Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS
delivered on 2 March 2023 [1]

Joined Cases C-711/21 and C-712/21

XXX (C-711/21)
XXX (C-712/21)
v
État belge, represented by the Secrétaire d'État à l'Asile et la Migration

(Request for a preliminary ruling from the Conseil d'État (Council of State, Belgium))

(Reference for a preliminary ruling – Immigration policy – Charter of Fundamental Rights of the European Union – Articles 4, 7 and 47 – Directive 2008/115/EC – Return of illegally staying third-country nationals – Return decision – Change of circumstances relating to the family life and the state of health of third-country national after adoption of return decision – Reliance on change of circumstances after the closure of the international protection procedure – Final point in time to rely on a change in circumstances – Article 267 TFEU – Continued existence of the dispute in the main proceedings – Obligation of referring court to verify – Principle of sincere cooperation – Article 4(3) TEU – Admissibility of the reference for a preliminary ruling)

I. Introduction

1. The present requests for a preliminary ruling concern two return decisions that the Belgian authorities adopted in respect of the appellants in the main proceedings ('the applicants'), following the rejection of their requests for international protection. The Conseil d'État (Council of State, Belgium) [2] asks the Court of Justice to rule upon the compatibility of the return decisions with Articles 4, 7 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 5, Article 6(6) and Article 14 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 [3] ('the Return Directive'). In that context, the Conseil d'État (Council of State) seeks to ascertain whether a court reviewing the legality of those return decisions may take account of changes in the applicants' family life and/or state of health that occurred after the validity of the decisions to reject their requests for international protection had been upheld.

1 Original language: English.
2 Dated 4 November 2021.
3 OJ 2008 L 348, p. 98.

II. The dispute in the main proceedings

A. Case C-711/21

2. XXX, a third-country national, appears to have arrived in Belgium on 16 March 2017. He applied to the relevant Belgian authority on 24 March 2017 for recognition as a refugee. On 20 July 2017, the Commissaire général aux réfugiés et aux apatrides (Commissioner general for refugees and stateless persons, Belgium) ('CGRA') rejected XXX's application and also refused to grant him subsidiary protection. Based on that refusal, on 26 July 2017, the relevant authority ordered XXX to leave Belgian territory.

3. On 21 August 2017, XXX appealed against the CGRA's decision of 20 July 2017 to refuse to grant him international protection to the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium) ('the CCE'). The CCE rejected that appeal on 11 January 2018.

4. On 24 August 2017, XXX appealed against the decision of 26 July 2017 ordering him to leave Belgium to the CCE. At a hearing, XXX submitted documents evidencing changes in his family life and in his state of health. By judgment of 22 October 2019, the CCE rejected his appeal. The CCE held that XXX could no longer challenge the decision of 26 July 2017 ordering him to leave Belgium as the judgment of 11 January 2018 to reject his appeal against the CGRA's refusal to grant him international protection had definitively disposed of the matter. It took the view that, when it assessed the legality of an order to leave Belgian territory, it could not take account of developments after that order had been made.[4] The CCE also held that XXX could not succeed in his argument that the authorities could not adopt an order to require him to leave the territory while his appeal against the CGRA's decision not to grant him international protection was pending since his appeal against that decision had been determined on 11 January 2018.

5. On 6 November 2019, the applicant appealed against the CCE's judgment of 22 October 2019 to the Conseil d'État (Council of State). The Conseil d'État (Council of State) considers, first, that in the context of an application to annul an order to leave Belgian territory, the CCE should, in principle, examine that order *ex tunc*. Second, it is of the view that the *Gnandi* judgment does not clearly identify the moment at which a third-country national may avail of a change of circumstances for that purpose and thus does not rule on whether a court can take account of circumstances that occur after a return decision has been taken.[5] This approach may have significant implications for the application of the Return Directive, in particular Article 5 thereof, which provides that, when implementing that directive, Member States shall take due account, inter alia, of the family life and the state of health of the third-country national concerned.

4 By reference to judgment of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465) ('the *Gnandi* judgment').

5 Article 6(1) of the Return Directive states that '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.' Article 6(6) thereof provides that '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.'

B. Case C-712/21

6. On 29 February 2016, XXX applied to the relevant Belgian authority for recognition as a refugee. The CGRA both rejected her application on 30 September 2016 and refused to grant her subsidiary protection. By reference to the CGRA's decision, on 6 October 2016, the relevant authority ordered XXX to leave the Belgian territory.

7. On 28 October 2016, XXX appealed against the CGRA's decision of 30 September 2016 to the CCE. That appeal was dismissed on 19 January 2017. On 7 November 2016, XXX appealed against the order of 6 October 2016 to leave the territory to the CCE. Following a hearing at which XXX submitted documents relating to her private life, in a judgment of 22 October 2019 the CCE rejected her appeal against the order to leave the territory. That court followed the same reasoning as set out in point 4 of the present Opinion.

8. XXX lodged an appeal before the Conseil d'État (Council of State) against the CCE's judgment of 22 October 2019. For the same reasons as those set out in point 5 of the present Opinion, the Conseil d'État (Council of State) considered that the *Gnandi* judgment does not determine up to what time a body considering the legality of a return decision can take into account a change of circumstances that relates to the family life of a third-country national.

9. In the main proceedings in Cases C-711/21 and C-712/21, the Conseil d'État (Council of State) considered that Articles 4[6], 7 and 47 of the Charter and Article 5, Article 6(6) and Article 14 of the Return Directive may require the court reviewing the legality of an order to leave the territory, adopted following the rejection of an application for international protection, to take into account changes relating to the family life or the state of health of an applicant that occurred before the date on which that review is conducted. The Conseil d'État (Council of State) thus stayed the proceedings in both cases and referred the following questions to the Court for a preliminary ruling:

'(1) Must Articles 4[7], 7 and 47 of the [Charter] and Articles 5, [6(6)] and 13 of the [Return Directive], read in the light of the [*Gnandi* judgment], be interpreted as meaning that a court hearing an appeal against a return decision adopted pursuant to a decision refusing to grant international protection, when assessing the legality of the return decision, may take account of changes in circumstances that may have a significant bearing on the assessment of the situation under Article 5 [of the Return Directive], only where those changes occurred prior to the disposal of the international protection proceedings by the [CCE]?

(2) Must the circumstances referred to in Article 5 of [the Return Directive] have arisen at a time when the foreign national was legally resident or allowed to remain?'

III. Procedure before the Court

10. By decision of 4 January 2022, the President of the Court joined Cases C-711/21 and C-712/21 for the purposes of the oral and the written procedure, and for judgment.

[6] Article 4 of the Charter is not relevant to Case C-712/21 as the applicant did not argue that that provision had been infringed.

[7] The questions referred for a preliminary ruling in Case C-711/21 and Case 712/21 are identical save that in Case C-712/21, the Conseil d'État (Council of State) considered it unnecessary to refer a question on Article 4 of the Charter.

11. The applicants, the Belgian and Netherlands Governments and the European Commission submitted written observations.

12. The Belgian Government's written observations of 29 March 2022 claimed that both cases were inadmissible as the interpretation of EU law the referring court sought was no longer necessary to enable it to deliver judgment. On 30 March 2020, the relevant authority granted the applicant in Case C-711/21 a residence permit.[8] On 8 March 2021, the relevant authority granted the applicant in Case C-712/21 a residence permit valid until 18 February 2021, thereafter renewed until 18 February 2023.[9] The Belgian Government also informed the Court that the relevant Belgian authority[10] had, on 24 February 2022, communicated those developments to the Conseil d'État (Council of State).

13. On 17 June 2022, the President of the Court wrote to the Conseil d'État (Council of State) to confirm whether the applicants had a right to reside in Belgium and, if so, if it wished to maintain its requests for a preliminary ruling. On 27 June 2022, the Conseil d'État (Council of State) confirmed, after hearing the applicants' lawyer, that they had each been granted a right to reside in Belgium. It nonetheless wished to maintain its requests for a preliminary ruling. The Conseil d'État (Council of State) stated that, according to the applicants' lawyer, their right to remain in Belgium is temporary and the Belgian Government has not withdrawn the return decisions. The applicants' lawyer submitted that if their right to reside in Belgium is not extended, the Belgian Government may seek to reactivate the return procedure based on the return decisions taken with respect to the applicants.

14. In the light of the reply of the Conseil d'État (Council of State), on 6 July 2022 the Reporting Judge and the Advocate General requested[11] that the Belgian Government inform the Court of the current status of the return decisions taken with respect to the applicants or any other return decisions that may have been adopted with regard to them. On 15 July 2022, the Belgian Government responded by stating that 'the grant of a residence permit is incompatible with a return decision. A return decision is withdrawn by operation of law by the grant of a residence permit without it being necessary for the competent authority to adopt a new decision on return.' The Belgian Government concluded that, in the light of recent case-law of the Conseil d'État (Council of State) on that very point,[12] the applicants no longer had an interest in pursuing the proceedings seeking to annul the return decisions.

15. On 20 July 2022, the Court forwarded the Belgian Government's reply of 15 July 2022 to the Conseil d'État (Council of State). It again asked whether it wished to maintain its requests for a preliminary ruling and, if so, to indicate its reasons for so doing.

16. On 3 August 2022, the Conseil d'État (Council of State) stated that, in the light of the divergent positions of the applicants' lawyer and the Belgian Government, it could not withdraw its requests for a preliminary ruling without first hearing the parties and ruling on the applicants' interest in maintaining their annulment actions. It further indicated that the proceedings before it

8 The residence permit in question is a 'Carte F'. It is valid for five years.

9 The residence permit in question is a 'Carte A'. It is valid for one year and is renewable.

10 The Office des étrangers (Belgian Immigration Office).

11 Pursuant to Article 62(1) of the Rules of Procedure of the Court of Justice.

12 C.E., n° 254.100 of 24 June 2022. In that judgment the Conseil d'État (Council of State) held that, given that a residence permit had been granted to an appellant, 'such a decision is incompatible with the order to leave the territory' and 'constitutes an act contrary to the latter in such a way that it has removed this decision from the legal order. Given that the challenged administrative act … has disappeared from the legal order, the operative part of the contested judgment is no longer liable to give rise to a complaint by the appellant. The appellant therefore no longer has the necessary interest in the present action'.

were suspended pending the Court's answer to its requests for a preliminary ruling. The Conseil d'État (Council of State) therefore considered that it was not in a position to rule on the status of the return decisions and the applicants' interest in the pursuit of their appeals.

IV. Jurisdiction of the Court to answer the questions referred

17. It is settled case-law that questions on the interpretation of EU law referred by a national court pursuant to Article 267 TFEU enjoy a presumption of relevance. In the context of the cooperation between the Court and the national courts which that provision mandates, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling to enable it to deliver judgment and the relevance of the questions which it submits to the Court. It is, nevertheless, clear from both the text and the scheme of Article 267 TFEU that a national court may not request a preliminary ruling unless a case is pending before it in which it is called upon to give a decision that is capable of taking account of the Court's answer. The Court may not issue advisory opinions on general or hypothetical questions. A request for a preliminary ruling must thus be necessary for the effective resolution of a dispute before the referring court. [13]

18. It follows that the Court, where appropriate, may examine the circumstances in which a national court referred a case to it in order to assess whether it has jurisdiction and, in particular, to determine whether the interpretation of EU law that is sought bears any relation to the facts of the main action or its purpose so that the Court is not led to deliver advisory opinions on general or hypothetical questions. [14] If it appears that the question raised is manifestly irrelevant for the purposes of deciding a case, the Court must declare that there is no need to proceed to judgment. [15]

19. The preliminary ruling procedure provided for in Article 267 TFEU, which sets up a dialogue between the Court and the courts and tribunals of the Member States, is the keystone of the judicial system established by the Treaties. It seeks to secure uniformity in the interpretation of EU law, thereby ensuring, inter alia, its consistency, its full effect and its autonomy. [16] Article 267 TFEU and the system of judicial dialogue and cooperation it establishes is a *lex specialis* that expresses the basic principle laid down in Article 4(3) TEU [17] according to which the European Union and the Member States are bound to sincerely cooperate in carrying out tasks that flow

[13] See judgments of 27 June 2013, *Di Donna* (C-492/11, EU:C:2013:428, paragraphs 24 to 26 and the case-law cited); of 27 February 2014, *Pohotovosť* (C-470/12, EU:C:2014:101, paragraphs 27 to 29 and the case-law cited); and of 24 November 2020, *Openbaar Ministerie (Forgery of documents)* (C-510/19, EU:C:2020:953, paragraph 27 and the case-law cited).

[14] Although the Conseil d'État (Council of State) was unaware that the applicants were in possession of a residence permit on 4 November 2021, it did not subsequently inform the Court of those developments despite having been notified thereof on 24 February 2022. In that context, paragraph 26 of the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2019 C 380 p. 1) states, inter alia, that 'it is incumbent on [the referring court] to inform the Court of any procedural step that may affect the referral …'

[15] Judgment of 24 October 2013, *Stoilov i Ko* (C-180/12, EU:C:2013:693, paragraph 38). While the Belgian Government raised the question of the admissibility of the requests for a preliminary ruling in the present proceedings, it is clear from the aforementioned judgment and the *Gnandi* judgment (paragraph 31) that the Court can raise the question of the admissibility of such requests of its own motion. In accordance with Article 23 of the Statute of the Court of Justice of the European Union, the referring court suspends the procedure before it. Nonetheless, Article 101 of the Rules of Procedure of the Court of Justice provides that the Court may request clarification from the referring court or tribunal.

[16] Judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 90).

[17] See Temple Lang, J., *The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions Under Article 10 EC*, Fordham International Law Journal, 2007, Vol. 31, Issue 5, p. 1517. See also, Klamert, M., 'Article 4 TEU' in Kellerbauer, M., Klamert, M., and Tomkin, J., (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford University Press, New York (online), 2019, pp. 35-60.

from the Treaties.[18] National courts, as emanations of the State, are bound by that principle in their dealings with the EU institutions including the Court.[19] The duty of sincere cooperation is reciprocal in nature as is clear from the text of Article 4(3) TEU which refers to 'full mutual respect' between the European Union and the Member States.[20] In the division of functions in the administration of justice between national courts and the Court provided for by Article 267 TFEU, the Court gives preliminary rulings without, in principle, examining the circumstances in which the national courts referred questions and proposes to apply the provision(s) of EU law in question. It is otherwise only in cases where it either appears that the Article 267 TFEU procedure has been misused and has been resorted to in order to elicit a ruling from the Court by means of a spurious dispute or it is obvious that the provisions of EU law submitted for the interpretation of the Court cannot apply in the resolution of the proceedings out of which the reference was made.[21]

20. In the light of the plea of inadmissibility the Belgian Government raised in its written observations and the correspondence between the Court, the Conseil d'État (Council of State) and the Belgian Government, considerable uncertainty persists as to whether the Conseil d'État (Council of State) must take the Court's reply to the questions referred for a preliminary ruling into consideration when it may come to resolve the disputes pending before it. In that regard, the case-law of the Conseil d'État (Council of State) that the Belgian Government cited in its reply to the Court of 15 July 2022 clearly indicates that a ruling by the Court is unnecessary for the effective resolution of the appeals before the Conseil d'État (Council of State) given that the return decisions, the subject matter of those appeals, appear to have been removed from the Belgian legal order.[22]

21. While it is ultimately a matter for the Conseil d'État (Council of State) to decide, that court, when again asked by the Court on 20 July 2022 to indicate whether it wished to maintain its requests for a preliminary ruling and, if so, why, did not address the relevance of its own recent ruling and simply confirmed its wish to maintain those requests without explaining why they had any bearing upon the outcome of the disputes before it.[23] The Conseil d'État (Council of State) merely refers to the need to hear the parties before ruling on the matter in circumstances where the proceedings before it are suspended.

[18] Member States must take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of EU institutions. They shall facilitate the achievement of the EU's tasks and refrain from any measure that could jeopardise the attainment of the EU's objectives.

[19] In accordance with Article 4(3) TEU, Member State courts are obliged to take all the measures necessary to guarantee the application and effectiveness of EU law. See judgment of 17 December 2020, *Commission* v *Slovenia (ECB archives)* (C-316/19, EU:C:2020:1030, paragraphs 119 and 124).

[20] Order of 13 July 1990, *Zwartveld and Others* (C-2/88-IMM, EU:C:1990:315, paragraph 17).

[21] Judgment of 8 November 1990, *Gmurzynska-Bscher* (C-231/89, EU:C:1990:386, paragraph 23).

[22] See C.E., nº 254.100 of 24 June 2022. The Conseil d'État (Council of State) must verify the relevance and content of that national case-law in the context of the disputes in the main proceedings. It appears, subject to verification by the referring court, that its position on the matter has altered recently. See judgment of 15 April 2021, *État belge (Circumstances subsequent to a transfer decision)* (C-194/19, EU:C:2021:270, paragraph 20), which concerned similar appeal proceedings before the Conseil d'État (Council of State). In that case, the Conseil d'État (Council of State) indicated, following a request for information by the Court, that the appeal in the main proceedings challenging the legality of a decision to reject the appellant's application for asylum and to order him to leave Belgian territory had a purpose as it concerned a judicial decision that could not be removed from the legal order by any factual circumstances.

[23] See, by contrast, paragraphs 32 and 33 of the *Gnandi* judgment where the Conseil d'État (Council of State) clearly explained why the Court's answer was necessary for it to resolve the dispute before it and why it wished to maintain its request for a preliminary ruling. See also, judgment of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraphs 30 and 31), where the Tribunal Supremo (Supreme Court, Spain), explained that, while the proceedings before it relating to the refusal to grant a temporary residence permit had been resolved, an answer by the Court to the request for a preliminary ruling was useful in order to resolve an outstanding issue of the compensation due as a consequence of that refusal.

22. Given the recent case-law of the Conseil d'État (Council of State), [24] the fact that the relevant Belgian authority had informed it that it had issued residence permits to the applicants and that that court had queried the applicants' lawyer on a number of occasions on the matter, [25] it is unclear why the Conseil d'État (Council of State) is apparently unwilling to answer in full the question the Court addressed to it, thereby assisting the Court in discharging its task to ensure that, in the interpretation of the Treaties, the law is observed. [26]

23. In her Opinion in *Di Donna*, Advocate General Kokott observed that the spirit of cooperation in which the preliminary ruling procedure is conducted requires the referring court to respect the function of the Court 'which is to contribute to the administration of justice in the Member States, not to deliver advisory opinions on general or hypothetical questions.' [27] In his Opinion in *Pohotovosť*, Advocate General Wahl stated that 'it is essential for national courts to explain, when the reasons do not emerge beyond any doubt from the file, why they consider that a reply to their questions is necessary to enable them to give judgment. The Court's duty to have regard to the national court's proper responsibilities implies at the same time that the national court should have regard to the proper function of the Court in requests for preliminary rulings. Thus, the Court recently found that there was no need for it to give a ruling in a situation where, despite an invitation made to it, the referring court had maintained its request for a preliminary ruling and not taken a position on the bearing of a development or an event of which the Court had become aware on the decision in the main proceedings or on the relevance of the questions referred with a view to the resolution of the main proceedings.' [28]

24. It appears to me that, in the exercise of this cooperation, the Conseil d'État (Council of State) could have lifted the suspension of the proceedings before it, heard the parties on the matter and ruled on the existence, as a matter of Belgian law, of the return decisions made with respect to the applicants. In that context, it is settled case-law that a provision of national law that prevents the operation of the Article 267 TFEU procedure must be set aside. [29] On the basis of the information in the Court's possession, the present preliminary proceedings are prima facie moot such that the Court's answers to the questions referred may not be necessary to enable the referring court to resolve the disputes before it. [30] Due to changes in the applicants' circumstances since the requests for a preliminary ruling were made, there is also a clear risk that the Court will waste valuable resources answering those requests. These observations are made without prejudice to the right that inures in the Conseil d'État (Council of State) to submit new requests for a preliminary ruling once it has verified that the answers thereto are necessary for the effective resolution of a dispute before it. [31]

[24] See C.E., nº 254.100 of 24 June 2022.

[25] It appears, subject to verification by the referring court, that it did not query the relevant Belgian authority on the matter.

[26] See, by analogy, judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 107).

[27] Opinion of Advocate General Kokott in *Di Donna* (C-492/11, EU:C:2013:225, point 22).

[28] Opinion of Advocate General Wahl in *Pohotovosť* (C-470/12, EU:C:2013:844, point 29).

[29] Judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 141 and the case-law cited).

[30] The Court's reply to questions asked in such circumstances could amount to providing an advisory opinion on hypothetical questions in disregard of the Court's task in the context of the judicial cooperation instituted by Article 267 TFEU.

[31] See, by analogy, order of 12 May 2016, *Security Service and Others* (C-692/15 to C-694/15, EU:C:2016:344, paragraph 30).

V. Conclusion

25. By reason of the foregoing, I advise the Court that it has no jurisdiction pursuant to Article 267 TFEU to answer the questions the Conseil d'État (Council of State, Belgium) referred on 4 November 2021.