ECLI:EU:C:2021:127

Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

24 February 2021 (*)

(Reference for a preliminary ruling – Asylum and immigration – Directive 2008/115/EC – Articles 3, 4, 6 and 15 – Refugee staying illegally in the territory of a Member State – Detention for the purpose of transfer to another Member State – Refugee status in that other Member State – Principle of non-refoulement – No return decision – Applicability of Directive 2008/115)

In Case C-673/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Council of State, Netherlands), made by decision of 4 September 2019, received at the Court on 11 September 2019, in the proceedings

M,

A,

Staatssecretaris van Justitie en Veiligheid

v

Staatssecretaris van Justitie en Veiligheid,

T,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Fifth Chamber, M. Ilešič, C. Lycourgos (Rapporteur) and I. Jarukaitis, Judges,

Advocate General: M. Szpunar,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 July 2020,

after considering the observations submitted on behalf of:

– M, by A. Khalaf and H. Postma, advocaten,

– T, by J. van Mulken, advocaat,

– the Netherlands Government, by M. Bulterman, P. Huurnink and C. S. Schillemans, acting as Agents,

– the Estonian Government,, by N. Grünberg, acting as Agent,

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

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

after hearing the Opinion of the Advocate General at the sitting on 20 October 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 3, 4, 6 and 15 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 disputes between M, A and T and the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security; 'the State Secretary') concerning possible compensation for harm suffered as a result of their detention for the purpose of their transfer from the Netherlands to another Member State.

Legal context

EU law

Directive 2008/115

3 Recitals 2, 4 and 5 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.

…

(4) Clear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well-managed migration policy.

(5) This directive should establish a horizontal set of rules, applicable to all third-country nationals who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State.'

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 Community law as well as international law, including refugee protection and human rights obligations.’

5 Article 2 of that directive provides:

‘1. This directive applies to third-country nationals staying illegally on the territory of a Member State.

2. Member States may decide not to apply this directive to third-country nationals who:

(a) are subject to a refusal of entry in accordance with Article 13 of the [Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)], or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State;

(b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.

3. This directive shall not apply to persons enjoying the Community right of free movement as defined in Article 2(5) of the Schengen Borders Code.’

6 Article 3 of Directive 2008/115 is worded as follows:

‘For the purpose of this directive:

…

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 the Schengen Borders Code 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;’

…’

7 Under Article 4(3) of Directive 2008/115:

‘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.’

8 Article 5 of that directive states:

‘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*.’

9 Article 6 of Directive 2008/115 states:

‘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 15 of that directive provides:

‘1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

(a) there is a risk of absconding or

(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

…’

Netherlands law

The Vreemdelingenwet

11 Article 59(2) of the Vreemdelingenwet 2000 (2000 Law on Foreign Nationals) of 23 November 2000 (Stb. 2000, No 495), as amended with effect of 31 December 2011 in order to transpose Directive 2008/115 into Netherlands law ('the Vw 2000'), provides:

'If the documents necessary for the return of a foreign national are available or will be available within a short period of time, the interests of public order are deemed to require the detention of the foreign national, unless the foreign national has had lawful residence on the basis of Article 8(a) to (e) and (l).'

12 Article 62a of the Vw 2000 states:

'(1) Our Minister shall inform in writing a foreign national who is not a national of a Member State and who does not or no longer has lawful residence of the obligation to leave the Netherlands of his own accord and of the period within which he must comply with that obligation, unless:

…

(b) the foreign national is in possession of a valid residence permit or other authorisation for stay issued by another Member State

…

(3) The foreign national referred to in paragraph 1(b) shall be ordered to return immediately to the territory of the Member State concerned. If that order is not complied with or if the immediate departure of the foreign national is required for reasons of public policy or national security, a return decision shall be issued against him.'

13 Paragraph 63 of that law provides:

'(1) A foreign national who is not legally resident and who has not left the Netherlands on his own initiative within the period prescribed by this law may be deported.

(2) Our Minister shall be responsible for deportation matters.

…'

14 Under Article 106 of that law:

'(1) If the court orders the lifting of a measure involving deprivation or restriction of liberty, or if the deprivation or restriction of liberty is already lifted before the application for the lifting of that measure is examined, it may award the foreign national compensation at the expense of the State. Damage shall include non-pecuniary loss. …

(2) Paragraph 1 shall apply *mutatis mutandis* where the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State, Netherlands) orders the lifting of the measure involving deprivation or restriction of liberty.'

The Vreemdelingencirculaire

15 Until 1 January 2019, Article A3/2 of the Vreemdelingencirculaire 2000 (2000 Circular on foreign nationals) stated:

‘If the issuing of a return decision is contrary to international obligations (the prohibition of *refoulement*), the official responsible for border control or the control of foreign nationals shall not issue a return decision.

…’

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

16 By decisions of 28 February 2018, 13 June 2018 and 9 October 2018, the State Secretary rejected as inadmissible the applications for international protection lodged in the Netherlands by M, A and T, respectively, on the grounds that these persons, being third-country nationals, already had refugee status in another Member State, namely the Republic of Bulgaria, the Kingdom of Spain and the Federal Republic of Germany, respectively.

17 By the same decisions, pursuant to Article 62a(3) of the Vw 2000, he ordered those persons to go immediately to the territory of the Member State which had granted them such status. As none of those persons complied with that order, the State Secretary placed them in detention pursuant to Article 59(2) of the Vw 2000 for the purpose of their forced transfer to those three Member States. They were then forcibly returned to those Member States after the latter agreed to readmit them to their territory.

18 M, A and T brought actions before the Rechtbank Den Haag (District Court, The Hague, Netherlands), claiming, in essence, that their detention should have been preceded by the issuing of a return order within the meaning of Article 62a(3) of the Vw 2000, which transposes Article 6(2) of Directive 2008/115 into Netherlands law. The actions brought by M and A were dismissed. The action brought by T was upheld.

19 M and A appealed against the judgment of the Rechtbank Den Haag (District Court, The Hague) before the Raad van State (Council of State, Netherlands). The State Secretary also appealed against the judgment upholding T’s action.

20 After noting that the disputes pending before it concern only the possible right of M, A and T to compensation for the harm suffered as a result of their detention, the referring court points out that the outcome of those disputes depends on whether Directive 2008/115 precludes the State Secretary from detaining the third-country nationals at issue in the main proceedings, on the basis of Article 59(2) of the Vw 2000, in order to ensure that they are transferred to another Member State, without issuing a return decision within the meaning of Article 62a(3) of the Vw 2000.

21 The referring court asks, in the first place, whether Directive 2008/115 is applicable in this case.

22 In that connection, it points out that, since they are staying illegally in the territory of the Netherlands, the third-country nationals at issue in the main proceedings fall within the scope of Directive 2008/115, as laid down in Article 2(1) thereof. Furthermore, that court states that Article 6(2) of that directive governs the situation of illegally staying third-country nationals who, as in the present case, nevertheless have the right to reside in another Member State by requiring that a return decision be issued against them if they refuse to go immediately to that other Member State.

23 However, it would not be possible to issue a return decision to third-country nationals who, as in this case, have refugee status in another Member State, ordering their return to their country of origin, having regard to the prohibition of *refoulement* which must be respected in the event of implementation of Directive 2008/115. Furthermore, according to the referring court, the possible return of M, A and T to a transit country is not envisaged and these persons have not expressed the wish to leave voluntarily for another third country. It would therefore not be possible to issue a return decision within the meaning of that directive.

24 In those circumstances, the referring court considers that, having regard to the provisions of Articles 1 and 3(3) of Directive 2008/115, read in conjunction with recital 5 thereof, it is not inconceivable that the provisions of that directive are not applicable to the case of forced departure of the third-country nationals at issue in the main proceedings to the Member State in which they enjoy international protection. Should that be the case, the detention of these nationals would be entirely determined by national law.

25 Should Directive 2008/115 nevertheless apply to the disputes pending before it, the referring court asks, in the second place, whether the national practice in question can be justified as a more favourable national measure within the meaning of Article 4(3) of that directive.

26 In those circumstances, the Raad van State (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does Directive 2008/115, in particular Articles 3, 4, 6 and 15 thereof, preclude a foreign national who enjoys international protection in another [EU] Member State from being detained under national law, given that the purpose of the detention is removal to that other Member State and, for that reason, an instruction to depart to the territory of that Member State had initially been issued but no return decision was subsequently taken?’

Consideration of the question referred

27 By its question, the national court asks, in essence, whether Articles 3, 4, 6 and 15 of Directive 2008/115 must be interpreted as precluding a Member State from placing in administrative detention a third-country national who is staying illegally in its territory without a return decision having first been issued to him or her, in order to carry out the forced transfer of that national to another Member State in which that national has refugee status, where that national has refused to comply with the order issued to him or her to go to that other Member State.

28 The aim of Directive 2008/115 is, according to recital 2 thereof, to establish an effective removal and repatriation policy based on common standards, so that the persons concerned are repatriated in a humane manner and with full respect for their fundamental rights and dignity. Recital 4 of that directive adds in that regard that an effective return policy is a necessary element of a well-managed migration policy. As is clear from both the 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 17 September 2020, *JZ (Custodial sentence in the case of an entry ban)*, C-806/18, EU:C:2020:724, paragraph 24 and the case-law cited).

29 In that connection, it should be recalled in the first place that, subject to the exceptions laid down in Article 2(2), Directive 2008/115 applies to any third-country national staying illegally on the territory of a Member State (see, to that effect, judgments of 7 June 2016, *Affum*, C-47/15, EU:C:2016:408, paragraph 61, and of 19 March 2019, *Arib and Others*, C-444/17, EU:C:2019:220,

paragraph 39). The concept of ‘illegal stay’ is defined in Article 3(2) of that directive as ‘the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions … for entry, stay or residence in that Member State’.

30 It follows from that definition that any third-country national who is present on the territory of a Member State without fulfilling the conditions for entry, stay or residence there is, by virtue of that fact alone, staying there illegally (judgment of 7 June 2016, *Affum*, C-47/15, EU:C:2016:408, paragraph 48). This may be the case even if, as in the present case, that national has a valid residence permit in another Member State on the grounds that the latter has granted him or her refugee status.

31 Moreover, where a third-country national falls within the scope of Directive 2008/115, he must therefore, in principle, be subject to the common standards and procedures laid down by the directive for the purpose of his removal, as long as his stay has not, as the case may be, been regularised (see, to that effect, judgment of 7 June 2016, *Affum*, C-47/15, EU:C:2016:408, paragraphs 61 and 62).

32 In that connection, it follows, first, from Article 6(1) of Directive 2008/115 that, once the unlawful nature of residence has been established, any third-country national must, without prejudice to the exceptions provided for in paragraphs 2 to 5 of that article and in strict compliance with the requirements laid down in Article 5 of that directive, be the subject of a return decision. In accordance with Article 3(3) of that directive, that national goes back to his or her country of origin, or a transit or third country to which that national decides to return voluntarily and which is prepared to admit him or her to its territory.

33 By way of derogation from Article 6(1) of Directive 2008/115, paragraph 2 of that article provides, second, that where a third-country national staying illegally on the territory of one Member State holds a residence permit issued by another Member State, he or she must return immediately to the territory of that Member State.

34 However, according to that provision, where that national does not comply with that obligation or where his or her immediate departure is required on grounds of public policy or national security, the Member State in which that third-country national is staying illegally is required to issue a return decision in his or her regard.

35 It therefore follows from Article 6(2) that a third-country national staying illegally in the territory of a Member State whilst having a right of residence in another Member State should be allowed to return to the latter, rather than be issued a return decision from the outset, unless public policy or national security so requires (see, to that effect, judgment of 16 January 2018, *E*, C-240/17, EU:C:2018:8, paragraph 46).

36 However, that provision cannot be interpreted as laying down an exception to the scope of Directive 2008/115, in addition to those set out in Article 2(2) thereof, which would allow Member States to exempt illegally staying third-country nationals from common standards and procedures for return where they refuse to return immediately to the territory of the Member State which has granted them a right of residence (see, by analogy, judgment of 7 June 2016, *Affum*, C-47/15, EU:C:2016:408, paragraph 82).

37 On the contrary, as set out in paragraph 34 of the present judgment, in such a case, the Member States on whose territory those nationals are staying illegally are, in principle, required under Article 6(2) of Directive 2008/115, read in conjunction with Article 6(1) thereof, to issue a

return decision requiring those nationals to leave the territory of the European Union (see, to that effect, judgment of 16 January 2018, *E*, C-240/17, EU:C:2018:8, paragraph 45).

38 In the second place, it is apparent from the information before the Court that it was legally impossible for the Netherlands authorities to issue, in accordance with Article 6(2) of Directive 2008/115, a return decision against the third-country nationals at issue in the main proceedings after those nationals had refused to comply with the order issued to them to return to the Member State in whose territory they had a residence permit.

39 Any return decision must identify, among the third countries referred to in Article 3(3) of Directive 2008/115, the country to which the third-country national, to whom that decision is addressed, must return (see, to that effect, judgment of 14 May 2020, *Országos Idegenrendézeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 115).

40 It is common ground, first, that the third-country nationals at issue in the main proceedings enjoy refugee status in a Member State other than the Netherlands. They cannot therefore be returned to their country of origin, as otherwise they would be in breach of the principle of *non-refoulement*, which is guaranteed in Article 18 and Article 19(2) of the Charter of Fundamental Rights of the European Union and which, as stated in Article 5 of Directive 2008/115, must be respected by the Member States in the implementation of that directive and, therefore, in particular when considering whether to issue a return decision (see, to that effect, judgment of 19 June 2018, *Gnandi*, C-181/16, EU:C:2018:465, paragraph 53).

41 Second, it is clear from the order for reference that those nationals also cannot be returned to a transit country or a third country to which they may have decided to return voluntarily and which would accept them on its territory, within the meaning of Article 3(3) of Directive 2008/115.

42 It follows that, in circumstances such as those at issue in the main proceedings, where none of the countries referred to in Article 3(3) of Directive 2008/115 can be a return destination, the Member State concerned is legally unable to fulfil the obligation, imposed on it by Article 6(2) of Directive 2008/115, to issue a return decision to a third-country national staying illegally on its territory and who refuses to go immediately to the Member State in which he or she holds a residence permit. Moreover, no standard or procedure laid down by that directive permits the removal of that national, even though he or she is staying illegally in the territory of a Member State.

43 In the third place, it must be recalled that Directive 2008/115 is not intended to harmonise in their entirety the national rules of the Member States on the stay of foreign nationals (judgment of 6 December 2011, *Achughbabian*, C-329/11, EU:C:2011:807, paragraph 28). The common standards and procedures established by that directive concern only the issuing of return decisions and the implementation of those decisions (see, to that effect, judgment of 6 December 2011, *Achughbabian*, C-329/11, EU:C:2011:807, paragraph 29, and of 8 May 2018, *K. A. and Others (Family reunification in Belgium),* C-82/16, EU:C:2018:308, paragraph 44).

44 In particular, Directive 2008/115 is not intended to determine the consequences of the illegal residence on the territory of a Member State of third-country nationals in respect of whom no decision on their return to a third country can be issued (see, by analogy, judgment of 5 June 2014, *Mahdi*, C-146/14 PPU, EU:C:2014:1320, paragraph 87). That is also the case where, as in the present case, this is due, inter alia, to the application of the principle of *non-refoulement*.

45 It follows that, in a situation such as that at issue in the main proceedings, where no return decision can be issued, the decision of a Member State to carry out the forced transfer of a third-country national residing illegally on its territory to the Member State which has granted him or her refugee status is not governed by the common standards and procedures laid down by Directive 2008/115. Accordingly, that decision does not fall within the scope of that directive, but rather within that of the exercise of the sole competence of that Member State in matters of illegal immigration. Consequently, the same applies to the administrative detention of such a national ordered, in such circumstances, to ensure his or her transfer to the Member State in which he or she has refugee status.

46 More particularly, neither Article 6(2) of Directive 2008/115 nor any other provision of that directive prevents a Member State, in circumstances such as those at issue in the main proceedings, from placing a third-country national staying illegally on its territory in administrative detention in order to transfer him or her to another Member State in which that national has a residence permit, without first having taken a return decision against him or her, since such a decision cannot, hypothetically, be issued.

47 Lastly, it is important to add that the forced transfer and detention of a third-country national in circumstances such as those at issue in the main proceedings are subject to full observance of fundamental rights, in particular those guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (judgments of 6 December 2011, *Achughbabian*, C-329/11, EU:C:2011:807, paragraph 49, of 1 October 2015, *Celaj*, C-290/14, EU:C:2015:640, paragraph 32, and of 17 September 2020, *JZ (Custodial sentence in the case of an entry ban)*, C-806/18, EU:C:2020:724, paragraph 41).

48 In the light of all the foregoing considerations, the answer to the question referred is that Articles 3, 4, 6 and 15 of Directive 2008/115 must be interpreted as not precluding a Member State from placing in administrative detention a third-country national residing illegally on its territory, in order to carry out the forced transfer of that national to another Member State in which that national has refugee status, where that national has refused to comply with the order to go to that other Member State and it is not possible to issue a return decision to him or her.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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:

Articles 3, 4, 6 and 15 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 must be interpreted as not precluding a Member State from placing in administrative detention a third-country national residing illegally on its territory, in order to carry out the forced transfer of that national to another Member State in which that national has refugee status, where that national has refused to comply with the order to go to that other Member State and it is not possible to issue a return decision to him or her.

[Signatures]

* Language of the case: Dutch.