JUDGMENT OF THE COURT (Third Chamber)

22 October 2009 *

In Joined Cases C-261/08 and C-348/08,

REFERENCES for preliminary rulings under Articles 68 EC and 234 EC from the Tribunal Superior de Justicia de Murcia (Spain), made by decisions of 12 June and 22 July 2008, received at the Court on 19 June and 30 July 2008 respectively, in the proceedings

María Julia Zurita García (C-261/08),

Aurelio Choque Cabrera (C-348/08)

v

Delegado del Gobierno en la Región de Murcia,

* Language of the cases: Spanish.

THE COURT (Third Chamber),

composed of P. Lindh, President of the Sixth Chamber, acting as President of the Third Chamber, A. Rosas, U. Lõhmus (Rapporteur), A. Ó Caoimh and A. Arabadjiev, Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

having regard to the request of the national court of 13 June 2008, received at the Court on 19 June 2008, that the urgent procedure be applied to the order for reference in Case C-261/08 *Zurita García* under Article 104b of the Rules of Procedure,

having regard to the decision of the Third Chamber of the Court of 25 June 2008 not to apply the urgent procedure to that order for reference,

after considering the observations submitted on behalf of:

— Mr Choque Cabrera, by E. Bermejo Garrés, procuradora, and A. Corbalán Maiquez, abogado,

— the Spanish Government, by N. Díaz Abad, acting as Agent,

— the Italian Government, by I. Bruni, acting as Agent, and by G. Fiengo and W. Ferrante, avvocati dello Stato,

— the Austrian Government, by E. Riedl, acting as Agent,

— the Commission of the European Communities, by M. Wilderspin and E. Adsera Ribera, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 May 2009,

gives the following

Judgment

1 The present references for preliminary rulings concern the interpretation of Article 62(1) and (2)(a) EC, and Articles 5, 11 and 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).

2 The references have been made in the course of two actions brought by Bolivian nationals, namely Ms Zurita García (Case C-261/08) and Mr Choque Cabrera (Case C-348/08), against the Delegado del Gobierno en la Región de Murcia (government representative for the region of Murcia; 'the Delgado del Gobierno') relating to orders for expulsion from Spanish territory, with a prohibition on entry into the Schengen area for five years, adopted against Ms Zurita García and Mr Choque Cabrera.

Legal context

Community legislation

The Schengen Protocol

3 Under Article 1 of the Protocol integrating the Schengen *acquis* into the framework of the European Union, annexed to the Treaty on European Union and the Treaty establishing the European Community by the Treaty of Amsterdam ('the Protocol'), 13 Member States of the European Union are authorised to establish closer cooperation among themselves within the scope of the Schengen *acquis*, as defined in the annex to that protocol. That cooperation is conducted within the institutional and legal framework of the European Union and with respect for the relevant provisions of the Treaty on European Union and of the Treaty establishing the European Community.

4 Under the first subparagraph of Article 2(1) of the Protocol, from the date of entry into force of the Treaty of Amsterdam, that is to say, from 1 May 1999, the Schengen *acquis* was to apply immediately to the 13 Member States referred to in Article 1 of the Protocol.

5 Both the Agreement 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 14 June 1985 (OJ 2000 L 239, p. 13), and the Convention implementing the Schengen Agreement, signed at Schengen on 19 June 1990 (OJ 2000 L 239, p. 19), as amended by Council Regulation (EC) No 2133/2004 of 13 December 2004 on the requirement for the competent authorities of the Member States to stamp systematically the travel documents of third-country nationals when they cross the external borders of the Member States and amending the provisions of the Convention implementing the Schengen Agreement and the common manual to this end (OJ 2004 L 369, p. 5) ('the CISA'), form part of that *acquis*.

6 Pursuant to the second sentence of the second subparagraph of Article 2(1) of the Protocol, the Council of the European Union adopted, on 20 May 1999, Decision 1999/436/EC determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis* (OJ 1999 L 176, p. 17). It follows from Article 2 of Decision 1999/436, in conjunction with Annex A thereto, that the Council selected Articles 62 EC and 63 EC, which form part of Title IV of the EC Treaty, entitled 'Visas, asylum, immigration and other policies related to free movement of persons', as the legal bases for Article 23 of the CISA.

The CISA

7 Article 6b of the CISA provides:

'1. If the travel document of a third-country national does not bear an entry stamp, the competent national authorities may presume that the holder does not fulfil, or no longer fulfils, the conditions of duration of stay applicable within the Member State concerned.

2. This presumption may be rebutted where the third-country national provides, by any means, credible evidence such as transport tickets or proof of his or her presence outside the territory of the Member States, which shows that he or she has respected the conditions relating to the duration of a short stay.

…

3. Should the presumption referred to in paragraph 1 not be rebutted, the third-country national may be expelled by the competent authorities from the territory of the Member States concerned.'

8 Article 23 of the CISA states:

'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.

…

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. If under that law expulsion is not authorised, the Contracting Party concerned may allow the persons concerned to remain within its territory.

…

5. Paragraph 4 shall not preclude the application of national provisions on the right of asylum, the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967, paragraph 2 of this Article or Article 33(1) of this Convention.'

Regulation No 562/2006

9 Regulation No 562/2006 codifies the existing texts on border controls and seeks to consolidate and develop the legislative aspect of the policy of integrated management of borders by detailing rules on the crossing of external borders.

10 Under Article 5 of that regulation, relating to entry conditions for third-country nationals:

'1. For stays not exceeding three months per six-month period, the entry conditions for third-country nationals shall be the following:

(a) they are in possession of a valid travel document or documents authorising them to cross the border;

(b) they are in possession of a valid visa, if required pursuant to Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [OJ 2001 L 81, p. 1], except where they hold a valid residence permit;

(c) they justify the purpose and conditions of the intended stay, and they have sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin or transit to a third country into which they are certain to be admitted, or are in a position to acquire such means lawfully;

(d) they are not persons for whom an alert has been issued in the [Schengen Information System] for the purposes of refusing entry;

(e) they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States' national databases for the purposes of refusing entry on the same grounds.

…'

11 The wording of Article 11(1) and (3) of Regulation No 562/2006, concerning the presumption as regards fulfilment of conditions of duration of stay, adopted that of Article 6b(1) and (3) of the CISA, except in the Spanish-language version, which provides as follows in Article 11(3) of the regulation:

'Should the presumption referred to in paragraph 1 not be rebutted, the competent authorities shall expel the third-country national from the territories of the Member States concerned.'

12 Article 13 of Regulation No 562/2006, concerning the refusal of entry, states:

'1. A third-country national who does not fulfil all the entry conditions laid down in Article 5(1) and does not belong to the categories of persons referred to in Article 5(4) shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.

…'

13 Under Article 39(1) of that regulation, Articles 2 to 8 of the CISA were repealed with effect from 13 October 2006.

14 Pursuant to its Article 40, Regulation No 562/2006 entered into force on 13 October 2006.

National legislation

15 Framework Law 4/2000 on the rights and freedoms of aliens in Spain and their social integration (Ley Orgánica sobre derechos y libertades de los extranjeros en España y su integración social) of 11 January 2000 (BOE No 10 of 12 January 2000, p. 1139) was amended by Framework Law 8/2000 of 22 December 2000 (BOE No 307 of 23 December 2000, p. 45508), and by Framework Law 14/2003 of 20 November 2003 (BOE No 279 of 21 November 2003, p. 41193) ('the Law on Aliens').

16 Article 28(3) of the Law on Aliens, which governs the departure of aliens from Spain, provides:

'Departure [from Spanish territory] is obligatory in the following situations:

…

(c) in the event of administrative refusal of applications to remain on Spanish territory submitted by an alien, or in the absence of authorisation to be in Spain.'

17 Pursuant to Article 51 of the Law on Aliens, offences under the provisions relating to the entry and stay of aliens are classified according to their gravity as 'less serious', 'serious' and 'very serious'.

18 Article 53(a) of that law defines a serious offence as:

'Being unlawfully present on Spanish territory, on the ground that the person concerned has not obtained an extension of permission to stay or a residence permit, or on the ground that these have expired more than three months previously, and that person has not applied for renewal of that permission to stay or residence permit within the period laid down by law.'

19 Under Article 55 of the Law on Aliens, the penalty for a serious offence is a maximum fine of EUR 6 000. When imposing the penalty, the competent authority must apply criteria of proportionality, taking into account the degree of culpability, the damage caused, and the risk arising from the offence and its repercussions.

20 Article 57 of the Law on Aliens, concerning expulsion from the territory, provides:

'1. If the offender is a foreign national and behaves in a manner defined by law as very serious, or serious, within the meaning of Article 53(a), (b), (c), (d) and (f) of this Framework Law, it is possible, instead of imposing a fine, to expel that person from Spanish territory, at the conclusion of the corresponding administrative procedure.

2. Where the alien has been found guilty, in Spain or abroad, of intentional conduct which constitutes a criminal offence in Spain punishable by a prison sentence of longer than one year, that shall constitute a further legal basis for expulsion at the end of the corresponding administrative procedure, save where the previous conviction has been removed from the criminal record.

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

…'

21 Article 158 of Royal Decree 2393/2004, which adopted rules for the implementation of the Law on Aliens (Reglamento de la Ley de Extranjería) of 30 December 2004 (BOE No 6 of 7 January 2005, p. 485), provides:

'1. In the absence of authorisation to be in Spain, inter alia, because the conditions for entry or residence are not met, or are no longer met, or in the event of an administrative refusal of an application for permission to stay, a residence permit or any other documentation necessary so that the alien may remain on Spanish territory … the administrative decision shall inform the person concerned of the obligation on him to leave the country, without prejudice to the possibility of that warning also being indicated on his passport or similar document, or even being indicated on a separate document if the person concerned is present in Spain on the basis of an identification document which does not allow for a suitable statement to be inserted.

…

2. The compulsory departure must take place within the period prescribed by the decision refusing the request or, if appropriate and at the latest, within 15 days of the notification of the decision of refusal, save for exceptional circumstances and where the person concerned is able to prove that he has sufficient means of subsistence; in such a situation, the period may be extended by 90 days at most. If the period expires and the departure has not taken place, the provisions laid down in the present rules for the cases referred to in Article 53(a) of the Law [on Aliens] shall be applied.

3. If the aliens to whom the present article refers in fact leave Spanish territory in accordance with the provisions of the foregoing paragraphs, they shall not be prohibited from entering the country and they may return to Spain, on condition that they comply with the rules governing access to Spanish territory.

…'

22 It is apparent from the orders for reference that the abovementioned national provisions are interpreted by the Tribunal Supremo (Supreme Court) as meaning that, since expulsion is a criminal penalty, the decision which imposes it must be specifically reasoned and must comply with the principle of proportionality.

23 It is apparent from the files before the Court that, in practice, where a third-country national does not have the right to enter or remain in Spain and his conduct has not given rise to aggravating circumstances, the penalty imposed is to be restricted to a fine, except where there is an additional factor which would justify replacing the fine with expulsion.

The disputes in the main proceedings and the question referred for preliminary ruling

24 In Case C-261/08, on 26 September 2006, the competent authorities initiated an administrative procedure for infringement of Article 53(a) of the Law on Aliens against Ms Zurita García, a Bolivian national who was unlawfully present in Spain, either on the ground that she had not obtained an extension of her permission to stay or residence permit, or on the ground that the validity of those documents had expired more than three months previously and she had not sought to have them renewed.

25 That procedure led, on 15 November 2006, to the adoption of a decision by the Delgado del Gobierno announcing that Ms Zurita García was to be expelled from Spanish territory. That penalty was accompanied by a prohibition on entry to the Schengen area for a period of five years.

26 Ms Zurita García challenged that decision before the Juzgado de lo Contencioso-Administrativo nº 6 de Murcia (Court for Contentious Administrative Proceedings No 6 of Murcia), which rejected the action at first instance. On appeal, Ms Zurita García claimed that that decision should be quashed because the administration had not correctly applied the principle of proportionality when assessing the circumstances of the case, which in no way justified the replacement of a fine by expulsion.

27 In Case C-348/08, by decision of 30 July 2007, the Delgado del Gobierno ordered the expulsion from Spanish territory of Mr Choque Cabrera, a Bolivian national who was unlawfully in Spain, within the meaning of Article 53(a) of the Law on Aliens, either on the ground that he had not obtained an extension of his permission to stay or residence permit, or on the ground that the validity of those documents had expired more than three months previously and he had not sought to have them renewed. That penalty was accompanied with a prohibition on entry to the Schengen area for a period of five years.

28 Mr Choque Cabrera challenged that decision before the Juzgado de lo Contencioso-Administrativo nº 4 de Murcia (Court for Contentious Administrative Proceedings No 4 of Murcia), which rejected the action at first instance. On appeal, Mr Choque Cabrera claimed that that decision should be quashed because the administration had not applied the principle of proportionality when assessing the circumstances of the case, and did not give reasons for replacing a fine with expulsion.

29 In those circumstances, the Tribunal Superior de Justicia de Murcia (High Court of Justice of Murcia) decided to stay both actions before it and to refer the following question, worded identically in each case, to the Court for a preliminary ruling:

'Should Article 62(1) and (2)(a) of the Treaty establishing the European Community and Articles 5, 11 and 13 of Regulation (EC) No 562/2006 … be interpreted as precluding national legislation, and the case-law which interprets it, which permits the substitution of the expulsion of any "third-country national" who does not have documentation authorising him to enter and remain in the territory of the European Union by imposition of a fine?'

30 By order of the President of the Third Chamber of 27 March 2009, Cases C-261/08 and C-348/08 were joined for the purposes of the oral procedure and of judgment.

The question referred for a preliminary ruling

Admissibility of the question referred in Case C-261/08

31 The Spanish Government submits that the question referred in Case C-261/08 is inadmissible on the ground that it is purely hypothetical.

32 It claims that the principle of non-retroactivity in criminal law precludes the application *ratione temporis* of the obligation, which may be laid down in Article 11(3) of Regulation No 562/2006, to penalise the facts of the case in the main proceedings by expulsion, inasmuch as that regulation entered into force only on 13 October 2006, whereas the appellant in the main proceedings had already been accused of being unlawfully present on Spanish territory on 26 September 2006.

33 In the Spanish Government's view, as the case in the main proceedings concerns an administrative penalty, to which the same principles apply as those which apply to criminal proceedings, in particular the principle of legality and that of incrimination, the applicable legislation should be that which was in force on the date of the facts alleged, and not that which was applicable on the date on which the expulsion decision was taken by the national authorities, namely 15 November 2006, a position which the referring court appears to share.

34 In that regard, it should be recalled that, in proceedings under Article 234 EC, which are based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. Similarly, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the ultimate judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling (see, inter alia, Case C-326/00 *IKA* [2003] ECR I-1703, paragraph 27; Case C-145/03 *Keller* [2005] ECR I-2529, paragraph 33; Case C-419/04 *Conseil général de la Vienne* [2006] ECR I-5645, paragraph 19; and Case C-537/07 *Gómez-Limón* [2009] ECR I-6525, paragraph 24).

35 The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19; and *Gómez-Limón*, paragraph 25).

36 However, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (see, to that effect, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21). The spirit of cooperation which must prevail in the preliminary ruling

procedure requires the national court, for its part, to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (*Foglia*, paragraphs 18 and 20; Case 149/82 *Robards* [1983] ECR 171, paragraph 19; and Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 25).

37 In the present context, it must be held that, on the date on which the appellant in the main proceedings in Case C-261/08 was officially accused of being unlawfully present on Spanish territory, namely 26 September 2006, Regulation No 562/2006 had not yet entered into force, with the result that the issue as to whether that regulation needs to be interpreted may arise in relation to the facts giving rise to that case.

38 It is Article 6b of the CISA, and not Article 11(3) of Regulation No 562/2006, which will be applicable if the date of the facts were to be the criterion for determining the law applicable *ratione temporis* in Case C-261/08. Article 6b of the CISA is among those provisions which were repealed under Article 39 of Regulation No 562/2006 with effect from 13 October 2006.

39 In any event, however, as the Advocate General notes in point 27 of her Opinion, Article 11(3) of Regulation No 562/2006 merely repeats the wording of Article 6b(3) of the CISA, which was in force when the appellant in the main proceedings was officially accused of being unlawfully present on Spanish territory.

40 Moreover, it should be pointed out that the referring court has submitted a question for a preliminary ruling to the Court with the same wording, in the course of the proceedings giving rise to the case which is joined to Case C-261/08, that is to say, Case C-348/08, the facts of which occurred when Regulation No 562/2006 was already in force.

41 Therefore, the question referred in each of the two joined cases must be held to be admissible.

Substance

42 At the outset, it should be pointed out that the request for interpretation concerns Article 62(1) and (2)(a) EC, and Articles 5, 11 and 13 of Regulation No 562/2006.

43 It must be specified, firstly, that Article 62(1) and (2)(a) EC constitutes the legal basis for the Council's action with a view to the adoption of measures ensuring the absence of any checks on persons when crossing internal borders, and measures on the crossing of the external borders of the Member States, and does not have the objective, in and of itself, of granting rights to third-country nationals, or of imposing obligations on Member States.

44 Next, Article 5 of Regulation No 562/2006 establishes the entry conditions for third-country nationals when they cross an external border for stays not exceeding three months per six-month period, while Article 13 of that regulation concerns the refusal of entry, to the territory of the Member States, to third-country nationals who do not fulfil all of those conditions.

45 Consequently, Articles 5 and 13 of Regulation No 562/2006 likewise do not govern the situation of third-country nationals, such as Ms Zurita García and Mr Choque Cabrera, who were already on Spanish territory, since an unspecified date, when the expulsion order was made against them on grounds of their unlawful stay.

46 Lastly, having regard to the fact that it cannot be ruled out that Articles 6b and 23 of the CISA may be applicable, *ratione temporis*, in Case C-261/08 (see paragraphs 37 and 38 of this judgment), as the Austrian Government and the Commission of the European Communities suggest, it is appropriate to take those articles of the CISA into account when examining the question referred for a preliminary ruling in order to provide the referring court with an answer which will be of use to it (see, by analogy, Case C-275/06 *Promusicae* [2008] ECR I-271, paragraph 46, and Case C-346/06 *Rüffert* [2008] ECR I-1989, paragraph 18).

47 As is clear from its wording, Article 23 of the CISA applies to all those who are not nationals of a Member State and who do not fulfil, or no longer fulfil, the short-stay conditions applicable within the territory of one of the Member States, which, according to the factual account given in the orders for reference, would appear to be the situation of both Ms Zurita García and Mr Choque Cabrera.

48 It follows that, by its question, the referring court is asking, in essence, whether Articles 6b and 23 of the CISA and Article 11 of Regulation No 562/2006 must be interpreted as meaning that, where a third-country national is unlawfully present on the territory of a Member State because he or she does not fulfil, or no longer fulfils, the short-stay conditions applicable in that Member State, that Member State is obliged to adopt a decision to expel that person.

49 Both Article 6b(1) of the CISA and Article 11(1) of Regulation No 562/2006 establish a rebuttable presumption under which, if the travel document of a third-country national does not bear an entry stamp, the competent national authorities may presume that the holder does not fulfil, or no longer fulfils, the conditions of duration of stay applicable within the Member State concerned.

50 Article 6b(2) of the CISA, like Article 11(2) of Regulation No 562/2006, allows for that presumption to be rebutted where the third-country national provides, by any means,

credible evidence, such as transport tickets or proof of his or her presence outside the territory of the Member States, that he or she has respected the conditions relating to the duration of a short stay.

51 Pursuant to Article 6b(3) of the CISA and Article 11(3) of Regulation No 562/2006, should the presumption referred to in paragraph 1 of both of those articles not be rebutted, the third-country national may be expelled by the competent authorities from the territory of the Member States concerned.

52 The Commission points out, correctly, that there is a discrepancy between the wording of the Spanish-language version of Article 11(3) of Regulation No 562/2006 and that of the other language versions.

53 In the Spanish-language version, that provision imposes an obligation, inasmuch as it provides that the competent authorities of the Member State 'shall expel', from the territory of that Member State, a third-country national if the presumption is not rebutted. By contrast, in all the other language versions, expulsion appears as an option for those authorities.

54 It must be borne in mind in this regard that, according to settled case-law, the necessity for uniform application and accordingly for uniform interpretation of a Community measure makes it impossible to consider one version of the text in isolation, but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, in the light, in particular, of the versions in all languages (see, inter alia, Case 29/69 *Stauder* [1969] ECR 419, paragraph 3; Case 55/87 *Moksel Import und Export* [1988] ECR 3845, paragraph 15; Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraph 47; and Case C-188/03 *Junk* [2005] ECR I-885, paragraph 33).

55 It also follows from settled case-law that the wording used in one language version of a Community provision cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement of the uniform application of Community law (see Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraph 16; Case C-187/07 *Endendijk* [2008] ECR I-2115, paragraph 23; and Case C-239/07 *Sabatauskas and Others* [2008] ECR I-7523, paragraph 38).

56 In the present cases, as the Spanish-language version of Article 11(3) of Regulation No 562/2006 is the only one which diverges from the wording of the other language versions, it must be concluded that the real intention of the legislature was not to impose an obligation on the Member States concerned to expel, from their territory, third-country nationals in the event that they have not succeeded in rebutting the presumption referred to in Article 11(1), but to grant those Member States the option of so doing.

57 That interpretation is confirmed, as the Advocate General states in point 43 of her Opinion, by the fact that the Spanish-language version of Article 6b of the CISA, the wording of which was repeated in Article 11 of Regulation No 562/2006, accords with the other language versions as regards the discretionary nature of the power, for the Member States concerned, to expel a third-country national who does not succeed in rebutting the abovementioned presumption.

58 It remains to be examined whether, as the Austrian Government claims, it follows from Article 23 of the CISA that the Member States must expel from their territory any third-country national who is unlawfully present there, unless there is a reason to grant that person asylum or international protection. That provision would then preclude the option for a Member State to replace an expulsion order with the imposition of a fine.

59 That interpretation of Article 23 of the CISA cannot be upheld.

60 It should be pointed out, in that regard, that the wording of Article 23 of the CISA does not mention an obligation to expel in such strict terms, in the light of the exceptions therein.

61 First, Article 23(1), which forms part of Chapter 4, concerning the conditions governing the movement of aliens, under Title II on the abolition of checks at internal borders and movement of persons, favours the voluntary departure of a third-country national who does not fulfil, or no longer fulfils, the short-stay conditions applicable within the territory of the Member State concerned.

62 The same applies for Article 23(2), according to which a third-country national who holds a valid residence permit or provisional residence permit issued by another Member State is required to go to the territory of that Member State immediately.

63 Second, to the extent to which Article 23(3) of the CISA provides that, in certain circumstances, a third-country national must be expelled from a Member State on the territory of which he was apprehended, that consequence is subordinate to the conditions laid down in the national law of the Member State concerned. In the event that the application of that national law does not permit expulsion, that Member State may allow the person concerned to remain on its territory.

64 It is thus for the national law of each Member State to adopt, particularly with regard to the conditions under which expulsion may take place, the means for applying the basic rules established in Article 23 of the CISA relating to third-country nationals who do not fulfil, or no longer fulfil, the short-stay conditions for its territory.

65 In the cases in the main proceedings, it is apparent from the information provided to the Court in the course of the written procedure that, under national law, a decision imposing a fine is not a permit for a third-country national who is unlawfully present in

Spain to remain legally on Spanish territory. It is also apparent that, irrespective of whether that fine is paid or not, that decision is notified to the person concerned with a warning that he should leave the territory within 15 days and, that, should he fail to comply, he may be prosecuted under Article 53(a) of the Law on Aliens and risks being expelled with immediate effect.

66 Consequently, the reply to the question referred is that Articles 6b and 23 of the CISA and Article 11 of Regulation No 562/2006 must be interpreted as meaning that, where a third-country national is unlawfully present on the territory of a Member State because he or she does not fulfil, or no longer fulfils, the conditions of duration of stay applicable there, that Member State is not obliged to adopt a decision to expel that person.

Costs

67 Since these proceedings are, for the parties to the main proceedings, a step in the actions 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 (Third Chamber) hereby rules:

Articles 6b and 23 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, as amended by Council Regulation (EC) No 2133/2004 of 13 December 2004 on the requirement for the competent authorities of the Member States to stamp systematically the travel documents of third-country nationals when they cross the external borders of the Member States and amending the provisions of the Convention implementing the Schengen Agreement and the common manual to

this end, and Article 11 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) must be interpreted as meaning that, where a third-country national is unlawfully present on the territory of a Member State because he or she does not fulfil, or no longer fulfils, the conditions of duration of stay applicable there, that Member State is not obliged to adopt a decision to expel that person.

[Signatures]