Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

9 November 2023 *

(Reference for a preliminary ruling – Area of freedom, security and justice – Return of illegally staying third-country nationals – Directive 2008/115/EC – Article 3(2) – Concept of 'illegal stay' – Directive 2013/32/EU – Applicant for international protection – Article 9(1) – Right to remain in the Member State pending the examination of the application – Return decision adopted before the adoption of the first-instance decision rejecting the application for international protection)

In Case C-257/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Krajský soud v Brně (Regional Court, Brno, Czech Republic), made by decision of 28 February 2022, received at the Court on 14 April 2022, in the proceedings

CD

v

Ministerstvo vnitra České republiky, Odbor azylové a migrační politiky,

THE COURT (Tenth Chamber),

composed of Z. Csehi, President of the Chamber, E. Regan (Rapporteur), President of the Fifth Chamber, and D. Gratsias, Judge,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Czech Government, by A. Edelmannová, M. Smolek and J. Vláčil, acting as Agents,

– the European Commission, by A. Azéma, A. Katsimerou and M. Salyková, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: Czech.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(2) and (3) and Article 5 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 (OJ 2008 L 348, p. 98), read in conjunction with Article 2, Article 4 and Article 19(2) of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between CD, an Algerian national, and the Ministerstvo vnitra České republiky, Odbor azylové a migrační politiky (Ministry of the Interior of the Czech Republic, Asylum and migration policy service; 'the Ministry of the Interior') concerning a return decision adopted in respect of that national by the Ředitelství služby cizinecké policie (Directorate of the immigration police service, Czech Republic; 'the Directorate of immigration police') ('the return decision at issue').

Legal context

European Union law

Directive 2008/115

3 Recitals 9 and 12 of Directive 2008/115 state:

'(9) In accordance with Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [(OJ 2005 L 326, p. 13.)], a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force.

…

(12) The situation of third-country nationals who are staying illegally but who cannot yet be removed should be addressed. Their basic conditions of subsistence should be defined according to national legislation. In order to be able to demonstrate their specific situation in the event of administrative controls or checks, such persons should be provided with written confirmation of their situation. Member States should enjoy wide discretion concerning the form and format of the written confirmation and should also be able to include it in decisions related to return adopted under this Directive.'

4 Article 2 of Directive 2008/115, entitled 'Scope', provides, in paragraph 1:

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

5 Article 3(2) and (4) of the Directive, entitled 'Definitions', provide:

'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 [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)] or other conditions for entry, stay or residence in that Member State.

…

(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 Article 5 of that directive, entitled 'Non-refoulement, best interests of the child, family life and state of health', provides, inter alia, that when implementing that directive, Member States are to respect the principle of non-refoulement.

7 Article 6 of Directive 2008/115, entitled 'Return decision', provides, in paragraph 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.'

Directive 2013/32/EU

8 Article 9 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180 p. 60), entitled 'Right to remain in the Member State pending the examination of the application', provides, in paragraph 1 thereof:

'Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. This right to remain shall not constitute an entitlement to a residence permit.'

9 Article 36 of Directive 2013/32, under the heading 'The concept of safe country of origin', states:

'1. A third country designated as a safe country of origin in accordance with this Directive may, after an individual examination of the application, be considered as a safe country of origin for a particular applicant only if:

(a) he or she has the nationality of that country; or

(b) he or she is a stateless person and was formerly habitually resident in that country,

and he or she has not submitted any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances and in terms of his or her qualification as a beneficiary of international protection in accordance with Directive 2011/95/EU [of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9)].

2. Member States shall lay down in national legislation further rules and modalities for the application of the safe country of origin concept.'

10 Article 37 of Directive 2013/32, entitled 'National designation of third countries as safe countries of origin', provides:

'1. Member States may retain or introduce legislation that allows, in accordance with Annex I, for the national designation of safe countries of origin for the purposes of examining applications for international protection.

2. Member States shall regularly review the situation in third countries designated as safe countries of origin in accordance with this Article.

…'

Czech legislation

11 Paragraph 120a(1)(b) of Zákon č. 326/1999 Sb., o pobytu cizinců na území České republiky a o změně některých zákonů (Law 326/1999 on the residence of foreign nationals in the Czech Republic and amending other laws), in the version applicable to the facts in the main proceedings ('the Law on the residence of foreign nationals'), provides:

'In the context of an administrative removal decision under Paragraphs 119 and 120, the police are obliged to request a binding position from the Ministry as to whether the removal of the foreign national from the territory is possible pursuant to Paragraph 179 of the Law; this shall not apply

…

(b) if the foreign national comes from a safe country of origin, within the meaning of another legal provision, and has not referred to circumstances indicating that he or she could face a real danger as defined in Paragraph 179.

…'

12 According to Paragraph 179(1) and (2) of the Law on the residence of foreign nationals:

'(1) The removal of a foreign national from the territory shall not be possible where a well-founded concern exists that the foreign national would face real danger if he or she is returned to his or her country of origin, or, if he or she is a stateless person, to the State in which he or she had his or her last permanent residence.

(2) For the purposes of the present law, "real danger" should be understood as meaning a return in breach of Article 3 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ("the ECHR")].'

The dispute in the main proceedings and the question referred for a preliminary ruling

13 On 30 September 2021, the applicant in the main proceedings, an Algerian national, appeared at a facility for detaining foreign nationals, where he made an application for international protection. Since he was staying on Czech territory without a valid right of residence or a valid travel document, the police initiated an administrative removal procedure against him on 8 October 2021.

14 During his hearing, the applicant in the main proceedings stated that Algeria was not a safe country and that, inter alia, the government authorities there were incapable of protecting Algerian citizens. He indicated that he was threatened with death there by the family of the victim of a scuffle in the course of which he witnessed a murder. He stated that, although he had been found not-guilty by an Algerian court, he was prevented from coming home during the daytime due to that fear and did so only at night.

15 By the return decision at issue, adopted on 12 October 2021, the Directorate of immigration police ordered the administrative removal of the applicant in the main proceedings and set a period of a year during which he would be refused entry to the territory of the Member States.

16 The Directorate of immigration police considered that there was no ground preventing the removal of the applicant in the main proceedings from Czech territory, since there was no well-founded concern of real danger in the country of origin, within the meaning of Paragraph 179(1) and (2) of the Law on the residence of foreign nationals.

17 In that regard, the Directorate of immigration police found that Algeria was on the list of safe countries of origin established by vyhláška č. 328/2015 Sb., kterou se provádí zákon o azylu a zákon č. 221/2003 Sb., o dočasné ochraně cizinců (Decree No 328/2015, implementing the Asylum Law and Law No 221/2003 on temporary protection of foreign nationals), in the version applicable to the facts in the main proceedings ('Decree No 328/2015').

18 The administrative appeal lodged by the applicant in the main proceedings against the return decision was dismissed by the Ministry of the Interior by decision of 6 December 2021. The applicant in the main proceedings subsequently brought an action before the Krajský soud v Brně (Regional Court, Brno, Czech Republic), the referring court. Before the latter, he submitted, inter alia, that that decision was based on general considerations to the effect that Algeria is a safe country of origin, under Decree No 328/2015, whereas an individual assessment of his situation should have been carried out.

19 The referring court has doubts as to whether EU law precludes a Member State, in assessing whether a return decision taken against a third country national infringes the principle of non-refoulement, from (i) applying, in the context of the system for returning illegally staying third-country nationals, provided for by Directive 2008/115, the concept of a 'safe country of origin' provided for in Article 36 of Directive 2013/32 and (ii) interpreting that non-refoulement principle as concerning only the prohibition of ill treatment.

20 As regards the concept of a 'safe country of origin', the referring court observes that, although that concept is not set out in Directive 2008/115, its use in the context of the return procedure entails procedural simplifications for the police, since the police is relieved of the obligation to carry out a concrete assessment of whether there is a risk that the principle of non-refoulement will be breached in the destination country in the specific case of a returned third-country national. However, the use of that concept places the third-country national in a more difficult situation, since he or she is obliged to rebut the presumption that his or her country of origin is safe.

21 As regards the principle of non-refoulement, the referring court emphasises that Article 19(2) of the Charter and Article 3 ECHR, as interpreted by the case-law of the European Court of Human Rights, grants that principle a broader scope than that which follows from Paragraph 179(2) of the Law on the residence of foreign nationals, which limits the scope of that principle to the prohibition of ill treatment.

22 In addition, the referring court considers that the Czech Republic has failed to fulfil its obligation, under Article 37(2) of Directive 2013/32, to review regularly the situation in third countries designated as safe countries of origin in accordance with that article. Thus, in its view, the question arises whether, four years after the publication of the sources on which the designation of Algeria as a safe country of origin was based and three years after the inclusion of Algeria in Decree No 328/2015, the conclusion regarding the safety of Algeria remains justified.

23 In those circumstances, the Krajský soud v Brně (Regional Court, Brno) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Should Article 4(2) and (3) and Article 5 *in fine* of [Directive 2008/115] in conjunction with Article 2, Article 4, and Article 19(2) of [the Charter] be interpreted as precluding the application, in assessing whether a return decision under Article 6 of [Directive 2008/115] leads to a breach of the non-refoulement principle, of the concept of a safe country of origin under Articles 36 and 37 of [Directive 2013/32] in combination with the narrowed definition of the non-refoulement principle focused solely on the prohibition of ill treatment under Article 4 of [the Charter] and Article 3 [ECHR]?'

Consideration of the question referred

24 By its question, the referring court asks, in essence, whether Article 4(2) and (3) and Article 5 of Directive 2008/115, read in conjunction with Article 2, Article 4 and Article 19(2) of the Charter, must be interpreted as meaning that the principle of non-refoulement precludes the adoption of a return decision as regards a third country national staying illegally on the territory of a Member State where that national submits before the authorities of that Member State that he or she will be exposed in his or her country of origin to threats to his or her life from individuals and whether it is permissible for that Member State to have recourse to the concept of a 'safe country of origin', within the meaning of Articles 36 and 37 of Directive 2013/32, for the purposes of assessing the risk of a breach of that principle in such circumstances.

25 In its written observations, the European Commission expressed its doubts concerning the admissibility of the present request for a preliminary ruling. In particular, it submits that it appears from the national file that the application for international protection was not examined by the competent authorities before the initiation of the removal procedure, in which case the national provisions transposing Directive 2008/115 should never have been applied in the present

case. The Commission also submits that, in the context of the action brought before the referring court against the return decision at issue, the applicant maintained, inter alia, that a removal procedure had been wrongly initiated against him even though his application for international protection had not yet been examined.

26 In the present case, it appears from the order for reference that, on 30 September 2021, the applicant in the main proceedings made an application for international protection to the Czech Republic and that, on 12 October 2021, the Directorate of immigration police adopted, with respect to him, the return decision at issue, together with an entry ban.

27 Following two requests for information from the Court, dated 26 January and 1 March 2023, on the basis of Article 62(1) of the Rules of Procedure of the Court of Justice, the referring court confirmed, inter alia, (i) that, by decision of 25 November 2021, the Ministry of the Interior rejected the application for international protection submitted by the applicant in the main proceedings and (ii) that, in the context of the action brought before the referring court against the return decision at issue, that applicant submitted, inter alia, that, in view of his application for international protection, he should not have been the subject of a removal procedure.

28 In that regard, it should be observed that, according to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only, inter alia, where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its object or where the problem is hypothetical (judgment of 12 January 2023, *Nemzeti Adatvédelmi és Információszabadság Hatóság*, C-132/21, EU:C:2023:2, paragraph 24 and the case-law cited).

29 In the present case, a return decision was adopted by the Directorate of immigration police with respect to the applicant in the main proceedings. In addition, the subject matter of the dispute before the referring court is the legality of that decision and the question referred concerns the interpretation of provisions of Directive 2008/115 and Directive 2013/32 which are relevant as regards the grounds of illegality of that decision invoked, according to the order for reference, by the applicant in the main proceedings. It is therefore not manifestly clear from the case file submitted to the Court that the interpretation of EU law sought bears no relation to the purpose of the action, or that the problem raised by the national court is hypothetical.

30 Consequently, contrary to the Commission's suggestions, the question referred is not inadmissible.

31 However, according to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with all those elements for the interpretation of EU law which may be of assistance in adjudicating on the case pending before it, whether or not the referring court has specifically referred to them in its question (judgment of 21 September 2017, *Aviva*, C-605/15, EU:C:2017:718, paragraph 21 and the case-law cited).

32 In the present case, in accordance with that case-law, it is appropriate, as a preliminary point, to consider the question of the very applicability of Directive 2008/115 in circumstances such as those at issue in the main proceedings, where the return decision is adopted before the adoption of the first-instance decision rejecting the application for international protection.

33 First of all, it should be noted that the order to leave the territory at issue in the main proceedings constitutes a 'return decision', within the meaning of Article 3(4) of Directive 2008/115, that is to say 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.

34 Article 2(1) of Directive 2008/115 stipulates that that directive applies to third-country nationals staying illegally on the territory of a Member State. As regards return decisions more specifically, Article 6(1) of that directive provides that, in principle, Member States are to issue such a decision to any third-country national staying illegally on their territory.

35 In order to determine whether a return decision may be adopted in relation to a third-country national during the period running from that person's submission of an application for international protection until the adoption of the first-instance decision ruling on that application, it is therefore necessary to examine whether, during that period, the person concerned is staying illegally, within the meaning of Directive 2008/115 (see, by analogy, judgment of 19 June 2018, *Gnandi*, C-181/16, EU:C:2018:465, paragraph 38).

36 In that regard, it follows from the definition of the concept of 'illegal stay', set out in Article 3(2) of Directive 2008/115, that any third-country national who is present on the territory of a Member State without fulfilling the conditions for entry, stay or residence is, by virtue of that fact alone, staying there illegally (judgment of 19 June 2018, *Gnandi*, C-181/16, EU:C:2018:465, paragraph 39 and the case-law cited).

37 However, in accordance with Article 9(1) of Directive 2013/32, an applicant for international protection is to be allowed to remain in the Member State in which that application has been made, for the sole purpose of the procedure, until adoption of a decision at first instance refusing that person's application. Even though, according to the express wording of that provision, that right to remain does not constitute an entitlement to a residence permit, it is nevertheless apparent, inter alia, from recital 9 of Directive 2008/115, that that right prevents an applicant for international protection from being regarded as 'staying illegally', within the meaning of that directive, during the period from submission of the application for international protection until adoption of a first-instance decision on that application (see, to that effect, judgment of 16 November 2021, *Commission* v *Hungary (Criminalisation of assistance to asylum seekers)*, C-821/19, EU:C:2021:930, paragraph 137 and the case-law cited).

38 As is unambiguously clear from the wording of Article 9(1) of Directive 2013/32, the right of the applicant for international protection to remain in the Member State where he or she made that application, provided for in that provision, comes to an end with the adoption, by the competent authorities of that Member State, of the first-instance decision rejecting that application. In the absence of a right to stay or a residence permit granted on another legal basis, such as Article 6(4) of Directive 2008/115, which would enable the third-country national whose application has been rejected to fulfil the conditions for entry, stay or residence in the Member State concerned, the consequence of that rejection decision, once adopted, is that the applicant no longer fulfils those conditions and, accordingly, that person's stay becomes illegal (see, by analogy, judgment of 19 June 2018, *Gnandi*, C-181/16, EU:C:2018:465, paragraph 41).

39 Consequently, given that, during the period from the submission of the application for international protection until the adoption of the first-instance decision on that application, the existence of an authorisation to remain precludes the applicant's stay from being regarded as

'illegal' and, accordingly, the application of Directive 2008/115 to him or her, a return decision in respect of that person cannot be adopted during that period (see, to that effect, judgment of 19 June 2018, *Gnandi*, C-181/16, EU:C:2018:465, paragraphs 46, 58 and 59).

40 However, a return decision may, in principle, be adopted against the person concerned after the decision rejecting the application for international protection or aggregated together with that rejection in a single administrative act (see judgment of 19 June 2018, *Gnandi*, C-181/16, EU:C:2018:465, paragraph 59).

41 That being said, it cannot be inferred from the considerations set out in paragraphs 33 to 40 above that, in the event that the purpose of the return decision is the removal of a third-country national because of the illegal nature of his or her stay prior to his or her submission of an application for international protection, that situation would justify the adoption, by the competent authority of the Member State in which that third-country national has submitted an application for international protection, of a return decision after the submission of that application, but before a first-instance decision has been given on that application.

42 It is true that, as the Court has held, it follows from recital 12 of Directive 2008/115 that that directive is applicable to third-country nationals whose stay is classified as illegal, but who are permitted to remain lawfully on the territory of the Member State concerned because they cannot yet be removed. However, as can be seen from paragraph 37 above, Article 9(1) of Directive 2013/32, read in the light of recital 9 of Directive 2008/115, must be interpreted as meaning that the right of the applicant for international protection to remain in the Member State concerned during the period from submission of the application until adoption of a first-instance decision on that application, acts to prevent the concerned person's stay from being regarded as 'illegal', within the meaning of Directive 2008/115 (see, to that effect, judgment of 19 June 2018, *Gnandi*, C-181/16, EU:C:2018:465, paragraphs 46 and 47). In that regard, it is irrelevant that the return decision relates to the period during which that applicant was staying illegally in the Member State concerned, prior to the submission of the application for international protection.

43 Having regard to the considerations set out in paragraphs 33 to 42 above, it is not necessary to reply to the question referred by the referring court as to whether the provisions of EU law and, in particular, Directive 2008/115, referred to in paragraph 24 above, preclude the adoption of a return decision with respect to a third country national staying illegally in a Member State, in the circumstances described in that paragraph of the present judgment and whether a Member State may have recourse to the concept of a 'safe country of origin', within the meaning of Articles 36 and 37 of Directive 2013/32, for the purposes of assessing the risk of a breach of the principle of non-refoulement in the event of the adoption of that decision.

44 In the light of all the foregoing considerations, the answer to the request for a preliminary ruling is that Article 2(1) and Article 3(2) of Directive 2008/115, read in the light of recital 9 of that directive and in conjunction with Article 9(1) of Directive 2013/32, must be interpreted as meaning that they preclude the adoption of a return decision, under Article 6(1) of Directive 2008/115, in respect of a third-country national after the submission by that person of an application for international protection, but before the adoption of a first-instance decision on that application, irrespective of the period of residence to which that return decision refers.

Costs

45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

Article 2(1) and Article 3(2) 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, read in the light of recital 9 of that directive and in conjunction with Article 9(1) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection,

must be interpreted as meaning that they preclude the adoption of a return decision, under Article 6(1) of Directive 2008/115, in respect of a third-country national after the submission by that person of an application for international protection, but before the adoption of a first-instance decision on that application, irrespective of the period of residence to which that return decision refers.

[Signatures]