Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 23 April 2020[1]

Case C-806/18

JZ

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

(Reference for a preliminary ruling — Area of freedom, security and justice — Directive 2008/115/EC — Article 11 — Entry ban — Third-country national on whom such an entry ban has been imposed but who has never left the Member State concerned — Custodial sentence)

1. In the present request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), the Court is once again called upon to assess whether the provisions of Directive 2008/115/EC[2] preclude a provision of national criminal law that penalises an illegal stay by the imposition of a prison sentence.

2. While in the present case, the Member State in question can, in principle, provide for such a sentence, the specific feature of the question at issue is whether it has done so in the right manner.

Legal framework

EU law

3. The purpose of Directive 2008/115 is defined as follows in its Article 1, headed 'Subject matter':

'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.'

4. Article 3 of the directive, headed 'Definitions', provides:

'For the purposes of this Directive …:

…

1 Original language: English.

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).

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, 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;

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;

…

8. "voluntary departure" means compliance with the obligation to return within the time-limit fixed for that purpose in the return decision;

…'

5. Article 6 of Directive 2008/115, headed 'Return decision', provides:

'1. 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.

…

6. This Directive shall not prevent Member States from adopting 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, without prejudice to the procedural safeguards available under Chapter III and under other relevant provisions of Community and national law.'

6. Article 8 of that directive, headed 'Removal' states as follows:

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

…

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

7. Article 11 of the directive is headed 'Entry ban' and reads as follows:

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

(a) if no period for voluntary departure has been granted, or

(b) if the obligation to return has not been complied with.

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

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.

…'

8. Pursuant to Article 12(1), first subparagraph of the same directive, 'Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies'.

Netherlands law

9. The Vreemdelingenwet 2000 (2000 Law on Foreign Nationals), of 23 November 2000 (Stb 2000, No 495), as amended with effect of 31 December 2011 in order to transpose Directive 2008/115 ('the Vw 2000'), provides in its Article 61(1) that a foreign national who is not, or is no longer, legally resident must leave the Netherlands voluntarily within the period laid down in Article 62 of that law, paragraphs 1 and 2 of which transpose paragraphs 1 and 4 of Article 7 of Directive 2008/115.

10. Article 66a(1) of the Vw 2000, which is intended to transpose Article 11(2) of Directive 2008/115, provides that an entry ban is to be issued with respect to a foreign national who has not left the Netherlands voluntarily within the period provided.

11. Under Article 66a(4) of the Vw 2000, the entry ban is to be issued for a specified period, which may not exceed five years, unless the foreign 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 foreign national has actually left the Netherlands.

12. Under Article 66a(7) of the Vw 2000, a foreign national who is subject to an entry ban may not, under any circumstances, be lawfully resident:

'(a) 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;

(b) if he represents a threat to public policy or national security;

(c) if he represents a serious threat within the meaning of paragraph 4; or

(d) if, pursuant to a treaty or in the interests of the international relations of the Netherlands, he should be denied any form of stay.'

13. Under the Article 197 of the Wetboek van Strafrecht (Code of Criminal Law), resulting from the Law of 15 December 2011 (Stb. 2011, No 663), a foreign national who remains in the Netherlands while knowing, or having serious reason to suspect, that he has been declared to be an undesirable pursuant to a statutory provision or that an entry ban has been imposed on him pursuant to Article 66a(7) of the Vw 2000 is liable to, inter alia, a term of imprisonment not exceeding six months.

Facts, procedure and question referred

14. By way of an order of 14 April 2000, JZ was declared an undesirable foreign national within the meaning of the law in force at the time.[3]

15. By an order of the Staatssecretaris van Veiligheid en Justitie (State Secretary for Security and Justice, Netherlands) of 19 March 2013, that declaration of undesirability was lifted upon application by JZ in connection with the amendment of 31 December 2011 of the Vw 2000 as a consequence of the transposition of Directive 2008/115. By that order, a five-year entry ban was also issued with respect to JZ pursuant to Article 66a(7) of the Vw 2000, whereby the declaration of undesirability was lifted from the moment the entry ban took effect. According to the order, that lifting did not, however, bring any change in JZ's obligation to leave. JZ therefore had to leave the Netherlands immediately and on his own initiative and was liable to be removed. By virtue of Article 62a(2) of the Vw 2000, that order constitutes a return decision.

16. By way of a statement of reasons, the order states, inter alia, that JZ has been convicted on multiple occasions of committing various offences. According to Section A4/3.3 of the Vreemdelingencirculaire 2000 (2000 Circular on foreign nationals), any suspicion or conviction in respect of an offence constitutes a danger to public order. As JZ represented a danger to public order, he was to leave the Netherlands immediately pursuant to Article 62(2)(c) of the Vw 2000. An entry ban was accordingly imposed on him pursuant to Article 66a(1)(a) of the Vw 2000. In the light of Article 66a(7)(b) of the Vw 2000, JZ cannot, as a consequence of the entry ban, be lawfully resident.

17. The Gerechtshof Amsterdam (Court of Appeal, Amsterdam, Netherlands) determined that the steps of the return procedure were followed. JZ did not, however, leave the Netherlands following the order of 19 March 2013. It is undisputed that, on 21 October 2015, he was in Amsterdam in breach of that order. According to Article 197 of the Code of Criminal Law, a foreign national who stays in the Netherlands even though he knows or has serious reason to suspect that an entry ban has been imposed on him pursuant to Article 66a(7) of the Vw 2000 is guilty of a criminal offence. By a judgment of the Gerechtshof Amsterdam (Court of Appeal, Amsterdam), JZ was convicted and sentenced to a prison term of two months.

18. JZ lodged an appeal on a point of law against that judgment before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

3 Article 21 of the Vreemdelingenwet 1994 (1994 Law on Foreign Nationals). That declaration of undesirability meant, in essence, that both continued residence in the Netherlands as well as return to and stay in the Netherlands after departure are punishable if the other constituent elements of Article 197 of the Code of Criminal Law are present.

19. In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and, by order of 27 November 2018, received at the Court on 20 December 2018, to refer the following question to the Court of Justice for a preliminary ruling:

'Is the criminalisation under national law which criminalises the stay of a third-country national in the territory of the Netherlands after an entry ban has been imposed on him pursuant to Article 66a(7) of the Vw 2000 compatible with EU law, in particular with the finding of the Court of Justice of the European Union in the judgment of 26 July 2017, *Ouhrami* (C-225/16, EU:C:2017:590, paragraph 49) according to which the entry ban provided for in Article 11 of [Directive 2008/115] produces its 'effects' only from the point in time the foreign national has returned to his country of origin or to another third country, when national law also holds that that foreign national has no lawful residence and moreover it is established that the steps of the return procedure set out in [Directive 2008/115] have been followed but the actual return has not taken place?'

20. Written observations were lodged by JZ, the Czech, German and Netherlands Governments as well as the European Commission. All of these parties were represented at the hearing that was held on 6 February 2020.

Assessment

21. By its question, the referring court in essence seeks to ascertain whether the provisions of Directive 2008/115 preclude national legislation which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national when the conduct declared to be criminal is defined by reference to the imposition of an entry ban which has not yet taken effect in the absence of the departure of the person concerned.

Deprivation of liberty under Directive 2008/115

22. There have been many occasions when the Court has been called upon to assess national legislation in the light of Directive 2008/115 when it comes to imprisonment of third-country nationals on the ground of the illegality of their stay.

23. The deprivation of liberty of an individual in the form of a prison sentence, by its very nature, as a matter of principle, frustrates the objective of Directive 2008/115, which is to provide for an orderly return of the person concerned. It is for this reason that the Court has repeatedly held that Member States cannot apply criminal law rules liable to jeopardise the attainment of the objectives pursued by that directive and thus to deprive it of its effectiveness. [4]

24. Until the point in time at which the obligation to return is voluntarily complied with or enforced, and the person concerned has actually gone back to his or her country of origin, to a country of transit or to another third country, within the meaning of Article 3(3) of Directive 2008/115, the question whether the stay of the person concerned is illegal is governed by the return decision. [5] It is only from that point in time that the entry ban produces its effects, by prohibiting the person concerned, for a certain period of time following the return, from again entering and staying in the territory of the Member States. [6]

4 See judgments of 28 April 2011, *El Dridi* (C-61/11 PPU, EU:C:2011:268, paragraphs 53 to 55); of 6 December 2011, *Achughbabian* (C-329/11, EU:C:2011:807, paragraph 33); of 6 December 2012, *Sagor* (C-430/11, EU:C:2012:777, paragraph 32); of 1 October 2015, *Celaj* (C-290/14, EU:C:2015:640, paragraph 21); and of 7 June 2016, *Affum* (C-47/15, EU:C:2016:408, paragraph 63).

5 See judgment of 26 July 2017, *Ouhrami* (C-225/16, EU:C:2017:590, paragraph 49).

6 Ibid.

25. As I have previously explained,[7] the Court's case-law has accepted two situations in which Directive 2008/115 does not preclude the imposition of a sentence of imprisonment on a third-country national on the ground of an illegal stay, namely where the return procedure established by Directive 2008/115 has been applied and the national is staying illegally on that territory with no justified ground for non-return ('the Achughbabian situation')[8] and where the return procedure has been applied and the person concerned re-enters the territory of that Member State in breach of an entry ban ('the Celaj situation').[9]

26. Directive 2008/115 therefore establishes a complete system in order to make sure that an illegally staying third-country national leaves the territory of the Union. Where (i) a third-country national is within the scope of that directive, that is to say he or she is staying illegally in the territory of a Member State,[10] (ii) that Member State has not decided not to apply the directive on the grounds exhaustively listed therein[11] and (iii) he or she does not enjoy the right of free movement,[12] as defined in Article 2(5) of Regulation (EU) 2016/399,[13] then the third-country national must be returned.[14] The obligations incumbent on Member States as a result of Article 6 et seq. of Directive 2008/115 are persistent, continuous and apply without interruption in the sense that they arise automatically as soon as the conditions of these articles are fulfilled. If, once it is established that a third-country national is staying illegally on the territory of a Member State, that Member State were not to adopt a return decision but were to cause the person instead to be imprisoned, it would effectively suspend its obligations under Directive 2008/115.[15]

27. The more recent case in *Ouhrami*, which dealt with the legal nature of an entry ban,[16] completes this picture. Until the point in time at which the obligation to return is voluntarily complied with or enforced, and the person concerned has actually gone back to his or her country of origin, to a country of transit or to another third country, within the meaning of Article 3(3) of Directive 2008/115, the question whether the stay of the person concerned is illegal is governed by the return decision.[17] It is only from that point in time that the entry ban produces its effects, by prohibiting the person concerned, for a certain period of time following the return, from again entering and staying in the territory of the Member States.[18]

The situation of JZ

28. On the basis of this case-law, three interim conclusions can be drawn for the case at issue.

29. First, there is no 'Celaj situation',[19] since no re-entry into the territory of the Netherlands has taken place. JZ has in fact never left the Netherlands.

7 See in more detail my Opinion in *Affum* (C-47/15, EU:C:2016:68, points 48 to 56).

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

9 See judgment of 1 October 2015, *Celaj* (C-290/14, EU:C:2015:640, paragraph 33 and operative part).

10 See Article 2(1) of Directive 2008/115.

11 See Article 2(2) of Directive 2008/115.

12 See Article 2(3) of Directive 2008/115.

13 Regulation 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).

14 Without prejudice, of course, to the exceptions referred to in Article 6(2) to (5) of Directive 2008/115.

15 See my Opinion in *Celaj* (C-290/14, EU:C:2015:285, point 50).

16 See Article 3, point 6, and Article 11 of Directive 2008/115.

17 See judgment of 26 July 2017, *Ouhrami* (C-225/16, EU:C:2017:590, paragraph 49).

18 Ibid.

19 See point 25 of this Opinion.

30. Secondly, the present case concerns an initial illegal stay, governed by the return decision, and not, as in the *Ouhrami*[20] case, a subsequent illegal stay which is the consequence of a breach of an entry ban, within the meaning of Article 11 of Directive 2008/115.

31. Thirdly, as for 'the Achughbabian situation',[21] the Kingdom of the Netherlands can, in principle, provide for the imposition of a sentence of imprisonment on JZ on the ground of an illegal stay, as the return procedure established by Directive 2008/115 has been applied and the national is staying illegally on that territory with no justified ground for non-return.

32. But this is not what the Netherlands did. Whilst a return procedure has been applied unsuccessfully against JZ and JZ continues to stay illegally on the territory of the Netherlands with no justified ground for non-return, the reason *why* JZ is subject to a criminal penalty and, as a consequence, deprived of liberty, is not the unsuccessful return procedure but the fact that an entry ban has been imposed on JZ. As a consequence, there is no 'Achughbabian situation' in the case at issue.

33. Thus, the present case does not concern the question *whether* a Member State can, in a situation such as that at issue in the main proceedings, provide for the imposition of a sentence of imprisonment (yes, it can), but rather the actual *implementation* of that possibility by the Netherlands legislature, in so far as Article 197 of the Code of Criminal Law penalises an illegal stay of a person who has knowledge of an entry ban which, in cases such as that in the main proceedings, has not yet begun to take effect for want of an initial return.

34. According to JZ, it is clear from the explanatory memorandum to the proposal for amendment of Article 197 of the Code of Criminal Law that, by that proposal, the Netherlands Government intended only to introduce a penalty for breach of an entry ban and not to criminalise illegal residence, in respect of which it intended to introduce a separate legislative proposal. JZ claims that a proposal to this effect was in fact introduced on 7 January 2013, but was subsequently withdrawn on 14 May 2014 for political reasons.

35. By contrast, according to the Netherlands Government, the Netherlands legislature decided to make 'aggravated unlawful residence' (that is to say, any unlawful residence by a foreign national who knows or has serious reason to believe that he has been prohibited from entering the Netherlands pursuant to Article 66a(7) of the Vw 2000) a criminal offence under Article 197 of the Code of Criminal Law, whereas 'simple unlawful residence' is not punishable under Netherlands law.

36. It is certainly not within the jurisdiction of the Court to settle the debate on how to read Article 197 of the Code of Criminal Law, which appears to be contentious at national level.

37. Nevertheless, in order to guide the referring court and provide a useful answer to its question, the Court should examine whether or not a reading of Article 197 of the Code of Criminal Law under which the offending conduct may be defined by reference to the imposition of an entry ban which has not yet taken effect in the absence of the departure of the person concerned is compatible with EU law.

20 Judgment of 26 July 2017 (C-225/16, EU:C:2017:590).

21 See point 25 of this Opinion.

38. The Netherlands and German Governments argue that if Member States can, in an 'Achughbabian situation', impose a criminal penalty for an illegal stay after an unsuccessful return procedure, then a fortiori they can limit the imposition of a criminal penalty to those 'Achughbabian situations' in which the person concerned constitutes a threat to public order, which is evidenced by the imposition of an entry ban. In this connection, these governments point to the difference between the imposition of an entry ban and its taking effect. It is claimed that national criminal law could make the fact of committing an offence subject to the existence of an entry ban.

39. It is in my view beyond any doubt that a distinction must be made between the moment of the imposition of an entry ban and the moment when the entry ban takes effect. Moreover, as already stated above, the Netherlands can, under certain circumstances, impose a criminal penalty for an illegal stay. This is within their competence in the field of criminal law.

40. In this connection, I would like to state that the wording of Article 197 of the Code of Criminal Law is unfortunate with regard to the terms of Directive 2008/115, for it blurs the clear distinction made by that directive between a return decision and an entry ban. Even a benevolent reading of this provision requires intellectual pirouettes. JZ is correct in asserting that the provision is far from clear in this respect. Yet, even if this provision pertaining to national criminal law does not operate the same distinction in terminology as provided for by Directive 2008/115, this does not appear to me to go against the terms or the aims of that directive. One cannot deny, despite Article 197 of the Code of Criminal Law being worded in a somewhat confusing manner, that there is no indication that its application, including in the case at issue, alters the interplay between a return decision and an entry ban, provided for by Directive 2008/115. Moreover, while that directive does not preclude the imposition of a criminal penalty, the directive does not require that national criminal law entirely mirrors the same wording.

41. In order to dispel any possible doubts,[22] it should be stated that the situation of the present case falls squarely within the scope of Directive 2008/115.[23] Given the fact that the Kingdom of the Netherlands is, pursuant to Article 6(1) of that directive, under a persistent and continuous obligation to issue and implement a return decision, an obligation which applies without interruption, the – temporary – imprisonment of a person falls within the ambit of this procedure. As a consequence, national law such as that at issue in the main proceedings must not go against the terms of Directive 2008/115.

42. While, in this connection, the Czech Government claims that the present case does not fall within the scope of Directive 2008/115 with the argument that that directive does not harmonise national provisions penalising the illegality of a stay, I would submit that that government arrives from a correct starting point at the wrong conclusion. It is undisputed that Directive 2008/115 does not harmonise national provisions penalising the illegality of a stay. But Directive 2008/115 can preclude such provisions, for they must not oppose the terms or objective of that directive. After all, this is the very essence of the Court's case law summarised above, starting with the *El Dridi* judgment.[24] In this connection I should like to recall that the Court has consistently held that while Member States' competence in criminal law in the area of illegal immigration and illegal stays is not, in principle, curtailed by Directive 2008/115, they cannot adopt criminal law rules which are liable to oppose the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness.[25]

22 At the hearing, the Commission appeared to indicate that a situation such as the one in the present case was outside the scope of Directive 2008/115. The same goes for the German and Czech Governments.

23 As the Commission rightly stresses in its observations, the Kingdom of the Netherlands is not under an obligation to adopt criminal law rules penalising an illegal stay. But if it does, they must comply with the directive, including the Court's case-law summarised above.

24 Judgment of 28 April 2011 (C-61/11 PPU, EU:C:2011:268).

25 See in essence judgment of 28 April 2011, *El Dridi* (C-61/11 PPU, EU:C:2011:268, paragraph 54 et seq.).

43. I therefore provisionally conclude that the provisions of Directive 2008/115 do not preclude a provision of national criminal law such as Article 197 of the Code of Criminal Law.

44. This leaves us with the question of the compatibility of the provision concerned with the fundamental rights of the European Union, as far as the apparent lack of clarity of this provision is concerned.

45. The national provision in the present case falls within the ambit of Directive 2008/115 and therefore the implementation of EU law within the meaning of Article 51(1) of the Charter of Fundamental Rights of the European Union ('the Charter'). It must comply with general principles of EU law, including the fundamental rights enshrined in the Charter. In this regard, one can consider the national provision to further the effectiveness of Directive 2008/115 by inciting third-country nationals to comply with a return order and a subsequent entry ban. In other words, by introducing the entry ban, the Member States ensure compliance with the objective of that directive. Alternatively, one could also consider the national law in question to potentially interfere with the effectiveness of Directive 2008/115, which would make the situation at issue akin to that of a derogation to EU law.[26] Under this logic, situations in which Directive 2008/115 allows the Member States to deprive an individual, to whom that directive applies, of liberty in the form of a prison sentence must be understood as exceptions to the principal objective of that directive. As a consequence the Charter is of application in the present case, whichever way one approaches the national law in question.

46. In that regard, Article 52(1) of the Charter stipulates that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and must respect the essence of those rights and freedoms and be subject to the principle of proportionality. In so far as the Charter contains rights which correspond to rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), Article 52(3) of the Charter provides that the meaning and scope of those rights must be the same as those laid down by that convention, while specifying that EU law may provide more extensive protection. For the purpose of interpreting Article 6 of the Charter, account must therefore be taken of Article 5 ECHR as the minimum threshold of protection.

47. According to the European Court of Human Rights, any deprivation of liberty must be lawful not only in the sense that it must have a legal basis in national law, but also in the sense that lawfulness concerns the quality of the law, implying that a national law authorising the deprivation of liberty must be sufficiently accessible, precise and foreseeable in its application in order to avoid all risk of arbitrariness.[27]

48. Moreover, I should like to recall Article 49(1) of the Charter, according to which no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. This includes, to my mind, the obligation on Member States to define their provisions of criminal law in such a way as to be sufficiently specific to allow the scope and application of the offence to be identified and interpreted. A provision of criminal law must be accessible and its meaning be readily understandable. Any doubts must be avoided.

49. I should like to stress that as regards the compatibility with the Charter, there is less room for a benevolent reading of the national provision than was possible as regards the compatibility with Directive 2008/115. It is for the referring court to analyse the compatibility of the provision in question with fundamental rights, on the basis of the Charter, read in conjunction with the ECHR, including the case-law referred to above. If the referring court wants to apply Article 197 of the Code

26 With respect to the latter the Court has already held that EU fundamental rights apply, see judgment of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281).

27 See, to that effect, judgment of the ECtHR of 21 October 2013, *Del Río Prada v. Spain* (CE:ECHR:2013:1021JUD004275009, § 125).

of Criminal Law to the case at issue in the main proceedings, that court must, further to its analysis, arrive at the conclusion that it transpires clearly from that provision which actual act is defined as a criminal offence. In other words, it must be clear that the breach of the obligation to leave the territory of the Netherlands constitutes in itself a criminal offence. In the absence of such a finding, the principle of legality is not complied with.

Conclusion

50. In light of the foregoing considerations, I propose that the Court answer the question referred by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) as follows:

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals must be interpreted as not precluding a Member State's legislation, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national when the offending conduct is defined by reference to the imposition of an entry ban which has not yet taken effect in the absence of the departure of the person concerned, provided that that legislation is sufficiently specific to allow the scope and application of the offence to be identified and interpreted, which is for the national court to verify.