



Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 15 June 2017¹

Case C-181/16

Sadikou Gnandi
v
État belge

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

(Reference for a preliminary ruling — Directive 2008/115/EC — Return of illegally staying third-country nationals — Order for removal from national territory — Order issued after the rejection of the asylum application and before exhaustion of legal remedies)

1. The present request for a preliminary ruling concerns the interpretation of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and of Article 5 and Article 13(1) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.²

2. By its question, the Conseil d'État (Council of State, Belgium) asks the Court in essence whether the principle of non-refoulement and the right to an effective remedy preclude the adoption of a return decision within the meaning of Directive 2008/115 in respect of an asylum seeker after the rejection of his application for international protection at first instance and therefore before the legal remedies available to him against that rejection have been exhausted.

¹ Original language: French.

² OJ 2008 L 348, p. 98.

Legal context

EU law

Directive 2005/85/EC

3. Article 7 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status,³ provides:

‘[Asylum] 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.⁴

...’

4. Article 39(1) of that directive obliges Member States to ensure that asylum seekers have the right to an effective remedy. Article 39(3) is worded as follows:

‘Member States shall, where appropriate, provide for rules in accordance with their international obligations dealing with:

- (a) the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome;
- (b) the possibility of legal remedy or protective measures where the remedy pursuant to paragraph 1 does not have the effect of allowing applicants to remain in the Member State concerned pending its outcome. ...

...’

5. Directive 2005/85 was repealed and replaced by 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.⁵ Article 46(5) of the latter directive provides that ‘Member States shall allow applicants to remain in the territory until the period within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the period, pending the outcome of the remedy’. However, that provision does not apply, *ratione temporis*, to the facts of the dispute in the main proceedings.⁶

Directive 2008/115

6. Article 2(1) of Directive 2008/115 states that the directive applies to third-country nationals staying illegally on the territory of a Member State.

³ OJ 2005 L 326, p. 13.

⁴ Paragraph 2 of that article provides for limited exceptions to the rule set out in paragraph 1. Those exceptions are not applicable to the dispute in the main proceedings.

⁵ OJ 2013 L 180, p. 60.

⁶ Under the first paragraph of Article 52 of Directive 2013/32, applications for international protection lodged before 20 July 2015 are governed by the laws, regulations and administrative provisions adopted pursuant to Directive 2005/85.

7. Under Article 3(2), (4) and (5) of that directive:

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

...

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

...

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

5. “removal” means the enforcement of the obligation to return, namely the physical transportation out of the Member State.’

8. Article 5 of Directive 2008/115 requires Member States to respect the principle of non-refoulement when implementing the directive.

9. Article 6 of that directive, entitled ‘Return decision’, provides, in paragraphs 1 and 6:

‘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.

...

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

10. Article 8 of the directive, entitled ‘Removal’, provides, in paragraph 3:

‘Member States may adopt a separate administrative or judicial decision or act ordering the removal.’

11. Paragraph 1 of Article 9(1) of that directive, entitled ‘Postponement of removal’, provides:

‘Member States shall postpone removal:

- (a) when it would violate the principle of non-refoulement, or
- (b) for as long as a suspensory effect is granted in accordance with Article 13(2).’

12. Article 12(1) of Directive 2008/115 states:

‘Return decisions ... shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies.

...’

13. Under Article 13(1) and 2) of that directive:

‘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 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.’

Belgian law

14. Article 39/70(1) of the Law of 15 December 1980 on entry to the national territory, settlement, residence and removal of foreign nationals (‘the Law of 15 December 1980’) provides:

‘Unless the person concerned agrees, no order for removal from national territory or for refoulement may be enforced against a foreign national during the period prescribed for bringing an appeal or during the examination of that appeal.’

15. The first and second subparagraphs of Article 52/3(1) provide:

‘Where the Commissaire général aux réfugiés et aux apatrides (Commissioner General for Refugees and Stateless Persons) (“the CGRA”) does not take the asylum application into consideration or refuses to grant refugee status or the status of subsidiary protection to the foreign national, and that person is unlawfully present in the Kingdom of Belgium, the Minister or his representative shall issue, without delay, an order to leave Belgium, justified on one of the grounds set out in Article 7(1)(i) to (xii). ...

Where the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) (“the CCE”) dismisses the appeal of a foreign national against a decision taken by the [CGRA] pursuant to Article 39/2(1)(i) and the foreign national is unlawfully present in the Kingdom of Belgium, the Minister or his representative shall decide to extend without delay the order requiring him to leave Belgium provided for under the first subparagraph. ...’

16. Article 75(2) of the Royal Decree of 8 October 1981 on entry to the national territory, residents, settlement and removal of foreign nationals provides:

‘If the [CGRA] refuses to grant refugee status and subsidiary protection to a foreign national or does not take the asylum application into consideration, the Minister or his representative shall issue the person concerned with an order requiring him to leave Belgium in accordance with Article 52/3(1) of the Law [of 15 December 1980].’

17. Article 111 of that royal decree provides:

‘When an appeal by right is brought before the [CCE] under the ordinary procedure ..., the municipal administration shall issue the person concerned with a document in accordance with the model in Annex 35, if instructed to do so by the Minister or his representative, if that appeal is brought against a decision involving removal from the Kingdom of Belgium.

That document shall be valid for three months from the date of issue and shall then be extended month by month pending a decision on the appeal referred to in the previous subparagraph.’

18. Annex 35 to the aforementioned royal decree, entitled ‘Special Residence Permit’, states that a person to whom that permit is granted ‘is neither admitted nor authorised to stay but may remain in the territory of the Kingdom of Belgium pending a decision of the [CCE]’.

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

19. On 14 April 2011, Mr Sadikou Gnandi, a Togolese national and the appellant in the main proceedings, submitted an application for asylum.

20. On 23 May 2014, the CGRA rejected that application.

21. On 3 June 2014, the État belge (Belgian State), the respondent in the main proceedings, ordered the appellant in the main proceedings to leave Belgium.

22. On 23 June 2014, the appellant in the main proceedings lodged an appeal with the CCE against the CGRA’s decision of 23 May 2014 rejecting his application for asylum. On the same day the appellant sought, also before the CCE, the annulment and suspension of enforcement of the order of 3 June 2014 requiring him to leave Belgium.

23. By judgment of 31 October 2014, the CCE dismissed the appeal brought against the CGRA’s decision of 23 May 2014. On 19 November 2014, the appellant in the main proceedings lodged an appeal with the Conseil d’État (Council of State) against that judgment. On 10 November 2015 the Conseil d’État set aside that judgment and referred the case back to the CCE.

24. By judgment of 19 May 2015, the CCE also dismissed the appeal brought against the order of 3 June 2014 to leave Belgium on the ground that the appellant no longer had any interest in the action. The CCE considered *inter alia* that its judgment of 31 October 2014 had put an end to the application for asylum brought by the appellant in the main proceedings and that he therefore no longer had an interest in invoking the benefit of continuing with an application for asylum which had been concluded. The CCE further considered that, since the aforementioned contested order to leave Belgium had not been followed by enforcement, the appellant had had the opportunity to put forward his arguments before the CCE following the CGRA’s decision rejecting his application for asylum and therefore could no longer show that he had an interest in invoking infringement of Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (‘the ECHR’).

25. On 2 June 2015 the appellant in the main proceedings challenged the CCE’s judgment of 19 May 2015 before the referring court. In the course of those appeal proceedings, the referring court dismissed an initial objection of inadmissibility, considering that the contested order to leave Belgium adversely affected the appellant. According to that court, the order, although it temporarily cannot be the subject of enforcement measures, does require the appellant to leave Belgium. Furthermore, the prohibition on proceeding with enforcement of that order is only temporary and may be enforced once the CCE has again dismissed the appeal brought against the CGRA’s decision of 23 May 2014.

26. In those same appeal proceedings, the Belgian State raised a second objection of inadmissibility, also alleging a lack of interest in bringing the action, arguing *inter alia* that if the order to leave Belgium were annulled it would have no option but to take the same decision. The legislation at issue in the main proceedings requires it to adopt an order to leave Belgium as soon as the application for asylum is rejected by the CGRA, irrespective of whether that rejection is final. Mr Gnandi contends that the imposition of an obligation to leave Belgium as soon as the application for asylum is rejected and, therefore, before the legal remedies against that rejection have been exhausted, infringes EU law,

in particular the right to an effective remedy and also the principle of non-refoulement. The referring court considers that, if EU law precluded the issuance of an order to leave Belgium before the asylum procedure was definitively concluded, the appellant would have the required interest in having the contested judgment set aside.

27. In those circumstances, the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 5 of Directive [2008/115], which requires Member States to respect the principle of non-refoulement when they are implementing that directive, and the right to an effective remedy provided for under Article 13(1) of that directive and under Article 47 of the [Charter] be interpreted as precluding the adoption of a return decision, as provided for under Article 6 of [Directive 2008/115] and under Article 52/3(1) of the Law of 15 December 1980 ... and Article 75(2) of the Royal Decree of 8 October 1981 ..., after the rejection of the asylum application by the [CGRA] and therefore before the legal remedies available against that rejection decision can be exhausted and before the asylum procedure can be definitively concluded?'

28. Following the decision of the referring court to refer that question to the Court for a preliminary ruling, the CCE, by judgment of 11 March 2016, set aside the CGRA's decision of 23 May 2014 rejecting the application for asylum and referred the case back to the CGRA. On 30 June 2016, the CGRA again adopted a decision refusing asylum, which Mr Gnandi again contested before the CCE.

29. Furthermore, on 8 February 2016, Mr Gnandi, independently of his application for asylum, was authorised to stay temporarily in Belgium until 1 March 2017.

Procedure before the Court

30. Pursuant to Article 101 of the Rules of Procedure of the Court, a request for clarification was sent by the Court to the referring court, which replied by letter of 14 February 2017.

31. Mr Gnandi, the Belgium and Czech Governments and the European Commission submitted written observations pursuant to the second paragraph of Article 23 of the Statute of the Court of Justice of the European Union. Those interested parties, with the exception of the Czech Republic, presented oral argument at the hearing on 1 March 2017.

32. On 2 March 2017, pursuant to Article 62(1) of the Rules of Procedure, the Belgian Government was asked to produce a number of documents. It complied with that request on 9 March 2017.

Analysis

The need for an answer to the question for the purposes of resolving the dispute in the main proceedings

33. In its written observations, the Belgian Government maintains, as its principal argument, that it is no longer necessary to rule on the question referred for a preliminary ruling. It states that the order to leave Belgium at issue in the main proceedings became null and void following the CCE's judgment of 11 March 2016 setting aside the CGRA's decision of 23 May 2014 which constitutes the basis of the order, and that Mr Gnandi was authorised to stay temporarily in Belgium until 1 March 2017. In the circumstances, the dispute in the main proceedings is now devoid of purpose or, at the very least, Mr Gnandi no longer has any interest in bringing his action.

34. When asked by the Court to state the reasons why it considers that a reply to the question referred for a preliminary ruling is still necessary, in view of the arguments put forward by the Belgian Government, the referring court stated that the annulment, by the CCE's judgment of 11 March 2016, of the decision rejecting Mr Gnandi's application for asylum does not in itself have any legal effect on the order of 3 June 2014 requiring him to leave Belgium.

35. That annulment did, however, have the effect of reopening Mr Gnandi's asylum procedure before the CGRA, which led the Belgian authorities to issue him with a temporary residence permit pending a new decision on his application for international protection.

36. The referring court recognises that it has already held that a temporary residence permit such as that granted to Mr Gnandi constitutes an act which conflicts with a previously issued order to leave Belgium, which entails implicitly withdrawal of that order. It nevertheless points out that, in the judgment of 15 February 2016, *N* (C-601/15 PPU, EU:C:2016:84, paragraph 75), the Court stated that the principle that Directive 2008/115 must be effective requires that a return procedure opened under that directive can be resumed at the stage at which it was interrupted, as soon as the application for international protection which interrupted it has been rejected at first instance. In the light of that requirement to ensure the effectiveness of Directive 2008/115, the view cannot be taken, according to the referring court, that the order of 3 June 2014 to leave Belgium has become null and void. That measure again produces effects following the second rejection of Mr Gnandi's application for asylum, on 30 June 2016, so as to permit the resumption of the return procedure at the stage at which it was interrupted.

37. According to settled case-law, the procedure provided for by Article 267 TFEU is an instrument of cooperation between the Court and national courts by means of which the Court provides national courts with the criteria for the interpretation of EU law which they need in order to decide the disputes before them.⁷ In the context of that cooperation, the national court seised of the dispute is in the best position to assess, having regard to the particular features of the case, whether a preliminary ruling is necessary to enable it to give judgment and the relevance of the questions which it refers to the Court.⁸

38. That does not alter the fact that it is for the Court, where appropriate, to examine the circumstances in which the case was referred to it by a national court in order to assess whether it has jurisdiction and, in particular, determine whether the interpretation of EU law that is sought bears any relation to the facts of the main action or its purpose, so that the Court is not led to deliver advisory opinions on general or hypothetical questions.⁹ If it appears that the question raised is manifestly irrelevant for the purposes of deciding the case, the Court must declare that there is no need to proceed to judgment.¹⁰

39. The Court has held, in particular, that there was no need to rule on a request for a preliminary ruling where the measure against which the action in the main proceedings was brought had become null and void following events which occurred after that request was made, so that the dispute in the main proceedings had become devoid of purpose.¹¹

⁷ See, to that effect, inter alia, judgments of 16 July 1992, *Meilicke* (C-83/91, EU:C:1992:332, paragraph 22); of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756, paragraph 83); and of 24 October 2013, *Stoilov i Ko* (C-180/12, EU:C:2013:693, paragraph 36).

⁸ See, to that effect, inter alia, judgments of 16 July 1992, *Lourenço Dias* (C-343/90, EU:C:1992:327, paragraph 15); of 21 February 2006, *Ritter-Coulais* (C-152/03, EU:C:2006:123, paragraph 14); and of 24 October 2013, *Stoilov i Ko* (C-180/12, EU:C:2013:693, paragraph 37).

⁹ See, to that effect, inter alia, judgments of 16 December 1981, *Foglia* (244/80, EU:C:1981:302, paragraphs 18 and 21); of 30 September 2003, *Inspire Art* (C-167/01, EU:C:2003:512, paragraph 45); and of 24 October 2013, *Stoilov i Ko* (C-180/12, EU:C:2013:693, paragraph 38).

¹⁰ See judgments of 16 July 1992, *Lourenço Dias* (C-343/90, EU:C:1992:327, paragraph 20); of 21 February 2006, *Ritter-Coulais* (C-152/03, EU:C:2006:123, paragraph 15 and the case-law cited); and of 24 October 2013, *Stoilov i Ko* (C-180/12, EU:C:2013:693, paragraph 38).

¹¹ See orders of 10 June 2011, *Mohammad Imran* (C-155/11 PPU, EU:C:2011:387, paragraphs 16 to 18), and of 3 March 2016, *Euro Bank* (C-537/15, not published, EU:C:2016:143, paragraphs 31 to 36). See also judgment of 24 October 2013, *Stoilov i Ko* (C-180/12, EU:C:2013:693, paragraphs 39 to 46).

40. In the present case, as regards, first, the effects of the CCE's judgment of 11 March 2016 annulling the rejection of Mr Gnandi's application for asylum on the order of 3 June 2014 requiring him to leave Belgium, the referring court merely denies that that judgment had any legal effect on the aforementioned order, without however giving reasons for its view. The Belgian Government, for its part, bases its claim that the delivery of that judgment rendered the aforementioned order null and void solely on the ground that the order is based on the CGRA's negative decision of 23 May 2014.

41. In that regard, I would point out that, although the order of 3 June 2014 to leave Belgian territory states, under the title 'Reason for the decision', that 'a decision refusing refugee status ... was delivered by the [CGRA] on 26 [May] 2014',¹² it states, under the same title, that the order to leave Belgium was issued 'pursuant to Article 7(1) of the Law of 15 December 1980' and for the reasons stated in point 1 of that provision, namely 'the person concerned remains in Belgium without having the documents required in Article 2 [of the Law of 15 December 1980], in fact, the person concerned is not in possession of a valid passport with a valid visa'. It is apparent, therefore, from the order of 3 June 2014 to leave Belgium that, contrary to what is suggested by the Belgian Government, the reason for the adoption of the order was not the CGRA's decision but the illegal nature of Mr Gnandi's presence in Belgium. Indeed, under the relevant provisions of Belgian law, that order could not be issued in the circumstances of the dispute in the main proceedings until after Mr Gnandi's application for asylum was rejected by the CGRA.¹³ That rejection was therefore a *prerequisite* for the adoption of the order. However, it was not the basis for the order which, as is apparent from the wording of the order, was Mr Gnandi's illegal stay.

42. Moreover, the order to leave Belgium at issue in the main proceedings was adopted in accordance with Article 75(2) of the Royal Decree of 8 October 1981, which refers to Article 52/3(1) of the Law of 15 December 1980. However, I note that under neither of those provisions does the potential annulment of the decision refusing refugee status adopted by the CGRA with referral of the case back to the CGRA deprive the order to leave Belgium adopted pursuant to those provisions of all legal effect. Moreover, Belgian law provides for other situations in which an order to leave Belgium coexists with an application for international protection and a procedure to recognise refugee status which has already been initiated.¹⁴ Lastly, I would point out that, apart from the two aforementioned articles, the Belgian Government does not rely on any other provision of national law or any judicial decision in support of its claims.

43. In light of the foregoing, it is not clear to me that the dispute in the main proceedings is devoid of purpose following the annulment of the CGRA's decision of 23 May 2014. In those circumstances, to abide by the opinion of the Belgian Government, in spite of the conflicting opinion, albeit unreasoned, expressed by the referring court, would amount to calling into question the respective roles of the national court and the Court of Justice in the procedure under Article 267 TFEU. Admittedly, the Court has already had occasion to hold that it is unnecessary to proceed to judgment notwithstanding the expressed wish of the referring court to maintain its request for a preliminary ruling.¹⁵ However, that has occurred only in cases in which there was no doubt that the dispute in the main proceedings or the request for a preliminary ruling had become devoid of purpose, with the result that maintaining that request would clearly have led the Court to reply to questions which were hypothetical or irrelevant to the outcome of the dispute in the main proceedings. For the reasons set out above, that, in my view, is not the situation in the present case.

¹² The date indicated does not correspond to the date given by the referring court and shown on the copy of the CGRA's decision which was sent to the Court by the Belgian Government.

¹³ That is not always the case. In some cases, in particular in those referred to in Article 74/6(1a) of the Law of 15 December 1980, the order to leave Belgium is issued when the application for asylum is filed (see also Article 52/3(2) of the Law of 15 December 1980).

¹⁴ Inter alia in cases of 'subsequent' applications for asylum: see Article 74/6(1a) of the Law of 15 December 1980.

¹⁵ See, inter alia, orders of 22 October 2012, *Šujetová* (C-252/11, not published, EU:C:2012:653, paragraphs 11 to 20); of 5 June 2014, *Antonio Gramsci Shipping and Others* (C-350/13, EU:C:2014:1516, paragraphs 5 to 12); and of 23 March 2016, *Overseas Financial and Oaktree Finance* (C-319/15, not published, EU:C:2016:268, paragraphs 28 to 35). See also judgments of 27 June 2013, *Di Donna* (C-492/11, EU:C:2013:428, paragraphs 24 to 31), and of 24 October 2013, *Stoilov i Ko* (C-180/12, EU:C:2013:693, paragraphs 39 to 46).

44. As regards, secondly, the effect of the temporary residence permit issued to Mr Gnandi on the order of 3 June 2014 requiring him to leave Belgium, it appears, from a reading of the reply to the request for clarification, that, according to the Conseil d'État (Council of State), the interpretation of Directive 2008/115 upheld by the Court in the judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84), precludes the conclusion that that permit implicitly withdrew the order.

45. In this regard I would point out that the analysis of the question referred for a preliminary ruling by the Conseil d'État (Council of State) requires inter alia an examination of whether and in what terms the solution found by the Court in the judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84), may be applied to the dispute in the main proceedings, with the result that the Court's answer to that question continues to be useful — if only on that point — for the decision which the referring court will find it necessary to reach in the dispute in the main proceedings. I also note that it is not apparent from the reply to the request for clarification that an application of solely national rules would necessarily lead the Conseil d'État (Council of State) to conclude that the order to leave Belgium at issue in the main proceedings has become null and void on the ground that a temporary residence permit was issued to Mr Gnandi, as that court has not shown consistent judicial decision-making in that regard. It is therefore not clear that the decision in the main proceedings has become devoid of purpose following the issue of that permit.

46. In the light of all the foregoing considerations, it cannot be maintained, as the Belgian Government contends, that the Court's answer to the question referred for a preliminary ruling is no longer required for the outcome of the dispute in the main proceedings.

Consideration of the question referred

47. It should be observed, as a preliminary point, that the referring court and all of the interested parties who have submitted observations before the Court classify the order of 3 June 2014 to leave Belgium as a 'return decision' within the meaning of Directive 2008/115.

48. I concur in that view. That order comes within the definition in Article 3(4) of that directive: it is an administrative act declaring Mr Gnandi's stay in Belgium illegal and ordering him to leave the country by the time limit stated.¹⁶ The fact that, under Article 39/70 of the Law of 15 December 1980, that order is temporarily not subject to enforcement measures does not affect that classification.

49. By its question, the referring court is asking the Court in essence whether the conditions for adopting such a return decision were satisfied in the circumstances of the dispute in the main proceedings and whether or not its adoption has infringed the principles of non-refoulement and effective judicial protection.

50. In that regard, I would point out that, according to Article 2(1) of Directive 2008/115, the directive applies to third-country nationals staying illegally on the territory of a Member State. Under Article 6(1) of Directive 2008/115, the wording of which is reproduced in point 9 of this Opinion, for a return decision to be issued to a third-party national, he must be 'staying illegally' on the territory of the Member State concerned.

51. It is therefore necessary to ascertain whether, in the circumstances of the dispute in the main proceedings, Mr Gnandi could be considered as staying illegally in Belgium within the meaning of Directive 2008/115 and whether a return decision could, or should, be adopted against him by the Belgian authorities.

¹⁶ See, to that effect, judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453, paragraph 39).

52. The concept of ‘illegal stay’ is defined in Article 3(2) of Directive 2008/115, reproduced in point 7 of this Opinion.¹⁷ It follows from that definition that any third-country national who is present on the territory of a Member State without fulfilling the conditions of entry, stay or residence in that State is staying there illegally.¹⁸

53. Recital 9 of that directive, which refers in that regard to Directive 2005/85, states that 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’.

54. Article 7(1) of Directive 2005/85, applicable at the time of the facts in the main proceedings, recognised that an asylum seeker had the *right to remain* on the territory of the Member State concerned at least until his or her application had been rejected at first instance. In paragraph 48 of its judgment of 30 May 2013, *Arslan* (C-534/11, EU:C:2013:343), the Court stated that that right precludes such an asylum seeker being considered to be ‘illegally staying’ within the meaning of Directive 2008/115. That is so, according to the Court, irrespective of whether or not the Member State has issued the asylum seeker with a residence permit, since Article 7 of Directive 2005/85 leaves the decision whether to grant such a permit to the discretion of that Member State.

55. It is, in my view, clear from the reasoning followed by the Court in paragraphs 44 to 49 of the grounds of the judgment of 30 May 2013, *Arslan* (C-534/11, EU:C:2013:343), and, more generally, from the linkage between Directive 2008/115 and Directive 2005/85 — now Directive 2013/32 — that a third-country national who is applying for asylum cannot be considered as staying illegally on the territory of the Member State in which he has lodged his application for international protection provided that he is granted a right to remain on that territory — pending the outcome of the proceedings relating to that application — under either EU law or national law.

56. That conclusion is, moreover, implicitly confirmed by Article 6(4) of Directive 2008/115, which provides that if a Member State decides to grant an autonomous residence permit or other authorisation offering the right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on its territory, no return decision is to be issued against him. Although a person’s right to remain on the territory of the Member State in which he has lodged an application for asylum, pending examination of the application, does not constitute a right to a residence permit, as stated in the final sentence of Article 7(1) of Directive 2005/85, as the Commission pointed out at the hearing and as is stated in the Return Handbook adopted by it,¹⁹ any third-country national physically present on the territory of a Member State is, for the purposes of Directive 2008/115, either staying legally or illegally. There is no third option.²⁰

57. Since he cannot be considered as staying illegally, an asylum seeker authorised to remain on the territory of a Member State pending examination of his application does not come within Directive 2008/115,²¹ at least during the period for which he has that authorisation. He cannot therefore be the addressee of a return decision within the meaning of Article 6(1) of that directive.

¹⁷ In the absence of an express reference to national law, that concept must be interpreted only on the basis of EU law (see, inter alia, judgment of 21 October 2010, *Padawan* (C-467/08, EU:C:2010:620, paragraph 32)), even though the specific assessment as to whether a third-country national is staying legally or illegally on the territory of a Member State may also depend, as appropriate, on the application of rules of domestic law of that State.

¹⁸ See judgment of 7 June 2016, *Affum* (C-47/15, EU:C:2016:408, paragraph 48).

¹⁹ See the Commission Recommendation of 1 October 2015 establishing a common ‘Return Handbook’ to be used by the competent authorities of the Member States when carrying out return-related tasks [C(2015) 6250 final] (‘the Return Handbook’).

²⁰ See the Return Handbook, paragraph 1.2.

²¹ See judgment of 30 May 2013, *Arslan* (C-534/11, EU:C:2013:343, paragraphs 48 and 49).

58. As I have already pointed out in this Opinion, at the time of the events in the main proceedings Directive 2005/85 provided that an asylum seeker had the right to remain on the territory of the Member State concerned only until his application had been rejected at first instance. In Mr Gnandi's case, that right therefore ceased on 23 May 2014, the date on which the CGRA adopted the decision rejecting his application.

59. Article 39(3)(a) of Directive 2005/85 left it to the Member States to provide for rules in accordance with their international obligations concerning the right of applicants to remain in the Member State in which they have lodged their application for asylum pending the outcome of the legal remedy provided for in Article 39(1) of that directive, against the rejection of that application at first instance.

60. It is apparent from the documents in the case that, on 11 July 2014, the Belgian authorities issued Mr Gnandi with a 'special residence permit' as provided in Annex 35 to the Royal Decree of 8 October 1981, pursuant to Article 111 of that decree, on the ground that he had lodged an appeal by right before the CCE. That permit, initially valid until 10 October 2014 and successively extended until 10 December 2014, states that 'the person concerned is neither admitted nor authorised to stay but may remain in the territory of the Kingdom of Belgium pending a decision by the [CCE]'.

61. Without it being necessary to express a view as to whether or not the Kingdom of Belgium relied on Article 39(3)(a) of Directive 2005/85, it is clear that the aforementioned permit granted Mr Gnandi a *right to remain on Belgian territory* pending the outcome of his appeal. From the date on which it was issued, the permit therefore precluded the adoption of a return decision within the meaning of Article 6(1) of Directive 2008/115 against Mr Gnandi, because his presence in Belgium could not be classified as 'illegal'.

62. I note, however, that the order requiring him to leave Belgium at issue in the main proceedings was adopted 3 June 2014, that is to say, before Mr Gnandi brought his appeal before the CCE on 23 June 2014. Therefore, at the time at which that order was adopted, Belgian law did not yet recognise that Mr Gnandi had a right to remain on Belgian territory, since that right arose only when the appeal was lodged.²²

63. Must the view be taken that, during the period between the date on which his application for asylum was rejected by the CGRA and the date on which he lodged his appeal with the CCE, Mr Gnandi — since he had no valid passport or visa and had no right to remain on Belgian territory as an asylum seeker either under Directive 2005/85 or under Belgian legislation — was staying illegally, and that therefore a return decision within the meaning of Article 6(1) of Directive 2008/115 could be adopted against him?

64. For reasons which I shall explain, I am convinced that this question must be answered in the negative.

²² A special residence permit, set out in Annex 35 to the Royal Decree of 8 October 1981, was only issued to Mr Gnandi on 10 July 2014, but the right to remain on Belgian territory which it confirms is linked to the bringing of the appeal and stems from Article 111 of the Royal Decree of 8 October 1981.

65. Article 39(1)(a) of Directive 2005/85 required Member States to ensure that asylum seekers had ‘the right to an effective remedy’ before a court or tribunal against any decision taken on their application for asylum. As the Court recognised in its judgment of 17 December 2015, *Tall* (C-239/14, EU:C:2015:824, paragraphs 51 to 53), the characteristics of that remedy must be determined in a manner consistent with Article 47 of the Charter, which constitutes a reaffirmation of the principal of effective judicial protection, and in the light of the principle of non-refoulement, enshrined in Article 19(2) of the Charter.²³

66. However, I would point out that it is apparent from the case-law of the European Court of Human Rights which, in accordance with Article 52(3) of the Charter, must be taken into account for interpreting Article 19(2) and Article 47 thereof, that when a State decides to return a foreign national to a country where there are substantial grounds for believing that he will be exposed to a real risk of ill-treatment contrary to Article 3 ECHR, the effectiveness of the remedy relied on and provided for in Article 13 ECHR requires that the foreign national have available to him a remedy enabling automatic suspension of enforcement of the measure allowing for his removal.²⁴ The same principles have been affirmed by the Court, inter alia in the judgments of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453: paragraph 52 and 53), and of 17 December 2015, *Tall* (C-239/14, EU:C:2015:824, paragraph 58).

67. Although the case-law referred to above concerns only appeals against measures the enforcement of which risks exposing the person concerned to ill-treatment contrary to Article 3 ECHR and Article 19(2) of the Charter, a decision rejecting an application for international protection which does not per se entail removal measures does not, in principle, constitute such a measure. That is why the Court has taken the view that the lack of suspensory effect of an appeal brought against such a decision is, in principle, compatible with Article 19(2) and Article 47 of the Charter. Although such a decision does not allow a third-country national to receive international protection, the enforcement of that decision cannot, as such, lead to that national’s removal.²⁵

68. However, the effectiveness of a legal remedy against such a decision and observance of the principle of non-refoulement would also be infringed if, during the period for lodging that action — and, once this had been lodged, until its outcome — the asylum seeker were exposed to *the enforcement of removal measures*.

69. Furthermore, to return to the case with which we are concerned, the Belgian legislation expressly provides, in Article 39/70 of the Law of 15 December 1980, that no order for removal may be enforced against a foreign national during the period for bringing the appeal by right against decisions of the CGRA.

70. Therefore, if no order for removal may be enforced against a third-country national during the period for bringing an appeal against the decision rejecting his application for international protection, failing which that appeal would be deprived of its effectiveness and the principle of non-refoulement would be infringed, that means that that national *has the right to remain on the territory of the Member State* in which he has lodged in that appeal during the aforementioned period.

²³ That provision states inter alia that no one may be removed to a State where there is a serious risk that he or she would be subjected to inhuman or degrading treatment. In its judgement of 28 July 2011, *Samba Diouf* (C-69/10, EU:C:2011:524, paragraph 61), the Court recognised that ‘the objective of Directive 2005/85 is to establish a common system of safeguards serving to ensure that the ... Convention [relating to the Status of Refugees, signed in Geneva on 28 July 1951] and the fundamental rights are fully complied with’, including the right to an effective judicial remedy.

²⁴ See, most recently, ECtHR, 14 February 2017, *Allanazarova v. Russia* (CE:ECHR:2017:0214JUD004672115, paragraphs 96 to 99 and the case-law cited).

²⁵ See, with regard to a decision not to examine a subsequent application for asylum, judgment of 17 December 2015, *Tall* (C-239/14, EU:C:2015:824, paragraph 56).

71. That right precludes him from being considered as staying illegally within the meaning of Directive 2008/115, as interpreted by the judgment of 30 May 2013, *Arslan* (C-534/11, EU:C:2013:343),²⁶ and, therefore, from being subject to a return decision within the meaning of Article 6(1) of that directive.

72. In my view, the foregoing conclusion is not precluded by the judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84), relied on by the Belgium Government.

73. In that judgment, the Court rejected the argument that the lodging of an application for asylum by a third-country national subject to a return procedure within the meaning of Directive 2008/115 could have the effect of rendering any return decision adopted in connection with that procedure null and void.²⁷ The fact that, as an asylum seeker, that national has the right to remain on the territory of the Member State concerned pending the outcome of his application and, therefore, cannot be considered as staying illegally within the meaning of Article 3(2) of Directive 2008/115 does not, in the Court's view, preclude the return procedure initiated previously against him — and interrupted — from remaining open and being resumed if the application for asylum is unsuccessful.

74. That approach, which has been adopted previously in paragraph 60 of the judgment of 30 May 2013, *Arslan* (C-534/11, EU:C:2013:343), is, in the Court's view, justified by the need not to jeopardise the attainment of the objective pursued by Directive 2008/115, namely the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals.²⁸ The obligation imposed on Member States by Article 8 of that directive to proceed with removals in the situations referred to in paragraph 1 of that article — an obligation which must be fulfilled as soon as possible —²⁹ would not be met if the removal were delayed because, following the rejection of first instance of the application for international protection, a return procedure could not be resumed at the stage at which it was interrupted but had to start afresh.³⁰

75. According to the Belgian Government, since, in accordance with the judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84), a return procedure may be resumed following the rejection of the application for asylum at first instance, it must also be able to be initiated at the time of that rejection.

76. I do not agree. The factual and legal circumstances of the procedure in the main proceedings in the present case are clearly different from those in the case which led to the judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84), with the result that the solution found in the latter case cannot automatically be transposed to the former.

77. The return procedure opened against Mr N. had been initiated *before* he lodged his application for international protection.³¹ Therefore, when that procedure was opened, Mr N. was not an asylum seeker³² and had no right to remain, as such, in the Netherlands. He was staying illegally within the meaning of Article 3(2) of Directive 2008/115. Furthermore, when he lodged his application for asylum, the return decision, and the 10-year entry ban which had been imposed on him, became final.³³

26 I note in passing that, in the judgment in *Saadi v. United Kingdom*, the Grand Chamber of the European Court of Human Rights adopted a different approach in the context of Article 5, paragraph 1f, of the ECHR. According to that Court, entry of an asylum seeker to the territory of a contracting State is 'illegal' if it has not been 'authorised' by that State (see judgment of 29 January 2008, (CE:ECHR:2008:0129JUD001322903, paragraph 65), which appears to imply that the application for asylum is successful. See, however, the joint dissenting opinion of six judges of the Grand Chamber.

27 See judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 75).

28 See judgment of 28 April 2011, *El Dridi* (C-61/11 PPU, EU:C:2011:268, paragraph 59).

29 See, to that effect, judgment of 6 December 2011, *Achughbabian* (C-329/11, EU:C:2011:807, paragraphs 43 and 45).

30 See judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 76).

31 It was the fourth application for asylum lodged by Mr N. The first and third had been definitively rejected and the second had been withdrawn.

32 The three applications for asylum which Mr N. had lodged previously had all been definitively rejected, so that no asylum proceedings were pending at the time a return decision was issued against him.

33 See, *inter alia*, paragraph 44 of the judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84).

78. By contrast, when the order to leave Belgium at issue in the main proceedings was served on Mr Gnandi, *the asylum procedure was ongoing*, the CGRA had adopted a decision rejecting the application and the time limit for bringing an appeal against that decision was running. As he could not be returned during that period and, after lodging the appeal, until its outcome, Mr Gnandi, as we have seen above, had the right to remain in Belgium. At the time when the return procedure was initiated, Mr Gnandi could therefore not be considered as staying illegally within the meaning of Article 3(2) of Directive 2008/115.

79. It follows that an application by analogy of the judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84), to the present case is not only unacceptable as a method of interpretation, in view of the differences between the disputes in the main proceedings in this case and the dispute which gave rise to that judgment, it would lead in essence to the unpalatable result under which Member States could initiate a return procedure within the meaning of Directive 2008/115 even though the conditions required by that directive are not satisfied.

80. Moreover, the requirements of effectiveness and expediency underlying the approach adopted by the Court in that judgment apply only when a return procedure has already been initiated. In such a case, those requirements may warrant that such a procedure be suspended and not annulled. In that regard, the judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84), is consistent with Article 6(4) of Directive 2008/115, which provides that, where a Member State decides to grant a third-country national a residence permit and a return decision has already been taken, it may simply be suspended for the duration of validity of that permit or postponed under Article 9 of that directive, which provides that removal is to be ‘postponed’ where it would infringe the principle of non-refoulement.

81. In other words, a properly initiated return procedure may be maintained, whilst remaining suspended, against a third-country national who, during that procedure, acquires a right to stay or remain on the territory of the Member State concerned.

82. Such a procedure may not be initiated against such a national while such a right exists, however.

83. Nor may arguments against the conclusion set out in point 71 of this Opinion be drawn from Article 6(6) of Directive 2008/115, or from the Return Handbook, also relied on by the Belgian Government.

84. Article 6(6) of Directive 2008/115, the wording of which is reproduced in point 9 of this Opinion, provides that a return decision may be adopted simultaneously and contextually at the ending of the legal stay of the person concerned and the declaration of that ending.

85. That provision only gives Member States a procedural power,³⁴ aimed at simplifying the two-stage procedure provided for by that directive³⁵ of which they may avail themselves in accordance with the conditions for applying the directive. Those conditions include the one relating to the illegality of the stay of the third-country national concerned. The possibility of adopting a single measure instead of two different measures to put an end to that national’s legal stay, on the one hand, and to adopt a return and/or removal decision, on the other, cannot allow Member States to disregard that condition and to initiate a return procedure against a person who has a right to remain on their territory.

³⁴ I would point out in passing that the Belgian authorities did not resort to that power in Mr Gnandi’s case. Firstly, the order to leave Belgium served on Mr Gnandi does not in itself put an end to his legal stay in Belgium, but rather establishes the illegal nature of that stay and, secondly, that order and the CGRA’s decision of 23 May 2014 are two different measures adopted by two different authorities.

³⁵ The proposal for Directive 2008/115 mentions, in paragraph 4, that that power has been provided in order to meet the concern expressed by many Member States during preliminary consultations, to the effect that the two-stage procedure might cause delays in procedure.

86. Furthermore, this conclusion is clear from the very wording of Article 6(6) of Directive 2008/115, which permits a return decision and/or removal decision to be combined with a ‘decision on the ending of a legal stay’, namely with a decision which, by putting an end to that stay, marks the beginning of the illegal stay of the person concerned. However, as I have shown above, that is not the situation of the rejection of an application for asylum where, under EU law or national law, that rejection is not final and the applicant has the right to remain in the territory of the Member State concerned pending the outcome of the asylum procedure.

87. Moreover, I would point out, as did the Commission in its oral argument, that Article 6(6) of Directive 2008/115 applies ‘without prejudice [to the] relevant provisions of [EU] law and national law’. Those provisions also include the principles of EU law referred to above and the national rules which grant the asylum seeker the right to remain in the territory of the Member State concerned during the asylum procedure.

88. The Return Handbook states, for its part, that the rejection of an application for asylum and a return decision may be adopted in a single measure under Article 6(6) of Directive 2008/115.³⁶ That handbook, which has no binding force,³⁷ was adopted after the entry into force of Directive 2013/32, which replaced Directive 2005/85 and, as pointed out by the Commission at the hearing, it must be read in the light of the provisions of that directive. As I have observed above, Article 46(5) of Directive 2013/32 provides that Member States are to allow asylum seekers to remain in their territory until the period within which to exercise their right to an effective remedy against the decision rejecting the application has expired and, when such a right has been exercised within the period, pending the outcome of the remedy. It is therefore clear that, when the handbook states that a decision to refuse an application for asylum also imposes an obligation to return, it is not referring to a decision against which an appeal may be brought pursuant to Article 46(1) of Directive 2013/32, because such an interpretation would conflict with the principles laid down in the judgment in *Arslan*.³⁸ That statement must therefore be considered rather as a rejection decision which has become final or, as explained by the Commission at the hearing, a decision taken in one of the situations listed in Article 46(6) of that directive, where the law of the Member State concerned or a judicial decision does not grant the asylum seeker the possibility of remaining on the territory of that State pending the outcome of the appeal.

89. It is apparent from all of the foregoing considerations that no return decision within the meaning of Directive 2008/115 could be adopted against Mr Gnandi during the period for bringing an appeal against the decision to reject his application for asylum and, once that appeal had been lodged, during the whole time that appeal was being considered and until his ‘special residence permit’, in Annex 35 to the Royal Decree of 8 October 1981, had expired.

90. With regard to the period following the CCE’s judgment of 31 October 2014 and the lodging of the administrative appeal against that decision, it should be remembered that, in the judgment of 28 July 2011, *Samba Diouf* (C-69/10, EU:C:2011:524), the Court stated that Directive 2005/85 does not require there to be two levels of jurisdiction and that the principle of effective judicial protection affords an individual a right of access to a court or tribunal but not to a number of levels of jurisdiction.³⁹

³⁶ See ‘Return Handbook, paragraph 12.2.’

³⁷ As stated in the foreword, the handbook is based to a large extent on the work conducted by Member States and the Commission within the ‘Contact Committee Return Directive’ between 2009 and 2014 and sets out, systematically and succinctly, the discussions that took place within that forum, which do not necessarily reflect a consensus among Member States on the interpretation of the legal acts.

³⁸ See judgment of 30 May 2013, *Arslan* (C-534/11, EU:C:2013:343).

³⁹ See point 69. As regards Article 13 ECHR, see, most recently, ECtHR, 14 February 2017, *Allanazarova v. Russia* (CE:ECHR:2017:0214JUD004672115, paragraph 98), in which it is stated that that provision does not oblige the Contracting States to establish two levels of jurisdiction in respect of removal measures and that it is sufficient if there is at least one national remedy which fulfils the conditions of effectiveness required by that provision, namely a remedy enabling careful checking and a rigorous examination of a claim concerning a risk of treatment contrary to Article 3 ECHR and having an automatic suspensory effect with regard to the contested measure.

91. It is, however, apparent from the arguments put forward so far that, where the legislation of a Member State provides for two levels of jurisdiction and also authorises an asylum seeker to remain in the territory of that State pending the outcome of the appeal or appeal in cassation, a return procedure within the meaning of Directive 2008/115 cannot be initiated against him. It is apparent from the documents in the case file that, on 8 February 2016, the Belgian authorities issued Mr Gnandi with a temporarily residence permit, valid until 1 March 2017, on the basis of Article 9a of the Law of 15 December 1980, which provides that such a document may be issued, *inter alia*, to asylum seekers who have lodged an administrative appeal that has been declared admissible.

92. Before concluding, I should also like to consider briefly two matters which, although not directly referred to by the request for a preliminary ruling, have nevertheless been discussed by the parties in their observations and at the hearing.

93. The first concerns the issue of compliance of the order to leave Belgium at issue in the main proceedings with the procedural safeguards of Directive 2008/115.

94. In that regard, I would point out that the formal notification of the order indicated that it was possible to bring an action for annulment pursuant to Article 39/2(2) of the Law of 15 December 1980, and to submit an application for suspension under Article 39/82 of that law, and stated that, 'subject to application of Article 39/79 of that same law', neither such an action nor such application has the effect of suspending enforcement of the order notified. On the other hand, that notification made no mention of the fact that Article 39/70 of the Law of 15 December 1980 prohibited enforcement of that order during the period for bringing an appeal against the decision refusing recognition of refugee status and during the examination of any appeal against that decision. On the contrary, the information given to Mr Gnandi with the order to leave Belgium at issue in the main proceedings was such as to convince him that the order could be enforced at the end of the period set for voluntary departure. The notification stated that if Mr Gnandi did not comply with that order, he could be taken to the border and arrested for that purpose. Mr Gnandi stated, without being contested on the point by the Belgian Government, that the same information was contained in a printed document which was sent to him together with the notification.

95. In those circumstances, I do not think that the return decision notified to Mr Gnandi could be regarded as complying with the procedural guarantees laid down in Directive 2008/115, in particular in Article 12(1), which provides that those decisions are to 'give ... information about available legal remedies' and Article 14(2), which provides that Member States are to provide the persons referred to in paragraph 1 of that article⁴⁰ with a written confirmation that the return decision will temporarily not be enforced. More generally, the incomplete and contradictory nature⁴¹ of that information in the circumstances of the dispute in the main proceedings does not, in my view, satisfy the requirements for a fair and transparent procedure as referred to in recital 6 of that directive.

96. The second matter which merits brief consideration concerns the effects of the order to leave Belgium at issue in the main proceedings on the conditions of Mr Gnandi's stay in Belgium, in particular as regards his social and economic rights.

⁴⁰ These are, *inter alia*, persons whose removal has been postponed in accordance with Article 9 of Directive 2008/115 as being contrary to the principle of non-refoulement.

⁴¹ The order to leave Belgium at issue in the main proceedings was notified to Mr Gnandi only a few days after the CGRA's decision of 23 May 2014 informing him that no measure of removal could be adopted against him during the period for bringing an appeal before the CCE against that decision. However, as we have seen, that order — adopted by an authority other than the CGRA — and the accompanying notification made no mention of the fact that enforcement of the order to leave Belgium was temporarily suspended but, on the contrary, were worded in such a way as to create the opposite impression, thus helping to confuse the person to whom it was addressed with regard to his obligations and the remedies available to him.

97. The referring court provides only scant information in that regard. In essence, it states merely that the order was binding on Mr Gnandi, who was required to comply with it voluntarily, even though no measure for removal could be enforced against him. However, it is apparent from the documents in the case file and is not disputed by the parties that, in accordance with the circular dated 30 August 2013,⁴² the appellant's name was struck from the population register following the adoption of that order, which seems to imply that he no longer had a right to any insurance or any form of social assistance.

98. In regard, I note that Directive 2003/9,⁴³ and also Directive 2013/33,⁴⁴ which replaced it as from 20 July 2015, lay down the minimum conditions for reception which Member States are required to ensure for third-country nationals and stateless persons who make an application for international protection, as long as they are authorised to remain on their territory as asylum seekers.⁴⁵ The measures provided for by those directives, which relate in particular to the practical conditions of reception and healthcare, entail responsibility for the situation of the asylum seeker,⁴⁶ which is by no means comparable to the safeguards in place pending return as provided for in Article 14(1) of Directive 2008/115.⁴⁷

99. Secondly, I note, as did the Commission in its written observations, that in a judgment of 2015⁴⁸ the European Court of Human Rights stated that forcing an asylum seeker to return to the country from which he has fled without having the merits of his fears examined by a court constitutes an infringement of the safeguards of availability and accessibility of legal remedies as required in practice by the combined provisions of Articles 3 and 13 ECHR.⁴⁹ It is true that the Grand Chamber of the European Court of Human Rights, to which the case which gave rise to the judgement was referred, decided to strike out the application from the list, so that that judgment no longer has any legal effect.⁵⁰ I nevertheless consider that the interpretation of the principle of effective judicial protection given in that judgment should be retained in respect of Article 47 of the Charter, read in conjunction with Article 19(2) thereof. Those provisions preclude an asylum seeker from being forced de facto to leave the territory of the State in which he has lodged an appeal against the rejection of his application for asylum, before the outcome of that appeal, owing to the fact that it is impossible for him to provide for his essential needs.

Conclusion

100. In the light of all the foregoing considerations, I propose that the Court reply as follows to the Conseil d'État (Council of State, Belgium):

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, in particular Article 2(1) and Article 5 thereof, and the principles of non-refoulement and effective judicial protection, enshrined respectively in Article 19(2) and the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, preclude the adoption of a

⁴² Circular repealing that of 20 July 2001 on the legal scope of Annex 35 to the Royal Decree of 8 October 1981. *Moniteur belge* of 6 September 2013, p. 63240.

⁴³ Council Directive of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18).

⁴⁴ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96).

⁴⁵ See Article 3(1) of the two directives.

⁴⁶ See judgment of 27 February 2014, *Saciri and Others* (C-79/13, EU:C:2014:103, paragraphs 35 to 42).

⁴⁷ Under Article 14(1)(b) of Directive 2008/115, third-country nationals are entitled, during the period for voluntary departure, only to emergency healthcare and essential treatment of illness. Article 14(1)(d) of that directive provides that the special needs of vulnerable persons are to be taken into account.

⁴⁸ ECtHR, 7 July 2015, *V.M. and Others v. Belgium* (CE:ECHR:2015:0707JUD006012511).

⁴⁹ ECtHR, 7 July 2015, *V.M. and Others v. Belgium* (CE:ECHR:2015:0707JUD006012511, paragraph 197 et seq.).

⁵⁰ ECtHR, 17 November 2016, *V.M. and Others v. Belgium* (CE:ECHR:2016:1117JUD006012511).

return decision pursuant to Article 6(1) of that directive in respect of a third-country national who has lodged an application for international protection within the meaning of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status and who, under EU law and/or national law, is authorised to remain in the Member State in which he has lodged his application for international protection, during the period for bringing the appeal provided for in Article 39(1) of Directive 2005/85 against the rejection of that application and, where that appeal has been lodged within the period, during the examination of the appeal. On the other hand, Directive 2008/115 and the principles of non-refoulement and effective judicial protection do not preclude the adoption of such a return decision in respect of that national after rejection of that application unless, under national law, that national is authorised to remain in the Member State concerned pending the final outcome of the asylum procedure.