Reports of Cases

ORDER OF THE COURT (Eighth Chamber)

26 April 2023*

(Reference for a preliminary ruling – Article 99 of the Rules of Procedure of the Court of Justice – Immigration policy – Directive 2008/115/EC – Common standards and procedures in Member States for returning illegally staying third-country nationals – Article 6(2) – Return decision accompanied by an entry ban of three years' duration – Third-country national holding a valid residence permit issued by another Member State – Failure by the national police authority to permit that national to go to the territory of that other Member State before it adopts that return decision in respect of that national)

In Case C-629/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Förvaltningsrätten i Göteborg, migrationsdomstolen (Administrative Court for Immigration Matters, Gothenburg, Sweden), made by decision of 27 September 2022, received at the Court on 7 October 2022, in the proceedings

A.L.

v

Migrationsverket,

THE COURT (Eighth Chamber),

composed of M. Safjan (Rapporteur), President of the Chamber, N. Piçarra and N. Jääskinen, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to rule by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

* Language of the case: Swedish.

Order

1 This request for a preliminary ruling concerns the interpretation of Article 6(2) 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 A.L., a third-country national staying illegally in Sweden, and the Migrationsverket (Immigration Board, Sweden) concerning the latter's decision to dismiss the administrative appeal brought by A.L. against the return decision issued in respect of him by the Swedish police authority and against the ban on entry to Sweden accompanying that decision.

Legal context

European Union 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 2 of that directive, entitled 'Scope', provides, in paragraph 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 [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 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.'

5 Article 4 of that directive, entitled 'More favourable provisions', states:

'1. This Directive shall be without prejudice to more favourable provisions of:

(a) bilateral or multilateral agreements between the Community or the Community and its Member States and one or more third countries;

(b) bilateral or multilateral agreements between one or more Member States and one or more third countries.

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.

4. With regard to third-country nationals excluded from the scope of this Directive in accordance with Article 2(2)(a), Member States shall:

(a) ensure that their treatment and level of protection are no less favourable than as set out in Article 8(4) and (5) (limitations on use of coercive measures), Article 9(2)(a) (postponement of removal), Article 14(1)(b) and (d) (emergency health care and taking into account needs of vulnerable persons), and Articles 16 and 17 (detention conditions) and

(b) respect the principle of non-refoulement.'

6 Pursuant to Article 6 of that directive, headed 'Return decision':

'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 that event no return decision shall be issued. Where a return decision has already been issued, it shall 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.

6. This Directive shall not prevent Member States from adopting a decision on the ending of a legal stay together with a return decision and/or a decision on a removal and/or entry ban in a single administrative or judicial decision or act as provided for in their national legislation,

without prejudice to the procedural safeguards available under Chapter III and under other relevant provisions of Community and national law.'

7 Article 11 of Directive 2008/115, entitled 'Entry ban', is worded as follows:

'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.

…'

Swedish law

8 Paragraph 6 a of Chapter 8 of the Utlänningslag (2005:716) (Law (2005:716) on foreign nationals) provides:

'When a question arises concerning the removal or expulsion pursuant to Paragraphs 2, 3 or 6 [of the present chapter] of a foreign national who holds a valid residence permit or any other form of permit entitling him or her to reside in another EU Member State, the determining authority shall request the foreign national to return to the other EU Member State voluntarily within a reasonable time. The determining authority may make a decision on removal or expulsion only if the foreign national has not complied with such a request.

The first subparagraph shall not apply if:

…

(5) it is likely that the foreign national would not comply with the request.

…'

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

9 On 23 March 2022, A.L., a third-country national, was subject to a traffic check in Sweden. During that check, the Swedish police authority found that A.L. did not have either a residence permit or a work permit for Sweden. However, he was able to present a Croatian residence permit valid until 25 June 2022 and argued that he was working for a Croatian agency which had hired out his services to a Swedish company.

10 On the same day, that police authority adopted a decision ordering A.L. to leave Swedish territory. That decision was accompanied by an entry ban in respect of Sweden of three years' duration. It is apparent from the order for reference that that police authority did not ask A.L. to return to Croatia voluntarily, on the ground that it was, in its view, likely that he would not comply with such a request.

11 A.L. left for Zagreb (Croatia) on 1 April 2022.

12 A.L. brought an administrative appeal against the decision referred to in paragraph 10 of the present order before the Immigration Board. After the Immigration Board dismissed that action, A.L. brought an action in the courts against that rejection decision before the Förvaltningsrätten i Göteborg, migrationsdomstolen (Administrative Court for Immigration Matters, Gothenburg, Sweden), which is the referring court.

13 That court asks whether Article 6 of Chapter 8 of the Law (2005:716) on foreign nationals, which implements Article 6(2) of Directive 2008/115 in Swedish law, is compatible with that directive.

14 It is true that the first subparagraph of Paragraph 6 a of that directive provides, in accordance with Article 6(2) of that directive, that the competent national authority must permit a third-country national with a right of residence in a Member State to return to that Member State voluntarily before taking a decision on whether to return that national. However, point 5 of the second subparagraph of Paragraph 6 a lays down an exception which is not provided for in Article 6(2) of that directive, in so far as, where it is likely that that third-country national will not return to that Member State, a return decision may be issued in respect of him or her without that authority having first permitted him or her to return to that Member State.

15 In those circumstances, the Förvaltningsrätten i Göteborg, migrationsdomstolen (Administrative Court for Immigration Matters, Gothenburg) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) What is the meaning of Article 6(2) of the Returns Directive? … Does it mean that a third-country national must be requested to return immediately from the Member State in which he or she is staying illegally to the Member State in which he or she has a valid residence permit, unless the third-country national's immediate departure is required for reasons of public policy or national security?

(2) Does the Returns Directive or other EU law provide guidance on what the consequence is of a national authority not issuing the necessary request pursuant to Article 6(2) of the Returns Directive? Does a failure to issue the necessary request mean that the removal decision and the decision banning return are invalid?

(3) If Article 6(2) of the Returns Directive entails such a request and consequence, is it sufficiently clear and precise to have direct effect?

(4) Is national legislation, such as the Swedish rule in Paragraph 6 a of Chapter 8 of the Law [(2005:716)] on foreign nationals, which creates additional exemptions from a possible obligation to issue a [request], compatible with EU law?'

Consideration of the questions referred

16 Under Article 99 of the Rules of Procedure of the Court of Justice, where the reply to a question referred for a preliminary ruling may be clearly deduced from existing case-law, or where the answer to the question referred admits of no reasonable doubt, the Court may at any time, on a proposal by the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

17 It is appropriate to apply that provision in the present case.

The first and fourth questions

18 By its first and fourth questions, which it is appropriate to examine together and first of all, the referring court asks, in essence, whether Article 6(2) of Directive 2008/115 must be interpreted as meaning that the competent authorities of a Member State are required to permit a third-country national staying illegally on the territory of that Member State who holds a valid residence permit or other authorisation offering a right to stay issued by another Member State to go to that other Member State before they adopt, if the circumstances so require, a return decision in respect of that person, even though those authorities consider it likely that that national will not comply with a request to go to that other Member State.

19 Article 6(2) of Directive 2008/115 states that 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 are to 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 that requirement, or where the third-country national's immediate departure is required for reasons of public policy or national security, paragraph 1 of that article is to apply. The latter provision provides that Member States are to issue a return decision to any third-country national staying illegally on their territory.

20 It follows from Article 6(2) that a third-country national staying illegally in the territory of a Member State while holding a valid residence permit or other authorisation offering a right to stay issued by another Member State should be allowed to return to the latter State rather than to be issued a return decision from the outset, unless public policy or national security so requires (see, to that effect, judgment of 24 February 2021, *M and Others (Transfer to a Member State)*, C-673/19, EU:C:2021:127, paragraph 35 and the case-law cited).

21 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 (judgment of 24 February 2021, *M and Others (Transfer to a Member State)*, C-673/19, EU:C:2021:127, paragraph 36).

22 On the contrary, in the situation where those nationals refuse to return immediately to that territory, 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 (judgment of 24 February 2021, *M and Others (Transfer to a Member State)*, C-673/19, EU:C:2021:127, paragraph 37 and the case-law cited).

23 As is apparent from both its title and from the wording of Article 1 of Directive 2008/115, that directive establishes 'common standards and procedures' which must be applied by each Member State for returning illegally staying third-country nationals. It follows from that expression, but also from the general scheme of that directive, that Member States may depart from those standards and procedures only as provided for in Directive 2008/115, inter alia in Article 4 thereof (judgment of 28 April 2011, *El Dridi*, C-61/11 PPU, EU:C:2011:268, paragraph 32).

24 Article 4(3) allows Member States to adopt or maintain provisions that are more favourable than Directive 2008/115 to illegally staying third-country nationals provided that such provisions are compatible with it. That directive does not however allow those States to apply stricter standards in the area that it governs (judgment of 28 April 2011, *El Dridi*, C-61/11 PPU, EU:C:2011:268, paragraph 33).

25 In that regard, the Court has also observed that Directive 2008/115 sets out specifically the procedure to be applied by each Member State for returning third-country nationals staying illegally on their territory and fixes the order in which the various, successive stages of that procedure should take place (judgment of 28 April 2011, *El Dridi*, C-61/11 PPU, EU:C:2011:268, paragraph 34).

26 In the light of those considerations, it must be stated that an interpretation of Article 6(2) of Directive 2008/115 to the effect that that provision permits the competent authorities of the Member States to adopt a return decision where it is 'likely' that the third-country national concerned will not comply with a request to go immediately to the territory of the Member State which issued him or her with a valid residence permit or other authorisation offering a right of residence would amount to establishing a derogation which is not provided for in Article 6(2) and would therefore deprive that provision of its practical effect.

27 In the light of those reasons, the answer to the first and fourth questions is that Article 6(2) of Directive 2008/115 must be interpreted as meaning that the competent authorities of a Member State are required to permit a third-country national staying illegally on the territory of that Member State who holds a valid residence permit or other authorisation offering a right to stay issued by another Member State to go to that other Member State before they adopt, if the circumstances so require, a return decision in respect of such a national, even though those authorities consider it likely that that national will not comply with a request to go to that other Member State.

The third question

28 By its third question, which it is appropriate to examine after examining the first and fourth questions, the referring court asks, in essence, whether Article 6(2) of Directive 2008/115 must be interpreted as meaning that, in so far as it requires Member States to permit third-country nationals staying illegally on their territory to go to the Member State which issued them with a valid residence permit or other authorisation offering a right to stay before they adopt, if the circumstances so require, a return decision in respect of them, has direct effect and may accordingly be relied on by individuals before the national courts.

29 It is apparent from the settled case-law of the Court of Justice that, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the Member

State concerned, where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (judgment of 1 August 2022, *TL (Absence of an interpreter and of translation)*, C-242/22 PPU, EU:C:2022:611, paragraph 49 and the case-law cited).

30 In that regard, the Court has stated that a provision of EU law is, first, unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States and, second, sufficiently precise to be relied on by an individual and applied by a court where it sets out an obligation in unequivocal terms (judgment of 1 August 2022, *TL (Absence of an interpreter and of translation)*, C-242/22 PPU, EU:C:2022:611, paragraph 50 and the case-law cited).

31 Furthermore, the Court has held that, even though a directive leaves the Member States a degree of latitude when they adopt rules in order to implement it, a provision of that directive may be regarded as unconditional and precise where it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it (judgment of 1 August 2022, *TL (Absence of an interpreter and of translation)*, C-242/22 PPU, EU:C:2022:611, paragraph 51 and the case-law cited).

32 In the present case, as stated in paragraph 25 of the present order, Directive 2008/115 sets out specifically the procedure to be applied by each Member State for returning third-country nationals staying illegally on their territory and fixes the order in which the various, successive stages of that procedure should take place.

33 In that regard, it follows from the wording of Article 6(2) of Directive 2008/115 that it is only where the third-country national concerned does not comply with the obligation to go immediately to the territory of the Member State which issued him or her with a valid residence permit or other authorisation offering a right to stay or where his or her immediate departure is required for reasons of public policy or national security that the Member State on whose territory that third-country national is staying illegally may issue a return decision, in accordance with Article 6(1) of that directive.

34 It should be noted, first, that the obligation on the Member States to permit third-country nationals staying illegally on their territory to go to the Member State which issued them with a valid residence permit or other authorisation offering a right to stay is unconditional in nature, since Article 6(2) of Directive 2008/115 does not make that obligation subject to an EU measure being taken nor does it allow Member States to make that obligation subject to conditions or restrict the scope of that obligation.

35 Second, while Directive 2008/115 leaves a certain degree of latitude to the Member States when adopting practical arrangements intended to implement the procedure referred to in Article 6(2) of that directive, that provision imposes on them, in unequivocal terms, the obligation to permit third-country nationals staying illegally on their territory to go to the Member State which issued them with a valid residence permit or other authorisation offering a right to stay before a return decision is issued in respect of them.

36 In the light of those reasons, the answer to the third question is that Article 6(2) of Directive 2008/115 must be interpreted as meaning that, in so far as it requires Member States to permit third-country nationals staying illegally on their territory to go to the Member State which issued them with a valid residence permit or other authorisation offering a right to stay before those Member States adopt, if the circumstances so require, a return decision in respect of such nationals, that provision has direct effect and may accordingly be relied on by individuals before the national courts.

The second question

37 By its second question, which it is appropriate to examine last, the referring court asks, in essence, whether Article 6(2) of Directive 2008/115 must be interpreted as meaning that where, contrary to that provision, a Member State does not permit a third-country national staying illegally on its territory to go immediately to the Member State which issued him or her with a valid residence permit or other authorisation offering a right to stay before it adopts a return decision in respect of that national, that return decision and the entry ban accompanying it are invalid.

38 In the light of the principle of the primacy of EU law, where it is impossible for it to interpret national legislation in compliance with the requirements of EU law, any national court, acting in the exercise of its jurisdiction, has, as a body of a Member State, the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case before it, such as, in the present case, Article 6(2) of Directive 2008/115 (see, to that effect, judgment of 10 March 2022, *Landkreis Gifhorn*, C-519/20, EU:C:2022:178, paragraph 101 and the case-law cited).

39 It follows that, unless national legislation such as that at issue in the case in the main proceedings can be interpreted in accordance with EU law, any national court, acting in the exercise of its jurisdiction, must refuse to apply such legislation in the case before it (see, to that effect, judgment of 10 March 2022, *Landkreis Gifhorn*, C-519/20, EU:C:2022:178, paragraph 102).

40 In that respect, the national court must bear in mind that that entails, if the circumstances so require, the obligation to take all appropriate measures to enable EU law to be fully applied (judgment of 16 December 2010, *Seydaland Vereinigte Agrarbetriebe*, C-239/09, EU:C:2010:778, paragraph 53 and the case-law cited).

41 Under the principle of sincere cooperation set out in Article 4(3) TEU, Member States are required to eliminate the unlawful consequences of a breach of EU law (judgment of 25 June 2020, *A and Others (Wind turbines at Aalter and Nevele)*, C-24/19, EU:C:2020:503, paragraph 83). It follows that the competent national authorities, including national courts hearing an appeal against a measure of domestic law adopted contrary to Article 6(2) of Directive 2008/115, are required, in the exercise of their powers, to take all necessary measures to remedy a national authority's failure to fulfil obligations arising from that provision. That may, for example, result in the invalidity under national law of a return decision and, consequently, also of a decision accompanying it, such as an entry ban under Article 11 of that directive.

42 In the light of those reasons, the answer to the second question is that Article 6(2) of Directive 2008/115 must be interpreted as meaning that where, contrary to that provision, a Member State does not permit a third-country national staying illegally on its territory to go immediately to the Member State which issued him or her with a valid residence permit or other authorisation offering a right to stay before it adopts a return decision in respect of that national, the

competent national authorities, including national courts hearing an appeal against that return decision and the accompanying entry ban, are required to take all necessary measures to remedy a national authority's failure to fulfil obligations arising from that provision.

Costs

43 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.

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

1. **Article 6(2) 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 meaning that the competent authorities of a Member State are required to permit a third-country national staying illegally on the territory of that Member State who holds a valid residence permit or other authorisation offering a right to stay issued by another Member State to go to that other Member State before they adopt, if the circumstances so require, a return decision in respect of such a national, even though those authorities consider it likely that that national will not comply with a request to go to that other Member State.

2. **Article 6(2) of the Directive 2008/115**

   must be interpreted as meaning that in so far as it requires Member States to permit third-country nationals staying illegally on their territory to go to the Member State which issued them with a valid residence permit or other authorisation offering a right to stay before those Member States adopt, if the circumstances so require, a return decision in respect of such nationals, that provision has direct effect and may accordingly be relied on by individuals before the national courts.

3. **Article 6(2) of Directive 2008/115**

   must be interpreted as meaning that where, contrary to that provision, a Member State does not permit a third-country national staying illegally on its territory to go immediately to the Member State which issued him or her with a valid residence permit or other authorisation offering a right to stay before it adopts a return decision in respect of that national, the competent national authorities, including national courts hearing an appeal against that return decision and the accompanying entry ban, are required to take all necessary measures to remedy a national authority's failure to fulfil obligations arising from that provision.

[Signatures]