Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

23 April 2015 *

(Reference for a preliminary ruling — Area of freedom, security and justice — Directive 2008/115/EC — Common standards and procedures for returning illegally staying third-country nationals — Articles 6(1) and 8(1) — National legislation providing, in the event of illegal staying, for either a fine or removal, depending on the circumstances)

In Case C-38/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco (Spain), made by decision of 17 December 2013, received at the Court on 27 January 2014, in the proceedings

Subdelegación del Gobierno en Gipuzkoa — Extranjería

v

Samir Zaizoune,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen (Rapporteur), President of the Chamber, K. Jürimäe, J. Malenovský, M. Safjan and A. Prechal, Judges,

Advocate General: Y. Bot,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 9 December 2014,

after considering the observations submitted on behalf of:

— the Spanish Government, by A. Rubio González, acting as Agent,

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

— the European Commission, by S. Pardo Quintillán and M. Condou-Durande, acting as Agents,

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

gives the following

* Language of the case: Spanish.

Judgment

1 This request for a preliminary ruling concerns, in particular, the interpretation of Articles 6(1) and 8(1) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

2 The request has been made in proceedings brought against Mr Zaizoune relating to his illegal stay in Spanish territory.

Legal context

Directive 2008/115

3 Recitals 2 to 4 in the preamble to Directive 2008/115 state:

'(2) The Brussels European Council of 4 and 5 November 2004 called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.

...

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

4 Article 1 of Directive 2008/115, entitled 'Subject matter', provides:

'This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.'

5 Article 3 of Directive 2008/115 defines various terms for the purposes of that directive. Thus, point 4 of Article 3 of Directive 2008/115 defines the 'return decision' as '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 Point 5 of Article 3 of Directive 2008/115 defines 'removal' as 'the enforcement of the obligation to return, namely the physical transportation out of the Member State'.

7 Under the heading 'More favourable provisions', Article 4(2) and (3) of Directive 2008/115 provides:

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

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

8 Article 6 of Directive 2008/115, entitled ‘Return decision’, provides:

‘1. Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5.

2. Third-country nationals staying illegally on the territory of a Member State and holding a valid residence permit or other authorisation offering a right to stay issued by another Member State shall be required to go to the territory of that other Member State immediately. In the event of non-compliance by the third-country national concerned with this requirement, or where the third-country national’s immediate departure is required for reasons of public policy or national security, paragraph 1 shall apply.

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

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

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

…’

9 Article 7(1) and (4) of Directive 2008/115, entitled ‘Voluntary departure’, provides:

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

…

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

10 Article 8(1) of Directive 2008/115, entitled ‘Removal’, provides:

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

Spanish law

11 Article 28(3)(c) of Basic 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), in the version resulting from paragraph 28 of the sole article of the Basic Law 2/2009 (Ley Orgánica 2/2009, BOE No 299 of 12 December 2009), in force since 13 December 2009 ('the Law on Aliens') provides:

'Departure [from Spanish territory] shall be compulsory in the following cases:

...

(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.'

12 Under Article 51(2) of the Law on Aliens, the administrative offences set out in that law are classified, depending on their gravity, as either 'minor', 'serious' or 'very serious'.

13 Article 53(1)(a) of the Law on Aliens defines as a serious offence '[b]eing unlawfully present on Spanish territory, on the ground that the person concerned has not obtained an extension of permission to stay or does not have a residence permit, or on the ground that the residence permit has expired more than three months previously, and that person has not applied for renewal of that permit within the period laid down by law'.

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

15 Article 55(3) of the Law on Aliens provides that the competent court, when imposing a penalty, is to apply criteria of proportionality, taking into account the degree of fault, the harm caused and the risk arising from the offence and its effects.

16 Article 57 of the Law on Aliens provides:

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

...

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

...'

17 Article 24 of Royal Decree 557/2011 of 20 April 2011, approving the rules for the implementation of Basic Law 4/2000 on the rights and freedoms of foreign nationals in Spain and their social integration, as amended by Basic Law 2/2009, provides:

'1. In the absence of authorisation to stay in Spain, inter alia, because the conditions for entry or stay are not met, or are no longer met, or in the event of an administrative refusal of an application for an extension of stay, a residence permit or any other documentation necessary allowing the foreign national to remain on Spanish territory ... the administrative decision issued to that end shall inform the person concerned of the obligation on him to leave the country, without prejudice to the

possibility of that notice 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 ...'

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

18 Mr Zaizoune, a Moroccan national, was arrested on 15 July 2011 in Spain by law enforcement authorities.

19 Since Mr Zaizoune was unable to present his identity documents on that occasion, he was arrested and a procedure to remove him from Spanish territory was commenced.

20 That procedure led, on 19 October 2011, to the Subdelegación del Gobierno en Gipuzkoa (Representation of the Spanish State in Gipuzkoa) adopting a decision ordering his removal from Spain and banning him from entry for five years.

21 That decision was based on the fact that Mr Zaizoune was staying illegally in Spain, within the meaning of Article 53(1)(a) of the Law on Aliens, coupled with his criminal record in Spain.

22 Mr Zaizoune brought an action against that decision before the Juzgado de lo Contencioso-Administrativo No 2 Donostia-San Sebastián (Court for Contentious Administrative Proceedings No 2, San Sebastián) which annulled the decision, replacing the removal with a fine.

23 The Subdelegacion del Gobierno en Gipuzkoa appealed against that judgment to the referring court. That court stated that the national provisions were interpreted by the Spanish court of last instance as meaning that the main penalty to be imposed on illegally staying third-country nationals is a fine, unless there are additional aggravating factors justifying the replacement of the fine with removal from the national territory.

24 In those circumstances, the Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco (Supreme Court of Justice of the Autonomous Community of the Basque Country) decided to stay the proceedings and to refer to the Court the following question for a preliminary ruling:

'In the light of the principles of sincere cooperation and the effectiveness of directives, must Articles 4(2), 4(3) and 6(1) of Directive 2008/115 be interpreted as meaning that they preclude legislation such as the national legislation at issue in the main proceedings and the case-law which interprets it, pursuant to which the illegal stay of a foreign national [on the national territory] may be punishable just by a financial penalty, which, moreover, may not be imposed concurrently with the penalty of removal?'

The question referred for a preliminary ruling

25 It should be observed as a preliminary point that, in the context of the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The Court has a duty to interpret all provisions of EU law which national courts need in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court of Justice by those courts (judgment in *eco cosmetics and Raiffeisenbank St. Georgen*, C-119/13 and C-120/13, EU:C:2014:2144, paragraph 32 and the case-law cited).

26 Consequently, even if, formally, the questions referred concern the interpretation of Articles 4(2), 4(3) and 6(1) of Directive 2008/115, that does not prevent this Court from providing the referring court with all the elements of interpretation of EU law that may be of assistance in adjudicating in the case in the main proceedings. It is, in this regard, for the Court to extract from all the information provided by the national court, in particular from the grounds of the decisions to make the reference, the points of EU law which require interpretation in view of the subject-matter of the dispute (see judgment in *eco cosmetics and Raiffeisenbank St. Georgen*, C-119/13 and C-120/13, EU:C:2014:2144, paragraph 33 and the case-law cited).

27 In this case, it should be noted that, as was confirmed by the Spanish Government in its observations at the hearing, the concept of 'removal' contained in the order for reference, covers both a return decision and its enforcement. Therefore, the interpretation of Article 8(1) of Directive 2008/115, which relates to the enforcement of the return decision, is also relevant in the context of the main proceedings.

28 In those circumstances, in order to provide a useful reply to the referring court, the question submitted must be reformulated as asking, in essence, whether Directive 2008/115, in particular, Articles 6(1) and Article 8(1), read in conjunction with Article 4(2) and (3), must be interpreted as precluding legislation of a Member State such as that at issue in the main proceedings which provides, in the event of third-country nationals illegally staying in the territory of that State, depending on the circumstances, for either a fine or removal, since the two measures are mutually exclusive.

29 It appears from the order for reference that illegally staying third-country nationals on Spanish territory may, under the national legislation at issue, as interpreted by the Spanish court of last instance, be punished only by a fine, which is incompatible with removal from the national territory, since removal is ordered only where there are additional aggravating factors.

30 In that regard, it must be recalled that the objective of Directive 2008/115, as is apparent from recitals 2 and 4 in the preamble thereto, is the establishment of an effective removal and repatriation policy. Article 1 of that directive sets out the 'common standards and procedures' to be applied by each Member State for returning illegally staying third-country nationals.

31 As is clear from paragraph 35 of the judgment in *El Dridi* (C-61/11 PPU, EU:C:2011:268), Article 6(1) of Directive 2008/115 provides, first of all, principally, for an obligation for Member States to issue a return decision against any third-country national staying illegally on their territory.

32 Once it has been established that the stay is illegal, the national authorities must, pursuant to Article 6(1) of that directive and without prejudice to the exceptions laid down by Article 6(2) to (5) thereof, adopt a return decision (judgment in *Achughbabian*, C-329/11, EU:C:2011:807, paragraph 31). In that regard, nothing in the documents before the Court suggests that Mr Zaizoune finds himself in any of the situations mentioned in those paragraphs.

33 It must also be noted that, where a return decision has been issued against a third-country national, but that third-country national has not complied with the obligation to return, whether within the period for voluntary departure, or if no period is granted to that effect, Article 8(1) of Directive 2008/115 requires Member States, in order to ensure the effectiveness of return procedures, to take all measures necessary to carry out the removal of the person concerned, namely, pursuant to Article 3, point 5, of that directive, the physical transportation of the person concerned out of that Member State (see, to that effect, judgment in *Achughbabian*, C-329/11, EU:C:2011:807, paragraph 35).

34 It must be recalled, moreover, that, as follows both from the duty of sincere cooperation on the Member States and the requirements of effectiveness referred to, in particular, in recital 4 in the preamble to Directive 2008/115, the obligation imposed on the Member States by Article 8 of that

directive, in the cases set out in Article 8(1), to carry out the removal of the third-country national, must be fulfilled as soon as possible (see judgment in *Sagor*, C-430/11, EU:C:2012:777, paragraph 43 and the case-law cited).

35 It follows that national legislation such as that at issue in the main proceedings does not meet the clear requirements of Articles 6(1) and 8(1) of Directive 2008/115.

36 The Member States' right to derogate, pursuant to Article 4(2) and (3) of Directive 2008/115, from the standards and procedures set out by that directive cannot affect that conclusion.

37 Thus, as regards provisions laid down in the Community *acquis* relating to immigration and asylum which may be more favourable for the third-country national, referred to by Article 4(2) of Directive 2008/115, it must be stated that no provision of the directive nor any provision of an act which forms part of the Community *acquis* permits a mechanism being put in place which provides, in the event of third-country nationals illegally staying in the territory of a Member State, depending on the circumstances, for either a fine or removal, since the two measures are mutually exclusive.

38 As regards Article 4(3) of Directive 2008/115, it should be noted that the power to derogate provided for therein is contingent on the more favourable provisions for persons falling within the scope of Directive 2008/115, adopted or maintained by Member States, being compatible with that directive. Given the objective pursued by that directive, as recalled in paragraph 30 above, and also the Member States' obligations which are evident from Articles 6(1) and 8(1) of that directive, there is no such compatibility where national legislation provides for a mechanism such as that set out in paragraph 37 above.

39 In that regard, it must be borne in mind that Member States must not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness (see, to that effect, judgment in *Achughbabian*, C-329/11, EU:C:2011:807, paragraph 33 and the case-law cited).

40 It follows that national legislation such as that at issue in the main proceedings is likely to thwart the application of the common standards and procedures established by Directive 2008/115 and, as the case may be, delay the return, thereby undermining the effectiveness of that directive (see, to that effect, judgment in *Achughbabian*, C-329/11, EU:C:2011:807, paragraph 39).

41 Having regard to all of the foregoing considerations, the answer to the question referred is that Directive 2008/115, in particular Articles 6(1) and Article 8(1), read in conjunction with Article 4(2) and (3), must be interpreted as precluding legislation of a Member State such as that at issue in the main proceedings, which provides, in the event of third-country nationals illegally staying in the territory of that Member State, depending on the circumstances, for either a fine or removal, since the two measures are mutually exclusive.

Costs

42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, in particular, Articles 6(1) and Article 8(1), read in conjunction with

Article 4(2) and (3), must be interpreted as precluding legislation of a Member State such as that at issue in the main proceedings, which provides, in the event of third-country nationals illegally staying in the territory of that Member State, depending on the circumstances, for either a fine or removal, since the two measures are mutually exclusive.

[Signatures]