



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

22 June 2023*

(Reference for a preliminary ruling – Article 267 TFEU – Admissibility – Continued interest in bringing proceedings in the dispute in the main proceedings – Obligation of the referring court to verify)

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

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, Belgium), made by decisions of 4 November 2021, received at the Court on 25 November 2021, in the proceedings

XXX (C-711/21),

XXX (C-712/21)

v

État belge, represented by the secrétaire d'État à l'Asile et la Migration

THE COURT (Fourth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Chamber, L.S. Rossi, J.-C. Bonichot, S. Rodin and O. Spineanu-Matei, Judges,

Advocate General: A.M. Collins,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- XXX and XXX, by D. Andrien, avocat,
- the Belgian Government, by M. Jacobs, C. Pochet and M. Van Regemorter, acting as Agents, and by S. Matray, avocate,
- the Netherlands Government, by M.K. Bulterman and M.H.S. Gijzen, acting as Agents,

* Language of the case: French.

– the European Commission, by A. Azema and A. Katsimerou, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 2 March 2023,
gives the following

Judgment

- 1 These requests for a preliminary ruling concern the interpretation of Articles 4, 7 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 5, Article 6(6) and Article 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 (OJ 2008 L 348, p. 98).
- 2 The requests have been made in two sets of proceedings between two third-country nationals and the État belge (Belgian State), concerning the legality of the return decisions to which those nationals were subject.

Legal context

European Union law

- 3 Article 5 of Directive 2008/115 provides:

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

(a) the best interests of the child;

(b) family life;

(c) the state of health of the third-country national concerned,

and respect the principle of non-refoulement.'
- 4 Article 6 of that directive provides:

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

...

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

5 Under Article 13 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.

...’

Belgian law

6 Article 7 of the loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (*Moniteur belge* of 31 December 1980, p. 29535) (Law of 15 December 1980 on the entry to Belgian territory, residence, settlement and removal of foreign nationals), in the version applicable to the disputes in the main proceedings, provided:

‘Without prejudice to more favourable provisions that may be contained in an international treaty, the Minister or his or her representative may give to a foreign national, who is neither authorised nor permitted to stay more than three months or to settle in the Kingdom of Belgium, an order to leave the territory within a specified period, or must, in the situations referred to in points 1, 2, 5, 11 or 12, issue an order to leave the territory within a specified period:

1° if the foreign national is staying in the Kingdom of Belgium without being in possession of the documents required by Article 2

...’.

7 Article 52/3(1) of that law was worded as follows:

‘Where the Commissioner General for Refugees and Stateless Persons 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 or her representative shall issue, without delay, an order to leave Belgian territory, justified on one of the grounds set out in points 1 to 12 of the first subparagraph of Article 7. That decision shall be notified to the person concerned in accordance with Article 51/2.

Where the Council for asylum and immigration proceedings dismisses the appeal of a foreign national against a decision taken by the Commissioner General for Refugees and Stateless Persons pursuant to Article 39/2(1)(1), and the foreign national is unlawfully present in the Kingdom of Belgium, the Minister or his or her representative shall decide to extend without delay the order requiring him or her to leave Belgian territory provided for under the first subparagraph. That decision shall immediately be notified to the person concerned in accordance with Article 51/2.

...’.

8 Under Article 74/13 of that law:

‘When taking a decision on removal the Minister or his or her representative shall take due account of the best interests of the child, family life and the state of health of the third-country national concerned’.

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-711/21

- 9 On 20 July 2017, the Commissaire général aux réfugiés et aux apatrides (Commissioner General for Refugees and Stateless Persons, Belgium) (‘the CGRA’) refused to grant XXX refugee status and subsidiary protection.
- 10 On 26 July 2017, an order to leave the territory was issued against XXX.
- 11 On 21 August 2017, XXX appealed against the CGRA’s decision rejecting his application for international protection to the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium) (‘the CCE’).
- 12 On 24 August 2017, XXX appealed against the decision ordering him to leave the territory to the CCE.
- 13 On 11 January 2018, the CCE dismissed the appeal brought against the CGRA’s decision.
- 14 By judgment of 22 October 2019, delivered following a hearing at which XXX lodged an additional submission and documents relating to his private life and his state of health, the CCE dismissed the appeal brought against the decision ordering him to leave the territory.
- 15 The CCE took the view that XXX no longer had an interest in challenging that order to leave the territory on the ground, first, that that court had issued a final rejection of his application for international protection and, secondly, that the principal complaint raised by XXX was based on the fact that that order to leave the territory could not be issued while appeal proceedings against the CGRA’s decision were pending before it.
- 16 The CCE took the view that, in accordance with the judgment of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465; ‘the judgment in *Gnandi*’), it was required to take into account the events relating to XXX’s family life and state of health only if those events occurred prior to the disposal of the international protection proceedings. However, the events relied on by XXX in the additional submission that it lodged with the CCE occurred after the date of the CCE’s judgment dismissing the appeal against the CGRA’s decision.
- 17 Hearing an appeal against the judgment of the CCE of 22 October 2019, the referring court observes, in the first place, that, in the context of an action for annulment of a decision ordering a person to leave the territory, the CCE is, in principle, to carry out an *ex tunc* examination of that decision.

- 18 The referring court takes the view, in the second place, that the judgment in *Gnandi* does not make it possible to determine with certainty up to what time a third-country national may rely on any change in circumstances which has occurred after the adoption of the return decision to which he or she is subject and which may have a significant bearing on the assessment of his or her situation under Directive 2008/115, and in particular Article 5 thereof.
- 19 Therefore, the referring court takes the view that it cannot be ruled out that Articles 4, 7 and 47 of the Charter and the provisions of Directive 2008/115 require the national court which is responsible for examining the legality of the order to leave the territory notified to a third-country national following the rejection of his or her application for international protection to take into account changes in that national's family life or state of health that occur up to the date on which that court gives its ruling.
- 20 In those circumstances, the Conseil d'État (Council of State, Belgium) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Must Articles 4, 7 and 47 of the [Charter] and [Article 5, Article 6(6)] and [Article] 13 of Directive [2008/115], read in the light of the judgment [in *Gnandi*], be interpreted as meaning that a court hearing an appeal against a return decision adopted pursuant to a decision refusing to grant international protection, when assessing the legality of the return decision, may take account of changes in circumstances that may have a significant bearing on the assessment of the situation under Article 5 [of Directive 2008/115], only where those changes occurred prior to the disposal of the international protection proceedings by the [CCE]?
- (2) Must the circumstances referred to in Article 5 of Directive [2008/115] have arisen at a time when the foreign national was legally resident or allowed to remain?’

Case C-712/21

- 21 On 30 September 2016, the CGRA refused to grant XXX refugee status and subsidiary protection.
- 22 On 6 October 2016, an order to leave the territory was issued against XXX.
- 23 On 28 October 2016, XXX appealed against the CGRA's decision rejecting her application for international protection to the CCE.
- 24 On 7 November 2016, XXX appealed against the decision ordering her to leave the territory to the CCE.
- 25 By judgment of 19 January 2017, the CCE dismissed the appeal brought against the CGRA's decision.
- 26 By judgment of 22 October 2019, following a hearing at which XXX lodged an additional submission and documents relating to her private life, the CCE dismissed the appeal brought against the decision ordering her to leave the territory on grounds similar to those referred to in paragraphs 15 and 16 above.

- 27 Hearing an appeal against that judgment, the referring court takes the view, for reasons similar to those set out in paragraphs 17 to 19 above, that the scope of the judgment in *Gnandi* must be clarified in order to determine up to what time a change in circumstances concerning the family life of a third-country national who has been the subject of a return decision may be taken into account by the court responsible for ruling on the legality of such a decision. However, that court takes the view that it is not necessary to refer a question to the Court of Justice, in the context of that case, concerning the possibility of an infringement of Article 4 of the Charter, since no such infringement has been alleged by XXX.
- 28 In those circumstances, the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Must Articles 7 and 47 of the [Charter] and Articles 5, [6(6)] and 13 of Directive [2008/115], read in the light of the judgment [in *Gnandi*], be interpreted as meaning that a court hearing an appeal against a return decision adopted pursuant to a decision refusing to grant international protection, when assessing the legality of the return decision, may take account of changes in circumstances that may have a significant bearing on the assessment of the situation under Article 5 [of Directive 2008/115], only where those changes occurred prior to the disposal of the international protection proceedings by the [CCE]?
- (2) Must the circumstances referred to in Article 5 of Directive [2008/115] have arisen at a time when the foreign national was legally resident or allowed to remain?’
- 29 By decision of the President of the Court of Justice of 4 January 2022, Cases C-711/21 and C-712/21 were joined for the purposes of the written and oral parts of the procedure and of the judgment.

The questions referred for a preliminary ruling

- 30 In the first place, it follows from settled case-law that, although questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court of Justice to determine, enjoy a presumption of relevance, the fact nonetheless remains that the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court of Justice provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them. The justification for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute. As is apparent from the actual words of Article 267 TFEU, the question referred for a preliminary ruling must be ‘necessary’ to enable the referring court to ‘give judgment’ in the case before it (judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 167 and the case-law cited).
- 31 Therefore, whilst the Court of Justice must be able to place as much reliance as possible upon the assessment by the national court of the extent to which the questions submitted are necessary, it must be in a position to make any assessment inherent in the performance of its own duties in particular in order to determine whether the request for a preliminary ruling is admissible, since the national court must, in the use which it makes of the possibilities offered by Article 267

TFEU, have regard to the particular function entrusted to the Court of Justice in this field (see, to that effect, judgments of 16 December 1981, *Foglia*, 244/80, EU:C:1981:302, paragraphs 19 and 20, and of 9 December 2010, *Fluxys*, C-241/09, EU:C:2010:753, paragraph 31).

- 32 Thus, it is essential for national courts to explain, when the reasons do not emerge beyond any doubt from the file, why they consider that a reply to their questions is necessary to enable them to give judgment (judgments of 16 December 1981, *Foglia*, 244/80, EU:C:1981:302, paragraph 17, and of 29 April 2004, *Plato Plastik Robert Frank*, C-341/01, EU:C:2004:254, paragraph 29).
- 33 In the second place, the effectiveness of the judicial cooperation established by the procedure provided for in Article 267 TFEU requires the referring court to answer as fully as possible the questions addressed to it by the Court of Justice, if necessary after hearing the parties to the main proceedings in that regard.
- 34 In the present case, the Belgian Government disputes the admissibility of the questions referred for a preliminary ruling on the ground that the Conseil d'État (Council of State) should hold the appeals pending before it to be inadmissible for a reason unrelated to the provisions of EU law whose interpretation is sought by means of those questions. The Belgian Government thus submits that the applicants in the main proceedings obtained, after those appeals had been brought, a right to reside on Belgian territory and that, as a result, they lost their interest in bringing proceedings before the Conseil d'État (Council of State).
- 35 In that regard, it should be observed that, if it were established that the applicants in the main proceedings have in fact lost their interest in pursuing the proceedings to have the CCE's judgments at issue in the main proceedings set aside, the questions referred for a preliminary ruling would no longer be relevant for the purposes of deciding the disputes pending before the Conseil d'État (Council of State) and the Court of Justice would have to declare that there is no need to proceed to judgment (see, to that effect, judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 70).
- 36 From that point of view, the Conseil d'État (Council of State) was asked to indicate to the Court of Justice whether the applicants in the main proceedings now had a right to reside on Belgian territory and, if so, whether it wished to maintain its questions for a preliminary ruling.
- 37 The Conseil d'État (Council of State) replied that the lawyer representing the applicants in the main proceedings had argued that, although they had indeed been granted a temporary right to reside on Belgian territory, the fact remained that, if such a right to reside were not extended, the Belgian authorities could resume the return procedure on the basis of the already existing return decisions, those decisions having not been withdrawn. In the light of those explanations, the Conseil d'État (Council of State) stated that it wished to maintain its questions referred for a preliminary ruling.
- 38 In the light of that reply, the Judge-Rapporteur and the Advocate General requested that the Belgian Government inform the Court of Justice of the current status of the return decisions at issue in the main proceedings.

- 39 The Belgian Government submitted, in essence, that those return decisions had been repealed by the decisions granting the applicants in the main proceedings a right to reside and that, therefore, even once such a right to reside has come to an end, the national competent authority will not be able to pursue the return procedure with regard to the applicants in the main proceedings on the basis of those return decisions.
- 40 The Belgian Government also referred to recent case-law of the Conseil d'État (Council of State), according to which the return decision to which a third-country national is subject disappears from the legal order as soon as that national is granted a right to reside, with the result that the operative part of the CCE's judgment that has confirmed that return decision and that is under appeal before the Conseil d'État (Council of State) is no longer capable of adversely affecting that national, who is therefore deprived of the requisite interest in pursuing the proceedings to have it set aside.
- 41 In the light of that reply, the Conseil d'État (Council of State) was asked by the Court of Justice to indicate to it whether it wished to maintain its questions referred for a preliminary ruling and, if so, for what reasons.
- 42 The Conseil d'État (Council of State) replied that it wished to maintain its questions referred for a preliminary ruling. It justified that decision by recalling the position taken by the lawyer of the applicants in the main proceedings, whilst acknowledging that the Belgian Government adopted a divergent position. It further stated that the proceedings pending before it had been stayed pending the answer of the Court of Justice and that it could not, without new adversarial debates between the parties at the hearing and without a new judgment ruling on the question whether the applicants in the main proceedings still have an interest in having the CCE's judgments set aside, rule that the return decisions have disappeared from the legal order and that those applicants no longer have an interest in bringing proceedings.
- 43 It follows that, despite the express request of the Court of Justice to that effect, the Conseil d'État (Council of State) has not put the Court of Justice in a position to satisfy itself that, in view of circumstances arising subsequent to the references for a preliminary ruling, the questions referred for a preliminary ruling remained relevant to the outcome of the actions brought by the applicants in the main proceedings and therefore justified by a need inherent in the effective resolution of the disputes that the Conseil d'État (Council of State) is called upon to settle.
- 44 First of all, as noted in paragraphs 32 and 33 above, the instrument of cooperation between the Court of Justice and national courts that is provided for in Article 267 TFEU means that a national court must provide, in so far as it is at all possible, a useful answer to the questions addressed to it by the Court of Justice.
- 45 Merely referring to the position of a party to the main proceedings is not sufficient in that regard. If, by doing so, the referring court sets out the arguments of that party, it does not in any way indicate to what extent it intends to adopt those arguments as its own and whether it infers from them that an answer to the question referred is necessary to enable it to give judgment (see, to that effect, order of 4 October 2022, *Teritorialna direktsia na NAP – Plovdiv*, C-49/20, not published, EU:C:2022:770, paragraph 65 and the case-law cited).
- 46 Next, although, in accordance with the first paragraph of Article 23 of the Statute of the Court of Justice of the European Union, the decision by which the referring court refers a case to the Court of Justice suspends the proceedings, it nevertheless follows from the foregoing that that provision

cannot be understood as prohibiting that referring court, once it has referred questions to the Court of Justice, from hearing the parties regarding the answers to be given to the questions addressed to it in the context of the procedure of cooperation provided for in Article 267 TFEU.

- 47 As the Advocate General observed in point 24 of his Opinion, it should also be borne in mind that, in accordance with the Court's settled case-law, a provision of national law which prevents the procedure laid down in Article 267 TFEU from being implemented must be set aside without the court concerned having to request or await the prior setting aside of that provision of national law by legislative or other constitutional means (judgments of 14 December 1995, *Peterbroeck*, C-312/93, EU:C:1995:437, paragraph 13, and of 2 March 2021, *A.B. and Others (Appointment of Judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 141).
- 48 It follows that any national court is required to disapply any provision of its national law which would not allow it to provide a useful answer to the requests sent to it by the Court of Justice in the context of the procedure provided for in Article 267 TFEU.
- 49 Lastly, it should be added that the present case differs from that which gave rise to the judgment of 15 April 2021, *État belge (Circumstances subsequent to a transfer decision)* (C-194/19, EU:C:2021:270). In the latter case, first, the Conseil d'État (Council of State) had replied to the question put by the Court of Justice that the dispute pending before it still had a purpose and, secondly, the Court of Justice had not been informed that the Conseil d'État (Council of State) had developed case-law in which it held that, in cases similar to the dispute in the main proceedings, the applicants were to be regarded as having lost their interest in bringing proceedings.
- 50 It follows from all the foregoing considerations that the present requests for a preliminary ruling must be declared inadmissible.

Costs

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

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

The requests for a preliminary ruling from the Conseil d'État (Council of State, Belgium), made by decisions of 4 November 2021, are inadmissible.

[Signatures]