Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 10 February 2021 [1]

Case C-546/19

BZ
v
Westerwaldkreis

(Request for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court, Germany))

(Reference for a preliminary ruling – Border controls, asylum and immigration – Immigration policy – Return of illegally staying third-country nationals – Directive 2008/115/EC – Scope – Entry ban issued against a third-country national following a criminal conviction – Public policy and public security grounds – Withdrawal of the return decision – Lawfulness of the entry ban)

1. In the present case, the Court is once again asked by the Bundesverwaltungsgericht (Federal Administrative Court, Germany) to give a preliminary ruling 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]

2. On this occasion, the questions referred by the national court will enable the Court to provide the necessary clarification in relation to two aspects of the 'entry ban' which is provided for by Directive 2008/115 and which prohibits entry into and stay on the territory of all the Member States. More specifically, the Court is called up to define, first of all, the extent of the discretion which has been left to the Member States in the adoption of prohibitions on entry that are governed exclusively by rules of national law and, secondly, the legal relationship, established by Directive 2008/115, between entry bans and return decisions.

[1] Original language: French.

[2] OJ 2008 L 348, p. 98.

I. Legal framework

A. European Union law

1. Directive 2008/115

3. Article 1 of Directive 2008/115, entitled 'Subject matter', provides:

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

4. Article 2(1) and (2) of the directive, 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:

…

(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.'

5. Article 3 of the directive, entitled 'Definitions', states:

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

…

(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;

…

(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;

…'

6. Article 6(1) of Directive 2008/115, entitled 'Return decision', is worded as follows:

'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.'

7. Pursuant to Article 9(1) of the directive, entitled 'Postponement of removal':

'1. Member States shall postpone removal:

(a) when it would violate the principle of non-refoulement …'

8. Article 11 of the directive, entitled 'Entry ban', provides:

'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.

…'

2. Regulation (EC) No 1987/2006

9. Article 24(1) to (3) of 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) [3] states:

'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 in accordance with the rules of procedure laid down by national law taken on the basis of an individual assessment. Appeals against these decisions shall lie in accordance with national legislation.

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. This situation shall arise in particular in the case of:

(a) a third-country national who has been convicted in a Member State of an offence carrying a penalty involving deprivation of liberty of at least one year;

(b) a third-country national in respect of whom there are serious grounds for believing that he has committed a serious criminal offence or in respect of whom there are clear indications of an intention to commit such an offence in the territory of a Member State.

[3] OJ 2006 L 381, p. 4.

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.'

B. German law

10. The Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Law on the residence, employment and integration of foreign nationals in the Federal territory) (BGBl. 2008 I, p. 162), in the version applicable at the material time in the main proceedings ('the Aufenthaltsgesetz'), contains a Paragraph 11, entitled 'Prohibition on entry and residence', which is worded as follows:

'1. A foreign national who has been placed under an order for expulsion, forcible return or removal may not re-enter Federal territory and reside there and shall not be issued with a residence permit even where the conditions of entitlement under this law are met.

2. The duration of the prohibition on entry and residence shall be determined *ex officio*. It shall commence at the time of the foreign national's departure. In the case of expulsion, the duration of the prohibition shall be determined at the same time as the expulsion order is made. In other cases, it shall be determined at the same time as the removal warning is issued and at the latest at the time of removal or forcible return …

3. The duration of the prohibition on entry and residence shall be determined by discretionary decision. It may exceed five years only if the foreign national has been expelled following a criminal conviction or if he or she represents a serious threat to public security and public policy. The duration of the prohibition shall in no case exceed 10 years.

…'

11. Paragraph 50 of the Aufenthaltsgesetz, entitled 'Obligation to leave the territory', provides:

'1. A foreign national shall be under an obligation to leave the territory if he or she does not hold, or no longer holds the necessary residence permit …

2. The foreign national shall be required to leave the territory of the Federal Republic without delay or, if he or she has been granted a period of time in which to leave the territory, before the expiry of that period.

…'

12. Paragraph 51 of the Aufenthaltsgesetz, entitled 'Termination of lawful residence; maintenance of restrictions', provides, in subparagraph 1(5) thereof:

'1. A residence permit shall cease to be valid in any of the following cases:

…

(5) in the event of the expulsion of the foreign national, …'

13. Pursuant to Paragraph 53(1) of the Aufenthaltsgesetz, headed 'Expulsion':

'A foreign national whose residence represents a threat to public security and public policy, to the free and democratic constitutional order or to any other overriding interest of the Federal Republic of Germany shall be placed under an expulsion order if, regard being had to all the circumstances of the case, it is apparent, after the interest in the foreign national's departure has been weighed against his or her interest in remaining on the territory of the Federal Republic, that the public interest in his or her departure prevails.'

14. Paragraph 54(1)(1) of the Aufenthaltsgesetz provides:

'1. The interest in the expulsion of the foreign national in accordance with Paragraph 53(1) shall be particularly significant if:

(1) he has been given a custodial sentence … by decision which has acquired the force of *res judicata* …'

15. Paragraph 58 of the Aufenthaltsgesetz, entitled 'Removal' provides, in subparagraphs 1 and 2 thereof:

'1. A foreign national shall be placed under a removal order if his or her obligation to leave the territory has become enforceable, if he or she has not been granted a period of time in which to leave the territory or such period of time has expired, and if there is no assurance of voluntary compliance with his or her obligation to leave the territory or if surveillance of the foreign national appears necessary for reasons of public security and public policy …

2. In all other cases, the obligation to leave the territory shall become enforceable only after a refusal to issue a residence permit becomes enforceable or after a different administrative act pursuant to which the foreign national is required to leave the territory in accordance with Paragraph 50(1) becomes enforceable.

…'

16. Paragraph 60a of the Aufenthaltsgesetz, entitled 'Temporary suspension of removal', states, in subparagraphs 2 to 4 thereof:

'2. The removal of a foreign national shall be suspended for such time as his or her removal is impossible for factual and legal reasons and no temporary residence permit has been granted …

3. The suspension of the removal of a foreign national is without prejudice to his or her obligation to leave the territory.

4. A foreign national who has been granted the benefit of a suspension of removal shall be provided with a certificate.

…'

II. Facts, procedure and questions referred

17. BZ, who was born in Syria and is of indeterminate nationality, has resided since 1990 in Germany. Although he has been under an obligation to leave the territory since that date, he has nevertheless continued to reside in that Member State, having been granted discretionary leave to remain, which has been regularly extended, pursuant to Paragraph 60a of the Aufenthaltsgesetz.

18. On 17 March 2013, BZ was given a custodial sentence of three years and four months for offences of supporting terrorism. In March 2014, the enforcement of the remainder of his prison sentence was suspended.

19. As a result of that criminal conviction, by decision of 24 February 2014, the Westerwaldkreis (District of Westerwald) placed BZ under an expulsion order pursuant to Paragraph 53(1) of the Aufenthaltsgesetz ('the expulsion order'). That decision also included a prohibition on entry into and residence on the Federal territory for a period of six years, subsequently reduced to four years, beginning on the date of his departure and ending no later than 21 July 2023. At the same time, the District of Westerwald issued a removal warning against BZ.

20. BZ appealed against those measures. At the hearing before the opposition committee, the District of Westerwald withdrew the removal warning and dismissed the remainder of the opposition.

21. BZ then brought before the Verwaltungsgericht Koblenz (Administrative Court, Koblenz, Germany) an action for the annulment of the expulsion order and the prohibition on entry into and residence on Federal territory, which was dismissed by judgment of that court. BZ then brought an appeal against that judgment before the Oberverwaltungsgericht Rheinland-Pfalz (Higher Administrative Court, Rhineland-Palatinate, Germany).

22. BZ's application for asylum was then rejected by the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees, Germany) by decision of 21 July 2017 as being manifestly unfounded under national law. At the same time, that authority took notice of the fact that BZ could not be removed to Syria because the conditions which precluded removal laid down in Paragraph 60 of the Aufenthaltsgesetz, read together with Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, were fulfilled.

23. By judgment of 5 April 2018, the Oberverwaltungsgericht Rheinland-Pfalz (Higher Administrative Court, Rhineland-Palatinate) dismissed BZ's appeal. BZ then brought an appeal on a point of law before the referring court.

24. The referring court states that it has already dismissed the appeal on a point of law in so far as it was directed against the order for BZ's expulsion, which has therefore now become final. The appeal on a point of law remains pending solely in so far as concerns the decision to reduce the duration of the prohibition on entry and residence accompanying the expulsion order to four years, beginning on the date of departure and ending no later than 21 July 2023.

25. It appears from the explanation of German law given by the referring court that an expulsion order adopted pursuant to Paragraph 53 of the Aufenthaltsgesetz does not necessarily result in the removal of the foreign national concerned. According to the referring court, individuals whose residence represents a threat to public security may indeed be placed under an expulsion order

even if their removal from German territory is not possible on account of the situation prevailing in their country of destination. In such circumstances, the adoption of an expulsion order will have the consequence, first of all, of terminating the validity of any residence permit held by the foreign national concerned, in accordance with Paragraph 51(1)(5) of the Aufenthaltsgesetz, and secondly, under Paragraph 11(1) of the Aufenthaltsgesetz, of prohibiting entry and residence and precluding the issue of a new residence permit to the foreign national before the expiry of the expulsion order.

26. In that context, the referring court questions whether the fact that a prohibition on entry and residence may be ordered under national law, even in the absence of a removal warning, is compatible with EU law. The referring court states in this connection that, under German law, an expulsion order is not, as such, a 'return decision' within the meaning of Article 3(4) of Directive 2008/115, while a removal warning is.

27. In particular, the referring court entertains doubts as to whether a prohibition on entry and residence ordered against a third-country national for purposes 'not related to migration', and in particular when associated with an expulsion order, falls within the scope of Directive 2008/115. If that question is answered in the affirmative, the referring court then questions whether a prohibition on entry and residence may be regarded as conforming to the requirements of that directive in the event that the removal warning, issued at the same time as the prohibition order, is withdrawn by the authority that issued it.

28. If it must be held that the withdrawal of the return decision necessarily results in the unlawfulness of the prohibition on entry accompanying that decision, the referring court then asks whether that would still be the case where the expulsion order which preceded the return decision has become final.

29. It was in those circumstances that the Bundesverwaltungsgericht (Federal Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) (a) Does a prohibition on entry issued against a third-country national for purposes "not related to migration" come within the scope of [Directive 2008/115], at any rate if the Member State has not exercised the option under Article 2(2)(b) of that directive?

(b) If Question 1(a) is answered in the negative, does such a prohibition on entry still fall outside the scope of Directive 2008/115 if, leaving aside the expulsion order issued against him, with which the entry ban is associated, the third-country national is already staying illegally and therefore, in principle, comes within the scope of the directive?

(c) Do prohibitions on entry issued for purposes "not related to migration" include entry bans issued in connection with an expulsion order that has been issued for reasons of public security and public policy (in the present case, this being an expulsion order issued solely on general preventive grounds with the objective of combating terrorism)?'

(2) If Question 1 is answered to the effect that the prohibition on entry in question in the present case does come within the scope of Directive 2008/115:

(a) Does the administrative annulment of a return decision (in the present case, this being the removal warning) have the consequence that the entry ban, within the meaning of Article 3(6) of Directive 2008/115, that was issued at the same time becomes unlawful?

(b) Does this legal consequence ensue even if the expulsion order on the basis of which the return decision was issued has become final?'

III. Procedure before the Court

30. Written observations on these questions have been submitted by the German Government and Netherlands Government and by the European Commission.

31. On 23 April 2020, the Court sent a request for information to the referring court concerning the legal context of the dispute in the main the proceedings. The answer from the referring court dated 6 May 2020 was received at the Court on 27 May 2020.

32. On 8 October 2020, by way of a measure of organisation of the procedure, the Court put a question for written reply to all the interested parties. Written observations on that question were lodged within the prescribed period.

IV. Analysis

33. The German Government has claimed that the first question referred for a preliminary ruling is inadmissible. This argument seems to me to extend, by implication, also to the second question referred. I shall therefore begin my analysis by considering admissibility (Section A) and then focus on the substance of each of the questions referred (Section B).

A. Admissibility

34. The German Government has asserted in its written observations that, contrary to what the order for reference seems to suggest, the Federal Republic of Germany has exercised the option, laid down in Article 2(2)(b) of Directive 2008/115, of not applying the directive to third-country nationals who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, in accordance with national law.

35. In support of that assertion, the German Government draws the Court's attention to the fact that the explanatory memorandum for the German law transposing Directive 2008/115 contains the following passage regarding Paragraph 11 of the Aufenthaltsgesetz, which transposes Article 11 of the directive: 'The derogations from the usual five-year period provided for in the new fourth sentence are based on Article 2(2)(b) (a restriction of the scope of the directive in relation to individuals who have a criminal conviction) and on the second sentence of Article 11(2) (serious threat to public policy and public security) of Directive 2008/115.'

36. I would observe in this connection that, further to the request for information which the Court sent it, the referring court has maintained the interpretation of German law which it set out in its order for reference, according to which the Federal Republic of Germany has not

decided, pursuant to Article 2(2)(b) of Directive 2008/115, to exclude third-country nationals who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction *entirely* from the scope of the directive.

37. The referring court observes that the passage of the explanatory memorandum cited by the German Government in fact relates to Paragraph 11(3) of the Aufenthaltsgesetz in the version applicable to the facts of the case in the main proceedings, according to which the length of the entry ban may exceed five years 'only if the foreign national has been expelled *following a criminal conviction* or if he or she represents a serious threat to public security and public policy'. [4] It considers that it is clear from that passage that, in the case of third-country nationals who are placed under an expulsion order following a criminal conviction, the German legislature intended, in relying on Article 2(2)(b) of Directive 2008/115, to derogate *specifically* from the particular rule contained in Article 11(2) of the directive, which limits the period of validity of entry bans to five years and which permits a derogation only in the event of a serious threat to public policy, public security or national security.

38. It is settled case-law that, under the division of jurisdiction between the Courts of the European Union and the national courts in preliminary reference proceedings, the Court must take into account the factual and legal context of the questions referred for a preliminary ruling *as set out in the order for reference*. This means that, whatever criticism the German Government may have made of the interpretation of national law adopted by the referring court, this reference for a preliminary ruling must be examined in the light of the interpretation [5] according to which, in relying on Article 2(2)(b) of Directive 2008/115, the German legislature did not intend to exclude third-country nationals expelled following a criminal conviction entirely from the scope of the directive. [6]

39. The fact that the Court accepted a different interpretation of the German legislation in *Filev and Osmani*, [7] as the German Government has pointed out, cannot, in my view, justify any other conclusion. In the case that gave rise to that judgment, the Court was bound, in accordance with the case-law mentioned in the preceding point of this Opinion, by the interpretation of national law given by the Amtsgericht Laufen (Local Court, Laufen, Germany), which had made the request for a preliminary ruling.

40. The relevance of the questions asked by the referring court therefore no longer being open to question, I consider that they should be regarded as admissible.

B. Substance

1. Preliminary observations

41. It is appropriate to outline the essential features of the legal framework that are relevant to the interpretation that is asked of the Court.

4 My italics.

5 See judgment of 21 June 2016, *New Valmar* (C-15/15, EU:C:2016:464, paragraph 25 and the case-law cited).

6 As regards the question whether Article 2(2)(b) of Directive 2008/115 permits the Member States to enact specific derogations from the directive, the referring court maintains, and rightly in my view, that that question is not decisive to the outcome of the dispute in the main proceedings, since, from a legal viewpoint, a negative answer would simply render periods of more than five years inapplicable to entry bans.

7 Judgment of 19 September 2013 (C-297/12, EU:C:2013:569).

42. The objective of Directive 2008/115 is to establish 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. [8]

43. To that end, the directive sets out in detail the procedure to be applied by each Member State for the return of illegally staying third-country nationals, to which are associated certain legal guarantees, and fixes the order in which the various stages of that procedure should take place.

44. More specifically, the directive provides that, whenever a third-country national stays illegally on the territory of a Member State, that Member State falls under an obligation to issue a 'return decision' to that person. [9] That decision imposes on the third-country national an 'obligation to return', which is to say, an obligation to return to his or her country of origin, or to a country of transit, or to another third country, [10] and, where necessary, fixes an appropriate period of time within which the individual should voluntarily leave the territory. [11] If a period for voluntary departure is not granted, or if the obligation to return has not been complied with, Member States are required to take all necessary measures to enforce the return decision. [12]

45. The return decision may, and in some cases must be accompanied by an 'entry ban'. Although entry bans are adopted by a single Member State, their purpose, in accordance with the definition given in Article 3(6) of Directive 2008/115, is to prohibit the addressee from entering into and staying *on the territory of any of the Member States*. It thus gives a 'European dimension' to the effects of national return measures. [13]

46. In order for this European dimension not to remain purely theoretical, the directive also provides that, where a Member State is considering issuing a residence permit or other authorisation offering a right to stay to a third-country national who is the subject of an entry ban issued by another Member State, it is required to consult that Member State first and to take account of its interests. [14] The initiation of that consultation procedure is dependent on prior knowledge of the entry bans issued by the other Member States, which is made possible by the fact that information on an entry ban may be the subject of a national alert entered into the Second-generation Schengen System, under Article 24(3) of Regulation No 1987/2006. [15]

47. It is precisely this entry ban that is the subject of the questions referred by the national court and that I shall examine in the analysis that follows.

8 See recitals 2 and 11 of Directive 2008/115.

9 Article 6(1) of Directive 2008/115.

10 Article 3(3) and (4) of Directive 2008/115.

11 Article 7(1) of Directive 2008/115. Member States may refrain from granting a period for voluntary departure in the situations identified in paragraph 4 of Article 7 (see footnote 18 of this Opinion).

12 Article 8(1) of Directive 2008/115.

13 See recital 14 of Directive 2008/115.

14 See Article 11(4) of Directive 2008/115, which refers, in this connection, to Article 25 of the 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).

15 This regulation has been repealed by Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation No 1987/2006 (OJ 2018 L 312, p. 14), which will apply from a date fixed no later than 28 December 2021. Article 24(1) of Regulation 2018/1861, which is to replace Article 24 of Regulation No 1987/2006, lays down an *obligation* for the Member States to enter an alert in SIS whenever an entry ban has been issued, in accordance with procedures respecting Directive 2008/115, in respect of an illegally staying third-country national.

2. The first question

48. By its first question, the referring court asks, in substance, whether a prohibition on entry and residence issued against a third-country national at the same time as an expulsion order is issued on the basis of a criminal conviction falls within the scope of Directive 2008/115.

49. It should be noted at the outset that, as is clear from the order for reference, the doubts which the referring court entertains arise from the wording of section 11 of the Commission's 'Return Handbook',[16] according to which Directive 2008/115 applies solely to entry bans associated with breach of the rules on migration in the Member States ('return-related entry bans'), which is to say, the rules governing the entry and stay of third-country nationals, whereas the directive leaves unaffected entry bans 'issued for other purposes not related to migration'. This second category includes, in addition to entry bans constituting a restrictive measure adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, entry bans issued in respect of third-country nationals who have committed a serious criminal offence or for whom there is a clear indication that there is an intention to commit such an offence. Accordingly, the entry ban at issue in the case in the main proceedings might, in the referring court's view, fall into this second category and, as a result, fall outside the scope of Directive 2008/115.

50. In other words, the Court is required to decide whether it is right to interpret Directive 2008/115 as applying solely to entry bans issued on account of breach of the rules on migration, while bans falling outside that category, in particular those whose purpose is to safeguard public policy and public security in the Member States, on the other hand, remain within the competence of the Member States.

51. I must observe, before anything else, that Article 3(6) of Directive 2008/115 defines an 'entry ban' as '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'. That definition consequently does not justify an interpretation according to which the EU legislature intended to refer in Article 3 solely to measures the basis of which is a breach of the rules on migration. To my mind, Article 11(1) of the directive does not justify such an interpretation either, since that provision merely sets out the circumstances under which return decisions must be (or may be) accompanied by an entry ban, and makes no reference to the reasons that may have resulted in the issue of an entry ban.

52. As regards consideration of the general scheme of Directive 2008/115, I agree with the referring court's understanding that it reveals nothing that militates in favour of a restriction of the directive's scope of the kind envisaged in section 11 of the Return Handbook.

53. It is important, in this connection, to refer to the provisions by which the directive delimits the scope of its application.

54. Article 2(1) of Directive 2008/115 establishes that the directive applies to third-country nationals *staying illegally* on the territory of a Member State, it being understood that 'an illegal stay' means, according to Article 3(2) of the directive, '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 [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

[16] Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks (OJ 2017 L 339, p. 83).

of persons across borders (Schengen Borders Code)][17] or other conditions for entry, stay or residence in that Member State'. Given the wide-ranging nature of the terms in which they are expressed, those provisions leave no doubt that the EU legislature intended to define the scope of the directive very broadly, inasmuch as it stipulated that the illegal nature of a stay, for the purposes of the directive, arises not only from breach of the rules on migration ('the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry … in that Member State'), but also from the breach of rules *other* than the rules on migration ('other conditions for … stay or residence in that Member State').

55. As I have mentioned, Article 2(2)(b) of Directive 2008/115 allows the Member States the option of not applying the directive to third-country nationals who are subject, inter alia, to return as a criminal law sanction or as a consequence of a criminal law sanction, in accordance with national law. Article 2 is therefore necessarily based on the premiss that an illegal stay capable of causing Directive 2008/115 to apply can also result from the commission of a serious criminal offence under national law. Indeed, it is obvious that the presence of such a provision would have been entirely superfluous if a relevant illegal stay for the purposes of that directive's application could only be one which related to a breach of the rules on migration. It follows that a return decision, like the entry ban that accompanies it, may also be adopted for reasons relating to the safeguarding of public policy or public security.

56. That conclusion seems to me all the more necessary once account is taken of other provisions of Directive 2008/115, such as Article 6(2),[18] Article 7(4),[19] Article 11(2) and (3) and the second subparagraph of Article 12(1).[20] Those provisions in fact prove that measures aimed at protecting public policy, public security and national security do not fall outside the scope of the harmonised rules laid down by the directive, the aims pursued by such measures merely meaning that the Member States have the option of derogating from the rules set out in those provisions.[21]

57. In so far as concerns entry bans specifically, Article 11(2) of Directive 2008/115 establishes that, although the length of an entry ban may not, in principle, exceed five years, Member States may issue an entry ban of longer duration in the event that the third-country national represents a serious threat to public policy, public security or national security. In addition, Article 11(3) of the directive provides, in substance, that Member States may not issue entry bans in respect of victims of human trafficking who have been granted a residence permit for that reason, unless they represent a threat to public policy, public security or national security.

58. The preparatory work confirms, to my mind, that the EU legislature in no way intended there to be any restriction of the scope of Directive 2008/115 based on the reasons for which a stay may be illegal. The Commission could not, I think, have expressed that idea more clearly than it did in

[17] OJ 2006 L 105, p. 1.

[18] Article 6(2) of Directive 2008/115 provides: 'Third-country nationals staying illegally on the territory of a Member State and holding a valid residence permit or other authorisation offering a right to stay issued by another Member State shall be required to go to the territory of that other Member State immediately. In the event of non-compliance by the third-country national concerned with this requirement, or where the third-country national's immediate departure is required *for reasons of public policy or national security*, paragraph 1 shall apply' (my italics).

[19] Article 7(4) of Directive 2008/115 provides: 'If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses *a risk to public policy, public security or national security*, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days' (my italics).

[20] Article 12(1) of Directive 2008/115 reads as follows: '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.
The information on reasons in fact may be limited where national law allows for the right to information to be restricted, in particular *in order to safeguard national security, defence, public security* and for the prevention, investigation, detection and prosecution of criminal offences' (my italics).

[21] See, to that effect, my Opinion in *Stadt Frankfurt am Main* (C-18/19, EU:C:2020:130, point 40).

its proposal for a directive[22] and in Commission staff working document SEC/2005/1175.[23] Indeed, the Commission stated in the first document that the aim was 'to establish a horizontal set of rules, applicable to any illegally staying third-country national, *whatever the reason of the illegality of the stay* (e.g., expiry of a visa, expiry of a residence permit, revocation or withdrawal of a residence permit, negative final decision on an asylum application, withdrawal of refugee status, illegal entrance)',[24] while, in the second document, it stated that the proposed directive should apply not only to third-country nationals whose stay is illegal because they no longer fulfil the conditions of entry set out in Article 5 of the Convention implementing the Schengen Agreement (now Article 6 of the Schengen Borders Code), but also to those whose stay is illegal for other reasons, and it cited, by way of example, third-country nationals who, *having committed a serious crime*, lose their residence permit and are at once made the subject of a return procedure.

59. Admittedly, the Commission acknowledged in its proposal that consideration had been given to whether the issue of 'expulsion or removal for reasons of national and public security' should also be harmonised by the proposed directive. It also acknowledged that it had been decided that it should not, inter alia, because such harmonisation should be pursued not within the context of a directive dealing with the ending of illegal stay and return, but rather within the context of the directives regulating the conditions of entry and stay and the ending of legal residence and stay. Nevertheless, the Commission went on to explain that that did not mean that the directive would not apply to third-country nationals whose legal stay has been ended for reasons of public order. On the contrary, such individuals would thus become third-country nationals staying illegally and thus acquire a status which, without any further definition being necessary, resulted in the application of the directive.[25]

60. As assessment of Article 3(6) and Article 11 of Directive 2008/115 from a teleological viewpoint also suggests, to my mind, that the directive was, in principle, designed to have a sufficiently broad scope so as not to be limited to entry bans issued for breach of the rules on migration. Indeed, the 'European dimension' which the entry ban provided for in those provisions is intended to confer on the effects of national return measures may be explained, as the referring court rightly points out, by the purpose of those provisions, which is to prevent illegal immigration and to ensure that illegally staying third-country nationals are not able to circumvent national measures terminating their legal stay by exploiting legislative disparities between the Member States. Those objectives are not compatible, to my mind, with any restriction of the range of individuals in respect of whom an entry ban may be issued, such as that contemplated by the 'Return Handbook'.

61. At this point it is nevertheless necessary to acknowledge that the most serious of the referring court's doubts seem to concern the question of whether an interpretation such as that which I propose in this Opinion is correct in the light of the provisions of Regulation No 1987/2006.

62. It should be recalled, in fact, that Section 11 of the 'Return Handbook' expressly cites, among the entry bans 'issued for other purposes not related to migration', which therefore escape the application of Directive 2008/115, those issued in respect of third-country nationals who have

[22] 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 (SEC(2005) 1057, COM(2005) 391 final – 2005/0167 (COD), Section 4, Chapter I).

[23] Commission staff working document – Detailed comments on Proposal for a European Parliament and Council Directive on common standards on procedures in Member States for returning illegally staying third country nationals (COM(2005) 391 final).

[24] My italics.

[25] See Section 3, point 12 of the proposal.

committed a serious criminal offence or for whom there is a clear indication that there is an intention to commit such an offence. Section 11 refers, in this regard, to the prohibitions on entry or stay based on a threat to public policy or public security or to national security referred to in Article 24(2) of Regulation No 1987/2006, which must be read together with Article 24(1) of that regulation. I would add that Article 24(3) of that regulation governs prohibitions on entry or residence in respect of third-country nationals who have been the subject of 'a measure involving expulsion, refusal of entry or removal' and which are based on 'a failure to comply with national regulations on the entry or residence of third-country nationals'.

63. It is thus clear from Article 24 of Regulation No 1987/2006, which was adopted prior to the entry into force of Directive 2008/115, that prohibitions on entry or residence based on a threat to public policy, public security or national security, and such prohibitions issued in respect of third-country nationals who are addressees of a decision entailing expulsion, refusal of entry or removal are defined as *separate* categories, in that they are subject to distinct legal rules (the obligation to enter an alert in SIS existing only in the case of the former). Regulation 2018/1861, which will apply instead of Regulation No 1987/2006 from a date fixed no later than 28 December 2021, takes up, in Article 24(1), the two-category structure and content of Article 24 of Regulation No 1987/2006,[26] albeit the second category of prohibitions on entry is now denoted as harmonised by Directive 2008/115 (entry bans 'in accordance with procedures respecting Directive [2008/115] in respect of a third-country national').[27]

64. The referring court seems to wonder whether this should result in the conclusion that *every* prohibition on entry based on a threat to public policy, public security or national security falls outside the scope of Directive 2008/115 and is accordingly subject only to the legal rules which apply to it under national law, as the Netherlands Government has argued in its written observations.

65. Admittedly, given that Directive 2008/115 is a development of the Schengen *acquis*, account must be taken in its interpretation of the need for coherence in that *acquis*,[28] which includes, without a shadow of a doubt, the provisions of Regulation No 1987/2006. It seems to me, however, that the interpretation of Article 24(2) of that regulation envisaged in the preceding point of this Opinion is based on an incorrect understanding of the scope of application *ratione personae* of that provision.

66. Indeed, I believe that the prohibitions on entry or stay based on a threat to public policy, public security or national security referred to in Article 24(2) of Regulation No 1987/2006 solely concern third-country nationals staying *outside* the territory of the Member State in question at the time when the prohibition is issued. That explains why they are treated as a separate category

[26] The only change of substance made is the extension of the obligation to enter an alert in SIS to entry bans issued in accordance with the procedures laid down in Directive 2008/115. See, in particular, the 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, COM(2016) 882 final – 2016/0408 (COD), p. 4. See also footnote 15 to this Opinion.

[27] Article 24(1) of Regulation 2018/1861 reads as follows: 'Member States shall enter an alert for refusal of entry and stay when one of the following conditions is met: (a) the Member State has concluded, based on an individual assessment which includes an assessment of the personal circumstances of the third-country national concerned and the consequences of refusing him or her entry and stay, that the presence of that third-country national on its territory poses a threat to public policy, to public security or to national security, and the Member State has consequently adopted a judicial or administrative decision in accordance with its national law to refuse entry and stay and issued a national alert for refusal of entry and stay; or (b) the Member State has issued an entry ban in accordance with procedures respecting Directive [2008/115] in respect of a third-country national.'

[28] Judgment of 26 October 2010, *United Kingdom* v *Council* (C-482/08, EU:C:2010:631, paragraph 48).

from prohibitions which come under Directive 2008/115: how could a Member State envisage initiating a return procedure in respect of a third-country national if he or she were not illegally staying on its territory?

67. On the other hand, Article 24(2) of Regulation No 1987/2006 does not, as the Netherlands Government claims, relate to prohibitions on entry or stay such as that at issue in the case in the main proceedings, that is to say, those issued for reasons of public policy or public security in respect of a third-country national who is *already* on the territory of a Member State. Indeed, the issue of such prohibitions on entry and stay presupposes that the third-country national is illegally staying and must, consequently, be made the subject of a return decision. These are therefore prohibitions 'related to return' which, as such, are governed by Directive 2008/115.

68. To summarise, the Member States retain competence to provide for prohibitions on entry in respect of individuals who pose a threat to public policy, public security or national security, in particular if they have been convicted in a Member State of an offence that carries a custodial sentence of at least one year, provided that they are residing outside the territory of the Member State concerned at the time when the prohibition is issued. On the other hand, the Member States must follow the harmonised rules laid down by Directive 2008/115, beginning with the obligation to adopt a return decision, when providing for entry ban in respect of individuals who pose a threat to public policy, public security or national security if those individuals are already present on their territory.[29] Directive 2008/115 will apply unless, in respect of cases where the threat or danger to public order, public security or national security arises from the fact that the individual concerned is the subject of a serious criminal conviction or is subject to an extradition procedure, the Member State in question has availed itself of the option conferred by Article 2(2)(b) of the directive.[30]

69. It is, therefore, the connection with the requirement to return the third-country nationals concerned which distinguishes entry bans falling within the scope of Directive 2008/115 from those which are based on national law alone, and not the reasons for which the bans are issued. In its written observations, the Commission itself acknowledged that Section 11 of the 'Return Handbook' could be confusing in that it refers to entry bans issued 'for other purposes not related to migration', rather than using the correct formula of entry bans 'not related to return'.

70. In light of the foregoing, I suggest that the Court answer the first question referred for a preliminary ruling by holding that a prohibition on entry and stay issued in respect of a third-country national at the same time as an expulsion order is issued on the basis of a criminal conviction falls within the scope of Directive 2008/115.

[29] The distinction between these two categories of entry ban is illustrated by French law, in particular, the Code de l'entrée et du séjour des étrangers et du droit d'asile (Code on the Entry and Residence of Foreign Nationals and the Right of Asylum). The first category, entitled 'Administrative territorial prohibition', is provided for by Article L. 214-2 of the code, which states that '[any third-country national] may, if he or she does not habitually reside in France and is *not present* on national territory, be the subject of an administrative territorial prohibition if his or her presence in France represents a serious threat to public policy or to national security or to France's international relations' (my italics). The second category, entitled 'Prohibition on return to French territory', is provided for by Article L. 511-1 of the code, which states that 'an administrative authority may require a foreign national who is not a national of a Member State of the European Union to leave French territory … in any of the following cases: … 7. The conduct of a foreign national who has not been legally staying in France for more than three months represents a threat to public policy'.

[30] By way of example, the French Republic has availed itself of this option in connection with the 'Prohibition from French territory' provided for by Article L. 541-1 of the Code on the Entry and Residence of Foreign Nationals and the Right of Asylum, which is a sanction which a judicial authority may order in respect of a foreign national convicted of a crime or other offence governed by Articles 131-30, 131-30-1 or 131-30-2 of the French criminal code.

3. The second question

71. By its second question, the referring court seeks to establish, in substance, whether Directive 2008/115 precludes the maintenance in force of a prohibition on entry and stay issued in respect of a third-country national at the same time as an expulsion order – which has become final – adopted on the basis of a criminal conviction, once the return decision has been withdrawn.

72. This question has arisen because of the particular features of the German legislation, such as they appear from the explanation of the national legal framework in the order for reference, which may be summarised as follows: (i) an expulsion order is not a 'return decision' within the meaning of Directive 2008/115, while a German removal warning is; (ii) every expulsion order has the effect of rendering the foreign national's stay illegal and placing him or her under an obligation – in the abstract – to leave German territory; and (iii) a prohibition on entry and stay attaches, *ipso iure*, not only to every removal warning, but also to every expulsion order. Those features lead the referring court to wonder whether the entry ban must undergo the same legal treatment as the return decision and consequently be incapable of subsisting once the return decision has been withdrawn.

73. After noting that the wording of Article 11(1) of Directive 2008/115, in accordance with which return decisions must (under the first subparagraph) or may (under the second subparagraph) be 'accompanied' by an entry ban, does not provide an answer to that question, the referring court explains that the fact that Article 3(6) of the directive defines an entry ban as an administrative or judicial decision or act 'accompanying a return decision' does not, in its view, necessarily mean that the withdrawal of a return decision removes all basis for the entry ban accompanying it. In this connection, it queries whether the temporal link between those two acts is, under the directive, also reflected in a material link, which would, on the other hand, justify an interpretation according to which the entry ban becomes unlawful once the return decision has been withdrawn.

74. It seems to me that one point needs to be clarified, in the interests of a coherent reading of Article 3(6) and Article 11(1) of Directive 2008/115. I do not think that the phrase 'accompanying a return decision' is intended to convey a temporal link or that the two acts in question must even be simultaneous, as the referring court seems to assume. Indeed, it must be observed in this connection that, under Article 11(1) of Directive 2008/115, one of the two cases in which the Member States are required to issue an entry ban is where an obligation to return has not been complied with within the period of time granted in the return decision for voluntary departure (under point (b) of the first subparagraph). Given that the entry ban will, in such a case, be imposed at a *later* stage, after the return decision, it is not possible, in my view, to read into the definition of an entry ban any requirement for the two acts to be simultaneous.

75. That finding might suggest that the definition in question has been poorly formulated and that the EU legislature intended, by using the verb 'to accompany', to impose a requirement for a link of a different kind between entry bans under Directive 2008/115 and return decisions, in particular a material link which, as such, would mean that an entry ban could not be maintained in force once the return decision has been withdrawn.

76. That hypothesis is supported, in my opinion, by the judgment which the Court delivered in *Ouhrami*.[31] In its answer concerning the interpretation of Article 11(2) of Directive 2008/115 and, in particular, concerning the point in time from which the duration of an entry ban must be calculated, the Court in fact stated that Article 3(6) and Article 11(1), in conjunction with Article 3(4) of Directive 2008/115, must be understood as meaning that an entry ban 'is intended to *supplement* a return order by prohibiting the person concerned, for a specified period of time … after leaving the territory of the Member States, from again entering and staying in that territory'[32] and concluded that, 'accordingly, in order for an entry ban to come into effect, the person concerned *must* previously have left that territory'.[33] I am of the opinion that, on a textual level, the terms used by the Court mean that a return decision should be regarded as a *necessary precondition* of the validity of an entry ban. In any event, that conclusion seems to me to emerge from the Court's subsequent analysis of the systematic interpretation of the provision in question, according to which Directive 2008/115 draws a *clear distinction* between the stage of the procedure leading up to voluntary or enforced compliance with the obligation to return, during which the illegal stay of the person concerned is governed by the return decision, and the next stage, during which the entry ban produces its legal effects, which take the form of a prohibition on entry into the territory of the Member States and on staying there following a new illegal entry.[34]

77. I should nevertheless observe that the German Government's written observations advocate a somewhat different reading of that judgment. According to that government, while it is true that an entry ban produces its legal effects from the time when the obligation to leave the territory which results from the illegal stay of a third-country national is enforced, it is also true that it is not necessarily the return decision, as provided for by Article 6(1) of Directive 2008/115, that establishes that obligation. Far from systematically being a constituent element of the illegality of a stay, a return decision, according to the German Government, in fact does no more than record that illegality.

78. If the illegality of the stay does not necessarily have to be formalised by a return decision, then a measure prohibiting entry would still be possible, according to the German Government, even where the return decision is withdrawn, since the prohibition on entry could produce legal effects of its own in the event that the third-country national has complied with the obligation imposed on him or her by Paragraph 50 of the Aufenthaltsgesetz by leaving German territory voluntarily.

79. I cannot endorse that argument. Indeed, that interpretation is consistent neither with the logic nor with the spirit of Directive 2008/115.

80. In so far as the logic of the directive is concerned, the directive admittedly leaves the Member States free to provide that an expulsion order renders the stay of a third-country national illegal and that the third-country national will thus fall under a general and abstract legal obligation, like that under Paragraph 50 of the Aufenthaltsgesetz, to leave the territory of the Member State in question. However, once the illegality of the stay has been established, the directive does not permit the Member State concerned to tolerate the presence of the third-country national until he or she decides to leave the national territory of his or her own accord. On the contrary, the

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

[32] Judgment of 26 July 2017, *Ouhrami* (C-225/16, EU:C:2017:590, paragraph 45). My italics.

[33] Judgment of 26 July 2017, *Ouhrami* (C-225/16, EU:C:2017:590, paragraph 45). My italics.

[34] Judgment of 26 July 2017, *Ouhrami* (C-225/16, EU:C:2017:590, paragraphs 46 to 49). The Court recently adopted the same reasoning in its judgment of 17 September 2020, *JZ (Custodial sentence in the case of an entry ban)* (C-806/18, EU:C:2020:724, paragraphs 32 to 34).

Member State is required to issue a return decision to the third-country national, in accordance with Article 6(1) of that directive,[35] unless it decides to make the individual's stay legal by granting him or her a residence permit or other authorisation offering a right to stay, in accordance with Article 6(4) of that directive.[36] There is no exception to the obligation imposed on the Member States to commence a return procedure if they do not grant a right of residence. They remain under that obligation regardless of whether, in any given case, the return decision is a constituent element of the illegality of the stay or is merely of declaratory value.

81. As regards the spirit of Directive 2008/115, the obligation laid down in Article 6(1) thereof is intended, as the Commission explained in the 'Return Handbook', to reduce 'grey areas' (of illegal immigration), to prevent exploitation of illegally staying persons and to improve legal certainty for all involved.[37] An interpretation such as that envisaged by the German Government – according to which, in order for an entry ban to come into effect, it is not always necessary for the individual concerned to have left the national territory pursuant to the issue to him or her of a return decision, inasmuch as it is sufficient if the individual has left in order to comply with a general and abstract obligation laid down in national legislation – is, in my opinion, wholly inconsistent with those objectives. Indeed, the 'grey areas' to which the Commission has referred could not be effectively reduced by means of an obligation of that kind since, by contrast with the obligation to return contained in a return decision, it does not necessarily indicate the period of time within which the individual concerned is required voluntarily to leave the territory of the Member State in question, nor does it entail forced departure in the event that the individual has not left voluntarily.

82. If an entry ban under Directive 2008/115 may produce its own legal effects only after voluntary compliance with, or enforcement of a return decision, it goes without saying that it cannot be maintained in force after the return decision has been withdrawn.

83. The view which I propound in this Opinion that this entry ban is an instrument that is necessarily ancillary to a return decision[38] seems to me, moreover, to be clearly reflected in the objectives underlying the inclusion of the entry ban in Directive 2008/115. I have pointed out repeatedly in this Opinion that, in prohibiting any entry into and any stay on the territory of any of the Member States, the entry ban aims to give 'a European dimension' to 'the effects of national return measures'.[39] I should add that, as Section 11 of the 'Return Handbook' essentially states, the entry ban aims to foster the credibility of the return procedure by sending a message to individuals who have been expelled for having breached the rules on migration in the Member States that they will not be allowed to re-enter any Member State for a specified period of time. These objectives

[35] See, on this point, Opinion of Advocate General Szpunar in *Celaj* (C-290/14, EU:C:2015:285, point 50), according to which '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' (my italics).

[36] See the Commission's answer to Parliamentary Question No P-1687/10 (OJ 2011 C 138 E, p. 1), in which it stated, with regard to the obligation thus imposed on Member States, like the Kingdom of Spain: 'It implies that Spanish authorities are not free any more – once they become aware of the presence of an illegally staying third-country national on their territory – to tolerate this situation without either initiating return procedures or launching procedures for granting a right to stay.'

[37] See the 'Return Handbook', Section 5, p. 100. See also the Commission's answer to Parliamentary Question No P-1687/10 (OJ 2011 C 138 E, p. 1), according to which 'the obligation on Member States to either initiate return procedures or to grant a right to stay has been proposed by the Commission and was adopted by the European Parliament and Council in order to reduce "grey areas", to prevent exploitation of illegally staying persons and to improve legal certainty for all involved'.

[38] See also Martucci, F., 'La directive "retour": la politique européenne d'immigration face à ses paradoxes', in *Revue trimestrielle de droit de l'Union européenne*, 2009, p. 50, which defined the entry ban under Article 11 of Directive 2008/115 as being 'ancillary to the return'.

[39] Recital 14 of Directive 2008/115.

leave no doubt, in my view, that no prohibition on entry within the scope of Directive 2008/115 may ever be adopted in the absence of a return decision or maintained in the event that the return decision is withdrawn.

84. Moreover, I do not see how the circumstance, mentioned by the referring court, that the expulsion order issued as a basis for the return decision has become final can alter that conclusion. On the contrary, the fact that, given that circumstance, the only thing missing in order for it to be possible to enforce the obligation upon the applicant in the main proceedings to leave, which is provided for in Paragraph 50 of the Aufenthaltsgesetz, is an administrative decision merely highlights the fact that the return decision no longer exists legally, such that there is no basis for the associated prohibition on entry.

85. At this point, one might, however, wonder whether the withdrawal of the return decision nevertheless has the effect that the prohibition on entry that initially accompanied it becomes a 'prohibition not related to return' and thus falls outside the scope of Directive 2008/115, and that question was put to the parties in these proceedings for a written reply.

86. On this point I confess that I share the opinion expressed by the Commission, which is that it does not. As the Commission points out, the prohibition on entry and stay that initially accompanied the return decision in the case in the main proceedings falls within the scope of Directive 2008/115 since it was issued in respect of an illegally staying third-country national precisely on account of his illegal stay. Given that the mere withdrawal of the return decision does not alter those facts, it seems clear to me that that withdrawal is incapable, in the absence of any new measure adopted by the national authorities, of altering the legal characterisation of the prohibition on entry and stay. Indeed, by contrast with entry bans adopted pursuant to Article 11 of Directive 2008/115, national prohibitions on entry are subject to conditions governing their application that do not include the illegal nature of the stay.[40] In this regard, the German authorities can still adopt an administrative act containing a prohibition on entry of national scope, if the conditions governing the application of such a prohibition, not related to return, are fulfilled.

87. One last remark is called for. I am not unaware of the fact that the concern which led the German authorities to withdraw the return decision, while leaving intact the prohibition on entry and stay, was to prevent the applicant in the case in the main proceedings from being able to consolidate his right of residence in Germany.[41] However, like the Netherlands Government and the Commission, I would observe that Directive 2008/115 offers the Member States a legal means of addressing such situations, namely that referred to in Article 9(1)(a) of the directive, which provides that the Member States must postpone removal when it would be contrary to the principle of non-refoulement, while at the same time providing the individual concerned with a written confirmation of his or her situation, as is mentioned in recital 12 of the directive.[42] This course of action enables national authorities to do whatever is necessary to have a return decision simply suspended and to forestall any question regarding the legality of maintaining in force the prohibition on entry accompanying that return decision. Given that the removal of the

[40] See point 68 of this Opinion.

[41] See point 25 of this Opinion.

[42] Recital 12 of Directive 2008/115 states: '… In order to be able to demonstrate their specific situation in the event of administrative controls or checks, [third-country nationals who are staying illegally but who cannot yet be removed] should be provided with written confirmation of their situation …'

applicant in the case in the main proceedings appears to have been suspended by virtue of a discretionary leave to remain under Paragraph 60a of the Aufenthaltsgesetz, I wonder if the German authorities have had recourse to this method.

88. In light of the foregoing, I suggest that the Court answer the second question referred for a preliminary ruling by holding that Directive 2008/115 precludes the maintenance in force of a prohibition on entry and stay issued in respect of a third-country national at the same time as an expulsion order adopted on the basis of a criminal conviction, once the return decision has been withdrawn. That remains the case even if the expulsion order has become final.

V. Conclusion

89. In light of the foregoing considerations, I suggest that the Court answer the questions referred by the Bundesverwaltungsgericht (Federal Administrative Court, Germany) for a preliminary ruling as follows:

(1) A prohibition on entry and stay issued in respect of a third-country national at the same time as an expulsion order is issued on the basis of a criminal conviction falls within the scope 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) Directive 2008/115 precludes the maintenance in force of a prohibition on entry and stay issued in respect of a third-country national at the same time as an expulsion order adopted on the basis of a criminal conviction, once the return decision has been withdrawn. That remains the case even if the expulsion order has become final.