Reports of Cases

OPINION OF ADVOCATE GENERAL
PRIIT PIKAMÄE
delivered on 4 March 2020 [1]

Case C-402/19

LM
v
Centre public d'action sociale de Seraing

(Request for a preliminary ruling from the cour du travail de Liège (Higher Labour Court, Liège, Belgium))

(Reference for a preliminary ruling – Immigration policy – Return of illegally staying third-country nationals – Parent of a seriously ill child who reached the age of majority during the course of an appeal against the rejection of an application for a residence permit – Order to leave the territory – Directive 2008/115 – Article 13 – Legal remedy with suspensory effect – Article 14 – Safeguards pending return – Basic needs – Grant of social assistance to the parent – Charter of Fundamental Rights of the European Union – Articles 7, 24 and 47 – Relationship of dependency between the parent and the seriously ill child)

1. Is the obligation to provide for the basic needs of an illegally staying third-country national who is seriously ill, for as long as removal is suspended as a result of the lodging of an appeal against the return decision, to be extended so as to benefit the father of that person, a third-country national whose presence at his child's side is regarded, on medical grounds, as crucial?

2. That, essentially, is the question before the Court, which will be required to interpret 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, [2] as regards the effectiveness of an appeal against a return decision and as regards safeguards pending return, reading those provisions in the light of, inter alia, Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter').

[1] Original language: French.

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

I. Legal background

A. EU law

3. Recital 12 of Directive 2008/115 states:

'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. …'

4. Article 3.3 to 3.5 of that directive provides:

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

…

3. "return" means the process of a third-country national going back – whether in voluntary compliance with an obligation to return, or enforced – to:

   – his or her country of origin, or

   – a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or

   – another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted;

4. "return decision" means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return;

5. "removal" means enforcement of the obligation to return, namely the physical transportation out of the Member State'.

5. Article 5 of the directive states:

'When implementing this Directive, Member States shall take due account of:

(a) the best interests of the child;

(b) family life;

…'

6. Article 9(1) of Directive 2008/115 requires Member States to postpone removal:

'…

(b) for as long as a suspensory effect is granted in accordance with Article 13(2).'

7. Under Article 13(1) and (2) of Directive 2008/115:

‘1. The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12(1), before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.

2. The authority or body mentioned in paragraph 1 shall have the power to review decisions related to return, as referred to in Article 12(1), including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation.’

8. Article 14(1) of that directive provides:

‘Member States shall, with the exception of the situation covered in Articles 16 and 17, ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure granted in accordance with Article 7 and during periods for which removal has been postponed in accordance with Article 9:

(a) family unity with family members present in their territory is maintained;

(b) emergency health care and essential treatment of illness are provided;

(c) minors are granted access to the basic education system subject to the length of their stay;

(d) special needs of vulnerable persons are taken into account.’

B. Belgian law

9. Article 57(2) of the Organic Law of 8 July 1976 on public social welfare centres (*Moniteur belge* of 5 August 1976, p. 9876) provides as follows:

‘By derogation from the other provisions of this law, the functions of the public welfare action centre shall be limited to:

1. the grant of urgent medical assistance, in respect of a foreign national staying illegally in the Kingdom;

…’

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

10. On 20 August 2012, LM submitted applications, on his own behalf and on that of his daughter R, at that time a minor, for residence permits to be issued on medical grounds, on the basis that R was suffering from a number of serious illnesses.

11. Those applications were declared admissible on 6 March 2013, and LM accordingly received social assistance from the Seraing public social welfare centre (‘the CPAS’).

12. Three decisions rejecting LM's applications for residence permits were subsequently adopted and then withdrawn by the competent authority. On 8 February 2016, a fourth decision rejecting those applications was adopted. That decision was also accompanied by an order to leave Belgian territory.

13. On 25 March 2016, LM brought an action for suspension and annulment before the Council for asylum and immigration proceedings (Belgium), in respect of the fourth rejection decision and the order to leave the territory.

14. The CPAS withdrew from LM his entitlement to social assistance with effect from 26 March 2016, the date on which the period for voluntary departure which he had been granted expired, on the ground that, as a third-country national staying in Belgium illegally, he was eligible only for urgent medical assistance, which was granted to him with effect from 22 March 2016.

15. LM brought an application for interim measures against the decision withdrawing social assistance before the tribunal du travail de Liège (Labour Court, Liège, Belgium), after which payment of that benefit resumed.

16. By two decisions of 16 May 2017, the CPAS again withdrew the benefit of social assistance from LM, with effect from 11 April 2017, on the ground that his daughter had come of age on that date. Since 11 April 2017, the daughter of the applicant in the main proceedings has been receiving social assistance equivalent to the single person rate of integration income, together with family benefits payable by reason of her disability.

17. LM brought an action against the CPAS decisions of 16 May 2017 before the tribunal du travail de Liège (Labour Court, Liège). By a ruling of 16 April 2018, that court held that the withdrawal of social assistance was statutorily justified as from the date on which R came of age, as the applicant's own state of health did not justify a departure from Belgian law.

18. On 22 May 2018, LM brought an appeal against that ruling before the referring court.

19. The referring court observes that it is apparent from the case-law of the European Court of Human Rights ('ECtHR') that relationships between parents and adult children can be protected by the right to family life where it is shown that there are additional elements of dependence between them. It notes that the deterioration in R's state of health which could be anticipated if she were to return to her country of origin would appear, in all respects, to meet the test of seriousness required for a finding that removal would expose her to inhuman or degrading treatment. It also notes that, having regard to her state of health, it is no less crucial for her to have her father nearby than it was when she was a minor.

20. Against that background, the referring court takes the view that, while the refusal to grant social assistance to LM cannot constitute an infringement of the right to family life in itself, it is nevertheless such as to deprive LM of the means to continue supporting his daughter and to remain physically close to her.

21. In those circumstances, the cour du travail de Liège (Higher Labour Court, Liège, Belgium) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does point 1 of the first subparagraph of Article 57(2) of the Belgian Organic Law of 8 July 1976 on public social welfare centres infringe Articles 5 and 13 of Directive [2008/115], read in the light of Articles 19(2) and 47 of the [Charter] and Article 14(1)(b) of that directive and Articles 7 and 12 of the Charter … as interpreted in the judgment [of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453)]:

– first, in so far as it results in depriving a third-country national, staying illegally in the territory of a Member State, of provision, in so far as possible, for his basic needs pending resolution of the action for suspension and annulment that he has brought in his own name as the representative of his child, who was at that time a minor, against a decision ordering them to leave the territory of a Member State;

– where, second, on the one hand, that child who has now come of age suffers from a serious illness and the enforcement of that decision may expose that child to a serious risk of a grave and irreversible deterioration in her state of health and, on the other, the presence of that parent alongside his daughter who has now come of age is considered to be imperative by the medical professionals given that she is particularly vulnerable as a result of her state of health (recurrent sickle cell crises and the need for surgery in order to prevent paralysis)?'

III. Procedure before the Court

22. Written observations were submitted by the Belgian and Netherlands Governments and by the European Commission.

IV. Analysis

A. Admissibility of the question referred for a preliminary ruling

23. First, the Belgian Government submits that the request for a preliminary ruling is inadmissible, on the ground that it concerns the compatibility of a provision of national law with various provisions of Directive 2008/115 and of the Charter, even though there is no connection between the situation of the applicant and EU law, given that that situation does not come within the scope of either Article 14 of the directive or of Article 19 of the Charter.

24. While it is true that the referring court's question is worded in such a way as to ask the Court for a ruling as to whether a provision of national law is compatible with EU law, which would not come within the Court's jurisdictional remit to deliver preliminary rulings, it follows from settled case-law that it is the duty of the Court, in such a situation, to provide the national court with all the guidance as to the interpretation of EU law necessary to enable it to rule on the compatibility of the national rules with EU law. [3]

[3] See, to this effect, judgment of 15 May 2014, *Almos Agrárkülkereskedelmi* (C-337/13, EU:C:2014:328, paragraph 18).

25. It should be noted, moreover, that what the national court is principally seeking to establish, by its question, is whether or not the situation of the applicant in the main proceedings comes within the scope of Article 14 of Directive 2008/115. Accordingly, the Belgian Government's argument that that provision is inapplicable, and more generally that there is no connection with EU law, is inextricably linked to the substantive answer to be given to that question, and thus cannot render the request for a preliminary ruling inadmissible. [4]

26. Secondly, it should be noted that the Belgian Government stated in its observations that a renewable one-year residence permit was ultimately granted to LM and his daughter on 17 May 2019, but did not identify any consequences of that situation as regards the admissibility of the question referred for a preliminary ruling.

27. According to settled case-law, it follows from both the wording and the scheme of Article 267 TFEU that a national court or tribunal is not empowered to bring a matter before the Court by way of a request for 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 ruling. The Court must therefore verify, if necessary of its own motion, that the dispute in the main proceedings is ongoing. [5]

28. In the present case, it bears emphasis that the request for a preliminary ruling has been made by an employment and social security court hearing an appeal against the CPAS decisions withdrawing social assistance from the applicant in the main proceedings with effect from 11 April 2017, the date on which his daughter came of age. There is nothing in the file submitted to the Court to suggest that the regularisation of the residence of LM and his daughter took effect prior to 17 May 2019, when residence permits were issued to them, or that there was, at the same time, a retroactive recognition of LM's entitlement to social security benefits as from 11 April 2017, with a corresponding payment of the arrears accrued in the intervening period.

29. The view can therefore be taken that there is an aspect of the subject matter of the main proceedings – namely whether LM is entitled to social assistance with effect from 11 April 2017 – which still subsists, and which the referring court will have to resolve, and that it remains useful, in terms of resolving the dispute, for the Court to answer the question referred. [6] It is therefore appropriate for a ruling to be given in response to the request from the referring court.

30. Thirdly, it is common ground that, in the decision containing the request for a preliminary ruling, the referring court also made a reference to the Cour constitutionnelle (Constitutional Court, Belgium), seeking to establish whether the Belgian legislation at issue in the main proceedings is compatible with the Belgian Constitution. The question referred to the national court has priority under the terms of the order for reference. It thus appears that, if that legislation were to be held to be unconstitutional, the subject matter of the present proceedings would cease to exist. The situation is, however, that, at the present stage of the proceedings, there has been no decision from the Cour constitutionnelle (Constitutional Court).

4 Judgment of 17 January 2019, *KPMG Baltics* (C-639/17, EU:C:2019:31, paragraph 11 and the case-law cited).

5 Judgment of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraph 31).

6 See, to that effect, judgment of 10 May 2017, *Chavez-Vilchez and Others* (C-133/15, EU:C:2017:354, paragraph 51).

B. The question referred

31. It is apparent on a first reading of the question referred to the Court that the national court is enquiring about the compatibility of a provision of national law having regard to the circumstances in which a third-country national is entitled to the benefit of the safeguards pending return that are provided for by EU law, in this instance in Article 14 of Directive 2008/115, and more particularly of provision for his basic needs, during the period in which an appeal brought by him, in his own name and in that of his child, at that time a minor, against a decision ordering them to leave the territory of a Member State is being examined.

32. However, in order to determine the exact scope of the request for a preliminary ruling, which is relatively complex in its wording, regard must be had to all of the provisions of EU law which it cites, namely Articles 5, 13 and 14 of Directive 2008/115 and Articles 7, 12, 19 and 47 of the Charter, as well as the judgment of the Court of Justice of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453), which it also cites.

33. In that judgment, the Court held, first, that an appeal brought against a return decision by a third-country national must, where enforcement of the decision might expose that national to a serious risk of a grave and irreversible deterioration in his state of health, be given automatic suspensory effect, and secondly, that that third-country national is entitled to provision for his basic needs, for as long as removal is postponed by reason of the lodging of that appeal.

34. It is thus apparent that the issue concerning the safeguards pending return set out in Article 14 of Directive 2008/115 is inextricably linked to that concerning the right to an effective remedy against the return decision laid down in Article 13 of that directive, the link being derived from Article 9(1)(b) of that directive, according to which Member States must postpone removal for as long as a suspensory effect is granted in accordance with Article 13(2) thereof.

35. Accordingly, in order to answer the question referred, it is first necessary to determine whether an appeal brought against a return decision by the parent of a child who is seriously ill must be given automatic suspensory effect, where enforcement of that decision would be liable to expose the child to a serious risk of a grave and irreversible deterioration in her state of health, and where it has been shown that it is essential for the parent to remain close to her.[7]

1. Whether an appeal brought against a return decision by the parent of a seriously ill child must be given automatic suspensory effect

36. Before examining the legal bases on which this question could be answered in the affirmative, I will consider the Belgian Government's substantive observations on this issue.

[7] In this regard, I cannot agree with the interpretation of the scope of the question referred set out in the observations of the Netherlands Government, which submits that the question of suspensory effect does not arise, as it is apparent from the order for reference that such an effect has already been recognised. That interpretation is contradicted by the express references to Article 13 of Directive 2008/115, concerning the effectiveness of the remedy available to migrants, to Article 47 of the Charter, reaffirming the principle of effective judicial protection, and to the judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453), it being apparent from the latter that the question of the recognition of suspensory effect has to be considered before those of safeguards pending return and provision for the basic needs of the national concerned can be resolved.

(a) The observations of the Belgian Government

37. First, it is clear on a literal reading of the Belgian Government's observations that it is seeking to establish that the national legislation is fully compliant with EU law.

38. It submits that Article 57(2) of the Organic Law of 8 July 1976, as interpreted by the Cour constitutionnelle (Constitutional Court), does not conflict with the objectives of Directive 2008/115, given that the Cour constitutionnelle (Constitutional Court) requires the specific family situation of a child, whether a minor or of full age, to be taken into account in determining whether to grant social assistance to the person concerned.

39. It also submits that domestic procedures ensure that there is an effective remedy within the meaning of EU law, as has been recognised by the Cour constitutionnelle (Constitutional Court) in a judgment of 18 July 2019, as it is possible to bring extremely urgent actions, which do have automatic suspensory effect, against removal or *refoulement* measures, for example before the conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium).

40. I would make the following remarks on these submissions of the Belgian Government.

41. First of all, I note that it is clear from the Belgian Government's observations that, under national law, a person staying illegally who is the parent of a minor or adult child cannot claim, in his own right, any form of social assistance apart from urgent medical assistance. The very question raised by the referring court, however, is whether such legislation is compatible with EU law in regard to the situation of a parent of a seriously ill child who has brought an appeal, on his own behalf and on that of his child, against return decisions concerning them.

42. Next, in relation to the references to decisions of the Cour constitutionnelle (Constitutional Court), I note that it is settled case-law that Article 267 TFEU gives national courts the widest discretion to refer matters to the Court if they consider that a case pending before them raises questions involving an interpretation of provisions of EU law, or consideration of their validity, which are necessary for the resolution of the case before them. The Court has thus held that a rule of national law, pursuant to which courts that are not adjudicating at final instance are bound by legal rulings of a higher court, cannot take away from those courts the discretion to refer to the Court questions of interpretation of the point of EU law concerned by such legal rulings. In that regard, the Court has held that a court not ruling at final instance, such as the referring court, must be free, in particular if it considers that a higher court's legal ruling might lead it to deliver a judgment contrary to EU law, to refer to the Court the questions which are of concern to it. [8]

43. Finally, in accordance with settled case-law of the Court, the preliminary-ruling procedure does not involve the Court in interpreting national law in order to determine, in this particular case, the precise state of Belgian procedural law in regard to appeals brought by migrants awaiting removal.

44. It should be noted that, according to settled case-law, the preliminary-ruling procedure laid down in Article 267 TFEU is based on a clear separation of functions between national courts and tribunals and the Court of Justice, with the latter being empowered only to rule on the

[8] See judgment of 22 June 2010, *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraphs 41 and 42 and the case-law cited).

interpretation or the validity of the acts of EU law referred to in that article. In that context, it is not for the Court to rule on the interpretation of provisions of national law or to decide whether the referring court's interpretation of those provisions is correct. [9]

45. It is solely for the national court, before which the 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 in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions referred concern the interpretation of a rule of EU law, they are presumed to be relevant and the Court is, in principle, bound to give a ruling. [10]

46. Secondly, it appears from the observations of the Belgian Government that there are divergent views as to the scope *ratione temporis* of Article 13 of Directive 2008/115.

47. Thus, the Belgian Government argues [11] that it follows from the judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453), that the time at which the remedy is required to be effective is the time of removal, or in other words when the return decision is enforced, and it points out that the return decision relating to LM has precisely not been enforced. This approach postpones the operation of the principle of effective judicial protection from the time when the return decision is adopted to the time when removal is imminent, with a consequential postponement of the application of the safeguards pending return provided for by Article 14 of Directive 2008/115 beyond the lodging of the appeal against the return decision.

48. That argument cannot be accepted, as it is based on a misunderstanding of the judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453), and the mechanism established by Directive 2008/115 in order to ensure an effective removal and repatriation policy with full respect for the fundamental rights and dignity of the persons concerned. The Belgian Government merely seizes on the use of the word 'enforcement' in the operative part of that judgment and thereby overlooks the reasoning which led the Court to adopt the approach reflected in the operative part, as well as the clarification subsequently given.

49. The question before the Court related, in particular, to the interpretation of Article 13 of Directive 2008/115, read in the light of Article 47 of the Charter, for the purposes of determining the 'characteristics of the remedy that must be made available to challenge a return decision' within the meaning of Article 3(4) of that directive, that is to say, an administrative act declaring the stay of a third-country national to be illegal and stating an obligation to return, of exactly the same kind as the decision taken in respect of LM on 8 February 2016. The Court stated that 'in order for the appeal to be effective in respect of a return decision' the enforcement of which may expose the third-country national concerned to a serious risk of a grave and irreversible deterioration in his state of health, that third-country national must be able to avail himself of a remedy with suspensory effect, in order to ensure that the 'return decision' will not be enforced before a competent authority has had the opportunity to examine an objection alleging infringement of Article 5 of Directive 2008/115, read in the light of Article 19(2) of the Charter. [12]

9 See judgment of 22 May 2014, *Érsekcsanádi Mezőgazdasági* (C-56/13, EU:C:2014:352, paragraph 53 and the case-law cited).

10 See judgment of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 26 and the case-law cited).

11 See paragraph 65 of the observations.

12 See judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453, paragraph 50).

50. The Court clarified its case-law in the judgment in *Gnandi*,[13] reiterating the obligation to provide, in certain cases, for an appeal against the return order to have automatic suspensory effect, but adding that this applied 'a fortiori, to a possible removal decision, within the meaning of Article 8(3) of [Directive 2008/115]'. It is clear from the reasoning of that judgment that the adoption of a removal decision is regarded as an additional precarious situation in which an appeal brought by the third-country national concerned must be given automatic suspensory effect.

51. This approach is explained by the fact that, under Article 8(3) of Directive 2008/115, removal orders are optional (unlike return decisions under Article 6(1) of that directive), and by the fact that, having regard to the legal nature of a return decision, as defined in Article 3(4) of the directive, such a decision can result of itself in the removal of the third-country national. Article 13(1) of Directive 2008/115 affords the third-country national an effective remedy to appeal against or seek review of decisions related to return, which are defined in Article 12(1) of that directive as return decisions and, 'if issued', entry-ban decisions and decisions on removal.

52. It is important to emphasise that the guarantee of an effective remedy set out in Article 13 of the directive, read in the light of Article 47 of the Charter, entails, by definition, the adoption of an act the legality of which can be challenged before a court. A joint reading of Articles 6, 8, 12(1) and 13(1) of Directive 2008/115 makes it clear that this act may consist simply of the return decision.

53. It is thus apparent that the Belgian Government's argument that, under EU law, the third-country national need be afforded a remedy with automatic suspensory effect only as from the time when his removal becomes imminent, and not from the time of adoption of the return decision, is at variance with the general scheme of Directive 2008/115 and must therefore be rejected.

(b) The relevant legal framework

54. While the referring court asks the Court to have regard to the right to respect for family life, as enshrined in Article 7 of the Charter and in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), it should be noted that the Commission raises a completely different legal basis for concluding that the appeal brought by the applicant in the main proceedings must be given automatic suspensory effect.

55. Essentially, the Commission proposes to reason by analogy with the case-law of the Court of Justice concerning the grant to third-country nationals, on the basis of Articles 20 and 21 TFEU, of secondary rights of residence within the territory of the European Union, in order to avoid a situation in which the right of residence of a minor, being a citizen of the European Union, is undermined by the removal of the third-country national, being the parent of that minor. It follows, the Commission submits, that the appeal brought by the applicant in the main proceedings must be recognised as having suspensory effect, in order not to render ineffective the suspension of enforcement of the return order which his daughter enjoys pursuant to the judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453).

[13] Judgment of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraph 56).

56. It is true that the Court has held that a right of residence must be granted to a third-country national who is a member of the family of such an EU citizen, so as to avoid undermining the effectiveness of EU citizenship, if, as a consequence of the refusal of such a right, that citizen would be obliged in practice to leave the entire territory of the European Union, thus depriving that citizen of the genuine enjoyment of the substance of the rights conferred by that status. The Court has made it clear that the purpose and justification of those derived rights, which are not autonomous rights of the third-country nationals in question, are based on the fact that a refusal to allow them would be such as to interfere, in particular, with an EU citizen's freedom of movement. [14]

57. It is thus apparent, as the Commission itself acknowledges, that the legal and factual backgrounds to the case-law on which its submissions are based differ markedly from those of the present case, in which both the applicant in the main proceedings and his daughter are third-country nationals who are staying illegally and are subject to return decisions. It seems to me that this precludes any straightforward application by analogy of that case-law.

58. Nevertheless, I note that the concepts of 'protection of family life' and of 'the best interests' of the child are explicitly used by the Court as standards for the interpretation of various rules of primary or secondary EU law that are capable of providing a basis for granting a secondary right of residence in the territory of the European Union to a third-country national, or of ensuring the effectiveness of the right to family reunification of third-country nationals who are residing lawfully in the territory of the Member States. [15]

59. These specific aspects of the reasoning of the Court, concerning Article 7 of the Charter, read in conjunction with Article 24 thereof, can, by contrast, be transposed to the present case, in order to identify a legal basis on which automatic suspensory effect must be given to the appeal brought by the applicant in the main proceedings, the father of a seriously ill child, against the return order relating to him.

(c) Respect for family life as a basis for suspensory effect

60. With regard to the characteristics of the remedy that must be made available to challenge a return decision such as the decision at issue before the referring court, it is apparent from Article 13(1) of Directive 2008/115, read in conjunction with Article 12(1) of that directive, [16] that a third-country national must be afforded an effective remedy to appeal against or seek review of a decision ordering his return. [17]

[14] Judgment of 8 May 2018, *K.A. and Others (Family reunification in Belgium)* (C-82/16, EU:C:2018:308, paragraphs 50 and 51 and the case-law cited).

[15] See judgments of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 66); of 8 May 2018, *K.A. and Others (Family reunification in Belgium)* (C-82/16, EU:C:2018:308, paragraph 71); of 4 March 2010, *Chakroun* (C-578/08, EU:C:2010:117, paragraph 44); and of 6 December 2012, *O. and S.* (C-356/11 and C-357/11, EU:C:2012:776, paragraphs 75 to 80), the last two of which relate to Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).

[16] Article 12(1) of Directive 2008/115 provides as follows: 'Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies. The information on reasons in fact may be limited where national law allows for the right to information to be restricted, in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.'

[17] See judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453, paragraph 43).

61. Article 13(2) of Directive 2008/115 provides that the authority or body with power to adjudicate on such an appeal may temporarily suspend enforcement of the return decision that is being challenged, unless a temporary suspension is already applicable under national legislation. It follows that that directive does not require that the remedy provided for in Article 13(1) must necessarily have suspensory effect. [18]

62. It should be recalled, however, that the provisions of Directive 2008/115 must be interpreted, as stated in recital 2 thereof, with full respect for the fundamental rights and dignity of the persons concerned. [19]

63. The characteristics of the remedy provided for in Article 13(1) of Directive 2008/115 must therefore be determined in accordance with Article 47 of the Charter, which reaffirms the principle of effective judicial protection and states that everyone whose rights and freedoms guaranteed by EU law have been infringed is entitled to an effective remedy before a tribunal in compliance with the conditions laid down in that article, and in accordance with Article 7 of the Charter, which recognises the right to respect for family life. [20]

64. Article 7 of the Charter, for its part, must be read in the light of the obligation to consider the best interests of the child under Article 24(2) thereof, and with regard to the fundamental right of a child to such protection and care as is necessary for that child's well-being, as well as the right to maintain on a regular basis a personal relationship and direct contact with his or her parents, respect for which undeniably merges into the best interests of the child. [21] The requirement to interpret Directive 2008/115 in the light of Articles 7 and 24 of the Charter arises, moreover, from the actual wording of Article 5(a) and (b) of that directive, under which Member States are required to take due account, when implementing it, of the best interests of the child and family life. [22]

65. As can be seen from the Explanations relating to the Charter, [23] in accordance with Article 52(3) of the Charter, the rights guaranteed by Article 7 of the Charter have the same meaning and scope as those guaranteed by Article 8 of the ECHR, as interpreted by the case-law of the ECtHR. [24]

66. In this regard, the Belgian Government submits in its observations that the ECtHR, ruling, in its judgment in *De Souza Ribeiro v. France*, [25] on whether the special regime for appeals against removal orders applicable to French Guiana (a French overseas *département* and region) was compatible with Article 13, read together with Article 8, of the ECHR, held that, 'where

[18] See judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453, paragraph 44).

[19] See judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453, paragraph 42).

[20] See, to that effect, judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453, paragraph 45).

[21] See, to that effect, judgments of 6 December 2012, *O. and S.* (C-356/11 and C-357/11, EU:C:2012:776, paragraph 76), and of 5 October 2010, *McB.* (C-400/10 PPU, EU:C:2010:582, paragraph 60). I note that the wording of Article 24(3) of the Charter refers to 'both' parents, contemplating as it does the situation in which, for example, conflict between the parents results in unlawful removal of the child and forced separation from one of the parents. Nevertheless, the wording seems to me to be based on the general consideration that it is beneficial in terms of the equilibrium and development of the child for him or her to grow up in a family environment in which the parents are present, and not to be involuntarily separated from them. The essential component of family life is the right to live together so that family relationships can develop normally and family members can be together (ECtHR, 13 June 1979, *Marckx v. Belgium*, CE:ECHR:1979:0613JUD000683374, § 31, and ECtHR, 24 March 1988, *Olsson v. Sweden (No. 1)*, CE:ECHR:1988:0324JUD001046583, § 59).

[22] See, to that effect, judgment of 6 December 2012, *O. and S.* (C-356/11 and C-357/11, EU:C:2012:776, paragraph 80).

[23] OJ 2007 C 303, p. 17.

[24] See, to that effect, judgments of 26 March 2019, *SM (Child under guardianship under the Algerian kafala system)* (C-129/18, EU:C:2019:248, paragraph 65), and of 15 November 2011, *Dereci and Others* (C-256/11, EU:C:2011:734, paragraph 70).

[25] ECtHR, 13 December 2012, *De Souza Ribeiro v. France*, CE:ECHR:2012:1213JUD002268907, § 83.

expulsions are challenged on the basis of alleged interference with private and family life, it is not imperative, in order for a remedy to be effective, that it should have automatic suspensory effect'. In cases of alleged interference with private and family life, therefore, the requirement of effectiveness does not, it submits, entail that those concerned must be able to bring an appeal which has automatic suspensory effect. This, in its view, differs from the position in cases where expulsion is challenged on the basis of a risk of inhuman or degrading treatment contrary to Article 3 of the ECHR. [26]

67. This single reference to the judgment of the ECtHR in question does not reflect the diversity of the case-law of that court in regard to matters involving both immigration and the protection of family life. [27] It must also be stated that the circumstances of the case under consideration in that judgment differ significantly from those of the present request for a preliminary ruling, which makes it inapposite to refer to that judgment in the present case. The case in question concerned an individual who had come of age by the time when he brought the interim application for suspension of enforcement of the removal order and the substantive proceedings, who was living with his family in French Guiana, and whose relationship with the other members of the family had no particular features beyond normal emotional ties. Moreover, he had been able to return to French Guiana some time after his expulsion, and had been able to obtain a residence permit.

68. It must be borne in mind that the legal issue raised by the present request for a preliminary ruling concerns the possibility of recognising an appeal against a return decision, within the meaning of Article 3 of Directive 2008/115, as having automatic suspensory effect – which, in my view, makes it necessary to assess the family situation of the applicant in the main proceedings and the possibility that the right to respect for family life may have been infringedat the date on which he lodged that appeal.

69. It is apparent from the decision making the reference that, on 25 March 2016, the applicant in the main proceedings lodged, on his own behalf and in his capacity as the legal representative of his daughter, at that time a minor nearing the age of 17, an appeal against the decision rejecting the application for a residence permit, which had been accompanied by an order to leave the national territory, [28] the two persons concerned having been resident in Belgium, and having lived under the same roof, since 8 April 2012. In that situation there is unquestionably 'family life' as required by the ECtHR in its case-law on Article 8 of the ECHR, bearing in mind that the notion of 'family life' can encompass the relationship between a legitimate or natural child and his or her father, regardless of whether or not the mother is present in the home, and that the protection guaranteed by Article 8 of the ECHR extends to all members of the family. [29]

[26] There is nothing in the file submitted to the Court to indicate that LM is seriously ill, and in my view it is clear that his situation does not come under Article 19(2) of the Charter, under which no one may be removed to a State where there is a serious risk that he or she would be subject to inhuman or degrading treatment. That provision, which informed the interpretation of Article 5 of Directive 2008/115 on which the Court based its approach in the judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453), and which is also cited by the national court in the question referred, is not germane in the present case.

[27] I note that the ECtHR has held, amongst other things, that separation can cause irreversible harm to family members, involving a risk of infringement of Article 8 of the ECHR, which must be avoided by the imposition of an interim measure under Rule 39 of the Rules of that Court. (see ECtHR, 6 July 2010, *Neulinger and Shuruk v. Switzerland*, and 28 June 2011, *Nunez v. Norway*, CE:ECHR:2011:0628JUD005559709).

[28] It should be noted that, since the appeal against the return decision does not have suspensory effect in Belgian law, a removal order could have been made against the applicant in the main proceedings on or after 25 March 2016, which was the date of expiry of the 30-day period for voluntary departure attaching to the order to leave Belgian territory, that order having accompanied the refusal to issue a residence permit, which was dated 9 February 2016 and notified on 25 February of the same year. It is irrelevant, in my view, that the daughter of the applicant in the main proceedings came of age on 11 April 2017, that is to say, during the period of examination of the appeal against the return decision (which, I note, had not been determined at the time of the decision making the reference) and the proceedings concerning the applicant's entitlement to social assistance.

[29] ECtHR, 3 October 2014, *Jeunesse v. Netherlands*, CE:ECHR:2014:1003JUD001273810, § 117.

70. In cases concerning family life as well as immigration, and particularly those relating to the removal of foreign nationals, including those staying illegally, the ECtHR balances the competing interests, namely the personal interests of the individuals in leading a family life within a given territory and the general interest pursued by the State, in this case the control of immigration. Factors to be taken into account are the extent to which family life would effectively be ruptured, the extent of the ties which the individuals concerned have in the Contracting State in question, whether or not there are insurmountable obstacles in the way of the family living in the country of origin of the foreign national concerned, and whether there are factors of immigration control or considerations of public order weighing in favour of exclusion. [30]

71. Where children are concerned, the ECtHR considers that their best interests must be taken into account. On this particular point, it has observed that there is a broad consensus, including in international law, in support of the idea that, in all decisions concerning children, their best interests are of paramount importance. Whilst those interests cannot be decisive in themselves, they must certainly be given significant weight. Thus, in cases concerning family reunification, the ECtHR pays particular attention to the circumstances of the minor children concerned, especially their age, their situation in the country or countries concerned and *the extent to which they are dependent on their parents*. [31]

72. In this regard, I note that this same concept of a relationship of dependency is used by the Court of Justice as the basis for a secondary right of residence in the territory of the European Union on the part of a third-country national, where such a right arises by virtue of a member of the family of that third-country national enjoying the status of EU citizen under Article 20 TFEU. The Court takes the view that a refusal to grant a right of residence to a third-country national is liable to undermine the effectiveness of EU citizenship only if there exists, between that third-country national and the EU citizen who is a family member, a relationship of dependency of such a nature that it would lead to the EU citizen being compelled to accompany the third-country national concerned and to leave the territory of the European Union as a whole. [32]

73. In the context of that assessment, the competent authorities must take account of the right to respect for family life, as set out in Article 7 of the Charter, that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in Article 24(2) of the Charter. In reaching the conclusion that a relationship of dependency exists, account must be taken, in the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his or her emotional ties both to the EU-citizen parent and to the third-country-national parent, and the risks which separation from the latter might entail for that child's equilibrium. Accordingly, the fact that the third-country-national parent lives with the minor child who is an EU citizen is one of the relevant factors to be taken into consideration in order to determine whether there is a relationship of dependency between them, but it is not a prerequisite. [33]

74. As stated above, these considerations can be transposed to the issue of possible infringement of the right to respect for family life (assessed in conjunction with the best interests of the child) of a third-country national who is the parent of a seriously ill child, in the event of removal of that third-country national.

[30] See, inter alia, ECtHR, 3 October 2014, *Jeunesse v. Netherlands*, CE:ECHR:2014:1003JUD001273810, § 107.

[31] ECtHR, 3 October 2014, *Jeunesse v. Netherlands*, CE:ECHR:2014:1003JUD001273810, §§ 109 and 118.

[32] Judgment of 8 May 2018, *K.A. and Others (Family reunification in Belgium)* (C-82/16, EU:C:2018:308, paragraph 52).

[33] Judgment of 8 May 2018, *K.A. and Others (Family reunification in Belgium)* (C-82/16, EU:C:2018:308, paragraphs 71 to 73).

75. In the present case, the file submitted to the Court seems to me to show a genuine relationship of dependency between the applicant in the main proceedings and his daughter, although this is a matter for the national court to confirm.

76. It is apparent from the decision making the reference that LM's daughter suffers from severe sickle cell anaemia, a serious condition that can lead to attacks of pain at any time, has the potential for complications, and may prove fatal. As a result of her condition, she has suffered various critical episodes requiring hospitalisation, and has severe kyphosis which, if the risk of paralysis is to be avoided, will require surgery. That situation led the applicant in the main proceedings to leave the Congo with his daughter and, on 20 August 2012, to submit an application for a residence permit to the competent Belgian authorities, based on her state of health.

77. As the family unit is made up solely of the applicant and his daughter, the physical presence of the applicant was, at the time when the appeal was brought, and still is, essential in terms of accompanying her when she is hospitalised, in terms of adherence to medical treatment, and in terms of providing emotional support so as to assist her in coping with the trials of her condition. It is important to point out that the medical professionals have indicated in clear terms that the daughter of the applicant in the main proceedings 'requires the support of a relative who lives with her on a permanent basis, due to her state of health (recurrent sickle cell crises)'.

78. Against that background, the removal of the third-country national in question, being the father of a child who is seriously ill and in respect of whom the appeal against the return decision, enforcement of which would be liable to expose her to a serious risk of a grave and irreversible deterioration in her state of health, has automatic suspensory effect, would seriously and irreparably undermine the protection of family life guaranteed by Article 7 of the Charter, read in conjunction with the obligation to have regard to the best interests of the child, recognised in Article 24(2) of the Charter. The forced return of LM to the Congo would deprive his seriously ill daughter of his presence by her side, despite this being regarded by the medical professionals as essential, in breach of the fundamental right of a child to the protection and care necessary for his or her well-being and the right to maintain personal relations and direct contact with his or her parents on a regular basis, as set out in Article 24(1) and (3) of the Charter.

79. In order for the appeal to be effective in respect of a return decision the enforcement of which may lead to the situation described above, that third-country national must be able to avail himself, in such circumstances, of a remedy with suspensory effect, in order to ensure that the return decision is not enforced before a competent authority has had the opportunity to examine an objection alleging infringement of Article 5 of Directive 2008/115, read in the light of Articles 7 and 24 of the Charter.[34] This applies, a fortiori, to a potential removal decision, within the meaning of Article 8(3) of that directive.[35]

80. In my view, a contrary interpretation would result in a breach of the fundamental rights set out in those provisions of the Charter, which are recognised by Article 6(1) TEU as having the same legal value as the Treaties, and are protected by the Court. It should be borne in mind that the Member States must not only interpret their national law in a manner consistent with EU law,

[34] See, to that effect, judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453, paragraph 50).

[35] Judgment of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraph 56).

but must also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the legal order of the European Union. [36]

81. I would add that, in my view, the same conclusion would have to be reached if the fact that the applicant's daughter came of age on 11 April 2017 were taken into account and the analysis were to proceed on the basis of a family relationship between a parent and an adult child.

82. It should be noted, as regards the case-law of the ECtHR in the field of immigration, that that court has accepted in a number of cases concerning young adults, yet to found a family of their own, that their relationship with their parents and other close family members also constitutes 'family life'. [37] The ECtHR has held that there can be no 'family life' between parents and adult children unless they can demonstrate additional elements of dependence, beyond normal emotional ties. [38]

83. When making its assessment, referred to above, as to whether there is a stable relationship as required for a derived right of residence under Article 20 TFEU to be recognised in favour of third-country nationals, the Court of Justice also draws a distinction between minors and adults, adults being able, in principle, to live independently of the members of their family. The Court consequently regards the classification of a relationship between two adult members of the same family as a relationship of dependency, capable of giving rise to such a derived right of residence under Article 20 TFEU, as conceivable only in exceptional cases, where, having regard to all the relevant circumstances, there could be no form of separation of the individual concerned from the member of his or her family on whom he or she is dependent. [39]

84. It seems to me that, once again, these considerations can be transposed to the present case, which, in the light of the file submitted to the Court, may be considered to be exceptional. Having regard to the factual determinations relating to the medical situation of the daughter of the applicant in the main proceedings and its consequences as regards the nature of the relationship between those two individuals, I am satisfied as to the genuine existence both of a family life worthy of protection – the relationship in question going beyond normal emotional ties – and of a relationship of dependency such that the adult child could not be separated from her father, on whom she is dependent, according to the conclusions reached by the medical professionals.

2. Provision for the basic needs of the parent of a seriously ill child awaiting removal

85. It is common ground that, in order to avoid a legal vacuum in relation to such persons, the Commission had initially proposed a minimum level of conditions for illegally staying third-country nationals awaiting removal by referring to a series of conditions, going beyond mere emergency medical care and basic needs, which had already been set out in Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers in Member States. [40]

[36] See, to that effect, judgment of 6 December 2012, *O. and S.* (C-356/11 and C-357/11, EU:C:2012:776, paragraphs 77 and 78).

[37] ECtHR, 23 June 2008, *Maslov v. Austria*, CE:ECHR:2008:0623JUD000163803, § 62 and the case-law cited.

[38] ECtHR, 30 June 2015, *A.S. v. Switzerland*, CE:ECHR:2015:0630JUD003935013, § 49, and ECtHR, 23 October 2018, *Levakovic v. Denmark*, CE:ECHR:2018:1023JUD000784114, §§ 35 and 44.

[39] Judgment of 8 May 2018, *K.A. and Others (Family reunification in Belgium)* (C-82/16, EU:C:2018:308, paragraph 65).

[40] OJ 2003 L 31, p. 18.

86. It must be stated that the reference to Directive 2003/9 was omitted from the final wording of Directive 2008/115, after concerns had been raised during the legislative process that it might be perceived as setting 'too high a standard' as regards illegal migrants, and thus sending the wrong political message. Article 14(1) of Directive 2008/115 simply states that 'Member States shall … ensure that [certain] principles are taken into account as far as possible', while recital 12 of that directive indicates that the basic conditions of subsistence of migrants awaiting removal 'should be defined according to national legislation'.

87. Taking a dynamic approach to the combined interpretation of Articles 9 and 14 of Directive 2008/115, having regard to the general scheme of that directive, the Court, in its judgment in *Abdida*,[41] first of all recognised the wide breadth of Article 9(1)(b) of that directive, under which removal must be postponed for so long as a suspensory effect is granted in accordance with Article 13(2), holding that the first of those provisions must cover 'all situations' in which a Member State is required to suspend enforcement of a return decision following the lodging of an appeal against the decision. It went on to hold that, consequently, Member States are 'required' to provide to a third-country national suffering from a serious illness who has appealed against a return decision the enforcement of which may expose him to a serious risk of grave and irreversible deterioration in his state of health the safeguards, pending return, set out in Article 14 of Directive 2008/115.

88. The Court observed that, in the particular circumstances referred to above, the Member State concerned is obliged, pursuant to Article 14(1)(b) of Directive 2008/115, to make provision, in so far as possible, for the basic needs of a third-country national suffering from a serious illness pending consideration of his appeal against a return decision, where that national does not have the means to provide for his own needs, the rationale for this obligation being that the requirement to provide emergency health care and essential treatment of illness which is imposed by that article might otherwise be rendered meaningless.[42]

89. It can thus be seen that, reasoning deductively from the wording of Articles 9 and 14 of Directive 2008/115, the Court held that the fact that the appeal against the return decision was required to be given automatic suspensory effect had the necessary consequence that the person concerned was entitled to the benefit of the return safeguards, it being necessary to make provision for basic needs in order to prevent the specific safeguard relating to deterioration in the state of health of the migrant in question from becoming meaningless.

90. Against that background, it seems to me that, once it has been determined that the appeal brought by the applicant in the main proceedings against the return decision concerning him must be given automatic suspensory effect, it necessarily follows that the Member State in question is obliged to provide the person concerned with the benefit of the safeguards pending return established by Article 14 of Directive 2008/115.[43] As regards provision by the Member State concerned, in so far as possible, for the basic needs of LM, the question is whether the logic which led the Court to conclude that provision must be made for the basic needs of someone who is seriously ill can be applied to a parent on whom that person is dependent.

41 See judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453, paragraphs 54 to 58).

42 See judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453, paragraphs 59 and 60).

43 See, to that effect, judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453, paragraph 58).

91. In that regard, the principles listed in Article 14(1) of Directive 2008/115 include the maintenance of family unity with family members present in the territory and the taking into account of the special needs of vulnerable persons. It seems to me that effective implementation of these principles also gives rise to a concomitant requirement to make provision for the basic needs of the applicant in the main proceedings.

92. Irrespective of the fact that the daughter of the applicant in the main proceedings came of age on 11 April 2017, it seems to me that her particularly serious medical situation, and the relationship of dependency on her father which is its corollary, justify the conclusion that both the maintenance of family unity with the family members present in the territory, and the taking into account of the special needs of vulnerable persons (the seriously ill child being such a person), could be rendered meaningless if the basic needs of the applicant were not provided for, so as to enable him to feed, clothe and house himself. [44]

93. How, in practical terms, is it conceivable for the family unit to be maintained, and for provision to be made for the special needs of a child who, as a result of serious illness, is in a situation of dependency, if the material circumstances of one of the only two members of that family unit, who is supposed to provide crucial day-by-day support to the child, are not taken into account in any way? In other words, provision for the basic needs of the applicant in the main proceedings is a form of prerequisite for effective implementation of the safeguards pending return provided for in Article 14(1)(a) and (d) of Directive 2008/115, which must be interpreted in the light of Article 7 of the Charter.

94. Furthermore, applying the reasoning in the judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453) directly, it must in my view be concluded that the emergency health care and essential treatment of illness provided for in Article 14(1)(b) of Directive 2008/115, to which the seriously ill daughter of the applicant in the main proceedings is entitled, for as long as removal is suspended by reason of the lodging of an appeal with suspensory effect against the return decision, could be rendered meaningless in the absence of provision for the basic needs of her father, a third-country national benefiting from the same suspension whose presence at his daughter's side is considered, on medical grounds, to be essential. [45]

95. It is important to note, however, that, in its judgment in the aforementioned case, the Court introduced two qualifications as regards the obligation of Member States to provide for the basic needs of illegally staying third-country nationals awaiting removal.

96. The first is that that obligation is conditional on the migrant in question lacking the means to provide for his own needs; [46] this is a matter for the referring court to confirm in the present case, although the Court may provide guidance as to the factors to be taken into consideration in making that determination.

[44] Basic medical needs are taken into account in Article 14(1)(b) of Directive 2008/115.

[45] For the sake of completeness, I would point out that a basis for an obligation, on the part of the Member State concerned, to make provision for the basic needs of the main applicant could also be found in an interpretation of Article 14(1) of Directive 2008/115, read in the light of Articles 1, 2 and 3 of the Charter, which guarantee respect for human dignity and the rights to life and integrity of the person, and Article 4 of the Charter, which prohibits inhuman or degrading treatment. This possibility was well explained by Advocate General Bot in his Opinion in *Abdida* (C-562/13, EU:C:2014:2167, points 147, 148, 154 and 155), to which I refer, being of entirely the same opinion in this matter.

[46] See judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453, paragraph 59).

97. The crucial question is clearly whether the person concerned still has a source of income, and it would appear from the decision making the reference that he does not. Thus, it is common ground that, since 11 April 2017, the applicant in the main proceedings has no longer been receiving social financial assistance equivalent to the amount of integration income payable to persons living with a dependent minor child, and that, since that date, the social assistance granted to him has been limited to urgent medical assistance.

98. It is also necessary to establish whether the applicant in the main proceedings has access to the regular job market in Belgium. In this regard, while Article 3(1) of Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [47] requires Member States to prohibit the employment of illegally staying third-country nationals, Article 3(3) of that directive provides that a 'Member State may decide not to apply the prohibition referred to in paragraph 1 to illegally staying third-country nationals whose removal has been postponed and who are allowed to work in accordance with national law'. [48] Furthermore, the question of whether the applicant in the main proceedings has access to employment is not a purely legal question but must be determined on the facts, having regard to the role of the person concerned as a helper, and the consequent need for him to be available to provide assistance.

99. The second qualification is to be found in the Court's express statement that it is for the Member States to determine the form in which provision for the basic needs of the third-country national concerned is to be made. [49]

100. This reflects the discretion left to Member States by Directive 2008/115 as to the basic needs of migrants awaiting removal, at least as to how those needs are to be met. It follows, in my view, that the fact that the Member State concerned is required to meet, as far as possible, the basic needs of the applicant in the main proceedings (assuming that he is unable to provide for himself) does not necessarily mean that he must be entitled to an allowance in the form of a cash benefit, such as that claimed before the referring court.

101. In this regard, I note that the Belgian Government submits, in its observations, that the daughter of the applicant in the main proceedings receives adjusted social assistance in an amount reflecting the fact that her father is by her side. It is apparent from the decision making the reference that, since coming of age, the young woman has been receiving social assistance equivalent to the 'single person' rate of integration income, together with the family benefits which she is entitled to claim by reason of her disability.

102. It is for the national court to assess whether, in those circumstances, provision has in fact been made for the basic needs of the applicant in the main proceedings (who resides with his daughter) and thus to conclude that the Belgian legislation is compliant with EU law. [50]

47 OJ 2009 L 168, p. 24.

48 It is stated in the decision making the reference (page 22) that, despite having qualifications and significant work experience, LM, who is still of working age, is excluded from the job market because of his current status as an illegally staying third-country national. No further details are given. By definition, this statement does not take into account the fact that LM's removal must be postponed as a result of his appeal having suspensory effect.

49 See judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453, paragraph 61).

50 Finally, I note that the referring court makes reference, in its question, to Article 12 of the Charter. This is plainly a clerical error, as can be seen from page 25 of the decision making the reference, which refers unambiguously to the prohibition of discrimination on grounds of age, as provided for in Article 21 of the Charter. It must be stated, in any event, that there is nothing in the material submitted by the referring court to suggest that the present case might involve differing treatment of objectively comparable situations.

V. Conclusion

103. In the light of the foregoing considerations, I propose that the Court reply to the cour du travail de Liège (Higher Labour Court, Liege, Belgium) along the following lines:

Articles 5 and 13 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 Articles 7, 24 and 47 of the Charter of Fundamental Rights of the European Union, and Articles 9 and 14(1)(b) of that directive, read in conjunction with Articles 7 and 24 of the Charter, must be interpreted as precluding national legislation which:

– does not confer automatic suspensory effect on an appeal against a return decision and/or removal order brought by a third-country national, the parent of a child who is seriously ill and has the benefit of an automatic suspension triggered by the appeal against that decision and/or order in so far as it relates to her, and who would be at serious risk of a grave and irreversible deterioration in her state of health in the event of that decision and/or order being enforced, where there is a relationship of dependency between parent and child (whether or not the child is a minor), and which

– does not make provision, in so far as possible, for the basic needs of the third-country national, in order to ensure that family unity with family members present in the territory is effectively maintained and the special needs of vulnerable persons are effectively taken into account, and in order to ensure the effective provision of emergency health care and essential treatment of medical conditions to which the child of that national (whether or not a minor) is subject, for as long as the Member State is required, as a result of the bringing of that appeal, to defer the removal of the third-country national, subject to the possibility of that national providing for his own needs.