Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

8 May 2018*

(Reference for a preliminary ruling — Border control, asylum, immigration — Article 20 TFEU — Charter of Fundamental Rights of the European Union — Articles 7 and 24 — Directive 2008/115/EC — Articles 5 and 11 — Third-country national subject to an entry ban — Application for residence for the purposes of family reunification with a Union citizen who has not exercised freedom of movement — Refusal to examine the application)

In Case C-82/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings, Belgium), made by decision of 8 February 2016, received at the Court on 12 February 2016, in the proceedings

K.A.,

M.Z.,

M.J.,

N.N.N.,

O.I.O.,

R.I.,

B.A.

v

Belgische Staat,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, M. Ilešič and C. Vajda, Presidents of Chambers, J.–C. Bonichot, A. Arabadjiev, C. Toader, M. Safjan, E. Jarašiūnas, S. Rodin, F. Biltgen and C. Lycourgos (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 28 February 2017,

* Language of the case: Dutch.

after considering the observations submitted on behalf of:

– K.A., M.Z. and B.A., by J. De Lien, advocaat,

– M.J., by W. Goossens, advocaat,

– N.N.N., by B. Brijs, advocaat,

– the Belgian Government, by C. Pochet and M. Jacobs, acting as Agents, and by C. Decordier, D. Matray and T. Bricout, advocaten,

– the Greek Government, by T. Papadopoulou, acting as Agent,

– the European Commission, by E. Montaguti, C. Cattabriga and P.J.O. Van Nuffel, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 October 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 20 TFEU, Articles 7 and 24 of the Charter of Fundamental Rights of the European Union ('the Charter') and Articles 5 and 11 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 request has been made in the context of seven cases in proceedings between, on the one hand, K.A., M.Z., M.J., N.N.N., O.I.O., R.I. and B.A. respectively, and, on the other, the gemachtigde van de staatssecretaris voor Asiel en Migratie, Maatschappelijke Integratie en Armoedebestrijding (the representative of the Secretary of State for Asylum and Migration, Social Inclusion and Combating Poverty; 'the competent national authority') concerning the latter's decisions not to examine their respective applications for residence for the purposes of family reunification and, as the case may be, to issue an order to them to leave Belgium or to comply with an order to leave Belgium.

Legal context

European Union law

3 Recitals 2 and 6 of Directive 2008/115 state:

'(2) The Brussels European Council of 4 and 5 November 2004 called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.

…

(6) Member States should ensure that the ending of illegal stay of third-country nationals is carried out through a fair and transparent procedure. According to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay.

When using standard forms for decisions related to return, namely return decisions and, if issued, entry-ban decisions and decisions on removal, Member States should respect that principle and fully comply with all applicable provisions of this Directive.'

4 Article 1 of that directive provides:

'This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of [EU] law as well as international law, including refugee protection and human rights obligations.'

5 Article 2(1) of that directive provides:

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

6 Article 3 of that Directive provides:

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

…

2. "illegal stay" means the presence on the territory of a Member State of a third-country national who does not fulfil, or no longer fulfils, the conditions of entry as set out in Article 5 of [Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1)] or other conditions for entry, stay or residence in that Member State;

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 the enforcement of the obligation to return, namely the physical transportation out of the Member State;

6. "entry ban" means an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision;

…'

7 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.'

8 Article 6(1) of that directive is worded as follows:

'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.

…'

9 Article 7(4) of that directive is worded as follows:

'If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.'

10 Article 11 of that directive provides:

'1. Return decisions shall be accompanied by an entry ban:

(a) if no period for voluntary departure has been granted; or

(b) if the obligation to return has not been complied with.

In other cases return decisions may be accompanied by an entry ban.

2. The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security.

3. Member States shall consider withdrawing or suspending an entry ban where a third-country national who is the subject of an entry ban issued in accordance with paragraph 1, second subparagraph, can demonstrate that he or she has left the territory of a Member State in full compliance with a return decision.

Victims of trafficking in human beings who have been granted a residence permit pursuant to Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [(OJ 2004 L 261, p. 19)] shall not be subject of an entry ban without prejudice to paragraph 1, first subparagraph, point (b), and provided that the third-country national concerned does not represent a threat to public policy, public security or national security.

Member States may refrain from issuing, withdraw or suspend an entry ban in individual cases for humanitarian reasons.

Member States may withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons.

…'

Belgian law

11 The first subparagraph of Article 7 of the loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (the Law of 15 December 1980 on the admission, residence, establishment and removal of foreign nationals) (*Moniteur belge* of 31 December 1980, p. 14584), in the version thereof applicable to the main proceedings ('the Law of 15 December 1980'), provides:

'Without prejudice to more favourable provisions that may be contained in an international treaty, the Minister or his representative may give to a foreign national, who is neither authorised not permitted to stay more than three months or to settle in [Belgium], an order to leave [Belgium] within a specified period or must, in the situations referred to in paragraphs 1°, 2°, 5°, 11° or 12°, issue an order to leave [Belgium] within a specified period:

…

12° if the foreign national is the subject of an entry ban that has neither been suspended nor withdrawn.

…'

12 Article 40a(2) of that law provides:

'The following shall be regarded as family members of a Union citizen:

1° the spouse, or the foreign national with whom a registered partnership was concluded which in Belgium is regarded as being equivalent to marriage, who accompanies him or joins him;

2° the partner, who accompanies him or joins him, with whom the Union citizen has concluded a statutory registered partnership.

The partners must satisfy the following conditions:

(a) provide evidence that their duly established relationship is permanent and stable.

The permanence and stability of that relationship shall be demonstrated:

– if the partners provide evidence that they have cohabited in Belgium or in another country continuously for a period of at least one year before the application;

– if the partners provide evidence that they have known each other for at least two years before the application …;

– if the partners are the parents of a child;

(b) live together;

(c) both be more than 21 years old;

(d) be unmarried and not be in a permanent and stable partnership with another person;

…

3° the descendants of the Union citizen and descendants of his or her spouse or partner referred to in paragraphs 1° or 2°, who are under 21 years of age and dependent on them and who accompany them or join them …;

…

5° the father or mother of a Union citizen who is a minor as referred to in Article 40(4)(1) and (2) provided that the child is dependent on the parent and that the parent is actually responsible for the care of the child.'

13 Article 40b of that law provides:

'The provisions of this chapter shall apply to the family members of a Belgian citizen in so far as they relate to:

– family members mentioned in Article 40a(2)(1)(1) to (3), who accompany or join the Belgian citizen;

– family members mentioned in Article 40a(2)(1)(4) who are the father and mother of a minor Belgian citizen, who prove their identity with an identity document, and who accompany or join the Belgian citizen.

As regards the family members referred to in Article 40a(2)(1), 1° to 3°, the Belgian citizen must demonstrate:

– that he possesses a means of subsistence that is stable, adequate and regular. …

– that he has available acceptable accommodation enabling him to receive there the family member(s) seeking to join him ...'.

14 Article 43 of that Law, which also applies to the family members of a Belgian citizen pursuant to Article 40b of that law, is worded as follows:

'Entry and residence may only be denied to Union citizens and their family members on grounds of public policy, public security or public health and subject to the following limitations:

1° These grounds may not be invoked to serve economic ends;

2° Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society; justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

…

Where the Minister or his representative intends to bring to an end the residence of a Union citizen or a family member on grounds of public policy, public security or public health, account shall be taken of the length of the period of residence of the person concerned in [Belgium], his or her age, state of health, family and economic situation, social and cultural integration and the extent of his or her links with the country of origin.'

15 Article 74/11 of the Law of 15 December 1980 provides:

'§1. The duration of the entry ban shall be determined by taking account of the specific circumstances of each case.

The decision on removal shall be accompanied by an entry ban of a maximum of three years in the following cases:

1° if no period for voluntary departure was granted; or

2° if an earlier decision on removal was not enforced.

The maximum period of three years referred to in the second paragraph may be extended to a maximum of five years if:

1° the third-country national has committed fraud or has used other illegal means in order to obtain permission to stay or to retain his right to stay;

2° the third-country national has entered into a marriage, a partnership or an adoption solely in order to obtain permission to stay or to retain his right to stay in [Belgium].

The decision on removal may be accompanied by an entry ban exceeding five years, if the third-country national represents a serious threat to public policy or national security.

§ 2. …

The Minister or his representative may refrain from issuing an entry ban in individual cases for humanitarian reasons.

§ 3. The entry ban shall take effect on the day on which the entry-ban decision is notified.

The entry ban cannot run counter to the provisions regarding the right to international protection, as defined in Articles 9b, 48/3 and 48/4.'

16 Article 74/12 of that Law states:

'§ 1. The Minister or his representative may withdraw or suspend the entry ban for humanitarian reasons

…

Save where provided otherwise by international treaty, a law or a royal decree, the third-country national must lodge a reasoned application with the competent Belgian diplomatic mission or consul in his place of residence or stay abroad.

§ 2. The third-country national may lodge an application with the Minister or his representative to withdraw or suspend the entry ban on the basis of compliance with the removal obligation which had been issued earlier, if he provides written evidence that he left Belgian territory in full compliance with the removal decision.

§ 3. A decision on an application to withdraw or suspend an entry ban shall be taken within a maximum of four months following the lodging of that application. If no decision is taken within four months, the decision shall be deemed to be a refusal.

§ 4. During the examination of the application for withdrawal or suspension the third-country national concerned shall have no right of entry into or stay in [Belgium].

…'

17 Article 74/13 of that Law provides:

'When taking a decision on removal the Minister or his 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

18 It is apparent from the order for reference that the applicants in the main proceedings are all third-country nationals who are family members of Belgian citizens who have not exercised their right of freedom of movement or establishment. Those applicants are all individuals to whom a return decision has been issued, that decision being accompanied by a decision prohibiting their entry into the Member State concerned (an 'entry ban'). For each of the applicants, that entry ban has become final and, according to the referring court, under national law, that ban cannot, as a general rule, be extinguished or temporarily suspended unless there is lodged, outside Belgium, an application for the withdrawal or suspension of that entry ban.

19 The applicants in the main proceedings thereafter lodged, in Belgium, an application for a residence permit, on the basis of their status as either a dependent relative in the descending line of a Belgian citizen (K.A. and M.Z.), the parent of a minor Belgian child (M.J., N.N.N., O.I.O. and R.I.) or a lawfully cohabiting partner in a stable relationship with a Belgian citizen (B.A.). Those applications were not examined by the competent national authority on the ground that the applicants in the main proceedings were persons who were subject to an entry ban that remained in force. The applicants challenged the decisions at issue before the referring court.

20 It is more specifically stated in the order for reference, with respect to, first, K.A., that she, a citizen of Armenia, was issued, on 27 February 2013, with an order to leave Belgium, accompanied by an entry ban with a length of three years, on the ground that she had not complied with her obligation to return and that no period for voluntary departure had been granted to her, since she was considered to be a threat to public policy, after she was apprehended in the act of shoplifting. On 10 February 2014 K. A. and her two sons submitted, when they were in Belgium, an application for residence for the purposes of family reunification on the basis that she and her sons are dependent relatives in the descending line of her father, who is a Belgian national. On 28 March 2014, the competent national authority issued its decision in the form of an order to leave [Belgium], whereby it refused to examine the application for residence because of the entry ban imposed on 27 February 2013.

21 Second, with respect to M.Z., who is a Russian national, he was notified, on 2 July 2014, of an order to leave Belgium and an entry ban of a length of three years, on the ground that he had not complied with his obligation to return and that no period for voluntary departure had been granted to him, since he was considered to present a risk to public policy after being charged with theft by breaking

into a garage. On 8 September 2014 M.Z. was forcibly repatriated to Russia. On 5 November 2014, when M.Z. was again in Belgium, he made an application for a residence card, on the basis of his status as a dependent relative in the descending line of his Belgian father. On 29 April 2015 the competent national authority refused to examine that application, because of the existence of the entry ban imposed on him, and, in addition, enjoined him to comply with an order to leave Belgium.

22 Third, as regards M.J., who is a citizen of Uganda, she was ordered, on two occasions, to leave Belgium, on 13 January 2012 and on 12 November of the same year. On 11 January 2013, she was notified of an entry ban of three years, on the ground that she had not complied with her obligations to return and that no period for voluntary departure had been granted to her, in the light of the risk of absconding, due to her having no fixed address in Belgium, and the fact that she was considered a threat to public policy after charges of assault were brought by the police. On 20 February 2014 M.J. made an application, while she was in Belgium, for a residence card, on the basis of her status as the parent of a minor child of Belgian nationality, born on 26 October 2013. By a decision of 30 April 2014, the competent national authority refused to examine that application for residence for the purposes of family reunification because of the existence of the entry ban of 11 January 2013, and at the same time ordered her to leave Belgium.

23 Fourth, as regards N.N.N., who is a national of Kenya, she was the subject of two orders to leave Belgium, on 11 September 2012 and 22 February 2013 respectively. Subsequently, on 3 April 2014 N.N.N. gave birth to a daughter who obtained Belgian nationality, through her father. On 24 April 2014 N.N.N. was the subject of a further order to leave Belgium and was notified of an entry ban of three years on the ground that she had not complied with her obligation to return. On 9 September 2014 N.N.N. made an application, when she was in Belgium, for a residence card, on the basis of her status as a parent of a minor child of Belgian nationality. In support of that application, she produced evidence of payment by her daughter's father of a maintenance contribution and a letter in which the father states that he is unable to be fully responsible for the care of their daughter and that it is preferable that the child remain with her mother. On 4 March 2015 the competent national authority refused to examine her application for residence for the purposes of family reunification, because of the entry ban imposed on N.N.N., and, in addition, enjoined her to comply with an order to leave Belgium.

24 Fifth, with respect to O.I.O., who is a Nigerian national, he married R.C., a Belgian national, and they have a daughter who has Belgian nationality. On 11 May 2010 O.I.O. was convicted of assault. After her divorce from O.I.O., R.C. was awarded exclusive parental authority with respect to their daughter on 6 April 2011. The child resides with her mother, who receives family allowances and other social security benefits. Further, the right of O.I.O. to have personal contact with his daughter has been temporarily suspended. Because of the divorce from R.C., a decision to revoke O.I.O.'s right of residence, accompanied by an order to leave Belgium, was adopted. On 28 May 2013 he was notified of an entry ban of eight years because he had not complied with his obligation to return and no period for voluntary departure had been granted to him, on the ground that he presented a serious, real and present threat to public policy. On 6 November 2013 O.I.O. made an application, while he was in Belgium, for a residence card, based on his status as the parent of a minor Belgian child. On 30 April 2014 the competent national authority refused to examine that application because of the existence of the entry ban of 28 May 2013, while at the same time ordering O.I.O. to leave Belgium.

25 Sixth, as regards the situation of R.I., who is an Albanian national, it is stated in the order for reference that he is the father of a Belgian child. After the birth of that child, his right of residence, which he had obtained fraudulently, was revoked. He was also notified of an entry ban of five years, on 17 December 2012, because he had resorted to fraud or other illegal means in order to be granted a right of residence or to retain his right of residence. Thereafter, R.I. entered into marriage, in Albania, with the Belgian mother of his child. On 21 August 2014 R.I. made an application, when he was again in Belgium, for a residence card, based on his status as the parent of a minor Belgian child. On

13 February 2015 the competent national authority refused to examine that application, because of the entry ban imposed on him, and, in addition, enjoined him to comply with an order to leave Belgium.

26 Seventh, as regards B.A., who is a national of Guinea, he was subject to two orders to leave Belgium, dated 23 January 2013 and 29 May 2013. On 13 June 2014 he was notified of an entry ban of three years, on the ground that he had not complied with his obligation to return. Thereafter, B.A., while he was in Belgium, entered into a cohabitation agreement with his Belgian partner and made an application for a residence card, based on his status as the lawfully cohabiting partner of a Belgian citizen with whom he has a permanent and stable relationship. On 21 May 2015, the competent national authority refused to examine the application for residence for the purposes of family reunification, because of the existence of the entry ban of 13 June 2014, and, in addition, enjoined him to comply with an order to leave Belgium.

27 The referring court states, first, that, in accordance with a national practice, which is applied in all cases with no room for adaptation to a particular situation, the applications for residence for the purposes of family reunification submitted by the applicants in the main proceedings were not examined, and were therefore not examined on their merits, on the ground that those third-country nationals were individuals who were each subject to an entry ban. Accordingly, no account was taken, in connection with those applications, of family life, or, in the appropriate cases, of the interest of a child, or of the status as Union citizens of the Belgian family members. The referring court also states that it is the view of the competent national authority that the applicants in the main proceedings must first leave Belgium, then make an application for the removal or suspension of the entry ban, before they can submit an application for residence for the purposes of family reunification.

28 The referring court states, in that regard, that, in accordance with national law, a decision on a request for the withdrawal or suspension of an entry ban, made in the country of origin of the person concerned, must be adopted within four months following the making of the request. If that does not happen, the decision is to be deemed to be a refusal. Further, only after a decision is adopted on the withdrawal or suspension of the entry will any decision be taken, within a period of six months, on a visa application submitted, for the purposes of family reunification, by the third-country national in his or her State of origin.

29 The referring court finds, next, that, the cases brought before it do not fall within the scope of either Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12) or of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77). Further, the referring court states that the various Union citizens concerned in these cases by reason of the family ties connecting them to the applicants in the main proceedings do not travel regularly to another Member State as workers or service providers, and that those Union citizens have not developed or strengthened a family life with those applicants during a genuine period of residence in a Member State other than Belgium.

30 The referring court observes however that the situation of a Union citizen who has not exercised his or her right of freedom of movement cannot on the basis of that fact alone be assimilated to a purely internal situation, in accordance with the judgments of 8 March 2011, Ruiz Zambrano (C-34/09, EU:C:2011:124), and of 5 May 2011, McCarthy (C-434/09, EU:C:2011:277).

31 The referring court also states that, while the principles laid down in the judgment of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), are applicable only in exceptional circumstances, it does not follow from the Court's case-law that those principles are limited to situations in which there is a biological link between a third-country national, for whom a right of residence is sought, and a Union citizen who is a young child. The Court's case-law indicates that account must be taken of whether

there is a relationship of dependency between the Union citizen who is a young child and the third-country national, since that dependence may entail that the Union citizen will in fact be compelled to leave the territory of the European Union if the third-country national on whom the child is dependent is not granted a right of residence.

32 In those circumstances, the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings, Belgium) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Should EU law, in particular Article 20 TFEU and Articles 5 and 11 of [Directive 2008/115], read in the light of Articles 7 and 24 of the Charter, be interpreted as precluding in certain circumstances a national practice whereby a residence application, lodged by a family member who is a third-country national in the context of family reunification with an Union citizen in the Member State where the Union citizen concerned lives and of which he is a national and who has not made use of his right of freedom of movement and establishment (a "static Union citizen"), is not examined — whether or not accompanied by a removal decision — for the sole reason that the family member concerned who is a third-country national is subject to a valid entry ban with a European dimension?

(a) Is it important when assessing such circumstances that there is a relationship of dependence between the family member who is a third-country national and the static Union citizen which goes further than a mere family tie? If so, what factors play a role in determining the existence of a relationship of dependence? Would it be useful in that regard to refer to case-law relating to the existence of a family life under Article 8 [of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ("ECHR")] and Article 7 of the Charter?

(b) With reference to minor children in particular, does Article 20 TFEU require more than a biological tie between the parent who is a third-country national and the child who is a Union citizen? Is it important in that regard that cohabitation is demonstrated, or do emotional and financial ties suffice, such as residential or visiting arrangements and the payment of maintenance? Would it be useful in that regard to refer to what was stated in the Court of Justice judgments of 10 July 2014, *Ogieriakhi* (C-244/13, EU:C:2014:2068, paragraphs 38 and 39); of 16 July 2015, *Singh and Others* (C-218/14, EU:C:2015:476, paragraph 54); and of 6 December 2012, *O.* and *S.* (C-356/11 and C-357/11, EU:C:2012:776, paragraph 56)? See also in that regard [the judgment of 10 May 2017, *Chavez-Vilchez and Others* (C-133/15, EU:C:2017:354)].

(c) Is the fact that the family life was created at a moment when the third-country national was already subject to an entry ban and thus aware of the fact that his stay in the Member State was illegal, important for the assessment of such circumstances? Could that fact be of relevance to combat the possible abuse of residence procedures in the context of family reunification?

(d) Is the fact that no legal remedy within the meaning of Article 13(1) of Directive 2008/115/EC was applied for against the decision to impose an entry ban or the fact that the appeal against the decision to impose an entry ban was dismissed important for the assessment of such circumstances?

(e) Is the fact that the entry ban was imposed on grounds of public policy or on grounds of irregular stay a relevant factor? If so, must an examination also be undertaken of whether the third-country national concerned also represents a genuine, present and sufficiently serious threat to one of the fundamental interests of society? In that regard, can Articles 27 and 28 of Directive 2004/38/EC, which were transposed in Articles 43 and 45 of the [Law of 15 December 1980], and the associated case-law of the Court of Justice on public policy, be applied by analogy to family members of static Union citizens (see [the judgments of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675), and of 13 September 2016, *CS* (C-304/14, EU:C:2016:674)])?

(2) Should EU law, in particular Article 5 of Directive 2008/115 and Articles 7 and 24 of the Charter, be interpreted as precluding a national practice whereby a valid entry ban can be invoked in order not to consider a subsequent application [for residence for the purposes of] family reunification with a static Union citizen, lodged in the territory of a Member State, without taking due account of family life and the best interests of the children involved, which were mentioned in that subsequent application for family reunification?

(3) Should EU law, in particular Article 5 of Directive 2008/115 and Articles 7 and 24 of the Charter, be interpreted as precluding a national practice whereby a decision on removal is taken with regard to a third-country national who is already subject to a valid entry ban, without taking due account of family life and the best interests of the children involved, which were mentioned in a subsequent application for [residence for the purposes of] family reunification with a static Union citizen, i.e. after the entry ban was imposed?

(4) Does Article 11(3) of Directive 2008/115 imply that a third-country national must in principle lodge an application for the withdrawal or suspension of a final and valid entry ban from outside the European Union or are there circumstances in which he can also lodge that application in the European Union?
   (a) Must the third and fourth subparagraphs of Article 11(3) of Directive 2008/115 be understood to mean that the requirement laid down in the first subparagraph of Article 11(3) of the said Directive, to the effect that the withdrawal or the suspension of the entry ban can only be considered if the third-country national concerned is able to demonstrate that he or she has left the territory in full compliance with a return decision, must plainly have been met in every individual case or in all categories of cases?
   (b) Do Articles 5 and 11 of Directive 2008/115/EC preclude an interpretation whereby a residence application in the context of family reunification with a static Union citizen, who has not exercised his right of freedom of movement and establishment, is regarded as an implicit (temporary) application to withdraw or suspend the valid and final entry ban whereby, if it is shown that the residence conditions have not been met, the valid and final entry ban is revived?
   (c) Is the fact that the obligation to lodge a request for withdrawal or suspension in the country of origin possibly entails only a temporary separation between the third-country national and the static Union citizen, a relevant factor? Are there nevertheless circumstances in which Articles 7 and 24 of the Charter preclude such a temporary separation?
   (d) Is the fact that the only effect of the obligation to lodge a request for withdrawal or suspension in the country of origin is that the Union citizen would, if necessary, only have to leave the territory of the European Union in its entirety for a limited time, a relevant factor? Are there circumstances in which Article 20 TFEU nevertheless precludes the fact that the static Union citizen would have to leave the territory of the European Union in its entirety for a limited time?'

The request to have the oral part of the procedure reopened

33 Following the delivery of the Opinion of the Advocate General, the Belgian Government, by document lodged at the Registry of the Court on 12 December 2017, requested the reopening of the oral part of the procedure so that it might be given the opportunity, first, to respond to the Opinion on the ground it allegedly contained a misinterpretation of Directive 2008/115, and, second, to present its observations on the judgments of 26 July 2017, *Ouhrami* (C-225/16, EU:C:2017:59), and of 14 September 2017, *Petrea* (C-184/16, EU:C:2017:684).

34 As regards the criticism made of the Advocate General's Opinion, it must be borne in mind, first, that the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court make no provision for interested parties to submit observations in response to the Advocate General's Opinion (judgment of 25 October 2017, *Polbud — Wykonawstwo*, C-106/16, EU:C:2017:804, paragraph 23 and the case-law cited).

35 Second, under the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement. In this regard, the Court is not bound either by the Opinion delivered by the Advocate General or by the reasoning which led to that Opinion. Consequently, a party's disagreement with the Opinion of the Advocate General, irrespective of the questions examined in the Opinion, cannot in itself constitute grounds justifying the reopening of the oral procedure (judgment of 25 October 2017, *Polbud — Wykonawstwo*, C-106/16, EU:C:2017:804, paragraph 24 and the case-law cited).

36 For the remainder, it must be observed that the Court may at any time, pursuant to Article 83 of its Rules of Procedure, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information, or where the case must be decided on the basis of an argument which has not been debated between the interested parties (judgment of 22 June 2017, *Federatie Nederlandse Vakvereniging and Others*, C-126/16, EU:C:2017:489, paragraph 33).

37 However, in this case, the Court considers, after hearing the Advocate General, that it has all the material necessary to enable it to give a decision on the reference for a preliminary ruling before it and that the case does not have to be examined in the light of an argument that has not been debated before it.

38 In the light of the foregoing, the Court considers that there is no need to reopen the oral part of the procedure.

Consideration of the questions referred

Preliminary observations

39 First, it should at the outset be noted that the situations at issue in the main proceedings all involve the refusal of the competent national authority to examine an application for residence for the purposes of family reunification, submitted in Belgium by a third-country national family member of a Belgian citizen, as either a relative in the descending line, parent or lawfully cohabiting partner of a Belgian citizen, on the ground that the third-country national concerned was subject to an entry ban. The referring court states that, under national law, the applicants in the main proceedings must, as a general rule, submit, in their country of origin, a request for the withdrawal or suspension of the entry ban imposed on them before they can validly submit an application for residence for the purposes of family reunification.

40 Second, the referring court adds that, in each of the seven joined cases in the main proceedings, the Belgian citizen concerned has never exercised his right to freedom of movement within the European Union. Consequently, the third-country national family members of the Belgian citizens concerned cannot claim a derived right of residence either under Directive 2004/38 or under Article 21 TFEU (see, to that effect, judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraphs 52 to 54).

41 Last, it is apparent from the order for reference that the 'decisions on removal' adopted by the competent national authority involve the imposition of an obligation, on the applicants in the main proceedings, to leave Belgium, and that those decisions are accompanied by an entry ban. As stated by the Advocate General in point 44 of her Opinion, such decisions consequently must, for the purposes of an examination of the questions referred to the Court, be regarded as 'return decisions', within the meaning of Article 3(4) of Directive 2008/115 (see also, to that effect, judgment of 18 December 2014, *Abdida*, C-562/13, EU:C:2014:2453, paragraph 39) .

The first two questions

42 By the first two questions, which can be examined together, the referring court seeks, in essence, to ascertain:

– whether Articles 5 and 11 of Directive 2008/115 and Article 20 TFEU, read, when necessary, in the light of Articles 7 and 24 of the Charter, must be interpreted as precluding a practice of a Member State that consists in not examining an application for residence for the purposes of family reunification, submitted on its territory by a third-country national family member of a Union citizen who is a national of that Member State and who has never exercised his right of freedom of movement, solely on the ground that that third-country national is subject to a ban on entering that territory, without there being any examination of whether there exists a relationship of dependency between that Union citizen and that third-country national of such a kind that, in the event of a refusal to grant a derived right of residence to the third-country national, the Union citizen would, in fact, be compelled to leave the territory of the European Union as a whole and would accordingly be deprived of the genuine enjoyment of the substance of the rights conferred by his status;

– if the answer is in the affirmative, what factors should be taken into account in order to assess whether there is such a relationship of dependency and, when the Union citizen is a minor, what importance should be given to the existence of family ties, whether natural or legal, to where the Union citizen who is a national of the Member State concerned lives and to who is responsible for the financial support of that Union citizen;

– what might be the effect, against that background, of:

  – the fact that the relationship of dependency relied on by the third-country national in support of his or her application for residence for the purposes of family reunification comes into existence after the imposition of an entry ban on that third-country national;

  – the fact that that entry ban may have become final at the time when the third-country national submits his or her application for residence for the purposes of family reunification; and

  – the fact that that entry ban may be justified by failure to comply with an obligation to return or on public policy grounds.

The failure to examine an application for residence for the purposes of family reunification because the applicant is subject to a ban on entering the Member State concerned

43 It must be determined, first, whether Articles 5 and 11 of Directive 2008/115 or Article 20 TFEU, read, where necessary, in the light of Articles 7 and 24 of the Charter, must be interpreted as precluding a practice of a Member State that consists in not examining an application for residence for the purposes of family reunification that is submitted, on the territory of that Member State, by a third-country national who is the subject of an entry ban.

– *Directive 2008/115*

44 It is important at the outset to bear in mind that Directive 2008/115 concerns only the return of illegally staying third-country nationals and is thus not designed to harmonise in their entirety Member State rules on the stay of foreign nationals (judgment of 1 October 2015, *Celaj*, C-290/14, EU:C:2015:640, paragraph 20). Accordingly, the common standards and procedures established by Directive 2008/115 concern only the adoption of return decisions and the implementation of those decisions (judgment of 6 December 2011, *Achughbabian*, C-329/11, EU:C:2011:807, paragraph 29).

45 In particular, there is no provision in that directive that lays down rules concerning how to deal with an application for residence for the purposes of family reunification that is submitted, as in the cases in the main proceedings, after the adoption of a return decision accompanied by an entry ban. Further, the refusal to examine such an application in the circumstances described in paragraph 27 of this judgment is not liable to impede the application of the return procedure laid down by that directive.

46 It follows that Directive 2008/115, in particular Articles 5 and 11 thereof, must be interpreted as not precluding a practice of a Member State that consists in not examining an application for residence for the purposes of family reunification, submitted on its territory by a third-country national family member of a Union citizen who is a national of that Member State and who has never exercised his or her right to freedom of movement, solely on the ground that that third-country national is subject to a ban on entering the territory of that Member State.

– *Article 20 TFEU*

47 It must be recalled, first, that, in accordance with the Court's settled case-law, Article 20 TFEU confers on every individual who is a national of a Member State citizenship of the Union, which is intended to be the fundamental status of nationals of the Member States (see, inter alia, judgments of 20 September 2001, *Grzelczyk*, C-184/99, EU:C:2001:458, paragraph 31; of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124, paragraph 41, and of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 69 and the case-law cited).

48 Citizenship of the Union confers on each Union citizen a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and restrictions laid down by the Treaty and the measures adopted for their implementation (judgment of 13 September 2016 *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 70 and the case-law cited).

49 In that context, the Court has held that Article 20 TFEU precludes national measures, including decisions refusing a right of residence to the family members of a Union citizen, which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status (judgments of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124, paragraph 42; of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 45; and of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 61).

50 On the other hand, the Treaty provisions on citizenship of the Union do not confer any autonomous right on third-country nationals. Any rights conferred on third-country nationals are not autonomous rights of those nationals but rights derived from those enjoyed by a Union citizen. The purpose and justification of those derived rights are based on the fact that a refusal to allow them would be such as to interfere, in particular, with a Union citizen's freedom of movement (judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 62 and the case-law cited).

51 In this connection, the Court has previously held that there are very specific situations in which, despite the fact that secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of his freedom of movement, a right of residence must nevertheless be granted to a third-country national who is a family member of that Union citizen, since the effectiveness of Union citizenship would otherwise be undermined, if, as a consequence of refusal of such a right, that citizen would be obliged in practice to leave the territory of the European Union as a whole, thus depriving him of the genuine enjoyment of the substance of the rights conferred by that status (see, to that effect, judgments of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124, paragraphs 43 and 44, and of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 63).

52 However, a refusal to grant a right of residence to a third-country national is liable to undermine the effectiveness of Union citizenship only if there exists, between that third-country national and the Union citizen who is a family member, a relationship of dependency of such a nature that it would lead to the Union citizen being compelled to accompany the third-country national concerned and to leave the territory of the European Union as a whole (see, to that effect, judgments of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, paragraphs 65 to 67; of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 56; and of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 69).

53 In this case, it is clear that the practice at issue in the main proceedings concerns the procedural rules that govern, in relation to an application for residence for the purposes of family reunification, whether a third-country national may rely on the existence of a derived right under Article 20 TFEU.

54 In that regard, while it is indeed for the Member States to determine the rules on how to give effect to the derived right of residence which a third-country national must, in the very specific situations referred to in paragraph 51 of this judgment, be granted under Article 20 TFEU, the fact remains that those procedural rules cannot, however, undermine the effectiveness of Article 20 (see, to that effect, judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 76).

55 The consequence of the national practice at issue in the main proceedings is that before an application for residence for the purposes of family reunification will be examined and before any derived right of residence, under Article 20 TFEU, may be granted, the third-country national concerned is obliged first to leave the territory of the European Union in order to submit a request for the withdrawal or suspension of the entry ban to which he or she is subject. It is stated also in the order for reference that no examination of whether there may be a relationship of dependency between that third-country national and the Union citizen who is a family member, as set out in paragraph 52 of this judgment, takes place until the third-country national has obtained the withdrawal or suspension of his or her entry ban.

56 Contrary to what is argued by the Belgian Government, the obligation thus imposed, by the national practice at issue, on the third-country national to leave the territory of the European Union in order to request the withdrawal or suspension of the entry ban to which he is subject is liable to undermine the effectiveness of Article 20 TFEU if compliance with that obligation has the consequence that, because of the existence of a relationship of dependency between that third-country national and a Union citizen who is a family member, the Union citizen is, in practice, compelled to accompany the third-country national and, therefore, to leave, also, the territory of the European Union for a period of time that, as stated by the referring court, is indefinite.

57 Consequently, while it is true that a refusal by a third-country national to comply with the obligation to return and to cooperate in the context of a removal procedure cannot enable him to avoid, in whole or in part, the legal effects of an entry ban (see, to that effect, judgment of 26 July 2017, *Ouhrami*, C-225/16, EU:C:2017:590, paragraph 52), the fact remains that, when the competent national authority receives, from a third-country national, an application for a right of residence for

the purposes of family reunification with a Union citizen who is a national of the Member State concerned, that authority cannot refuse to examine that application solely on the ground that the third-country national is the subject of a ban on entering that Member State. It is the duty of that authority, on the contrary, to examine that application and to assess whether there exists, between the third-country national and Union citizen concerned, a relationship of dependency of such a nature that a derived right of residence must, as a general rule, be accorded to that third-country national, under Article 20 TFEU, since otherwise the Union citizen would be compelled, in practice, to leave the territory of the European Union as a whole and, therefore, would be deprived of the genuine enjoyment of the substance of the rights conferred on him by that status. In such circumstances, the Member State concerned must withdraw or, at the least, suspend the return decision and the entry ban to which that third-country national is subject.

58 The objective pursued by Article 20 TFEU would be defeated if a third-country national were compelled to leave, for an indefinite period, the territory of the European Union in order to obtain a withdrawal or suspension of the ban on entering that territory to which he is subject without it having been ascertained, first, that there does not exist, between that third-country national and a Union citizen who is a family member, a relationship of dependency of such a nature that the Union citizen would be compelled to accompany the third-country national to his or her country of origin, even though, precisely because of that relationship of dependency, a derived right of residence ought, as a general rule, to be granted to that third-country national under Article 20 TFEU.

59 Contrary to what is maintained by the Belgian Government, Article 3(6) and Article 11(3) of Directive 2008/115 cannot call into question that conclusion.

60 It is true that, pursuant to the first subparagraph of Article 11(3) of Directive 2008/115, a Member State may consider withdrawing or suspending an entry ban that accompanies a return decision that grants a period for voluntary departure, where the third-country national has left the territory of that Member State in compliance with that decision. However, it must be observed that, in the third and fourth subparagraphs of Article 11(3), the EU legislature provided that the Member States may withdraw or suspend an entry ban, in individual cases, for reasons other than that mentioned in the first subparagraph of Article 11(3), and it is not stated in the third and fourth subparagraphs that the third-country national on whom an entry ban has been imposed has to have left the territory of the Member State concerned.

61 Consequently, Article 3(6) and Article 11(3) of Directive 2008/115 do not, contrary to what is maintained by the Belgian Government, prohibit Member States from withdrawing or suspending an entry ban, where the return decision has not been complied with and the third-country national is in their territory.

62 It follows that Article 20 TFEU must be interpreted as precluding a practice of a Member State that consists in not examining an application for residence for the purposes of family reunification, submitted on its territory by a third-country national family member of a Union citizen who is a national of that Member State and who has never exercised his or her right to freedom of movement, solely on the ground that that third-country national is the subject of a ban on entering the territory of that Member State, without any examination of whether there exists a relationship of dependency between that Union citizen and that third-country national of such a nature that, in the event of a refusal to grant a derived right of residence to the third-country national, the Union citizen would, in practice, be compelled to leave the territory of the European Union as a whole and thereby be deprived of the genuine enjoyment of the substance of the rights conferred by that status.

The existence of a relationship of dependency capable of justifying a derived right of residence under Article 20 TFEU in the main proceedings

63 Second, it is necessary to examine the circumstances in which a relationship of dependency, capable of justifying a derived right of residence under Article 20 TFEU, may come into being in the joined cases in the main proceedings.

64 In that regard, it must be observed that the actions in the main proceedings brought by K.A., M.Z. and B.A. respectively concern applications for residence for the purposes of family reunification brought by adult third-country nationals, of whom the father or partner, in each case also an adult, is a Belgian citizen. On the other hand, the actions in the main proceedings brought by M.J., N.N.N., O.I.O. and R. I. concern applications for residence for the purposes of family reunification brought by third-country nationals who are adults, a minor child of whom is a Belgian citizen.

65 As regards, first, the cases in the main proceedings where the respective applicants are K.A., M. Z. and B.A., it must, at the outset, be emphasised that, unlike minors and a fortiori minors who are young children, such as the Union citizens concerned in the case that gave rise to the judgment of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), an adult is, as a general rule, capable of living an independent existence apart from the members of his family. It follows that the identification of a relationship between two adult members of the same family as a relationship of dependency, capable of giving rise to a derived right of residence under Article 20 TFEU, is 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 family on whom he is dependent.

66 In this instance, in none of the three cases in the main proceedings where the family relationship at issue is one between adults does the file submitted to the Court appear to suggest a relationship of dependency of such a nature as to justify granting to the third-country national a derived right of residence under Article 20 TFEU.

67 First, as regards K.A., the referring court does no more than state that she is dependent on her father, who is a Belgian national, but it is not suggested, either in the order for reference or in the observations submitted by K.A., that that relationship of dependency might be such as to compel her father to leave the territory of the European Union in the event that there was a refusal to grant K.A. a right of residence in Belgium.

68 Second, as regards M.Z., he is dependent on his Belgian father only for financial support. As stated, in essence, by the Advocate General in point 79 of her Opinion, such a relationship of purely financial dependency is not plainly one that would compel M.Z.'s father, who is a Belgian citizen, to leave the territory of the European Union as a whole, in the event that M.Z. were to be refused a right of residence in Belgium.

69 Third, there is nothing to indicate, in the order for reference, that the situation of B.A. and his lawful cohabitant involves dependency of any kind.

70 As regards, on the other hand, the actions in the main proceedings brought by M.J., N.N.N., O.I.O. and R.I., it must be recalled that the Court has already held that factors of relevance, for the purposes of determining whether a refusal to grant a derived right of residence to a third-country national parent of a child who is a Union citizen means that that child is deprived of the genuine enjoyment of the substance of the rights conferred on him by that status, by compelling that child, in practice, to accompany the parent and therefore leave the territory of the European Union as a whole, include the question of who has custody of the child and whether that child is legally, financially or emotionally dependent on the third-country national parent (see, to that effect, judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 68 and the case-law cited).

71 More particularly, in order to assess the risk that a particular child, who is a Union citizen, might be compelled to leave the territory of the European Union and thereby be deprived of the genuine enjoyment of the substance of the rights conferred on him by Article 20 TFEU if the child's third-country national parent were to be refused a right of residence in the Member State concerned, it is important to determine, in each case at issue in the main proceedings, which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third-country national parent. As part of that assessment, the competent authorities must take account of the right to respect for family life, as stated 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 (judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 70).

72 The fact that the other parent, where that parent is a Union citizen, is actually able — and willing — to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would be compelled to leave the territory of the European Union if a right of residence were refused to that third-country national. In reaching such a conclusion, 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 emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium (judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 71).

73 Accordingly, the fact that the third-country national parent lives with the minor child who is a Union 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 is not a prerequisite (see, to that effect, judgment of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 54).

74 On the other hand,, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the European Union, is not sufficient in itself to support the view that the Union citizen will be compelled to leave the territory of the European Union if such a right is not granted (see, to that effect, judgments of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, paragraph 68, and of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 52).

75 Accordingly, the existence of a family link, whether natural or legal, between the minor Union citizen and his third-country national parent cannot be sufficient ground to justify the grant, under Article 20 TFEU, of a derived right of residence to that parent in the territory of the Member State of which the minor child is a national.

76 It follows from paragraphs 64 to 75 of this judgment that Article 20 TFEU must be interpreted as meaning that:

– where the Union citizen is an adult, a relationship of dependency, capable of justifying the grant to the third-country national concerned of a derived right of residence under Article 20 TFEU, is conceivable only in exceptional cases, where, in the light of all the relevant circumstances, any form of separation of the individual concerned from the member of his family on whom he is dependent is not possible;

– where the Union citizen is a minor, the assessment of the existence of such a relationship of dependency must be based on consideration, in the best interests of the child, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties to each of his parents, and the risks which separation from the third-country national parent might entail for that child's equilibrium. The existence of a family link with that third-country national, whether natural or legal, is not sufficient, and cohabitation with that third-country national is not necessary, in order to establish such a relationship of dependency.

The importance of the time when the relationship of dependency comes into being

77 Third, it is necessary to determine whether Article 20 TFEU must be interpreted as meaning that it is immaterial that the relationship of dependency relied on by a third-country national in support of his application for residence for the purposes of family reunification comes into being after the imposition on him of an entry ban.

78 In that regard, it must be borne in mind that, first, the right of residence accorded to third-country national family members of a Union citizen, under Article 20 TFEU, is a derived right of residence, the aim of which is to protect the right of a Union citizen to move and reside freely, and, second, it is the relationship of dependency between that Union citizen and the third-country national family member, within the meaning set out in paragraph 52 of this judgment, that explains why that third-country national has to be accorded a right of residence in the territory of the Member State of which that Union citizen is a national.

79 That being the case, the effectiveness of Union citizenship would be compromised if an application for residence for the purposes of family reunification were to be automatically rejected where such a relationship of dependency between a Union citizen and a third-country national family member came into being at a time when the third-country national was already the subject of a return decision accompanied by an entry ban and was therefore aware that he was staying illegally. In such circumstances, the existence of such a relationship of dependency between a Union citizen and third-country national, could not, by definition, have been taken into account when the return decision, accompanied by an entry ban, was adopted with respect to the third-country national.

80 Further, the Court has already accepted, in the judgments of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), and of 10 May 2017, *Chavez-Vilchez and Others* (C-133/15, EU:C:2017:354), that third-country nationals who are parents of minor Union citizens who have never exercised their right to freedom of movement should be granted a derived right of residence, under Article 20 TFEU, even though, when the children concerned were born, their parents were staying illegally in the territory of the Member State concerned.

81 It follows from the foregoing that Article 20 TFEU must be interpreted as meaning that it is immaterial that the relationship of dependency relied on by a third-country national in support of his application for residence for the purposes of family reunification comes into being after the imposition on him of an entry ban.

Whether the entry ban is final

82 Fourth, it is necessary to determine whether Article 20 TFEU must be interpreted as meaning that it is immaterial that the entry ban imposed on the third-country national has become final at the time when he submits his application for residence for the purposes of family reunification.

83 In that regard, as is apparent from paragraphs 57 to 61 of this judgment, in order to ensure that Article 20 TFEU has practical effect, it is necessary to withdraw or suspend such an entry ban, even when that ban has become final, if there exists, between that third-country national and a Union citizen who is a member of his family, such a relationship of dependency as to justify according to that third-country national a derived right of residence, under Article 20, in the territory of the Member State concerned.

84 It follows that Article 20 TFEU must be interpreted as meaning that it is immaterial that the entry ban imposed on the third-country national has become final at the time when he submits his application for residence for the purposes of family reunification.

The reasons for the entry ban

85 Fifth, it is necessary to determine whether Article 20 TFEU must be interpreted as meaning that it is immaterial that the entry ban imposed on a third-country national who has submitted an application for residence for the purposes of family reunification is justified by a failure to comply with his obligation to return or on public policy grounds.

86 As a preliminary point, it must be stated that, under Article 11(1) of Directive 2008/115, Member States must impose an entry ban where a third-country national who has been the subject of a return decision has not complied with his obligation to return or where no period for voluntary departure was granted to him, which may be the case, in accordance with Article 7(4) of that directive, where the person concerned represents a risk to public policy, public security or national security.

87 As regards, first, non-compliance with the obligation to return, it must be stated that it is immaterial that the entry ban may have been imposed on such a ground.

88 For the reasons set out in paragraphs 53 to 62 and in paragraphs 79 and 80 of this judgment, a Member State may not refuse to examine an application for residence for the purposes of family reunification, submitted on its territory by a third-country national, on the sole ground that, after he has failed to comply with an obligation to return, that national is staying illegally in that Member State, without having first examined whether there does not exist, between that third-country national and a Union citizen who is member of his family, such a relationship of dependency as to require the granting to that third-country national of a derived right of residence under Article 20 TFEU.

89 Further, it must be borne in mind that, in the first place, the right of residence in the host Member State, accorded by Article 20 TFEU to a third-country national who is a family member of a Union citizen, stems directly from that provision and does not presuppose that the third-country national already has some other right of residence in the territory of the Member State concerned and, in the second place, since the benefit of that right of residence must be accorded to that third-country national from the moment when the relationship of dependency between him or her and the Union citizen comes into being, that third-country national can no longer be considered, from that moment and for as long as that relationship of dependency lasts, as staying illegally in the territory of the Member State concerned, within the meaning of Article 3(2) of Directive 2008/115.

90 As regards, second, the fact that the entry ban is due to public policy grounds, the Court has previously held that Article 20 TFEU does not affect the possibility of Member States relying on an exception linked, in particular, to upholding the requirements of public policy and safeguarding public security. That said, in so far as the situation of the applicants in the main proceedings falls within the scope of EU law, assessment of that situation must take account of the right to respect for private and family life, as laid down in Article 7 of the Charter, an article which must be read, when necessary, in conjunction with the obligation to take into consideration the child's best interests, recognised in

Article 24(2) of the Charter (see, to that effect, judgments of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 81, and of 13 September 2016, *CS*, C-304/14, EU:C:2016:674, paragraph 36).

91 Further, as a justification for derogating from the right of residence of Union citizens or members of their families, the concepts of 'public policy' and 'public security' must be interpreted strictly. Accordingly, the concept of 'public policy' presupposes, in any event, the existence, in addition to the disturbance of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. As regards the concept of 'public security', it is clear from the Court's case-law that that concept covers both the internal security of a Member State and its external security, and, consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a threat to military interests, may affect public security. The Court has also held that the fight against crime in connection with drug trafficking as part of an organised group or against terrorism is included within the concept of 'public security' (see, to that effect, judgments of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraphs 82 and 83, and of 13 September 2016, *CS*, C-304/14, EU:C:2016:674, paragraphs 37 to 39).

92 In that context, it must be held that, where the refusal of a right of residence is founded on the existence of a genuine, present and sufficiently serious threat to the requirements of public policy or of public security, in view of, inter alia, criminal offences committed by a third-country national, such a refusal is compatible with EU law even if its effect is that the Union citizen who is a family member of that third-country national is compelled to leave the territory of the European Union (see, to that effect, judgments of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 84, and of 13 September 2016, *CS*, C-304/14, EU:C:2016:674, paragraph 40).

93 On the other hand, that conclusion cannot be drawn automatically on the basis solely of the criminal record of the person concerned. It can be reached, where appropriate, only after a specific assessment by the national court of all the current and relevant circumstances of the case, in the light of the principle of proportionality, of the child's best interests and of the fundamental rights whose observance the Court ensures (judgments of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 85, and of 13 September 2016, *CS*, C-304/14, EU:C:2016:674, paragraph 41).

94 That assessment must therefore take account in particular of the personal conduct of the individual concerned, the length and legality of his residence on the territory of the Member State concerned, the nature and gravity of the offence committed, the extent to which the person concerned is currently a danger to society, the age of any children at issue and their state of health, as well as their economic and family situation (judgments of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 86, and of 13 September 2016, *CS*, C-304/14, EU:C:2016:674, paragraph 42).

95 It is however clear from the order for reference that the national practice at issue in the main proceedings does not require the competent national authority to undertake such a specific assessment of all the relevant circumstances of the individual case before it can reject an application for residence for the purposes of family reunification that is submitted in circumstances such as those of the main proceedings.

96 Further, the referring court states that it is not apparent from the decisions challenged before it that any such specific assessment was undertaken at the time of the adoption of the return decisions, accompanied by an entry ban, to which each of the applicants in the main proceedings was subject. In any event, even if that were the case, the competent national authority would nonetheless be under an obligation, at the time when it is contemplating the rejection of the application for residence for the purposes of family reunification submitted by a third-country national, to examine whether, since the adoption of the return decision, the factual background has changed in such a way that a right of

residence may no longer be refused to that a third-country national (see, by analogy, judgments of 29 April 2004, *Orfanopoulos and Oliveri*, C-482/01 and C-493/01, EU:C:2004:262, paragraphs 79 and 82, and of 11 November 2004, *Cetinkaya*, C-467/02, EU:C:2004:708, paragraphs 45 and 47).

97 It follows that Article 20 TFEU must be interpreted as meaning that it is immaterial that an entry ban, imposed on a third-country national who has submitted an application for residence for the purposes of family reunification, may be justified by non-compliance with an obligation to return. Where such a ban is justified on public policy grounds, such grounds may permit a refusal to grant that third-country national a derived right of residence under Article 20 TFEU only if it is apparent from a specific assessment of all the circumstances of the individual case, in the light of the principle of proportionality, the best interests of any child or children concerned and fundamental rights, that the person concerned represents a genuine, present, and sufficiently serious threat to public policy.

The third question

98 By its third question, the referring court seeks, in essence, to ascertain whether Article 5 of Directive 2008/115 and Articles 7 and 24 of the Charter must be interpreted as precluding a national practice pursuant to which a return decision is adopted with respect to a third-country national, on whom a return decision, accompanied by an entry ban, has previously been imposed, without any account being taken of the details of his family life, and in particular the interests of his minor child, referred to in an application for residence for the purposes of family reunification submitted after the imposition of such an entry ban.

99 In the light of the answer given to the first and second questions, the third question has to be understood as referring exclusively to cases where the third-country national cannot qualify for a derived right of residence under Article 20 TFEU.

100 From that perspective, it must, first, be recalled that, in the wording of recital 2 of Directive 2008/115, the aim of that directive is the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity. As is apparent from both its title and Article 1 thereof, Directive 2008/115 establishes for that purpose 'common standards and procedures' which must be applied by each Member State for returning illegally staying third-country nationals (judgment of 5 November 2014, *Mukarubega*, C-166/13, EU:C:2014:2336, paragraph 39 and the case-law cited).

101 Moreover, it follows from recital 6 of that directive that the Member States are obliged to adopt, with respect to illegally staying third-country nationals in their territory, a return decision, prescribed by Article 6(1) of that directive, after a fair and transparent procedure.

102 More specifically, pursuant to Article 5 of Directive 2008/115, headed 'Non-refoulement, best interests of the child, family life and state of health', when the Member States implement that directive, they must, first, take due account of the best interests of the child, family life and the state of health of the third-country national concerned and, second, respect the principle of non-refoulement (judgment of 11 December 2014, *Boudjlida*, C-249/13, EU:C:2014:2431, paragraph 48).

103 It follows that, when the competent national authority is contemplating the adoption of a return decision, that authority must necessarily observe the obligations imposed by Article 5 of Directive 2008/115 and hear the person concerned on that subject. In that regard, the person concerned must cooperate with the competent national authority when he is heard in order to provide the authority with all the relevant information on his personal and family situation and, in particular, information which might justify a return decision not being issued (judgment of 11 December 2014, Boudjlida, C-249/13, EU:C:2014:2431, paragraphs 49 and 50).

104 Article 5 of Directive 2008/115 consequently precludes a Member State from adopting a return decision without taking into account the relevant details of the family life of the third-country national concerned which that person has put forward, in support of an application for residence for the purposes of family reunification, in order to oppose the adoption of such a decision, even when that third-country national has previously been the subject of a return decision, accompanied by an entry ban.

105 However, as stated in paragraph 103 of this judgment, the person concerned is subject to a duty of honest cooperation with the competent national authority. That duty of honest cooperation means that he or she is obliged, as soon as possible, to inform that authority of any relevant changes in his or her family life. The right of a third-country national to expect that changes in his or her family situation will be taken into account before a return decision is adopted cannot be used in order to re-open or extend indefinitely the administrative procedure (see, by analogy, judgment of 5 November 2014, Mukarubega, C-166/13, EU:C:2014:2336, paragraph 71).

106 Accordingly, where, as in the cases in the main proceedings, the third-country national has previously been the subject of a return decision, and in so far as, in the course of that initial procedure, he may have provided details of his family life, as it previously existed at that time, and as the basis for his application for residence for the purposes of family reunification, the competent national authority cannot be criticised for failing to take those details into account, in the course of a subsequent return procedure, since those details ought to have been put forward by the person concerned at an earlier procedural stage.

107 The answer to the third question is therefore that Article 5 of Directive 2008/115 must be interpreted as precluding a national practice pursuant to which a return decision is adopted with respect to a third-country national, who has previously been the subject of a return decision, accompanied by an entry ban that remains in force, without any account being taken of the details of his or her family life, and in particular the interests of a minor child of that third-country national, referred to in an application for residence for the purposes of family reunification submitted after the adoption of such an entry ban, unless such details could have been provided earlier by the person concerned.

The fourth question

108 In the light of the answers given to the first, second and third questions, there is no need to answer the fourth question.

Costs

109 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 (Grand Chamber) hereby rules:

1. **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 Articles 5 and 11 thereof, must be interpreted as not precluding a practice of a Member State that consists in not examining an application for residence for the purposes of family reunification, submitted on its territory by a third-country national family member of a Union citizen who is a national of that Member**

State and who has never exercised his or her right to freedom of movement, solely on the ground that that third-country national is the subject of a ban on entering the territory of that Member State.

2. Article 20 TFEU must be interpreted as meaning that:-

- **a practice of a Member State that consists in not examining such an application solely on the ground stated above, without any examination of whether there exists a relationship of dependency between that Union citizen and that third-country national of such a nature that, in the event of a refusal to grant a derived right of residence to the third-country national, the Union citizen would, in practice, be compelled to leave the territory of the European Union as a whole and thereby be deprived of the genuine enjoyment of the substance of the rights conferred by that status, is precluded;**

- **where the Union citizen is an adult, a relationship of dependency, capable of justifying the grant, to the third-country national concerned, of a derived right of residence under Article 20 TFEU, is conceivable only in exceptional cases, where, in the light of all the relevant circumstances, any form of separation of the individual concerned from the member of his family on whom he is dependent is not possible;**

- **where the Union citizen is a minor, the assessment of the existence of such a relationship of dependency must be based on consideration, in the best interests of the child, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties to each of his parents, and the risks which separation from the third-country national parent might entail for that child's equilibrium; the existence of a family link with that third-country national, whether natural or legal, is not sufficient, and cohabitation with that third-country national is not necessary. in order to establish such a relationship of dependency;**

- **it is immaterial that the relationship of dependency relied on by a third-country national in support of his application for residence for the purposes of family reunification comes into being after the imposition on him of an entry ban;**

- **it is immaterial that the entry ban imposed on the third-country national has become final at the time when he submits his application for residence for the purposes of family reunification; and**

- **it is immaterial that an entry ban, imposed on a third-country national who has submitted an application for residence for the purposes of family reunification, may be justified by non-compliance with an obligation to return; where such a ban is justified on public policy grounds, such grounds may permit a refusal to grant that third-country national a derived right of residence under Article 20 TFEU only if it is apparent from a specific assessment of all the circumstances of the individual case, in the light of the principle of proportionality, the best interests of any child or children concerned and fundamental rights, that the person concerned represents a genuine, present, and sufficiently serious threat to public policy.**

3. Article 5 of Directive 2008/115 must be interpreted as precluding a national practice pursuant to which a return decision is adopted with respect to a third-country national, who has previously been the subject of a return decision, accompanied by an entry ban that remains in force, without any account being taken of the details of his or her family life, and in particular the interests of a minor child of that third-country national, referred to in an

application for residence for the purposes of family reunification submitted after the adoption of such an entry ban, unless such details could have been provided earlier by the person concerned.

[Signatures]