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ECLI:EU:C:2020:807

Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

8 October 2020 (*)

(Reference for a preliminary ruling – Area of freedom, security and justice – Directive 2008/115/EC – Common standards and procedures for returning illegally staying third-country nationals – Article 6(1) and Article 8(1) – Illegal stay – National legislation providing for either a fine or removal, depending on the circumstances – Consequences of the judgment of 23 April 2015, *Zaizoune* (C-38/14, EU:C:2015:260) – National legislation more favourable to the interested party – Direct effect of directives – Limits)

In Case C-568/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de Castilla-La Mancha (High Court of Justice of Castilla-La Mancha, Spain), made by decision of 11 July 2019, received at the Court on 25 July 2019, in the proceedings

MO

v

Subdelegación del Gobierno en Toledo,

THE COURT (Sixth Chamber),

composed of C. Toader, acting as President of the Chamber, M. Safjan (Rapporteur) and N. Jääskinen, Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Spanish Government, by L. Aguilera Ruiz, acting as Agent,
- the European Commission, by C. Cattabriga and I. Galindo Martín, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation 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 proceedings between MO and the Subdelegación del Gobierno en Toledo (Provincial Representation of the Government for Toledo, Spain) concerning MO's illegal stay on Spanish territory.

Legal context

EU law

3 Article 1 of Directive 2008/115, entitled 'Subject matter', 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 Community law as well as international law, including refugee protection and human rights obligations.'

4 Article 3 of that directive provides:

'For the purpose of this Directive:

...

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;

...'

5 Article 4 of that directive, entitled 'More favourable provisions', states in paragraphs 2 and 3:

'2. This Directive shall be without prejudice to any provision which may be more favourable for the third-country national, laid down in the Community *acquis* relating to immigration and asylum.

3. This Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive.'

6 Article 6 of that directive, entitled 'Return decision', 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.

3. Member States may refrain from issuing a return decision to a third-country national staying illegally on their territory if the third-country national concerned is taken back by another Member State under bilateral agreements or arrangements existing on the date of entry into force of this Directive. In such a case the Member State which has taken back the third-country national concerned shall apply paragraph 1.

4. Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In such cases, no return decision is to be issued. Where a return decision has already been issued, it is to be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay.

5. If a third-country national staying illegally on the territory of a Member State is the subject of a pending procedure for renewing his or her residence permit or other authorisation offering a right to stay, that Member State shall consider refraining from issuing a return decision, until the pending procedure is finished, without prejudice to paragraph 6.

...'

7 Article 7 of Directive 2008/115, entitled 'Voluntary departure', provides, in paragraphs 1 and 4:

'1. A return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days, without prejudice to the exceptions referred to in paragraphs 2 and 4. ...

...

4. 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 ...'

8 Article 8 of that directive, entitled 'Removal', provides in paragraph 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.'

Spanish law

9 Article 53(1)(a) of Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social (Basic Law 4/2000 on the rights and freedoms of foreign nationals in Spain and their social integration) of 11 January 2000 (BOE No 10 of 12 January 2000, p. 1139), as amended by Ley Orgánica 2/2009 (Basic Law 2/2009) of 11 December 2009 (BOE No 299 of 12 December 2009, p. 104986) ('the Law on foreign nationals), defines as a 'serious' offence 'being illegally present on Spanish territory, on the ground that the person concerned has not obtained an extension of permission to stay or does not have a residence permit, or on the ground that the residence permit has expired more than three months previously, and that person has not applied for renewal of that permit within the period laid down by law'.

10 According to Article 55(1)(b) of the Law on foreign nationals, the penalty to be imposed for a serious offence is a fine of between EUR 501 and EUR 10 000.

11 Article 57 of that law provides:

'1. Where the offenders are foreign nationals and they commit offences which may be classified as "very serious" or "serious", within the meaning of Article 53(1)(a), (b), (c), (d) and (f) of this Basic Law, it is possible, having regard to the principle of proportionality, to order removal from Spanish territory, instead of a fine, following the appropriate administrative procedure and by means of a reasoned decision which includes an assessment of the facts which constitute the offence.

...

3. Under no circumstances may the penalties of expulsion and a fine be imposed concurrently.

...'

12 Article 63 of that law, relating to the 'Priority procedure', provides, in paragraph 7:

'In the situations covered by this article the removal order will be enforced immediately.'

13 Paragraph 63a(2) of that law provides:

'The decision ordering removal, made under the ordinary procedure, shall include a voluntary compliance period for the person concerned to leave national territory. That period will vary between 7 and 30 days and will begin to run when the aforementioned decision is served. The period for complying voluntarily with the removal order may be extended for an appropriate period having regard to the circumstances of each case, for example, the length of stay, the existence of dependent children attending school and the existence of other family and social links.'

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

14 On 14 January 2017, the Comisaría de Talavera de la Reina (the police station in Talavera de la Reina, Spain) decided to initiate a priority removal procedure against MO, a Columbian national, because of an alleged infringement of Article 53(1)(a) of the Law on foreign nationals.

15 During that procedure, MO declared that he entered Spain in 2009 at the age of 17 under a visa accompanied by a residence permit issued for the purpose of family reunification with his mother. He presented a passport which was valid until 24 December 2018, a residence card valid until 2013 and a certificate of registration with the municipality of Talavera de la Reina, showing that registration took place in 2015. MO confirmed that he often worked during his stay in Spain, and he presented a number of employment contracts, along with an employment record and a bank

reference. He declared that he did not have a criminal record and that he had a permanent residence in Talavera de la Reina. MO also produced other documents, in particular a municipal library card, a health insurance card and certificates confirming courses he had undertaken and training he had completed.

16 On 3 February 2017, the Subdelegado del Gobierno en Toledo (Provincial Representative of the Government for Toledo, Spain) ('the Government representative') issued a removal order against MO on the basis of Article 53(1)(a) of the Law on foreign nationals, together with a ban on re-entry to Spanish territory for a period of five years. In that respect, the Government representative relied on the case-law of the Tribunal Supremo (Supreme Court, Spain) authorising removal in a case where the illegal stay is accompanied by a negative element in the conduct of the person concerned. In the main proceedings, those elements related to the fact that MO had not provided proof that he entered Spain via a border post, he had not indicated the duration of his stay in that Member State and he had no identity document. In addition, the Government representative stated that in MO's case the removal would not lead to the uprooting of family ties, since he had not demonstrated the existence of direct ascendants or descendants lawfully residing in Spain.

17 MO challenged the removal order made by the Government representative before the Juzgado de lo Contencioso-Administrativo de Toledo (Administrative Court, Toledo, Spain), which was dismissed by that court.

18 MO lodged an appeal against the decision of that court before the Tribunal Superior de Justicia de Castilla-La Mancha (High Court of Justice of Castilla-La Mancha, Spain).

19 That court states that the interpretation of the national legislation, adopted by the Tribunal Supremo (Supreme Court) and referred to in paragraph 16 above, was taken up by the Spanish legislature when that legislation was amended by Basic Law 2/2009.

20 The referring court is of the view that the Government representative was wrong to state that there was a negative element in MO's conduct. Indeed, during the procedure, MO produced a valid passport, a visa to enter Spanish territory and residence permits up to 2013. In addition, MO has established family and social ties in Spain.

21 With regard to MO's conduct, that court states that the file submitted for its examination does not contain any negative element, additional to the mere illegal stay in Spain.

22 In those circumstances, the referring court is unsure of the consequences to be drawn from the judgment of 23 April 2015, *Zaizoune* (C-38/14, EU:C:2015:260), in order to assess MO's situation. In that judgment, the Court held that Directive 2008/115 must be interpreted as precluding legislation of a Member State which, in the event of third-country nationals staying illegally in the territory of that Member State, makes provision, depending on the circumstances, for either a fine or removal, the two measures being mutually exclusive.

23 In the present case, MO's situation is governed by the same national legislation as was applied in the case giving rise to that judgment of the Court. Furthermore, according to the interpretation adopted by the Tribunal Supremo (Supreme Court) before that judgment was delivered, removal from the national territory of a third-country national staying illegally in Spain may be ordered only if there are additional aggravating factors.

24 After the judgment of 23 April 2015, *Zaizoune* (C-38/14, EU:C:2015:260), was delivered, the Tribunal Supremo (Supreme Court) held inter alia in a judgment of 30 May 2019 that the Spanish

administrative and judicial authorities are entitled to refuse to apply the provisions of the Law on foreign nationals which provide that the imposition of a fine takes precedence and which require that a removal order is expressly justified by the presence of aggravating factors. In doing so, the Tribunal Supremo (Supreme Court) directly applied the provisions of Directive 2008/115, to the detriment of the person concerned, thereby aggravating that person's criminal liability. Following the judgment of 23 April 2015, *Zaizoune* (C-38/14, EU:C:2015:260), the Spanish courts were required to apply that directive directly in that way, even if it were to be applied to the detriment of the persons concerned.

25 The referring court is uncertain whether it is possible, in the main proceedings, to rely directly on the provisions of Directive 2008/115 for the purposes of ordering the removal of MO, even in the absence of any aggravating factors, additional to his illegal stay on Spanish territory. In that regard, it refers to the Court's case-law which precludes the possibility of applying the provisions of a directive directly to an individual, in particular, the judgments of 26 February 1986, *Marshall* (152/84, EU:C:1986:84), and of 11 June 1987, *X* (14/86, EU:C:1987:275). In addition, that court refers to the judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936), which lays down the limits of the obligation to interpret national law in accordance with the directives, having regard to the principle that offences and penalties must have a proper legal basis.

26 In those circumstances the Tribunal Superior de Justicia de Castilla-La Mancha (High Court of Justice of Castilla-La Mancha) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is an interpretation of the judgment of 23 April 2015 [*Zaizoune*, C-38/14, EU:C:2015:260] as meaning that the Spanish authorities and courts can directly apply Directive 2008/115 to the detriment of the third-country national, thereby ignoring and disapplying more advantageous national penalty provisions, aggravating that national's liability to a penalty and possibly disregarding the principle that criminal penalties must be defined by law, compatible with the case-law of the Court of Justice on the limits on the direct effect of directives, and should the fact that the Spanish legislation is not in conformity with directive [2008/115] be resolved, not in that way but by legislative reform or by the remedies provided by EU law whereby a State can be required properly to transpose directives?'

Consideration of the question referred

27 By its question, the referring court asks, in essence, whether Directive 2008/115 must be interpreted as meaning that, where national legislation makes provision, in the event of a third-country national staying illegally in the territory of a Member State, for either a fine or removal, and the latter measure may be adopted only if there are aggravating circumstances concerning that national, additional to his or her illegal stay, the competent national authority may rely directly on the provisions of that directive in order to adopt a return decision and to enforce that decision, even in the absence of such aggravating circumstances.

28 As a preliminary point, it should be noted that, as is apparent from the order for reference, that national legislation, applicable since the adoption of Basic Law 2/2009 which amended Basic Law 4/2000, confirmed the solution adopted by the Tribunal Supremo (Supreme Court), referred to in paragraph 23 above.

29 That national legislation was considered in the judgment of 23 April 2015, *Zaizoune* (C-38/14, EU:C:2015:260). As is clear from paragraphs 31 and 32 of that judgment, Article 6(1) of Directive 2008/115, first of all, lays down principally an obligation for Member States to issue a return decision against any third-country national staying illegally on their territory. Once it has

been established that the stay is illegal, the competent national authorities must, pursuant to Article 6(1) of that directive and without prejudice to the exceptions laid down by Article 6(2) to (5) thereof, adopt a return decision.

30 The Court held that the Spanish legislation concerned which, in the event of third-country nationals staying illegally in Spanish territory, makes provision for a fine or removal, depending on the circumstances, both measures being mutually exclusive, is capable of thwarting the application of the common standards and procedures established by Directive 2008/115 and, as the case may be, delaying the return, thereby undermining the effectiveness of that directive (see, to that effect, judgment of 23 April 2015, *Zaizoune*, C-38/14, EU:C:2015:260, paragraph 40).

31 Therefore, the Court held that Directive 2008/115, and in particular Article 6(1) and Article 8(1) read in conjunction with Article 4(2) and (3), must be interpreted as precluding such legislation (judgment of 23 April 2015, *Zaizoune*, C-38/14, EU:C:2015:260, paragraph 41).

32 As is apparent from the order for reference, after that judgment was delivered, the Tribunal Supremo (Supreme Court) held that the Spanish administrative and judicial authorities are entitled to refuse to apply that part of the national legislation which does not comply with Directive 2008/115 and to rely directly on that directive in order to impose a removal order in the event of an illegal stay in Spanish territory, even in the absence of aggravating factors.

33 In that regard, it should be observed that, when applying domestic law, and within the limits established by general principles of law, national courts are required to interpret that law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by that directive (judgment of 19 March 2020, *Sánchez Ruiz and Others*, C-103/18 and C-429/18, EU:C:2020:219, paragraph 121).

34 In the present case, the referring court, which has the task of determining whether it is able to interpret the national legislation at issue in the main proceedings in conformity with EU law, seems to preclude that possibility. It considers that, in that situation, the question arises whether it is possible to apply that directive directly, to the detriment of the person concerned.

35 In that regard, it must be observed that, in accordance with the Court's settled case-law, a directive cannot, of itself, impose obligations on an individual, since a provision of a directive may not be relied upon as such by a Member State against such an individual (see, to that effect, judgments of 26 February 1986, *Marshall*, 152/84, EU:C:1986:84, paragraph 48, and of 12 December 2013, *Portgás*, C-425/12, EU:C:2013:829, paragraph 22).

36 Therefore, in so far as the national legislation applicable to MO in the main proceedings provides that removal, within the meaning of that legislation, of a third-country national residing on Spanish territory may be ordered only if there are aggravating circumstances concerning that national, additional to his or her illegal stay, and that that legislation cannot be interpreted in conformity with Directive 2008/115, which is a matter for the referring court to ascertain, that Member State cannot rely on that directive in order to adopt a return decision in respect of MO, within the meaning of that directive, and to enforce that decision, even in the absence of those aggravating circumstances.

37 In view of all of the foregoing considerations, the answer to the question raised is that Directive 2008/115 must be interpreted as meaning that, where national legislation makes provision, in the event of a third-country national staying illegally in the territory of a Member State, for either a fine or removal, and the latter measure may be adopted only if there are aggravating

circumstances concerning that national, additional to his or her illegal stay, the competent national authority may not rely directly on the provisions of that directive in order to adopt a return decision and to enforce that decision, even in the absence of such aggravating circumstances.

Costs

38 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 (Sixth Chamber) hereby rules:

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 must be interpreted as meaning that, where national legislation makes provision, in the event of a third-country national staying illegally in the territory of a Member State, for either a fine or removal, and the latter measure may be adopted only if there are aggravating circumstances concerning that national, additional to his or her illegal stay, the competent national authority may not rely directly on the provisions of that directive in order to adopt a return decision and to enforce that decision, even in the absence of such aggravating circumstances.

[Signatures]

* Language of the case: Spanish.

Fine modulo