



Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 17 October 2018¹

Case C-444/17

Préfet des Pyrénées-Orientales
v
Abdelaziz Arib,
Procureur de la République,
Procureur général près la cour d'appel de Montpellier

(Request for a preliminary ruling
from the Cour de cassation (Court of Cassation, France))

(Reference for a preliminary ruling — Area of freedom, security and justice — Schengen Borders Code — Article 32 — Border control at internal borders — Directive 2008/115/EC — Scope — Article 2(2)(a) — Illegal entry of a third-country national — Internal borders and external borders not to be equated)

Introduction

1. According to now settled case-law of the Court, the provisions of Directive 2008/115/EC² preclude, in principle, the imposition of a term of imprisonment on a third-country national on the sole ground of his or her illegal stay in a Member State. The only two exceptions in the Court's case-law are the situation in which the return procedure established by Directive 2008/115 has been applied and the national continues to stay illegally on the territory of that Member State with no justified ground for non-return,³ and the situation in which a return procedure has been applied and the person concerned re-enters that territory in breach of an entry ban.⁴

2. The key question arising in this reference for a preliminary ruling from the Cour de cassation (Court of Cassation, France) is whether a third exception should be allowed for the situation in which an illegally staying third-country national has been intercepted near an internal border. Thus, it is not a matter of determining whether or not the reintroduction of internal border control was lawful, but merely the consequences of such reintroduction.

3. Thus, in the context of the present case, the Court is once again called upon to rule on whether or not a national legal provision, under which a term of imprisonment may be imposed on a third-country national on the sole ground of his or her irregular status, is consistent with Directive 2008/115.

¹ Original language: French.

² Directive of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

³ See judgment of 6 December 2011, *Achughbabian*, C-329/11, EU:C:2011:807, paragraph 50 and the second indent of the operative part.

⁴ See judgment of 1 October 2015, *Celaj*, C-290/14, EU:C:2015:640, paragraph 28 and the operative part.

4. My analysis leads me to propose that the Court reply to this question in the negative. For the purposes of Directive 2008/115, whether an individual is intercepted near the border between France and Spain or on the Champs-Élysées is irrelevant. In that respect, it is important to note that the temporary reintroduction of internal border control pursuant to the Schengen Borders Code⁵ does not alter this.

Legal context

EU law

The Schengen Borders Code

5. Article 5 of the Schengen Borders Code provides:

‘1. External borders may be crossed only at border crossing points and during the fixed opening hours. The opening hours shall be clearly indicated at border crossing points which are not open 24 hours a day.

Member States shall notify the list of their border crossing points to the Commission in accordance with Article 39.

...

3. Without prejudice to the exceptions provided for in paragraph 2 or to their international protection obligations, Member States shall introduce penalties, in accordance with their national law, for the unauthorised crossing of external borders at places other than border crossing points or at times other than the fixed opening hours. Those penalties shall be effective, proportionate and dissuasive.’

6. Article 13(1) of the code states:

‘The main purpose of border surveillance shall be to prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally. A person who has crossed a border illegally and who has no right to stay on the territory of the Member State concerned shall be apprehended and made subject to procedures respecting Directive 2008/115/EC.’

7. Under Article 14 of the code:

‘1. A third-country national who does not fulfil all the entry conditions laid down in Article 6(1) and does not belong to the categories of persons referred to in Article 6(5) shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.

2. Entry may only be refused by a substantiated decision stating the precise reasons for the refusal. The decision shall be taken by an authority empowered by national law. It shall take effect immediately.

⁵ 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).

The substantiated decision stating the precise reasons for the refusal shall be given by means of a standard form, as set out in Annex V, Part B, filled in by the authority empowered by national law to refuse entry. The completed standard form shall be handed to the third-country national concerned, who shall acknowledge receipt of the decision to refuse entry by means of that form.

3. Persons refused entry shall have the right to appeal. Appeals shall be conducted in accordance with national law. A written indication of contact points able to provide information on representatives competent to act on behalf of the third-country national in accordance with national law shall also be given to the third-country national.

Lodging such an appeal shall not have suspensive effect on a decision to refuse entry.

Without prejudice to any compensation granted in accordance with national law, the third-country national concerned shall, where the appeal concludes that the decision to refuse entry was ill-founded, be entitled to correction of the cancelled entry stamp, and any other cancellations or additions which have been made, by the Member State which refused entry.

4. The border guards shall ensure that a third-country national refused entry does not enter the territory of the Member State concerned.

5. Member States shall collect statistics on the number of persons refused entry, the grounds for refusal, the nationality of the persons who were refused entry and the type of border (land, air or sea) at which they were refused entry and submit them yearly to the Commission (Eurostat) in accordance with Regulation (EC) No 862/2007⁶...

6. Detailed rules governing refusal of entry are given in Part A of Annex V.'

8. Article 23 of the Schengen Borders Code, entitled 'Checks within the territory', states:

'The absence of border control at internal borders shall not affect:

- (a) the exercise of police powers by the competent authorities of the Member States under national law, insofar as the exercise of those powers does not have an effect equivalent to border checks; that shall also apply in border areas. Within the meaning of the first sentence, the exercise of police powers may not, in particular, be considered equivalent to the exercise of border checks when the police measures:
 - (i) do not have border control as an objective;
 - (ii) are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime;
 - (iii) are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders;
 - (iv) are carried out on the basis of spot-checks;

...'

⁶ Regulation of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers (OJ 2007 L 199, p. 23).

9. Article 25 of the code provides:

‘1. Where, in the area without internal border control, there is a serious threat to public policy or internal security in a Member State, that Member State may exceptionally reintroduce border control at all or specific parts of its internal borders for a limited period of up to 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days. The scope and duration of the temporary reintroduction of border control at internal borders shall not exceed what is strictly necessary to respond to the serious threat.

2. Border control at internal borders shall only be reintroduced as a last resort, and in accordance with Articles 27, 28 and 29. The criteria referred to, respectively, in Articles 26 and 30 shall be taken into account in each case where a decision on the reintroduction of border control at internal borders is considered pursuant, respectively, to Article 27, 28 or 29.

3. If the serious threat to public policy or internal security in the Member State concerned persists beyond the period provided for in paragraph 1 of this Article, that Member State may prolong border control at its internal borders, taking account of the criteria referred to in Article 26 and in accordance with Article 27, on the same grounds as those referred to in paragraph 1 of this Article and, taking into account any new elements, for renewable periods of up to 30 days.

4. The total period during which border control is reintroduced at internal borders, including any prolongation provided for under paragraph 3 of this Article, shall not exceed six months. Where there are exceptional circumstances as referred to in Article 29, that total period may be extended to a maximum length of two years, in accordance with paragraph 1 of that Article.’

10. Article 32 of that Code states:

‘Where border control at internal borders is reintroduced, the relevant provisions of Title II shall apply *mutatis mutandis*.’

11. Articles 5, 13 and 14 of the Schengen Borders Code form part of Title II thereof, entitled ‘External borders’, while Articles 23, 25 and 32 form part of Title III thereof, entitled ‘Internal borders’.

Directive 2008/115

12. The subject matter of Directive 2008/115 is described in Article 1 thereof as follows:

‘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.’

13. Article 2 of Directive 2008/115, entitled ‘Scope’, provides:

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

2. Member States may decide not to apply this Directive to third-country nationals who:

- (a) are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State;

- (b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.

...'

14. Under Article 3 of the directive, entitled 'Definitions':

'For the purpose of this Directive, the following definitions shall apply:

...

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;
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 Community 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;

...'

15. Article 4(4) of the directive provides:

'With regard to third-country nationals excluded from the scope of this Directive in accordance with Article 2(2)(a), Member States shall:

- (a) ensure that their treatment and level of protection are no less favourable than as set out in Article 8(4) and (5) (limitations on use of coercive measures), Article 9(2)(a) (postponement of removal), Article 14(1) (b) and (d) (emergency health care and taking into account needs of vulnerable persons), and Articles 16 and 17 (detention conditions) and
- (b) respect the principle of non-refoulement.'

16. Under Article 6(1) ('Return decision') of Directive 2008/115: 'Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5'.

17. Article 16 of the directive reads:

- ‘1. Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners.
2. Third-country nationals in detention shall be allowed — on request — to establish in due time contact with legal representatives, family members and competent consular authorities.
3. Particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided.
4. Relevant and competent national, international and non-governmental organisations and bodies shall have the possibility to visit detention facilities, as referred to in paragraph 1, to the extent that they are being used for detaining third-country nationals in accordance with this Chapter. Such visits may be subject to authorisation.
5. Third-country nationals kept in detention shall be systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations. Such information shall include information on their entitlement under national law to contact the organisations and bodies referred to in paragraph 4.’

French law

18. Article L. 621-2 of the code de l’entrée et du séjour des étrangers et du droit d’asile (Code on the entry and stay of foreign nationals and the right of asylum), as amended by Law No 2012-1560 of 31 December 2012 on the detention of foreign nationals for the purpose of verifying their right to stay and amending the offence of aiding an illegal stay in order to exclude humanitarian and altruistic actions⁷ (‘the Céseda’), provides:

‘A foreign national who is not a national of a Member State of the European Union shall be liable to a sentence of one year’s imprisonment and a fine of EUR 3 750:

- (1) if he has entered the territory of Metropolitan France without satisfying the conditions laid down in Article 5(1)(a), (b) or (c) of Regulation (EC) No 562/2006 [⁸] 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) [⁹] and without having been admitted to that territory pursuant to Article 5(4)(a) and (c) of that same regulation; [¹⁰] the same shall apply where an alert has been issued for the purpose of refusing the foreign national entry pursuant to an enforceable decision adopted by another State party to the convention signed in Schengen on 19 June 1990;
- (2) or if, arriving directly from the territory of a State party to that convention, he has entered the territory of Metropolitan France without complying with the requirements of Article 19(1) or (2), Article 20(1) and Article 21(1) or (2) thereof, with the exception of the conditions referred to in

⁷ JORF of 1 January 2013, p. 48.

⁸ Which corresponds to Article 6(1)(a), (b) and (c) of the Schengen Borders Code.

⁹ OJ 2006 L 105, p. 1.

¹⁰ Which corresponds to Article 6(5)(a) and (c) of the Schengen Borders Code.

Article 5(1)(e) of Regulation [No 562/2006] cited above and in Article 5(1)(d) thereof where the alert for the purpose of refusing entry does not result from an enforceable decision adopted by another State party to the convention;

...

For the purposes of this article, criminal proceedings may be instituted only in cases where the facts have been found in the circumstances provided for in Article 53 of the Code of Criminal Procedure.'

19. Article 53 of the Code de procédure pénale (Code of Criminal Procedure) states:

'A crime or other offence shall be classified as in *flagrante delicto* where it is in the course of being committed or has just been committed. A crime or other offence shall also be so classified where, at a time very close to the act, the person suspected is pursued by hue and cry, is found in the possession of articles, or has on or about him traces or clues so as to give grounds for believing that he has taken part in the crime or other offence.

Following the discovery of a crime or other offence classified as in *flagrante delicto*, the investigation conducted under the supervision of the public prosecutor under the conditions provided for by the present chapter may continue without interruption for eight days.

Where the investigations necessary for establishing the truth in relation to a crime or other offence punishable by a term of at least five years' imprisonment cannot be postponed, the public prosecutor may decide to extend the investigation, subject to the same conditions, by a maximum of eight days.'

20. Article 62-2 of the Code of Criminal Procedure states:

'Police custody is a coercive measure decided upon by a senior law-enforcement officer, under the supervision of the courts, whereby a person reasonably suspected on one or more grounds of having committed or attempted to commit a crime or other offence punishable by imprisonment is held at the disposal of investigators.

...'

21. Article 78-2 of the Code of Criminal Procedure states:

'Senior law-enforcement officers and, upon their orders and under their responsibility, the law-enforcement officers and assistant law-enforcement officers referred to in Articles 20 and 21-1 may ask any person to prove his identity by any means, where one or more plausible reasons exist for suspecting that:

- the person has committed or attempted to commit an offence;
- or the person is preparing to commit a crime or other offence;
- or the person is likely to provide information useful for the investigation in the event of a crime or other offence;
- or the person has breached the obligations or provisions to which he is subject in the context of judicial supervision, house arrest with electronic surveillance, a sentence or a measure followed by the judge responsible for the execution of sentences;
- or the person is the subject of inquiries ordered by a judicial authority.

On the public prosecutor's written recommendations for the purposes of the investigation and prosecution of offences specified by him, the identity of any person may also be checked, in accordance with the same rules, in the places and for a period of time determined by the public prosecutor. The fact that the identity check uncovers offences other than those referred to in the public prosecutor's recommendations shall not constitute a ground for invalidating related proceedings.

The identity of any person, regardless of his conduct, may also be checked pursuant to the rules set out in the first paragraph to prevent a breach of public order, in particular, an offence against the safety of persons or property.

In an area between the land border of France with the States party to the convention signed in Schengen on 19 June 1990 and a line drawn 20 kilometres inside that border, and in the publicly accessible areas of ports, airports and railway or bus stations open to international traffic, designated by order, for the prevention and search of offences relating to cross-border crime, the identity of any person may also be checked, in accordance with the rules provided for in the first paragraph, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled. Where that identity check takes place on board an international train, it may be carried out on the section of the journey between the border and the first stop situated beyond the 20 kilometre line. However, on international trains on lines with particular service characteristics the identity check may also be carried out between that stop and a stop situated within the next 50 kilometres. Those lines and those stops are designated by ministerial order. Where there is a section of motorway starting in the area referred to in the first sentence of this paragraph and the first motorway tollbooth is situated beyond the 20-kilometre line, the identity check may also take place up to that first tollbooth, on parking areas and on the site of that tollbooth and the adjoining parking areas. The tollbooths concerned by this provision shall be designated by order. The fact that the identity check uncovers an offence other than the non-observance of the aforementioned obligations shall not constitute a ground for invalidating related proceedings. For the purposes of this paragraph, checks related to the obligations laid down by law to hold, carry and produce papers and documents may only be carried out in any given location for a period not exceeding six consecutive hours and may not consist in the systematic checks on persons present in or moving within the areas or places referred to in this paragraph.

...'

Facts, main proceedings and questions referred

22. Having entered French territory on an unknown date, Mr Abdelaziz Arib, a Moroccan national, left France pursuant to a removal order notified to him on 10 August 2013.

23. On 15 June 2016, as he was travelling by coach from Morocco, Mr Arib was checked in Le Boulou (Pyrénées-Orientales, France), in the area between the land border separating France from Spain and a line drawn 20 kilometres inside that border, in accordance with the ninth paragraph of Article 78-2 of the Code of Criminal Procedure. He was unable to prove that he held a visa or other papers authorising him to stay on French territory.

24. Mr Arib was held in police custody on suspicion of illegal entry into French territory, an offence under Article L. 621-2 of the *Ceseda*.

25. On 16 June 2016, the préfet des Pyrénées-Orientales (Prefect of the Pyrénées-Orientales, France) ('the Prefect') made an order requiring Mr Arib to leave France and ordered his administrative detention.

26. By order of 21 June 2016, the judge responsible for matters relating to liberty and detention at the tribunal de grande instance de Perpignan (Regional Court, Perpignan, France) declared that Mr Arib's detention in police custody was invalid, together with subsequent proceedings, including his administrative detention, on the ground that it was not possible to detain him. Mr Arib, an illegally staying foreign national, had just crossed an internal border between France and Spain, which, in the judge's opinion, triggered the application of Directive 2008/115, under which no term of imprisonment can be imposed in circumstances such as those in the present case.

27. The Prefect lodged an appeal against that order.

28. By order of 22 June 2016, the First President of the cour d'appel de Montpellier (Court of Appeal, Montpellier, France) upheld the decision taken at first instance by the judge responsible for matters relating to liberty and detention at the tribunal de grande instance de Perpignan (Regional Court, Perpignan).

29. The Prefect lodged an appeal in cassation against that order before the referring court. In support of his appeal, the Prefect relies on a breach of Articles 2, 14, 25, 27 and 32 of the Schengen Borders Code as well as Article 2(2)(a) and Articles 8 and 15 of Directive 2008/115. He argues, *inter alia*, that where there is a serious threat to public policy or internal security, a Member State may, exceptionally, reintroduce border control at its internal borders, thus precluding in part the application of Directive 2008/115, and, in that case, since the protective measures under Directive 2008/115 do not apply, a person who has entered France illegally may be checked in accordance with the provisions of the ninth paragraph of Article 78-2 of the Code of Criminal Procedure and, by virtue of his or her illegal stay, be liable to a term of imprisonment and detention in police custody.

30. The referring court seeks to ascertain whether border control that has been reintroduced at an internal border of a Member State can be equated with border control at an external border when that border is crossed by a third-country national who does not have a right of entry and the control is carried out in cases of *flagrante delicto*. It therefore asks whether a Member State that has reintroduced border control at internal borders may rely upon Article 2(2)(a) of Directive 2008/115 in order to exclude a third-country national from the scope of the directive. If the answer is in the affirmative, the question then arises as to whether Article 4(4) of Directive 2008/115 is to be interpreted as not precluding the imprisonment of a third-country national in the factual circumstances of the present case.

31. In those circumstances the Cour de cassation (Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- '(1) Is Article 32 of [the Schengen Borders Code] – which provides that, when border control at internal borders is reintroduced, the relevant provisions of Title II (relating to external borders) are to apply *mutatis mutandis* – to be interpreted as meaning that border controls reintroduced at an internal border of a Member State may be equated with border controls at an external border, when that border is crossed by a third-country national who has no right of entry?
- (2) In the same circumstances of reintroduction of controls at internal borders, do that [code] and Directive [2008/115] permit the application, to the situation of a third-country national crossing a border at which controls have been reintroduced, of the power, conferred on the Member States by Article 2(2)(a) of Directive [2008/115], to continue to apply simplified national return procedures at their external borders?

(3) Should the answer to the previous question be in the affirmative, do the provisions of Article 2(2)(a) and of Article 4(4) of Directive [2008/115] preclude national legislation such as Article L. 621-2 of the [Ceseda], which penalises with a term of imprisonment the illegal entry into national territory of a third-country national in respect of whom the return procedure established by that directive has not yet been completed?’

32. The Prefect, the French and German Governments, and the European Commission submitted observations. The French and German Governments and the Commission presented oral arguments at the hearing held on 12 June 2018.

Analysis

33. While this is the third case in which the subject matter, in the main proceedings, is whether Article L. 621 of the Ceseda is consistent with the provisions of Directive 2008/115,¹¹ the distinguishing feature of this case lies in the interaction between the provisions of the directive with those of the Schengen Borders Code.

First and second questions

34. By its first and second questions, which should be addressed together, the referring court seeks, in essence, to ascertain whether, according to Article 2(2)(a) of Directive 2008/115 and Article 32 of the Schengen Borders Code, the authorities of a Member State may decide not to apply Directive 2008/115 to the situation of a third-country national apprehended or intercepted when irregularly crossing an internal border at which border control has been reintroduced pursuant to Article 25 of the Schengen Borders Code.¹²

35. The question arising is therefore whether the provisions of Directive 2008/115 must be applied where a Member State has temporarily reintroduced border control at its internal borders pursuant to Article 25 of the Schengen Borders Code.

36. In accordance with the second alternative¹³ set out in Article 2(2)(a) of Directive 2008/115, Member States may decide not to apply the directive to third-country nationals who have been apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.

Crossing a border

37. Mr Arib was apprehended during a check in Le Boulou (Pyrénées-Orientales), namely within 20 kilometres of the border between France and Spain.¹⁴ Given that this check was physically carried out within French territory, there is a question as to whether Mr Arib was apprehended in connection with the crossing of a *border*.

¹¹ See judgments of 6 December 2011, *Achughbabian* (C-329/11, EU:C:2011:807), and of 7 June 2016, *Affum* (C-47/15, EU:C:2016:408).

¹² In my opinion, the first question, in and of itself, goes beyond the scope of the main proceedings, insofar as its subject matter covers a range of hypothetical situations.

¹³ The first alternative, which concerns third-country nationals who are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, does not apply in the present case, in the absence of any such refusal.

¹⁴ On the basis of the former fourth paragraph of Article 78-2 of the Code of Criminal Procedure, now the ninth paragraph of Article 78-2 of that code.

38. According to the case-law of the Court, the expression ‘in connection with the irregular crossing’ of an (external) border implies a direct temporal and spatial link with that crossing of the border and presupposes that that situation therefore concerns third-country nationals who have been apprehended or intercepted by the competent authorities at the very time of the irregular crossing of the (external) border or near that border after it has been so crossed.¹⁵

39. In the present case there is, in my view, a direct temporal and spatial link with the crossing of the border between France and Spain.¹⁶

40. The question which then arises is whether, in the present case, we are also dealing with an *external* border for the purposes of Directive 2008/115, and more specifically Article 2(2)(a) thereof.

Article 2(2)(a) of Directive 2008/115: an external border?

41. Directive 2008/115 does not itself include a definition of the terms ‘internal border’ and ‘external border’. However, since the Schengen Borders Code is mentioned several times in the directive, it seems clear to me that the definition given in that code is applicable.¹⁷

42. Thus, according to Article 2(1) of the Schengen Borders Code, for the purposes of that code, the term ‘internal borders’ means the Member States’ common land borders¹⁸ (subparagraph (a)), the airports of the Member States for internal flights (subparagraph (b)) and sea, river and lake ports of the Member States for regular internal ferry connections. As for ‘external borders’, they are defined as the Member States’ land borders¹⁹ and sea borders, together with their airports, river ports, sea ports and lake ports, provided that they are not internal borders.

43. It should be pointed out that the term ‘Member States’ includes only the Member States of the European Union which take part in the Schengen *acquis* and the third countries taking part therein.²⁰

44. The border at issue between France and Spain constitutes, in the light of these definitions, an internal border.

45. On the basis of the wording of Article 2(2)(a) of Directive 2008/115, the analysis should stop there. The French Republic cannot decide not to apply Directive 2008/115 to Mr Arib.

46. That is also clear from the Court’s interpretation of Article 2(2) of Directive 2008/115 in the judgment in *Affum*.²¹ In that judgment, the Court noted that the two situations covered by Article 2(2)(a) of the directive relate exclusively to the crossing of a Member State’s external border, as defined in Article 2(2) of the Schengen Borders Code, and therefore do not concern the crossing of

¹⁵ See judgment of 7 June 2016, *Affum* (C-47/15, EU:C:2016:408, paragraph 72), and my Opinion in that matter (C-47/15, EU:C:2016:68, point 71).

¹⁶ In addition, in the context of the former Schengen Borders Code (Regulation No 562/2006), the Court ruled that identity checks carried out on the basis of the fourth paragraph of Article 78-2, of the Code of Criminal Procedure (now the ninth paragraph of Article 78-2 of that code) may have an effect equivalent to border controls (see judgment of 22 June 2010, *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraphs 71 to 75)). Nevertheless, as the Court has already interpreted the terms ‘in connection with the irregular crossing’ of a border *in the context of Directive 2008/115*, it is no longer necessary to resort to that case-law in the context of Article 23 of the Schengen Borders Code (formerly Article 21 of Regulation No 562/2006).

¹⁷ See my Opinion in *Affum* (C-47/15, EU:C:2016:68, point 42).

¹⁸ Including river and lake borders.

¹⁹ Including river and lake borders.

²⁰ See recitals 37 to 44 of the Schengen Borders Code.

²¹ Judgment of 7 June 2016 (C-47/15, EU:C:2016:408).

a common border of Member States forming part of the Schengen area. The Court considered that that provision thus cannot permit the Member States to exclude certain illegally staying third-country nationals from the scope of Directive 2008/115 on the ground of illegal entry across an internal border.²²

The reintroduction of border control at internal borders

47. It is necessary to ascertain whether the reintroduction of border control at internal borders may possibly affect the applicability of Directive 2008/115.

48. In that regard, the French Republic and the Federal Republic of Germany argue that it follows from Article 32 of the Schengen Borders Code that the border between France and Spain must, in the present case, be treated as an external border.

49. I cannot agree with that point of view.

50. Admittedly, under Article 32 of the Schengen Borders Code, where border control at internal borders is reintroduced, the relevant provisions of Title II (external borders) of the code are to apply *mutatis mutandis*, but this precisely does not mean that the expression ‘external border’ replaces the expression ‘internal border’ entirely (for the purposes of the Schengen Borders Code or other legal instruments such as Directive 2008/115).

51. Title III of the Schengen Borders Code governs internal borders. The general rule, which is the *raison d’être* and the key provision of the code, is set out in Article 22 of Title III: internal borders may be crossed at any point without a border check on persons being carried out.²³ In addition to the absence of border control at internal borders, Title III of the Schengen Borders Code (Chapter I — Articles 22 to 24) deals with the temporary reintroduction of border controls at internal borders (Chapter II - Articles 25 to 35).

52. It is in that regard that Article 32 of the Schengen Borders Code provides that, where border control at internal borders is reintroduced, the relevant provisions of Title II are to apply *mutatis mutandis*. This provision therefore refers clearly to the other provisions of the Schengen Borders Code. There is no mention at all of Directive 2008/115.

53. The wording of Article 2(2)(a) of Directive 2008/115 is unambiguous: this provision refers to an *external* border.

54. To me, this wording seems to be supported by the purpose and aim of that provision. The exception provided for in Article 2(2)(a) of Directive 2008/115 is also subject to the overall purpose of that directive which is, according to Article 1 thereof, to set out common standards and procedures to be applied in Member States for *returning* illegally staying third-country nationals.²⁴ Thus, while Member States may decide not to apply Directive 2008/115, it is in order to return third-country nationals (even) more efficiently.

²² See judgment of 7 June 2016, *Affum* (C-47/15, EU:C:2016:408, paragraph 69).

²³ ‘Irrespective of their nationality’, as that provision makes clear with implacable logic. In fact, the crossing of borders without any control is possible only if it applies to everyone. Due to the very nature of the absence of controls, the removal of internal border controls that this provision is designed to achieve must extend to third-country nationals. See, in that regard, Hoppe, M., in Lenz C.O. and Borchardt K.-D. (eds), *EU-Verträge Kommentar*, Bundeanzeiger Verlag, 6th ed., Cologne, 2013, Article 77 TFEU, point 5, and Müller-Graff, P.-Chr., in Pechstein M., Nowak C., Häde U. (eds), *Frankfurter Kommentar zu EUV, GRC und AEUV, Band II*, Mohr Siebeck, Tübingen, 2017, Article 77 TFEU, point 1.

²⁴ In accordance with fundamental rights as well as international law, including refugee protection and human rights obligations.

55. If Member States exercise the power,²⁵ provided for in Article 2(2)(a) of Directive 2008/115, not to apply the directive to third-country nationals staying illegally on the territory of a Member State, it is because it is much easier to return a third-country national from an external border.

56. As the referring court points out, and as the Court has already held,²⁶ Article 2(2)(a) of Directive 2008/115 permits the Member States to continue to apply simplified national return procedures at their external borders, without having to follow all the procedural stages prescribed by the directive, in order to be able to remove more swiftly third-country nationals intercepted when crossing those borders.

57. However, the situation of a third-country national who is already within the Schengen area is clearly different from the situation provided for in Article 2(2)(a) of Directive 2008/115.

58. Moreover, Member States do not protect the same legal interests at external borders as they do at internal borders.

59. A Member State which, under the Schengen Borders Code, is responsible for controlling the external borders of that area is acting in the interest of all the member states of the Schengen area. However, a Member State which decides to reinstate border control at internal borders does so in its own interest.

60. Consequently, I propose that the Court's reply to the first and second questions should be that Article 2(2)(a) of Directive 2008/115 and Article 32 of the Schengen Borders Code are to be interpreted as meaning that the authorities of a Member State may not decide not to apply Directive 2008/115 to the situation of a third-country national apprehended or intercepted when irregularly crossing an internal border at which border control has been reintroduced pursuant to Article 25 of the Schengen Borders Code.

Third question

61. By the third question, the referring court seeks to ascertain whether, should the answer to the second question be in the affirmative, the provisions of Article 2(2)(a) and Article 4(4) of Directive 2008/115 preclude national legislation such as Article L. 621-2 of the *Ceseda*, which penalises with a term of imprisonment the illegal entry into national territory of a third-country national in respect of whom the return procedure established by that directive has not yet been completed.

62. Given my response to the first and second questions, this question is hypothetical. For that reason I will examine that question only for the event that the Court does not agree with me on the answer to the first two questions from the referring court.

63. It should be pointed out from the outset that, in principle, under Article 2(2)(a) of Directive 2008/115, the directive *does not apply* to a third-country national in a case such as that set out in that question. That said, in accordance with Article 4(4) of Directive 2008/115, Member States are still required to ensure that the treatment and level of protection afforded to third-country nationals are no less favourable than as set out, in particular, in Articles 16 and 17 (detention conditions).²⁷

²⁵ The Court, of course, refers to it as an 'exception' (see judgment of 7 June 2016, *Affum* (C-47/15, EU:C:2016:408, paragraph 73)), which, in my opinion, implies that the provision in question must be interpreted strictly. See, to that effect, also Peers S., *EU Justice and Home Affairs Law* (Volume 1: *EU Justice and Home Affairs Law*), 4th ed., OUP, Oxford 2016, p. 504.

²⁶ See judgment of 7 June 2016, *Affum* (C-47/15, EU:C:2016:408, paragraph 74).

²⁷ As well as in Article 8(4) and (5) (limitations on use of coercive measures), Article 9(2)(a) (postponement of removal), Article 14(1)(b) and (d) (emergency health care and taking into account needs of vulnerable persons).

64. As the Court pointed out in the judgment in *Affum*, the purpose of Article 2(2)(a) of Directive 2008/115, as is apparent from the directive's history, is to permit the Member States to continue to apply simplified national return procedures at their external borders, without having to follow all the procedural stages prescribed by the directive, in order to be able to remove more swiftly third-country nationals intercepted when crossing those borders.²⁸ This also elucidates the rationale of Article 4(4) of Directive 2008/115²⁹ which, according to the Court, 'regulates in detail the exercise by the Member States of the power provided for in Article 2(2)(a)'²⁹ and which 'is intended in that context to ensure that those simplified national procedures observe the minimum guarantees prescribed by [Directive 2008/115]'.³⁰

65. In my opinion, this analysis shows that, in the eyes of the EU legislature, a Member State's exercise of the power provided for in Article 2(2)(a) of Directive 2008/115 logically presupposes that that Member State is applying a simplified national return procedure.

66. It is therefore tempting to transpose the case-law of the judgment in *Affum* to a situation covered by Article 2(2)(a) of Directive 2008/115 and find that it is impossible to imprison a third-country national.

67. However, I do not think that such an interpretation can be successful as it goes beyond the wording of Article 2(2)(a) of Directive 2008/115, by adding a further condition to it. The Court's settled case-law concerning the deprivation of liberty of an illegally staying third-country national,³¹ guided primarily by considerations relating to the effectiveness of Directive 2008/115,³² in particular Article 6(1)³³ and Article 8(1) thereof,³⁴ refers specifically to the scope of that directive. When a Member State applies Article 2(2)(a) of Directive 2008/115, the situation of a national is no longer governed by the directive and considerations relating to the effectiveness thereof can no longer be relied upon.

68. Therefore, even if there is good reason to doubt that police custody can contribute to the person concerned being removed more swiftly, this question does not arise since it does not come within the scope of Directive 2008/115.

69. For those reasons, my reply to the third (hypothetical) question is that the provisions of Article 2(2)(a) and Article 4(4) of Directive 2008/115 do not preclude national legislation such as Article L. 621-2 of the *Ceseda* which penalises with a term of imprisonment the illegal entry into national territory of a third-country national in respect of whom the return procedure established by that directive has not yet been completed.

²⁸ See judgment of 7 June 2016, *Affum* (C-47/15, EU:C:2016:408, paragraph 74).

²⁹ Ibid.

³⁰ Ibid.

³¹ For an overview of the case-law of the Court, see my Opinion in *Affum* (C-47/15, EU:C:2016:68, points 48 to 56).

³² See, inter alia, the judgment in *Achughbabian* (C-329/11, EU:C:2011:807, paragraph 33). See also my Opinion in *Celaj* (C-290/14, EU:C:2015:285, point 60). See also Bartolini, S., Bombois, Th., 'Immigration Detention before the CJEU: The Interrelationship between the Returns Directive and the Recast Reception Conditions Directive and their Impact on the Rights of Third Country Nationals', *European Human Rights Law Review*, 2016, p. 518 to 529 and, in particular, p. 523.

³³ Which provides that Member States are to issue a return decision to any third-country national staying illegally on their territory, without prejudice to certain exceptions.

³⁴ Which states that Member States are to take all necessary measures to enforce the return decision (if no period for voluntary departure has been granted in accordance with Article 7(4) of Directive 2008/115 or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7 of the directive).

Conclusion

70. In the light of all the foregoing, I propose that the Court reply to the questions referred for a preliminary ruling by the Cour de cassation (Court of Cassation, France) as follows:

Article 2(2)(a) 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, and Article 32 of Regulation (EU) No 2016/399 of the European Parliament and of the Council of 9 March 2016 concerning a code of the European Union on the movement of persons across borders (Schengen Borders Code), are to be interpreted as meaning that the authorities of a Member State may not decide not to apply Directive 2008/115 to the situation of a third-country national apprehended or intercepted when irregularly crossing an internal border at which border control has been reintroduced pursuant to Article 25 of the Schengen Borders Code.