Reports of Cases

OPINION OF ADVOCATE GENERAL
SPIELMANN
delivered on 30 January 2025 [1]

Joined Cases C-636/23 (Al Hoceima) and C-637/23 (Boghni) [i]

W

v

Belgische Staat (C-636/23)

(Request for a preliminary ruling from the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings, Belgium))

and

X

v

État belge, represented by the secrétaire d'État à l'Asile et la Migration (C-637/23)

(Request for a preliminary ruling from the Conseil du Contentieux des Étrangers (Council for asylum and immigration proceedings, Belgium))

(Reference for a preliminary ruling – Border controls, asylum and immigration – Immigration policy – Return of illegally staying third-country nationals – Directive 2008/115/EC – Return decision – Article 7 – Voluntary departure – No grant of period for voluntary departure – Article 13 – Right to an effective remedy – Consequences of unlawfulness on the return decision – Article 11 – Entry ban issued a considerable period of time after adoption of the return decision)

1. In the present cases, the Court has received requests from the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings, Belgium) for a preliminary ruling on the interpretation of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. [2]

2. The questions raised by the referring court relate primarily to 'voluntary departure' as provided for in Article 7 of Directive 2008/115. Accordingly, the Court is invited to provide the clarification necessary to define the terms of the legal position of a third-country national, to whom a return decision has been addressed but a period for voluntary departure has not been granted. In its forthcoming judgment, the Court will, inter alia, have the opportunity to determine, first, whether the refusal to grant a period for voluntary departure must imperatively be capable of being challenged by way of an appeal; second, whether an entry ban based on a return decision

[1] Original language: French.

[i] The names of the present cases are fictitious names. They do not correspond to the names of any parties to the proceedings.

[2] OJ 2008 L 348, p. 98.

may be imposed even when a considerable period of time has elapsed since that decision was adopted; and, third, what consequences the unlawfulness of the failure to grant a period for voluntary departure have for the legal status of the return decision in which there is no such grant.

Legal framework

European Union law

3. Article 3 of Directive 2008/115, headed 'Definitions', provides:

'For the purpose of this Directive the following definitions shall apply:

…

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;

…

6. "entry ban" means an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision;

…'

4. Article 7of Directive 2008/115, headed 'Voluntary departure', provides in paragraphs 1, 2 and 4:

'1. A return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days, without prejudice to the exceptions referred to in paragraphs 2 and 4. Member States may provide in their national legislation that such a period shall be granted only following an application by the third-country national concerned. In such a case, Member States shall inform the third-country nationals concerned of the possibility of submitting such an application.

The time period provided for in the first subparagraph shall not exclude the possibility for the third-country nationals concerned to leave earlier.

2. Member States shall, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.

…

4. If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.'

5. Article 8 of Directive 2008/115, headed 'Removal', provides in paragraphs 1 and 2:

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

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

6. Article 11 of Directive 2008/115, headed 'Entry ban', provides in paragraph 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.'

7. Article 13 of Directive 2008/115, headed 'Remedies', provides in paragraphs 1 and 2:

'1. The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12(1), before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.

2. The authority or body mentioned in paragraph 1 shall have the power to review decisions related to return, as referred to in Article 12(1), including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation.'

Belgian law

8. Article 1(6) and (8) of the wet betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen (Law on the admission, residence, settlement and removal of foreign nationals) of 15 December 1980[3] ('the Law on the status of foreign nationals'), which transposes Article 3(4) and (6) respectively of Directive 2008/115, reads as follows:

'6° removal decision: a decision declaring a foreign national's stay to be illegal and imposing an obligation to return;

…

[3] *Belgisch Staatsblad*, 31 December 1980, p. 14584.

8° entry ban: a decision that may accompany a removal decision and which, for a specified period, prohibits entry into and stay either on the territory of Kingdom of Belgium or on the territory of all Member States, including that of the Kingdom of Belgium …'

9. The first paragraph, points 1 and 3, of Article 7 of that law, which transposes Article 6(1) of Directive 2008/115, provides:

'Without prejudice to more favourable provisions that may be contained in an international treaty, [de minister die bevoegd is voor de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen (minister with responsibility for admission, residence, settlement and removal of foreign nationals)[4]) or his or her representative may, or, in the situations referred to in points 1°, 2°, 5°, 9°, 11° or 12°, the minister or his or her representative must issue to a foreign national, who is neither authorised nor permitted to stay for more than three months or to settle in the Kingdom of Belgium, an order to leave the territory within a specified period:

1° if he or she is staying in the Kingdom of Belgium without being in possession of the documents required by Article 2;

…

3° if his or her conduct is considered to be a threat to public policy or national security …'

10. The first paragraph of Article 39/56 of that law reads as follows:

'The actions referred to in Article 39/2 may be brought before the [Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings)[5]] by a foreign national who is able to show an injury or an interest.'

11. Article 74/11 of that law transposes Article 11(1) of Directive 2008/115 and provides inter alia that the duration of the entry ban shall be determined by taking account of the specific circumstances of each case.

12. Article 74/14 of the Law on the status of foreign nationals provides inter alia that the removal decision shall stipulate a period of 30 days to leave the territory and that, upon reasoned application made by the third-country national to the minister or to his or her representative, the period of time granted in which to leave the territory is to be extended on production of evidence that the voluntary return cannot be achieved within the period of time allowed. If necessary, that period of time may be extended, upon reasoned application made by the third-country national to the minister or to his or her representative, in order to take account of the specific circumstances of that person's case, such as the length of stay, the fact that children are attending school, the finalising of arrangements for voluntary departure and other family and social links. For as long as the period for voluntary departure is running, the third-country national is protected against forced expulsion. To avoid the risk of absconding during that period, the third-country national may be required to comply with preventive measures. There may be a derogation from the time limit if there is a risk of absconding, if the third-country national has not complied with the

4 See point 2 of Article 1 of the Law on the status of foreign nationals.

5 See Article 39/1 of the Law on the status of foreign nationals.

preventive measure imposed or if the third-country national is a threat to public policy or national security. In such a case, the removal decision shall stipulate a period of less than seven days or no period at all.

The disputes in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

Case C-636/23

13. The applicant, W, states that he has Moroccan nationality. On 3 January 2015, the representative of the Staatssecretaris voor Asiel en Migratie en Administratieve Vereenvoudiging (State Secretary for Asylum and Migration and administrative simplification, Belgium) issued an order for him to leave the territory and imposed an entry ban for a period of three years. On 22 May 2019, W lodged an application for international protection with the Belgian authorities. On 7 June 2019, W was sentenced by the Correctionele Rechtbank Antwerpen (Criminal Court, Antwerp, Belgium) to imprisonment for eighteen months, nine months of which were suspended for five years, for drug offences. On 9 July 2019, the Commissariaat-generaal voor de vluchtelingen en de staatlozen (Commissioner-General for Refugees and Stateless Persons, Belgium) adopted a decision refusing to grant refugee status and refusing to grant subsidiary protection.

14. On 18 July 2019, the Belgian authorities issued an order to leave the territory and imposed an entry ban on W for a period of eight years. He was notified of those decisions on the same date. No period for voluntary departure was granted. As for the grounds for the failure to grant such a period, the order to leave the territory stated that there was a risk of W absconding and that he was a danger to public policy and national security.

15. By an application lodged on 19 August 2019, W brought an action before the referring court for suspension and annulment of the order to leave the territory and of the entry ban issued on 18 July 2019.

16. On 19 November 2019, the referring court annulled the order to leave the territory and the entry ban in question, upholding W's argument that the grounds underlying the decision not to grant a period for voluntary departure were unlawful. As regards the ground relating to the risk of absconding, that court held that any assessment of the risk of absconding must be based on an individual assessment of the situation of the person concerned and that simply meeting an objective criterion, such as provided for by the Law on the status of foreign nationals, was insufficient. As for the ground based on the threat W posed to public policy, the referring court affirmed that the mere fact that W had been convicted of a drug offence did not constitute sufficiently solid grounds for establishing the existence of such a danger.

17. Moreover, taking the view that the indication of the period for voluntary departure is a constituent or essential element of the order to leave the territory, the referring court annulled the order to leave the territory in its entirety.

18. The Belgian State brought an appeal in cassation before the Raad van State (Council of State, Belgium) against the referring court's decision to annul the order to leave the territory, while agreeing with the referring court's annulment of the entry ban.

19. In its judgment of 1 September 2022, the Raad van State (Council of State) annulled the referring court's decision which annulled the order to leave the territory, holding, inter alia, that the absence of a period for voluntary departure is merely a means of enforcement, which does not alter the legal position of the foreign national concerned, given that the decision whether or not to grant a period for voluntary departure does not affect the primary finding of an illegal stay on the territory.

20. As a result, the referring court finds itself in the position of having to rule on W's appeal against the order to leave the territory in line with the legal ruling of the Raad van State (Council of State).

21. In those circumstances, the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 7(4), Article 8(1) and (2) and Article 11(1) of Directive 2008/115, read either in isolation or together, in the light of Article 13 of Directive 2008/115 and Article 47 of the Charter of Fundamental Rights of the European Union [("the Charter")], be interpreted as precluding the refusal to grant a period for voluntary departure from being regarded as a mere means of enforcement which does not alter the legal position of the foreign national concerned, given that the grant or otherwise of a period for voluntary departure does not alter the primary finding of an illegal stay in the territory?

(2) If the answer to the first question is in the affirmative, must the [word "accompanying" in Article 3(6) and the words ["shall be accompanied"] in Article 11(1) of Directive 2008/115 be interpreted as meaning that they do not preclude the competent authority from being able or having to issue, even after a considerable period of time, an entry ban based on a return decision that has not granted a period for voluntary departure?

If the answer to that question is in the negative, does that wording mean that a return decision which has not granted a period for voluntary departure must be accompanied simultaneously by an entry ban or within a reasonably short period of time?

If the answer to that question is in the affirmative, does the right to an effective remedy guaranteed by Article 13 of Directive 2008/115 and Article 47 of the [Charter] mean that it is possible, in the context of an appeal against a return decision, to challenge the legality of a decision not to grant a period for voluntary departure, whereas otherwise the legality of the legal basis of the entry ban could no longer be effectively challenged?

(3) If the answer to the first question is in the affirmative, must the terms "an appropriate period" in the first subparagraph of Article 7(1) and "an obligation to return" in Article 3(4) of Directive 2008/115 be interpreted as meaning that a provision laying down a period of time, or in any event the refusal to grant a period of time, within the framework of the obligation to depart is an essential element of a return decision, in the sense that, if that period is found to be unlawful, the return decision lapses in its entirety and a new return decision must be issued?

If the Court considers that the refusal to grant a period of time is not an essential element of a return decision, and if the Member State concerned has not made use of the option, under Article 7[(1)] of Directive 2008/115, to grant a period of time only upon application by the [third-country] national concerned, what [are] the practical scope and enforceability of a return decision, within the meaning of Article 3(4) of Directive 2008/115, from which the element relating to the period would disappear?'

Case C-637/23

22. According to X, he arrived in Belgium two years ago, where he claims to be staying with his brother. He states that he is of Algerian nationality.

23. On 27 January 2023, X was deprived of his liberty following an administrative report on the monitoring of a foreign national.

24. On 28 January 2023, X was served with an order to leave the territory with deportation and detention for the purpose of removal, and a two-year entry ban. That order stated that no period for voluntary departure was granted, in so far as there was a risk of X absconding. The reasons for refusing to grant that period are essentially as follows:

'The person concerned did not submit an application for residence or for international protection following his illegal entry or during his illegal stay or within the period provided for by this law.

The person concerned claims to have resided in Belgium for two years. The administrative file does not show that he has tried to regularise his stay in the legally prescribed manner.

The person concerned is not cooperating, or has not cooperated, in his relations with the authorities.

The person concerned did not report to the local authority within the [legal] time limit and provides no proof that he is staying in a hotel.'

25. X's release was ordered by judgment of 6 February 2023, confirmed on appeal by judgment of 21 February 2023.

26. By application lodged on 6 February 2023, X brought before the referring court an action for suspension and annulment of the order to leave the territory with deportation and of the entry ban issued on 28 January 2023.

27. As regards the order to leave the territory with deportation, X claims before the referring court, in essence, that it is for the Belgian State to make an individual assessment prior to establishing a risk of absconding. X also submits that it is not sufficient just to refer to the criteria set out in the Law on the status of foreign nationals, but that it is also necessary to justify how those criteria apply to the present case. According to X, there is nothing in the grounds for the measure or in the administrative file to explain why the Belgian State relied on any risk of absconding to waive the ordinary 30-day period provided for in that law. As for the entry ban, X considers that the reasons given for that measure are also inadequate and insufficient, in so far as they are based on X's risk of absconding.

28. When questioned at the hearing before the referring court on the nature of the decision not to grant a period of time in which to leave the territory, X submitted that, in so far as that decision produces legal effects, in particular as regards detention and the entry ban, it is not merely an enforcement measure and must therefore be open to legal challenge. For its part, the Belgian State maintains that the decision not to grant a period of time in which to leave the territory is not open to appeal.

29. When questioned at the same hearing about the continued interest in challenging the deportation decision, the Belgian State submits that, given X's release, that interest has disappeared, whereas X defers on that point to the wisdom of the referring court. In that respect, the latter considers that, as a result of X's release, the appeal has lapsed, in so far as it concerns the decision to deport him.

30. In those circumstances, the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 7(4), Article 8(1) and (2) and Article 11(1) of Directive 2008/115, read together or separately in the light of Article 13 of Directive 2008/115 and Article 47 of the [Charter], be interpreted as meaning that they preclude the decision not to grant a period for voluntary departure from being regarded as a mere enforcement measure which does not alter the legal position of the foreign national concerned, since the granting or not of a period for voluntary departure in no way alters the first finding of an illegal stay on the territory?

Moreover, does the right to an effective remedy, guaranteed by Article 13 of Directive 2008/115 and by Article 47 of the [Charter], mean that it is possible to challenge, in an appeal against the return decision, the lawfulness of a decision not to grant a period for voluntary departure where, if that is not the case, the lawfulness of the legal basis for the entry ban can no longer be effectively challenged?

(2) If the answer to the first question is in the affirmative, must the words "provide for an appropriate period" in Article 7(1) and "and … an obligation to return" in Article 3(4) of Directive 2008/115 be interpreted as meaning that a provision relating to the period, [or, in any event, not granting a period,] in the context of the departure obligation, constitutes an essential element of a return decision, with the result that if that period is found to be unlawful, the return decision becomes null and void in its entirety and a new return decision must be issued?

If the Court of Justice is of the opinion that the refusal to grant a period is not an essential element of the return decision, and if the Member State concerned has not made use, under Article 7(1) of Directive 2008/115, of the option of setting a period only following an application by the third-country national concerned, what practical scope and enforceability [are] to be given to a return decision within the meaning of Article 3(4) of Directive 2008/115[,] which would be deprived of its component relating to the period?'

31. X, the applicant in the main proceedings in Case C-637/23, the German, Belgian and Czech Governments, and the European Commission have lodged written observations.

Analysis

32. For the sake of clarity, the questions referred by the national court should be grouped together in the present cases, so as to examine together those which relate to the same legal issue.

33. The first question and the third part of the second question in Case C-636/23, and the first question in Case C-637/23, relate to whether the failure to grant a period for voluntary departure must be open to challenge before the courts.

34. The second question in Case C-636/23 relates to the link between the return decision and the entry ban accompanying that return decision, and more specifically to whether a Member State has the right to issue an entry ban, even after a considerable period of time has elapsed since the adoption of a return decision that has not granted a period for voluntary departure.

35. The third question in Case C-636/23 and the second question in Case C-637/23 concern the consequences of the unlawfulness of a failure to grant a period for voluntary departure for the legal status of the return decision in which there is no such grant.

36. I will deal with them in that order, after outlining the essential features of the relevant legal framework for analysis.

Legal framework for analysis

37. Directive 2008/115 seeks to establish 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.[6]

38. The essential features of the legal framework enacted by Directive 2008/115 are summarised in the judgment in *El Dridi* as set out below.[7]

39. Directive 2008/115 specifically sets out the procedure, together with legal guarantees, to be applied by each Member State for returning illegally staying third-country nationals and fixes the order in which the various, successive stages of that procedure should take place.

40. Article 6 of Directive 2008/115 primarily provides for an obligation on Member States to issue a return decision to any third-country national staying illegally on their territory. As part of that initial stage, priority is to be given to voluntary compliance with the obligation resulting from the return decision. In that regard, Article 7(1) of Directive 2008/115 requires that decision to provide for an appropriate period for voluntary departure of between seven and thirty days.

41. Member States may, nevertheless, refrain from granting such a period or may grant a period shorter than seven days in the particular circumstances expressly listed in Article 7(4) of Directive 2008/115, namely where there is a risk of absconding, or if an application to stay has been dismissed as manifestly unfounded or fraudulent or if the person concerned poses a risk to public policy, public security or national security.

6 See recital 2 of Directive 2008/115.

7 Judgment of 28 April 2011 (C-61/11 PPU, EU:C:2011:268; 'the judgment in *El Dridi*').

42. Where a Member State has refrained from granting a period for voluntary departure, and also where the obligation to return has not been complied with within the period granted for voluntary departure, Article 8(1) and (4) of Directive 2008/115 imposes an obligation on that Member State to carry out the removal by taking all necessary measures including, where appropriate, coercive measures, in a proportionate manner and with due respect for fundamental rights. [8]

43. Accordingly, the order in which the stages of the return procedure established by Directive 2008/115 are to take place corresponds to a gradation of the measures to be taken in order to enforce the return decision, a gradation which goes from a measure that allows the person concerned the most liberty, namely granting a period for his or her voluntary departure, to measures that restrict that liberty the most, namely detention in a specialised facility; it being stipulated that the principle of proportionality must be observed throughout those stages. [9]

The first question and the third part of the second question in Case C-636/23, and the first question in Case C-637/23

44. By those questions, the referring court is asking, in essence, whether Article 13 of Directive 2008/115, read in the light of Article 47 of the Charter, must be interpreted as meaning that it requires that the failure to grant a period for voluntary departure may be challenged in court proceedings. [10]

45. Those questions are justified by the finding, in the orders for reference, that the referring court has exclusive jurisdiction under national law to hear actions brought against 'decisions', defined as any individual legal act intended to alter an existing legal situation, or indeed to prevent its alteration. In that regard, the national court observes that, in the judgment referring the case back to it, the Raad van State (Council of State) asserted that the period for voluntary departure in no way alters the status of the illegally staying third-country national, the latter simply being protected against coercive measures. It wonders, therefore, whether the failure to grant a period for voluntary departure is merely a means of enforcement that cannot be challenged before the courts.

46. At the outset, it should be recalled that Article 13(1) of Directive 2008/115 provides that the third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, namely return decisions, entry ban decisions and removal decisions.

47. Since it merely reaffirms the right to an effective remedy, that provision is not specific as to which elements of the return decision must necessarily be challenged by means of court proceedings.

8 See the judgment in *El Dridi*, paragraphs 34 to 38.

9 See the judgment in *El Dridi*, paragraph 41.

10 It should be recalled that, according to settled case-law, in the context of the cooperation procedure established by Article 267 TFEU, it is for the Court to provide a helpful answer to the national court which will enable it to settle the dispute before it. With that in mind, it is incumbent on the Court, where appropriate, to reformulate the questions submitted before it (see, in particular, judgment of 1 August 2022, *TL (Absence of an interpreter and of translation)* (C-242/22 PPU, EU:C:2022:611, paragraphs 42 and 43)). In the present case, it is primarily Article 13 of Directive 2008/115 ('Remedies') that should be interpreted in order to give a helpful answer to the referring court, since the other articles cited in the questions referred for a preliminary ruling are relevant only to the reasoning developed for the purpose of responding to them. Therefore, I propose to the Court to reformulate those questions by reference only to Article 13 of that directive.

48. However, it seems to me that those elements have been identified in the judgment in *Boudjlida*.[11]

49. When asked about the extent of the right to be heard before a return decision is adopted, the Court held, in essence, that every third-country national has the right to be heard on the subject of the illegality of his or her stay and the reasons which might, under national law, justify the competent national authority refraining from adopting a return decision, and on the content of such a decision.

50. More specifically, in the Court's view, that right implies that the person concerned is permitted to express his or her point of view on the legality of his or her stay and the possible application of exceptions provided in Article 6(2) and (3) of Directive 2008/115 on compliance with some of that person's fundamental rights, which bind the competent national authority under Article 5 of that directive, and on the detailed arrangements for the return, such as the period allowed for departure and whether return is to be voluntary or coerced.[12]

51. Moreover, the Court stated that the right to be heard before the adoption of a return decision must allow the competent national authority to investigate the matter in such a way as to be able to adopt a decision in full knowledge of the facts and to state reasons for that decision, so that, where appropriate, the person concerned *can duly exercise his or her right to bring legal proceedings*.[13] It is therefore evident that the aspects on which the person concerned must be heard, including the period allowed for departure and whether return is to be voluntary or coerced, may also be invoked in the context of court proceedings.

52. It follows that any illegally staying third-country national has a right to be heard, including on the grant of a period for voluntary departure or the extension of that period and, if that period has not been granted, the right to challenge the assessment made by the administration by way of those appeal proceedings.

53. The categorisation of the grant of a period for voluntary departure as a 'means of enforcement' not open to appeal, which is the basis of the opposing argument, rests on the finding that the issue of granting or not granting that period has no impact on the illegal nature of the person's stay. It seems to me that the impact on the *legal status* is not a relevant factor in determining whether that element of the return decision should be open to challenge by way of a legal action. Whilst it is true that a third-country national continues to stay illegally during the period granted to him or her for voluntary return,[14] the fact remains that the failure to grant a period for voluntary departure will have definite and undoubtedly far-reaching consequences on the *legal position* of that third-country national.

54. First, the failure to grant a period for voluntary departure results, under Article 8(2) of Directive 2008/115, in the immediate enforceability of the return decision, involving the deprivation of safeguards pending return as listed in Article 14(1) of that directive.[15] Second, the

[11] Judgment of 11 December 2014 (C-249/13, EU:C:2014:2431; 'the judgment in *Boudjlida*').

[12] See, in particular, the judgment in *Boudjlida*, paragraphs 47 to 51.

[13] See the judgment in *Boudjlida*, paragraph 59.

[14] See judgment of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraph 47).

[15] That provision provides: 'Member States shall, with the exception of the situation covered in Articles 16 and 17, ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure granted in accordance with Article 7 …: (a) family unity with family members present in their territory is maintained; (b) emergency health care and essential treatment of illness are provided; (c) minors are granted access to the basic education system subject to the length of their stay; (d) special needs of vulnerable persons are taken into account.'

failure to grant that period gives rise to the obligation on the part of the Member State concerned to adopt an entry ban under Article 11(1) of Directive 2008/115. In summary, where an illegally staying third-country national has not been granted a period for voluntary departure, not only is he or she at risk of being removed from that territory at any time but an entry ban is also issued against him or her.

55. Undoubtedly, we have here a provision of the return decision against which an action before the courts absolutely must be recognised. Whilst Article 47 of the Charter does indeed establish that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal, it seems to me to follow that an illegally staying third-country national is entitled, in accordance with Article 13 of Directive 2008/115, to claim infringement of his or her right not to be removed and not to have an entry ban imposed, which infringement is caused by the refusal of the competent national authority to grant that person a period for voluntary departure. [16]

56. In my view, the interpretation I am proposing is in no way diminished by the argument, put forward by the Belgian Government in its written observations, that such an interpretation would allow dilatory proceedings aimed solely at challenging in law the failure to grant a period of voluntary departure, even though the underlying obligation to return could not reasonably be called into question. Such an argument seems to be based on the idea that the failure to grant a period for voluntary departure cannot be challenged in court on the ground that it has no bearing on the legal status of the third-country national concerned, which I have already endeavoured to refute in my earlier remarks.

57. In view of the foregoing, I propose that the Court reply to the first question and to the third part of the second question in Case C-636/23, and to the first question in Case C-637/23, that Article 13 of Directive 2008/115, read in the light of Article 47 of the Charter, must be interpreted as meaning it requires that the failure to grant a period for voluntary departure may be challenged in court proceedings.

The second question in Case C-636/23

58. By this question, the referring court is asking, in essence, whether, if the answer to the first question asked in Case C-636/23 is in the affirmative, Article 3(6) and Article 11(1) of Directive 2008/115 must be interpreted as meaning that they preclude the competent national authority from still imposing an entry ban, even after a considerable period of time, on the basis of a return decision that did not grant a period for voluntary departure.

59. That question is explained by the fact that, in the main proceedings, on the one hand, the return decision and the entry ban based on that decision were annulled by the referring court and, on the other hand, the appeal in cassation brought against the referring court's judgment and upheld by the Raad van State (Council of State) sought the annulment only of the return

[16] It is apparent from the order for reference that the Raad van State (Council of State) does not accept that, in the context of an action directed solely against the entry ban, a plea may be raised against the failure to grant a period for voluntary departure, including on the ground that it is a plea against another decision. If an action were not recognised, that could then lead, according to the referring court, to situations in which the very legal basis for issuing the entry ban could not be effectively challenged. For my part, I merely point out that that plea should be allowed in the context of an action against an entry ban decision, given that the effective remedy against entry ban decisions, such as is set out in Article 13(1) of Directive 2008/115, must necessarily allow their legality to be contested (see, to that effect, judgment of 15 October 1987, *Heylens and Others* (222/86, EU:C:1987:442, paragraph 15)).

decision and not of the entry ban, the annulment of which by the referring court is therefore final. It follows that the only decision that subsists today is the return decision in which a period for voluntary departure was refused.

60. In those circumstances, and since a maximum period of 30 days for voluntary departure has already expired, it is necessary to answer the question as to whether the competent national authority may still impose an entry ban, in order to assess the merits of the plea in law in the present case against the failure to grant a period for voluntary departure.

61. The Court is thus invited to assess the legal relationship between the return decision and the entry ban under Directive 2008/115.

62. As the referring court stated, Article 3(6) and Article 11(1) of Directive 2008/115 are relevant for the purposes of that assessment. Article 3(6) defines 'entry ban' as 'an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, *accompanying* a return decision'. [17] In other words, such a decision is intended to prohibit the person to whom it is addressed from entering and staying on the territory of all the Member States, and thus gives a 'European dimension' to the effects of national return measures. [18] Article 11(1) provides that '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', adding that 'in other cases return decisions may be accompanied by an entry ban'. [19]

63. More specifically, the referring court questions the interpretation of those provisions as set out in the judgment in *Westerwaldkreis*. [20]

64. It should be recalled that, in the case that gave rise to that judgment, the Court had before it a question relating to the compatibility with Directive 2008/115 of the maintenance in force of an entry ban issued by a Member State against a third-country national who was on the territory of that Member State and was the subject of an expulsion order that had become final, when the return decision adopted in respect of that third-country national was withdrawn.

65. As the referring court observes, the Court held, in paragraph 52 of that judgment, that it follows from the wording of the abovementioned provisions 'that an "entry ban" is intended to supplement a return order'.

66. For my part, I do not think the use of the verb 'supplement' indicates that an entry ban can only be linked *simultaneously* or *only after a short period of time* with the return decision that does not grant a period for voluntary departure. That becomes clear, in my view, when the phrase referred to in the previous point is placed in context.

67. The Court went on to say in paragraph 52 of the judgment in *Westerwaldkreis* that an entry ban is intended to supplement a return decision 'by prohibiting the person concerned, for a specified period of time following his [or her] return – the term "return" being understood … to mean after leaving the territory of the Member States – from again entering and staying in that territory', adding that 'consequently, an entry ban produces its effects only from the point in time

[17] Emphasis added.

[18] See recital 14 of Directive 2008/115.

[19] Emphasis added.

[20] Judgment of 3 June 2021 (C-546/19, EU:C:2021:432).

at which the person concerned actually leaves the territory of the Member States'. Accordingly, the Court ruled in paragraph 54 of the same judgment that 'if an entry ban … may produce its own legal effects only after voluntary compliance with, or enforcement of, a return decision, it cannot be maintained in force after that return decision has been withdrawn'.

68. It follows that the verb 'supplement' is actually used in the sense that it is 'to be supplementary to' the return decision, and refers to a *material link* whereby that decision is, in principle, a prerequisite for the validity of the entry ban. [21] By contrast, the need for a temporal link cannot be inferred from that judgment.

69. In any event, it cannot be maintained that such a temporal link between a return decision and an entry ban is required by the relevant provisions. Such a finding could not be based on the wording of Article 11(1)(a) of Directive 2008/115, which provides for the possibility of an entry ban being adopted if no period for voluntary departure has been granted. Moreover, that finding is probably inconsistent with Article 11(1)(b), which refers to the situation where the obligation to return has not been complied with within the period of time granted in the return decision for voluntary departure and where an entry ban has been imposed as a result. Since the entry ban is imposed at a stage later than the return decision, that situation necessarily implies that there is no requirement for a return decision and an entry ban to be simultaneous. [22]

70. It follows that there is no temporal limit for the competent national authority to issue an entry ban accompanying a return decision that has not granted a period for voluntary departure. It is therefore possible for that authority to issue it even when a considerable period of time has elapsed since the adoption of the return decision.

71. Having regard to the foregoing, I propose that the Court answer the second question referred in Case C-636/23 so that Article 3(6) and Article 11(1) of Directive 2008/115 must be interpreted as meaning that they do not preclude the competent national authority from still imposing, even after a considerable period of time, an entry ban based on a return decision that has not granted a period for voluntary departure.

The third question in Case C-636/23 and the second question in Case C-637/23

72. By these questions, essentially the referring court is seeking to determine whether Article 7 and Article 3(4) of Directive 2008/115 must be interpreted as meaning that the provision relating to the period for voluntary departure constitutes an essential element of a return decision, so that, if that period is found to be unlawful, the return decision becomes null and void in its entirety. If not, and in the situation where the Member State concerned has not made use of the option, under Article 7(1) of Directive 2008/115, of granting such a period only upon application by the

[21] The particularities of the factual context explain why, in the judgment of 27 April 2023, *M.D. (Ban on entering Hungary)* (C-528/21, EU:C:2023:341), the Court disregarded the fact that, prior to being issued with an entry ban, the third-country national concerned had not been the subject of a return decision. First of all, the entry ban against that third-country national had been adopted in the wake of a decision whereby a Member State had withdrawn his or her right of residence on the territory of that Member State, on a ground identical to the one on which that entry ban was based, and, second, that third-country national had left the territory of that Member State to go to another Member State, prior to the adoption of that entry ban. The Court's interpretation was guided by the need to prevent Member States from easily circumventing the rules which, under Directive 2008/115, provide the framework for issuing such a ban. They would simply have to wait until the third-country national whose right of residence has been refused or withdrawn has left their territory, before adopting an entry ban, for that entry ban to be automatically exempt from compliance with those rules.

[22] See Opinion of Advocate General Pikamäe in *Westerwaldkreis* (C-546/19, EU:C:2021:105, point 74).

third-country national concerned, the referring court asks what are the practical scope and enforceability of a return decision that will be deprived of its provision relating to the period of time.

73. It is important to remember at the outset that Directive 2008/115 establishes the legal regime for voluntary departure and the consequences of refusal to grant a period for voluntary departure for the legal position of the third-country national concerned, without, however, expressly stating what would happen to a return decision if such a refusal were found to be unlawful.

74. According to the referring court, those consequences depend on the legal nature of the period for voluntary departure. As that court observes, the case-law of the Court of Justice offers very useful pointers on this subject in the case *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*.[23] As to whether a decision altering the country of destination referred to in an earlier return decision must be treated as a new decision, the Court held, first of all, that it follows from the definition of 'return decision', as set out in Article 3(4) of Directive 2008/115, that the actual imposition or declaration of an obligation to return constitutes *one of the two components of a return decision*, and that such an obligation is inconceivable unless a country of destination is identified. It then deduced that an amendment to the country of destination stated in an earlier return decision is so substantial that the competent national authority must therefore be considered to have adopted a new return decision.[24]

75. The question then arises as to whether, by analogy with that case, if the national court finds that the provision relating to the period for voluntary departure is unlawful and that the competent national authority is required to include a new provision relating to that period, that would mean amending a constituent element of the return decision (the obligation to return) and thus require that authority to adopt a new return decision.

76. In other words, it is necessary to ascertain whether, like the indication of the country of destination, the provision relating to the period for voluntary departure is an integral part of the obligation to return, so that any unlawfulness in that decision would render the return decision null and void in its entirety.

77. The following considerations lead me to propose a positive response to this question.

78. First of all, it should be observed that the definition of 'return', as provided in Article 3(3) of Directive 2008/115, refers expressly to the voluntary or enforced nature of the return. Under that definition, 'obligation to return' means the process of a third-country national going back – whether *in voluntary compliance with an obligation to return, or enforced*, to the country of destination, which implies that the finding whereby the competent national authority decides whether to grant voluntary departure, where appropriate granting a period of time for that purpose, is an integral part of the obligation to return.

79. Furthermore, it is important to point out that the provision relating to the period for voluntary departure *contributes* to the overall objective of Directive 2008/115.

[23] Judgment of 14 May 2020 (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367).

[24] See judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraphs 114 to 116).

80. The Court has already ruled that, by providing that the Member States are, in principle, required to grant a period for voluntary departure to illegally staying third-country nationals, Article 7 of Directive 2008/115 seeks, inter alia, to ensure that the fundamental rights of those nationals are observed in the implementation of a return decision. According to the Court, the purpose of that Article is in line with the general objective pursued by that directive, as set out in recitals 2 and 11 thereof, namely 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. [25]

81. From that I infer that the concept of 'obligation to return' as a constituent element of the return decision must be understood in such a way as to reflect a balance between the effectiveness of the removal policy and respect for the fundamental rights of the persons concerned. Any interpretation whereby the provision relating to the period of voluntary departure is not an integral part of the obligation to return would, in my view, be tantamount to compromising such a balance, and would thus run counter to the objective of Directive 2008/115.

82. In contrast to the Belgian and German Governments, it seems to me that that finding is not undermined by the second and third sentences of Article 7(1) of Directive 2008/115, whereby 'Member States may provide in their national legislation that such a period shall be granted only following an application by the third-country national concerned. In such a case, Member States shall inform the third-country nationals concerned of the possibility of submitting such an application'. Even if a Member State had made use of the power conferred upon it by that provision (which is not the case in this instance), the provision relating to the period for voluntary departure appears in the return decision, even when no application has been made by the third-country national concerned. In such a case, that provision would indicate that no period for voluntary departure had been granted because the procedural condition applicable to assessment of such a period of time had not been met.

83. It follows that any unlawfulness in that provision would have an impact on the obligation to return and, in turn, on the return decision in its entirety.

84. That interpretation also has the merit of rendering negligible the risk that, in some Member States, the competent national authority will proceed to enforce a return decision in which only the provision relating to the period for voluntary departure is unlawful, before the outcome of an appeal brought against such a decision. I would point out that, under Article 13(2) of Directive 2008/115, Member States have the *power* and not the obligation to provide that the bringing of an action against a return decision automatically entails the temporary suspension of the enforcement of that decision, [26] and that they are simply required to provide that the court seised *may*, in individual cases, temporarily suspend such enforcement.

[25] See judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraphs 47 and 48). The fact that enforced return may, in some circumstances, undermine the dignity of the person concerned can be inferred from reading Article 8(4) of Directive 2008/115, according to which 'where Member States use – as a last resort – coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force. They shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned'.

[26] See, in particular, order of 5 May 2021, *CPAS de Liège* (C-641/20, EU:C:2021:374, paragraph 22). By contrast, an action brought against a return decision *must*, in order to ensure that the requirements arising from the principle of non-refoulement and from Article 47 of the Charter are met with regard to the third-country national concerned, have suspensory effect as of right, where that decision is likely to expose that national to a real risk of being subjected to treatment contrary to Article 18 of the Charter, read in conjunction with Article 33 of the Geneva Convention, or to treatments contrary to Article 19(2) of the Charter (see, to that effect, judgments of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453, paragraphs 52 and 53), and of 17 December 2015, *Tall* (C-239/14, EU:C:2015:824, paragraphs 57 and 58)).

85. Finally, it is important to note that the proposed interpretation cannot be called into question by the following arguments. First, the German Government states in its written observations that, in accordance with a combined reading of Article 7(2) and Article 14(2) of Directive 2008/115, the period for voluntary departure may be extended by mere written confirmation and that, in accordance with Article 8(2) of that directive, that period may be shortened in the event of one of the risks referred to in Article 7(4) thereof arising, without the need for a new decision. According to that government, if the period for voluntary departure had not been severable from the return decision, any change to that period should have entailed a new return decision with an amended period. With regard to the first situation, it is sufficient, in my view, to note that an amendment such as the extension to the period for voluntary departure does not imply a new assessment by the competent national authority as to whether the conditions for granting that period have been met. Regarding the second scenario, I do not subscribe to that government's view that there is no need for a new return decision. Since that situation occurs when the competent national authority becomes aware of one of the risks referred to in Article 7(4) of Directive 2008/115, it necessarily implies a new assessment of the abovementioned conditions. Therefore, it seems to me that a new return decision is required.

86. Second, in support of its position, the German Government relies on the first part of Section 1.4 of the 'Return Handbook',[27] which reads as follows: 'The definition of a "return decision" focuses on two essential elements. A return decision must contain: (1) a statement concerning the illegality of the stay; and (2) the imposition of an obligation to return. A return decision may contain further elements, such as an entry ban, a voluntary departure period, designation of the country of return.' In that regard, I will merely point out that, whilst that Return Handbook is a reference tool for the competent authorities of the Member States for the performance of tasks linked to the return of illegally staying third-country nationals, the Recommendation to which it is annexed has no binding force.[28] That explains why, on two previous occasions, the reading of the provisions of Directive 2008/115 as recommended in that manual has not met with the Court's approval.[29]

87. In the light of the abovementioned considerations, I suggest that the Court answer the third question in Case C-636/23 and the second question in Case C-637/23 so that Article 7 and Article 3(4) of Directive 2008/115 must be interpreted as meaning that the provision relating to the period for voluntary departure is an integral part of the obligation to return, with the result that if that provision is found to be unlawful, the return decision becomes null and void in its entirety.

[27] The Return Handbook is annexed to Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks (OJ 2017 L 339, p. 83).

[28] See judgment of 3 June 2021, *Westerwaldkreis* (C-546/19, EU:C:2021:432, paragraph 47).

[29] In addition to the judgment of 3 June 2021, *Westerwaldkreis* (C-546/19, EU:C:2021:432, paragraph 47), see judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraphs 114 to 116).

Conclusion

88. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings, Belgium), as follows:

(1) Article 13 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, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union,

must be interpreted as meaning that it requires that the failure to grant a period for voluntary departure may be challenged in court proceedings.

(2) Article 3(6) and Article 11(1) of Directive 2008/115

must be interpreted as meaning that they do not preclude the competent national authority from still being able to impose, even after a considerable period of time, an entry ban based on a return decision that has not granted a period for voluntary departure.

(3) Article 7 and Article 3(4) of Directive 2008/115

must be interpreted as meaning that the provision relating to the period for voluntary departure is an integral part of the obligation to return, with the result that if that provision is found to be unlawful, the return decision becomes null and void in its entirety.