



Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 30 March 2023¹

Case C-143/22

**Association Avocats pour la défense des droits des étrangers (ADDE),
Association nationale d'assistance aux frontières pour les étrangers (ANAFE),
Association de recherche, de communication et d'action pour l'accès aux traitements
(ARCAT),**

**Comité inter-mouvements auprès des évacués (CIMADE),
Fédération des associations de solidarité avec tou-te-s les immigré-e-s (FASTI),
Groupe d'information et de soutien des immigrés (GISTI),**

Ligue des droits de l'homme (LDH),

Le paria,

Syndicat des avocats de France (SAF),

SOS – Hépatites Fédération

v

Ministre de l'Intérieur

intervenir

Défenseur des droits

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

(Reference for a preliminary ruling – Area of freedom, security and justice – Borders, asylum and immigration – Directive 2008/115/EC – Rules governing the movement of persons across borders – Regulation (EU) 2016/399 – Temporary reintroduction of border control at internal borders – Consequences for the applicability of the return directive)

Introduction

1. This request for a preliminary ruling is the latest in a series of cases which have come before the Court, since 2011, in relation to the compatibility of certain provisions of the French code de l'entrée et du séjour des étrangers et du droit d'asile (Code on the Entry and Stay of Foreign Nationals and the Right of Asylum; 'the Ceseda') with the requirements of Directive

¹ Original language: French.

2008/115/EC² and those of Regulation (EU) 2016/399³ (‘the Schengen Borders Code’).⁴ It is, in particular, the last two of those cases, which gave rise to the judgments in *Affum* and *Arib and Others*, that are relevant in the present case.

2. In this instance, a number of associations have brought an action before the Conseil d’État (Council of State, France) seeking, in particular, the annulment of Order No 2020-1733 of 16 December 2020 on the legislative part of the Code on the Entry and Stay of Foreign Nationals and the Right of Asylum⁵ (‘Order No 2020-1733’). The key question arising in this reference for a preliminary ruling is whether, where a Member State decides to introduce internal border controls under the Schengen Borders Code, it is required to apply the provisions of Directive 2008/115, or whether it may refuse entry to a third-country national on the basis of Article 14 of that code.

3. In this Opinion, I propose that the Court should rule that a situation such as that described by the referring court falls in line with those which gave rise to the judgments in *Affum* and *Arib and Others*, and that the provisions of Directive 2008/115 apply. Article 14 of the Schengen Borders Code should, on the other hand, be held not to apply.

Legal framework

European Union law

The Schengen Borders Code

4. Under Article 2 of the Schengen Borders Code:

‘For the purposes of this Regulation the following definitions apply:

1. “internal borders” means:

- (a) the common land borders, including river and lake borders, of the Member States;
- (b) the airports of the Member States for internal flights;
- (c) sea, river and lake ports of the Member States for regular internal ferry connections;

2. “external borders” means the Member States’ land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders;

...’

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

³ Regulation of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1).

⁴ See judgments of 6 December 2011, *Achughbadian* (C-329/11, EU:C:2011:807); of 5 November 2014, *Mukarubega* (C-166/13, EU:C:2014:2336); of 11 December 2014, *Boudjlida* (C-249/13, EU:C:2014:2431); of 7 June 2016, *Affum* (C-47/15, EU:C:2016:408; ‘the judgment in *Affum*’); and of 19 March 2019, *Arib and Others* (C-444/17, EU:C:2019:220; ‘the judgment in *Arib and Others*’).

⁵ JORF No 315 of 30 December 2020, text No 41.

5. Article 6 of that code provides:

‘1. For intended stays on the territory of the Member States of a duration of no more than 90 days in any 180-day period, which entails considering the 180-day period preceding each day of stay, the entry conditions for third-country nationals shall be the following:

- (a) they are in possession of a valid travel document entitling the holder to cross the border satisfying the following criteria:
 - (i) its validity shall extend at least three months after the intended date of departure from the territory of the Member States. In a justified case of emergency, this obligation may be waived;
 - (ii) it shall have been issued within the previous 10 years;
- (b) they are in possession of a valid visa, if required pursuant to [Regulation (EC) No 539/2001⁶], except where they hold a valid residence permit or a valid long-stay visa;
- (c) they justify the purpose and conditions of the intended stay, and they have sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin or transit to a third country into which they are certain to be admitted, or are in a position to acquire such means lawfully;
- (d) they are not persons for whom an alert has been issued in the [Schengen Information System] for the purposes of refusing entry;
- (e) they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States’ national data bases for the purposes of refusing entry on the same grounds.

...’

6. Article 13(1) of that code provides:

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

7. Article 14 of Schengen Borders Code provides:

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

⁶ Council Regulation of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (O) 2001 L 81, p. 1).

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

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

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

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

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

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

...

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

8. Article 23 of the Schengen Borders Code reads as follows:

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

(a) the exercise of police powers by the competent authorities of the Member States under national law, in so far as the exercise of those powers does not have an effect equivalent to border checks; that shall also apply in border areas. Within the meaning of the first sentence, the exercise of police powers may not, in particular, be considered equivalent to the exercise of border checks when the police measures:

(i) do not have border control as an objective;

(ii) are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime;

(iii) are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders;

(iv) are carried out on the basis of spot-checks;

...’

9. Article 25 of that code provides:

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

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

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

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

10. Article 32 of the Schengen Borders Code reads as follows:

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

11. Articles 5, 13 and 14 of the Schengen Borders Code are to be found in Title II of that code, which is entitled ‘External borders’, while Articles 23, 25 and 32 of that code are to be found in Title III, which is entitled ‘Internal borders’.

12. Part A of Annex V to the Schengen Borders Code provides:

‘1. When refusing entry, the competent border guard shall:

- (a) fill in the standard form for refusing entry, as shown in Part B. The third-country national concerned shall sign the form and shall be given a copy of the signed form. Where the third-country national refuses to sign, the border guard shall indicate this refusal in the form under the section “comments”;
- (b) affix an entry stamp on the passport, cancelled by a cross in indelible black ink, and write opposite it on the right-hand side, also in indelible ink, the letter(s) corresponding to the reason(s) for refusing entry, the list of which is given on the abovementioned standard form for refusing entry;

(c) annul or revoke the visas, as appropriate, in accordance with the conditions laid down in Article 34 of Regulation (EC) No 810/2009;^[7]

(d) record every refusal of entry in a register or on a list stating the identity and nationality of the third-country national concerned, the references of the document authorising the third-country national to cross the border and the reason for, and date of, refusal of entry.

2. If a third-country national who has been refused entry is brought to the border by a carrier, the authority responsible locally shall:

(a) order the carrier to take charge of the third-country national and transport him or her without delay to the third country from which he or she was brought, to the third country which issued the document authorising him or her to cross the border, or to any other third country where he or she is guaranteed admittance, or to find means of onward transportation in accordance with Article 26 of the Schengen Convention and [Directive 2001/51/EC];⁸

(b) pending onward transportation, take appropriate measures, in compliance with national law and having regard to local circumstances, to prevent third-country nationals who have been refused entry from entering illegally.

...'

Directive 2008/115

13. Article 2 of Directive 2008/115 provides:

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

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

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

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

...'

⁷ Regulation of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) (OJ 2009 L 243, p. 1).

⁸ Council Directive of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 (OJ 2001 L 187, p. 45).

14. Article 3 of that directive provides:

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

...

2. “illegal stay” means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State;

...’

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

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

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

16. Article 6 of Directive 2008/115 provides:

‘1. Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5.

2. 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.

3. Member States may refrain from issuing a return decision to a third-country national staying illegally on their territory if the third-country national concerned is taken back by another Member State under bilateral agreements or arrangements existing on the date of entry into force of this Directive. In such a case the Member State which has taken back the third-country national concerned shall apply paragraph 1.

...

6. This Directive shall not prevent Member States from adopting a decision on the ending of a legal stay together with a return decision and/or a decision on a removal and/or entry ban in a single administrative or judicial decision or act as provided for in their national legislation, without prejudice to the procedural safeguards available under Chapter III and under other relevant provisions of Community and national law.’

French law

17. In the version resulting from Order No 2020-1733, Article L. 332-2 of the *Ceseda* provides:

‘The decision refusing entry, which shall be in writing and substantiated, shall be taken by an officer belonging to a category prescribed by regulations.

The notification of the decision refusing entry shall state that the foreign national has the right to inform, or cause to be informed, the person he has indicated that he intended to visit, his consulate or the adviser of his choice. It shall state that the foreign national has the right to refuse to be repatriated before one clear day has passed, under the conditions laid down in Article L. 333-2.

The decision and the notification of rights which accompanies it shall be provided to him in a language he understands.

Particular attention shall be paid to vulnerable persons, especially minors whether or not accompanied by an adult.’

18. Article L. 332-3 of the *Ceseda*, in the version resulting from Order No 2020-1733, provides:

‘The procedure set out in Article L. 332-2 is applicable to a decision refusing entry to a foreign national pursuant to Article 6 of the [Schengen Borders Code]. It is also applicable to checks made at an internal border in the event of temporary reintroduction of border control under the conditions laid down in Chapter II of Title III of the [Schengen Borders Code].’

Facts, procedure and the question referred

19. The applicants in the main proceedings have brought an action before the Conseil d’État (Council of State) seeking, amongst other things, the annulment of Article L. 332-3 of the *Ceseda*. They submit, in particular, that that article infringes Directive 2008/115 in that it permits refusals of entry at internal borders at which checks have been reintroduced.

20. The referring court observes that the Court held, in its judgment in *Arib and Others*, that Article 2(2)(a) of Directive 2008/115, read in conjunction with Article 32 of the Schengen Borders Code, does not apply to the situation of an illegally staying third-country national who was apprehended in the immediate vicinity of an internal border of a Member State, even where that Member State has reintroduced border control at that border, pursuant to Article 25 of that code, on account of a serious threat to public policy or to internal security in that Member State.

21. On 27 November 2020, the referring court held that the provisions of Article L. 213-3-1 of the *Ceseda*, which provided that, in the event of the temporary reintroduction of border control at internal borders, a foreign national arriving directly from the territory of a State party to the Schengen Convention may be refused entry under the conditions laid down in Article L. 213-2 of that code if he or she has entered the territory of Metropolitan France crossing an internal land border without being authorised to do so and was checked in an area between the border and a line drawn 10 kilometres inside that border, are contrary to the provisions of Directive 2008/115 as interpreted by the Court in the judgment in *Arib and Others*.

22. The referring court states that Article L. 332-3 of the *Ceseda*, which is the subject of the action before it in the present proceedings, does not restate the provisions of Article L. 213-3-1 of that code, and accordingly that Article L. 332-3 thereof does not infringe the principle of *res judicata*. However, the second paragraph of Article L. 332-3 of that code provides that entry may be refused while carrying out checks at internal borders, in the event of temporary reintroduction of control at such borders under the conditions laid down in Chapter II of Title III of the Schengen Borders Code.

23. The referring court therefore considers it necessary to determine whether, in such a case, a third-country national arriving directly from the territory of a State party to the Schengen Convention and presenting himself or herself at an authorised border crossing point, without being in possession of documents substantiating permission to enter or a right to stay in France, may be refused entry on the basis of Article 14 of the Schengen Borders Code, without Directive 2008/115 being applicable.

24. In those circumstances the Conseil d'État (Council of State), by decision of 24 February 2022, received at the Court on 1 March 2022, decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'In the event of the temporary reintroduction of border controls at internal borders, under the conditions laid down in Chapter II of Title III of [the Schengen Borders Code], can foreign nationals arriving directly from the territory of a State party to the Schengen Convention ... be refused entry, when entry checks are carried out at that border, on the basis of Article 14 of that [code], without [Directive 2008/115] being applicable?'

25. The applicants in the main proceedings, the Défenseur des droits, the French and Polish Governments and the European Commission submitted observations. The same parties were represented at the hearing held on 19 January 2023.

Analysis

26. By its question, the referring court seeks, in essence, to establish whether, in the event of temporary reintroduction of border control at internal borders, under the conditions laid down in Chapter II of Title III of the Schengen Borders Code, Article 14 of that code or the provisions of Directive 2008/115 apply.

27. I would emphasise at the outset that the issue to be decided does not concern the legality of reintroducing border control at internal borders, but only the *consequences* of reintroducing such checks.⁹

28. I propose that the Court should rule, in response, that the provisions of Directive 2008/115 are applicable and, on the other hand, that Article 14 of the Schengen Borders Code is not applicable. That conclusion follows, in my view, from the Court's reasoning in the cases which gave rise to the judgments in *Affum* and *Arib and Others*.

⁹ The legality of reintroducing such checks is not disputed in the present case.

The applicability of Directive 2008/115

29. The purpose of Directive 2008/115, as stated in Article 1 thereof, is to set out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights and international law. It is apparent from recital 4 of that directive that it seeks to establish clear, transparent and fair rules to provide for an effective return policy as a necessary element of a well-managed migration policy.

30. The scope *ratione personae* of Directive 2008/115, as defined in Article 2 thereof, is wide.¹⁰ Article 2(1) of that directive provides that it applies to third-country nationals staying illegally on the territory of a Member State. The concept of ‘illegal stay’ is defined in Article 3(2) of that directive as ‘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 [6] of the Schengen Borders Code,^[11] or other conditions for entry, stay or residence in that Member State’.¹² It follows from that definition that any third-country national who is present on the territory of a Member State without fulfilling the conditions for entry, stay or residence there is, by virtue of that fact alone, staying there illegally, without such presence being subject to a condition requiring a minimum duration or an intention to remain on that territory.¹³ Nor is the fact that such presence is merely temporary or by way of transit among the grounds, listed in Article 2(2) of Directive 2008/115, on which Member States may decide to exclude an illegally staying third-country national from that directive’s scope.¹⁴

31. Furthermore, the Court has held that, in the context of Directive 2008/115, the concepts of ‘illegal stay’ and ‘illegal entry’ are closely linked, as such entry is one of the factual circumstances that may result in the third-country national’s stay on the territory of the Member State concerned being illegal.¹⁵ Since third-country nationals who have entered the territory of a Member State illegally and who, on that basis, are regarded as staying there illegally therefore fall, under Article 2(1) of Directive 2008/115, and without prejudice to Article 2(2) thereof, within that directive’s scope, they must be subject to the common standards and procedures laid down by that directive for the purpose of their removal, as long as their stay has not, as the case may be, been regularised.¹⁶

32. Under Article 2(2) of Directive 2008/115, Member States are authorised not to apply that directive in certain well-defined situations. Under Article 2(2)(a) thereof, a Member State may decide not to apply that directive to third-country nationals who are subject to a refusal of entry in accordance with Article 14 of the Schengen Borders Code,¹⁷ or who are apprehended or

¹⁰ See also Lutz, F., ‘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’, in Hailbronner, K. and Thym, D. (eds), *EU Immigration and Asylum Law – a Commentary*, 2nd ed., 2016, C.H. Beck, Hart, Nomos, Munich, Oxford, Baden-Baden, Article 2, paragraph 3.

¹¹ That article has replaced 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 of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1), to which Article 3(2) of Directive 2008/115 refers.

¹² Emphasis added.

¹³ See judgment in *Affum* (paragraph 48).

¹⁴ See judgment in *Affum* (paragraph 48).

¹⁵ See judgment in *Affum* (paragraph 60).

¹⁶ See judgment in *Affum* (paragraph 61).

¹⁷ Article 14 of the Schengen Borders Code has replaced Article 13 of Regulation No 562/2006, to which Article 2(2)(a) of Directive 2008/115 refers.

intercepted by the competent authorities in connection with the irregular crossing of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.

33. The Court has already had occasion to observe that it is clear from Article 2(2)(a) of Directive 2008/115 that that the two situations covered by that provision relate exclusively to the crossing of a Member State's external border, as defined in Article 2(2) of the Schengen Borders Code, and therefore do not concern the crossing of a common border of Member States forming part of the Schengen area. That provision thus cannot permit the Member States to exclude certain illegally staying third-country nationals from that directive's scope on the ground of illegal entry across an internal border.¹⁸ The Court also observed that, so far as concerns the first of the situations covered in Article 2(2)(a) of Directive 2008/115, it is not in dispute that only third-country nationals wishing to cross an external border in order to enter the Schengen area are subject to a refusal of entry in accordance with Article 14 of the Schengen Borders Code.¹⁹

34. On the basis of those observations, it is impossible to accept the French Government's argument that a third-country national who has been refused entry to the territory of a Member State is not staying on the territory of a Member State, as that would amount to a Member State unilaterally restricting the scope of Directive 2008/115. That Member State would be able to revoke a stay which had already begun. In my view there is no room for such a unilateral restriction on the scope of that directive.

35. As a provisional conclusion, I consider that it is not open to the French Republic to decide, on the basis of Article 2(2)(a) of Directive 2008/115, not to apply that directive to an illegally staying third-country national who is stopped at a border.

36. I would add that that conclusion corresponds exactly to the approach taken by the Court when it ruled that the provisions of Directive 2008/115 apply to the situation of an illegally staying third-country national who was apprehended in the immediate vicinity of an internal border of a Member State, even where that Member State has reintroduced border control at that border, pursuant to the Schengen Borders Code.²⁰ In my view, the same approach must be taken where the person concerned is apprehended at the border itself.

37. On the basis of those observations, a Member State is required to apply the provisions of Directive 2008/115 to any person stopped at an internal border in the Schengen area.

38. The provisions of the Schengen Borders Code, including Article 14 of that code, cannot change that conclusion.

The applicability of Article 14 of the Schengen Borders Code

39. The Schengen Borders Code establishes rules governing the movement of persons across borders.

¹⁸ See judgment in *Affum* (paragraph 69).

¹⁹ See judgment in *Affum* (paragraph 70).

²⁰ See judgment in *Arib and Others* (paragraph 67).

40. Regardless of their nationality, persons are not to be checked when crossing internal borders. It is only possible for border crossings to be free of checks if this applies to everyone.²¹ Thus, the removal of border control at internal borders necessarily extends to third-country nationals, because of the very nature of the absence of such checks.²² That also means that entry via the external borders of Member States is a matter of EU law.

41. Article 14 of the Schengen Borders Code, which imposes an *obligation* on Member States to refuse entry to the territory, at an *external* border, to a third-country national who does not fulfil the entry conditions laid down in Article 6(1) of that code,²³ does not apply to an internal border, even – on the basis of Article 32 thereof – *mutatis mutandis*. The *ratio legis* of those provisions is that it is incumbent on Member States with external borders to ensure that third-country nationals who do not have the right of entry do not enter the Schengen area. Once such a national has entered, what is incumbent on each Member State is not to refuse entry on the basis of the Schengen Borders Code, but to apply Directive 2008/115.

42. Moreover, the Member States²⁴ do not protect the same legal interests at external borders as they do at internal borders: a Member State which, under the Schengen Borders Code, is responsible for controlling the external borders of that area is acting in the interest of all the Member States of the Schengen area. In contrast, a Member State which decides to reintroduce border control at internal borders does so in its own interest.²⁵

43. On the basis of the considerations set out above, I propose that the question referred should be answered by ruling that, in the event of temporary reintroduction of border control at internal borders, under the conditions laid down in Chapter II of Title III of the Schengen Borders Code, Directive 2008/115 is applicable. On the other hand, Article 14 of that code is not applicable.

Final remarks – options left to the Member States by Directive 2008/115

44. Notwithstanding that, in the event of temporary reintroduction of border control at internal borders, in circumstances such as those described by the referring court, the provisions of Directive 2008/115 apply and Article 14 of the Schengen Borders Code does not apply, a number of possibilities remain open to the Member States for ensuring that illegally staying third-country nationals are returned efficaciously.

45. In that regard, I would observe that the return procedure established by Directive 2008/115 is centred on a return decision which, under Article 6(1) of that directive, the Member States are *required*²⁶ to adopt in respect of any third-country national staying illegally on their territory.²⁷

²¹ See, in that regard, Hoppe, M., in Lenz, C.O. and Borchardt, K.-D. (ed.), *EU-Verträge Kommentar*, Bundesanzeiger Verlag, 6th ed., Cologne, 2013, Article 77 AEUV, paragraph 5.

²² See, in that regard, Müller-Graff, P.-Chr., in Pechstein, M., Nowak, C. and Häde, U. (ed.), *Frankfurter Kommentar zu EUV, GRC und AEUV, Band II*, Mohr Siebeck, Tübingen, 2017, Article 77 AEUV, paragraph 1.

²³ And does not belong to the categories of persons referred to in Article 6(5) of the Schengen Borders Code.

²⁴ It should be noted that the term ‘Member States’ includes only the Member States of the European Union which take part in the Schengen *acquis* and the non-member countries taking part; see also recitals 21 to 28 of the Schengen Borders Code.

²⁵ See also, to that effect, Opinion of Advocate General Szpunar in *Arib and Others* (C-444/17, EU:C:2018:836, points 58 and 59).

²⁶ See judgment of 6 December 2011, *Achughbabian* (C-329/11, EU:C:2011:807, paragraph 31). On the obligatory nature of Article 6 of Directive 2008/115, see also Slama, S., ‘La transposition de la directive “retour”: vecteur de renforcement ou de régression des droits des irréguliers?’, in Dubin, L., *La légalité de la lutte contre l’immigration irrégulière par l’Union européenne*, Bruylant, Brussels, 2012, pp. 289 to 345, especially p. 330.

²⁷ This obligation is subject to a whole series of exceptions, which are set out in Article 6(2) to (5) of Directive 2008/115. Moreover, Article 6(6) of that directive allows Member States to adopt a decision on the ending of a legal stay together with a return decision.

Article 6(1) is the key provision of that directive, with the other provisions thereof being organised around it.²⁸ 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.²⁹ In other words, from the moment that a third-country national is staying illegally and the exceptions in Article 6(2) to (5) of that directive are not applicable, a Member State is obliged to issue a return decision and to enforce it.

46. In the event that a third-country national in respect of whom a return decision has been issued poses a risk to public policy or internal security, Directive 2008/115 does not preclude a Member State from detaining that national.³⁰ In such a situation, the Member State in question would not be required to grant a period for voluntary departure under Article 7(4) of that directive.

47. In addition, I would draw attention to Article 6(3) of Directive 2008/115, under which Member States may refrain from issuing a return decision to a third-country national staying illegally on their territory if the third-country national concerned is taken back by another Member State under bilateral agreements or arrangements existing on the date of entry into force of that directive.

48. Lastly, where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, the Member State in question may take urgent measures pursuant to Article 18 of Directive 2008/115.

Conclusion

49. Having regard to all of the foregoing considerations, I propose that the Court should answer the question referred for a preliminary ruling by the Conseil d'État (Council of State, France) as follows:

In the event of temporary reintroduction of border control at internal borders, under the conditions laid down in Chapter II of Title III of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), the provisions 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 are applicable. On the other hand, Article 14 of that regulation is not applicable.

²⁸ See also Hörich, D., 'Die Rückführungsrichtlinie: Entstehungsgeschichte, Regelungsgehalt und Hauptprobleme', *Zeitschrift für Ausländerrecht und Ausländerpolitik*, 2011, pp. 281 to 286, especially p. 283.

²⁹ See also Opinion of Advocate General Szpunar in *Celaj* (C-290/14, EU:C:2015:285, point 50).

³⁰ See, to that effect, judgment in *Arib and Others* (paragraph 66), and judgment of 2 July 2020, *Stadt Frankfurt am Main* (C-18/19, EU:C:2020:511, paragraph 41 et seq.).