil the conditions of entry under the Schengen Borders Code.[23] That directive replaces Articles 23 and 24 of the CISA concerning the return of third-country nationals who do not fulfil or no longer fulfil the short-stay conditions applicable within the territory of parties to the Schengen Agreement.[24]

35. In that context, the Return Directive sets out common standards, procedures and legal safeguards to be applied in Member States for returning illegally staying third-country nationals and for persons to be returned in a humane manner, with full respect of their fundamental rights and dignity.[25] The 'Europeanisation' of the effects of national return measures is intended to foster the credibility of a truly European return policy.[26]

36. It follows from the definition of the concept of 'illegal stay' laid down in Article 3(2) of the Return Directive that 'any third-country national who is present on the territory of a Member State without fulfilling the conditions for entry, stay or residence there is, by virtue of that fact alone, staying there illegally, without such presence being subject to a condition requiring a minimum duration or an intention to remain on that territory'.[27] It is initially for Member States to determine in accordance with their national law what those conditions are and hence whether a particular person's stay on their territory is legal or illegal.[28] The interaction of the Return Directive with the Schengen *acquis* as well as the scheme of that directive highlight the European dimension of return decisions and entry bans put in place in order to ensure an effective return policy.

23 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1). That regulation repealed and replaced Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1), which in turn repealed Articles 2 to 8 of the CISA with effect from 13 October 2006. See further recitals 25 to 30 of the Return Directive.

24 Article 21.

25 See to that effect recitals 2 and 11 and Article 1. See also judgment of 5 June 2014, *Mahdi*, C-146/14 PPU, EU:C:2014:1320, paragraph 38.

26 See to that effect the Commission's Proposal for a Directive of the European Parliament and of the Council of 1 September 2005 on common standards and procedures in Member States for returning illegally staying third-country nationals, COM(2005) 391 final ('the Commission's Proposal'), p. 7.

27 See judgment of 7 June 2016, *Affum*, C-47/15, EU:C:2016:408, paragraph 48.

28 The conditions of entry as set out in Article 5 of Regulation 2016/399 must be borne in mind. The broad definition in Article 3(2) of the Return Directive covers any third-country national who does not enjoy a legal right to stay in a Member State. Member States' national law in this area must respect rights conferred by EU law in relation to (for example) EU citizens and their family members, family reunification and third-country nationals who are long-term residents. See, respectively, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77), Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12) and Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44).

37. Return decisions impose on third-country nationals illegally staying in the territory of the Member States [29] the obligation to 'return', that is to go back to their country of origin, to a country of transit or to another third country. [30] It follows that the third-country national cannot remain in the territory of the issuing Member State. Other Member States may recognise and enforce return decisions in accordance with Directive 2001/40.

38. An entry ban cannot be issued independently but can only accompany a return decision. [31] It is clear from the wording of recital 14 and Article 3(6) of the Return Directive that an entry ban, even though issued by one Member State, is intended to prohibit entry into and stay on the territory of all Member States. It therefore gives a European dimension to the effects of national return measures. [32] The European dimension of entry bans is also clear from the fact that, where a Member State considers issuing a residence permit or other authorisation offering a right to stay to a third-country national who is subject to an entry ban issued by another Member State, it is required first to consult with that Member State and take account of its interests. [33] In that context, it is important that Member States have rapid access to information on entry bans issued by other Member States via SIS II. [34]

39. It follows from the above that from the date when the Return Directive entered into force, entry bans adopted by the national authorities acquired a European dimension and must therefore comply with the rules laid down by that directive.

40. The present case concerns a 'historic' entry ban, that is to say a national measure equivalent to an entry ban adopted by a Member State before the transposition of the Return Directive.

41. The Court's case-law has already addressed the issue of the temporal effects of the Return Directive. In *Filev and Osmani* the Court considered settled case-law that new rules apply immediately, absent any express derogation, to the future effects of a situation which arose under the old rules. [35] It follows that the Return Directive 'is applicable to those effects which occur after the date of its applicability in the Member State concerned of entry-ban decisions taken under national rules which were applicable before that date'. [36] In order to assess 'whether the continuation of the effects of such decisions is consistent with Article 11(2) of [the Return Directive] in relation in particular to the maximum length of five years in principle under that provision for an entry ban, account should also be taken of the period during which that prohibition was in force before [the Return Directive] became applicable'. [37]

42. Therefore, in the case of a historic entry ban of unlimited length, as was the case in *Filev and Osmani*, the Court found that the Return Directive precluded the effects of that ban from continuing beyond the maximum length of five years specified by Article 11(2) of that directive except where that entry ban was adopted against third-country nationals constituting a serious threat to public order, public security or national security. [38]

29 The term 'territory of the Member States' used by the Return Directive in order to define its territorial scope is inaccurate. The Return Directive does not apply to the United Kingdom and Ireland. Conversely, it does apply to Denmark (notwithstanding that Member State's particular status in this area of EU law) and to the Schengen associates (Iceland, Norway, Switzerland and Lichtenstein). See to that effect recitals 25 to 30 and Article 23. References to the 'Member States' territory' should be construed accordingly.

30 Article 3(3) and (4) of the Return Directive.

31 Article 11(1) of the Return Directive.

32 Recital 14 of the Return Directive. See, to that effect, judgment of 1 October 2015, *Celaj*, C-290/14, EU:C:2015:640, paragraph 24.

33 In accordance with Article 25 of the CISA. See also Article 11(4) of the Return Directive.

34 Recital 18 of the Return Directive.

35 Judgment of 19 September 2013, C-297/12, EU:C:2013:569, paragraph 40 and the case-law cited.

36 Paragraph 41.

37 Paragraph 42.

38 Paragraph 44.

43. That case-law is the obvious starting point for the analysis of the issues raised by the present case, namely the moment when an entry ban commences and the conditions under which a historic entry ban can exceed five years. It does not, however, in itself resolve the questions posed by the referring court.

The first question

44. By its first question the referring court in essence seeks guidance as to the interpretation of Article 11(2) of the Return Directive concerning when entry bans commence.

45. The text of that provision specifies that entry bans should not exceed five years in principle. It does not, however, specifically identify the starting point of that period. The Danish Government maintains that that matter is therefore left to the Member States to define under national law.

46. I do not agree with that analysis.

47. It follows from the European dimension of the return policy,[39] as well as from the objectives of the Return Directive, namely 'to establish common rules concerning return, removal … and entry bans',[40] that a coherent EU-wide approach is necessary when implementing that directive.

48. That coherent approach is particularly important in the context of the Schengen area establishing a single external frontier. It follows that, when classifying a measure as falling within the Schengen *acquis* or as a development of that *acquis*, the need for coherence and the need — where that *acquis* evolves — to maintain that coherence must be taken into account.[41] Exchange of information between Member States on return decisions and entry bans appears currently to be imperfect.[42] Indeed, the European Commission explained at the hearing that there are several proposals for improvement,[43] in particular by making it compulsory for Member States to enter an alert in the SIS II in all cases where an entry ban has been issued.[44] Such exchange of information is crucial to manage the single external frontier and needs to be based on precise and reliable data. In the case of entry bans, that information should logically include both the duration of the ban and its starting point.

49. In that context, it is also clear from the express wording of the Return Directive that it intends to harmonise the length of entry bans. Thus, a maximum duration of five years is set, except for cases where the third-country national represents a serious threat to public policy, public security or national security. Inconsistency on that matter would jeopardise the stated objectives of the Return Directive,

39 See points 35 to 39 above.

40 Recitals 5 and 20. See also the Commission's Proposal, p. 5.

41 Judgment of 26 October 2010, *United Kingdom* v *Council*, C-482/08, EU:C:2010:631, paragraph 48.

42 Thus, for example, whilst Directive 2001/40 deals with the mutual recognition of expulsion decisions, including return decisions, there is presently no obligation for a Member State to inform other Member States of the existence of such a decision by entering an alert concerning it in the SIS II.

43 See, inter alia, Proposal for a Regulation of the European Parliament and of the Council on the use of the Schengen Information System for the return of illegally staying third-country nationals, 21 December 2016, COM(2016) 881 final; Proposal for a Regulation of the European Parliament and of the Council on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending Regulation (EU) No 515/2014 and repealing Regulation (EC) No 1986/2006, Council Decision 2007/533/JHA and Commission Decision 2010/261/EU, 21 December 2016, COM(2016) 883 final; Proposal for a Regulation of the European Parliament and of the Council establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States of the European Union and determining the conditions for access to the EES for law enforcement purposes and amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011, 6 April 2016, COM(2016) 194 final; and Communication from the Commission to the European Parliament and the Council on a more effective return policy in the European Union — A renewed action plan, 2 March 2017, COM(2017) 200 final.

44 Proposal for a Regulation of the European Parliament and of the Council on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, amending Regulation (EU) No 515/2014 and repealing Regulation (EC) No 1987/2006, 21 December 2016, COM(2016) 882 final, p. 4.

the EU-wide effects of entry bans and the management of the Schengen area. To accept that an entry ban, whose legal foundation is a set of harmonised rules at a European level, should start to produce its effects at a different point in time depending on different choices exercised by Member States through their national legislation would undermine the efficient functioning of the Schengen area.

50. Here, I emphasise that Articles 3(6) and 11 of the Return Directive, which define the concept of 'entry ban', make no reference to the law of the Member States. An entry ban is therefore clearly an autonomous concept of EU law. It follows from the need for uniform application of EU law and from the principle of equality 'that the terms of a provision of [EU] law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union, having regard to the context of the provision and the objective pursued by the legislation in question'. [45]

51. That principle also applies to the constitutive elements of an entry ban, namely its temporal dimension (starting point and duration), territorial dimension (Member States' territory) and legal dimension (prohibition to enter and to reside within the territory of the Member States).

52. I therefore do not see the silence of the EU legislature on that matter as a deliberate and explicit choice. Rather it is a lacuna that it is permissible for the Court to fill having regard to the wording, the scheme and the objective of the Return Directive. The EU legislature of course remains at liberty to modify the Court's solution should it consider that desirable — for example, in order to enhance the efficiency of the SIS II and thus strengthen the Schengen *acquis*.

53. Several possible starting points have been canvassed before the Court. Mr Ouhrami submits that the starting point of an entry ban should be the moment that it is notified to the person that it affects. The Netherlands, Switzerland and the Commission submit that it should be when the third-country national actually leaves the territory of the Member States. Denmark explained at the hearing that under Danish law an entry ban becomes effective when the third-country national actually leaves the country, but that the starting point for calculating its duration is the first day of the first month after the third-country national left the country. The permutations could be multiplied almost infinitely: the date when the decision was adopted; the date when the decision became definitive; the day after the actual departure of the third-country national; the date when he is put in detention for the purpose of removal; the date when he is proven to have arrived in a third country and so on. A further possibility might be the date when an alert was entered into the SIS II. [46]

54. It appears from my own informal research, as confirmed by the Commission at the hearing, that there is significant disparity between the solutions that have been adopted by the Member States in that respect. It seems that three choices are recurrent in Member States' legislation, namely (i) the date when the entry ban was notified; (ii) the date when the entry ban became definitive and (iii) the date when the third-country national actually left the territory of the Member State in question.

55. All present the advantage of defining a specific point in time when the entry ban starts to produce its effects. It seems to me that using the date of notification has the disadvantage of attaching the legal effects of the entry ban to a moment in time when that measure is not yet definitive (and could, at least in theory, be altered or even annulled). Using the date on which the entry ban became definitive links the legal effects of a measure with EU dimension(s) that concerns the territory of all Member States to a point in time that depends on national procedural rules. These may vary substantially between the different legal systems.

45 See, by analogy, judgment of 17 July 2008, *Kozlowski*, C-66/08, EU:C:2008:437, paragraph 42 and the case-law cited.

46 Whilst that might accord with the Europe-wide logic of the SIS II system, there is presently no obligation on a Member State to enter an alert regarding an entry ban to that system. See Article 24(3) of Regulation No 1987/2006.

56. Furthermore, both those arrangements fail to recognise that entry bans are not standalone measures but always accompany a return decision, as is apparent from the wording of Articles 3(6) and 11(1) of the Return Directive. It follows that the first step in the procedure is the adoption of a return decision whose legal effect is to require the third-country national to 'return'. The second step, the adoption of an entry ban, is optional. It may be taken at the same time as the first step under Article 6(6) of the Return Directive. The entry ban produces a double legal effect: (i) a prohibition on entering and (ii) a prohibition on staying after a second illegal entry in the territory of the Member States. The legal effects of the entry ban can commence only when the return decision has been complied with. Until then, the third-country national's illegal stay is governed by the effects of the return decision.

57. It follows that providing for an entry ban to start at the moment of its notification or when it became definitive would invert the logic of the EU return policy. It would also compromise its efficiency, since a third-country national who is present illegally in the territory of the Member States could avoid the legal effects of an entry ban merely by avoiding complying with the return decision for the duration of that ban. That would tend to encourage third-country nationals not to comply with return decisions, whereas one of the stated objectives of the Return Directive is to give priority to voluntary departure. [47]

58. The third arrangement is to treat the moment when the third-country national actually left the territory of the Member States as the starting point of the entry ban. In what follows I proceed from the assumption that the return decision and accompanying entry ban have been duly notified to the third-country national and have become definitive under national law.

59. That approach is supported by the objective, the scheme and the wording of the Return Directive as well as by the legal nature of entry bans. As I have explained, entry bans are not autonomous measures but always accompany a return decision. [48] Taken in conjunction with the use of the word 'entry', that implies that the third-country national must first leave the territory of the Member States. Only then does the entry ban (which is actually a *re-entry ban*) take effect.

60. The legislative history of the Return Directive reinforces that view. In English, French, German and certain other linguistic versions the Commission's Proposal, [49] the Council's Proposal [50] and the European Parliament's Report [51] use the term 're-entry ban'. Only at a later stage did the term 'entry ban' appear. [52] That term was retained in the final version of the text. It seems, however, that the initial term ('re-entry ban') is still reflected in the implementing legislation of some Member States. [53]

61. The texts adopted after the Return Directive relating to the EU return policy confirm that the European legislator intended to define the starting point of entry bans as the moment that the third-country national actually leaves the territory of the Member States. The most recent Recommendation confirms that Member States should make full use of entry bans and ensure that they commence 'on the day on which the third-country nationals leave the EU so that their effective

47 Recital 10.

48 See point 56 above.

49 Articles 3(g) and 9.

50 Council of the European Union, Proposal for a European Parliament and Council Directive on common standards and procedures in Member States for returning illegally staying third-country nationals, 6 October 2006, 13451/06, Articles 2(g) and 9 of the proposed directive.

51 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, A6-0339/2007 final, Article 9 of the proposed directive.

52 See for instance the amended Council Proposal following discussions on 7 February 2008, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, 15 February 2008, 6541/08, Articles 3(g) and 9.

53 For example, in France, Article L. 511-1 of the Code d'entrée et du séjour des étrangers et du droit d'asile (Code on the entry and stay of foreign nationals and the right to asylum) uses the term 'interdiction de retour' and in Poland, Articles 318 to 320 of the Ustawa o Cudzoziemcach (Law on foreign nationals) uses the term 're-entry ban'.

duration is not unduly shortened'.[54] The Commission's Return Handbook adopts a similar approach: 'the moment at which the clock starts ticking … needs to be determined in advance: normally the clock should start ticking from the moment of departure or removal to a third country and not from the issuing date of the entry ban, since the EU entry ban cannot [yet] develop its effect in a situation in which the person has not yet left EU territory'. That handbook also takes into consideration 'those cases in which it is not possible in practice to determine in advance a concrete date of departure'. In such cases, 'Member States may use another date (e.g. the issuing date)'.[55] At the hearing, the Commission stated that the Return Handbook should not be interpreted as suggesting that the starting point of an entry ban should normally be other than the moment of departure of the third-country national. Only in exceptional cases, where it is impossible to establish when the third-country national actually left the territory of the Member States, should another date be used as the starting point of an entry ban.[56]

62. The objective of the Return Directive is to establish an effective return policy based on uniform, clear and fair rules and to give an EU-wide dimension to the return measures by establishing an entry ban prohibiting entry into, and stay on, the territory of all Member States. That also suggests that the starting point of an entry ban should be the moment when the third-country national leaves the territory of the Member States. Such an approach uses a point in time that depends on an objective factual element (departure) and not on the procedural rules of each Member State.[57] It also may encourage third-country nationals to comply with return decisions.

63. I therefore conclude that the starting point for the duration of an entry ban as provided for by Article 11(2) of the Return Directive should be the point when the third-country national actually leaves the territory of the Member States.

The second question

64. The referring court's second question is relevant only in the event that the Court should hold that the starting point of an entry ban is other than when the third-country national leaves the territory of the Member States. I have just indicated that I do not consider that to be the case. I shall nevertheless examine the second question for the sake of completeness.

65. The second question essentially asks whether a historic entry ban may exceed the maximum period of five years laid down in Article 11(2) of the Return Directive, when it is of fixed duration, has become definitive and was adopted on the grounds that the third-country national represented a danger to public order.

66. Article 11(2), final sentence, of the Return Directive permits an entry ban to exceed five years if the third-country national represents a 'serious threat to public policy, public security or national security'.

54 Commission Recommendation of 7 March 2017 on making returns more effective when implementing Directive 2008/115/EC of the European Parliament and of the Council, C(2017) 1600, point 24.

55 Commission Recommendation of 1 October 2015 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return related tasks, C(2015) 6250 final, Annex, p. 60. According to the Court's case-law, even if recommendations are not intended to produce binding effects, they still have certain legal effects. For instance, national courts are required to take them into consideration for the purpose of deciding disputes submitted to them, in particular where the recommendations cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding EU provisions. See to that effect judgment of 15 September 2016, *Koninklijke KPN and Others*, C-28/15, EU:C:2016:692, paragraph 41.

56 I note that within the Schengen area, the third-country national's travel document will be stamped on exit in accordance with Article 8 of the Schengen Border Code (Regulation 2016/399). In non-Schengen Member States, national law may well contain a similar provision. Thus, provided the third-country national did not leave in a clandestine manner, he should be able to demonstrate when the entry ban should be deemed to have begun.

57 For the SIS II to work effectively, this requires Member States to create alerts, as provided for by Article 24 of Regulation No 1987/2006, in respect of entry bans even though they may not yet know the third-country national's actual date of departure. This is indeed what the Netherlands currently do, as was explained at the hearing.

67. In *Filev and Osmani* the Court extended that rule to historic entry bans. It held that Article 11(2) of the Return Directive precludes the effects of historic entry bans continuing beyond the maximum length of entry bans laid down by that provision, except where such a ban was imposed on a third-country national constituting a 'serious threat to public order, public security or national security'. [58]

68. It is therefore clear both from the wording of Article 11(2) of the Return Directive and the case-law that a historic entry ban may exceed the maximum of five years laid down in principle by that provision. It is however necessary to address the conditions under which that is possible.

69. A Member State may avail itself of that possibility where the third-country national represents a 'serious threat to public policy, public security or national security'. In the present case it is the concept of 'public policy' (more accurately, 'public order') that is relevant. [59] That concept must be interpreted in the specific context of the Return Directive by reference to its wording, purpose, scheme and context. [60]

70. Member States essentially remain free to determine the requirements of public policy in accordance with their national needs, which can vary from one Member State to another and from one era to another. [61] However, I consider that a derogation, such as Article 11(2), final sentence, of the Return Directive, is not to be construed broadly rather than restrictively merely because it concerns individuals who do not have residence rights within the European Union. Furthermore, third-country nationals (including those whose presence on the territory of the Member States is illegal) to whom EU law applies come for that reason within the scope of the Charter of Fundamental Rights of the European Union. The fundamental rights that the Charter guarantees are to be observed with equal respect for all who come within its scope. What constitutes public policy requirements cannot therefore be determined unilaterally by each Member State without any control by the institutions of the European Union. [62]

71. The rules of criminal law are all public policy rules in the sense that they are imperative rules. An infringement of those rules therefore causes a disturbance to Member States' public policy. The magnitude of that disturbance will be lesser or greater depending on the nature of the act committed. The severity of the penalty laid down by the national legislature to sanction the prohibited conduct will normally reflect the perceived impact of that disturbance. A breach of a Member State's criminal law therefore equates to an act contrary to public policy. [63]

72. However, the mere fact that such an act is, by definition, contrary to public policy is not enough to warrant imposing an entry ban that exceeds five years. Two additional elements are necessary. First, there should be a 'serious threat' to public policy. Second, as recital 14 of the Return Directive makes clear, the length of the entry ban should be determined having due regard to all relevant circumstances of the individual case.

58 Paragraph 44.

59 The English version of the Return Directive uses the term 'public policy', whereas the French and other linguistic versions use the term '*ordre public*'. I have already addressed that difference in wording in my Opinion in *Zh. and O.*, C-554/13, EU:C:2015:94, points 28 to 33. As I explained in point 33 of that Opinion, 'It is evident, from looking at both the EU legislation and the case-law of the Court, that the term "public policy" is here used as an equivalent for the French term "*ordre public*"'. For ease of reference I shall nevertheless refer here to 'public policy', the term used in the English version of the Return Directive.

60 See my Opinion in *Zh. and O.*, C-554/13, EU:C:2015:94, point 57.

61 Judgment of 11 June 2015, *Zh. and O.*, C-554/13, EU:C:2015:377, paragraph 48.

62 See my Opinion in *Zh. and O.*, C-554/13, EU:C:2015:94, points 46 and 59.

63 See my Opinion in *Zh. and O.*, C-554/13, EU:C:2015:94, points 61 and 62.

73. I construe the term 'threat to public policy' as connoting that public policy may be endangered by a future act of the third-country national.[64] By using the adjective 'serious', the legislature implied that the threshold for justifying an entry ban exceeding five years is higher than the threshold for reducing the period for voluntary departure under Article 7(4) of the same directive.[65] Not every (past) breach of criminal law constitutes a (future) 'serious threat to public policy' within the meaning of Article 11(2).[66] The national authorities must carry out an assessment of the perceived future risk to society from the individual in question. The onus is on the Member State relying upon the derogation to show why public policy interests are likely to be seriously endangered unless a longer entry ban is imposed. The procedure must be 'in accordance with fundamental rights as general principles of [EU] law as well as international law'.[67]

74. The assessment must be carried out *in concreto*, with 'due regard to all relevant circumstances of an individual case', on 'a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay'.[68] Thus, a Member State may not rely upon its general practice or mere assumptions in order to determine that there exists a 'serious threat to public policy'. The requirement for an individual examination and the principle of proportionality oblige the Member State to have due regard to the third-country national's personal conduct and the perceived future risk that that conduct poses to public policy. It follows that the fact that a third-country national is suspected, or has been convicted, of an act punishable as a criminal offence under national law cannot, in itself, justify a finding that that person poses a 'serious threat to public policy' under Article 11(2) of the Return Directive.[69] The presence of several previous convictions for criminal offences may however suffice to invoke the derogation in Article 11(2) of the Return Directive, to the extent that those demonstrate an established pattern of behaviour on the part of the person concerned.

75. A further aspect is whether there is any limitation to the length of an entry ban exceeding five years that is imposed on the grounds of a 'serious threat to public policy, public security or national security'.

76. Article 11(2) of the Return Directive is silent in that regard. This Court's case-law seems to accept the possibility of imposing an entry ban of unlimited duration. In *Filev and Osmani* the Court ruled that 'Article 11(2) of Directive 2008/115 precludes a continuation of the effects of entry bans of unlimited length made before the date on which Directive 2008/115 became applicable, … beyond the maximum length of entry ban laid down by that provision, except where those entry bans were made against third-country nationals constituting a serious threat to public order, public security or national security'.[70] *A contrario*, that would suggest that, at least for historic entry bans, when a third-country national constitutes such a threat the continuation of the effects of an entry ban of unlimited length is possible.

64 Point 39.

65 The adjective 'serious' was not in the Commission's Proposal. It was added to the text of the Return Directive during the legislative process following a Belgian suggestion in 2008. See, to that effect, the amended Council Proposal following discussions on 7 February 2008, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, 6541/08, Article 9(2) of the text of the directive as included in that proposal and footnote 52.

66 See my Opinion in *Zh. and O.*, C-554/13, EU:C:2015:94, paragraph 62, and, by analogy, judgment of 27 October 1977, *Bouchereau*, 30/77, EU:C:1977:172, paragraph 27.

67 Article 1 of the Return Directive.

68 Recitals 14 and 6 of the Return Directive, respectively.

69 Judgment of 11 June 2015, *Zh. and O.*, C-554/13, EU:C:2015:377, paragraph 50.

70 Judgment of 19 September 2013, C-297/12, EU:C:2013:569, paragraph 44.

77. I do not agree with that approach. Article 11(2) of the Return Directive should be read in the light of Article 3(6) of that directive which defines entry bans as administrative or judicial decisions adopted for a 'specified period'. That excludes, in my view, the possibility of adopting entry bans of unlimited duration.[71] In the case of historic entry bans of unlimited duration, it may be necessary for the national authorities to review the file in the light of Article 11(2) of the Return Directive and substitute an appropriate fixed duration for the entry ban. However, the Court has not heard argument as to the possible variants on the length of entry bans and I therefore express no view on that question.

78. I conclude that it is for the national court to ascertain, according to national procedural rules, whether, when the historic entry ban was adopted, the national authorities assessed the personal conduct of the third-country national concerned and concluded on that basis that he posed a serious threat to public policy. In that context, the presence of several previous convictions for criminal offences may suffice to invoke the derogation in Article 11(2) of the Return Directive, to the extent that these demonstrate an established pattern of behaviour on the part of the person concerned. It is for the national court to ascertain that the procedure for imposing the entry ban was in accordance with fundamental rights as general principles of European Union law.

Conclusion

79. In the light of the foregoing considerations I am of the opinion that the Court should answer the questions referred by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) as follows:

– The starting point for the duration of an entry ban as provided for by Article 11(2) 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 should be the point when the third-country national actually leaves the territory of the Member States.

– Article 11(2), final sentence, of the Directive 2008/115 should be interpreted as meaning that a historic entry ban may exceed the limitation of five years if the conditions there laid down are satisfied. It is for the national court to ascertain, according to national procedural rules, whether, when the historic entry ban was adopted, the national authorities assessed the personal conduct of the third-country national concerned and concluded that he posed a serious threat to public policy. In that context, several previous convictions for criminal offences may suffice to invoke the derogation in Article 11(2) of Directive 2008/115 to the extent that these demonstrate an established pattern of behaviour on the part of the person concerned. It is for the national court to ascertain that the procedure was in accordance with fundamental rights as general principles of European Union law.

71 An entry ban is never a standalone measure but always accompanies a return decision. Even if it is not enforced, the latter could become time-barred under national rules on limitation. For that reason, I doubt that an entry ban applied to a third-country national who never leaves the territory of the Member States can be a 'perpetual entry ban', as Mr Ouhrami suggested.