ECLI:EU:C:2018:8

JUDGMENT OF THE COURT (Fifth Chamber)

16 January 2018 (*)

(Reference for a preliminary ruling — Third-country national staying illegally in a Member State — Threat to public order and national security — Directive 2008/115/EC — Article 6(2) — Return decision — Ban on entry to the territory of the Member States — Alert for the purposes of refusing admission to the Schengen Area — Third-country national holding a valid residence permit issued by another Member State — Convention implementing the Schengen Agreement — Article 25(2) — Consultation procedure between the Member State issuing the alert and the Member State which issued the residence permit — Time limit — Failure of the Contracting State consulted to adopt a position — Consequences for the enforcement of return decisions and entry ban)

In Case C-240/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Korkein hallinto-oikeus (Supreme Administrative Court, Finland), made by decision of 2 May 2017, received at the Court on 10 May 2017, in the proceedings

E

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, E. Levits (Rapporteur), A. Borg Barthet, M. Berger and F. Biltgen, Judges,

Advocate General: J. Kokott,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 9 November 2017,

after considering the observations submitted on behalf of:

– E, by J. Dunder, asianajaja,

– the Maahanmuuttovirasto, by P. Lindroos, acting as Agent,

– the Finnish Government, by J. Heliskoski, acting as Agent,

– the Belgian Government, by M. Jacobs, C. Pochet and C. Van Lul, acting as Agents,

– the German Government, by T. Henze and D. Klebs, acting as Agents,

– the Spanish Government, by S. Jiménez García, acting as Agent,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by C. Cattabriga and by G. Wils and I. Koskinen, acting as Agents,

– the Swiss Government, by E. Bichet, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 13 December 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 25(2) of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 19 June 1990 and which entered into force on 26 March 1995 (OJ 2000 L 239, p. 19, 'the CISA').

2 That request has been made in proceedings concerning E., a Nigerian national, in connection with a decision of the Finnish National Immigration Service (Maahanmuutto virasto, 'the Immigration Service') of 21 January 2015 to return E to his home country and to ban him from entering the Schengen Area.

Legal context

EU law

The CISA

3 Article 21 of the CISA, as amended by Regulation (EU) No 265/2010 of the European Parliament and of the Council of 25 March 2010 amending the Convention Implementing the Schengen Agreement and Regulation (EC) No 562/2006 as regards movement of persons with a long-stay visa (OJ 2010 L 85, p. 1) and by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 amending Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations (EC) No 1683/95 and (EC) No 539/2001 and Regulations (EC) No 767/2008 and (EC) No 810/2009 of the European Parliament and of the Council (OJ 2013 L 182, p. 1), provides:

'1. Aliens who hold valid residence permits issued by one of the Member States may, on the basis of that permit and a valid travel document, move freely for up to 90 days in any 180-day period within

the territories of the other Member States, provided that they fulfil the entry conditions referred to in Article 5(1)(a), (c) and (e) 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) and are not on the national list of alerts of the Member State concerned.

2. Paragraph 1 shall also apply to aliens who hold provisional residence permits issued by one of the Contracting Parties and travel documents issued by that Contracting Party.

…'

4 Under Article 23 of the CISA:

'1. Aliens who do not fulfil or who no longer fulfil the short-stay conditions applicable within the territory of a Contracting Party shall normally be required to leave the territories of the Contracting Parties immediately.

2. Aliens who hold valid residence permits or provisional residence permits issued by another Contracting Party shall be required to go to the territory of that Contracting Party immediately.

3. Where such aliens have not left voluntarily or where it may be assumed that they will not do so or where their immediate departure is required for reasons of national security or public policy, they must be expelled from the territory of the Contracting Party in which they were apprehended, in accordance with the national law of that Contracting Party. …

4. Such aliens may be expelled from the territory of that Party to their countries of origin or any other State to which they may be admitted, in particular under the relevant provisions of the readmission agreements concluded by the Contracting Parties.

…'

5 Article 25 of the CISA, as amended by Regulation No 265/2010, provides:

'1. Where a Member State considers issuing a residence permit, it shall systematically carry out a search in the Schengen Information System. Where a Member State considers issuing a residence permit to an alien for whom an alert has been issued for the purposes of refusing entry, it shall first consult the Member State issuing the alert and shall take account of its interests; the residence permit shall be issued for substantive reasons only, notably on humanitarian grounds or by reason of international commitments.

Where a residence permit is issued, the Member State issuing the alert shall withdraw the alert but may put the alien concerned on its national list of alerts.

1a. Prior to issuing an alert for the purposes of refusing entry within the meaning of Article 96, the Member States shall check their national records of long-stay visas or residence permits issued.

2. 'Where it emerges that an alert for the purposes of refusing entry has been issued for an alien who holds a valid residence permit issued by one of the Contracting Parties, the Contracting Party issuing the alert shall consult the Party which issued the residence permit in order to determine whether there are sufficient reasons for withdrawing the residence permit.

If the residence permit is not withdrawn, the Contracting Party issuing the alert shall withdraw the alert but may nevertheless put the alien in question on its national list of alerts.

3. Paragraphs 1 and 2 shall apply also to long-stay visas.'

6 Article 96 of the CISA provides:

'1. Data on aliens for whom an alert has been issued for the purposes of refusing entry shall be entered on the basis of a national alert resulting from decisions made in accordance with the rules of procedure laid down by national legislation, the administrative authorities or courts responsible.

2. Decisions may be based on a threat to public policy or public security or to national security which the presence of an alien in national territory may pose.

This situation shall arise in particular in the case of:

(a) an alien who has been convicted of an offence carrying a penalty involving deprivation of liberty of at least one year;

…'

Directive 2008/115/EC

7 Recital 14 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) provides:

'The effects of national return measures should be given a European dimension by establishing an entry ban prohibiting entry into and stay on the territory of all the Member States …'

8 Article 3 of Directive 2008/115 states:

'For the purpose of this Directive:

…

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. “expulsion” means 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;

…

8. “voluntary departure” means compliance with the obligation to return within the time-limit fixed for that purpose in the return decision;

…’

9 Article 6 of that directive, concerning return decisions terminating an illegal stay 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.

2. Third-country nationals staying illegally on the territory of a Member State and holding a valid residence permit or other authorisation offering a right to stay issued by another Member State shall be required to go to the territory of that other Member State immediately. In the event of non-compliance by the third-country national concerned with this requirement, or where the third-country national’s immediate departure is required for reasons of public policy or national security, paragraph 1 shall apply.

…’

10 Article 7(1) of that directive states:

‘A return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days …’

11 According to Article 8 of Directive 2008/115:

‘1. Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7.

2. If a Member State has granted a period for voluntary departure in accordance with Article 7, the return decision may be enforced only after the period has expired, unless a risk as referred to in Article 7(4) arises during that period.

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

…’

12 Article 11(1) of the directive provides:

‘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.'

13 Article 21 of Directive 2008/115 governs the relationship between the provisions of that directive and those of the CISA. In that connection, it must be stated that the former replaced, inter alia, the provisions of Article 23 of the CISA.

Regulation (EC) No 1987/2006

14 Pursuant to Article 24 of Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) (OJ 2006 L 381, p. 4):

'1. Data on third-country nationals in respect of whom an alert has been issued for the purposes of refusing entry or stay shall be entered on the basis of a national alert resulting from a decision taken by the competent administrative authorities or courts in accordance with the rules of procedure laid down by national law taken on the basis of an individual assessment. Appeals against these decisions shall lie in accordance with national legislation.

2. An alert shall be entered where the decision referred to in paragraph 1 is based on a threat to public policy or public security or to national security which the presence of the third-country national in question in the territory of a Member State may pose. This situation shall arise in particular in the case of:

(a) a third-country national who has been convicted in a Member State of an offence carrying a penalty involving deprivation of liberty of at least one year;

…

3. An alert may also be entered when the decision referred to in paragraph 1 is based on the fact that the third-country national has been subject to a measure involving expulsion, refusal of entry or removal which has not been rescinded or suspended, that includes or is accompanied by a prohibition on entry or, where applicable, a prohibition on residence, based on a failure to comply with national regulations on the entry or residence of third-country nationals.

…'

Finnish law

15 Paragraph 11(1)(5) of the Ulkomaalaislaki 301/2004 (Law on foreign nationals) provides that foreign nationals may enter Finland if they are not considered to pose a threat to public order, security or health or to Finland's international relations.

16 Pursuant to Paragraph 149b thereof, a third country national who stays illegally in Finland, whose application for a residence permit has been refused, and who has a valid residence permit granted by another Member State of the European Union or another permit which gives the right to reside is required to return immediately to the other Member State concerned. If the third country

national does not obey that order, or if his involuntary return is necessary for reasons of public order or public security, an order may be made for his removal.

17 Paragraph 150, first sub paragraph, of the Law on foreign nationals adds that the decision to return a foreign national may be accompanied by an entry ban. An entry ban will be issued if a time within to depart voluntarily has not been specified, which is the case where the person concerned is regarded as being a danger to public order or national security.

18 Paragraph 150, second subparagraph, of that law states that a foreign national who has been sentenced for an offence of aggravated nature may be prohibited entry until further notice if he represents a serious threat to public order or public security.

19 However, it is clear from Paragraph 150, subparagraph 3, of the Law on foreign nationals that the entry ban is restricted to Finland if the alien has a residence permit in another Schengen State, and the permit is not withdrawn.

20 When considering the issue of the expulsion of the alien and that of the issue of an entry ban and the length of that ban, Paragraph 146, first subparagraph, of the Law on foreign nationals requires account to be taken of the facts on which the decision is based and facts and circumstances otherwise influencing the matter as a whole, at least the length and purpose of residence of the foreign national in Finland and the nature of the residence permit issued, his ties to Finland, and the cultural and social connections to the home country of his family. If the deportation or the related entry ban is based on the foreign national's criminal acts, account must be taken of the seriousness of the act and the detriment, damage or danger to public or private security.

21 Furthermore, when considering whether to impose an entry ban and its length, Paragraph 146, second subparagraph, of the Law on foreign nationals requires account to be taken of whether the foreign national has family or employment ties with Finland or with another Schengen State, the preservation of which would be excessively difficult as a result of an entry ban.

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

22 E holds a residence permit issued by Spain, which is valid until 11 February 2018. He lived for 14 years in Spain where he has family ties.

23 On 24 January 2014, E was sentenced in Finland to a total of five years in prison for a number of serious narcotics offences. That judgment has become final.

24 By decision of 21 January 2015, the Immigration Service ordered the immediate return of the applicant in the main proceedings to Nigeria and accompanied that decision with a ban on entry to the Schengen Area until further notice.

25 The Immigration Service based its decision on the danger to public order and national security represented by E, having regard to the offences he had committed.

26 In accordance with Article 25(2) of the CISA, on 26 January 2015, the Immigration Service contacted the competent Spanish authorities in order to determine whether such grounds are sufficient for the withdrawal of the residence permit that the Spanish State had issued to the applicant in the main proceedings.

27 In the absence of a response from those authorities, on 20 June 2016, the Immigration Service issued another request. At the request of the Spanish authorities, the Immigration Service sent them the judgment convicting E. The Immigration Service subsequently made two further attempts to consult the Spanish authorities to which it received no response.

28 In dealing with the issue of the lawfulness of the decision to return the applicant in the main proceedings to his country of origin and of the ban on entry to the Schengen Area, the referring court asks about the effects of the consultation procedure laid down in Article 25(2) of the CISA.

29 On one hand, the extent to which that procedure is binding on the authorities which issued the return decision accompanied by an entry ban it is unclear from that provision. On the other hand, it does not indicate how those authorities are to proceed where the authorities to which a request is addressed fail to respond.

30 In those circumstances, the Korkein hallinto-oikeus (Supreme Administrative Court, Finland) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is Article 25(2) of the [CISA] to be interpreted as meaning that the obligation to consult among Contracting States has legal effects that may be relied on by a third-country national in a situation in which a Contracting State imposes an entry ban for the entire Schengen Area on him and orders his return to his home country on the ground that he constitutes a threat to public order and public security?

(2) If Article 25(2) of the CISA is applicable when the decision to refuse entry is issued must the consultations be initiated before the imposition of the entry ban or must the consultations be initiated only after the return decision and the entry ban have been issued?

(3) If the consultations may be initiated only after the decision to return that person and to impose an entry ban has been taken, does the fact that negotiations between Contracting States are on-going and that the other Contracting State has not indicated its intention to withdraw the residence permit of the third-country national, prevent the decision to deport the third country national and the imposition of an entry ban with respect to the entire Schengen Area from taking effect?

(4) How is a Contracting State to proceed in circumstances in which the Contracting State which issued the residence permit has failed, despite repeated requests, to adopt a position with regard to the withdrawal of the residence permit issued to a third-country national?’

Procedure before the Court

31 The referring court requested this reference for a preliminary ruling to be dealt with under the urgent procedure provided for in Article 107 of the Rules of Procedure of the Court of Justice. In response to a request for clarification from the Court, on 2 June 2017, the Korkein hallinto-oikeus (Supreme Administrative Court) stated that, with effect from 24 January 2016, the prison sentence imposed on E had been commuted to a suspended sentence, and that since then he had not been subject to any measures involving a deprivation of liberty. In those circumstances, on 8 June 2017, on the proposition of the Judge-Rapporteur, after hearing the Advocate General, the Fifth Chamber decided not to accede to the request of that court.

32 However, and having regard to the circumstances in the main proceedings, the President of the Court granted priority treatment to that case by decision of 12 June 2017 by virtue of Article 53(3) of the Rules of Procedure.

Consideration of the questions referred

The second question

33 By its second question, which it is appropriate to examine first, the referring court asks essentially whether Article 25(2) of the CISA must be interpreted as meaning that, where a Contracting State intends to expel and impose a ban on entry and stay in the Schengen Area on a third-country national who holds a valid residence permit issued by another Contracting State, the consultation procedure provided for in that provision must be initiated by the first State before the issue of a return decision accompanied by an entry ban to that third-country national, or whether it can be initiated after the adoption of that decision.

34 As is clear from the wording of most of the language versions of Article 25(2), first subparagraph, of the CISA, it is only where an alert for the purposes of refusing entry has been entered in the Schengen Information System for an alien who holds a valid residence permit issued by one of the Contracting Parties that the Contracting State entering the alert must consult the Contracting State which issued the residence permit.

35 Likewise, Article 25(2) of the CISA states, in its second subparagraph, that if the residence permit is not withdrawn, the first State must withdraw the alert for the purposes of refusing admission.

36 It follows that the consultation procedure provided for in Article 25(2) must, in principle, be initiated only after an alert for the purposes of refusing entry has been entered in the Schengen Information System for a third-country national and, therefore, once a return decision accompanied by an entry ban have been issued to him.

37 However, and in order to give a full answer to the referring court, it must be added that Article 25(2) of the CISA does not prohibit the Contracting State, which seeks to expel and ban entry and residence in the Schengen Area such a third-country national, from initiating the consultation procedure laid down in that provision before the issue of a return decision accompanied by an entry ban to him.

38 Having regard, on one hand, to the objective pursued in Article 25(2) of the CISA, which is to avoid a contradictory situation in which a third-country national is both holder of a valid residence permit issued by a Contracting State and the subject of an alert for the purposes of refusing entry in the Schengen Information System and, on the other hand, the principle of loyal cooperation as set out in Article 4(3) TEU, the consultation procedure should be initiated as soon as possible.

39 Therefore, the answer to the second question is that Article 25(2) of the CISA must be interpreted as meaning that it is open to the Contracting State which intends to issue a return decision accompanied by a ban on entry and stay in the Schengen Area to a third-country national who holds a valid residence permit issued by another Contracting State to initiate the consultation procedure laid down in that provision even before the issue of the return decision. That procedure must, in any event, be initiated as soon as such a decision has been issued.

The third and fourth questions

40 By its third and fourth questions, which it is appropriate to answer together, the referring court asks essentially about the inferences to be drawn by the Contracting State which initiated the consultation procedure under Article 25(2) of the CISA from the failure of the Contracting State consulted to respond, in particular, as regards the enforcement of the return decision and the ban on entry to the Schengen Area issued to a third-country national who is the holder of a valid residence permit issued by the latter State.

41 As a preliminary point, it must be recalled, in particular, that the CISA before being amended by Regulation No 562/2006, laid down the conditions which must be satisfied by third-country nationals for entry and residence of less than three months in the Schengen Area. However, residence permits for a period of more than 90 days are covered, for the most part, by the national legislation of the Member States, without prejudice to those entry conditions. Furthermore, the issue by a Contracting State of such a residence permit, in accordance with Article 21 of the CISA, entitles the holder to the right to free movement for a maximum of three months in the other Contracting States, provided that he satisfies the conditions set out in that article.

42 In accordance with Article 1 thereof, Directive 2008/115 lays down the common standards and procedures in Member States for returning illegally staying third-country nationals. Recital 14 of that directive states that the latter confers a European dimension on the effects of national return measures by establishing an entry ban prohibiting entry into and stay on the territory of all the Member States.

43 It follows from all of the foregoing considerations that any decision adopted by a Member State on the entry into and residence of a third-country national, in accordance with Regulation No 562/2006 and any return decision and ban on entry of such a third-country national issued by such a Member State under Directive 2008/115 produces effects for the other Member States and other Contracting States of the CISA.

44 In that context, Article 23(2) and (4) of the CISA governing the situation in which a third-country national is staying illegally on the territory of a Contracting State, but is, also the holder of a residence permit issued by another Contracting State. However, it is clear from Article 21 of Directive 2008/115 concerning the relationship between that directive and the CISA that Article 23 was replaced by the provisions of that directive.

45 In that connection, Article 6(2) of Directive 2008/115, like Article 23(2) and (4) of the CISA, provides for the obligation of the third-country national staying illegally in the territory of a Member State to return immediately to the territory of the Member State which issued him the residence permit and that if the third-country national fails to comply with that obligation, or where his immediate departure is required on grounds of public order or national security, a return decision must be issued to him

46 As the Advocate General observed, in point 63 of her Opinion, it is clear in a situation in which a third-country national who holds a residence permit issued by a Member State is staying illegally in another Member State that he must be allowed to travel to the Member State which issued his residence permit in order to exercise his right to reside there instead of being obliged to return to his country of origin, unless, in particular, public order or national security so requires.

47 In the present case, it should be borne in mind that E, the holder of a valid residence permit issued by the Spanish State, is staying illegally in Finland, that a return decision accompanied by a ban on entry to the Schengen Area has been issued to him on the ground that he is regarded by the Finnish authorities as posing a threat to public order and national security, that those authorities

initiated the consultation period laid down in Article 25(2) of the CISA on 26 January 2015, and that until now the Spanish authorities have failed to indicate their intentions concerning the maintenance or withdrawal of E's residence permit.

48 First, as regards the possibility for the Finnish authorities to issue a return decision accompanied by an entry ban to E in those circumstances, it is clear from the wording of Article 6(2) of Directive 2008/115 that those authorities were required to issue such a return decision and, in accordance with Article 11 thereof, to accompany it with an entry ban, provided that public order and national security so require which is, however, for the national court to ascertain in the light of the relevant case-law of the Court (see, to that effect, judgment of 11 June 2015, *Zh. And O.*, C-554/13, EU:C:2015:377, paragraphs 50 to 52 and 54).

49 In that case, it must be recalled that a Member State is required to assess the concept of 'risk to public policy', within the meaning of Article 7(4) of Directive 2008/115 on a case-by-case basis, in order to ascertain whether the personal conduct of the third-country national concerned poses a genuine and present risk to public policy, bearing in mind that the mere fact that that national has been criminally convicted is not sufficient by itself to present such a risk (see, to that effect, judgment of 11 June 2015, *Zh. And O.*, C-554/13, EU:C:2015:377, paragraphs 50 and 54).

50 Second, as regards the possibility for those authorities to enforce such a decision in the circumstances of the case in the main proceedings, it must be recalled that, in accordance with Article 8 of Directive 2008/115, the Finnish authorities are entitled to expel E without delay, without prejudice to E's right to rely on the rights he derives from the residence permit issued by the Spanish authorities by subsequently going to Spain. The fact that the consultation procedure laid down by Article 25(2) of the CISA is still ongoing does not call into question that interpretation.

51 Article 25(2) of the CISA does not preclude the issue of an alert for the purposes of refusing entry in the Schengen Information System even though the consultation procedure laid down in that provision is ongoing as is clear from paragraph 39 of the present judgment. However, the second subparagraph of that provision states that the alert must be withdrawn 'if the residence permit is not withdrawn'.

52 In that connection, it must be recalled that Article 25(2) of the CISA aims to prevent, by means of the consultation procedure which is a situation in which with respect to the same third-country national an alert for the purposes of reusing entry has been issued by one Contracting State and a valid residence permit has been issued by another Contracting State.

53 Thus, the authorities of the Member State consulted are required in accordance with the principle of loyal cooperation laid down in Article 4(3) TEU to take a position on the maintenance or withdrawal of the residence permit of the third-country national concerned, and that within a reasonable time, adapted to the nature of the case, so as to give them the time necessary to collect the relevant information (see, for example, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 97).

54 In the present case, it is clear that the Spanish authorities have failed to observe such a period. That being the case, after that period, as long as the residence permit concerned is valid and has not been formally withdrawn by those authorities, and in order to avoid maintaining a contradictory situation as described in paragraph 52 of the present decision, and the legal uncertainty that such a situation involves for the third-country national concerned, the Finnish authorities must withdraw the alert for the purposes of refusing admission and, if necessary, put the third-country national on their national list of alerts.

55 Having regard to all of those considerations, the answer to the third and fourth questions is that Article 25(2) of the CISA must be interpreted as meaning that it does not preclude the return decision accompanied by an entry ban issued by a Contracting State to a third-country national who is the holder of a valid residence permit issued by another Contracting State being enforced even though the consultation procedure laid down in that provision is ongoing, if that third-country national is regarded by the Contracting State issuing the alert as representing a threat to public order or national security, without prejudice to the third-country national's entitlement to rely on the rights he derives from that residence permit by going subsequently to the territory of the second Contracting State. However, after a reasonable time from the initiation of the consultation procedure and in the absence of a response from the Contracting State consulted, the Contracting State issuing the alert for the purposes of refusing entry must withdraw that alert and, if necessary, put the third-country national on its national list of alerts.

The first question

56 By its first question, the referring court asks essentially whether Article 25(2) of the CISA must be interpreted as meaning that the third-country national who is the holder of a valid residence permit issued by one Contracting State, and to whom a return decision accompanied by an entry ban has been issued in another Contracting State, may rely before the national courts on the legal effects resulting from the consultation procedure laid down in that provision.

57 In that connection, although that provision governs the procedure between the authorities of Contracting States, the fact remains that it is likely to have tangible effects on the rights and interests of individuals.

58 It must be recalled that that provision lays down in a clear, precise and unconditional manner a consultation procedure which must be initiated by a Contracting State seeking to ban the entry in the Schengen Area of a third-country national who is the holder of a valid residence permit issued by another Contracting State. Furthermore, if the second State considers that it is appropriate to maintain the residence permit it issued, that gives rise to an obligation which is also a clear, precise and unconditional on the first State to withdraw the alert for the purpose of refusing entry and, if necessary, to convert it into an alert on its national list.

59 In those circumstances, it must be held that an individual such as E may rely before the national courts on the consultation procedure laid down in Article 25(2) of the CISA and, in particular, on the obligations on the State issuing the alert, to initiate that procedure and, depending on the outcome of that procedure, to withdraw the alert for the purposes of refusing entry to the Schengen Area concerning him.

60 Therefore, the answer to the first question is that Article 25(2) of the CISA must be interpreted as meaning that a third-country national who is the holder of a valid residence permit issued by a Contracting State, and to whom a return decision accompanied by an entry ban has been issued in another Contracting State, may rely before the national courts on the legal effects deriving from the consultation procedure on the Contracting State issuing the alert and the requirements deriving therefrom.

Costs

61 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 (Fifth Chamber) hereby rules:

1. **Article 25(1) of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 19 June 1990 and which entered into force on 26 March 1995 must be interpreted as meaning that it is open to the Contracting State which intends to issue a return decision accompanied by a ban on entry and stay in the Schengen Area to a third-country national who holds a valid residence permit issued by another Contracting State to initiate the consultation procedure laid down in that provision even before the issue of the return decision. That procedure must, in any event, be initiated as soon as such a decision has been issued.**

2. **Article 25(2) of the Convention implementing the Schengen Agreement must be interpreted as meaning that it does not preclude the return decision accompanied by an entry ban issued by a Contracting State to a third-country national who is the holder of a valid residence permit issued by another Contracting State being enforced even though the consultation procedure laid down in that provision is ongoing, if that third-country national is regarded by the Contracting State issuing the alert as representing a threat to public order or national security, without prejudice to that third-country national's entitlement to rely on the rights he derives from that residence permit by going subsequently to the territory of the second Contracting State. However, after a reasonable time from the initiation of the consultation procedure and in the absence of a response from the Contracting State consulted, the Contracting State issuing the alert for the purposes of refusing entry must withdraw it and, if necessary, put the third-country national on its national list of alerts.**

3. **Article 25(2) of the Convention implementing the Schengen Agreement must be interpreted as meaning that a third-country national who is the holder of a valid residence permit issued by a Contracting State, and to whom a return decision accompanied by an entry ban has been issued in another Contracting State, may rely before the national courts on the legal effects deriving from the consultation procedure on the Contracting State issuing the alert and the requirements deriving therefrom.**

[Signatures]

* Language of the case: Finnish.