Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 2 February 2016 [1]

Case C-47/15

Sélina Affum, Amissah by marriage
v
Préfet du Pas-de-Calais
Procureur général de la Cour d'appel de Douai

(Request for a preliminary ruling from the Cour de cassation (France))

(Area of freedom, security and justice — Directive 2008/115/EC — Return of an illegally staying third-country national — Illegal entry — Transit — Sentence of imprisonment — Police custody)

I – **Introduction**

1. In this reference for a preliminary ruling from the Cour de cassation (Court of Cassation, France), the Court is once again requested to rule on the compatibility with Directive 2008/115/EC [2] of a national legal provision which permits a sentence of imprisonment to be imposed on a third-country national solely on the ground of the irregularity of his situation.

2. The present case differs from the previous cases relating to this matter [3] in two respects. First, it concerns a third-country national who entered the territory of the Member State concerned for the sole purpose of transit and was intercepted when leaving that Member State. The question thus arises as to whether there is a stay within the meaning of Directive 2008/115. Secondly, the Member State in question does not intend to adopt a return decision pursuant to Article 6(1) of Directive 2008/115, but to hand over the national concerned to the authorities of another Member State, on the basis of an arrangement concluded before the entry into force of Directive 2008/115.

3. This case will give the Court the opportunity to point out that Directive 2008/115 applies to any illegally staying third-country national, whatever the reason for his stay being illegal and wherever he is apprehended, and that the imposition of a sentence of imprisonment on a third country national is permitted only in clearly defined circumstances which do not apply in this instance.

1 — Original language: French.

2 — Directive 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).

3 — See judgments in *El Dridi* (C-61/11 PPU, EU:C:2011:268); *Achughbabian* (C-329/11, EU:C:2011:807); and *Celaj* (C-290/14, EU:C:2015:640). See also the judgment in *Sagor* (C-430/11, EU:C:2012:777), which concerned inter alia a home detention order.

II – **Legal framework**

A – *EU law*

1. Directive 2008/115

4. The subject matter of Directive 2008/115 is described in Article 1 as follows:

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

5. Article 2 of Directive 2008/115, headed ‘Scope’, provides:

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

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

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

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

…’

6. Article 3 of Directive 2008/115, headed ‘Definitions’, states:

‘For the purpose of this Directive:

…

2. “illegal stay” means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State;

3. “return” means the process of a third-country national going back — whether in voluntary compliance with an obligation to return, or enforced — to:

   — his or her country of origin, or

   — a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or

   — another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted;

4. “return decision” means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return;

5. “removal” means the enforcement of the obligation to return, namely the physical transportation out of the Member State;

…’

7. Article 4 of Directive 2008/115, headed ‘More favourable provisions’, provides:

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

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

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

…

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

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

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

8. Articles 6 to 8 of Directive 2008/115 state:

‘Article 6

Return decision

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

…

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.

…

Article 7

Voluntary departure

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. …

…

Article 8

Removal

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.

…'

9. Article 15 of Directive 2008/115, headed 'Detention', provides:

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

(a) there is a risk of absconding or

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

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

…'

2. The CISA and the Schengen Borders Code

10. 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 (OJ 2000 L 239, p. 19), signed in Schengen on 19 June 1990 ('the CISA'), forms part of the Schengen *acquis*.

11. In Title II of the CISA, Chapter 4, headed 'Conditions governing the movement of aliens', lays down in Article 19(1) and (2), Article 20(1) and Article 21(1) and (2) the conditions under which aliens who hold a uniform visa or a visa issued by one of the Contracting parties, aliens not subject to a visa requirement and aliens who hold a valid residence permit, or a provisional residence permit, issued by one of those parties may move freely within the territories of the Contracting Parties. Those provisions refer in particular to some of the entry conditions laid down in Article 5(1) of the CISA.

12. Regulation (EC) No 562/2006 [4] consolidated and developed the Schengen *acquis*.

13. The Schengen Borders Code, as stated in recital 27 thereof, 'constitutes a development of provisions of the Schengen *acquis* in which the United Kingdom [of Great Britain and Northern Ireland] does not take part … The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application'.

4 — Regulation 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), as amended by Regulation (EU) No 265/2010 of the European Parliament and of the Council of 25 March 2010 (OJ 2010 L 85, p. 1) ('the Schengen Borders Code').

14. According to Article 1 thereof, the Schengen Borders Code 'provides for the absence of border control of persons crossing the internal borders between the Member States of the European Union' and 'establishes rules governing border control of persons crossing the external borders of the Member States of the European Union'.

15. Article 2(1) and (2) of the Schengen Borders Code contains the following definitions:

'1. "internal borders" means:

(a) the common land borders, including river and lake borders, of the Member States;

(b) the airports of the Member States for internal flights;

(c) sea, river and lake ports of the Member States for regular ferry connections;

2. "external borders" means the Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders'.

16. In Title II of the Schengen Borders Code, Chapter I, headed 'Crossing of external borders and conditions for entry', provides in Articles 4 and 5:

'Article 4

Crossing of external borders

1. External borders may be crossed only at authorised border crossing-points and during the fixed opening hours. The opening hours shall be clearly indicated at border crossing points which are not open 24 hours a day.

…

3. Without prejudice to the exceptions provided for in paragraph 2 or to their international protection obligations, the Member States shall introduce penalties, in accordance with their national law, for the unauthorised crossing of external borders at places other than crossing points or at times other than the fixed opening hours. Such penalties shall be effective, proportionate and dissuasive.

Article 5

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 …, 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 (SIS)] 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 …

…

4. By way of derogation from paragraph 1:

(a) third-country nationals who do not fulfil all the conditions laid down in paragraph 1 but who hold a residence permit, a long-stay visa or a re-entry visa issued by one of the Member States or, where required, a residence permit or a long-stay visa and a re-entry visa, shall be authorised to enter the territories of the other Member States for transit purposes so that they may reach the territory of the Member State which issued the residence permit, long-stay visa or re-entry visa …;

…

(c) third-country nationals who do not fulfil one or more of the conditions laid down in paragraph 1 may be authorised by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations. …'

17. Chapter II of Title II of the Schengen Borders Code, headed 'Control of external borders and refusal or entry', provides in Article 7, relating to border checks on persons:

'Article 7

Border checks on persons

1. Cross-border movement at external borders shall be subject to checks by border guards. Checks shall be carried out in accordance with this chapter.

…

3. On entry and exit, third-country nationals shall be subject to thorough checks.

(a) thorough checks on entry shall comprise verification of the conditions governing entry laid down in Article 5(1) and, where applicable, of documents authorising residence and the pursuit of a professional activity. This shall include a detailed examination covering the following aspects:

…

(b) thorough checks on exit shall comprise:

(i) verification that the third-country national is in possession of a document valid for crossing the border;

(ii) verification of the travel document for signs of falsification or counterfeiting;

(iii) whenever possible, verification that the third-country national is not considered to be a threat to public policy, internal security or the international relations of any of the Member States;

(c) In addition to the checks referred to in point (b) thorough checks on exit may also comprise:

(i) verification that the person is in possession of a valid visa, if required …, except where he or she holds a valid residence permit; …

(ii) verification that the person did not exceed the maximum duration of authorised stay in the territory of the Member States;

(iii) consultation of alerts on persons and objects included in the SIS and reports in national data files.

…'

18. In Chapter I of Title III of the Schengen Borders Code, headed 'Abolition of border control at internal borders', Article 20 states that 'internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out'.

19. By virtue of Article 39(1) of the Schengen Borders Code, which forms part of Title IV, headed 'Final provisions', Articles 2 to 8 of the CISA were repealed with effect from 13 October 2006. The entry conditions in particular, which were previously included in Article 5(1) of the CISA, were thus replaced by those laid down in Article 5 of that code.

B – *French legislation*

1. Code on the Entry and Stay of Foreign Nationals and the Right of Asylum

20. Article L. 621-2 of the Code on the Entry and Stay of Foreign Nationals and the Right of Asylum (code de l'entrée et du séjour des étrangers et du droit d'asile), as amended by Law No 2012-1560 of 31 December 2012 on the holding of foreign nationals to verify their right to stay and amending the offence of aiding an illegal stay in order to exclude humanitarian and disinterested actions (loi No 2012-1560, du 31 décembre 2012, relative à la retenue pour vérification du droit au séjour et modifiant le délit d'aide au séjour irrégulier pour en exclure les actions humanitaires et désintéressées; JORF of 1 January 2013, p. 48) ('Ceseda'), provides:

'A foreign national who is not a national of a Member State of the European Union shall be liable to a sentence of one year's imprisonment and a fine of EUR 3 750:

1. if he has entered the territory of Metropolitan France without satisfying the conditions referred to in Article 5(1)(a), (b) and (c) of [the Schengen Borders Code] and without having been admitted to that territory pursuant to Article 5(4)(a) and (c) of that [code]; the same shall apply where an alert has been issued for the purpose of refusing the foreign national entry pursuant to an enforceable decision adopted by another State party to the [CISA];

2. or if, arriving directly from the territory of a State party to [the CISA], he has entered the territory of Metropolitan France without complying with the requirements of Article 19(1) or (2), Article 20(1) and Article 21(1) or (2) thereof, with the exception of the conditions referred to in Article 5(1)(e) of [the Schengen Borders Code] and in Article 5(1)(d) where the alert for the purpose of refusing entry does not result from an enforceable decision adopted by another State party to the [CISA];

…

For the purposes of this article, criminal proceedings may be instituted only in cases where the facts have been found in the circumstances provided for in Article 53 of the Code of Criminal Procedure (code de procédure pénale).'

2. Code of Criminal Procedure

21. The Code of Criminal Procedure, in the version in force at the material time, provides in Article 53:

'A crime or other offence shall be classified as *in flagrante delicto* where it is in the course of being committed or has just been committed. A crime or other offence shall also be so classified where, at a time very close to the act, the person suspected is pursued by hue and cry, is found in the possession of articles, or has on or about him traces or clues so as to give grounds for believing that he has taken part in the crime or other offence.

Following the discovery of a crime or other offence classified as *in flagrante delicto*, the investigation conducted under the direction of the public prosecutor under the conditions provided for by the present chapter may continue without interruption for eight days.

…'

22. Article 62-2 of the Code of Criminal Procedure states:

'Police custody is a coercive measure decided upon by a senior police officer, under the supervision of the courts, whereby a person reasonably suspected on one or more grounds of having committed or attempted to commit a crime or other offence punishable by imprisonment is held at the disposal of investigators.

…'

III – **The facts in the main proceedings, the proceedings before the Court and the questions referred for a preliminary ruling**

23. On 22 March 2013, Ms Affum, a Ghanaian national, was subject to a check by French police officers in Coquelles (France), the point of entry to the Channel Tunnel, when she was on a bus from Ghent (Belgium) to London (United Kingdom).

24. After presenting a Belgian passport with the name and photograph of another person, and lacking any other identity or travel document in her name, she was placed in police custody on the ground of illegal entry into French territory, on the basis of Article L. 621-2(2) of Ceseda.

25. The following day, the public prosecutor at the tribunal de grande instance de Boulogne-sur-Mer (Regional Court, Boulogne-sur-Mer, France) decided that no action should be taken in the criminal procedure initiated against Ms Affum. Consequently, the policy custody measure against her was terminated on the same day.

26. However, at the same time as the criminal procedure initiated against Ms Affum, her administrative situation was referred to the préfet du Pas-de-Calais (Prefect of Pas-de-Calais) for a decision on her possible removal from French territory.

27. By order of 23 March 2013, he decided that Ms Affum should be handed over to the Belgian authorities with a view to her readmission, on the basis of the arrangement between the Government of the French Republic, on the one part, and the Governments of the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands, of the other part, concerning the taking charge of persons at the common borders between France and the territory of the Benelux States, signed in Paris on 16 April 1964.

28. By that order, the Prefect of Pas-de-Calais ordered that Ms Affum be placed in administrative detention in premises not administered by the prison authorities for a period of five days following the end of her police custody, pending her removal. In compliance with that order, Ms Affum was therefore placed in administrative detention on 23 March 2013 for a period of five days with a view to being handed over to the Belgian authorities.

29. On 27 March 2013, the Prefect of Pas-de-Calais asked the judge responsible for matters relating to liberty and detention at the tribunal de grande instance de Lille (Regional Court, Lille, France) to extend the administrative detention pending a reply from the Belgian authorities concerning his request for readmission.

30. By way of defence, Ms Affum maintained, relying in particular on the judgment in *Achughbabian*,[5] that the request of the Prefect of Pas-de-Calais had to be rejected since it had been illegal to place her in police custody: under national law, such an illegality invalidated the whole procedure and was punished by a refusal to extend the detention and the release of the person concerned.

31. By order of 28 March 2013, the judge responsible for matters relating to liberty and detention at the tribunal de grande instance de Lille (Regional Court, Lille) held, however, that the police custody measure taken against Ms Affum was lawful and that she was therefore placed in administrative detention following a lawful procedure. He therefore granted the request of the Prefect of Pas-de-Calais and ordered that Ms Affum's administrative detention be extended for a maximum period of 20 days from that date.

32. Hearing the appeal brought by Ms Affum, the First President of the cour d'appel de Douai (Court of Appeal, Douai, France) confirmed that order of the judge responsible for matters relating to individual liberty and detention at the tribunal de grande instance de Lille (Regional Court, Lille), by order of 29 March 2013.

33. Hearing the appeal on a point of law brought by Ms Affum against that last order, the Cour de cassation (Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 3(2) of Directive 2008/115 to be interpreted as meaning that a third-country national is staying illegally on the territory of a Member State and thus falls within the scope of that directive, as defined in Article 2(1) thereof, where that foreign national is merely in transit as a passenger on a bus travelling on the territory of that Member State from another Member State forming part of the Schengen area and bound for a different Member State?

(2) Is Article 6(3) of Directive 2008/115 to be interpreted as meaning that that directive does not preclude national legislation under which a third-country national who has entered the territory of a Member State illegally is liable to a sentence of imprisonment where the foreign national in question may be taken back by another Member State pursuant to an agreement or an arrangement concluded with that State prior to the entry into force of the directive?

5 — C-329/11, EU:C:2011:807.

(3) Depending on the answer given to the previous question, is Directive 2008/115 to be interpreted as precluding national legislation under which a third-country national who has entered the territory of a Member State illegally is liable to a sentence of imprisonment, under the same conditions as those laid down by the Court of Justice in the judgment in *Achughbabian* [(C-329/11, EU:C:2011:807)] so far as concerns illegal stay, which are contingent on the person concerned not having been previously subject to the coercive measures referred to in Article 8 of the directive and the duration of that person's detention?'

34. Ms Affum submitted observations, as did the French, Czech, Greek, Hungarian and Swiss Governments and the European Commission. At the hearing on 10 November 2015, Ms Affum, the French and Greek Governments and the Commission stated their views.

IV – **Assessment**

35. By its three questions, which should be addressed together, the referring court seeks, in essence, to ascertain whether Directive 2008/115 precludes legislation of a Member State under which a third-country national who has entered its territory illegally is liable to a sentence of imprisonment where that person is intercepted when leaving the Schengen area [6] at an external border of that Member State, in transit from another Member State, and may be taken back by that other Member State pursuant to an arrangement concluded with the latter prior to the entry into force of Directive 2008/115.

36. In order to give a helpful reply to the questions asked, it is appropriate, first of all, to set out briefly the system introduced by, on the one hand, Directive 2008/115 and, on the other, the Schengen Borders Code, while analysing the demarcation line between those two instruments, then to recall briefly the Court's case-law concerning deprivation of a person's liberty in situations other than those provided for by Directive 2008/115 and, finally, to analyse the national legislation at issue.

A – *Directive 2008/115 and its scope*

37. The purpose of Directive 2008/115, as stated in Article 1 thereof, is to set out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights and international law. It is apparent from recital 4 that the directive seeks to establish clear, transparent and fair rules to provide for an effective return policy as a necessary element of a well-managed migration policy. Directive 2008/115 was adopted on the basis of point (3)(b) of the first subparagraph of the former Article 63 EC, [7] in accordance with the codecision procedure under Article 251 EC. [8] It was, in fact, the first legal instrument concerning immigration to be adopted following that procedure. [9]

6 — Although the term 'Schengen area' is not used by the Schengen Borders Code, it has become common for defining the Member States which fall under that code. I note that the Court itself uses that term. See, by way of example, judgments in *ANAFE* (C-606/10, EU:C:2012:348, various paragraphs and the operative part); *Air Baltic Corporation* (C-575/12, EU:C:2014:2155, paragraph 67); and *T.* (C-373/13, EU:C:2015:413, paragraph 52).

7 — That article became Article 79(2)(c) TFEU following the entry into force of the Treaty of Lisbon.

8 — That procedure had become applicable following the adoption of Council Decision 2004/927/EC of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty (OJ 2004 L 396, p 45).

9 — See Baldaccini, A., 'The return and removal of irregular migrants under EU law: an analysis of the Return Directive', *European Journal of Migration and Law*, 2001, pp. 1 to 17, in particular p. 1.

38. The scope *ratione personae* of Directive 2008/115, as defined in Article 2 thereof, is very wide. By virtue of Article 2(1), Directive 2008/115 applies to third-country nationals staying illegally on the territory of a Member State. An illegal stay is constituted by the presence on the territory of a Member State of a third-country national who does not fulfil, or no longer fulfils, the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State. [10]

39. Inasmuch as it refers only to illegal stay, Article 2(1) of Directive 2008/115 makes no distinction between illegal entry and illegal stay.

40. Under Article 2(2) of Directive 2008/115, Member States are authorised not to apply the directive in certain well-defined situations. Under Article 2(2)(a), a Member State may decide not to apply the directive to third-country nationals who are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.

41. The interception must take place, according to the aforementioned provision, in connection with the irregular crossing of the external border, which to my mind implies a close temporal and spatial link with the crossing of the border.

42. Directive 2008/115 does not itself contain a definition of the terms 'internal border' or 'external border'. However, since the Schengen Borders Code is mentioned therein several times, it seems clear to me that the definition given by that code is applicable. It is thus apparent from Article 2(1)(a) and (2) of the Schengen Borders Code that 'internal borders' means the common land borders [11] of the Member States and that 'external borders' means the Member States' land borders [12] and sea borders [13] provided that they are not internal borders. Of course, the terms 'Member States' includes only the Member States of the European Union which take part in the Schengen *acquis* and the third States taking part. [14]

43. Directive 2008/115 applies only to the States which form part of the Schengen area. According to Article 21 of Directive 2008/115, the directive replaces the provisions of Articles 23 and 24 of the CISA. With regard more specifically to the United Kingdom, recital 26 of Directive 2008/115 states that it 'is not taking part in the adoption of this Directive and is therefore not bound by it in its entirety or subject to its application'.

B – *The Schengen Borders Code*

44. The Schengen Borders Code establishes rules governing the movement of persons across borders.

45. The conditions for the crossing of external borders and the controls designed to ensure compliance with them are set out in Title II of the Schengen Borders Code. [15] Those controls comprise checks at the border crossing points designated by the Member States and surveillance between those crossing points.

10 — See Article 3(2) of Directive 2008/115.

11 — Including river and lake borders.

12 — Including river and lake borders.

13 — And also their airports, river ports, sea ports and lake ports.

14 — See recitals 21 to 28 of the Schengen Borders Code.

15 — Articles 4 to 19a of the Schengen Borders Code. That title is subdivided into five chapters, namely crossing of external borders and conditions for entry (Chapter I), control of external borders and refusal of entry (Chapter II), staff and resources for border control and cooperation between Member States (Chapter III), specific rules for border checks (Chapter IV), and specific measures in the case of serious deficiencies relating to external border control (Chapter IVa).

46. On the other hand, Directive 2008/115 applies where a person has entered the Schengen area illegally and does not have the right to stay there.

47. The Schengen Borders Code now [16] expressly makes the link between that code and Directive 2008/115, Under the second sentence of Article 12(1) of that code, a person who has crossed a border illegally and who has no right to stay on the territory of the Member State concerned is to be apprehended and made subject to procedures respecting Directive 2008/115.

C – *Deprivation of liberty in the light of Directive 2008/115*

48. Under Chapter IV of Directive 2008/115, headed 'Detention for the purpose of removal', detention may be used only as a measure of last resort, in so far as it is strictly necessary and pending removal. [17] The underlying rationale of the provisions on detention is that only the procedures for return and removal justify deprivation of liberty and that, if those procedures are not conducted with due diligence, detention ceases to be justified under those provisions. [18] Detention for removal purposes is neither punitive nor penal and does not constitute a prison sentence. [19] Moreover, Article 15(1) of Directive 2008/115 must be interpreted narrowly because enforced detention constitutes, as a deprivation of liberty, an exception to the fundamental right of individual freedom. [20]

49. As regards detention or imprisonment in situations other than those covered by Directive 2008/115, the directive does not contain any provision concerning the possibility for the Member States to use detention or imprisonment as a criminal penalty for an illegal stay. In my view the reason is clear, there being no place for such a penalty if the aim of Directive 2008/115 is to provide for the quick return of illegally staying third-country nationals. Any detention measure or sentence of imprisonment which is not imposed in connection with a return procedure will ultimately delay that procedure.

50. In *El Dridi* [21] the Court was asked to determine whether Directive 2008/115 precludes legislation of a Member State, such as the Italian legislation at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remained, without valid grounds, on the territory of that Member State, contrary to an order to leave that territory within a given period. The court declared that Directive 2008/115, in particular Articles 15 and 16 thereof, does preclude such legislation. [22]

16 — A few months after the events in the main proceedings, Article 12(1) of the Schengen Borders Code was amended precisely to clarify the link with Directive 2008/115. See Article 1(11) of Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 amending Regulation No 562/2006, the Convention implementing the Schengen Agreement, Council Regulations (EC) No 1683/95 and (EC) No 539/2001 and Regulations (EC) No 767/2008 and (EC) No 810/2009 of the European Parliament and of the Council (OJ 2013 L 182, p. 1).

17 — Articles 15 to 18 of Directive 2008/115.

18 — See, for further details, points 46 to 55 of my View in *Mahdi* (C-146/14 PPU, EU:C:2014:1936).

19 — See point 47 of my View in *Mahdi* (C-146/14 PPU, EU:C:2014:1936). See also point 35 of the View of Advocate General Mazák in *El Dridi* (C-61/11 PPU, EU:C:2011:205); point 54 of the View of Advocate General Wathelet in *G. and R.* (C-383/13 PPU, EU:C:2013:553); and point 91 of the Opinion of Advocate General Bot in *Bero and Bouzalmate* (C-473/13 and C-514/13, EU:C:2014:295).

20 — See point 47 of my View in *Mahdi* (C-146/14 PPU, EU:C:2014:1936). The European Court of Human Rights rules to the same effect regarding Article 5(1)(f) of the European Convention for the Protection of Human Rights and fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') (see, inter alia, ECtHR, *Quinn v. France*, 22 March 1995, § 42, Series A no. 311, and *Kaya v. Romania*, no. 33970/05, § 16, 12 October 2006).

21 — C-61/11 PPU, EU:C:2011:268.

22 — Judgment in *El Dridi* (C-61/11 PPU, EU:C:2011:268, paragraph 62 and operative part).

51. In *Achughbabian*[23] the Court was again called upon to determine whether Directive 2008/115 precludes national legislation such as the French legislation at issue in the main proceedings,[24] which provided for the imposition of a sentence of imprisonment on a third-country national on the sole ground of his illegal entry or residence in French territory. The court again declared that Directive 2008/115 precludes such legislation 'in so far as that legislation permits the imprisonment of a third-country national who, though staying illegally in the territory of the said Member State and not being willing to leave that territory voluntarily, has not been subject to the coercive measures referred to in Article 8 of that directive and has not, being placed in detention with a view to the preparation and carrying out of his removal, yet reached the end of the maximum term of that detention'.[25] In the main proceedings, Mr Achughbabian was in that position.

52. According to the reasoning followed by the Court in those two cases, imprisonment risked jeopardising the attainment of the objective pursued by Directive 2008/115 and was liable to frustrate the application of the measures referred to in Article 8(1) of that directive and to delay enforcement of the return decision.[26]

53. Nevertheless, in the judgment in *Achughbabian*,[27] the Court added that Directive 2008/115 does not preclude legislation of a Member State laying down criminal penalties for illegal stays 'in so far as [that legislation] permits the imprisonment of a third-country national to whom the return procedure established by [Directive 2008/115] has been applied and who is staying illegally in that territory with no justified ground for non-return.[28]

54. Subsequently, in *Sagor*,[29] the Court stated that a home detention order, imposed and enforced during the course of a return procedure, is 'liable to delay — and thus to impede — the measures, such as deportation and forced return by air, which can be used to achieve removal'. On the other hand, with regard to a criminal prosecution leading to a fine, the Court held that such a fine is not liable to impede the return procedure established by Directive 2008/115.[30] It added that 'the imposition of a fine does not in any way prevent a return decision from being made and implemented in full compliance with the conditions set out in Articles 6 to 8 of Directive 2008/115, nor does it undermine the common standards relating to deprivation of liberty set out in Articles 15 and 16 of that directive'.[31]

55. Lastly, in *Celaj*,[32] a case in which the Italian Republic intended to apply criminal penalties in respect of an illegally staying third-country national to whom the common standards and procedures established by Directive 2008/115 had been applied in order to terminate his first illegal stay on the territory of a Member State and who had re-entered the territory of that Member State in breach of an entry ban, the Court held that 'the circumstances of the case in the main proceedings [were] clearly distinct from those in the cases that led to the judgments in *El Dridi* (C-61/11 PPU, EU:C:2011:268) and *Achughbabian* (C-329/11, EU:C:2011:807)'[33] and that Directive 2008/115 '[does]

23 — C-329/11, EU:C:2011:807.

24 — The former Article L. 621-1 of Ceseda.

25 — Judgment in *Achughbabian* (C-329/11, EU:C:2011:807, paragraph 50 and first indent of the operative part).

26 — See judgments in *El Dridi* (C-61/11 PPU, EU:C:2011:268, paragraph 59) and *Achughbabian* (C-329/11, EU:C:2011:807, paragraph 45). For an analysis of the consequences of those two cases for the national legislature in criminal matters, see Mitsilegas, V., *The Criminalisation of Migration in Europe*, Springer, 2015, pp. 57 to 76.

27 — C-329/11, EU:C:2011:807.

28 — Paragraphs 48 and 50 and second indent of the operative part. For me, although this passage is also part of the operative part of the judgment, it clearly is in the nature of an *obiter dictum*, as it bears no link to the facts of the case at issue and concerns a hypothetical situation.

29 — C-430/11, EU:C:2012:777. paragraph 45.

30 — Paragraph 36.

31 — Paragraph 36.

32 — C-290/14, EU:C:2015:640.

33 — Judgment in *Celaj* (C-290/14, EU:C:2015:640, paragraph 28).

not, in principle, [preclude] legislation of a Member State which provides for the imposition of a prison sentence on an illegally staying third-country national who, after having been returned to his country of origin in the context of an earlier return procedure, unlawfully re-enters the territory of that State in breach of an entry ban'.[34]

56. To sum up, the Court's case-law has accepted two situations in which Directive 2008/115 does not preclude the imposition of a sentence of imprisonment on a third-country national on the ground of an illegal stay, namely where the return procedure established by Directive 2008/115 has been applied and the national is staying illegally on that territory with no justified ground for non-return (the 'Achughbabian' situation) and where the return procedure has been applied and the person concerned re-enters the territory of that Member State in breach of an entry ban (the 'Celaj' situation).

57. Ms Affum's case does not fall within either of these two situations, because no return procedure has been applied against her (the 'Achughbabian' situation) and no re-entry into French territory has taken place (the 'Celaj' situation).

58. Nevertheless, the French authorities consider that a sentence of imprisonment can be imposed on her for illegal entry into France.

D – *Illegal entry in the light of Directive 2008/115*

1. The French legislation

59. Following the Court's judgment in *Achughbabian*[35] and the judgment of the European Court of Human Rights in *Mallah v. France*,[36] the French Government, by Law No 2012-1560,[37] restructured its rules governing the removal of illegally staying foreign nationals. Inter alia, it amended its legislation so as to abolish the offence of staying illegally and to introduce the procedure for holding foreign nationals in order to verify their right to stay. However, the French authorities retained the offence of illegal entry in the event of the illegal crossing of external borders (Article L. 621-2(1) of Ceseda) and in the event of movement of a third country national in breach of the conditions for the movement of foreign nationals laid down in the CISA (Article L. 621-2(2) of Ceseda).

60. In the explanatory memorandum for the draft law, the French authorities take the view that 'the rules concerning the crossing of external borders and the movement of third-country nationals between the Member States do not fall within the scope of [Directive 2008/115]'.[38]

61. Indeed, according to the French authorities, those rules 'stem, so far as concerns the crossing of external borders, from the … Schengen Borders Code …, which provides that the Member States are required to introduce dissuasive penalties in the event of infringement established at the border, that is to say in the case of refusal of entry into the territory or of apprehension or interception at the

34 — Paragraph 33 and operative part.

35 — C-329/11, EU:C:2011:807.

36 — See ECtHR, *Mallah v. France*, no. 29681/08, 10 November 2011. In that case, a Moroccan national, convicted of harbouring his son-in-law, an illegally staying fellow countryman, claimed that his conviction constituted, having regard to the circumstances of the case, a disproportionate interference with the exercise of the right to respect for private and family life within the meaning of Article 8 of the ECHR. It was only because the person concerned had been granted an absolute discharge that the Strasbourg court held that Article 8 of the ECHR had not been infringed. Consequently, the French legislature extended the scope of the immunity from prosecution provided for in Article L. 622-4 for the offence of aiding illegal entry and stay. See paragraph 2.2 of the impact study of 21 September 2012 for the draft law on the restructuring of the legislative provisions concerning the removal of illegally staying foreign nationals, available on the internet at http://www.senat.fr/leg/etudes-impact/pjl11-789-ei/pjl11-789-ei.html.

37 — Law available on the internet at http://www.legifrance.gouv.fr/eli/loi/2012/12/31/INTX1230293L/jo/texte.

38 — Draft law on the holding of foreign nationals to verify their right to stay and amending the offence of aiding an illegal stay in order to exclude humanitarian and disinterested actions, registered at the Presidency of the Senate on 28 September 2012 and available on the internet at http://www.senat.fr/leg/pjl11-789.pdf, p. 6.

time of an illegal crossing of the border. As regards infringements of the rules laid down by the [CISA], [Directive 2008/115] expressly provides that the Member States may refrain from using a removal measure but implement the mechanisms for readmission between Member States, mechanisms to which [Directive 2008/115] is not applicable as has been pointed out by the judge hearing applications for interim relief at the Conseil d'État (Council of State) (CE, 27 June 2011, *ministère de l'intérieur* v *Lassoued*, No 350207)'. [39]

62. The French authorities conclude therefrom that 'those situations fall outside the scope of the interpretation of the Court of Justice of the European Union on which the Cour de cassation (Court of Cassation) has relied and the abolition of the rules on penalties would run counter to the European rules'. [40]

2. Ms Affum's situation

63. In order to justify their legislation, the French authorities rely on several provisions of Directive 2008/115 and of the Schengen Borders Code, provisions which I shall analyse below before inviting the Court to confirm the applicability of Directive 2008/115. In my view, none of the exceptions or limitations provided for by those two instruments is relevant in the present case.

a) Article 2(2)(a) of Directive 2008/115

64. The French Republic relies on Article 2(2)(a) of Directive 2008/115 and suggests that a case such as that in the main proceedings lies outside the scope of the directive.

65. In the first place, it should be pointed out that Article 2(2)(a) of Directive 2008/115 applies only to external borders, that the border between Belgium and France is an internal border and that Ms Affum was intercepted when leaving France at the external border between France and the United Kingdom.

66. In that context, the French Republic submits that Article 2(2)(a) of Directive 2008/115 applies to the illegal crossing of an external border of a Member State both on entry to and on exit from the Schengen area.

67. To the extent that the point of view of the French Republic appears, therefore, to imply that the situation of a person who has entered the territory of a Member State illegally by crossing an internal border but is intercepted only when leaving at the external border of the Member State is covered by Article 2(2)(a) of Directive 2008/115, I cannot agree with its view.

68. To my mind, it is clearly apparent from the wording of that provision that only illegal entry is covered, because otherwise the last part of the sentence ('and who have not subsequently obtained an authorisation or a right to stay in that Member State') would be meaningless. [41]

69. In the present instance, the French Republic cannot therefore rely on Article 2(2)(a) of Directive 2008/115.

39 — Ibidem, p. 6.

40 — Ibidem, p. 6.

41 — Moreover, if the reasoning of the French Republic were followed to its logical conclusion, the situation of a person who has entered the territory of a Member State illegally by crossing an internal border and is intercepted by the authorities of that Member State not at an external border but elsewhere on its territory would fall within the scope of Directive 2008/115, because he would not have crossed an external border. I do not think it is consistent to treat a person in Ms Affum's situation any differently.

b) Article 3(2) of Directive 2008/115: mere transit as ‘stay’

70. The referring court appears to have doubts as to whether the presence on the territory of a Member State which is part of the Schengen area of a third country national who is merely in transit to another Member State which is not a part of the Schengen area falls within the scope of Directive 2008/115.

71. Such doubts are unfounded.

72. According to Article 2(1) of Directive 2008/115, the directive applies to third-country nationals staying illegally on the territory of a Member State. ‘Illegal stay’ is defined, by Article 3(2) of the directive, as the ‘presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State’.

73. It is apparent from those provisions that a third-country national who is on a bus without fulfilling the conditions of entry is indeed present on the territory of the Member State in question and is staying there illegally. Whether he is in transit or not is unimportant for the purpose of the finding that he is staying illegally.

c) Article 6(3) of Directive 2008/115

74. Under Article 6(3) of Directive 2008/115, Member States may refrain from issuing a return decision if the person concerned is taken back by another Member State under ‘bilateral agreements or arrangements’ existing on the date of entry into force of the directive.

75. That provision, as is immediately apparent from its wording, states only that the Member State may refrain from issuing a return decision, but, unlike Article 2 of Directive 2008/115, in no way defines the directive’s scope. Article 6(3) of the directive cannot, as the French Government appears to suggest, have the effect of rendering all the provisions of the directive inapplicable to the case in the main proceedings. On the contrary, a Member State which relies on Article 6(3) of Directive 2008/115 remains bound by the other provisions of the directive and is required to ensure the full effectiveness of the directive. The Court’s case-law relating to the provisions of the directive, in particular to the deprivation of liberty of persons, remains applicable.

76. Article 6(3) of Directive 2008/115 therefore exempts only the Member State concerned from the obligation to issue a return decision within the meaning of Article 6(1) of that directive. The decision to hand a person back under the arrangement constitutes one of the measures provided for by the directive and a stage preparatory to a return from the territory of the Member States for the purposes of Directive 2008/115.

77. As regards interpretation of the term ‘bilateral’, I suggest that the Court opt for an interpretation of Article 6(3) of Directive 2008/115 which includes an arrangement such as that in the present case.[42] Although it was concluded by four Member States, that arrangement treats the territory of the Benelux as a single territory. It can therefore be equated with a bilateral agreement.

42 — Arrangement between the Governments of the Kingdom of the Netherlands, the Kingdom of Belgium and the Grand Duchy of Luxembourg, of the one part, and the Government of the French Republic, of the other part, concerning the taking charge of persons at the common borders between the territory of the Benelux States and France. The text of that arrangement is available on the internet at http://wetten.overheid.nl/BWBV0004480/geldigheidsdatum_06-08-2014.

78. Furthermore, such an interpretation would, in my view, be in accordance with the principle in Article 350 TFEU, according to which the provisions of the Treaties are not to preclude the existence or completion of regional unions between the Kingdom of Belgium and the Grand Duchy of Luxembourg, or between the Kingdom of Belgium, the Grand Duchy Luxembourg and the Kingdom of the Netherlands, to the extent that the objectives of these regional unions are not attained by application of the Treaties.

79. If, by means of that provision, the FEU Treaty already takes account of the specific situation of the Benelux, the Court ought to do the same in its interpretation of Article 6(3) of Directive 2008/115.

d) Article 4(3) of the Schengen Borders Code

80. The French Republic also relies on Article 4(3) of the Schengen Borders Code, under which Member States are to introduce penalties for the unauthorised crossing of external borders at places other than border crossing points or at times other than the fixed opening hours.

81. That provision is not applicable in the present instance because Ms Affum by no means tried to cross a border at a place other than a border crossing point or at a time other than during the fixed opening hours.

82. I see no reason, as the French Republic suggests, for not interpreting this provision literally and for also including border crossing points, since Article 4 of the Schengen Borders Code specifically provides for different treatment between crossing a border at border crossing points and during the fixed opening hours (Article 4(1)) and crossing the border other than at those points and outside the fixed opening hours (Article 4(2)). In other words, I see no reason of a teleological nature which could go against a literal and systemic interpretation of Article 4 of the Schengen Borders Code.

83. In that context, I emphasise that a person who has illegally crossed a border and who does not have the right to stay on the territory of the Member State concerned is therefore subject to Directive 2008/115.[43]

84. Directive 2008/115 is therefore applicable to Ms Affum's situation. As I have already observed in point 57 of this Opinion, her case does not fall within either of the situations in which the Court has found that Directive 2008/115 does not preclude the imprisonment of a third-country national. Therefore, persons in Ms Affum's situation cannot be imprisoned solely on the ground that they are staying illegally in France.

V – **Conclusion**

85. In the light of the above considerations, I propose that the Court should answer the questions referred by the Cour de cassation (Court of Cassation) as follows:

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 Article 6(3), Article 15 and Article 16 thereof, is to be interpreted as precluding legislation of a Member State under which a third-country national who has entered its territory illegally is liable to a sentence of imprisonment where that person is intercepted when leaving the Schengen area at an external border of that Member State, in transit from another Member State, and may be taken back by that other Member State pursuant to an arrangement concluded with the latter prior to the entry into force of Directive 2008/115.

43 — See also point 46 of this Opinion.