Reports of Cases

Case C-181/16

Sadikou Gnandi
v
État belge

(Request for a preliminary ruling from the Conseil d'État (Belgium))

(Reference for a preliminary ruling — Area of freedom, security and justice — Return of illegally staying third-country nationals — Directive 2008/115/EC — Article 3(2) — Concept of 'illegal stay' — Article 6 — Adoption of a return decision before resolution of an appeal against the decision of the determining authority rejecting the application for international protection — Charter of Fundamental Rights of the European Union — Article 18, Article 19(2) and Article 47 — Principle of non-refoulement — Right to an effective remedy — Authorisation to remain in a Member State)

Summary — Judgment of the Court (Grand Chamber), 19 June 2018

1. *Questions referred for a preliminary ruling — Reference to the Court — Requirement that there be a case pending before the referring court*

   (Art. 267 TFEU)

2. *Questions referred for a preliminary ruling — Jurisdiction of the Court — Interpretation of national law — Not included*

   (Art. 267 TFEU)

3. *Border controls, asylum and immigration — Immigration policy — Return of illegally staying third-country nationals — Directive 2008/115 — Scope ratione personae — Applicant for international protection whose application was rejected at first instance — Included — Authorisation to remain on the territory of the Member State pending the outcome of an appeal against that rejection — Irrelevant*

   (European Parliament and Council Directive 2008/115, Recital 9 and Arts 6(4) and (6); Council Directive 2005/85, Arts 7(1) and 39(3)(a))

4. *Border controls, asylum and immigration — Immigration policy — Return of illegally staying third-country nationals — Directive 2008/115 — Appeal against a return decision or a decision on a removal — Right to effective judicial protection — Principle of non-refoulement — Automatic suspensory effect of that appeal before a judicial body*

   (Charter of Fundamental Rights of the European Union, Arts 18, 19(2) and 47; European Parliament and Council Directive 2008/115, Art. 6)

5. *Border controls, asylum and immigration — Immigration policy — Return of illegally staying third-country nationals — Directive 2008/115 — Return decision relating to a third-country national after his application for international protection has been rejected and before resolution of an appeal against that rejection — Lawfulness — Conditions — Suspension of the return procedure pending the outcome of that appeal — Applicant entitled to benefit from the rights arising under Directive 2003/9 and to rely on any change in circumstances that occurred after the adoption of the return decision*

(Charter of Fundamental Rights of the European Union, Arts 18, 19(2) and 47; European Parliament and Council Directive 2008/115, Arts 5, 6(1), 7 and 15; Council Directive 2005/85; Council Directive 2003/9, Arts 2(c) and 3(1))

1. See the text of the decision.

(see para. 31)

2. See the text of the decision.

(see para. 34)

3. In accordance with Article 7(1) of Directive 2005/85, an applicant for international protection is to be allowed to remain in the Member State, for the sole purpose of the procedure, until adoption of a decision at first instance refusing that person's application. Even though, according to the express wording of that provision, that right to remain does not constitute an entitlement to a residence permit, it is nevertheless apparent, inter alia, from recital 9 of Directive 2008/115, that that right to remain prevents an applicant for international protection from being regarded as 'staying illegally', within the meaning of that directive, during the period from submission of the application for international protection until adoption of a first-instance decision on that application.

As is quite clear from the wording of Article 7(1) of Directive 2005/85, the right to remain laid down in that provision ends upon the adoption of a first-instance decision, by the determining authority, rejecting the application for international protection. In the absence of a right to stay or a residence permit granted on another legal basis (such as Article 6(4) of Directive 2008/115) which would enable the third-country national whose application has been rejected to fulfil the conditions for entry, stay or residence in the Member State concerned, the consequence of that rejection decision, once adopted, is that the applicant no longer fulfils those conditions and, accordingly, that person's stay becomes illegal. Thus, a return decision may, in principle, be adopted against such a third-country national after that rejection decision or aggregated together in a single administrative act.

It is true that, under Article 39(3)(a) of Directive 2005/85, Member States may provide for rules allowing applicants for international protection to remain on their territory pending the outcome of an appeal against the decision rejecting the application for international protection. It is also true that the Court has held, in paragraphs 47 and 49 of the judgment of 30 May 2013, *Arslan* (C-534/11, EU:C:2013:343), that an authorisation to remain for the purposes of exercising a right of appeal against a decision rejecting an application for international protection precludes the application of Directive 2008/115 to the third-country national who submitted that application until the conclusion of the appeal proceedings brought against that rejection decision. However, it cannot be inferred from that judgment that such an authorisation to remain precludes the conclusion that, as soon as the application for international protection is rejected, and without prejudice to the existence of a right to stay or to a residence permit as discussed in paragraph 41 above, the stay of the person concerned becomes illegal, within the meaning of Directive 2008/115.

(see paras 40-44, 59)

4. According to the case-law of the Court, when a State decides to return an applicant for international protection to a country where there are substantial grounds for believing that he will be exposed to a real risk of ill-treatment contrary to Article 18 of the Charter, read in conjunction with Article 33 of the Geneva Convention, or to Article 19(2) of the Charter, the right to an effective remedy provided for in Article 47 of the Charter requires that that applicant have available to him a remedy enabling automatic suspension of enforcement of the measure authorising his removal (see, to that effect, judgments of 18 December 2014, *Abdida*, C-562/13, EU:C:2014:2453, paragraph 52, and of 17 December 2015, *Tall*, C-239/14, EU:C:2015:824, paragraph 54).

It is true that the Court has previously ruled that the lack of suspensory effect of an appeal brought solely against a decision rejecting an application for international protection is, in principle, compatible with the principle of non-refoulement and Article 47 of the Charter, since the enforcement of such a decision cannot, as such, lead to removal of the third-country national concerned (see, to that effect, judgment of 17 December 2015, *Tall*, C-239/14, EU:C:2015:824, paragraph 56). By contrast, an appeal brought against a return decision within the meaning of Article 6 of Directive 2008/115 must, in order to ensure, as regards the third-country national concerned, compliance with the requirements arising from the principle of non-refoulement and Article 47 of the Charter, enable automatic suspensory effect, since that decision may expose the person concerned to a real risk of being subjected to treatment contrary to Article 18 of the Charter, read in conjunction with Article 33 of the Geneva Convention, or contrary to Article 19(2) of the Charter (see, to that effect, judgments of 18 December 2014, *Abdida*, C-562/13, EU:C:2014:2453, paragraphs 52 and 53, and of 17 December 2015, *Tall*, C-239/14, EU:C:2015:824, paragraphs 57 and 58). That applies, a fortiori, to a possible removal decision, within the meaning of Article 8(3) of that directive.

(see paras 54-56)

5. 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, read in conjunction with Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, and in the light of the principle of non-refoulement and the right to an effective remedy, enshrined in Article 18, Article 19(2) and Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding the adoption of a return decision, under Article 6(1) of Directive 2008/115, in respect of a third-country national who has applied for international protection, immediately after the rejection of that application by the determining authority or together in the same administrative act, and thus before the conclusion of any appeal proceedings brought against that rejection, provided, inter alia, that the Member State concerned ensures that all the legal effects of the return decision are suspended pending the outcome of the appeal, that that applicant is entitled, during that period, to benefit from the rights arising under Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, and that he is entitled to rely on any change in circumstances that occurred after the adoption of the return decision which may have a significant bearing on the assessment of his situation under Directive 2008/115, and in particular under Article 5 thereof, those being matters for the referring court to determine.

In that context, it is for the Member States to ensure the full effectiveness of an appeal against a decision rejecting an application for international protection, in accordance with the principle of equality of arms, which means, inter alia, that all the effects of the return decision must be suspended during the period prescribed for bringing that appeal and, if such an appeal is brought, until resolution of the appeal. In that regard, it is not sufficient for the Member State concerned to refrain from enforcing the return decision. On the contrary, it is necessary that all the legal effects of that decision be suspended and, in particular, that the period granted for voluntary departure in accordance with

Article 7 of Directive 2008/115 should not start to run as long as the person concerned is allowed to remain. In addition, during that period, that person may not be held in detention with a view to removal pursuant to Article 15 of that directive.

Furthermore, pending the outcome of an appeal against the rejection of his application for international protection at first instance by the determining authority, the person concerned must, in principle, be entitled to benefit from the rights arising under Directive 2003/9. Article 3(1) of that directive makes its application conditional only on the existence of an authorisation to remain on the territory as an applicant and, therefore, does not exclude the directive's application in the case where the person concerned has such an authorisation and is staying illegally, within the meaning of Directive 2008/115. In that regard, it is apparent from Article 2(c) of Directive 2003/9 that the person concerned is to retain his status as an applicant for international protection, within the meaning of that directive, until a final decision is adopted in relation to his application (see, to that effect, judgment of 27 September 2012, *Cimade and GISTI*, C-179/11, EU:C:2012:594, paragraph 53).

(see paras 61-63, 67, operative part)