Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

3 June 2021 *

(Reference for a preliminary ruling – Area of freedom, security and justice – Immigration policy – Return of illegally staying third-country nationals – Directive 2008/115/EC – Article 2(1) – Scope – Third-country national – Criminal conviction in the Member State – Article 3(6) – Entry ban – Grounds of public policy and public security – Withdrawal of the return decision – Lawfulness of the entry ban)

In Case C-546/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesverwaltungsgericht (Federal Administrative Court, Germany), made by decision of 9 May 2019, received at the Court on 16 July 2019, in the proceedings

BZ

v

Westerwaldkreis

THE COURT (Fourth Chamber),

composed of M. Vilaras (Rapporteur), President of the Chamber, N. Piçarra, D. Šváby, S. Rodin and K. Jürimäe, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the German Government, by J. Möller and R. Kanitz, acting as Agents,

– the Netherlands Government, by M. Bulterman and J.M. Hoogveld, acting as Agents,

– the European Commission, by C. Ladenburger and C. Cattabriga, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 February 2021,

* Language of the case: German.

gives the following

Judgment

1 This request for a preliminary ruling concerns 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 (OJ 2008 L 348, p. 98).

2 The request has been made in proceedings between BZ and Westerwaldkreis (District of Westerwald, Germany) concerning the lawfulness of a decision imposing an entry and residence ban imposed on BZ.

Legal context

European Union law

Directive 2008/115

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

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

4 Article 2(1) and (2) of that directive, entitled '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:

…

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

5 Article 3 of that directive, entitled 'Definitions', states:

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

(1) "third-country national" means any person who is not a citizen of the Union within the meaning of Article [21(1) TFEU] and who is not a person enjoying the … right of free movement, as defined in Article 2(5) of [Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1)];

(2) “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;

(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;

…’

6 Article 6 of Directive 2008/115, entitled ‘Return decision’, is worded as follows:

‘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.

…'

7 Under Article 7(3) and (4) of Directive 2008/115, entitled 'Voluntary departure':

'3. Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure.

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.'

8 Article 9 of that directive, entitled 'Postponement of removal', provides in paragraphs 1 and 3:

'1. Member States shall postpone removal:

(a) when it would violate the principle of non-refoulement …

…

3. If a removal is postponed as provided for in paragraphs 1 and 2, the obligations set out in Article 7(3) may be imposed on the third-country national concerned.'

9 Article 11 of that directive, entitled 'Entry ban', states:

'1. Return decisions shall be accompanied by an entry ban:

(a) if no period for voluntary departure has been granted, or

(b) if the obligation to return has not been complied with.

In other cases return decisions may be accompanied by an entry ban.

2. The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security.'

The Schengen Borders Code

10 Article 5 of Regulation No 562/2006, repealed and replaced from 11 April 2016 by Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)

(OJ 2016 L 77, p. 1), laid down the conditions of entry of third-country nationals for intended stays on the territory of the Member States of a duration of no more than 90 days in any 180-day period. As of 11 April 2016, these conditions are set out in Article 6 of Regulation 2016/399.

The Return Handbook

11 The Return Handbook is set out in the Annex 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). As is apparent from Section 2 of that recommendation, that manual is a main tool for the authorities of the Member States competent for carrying out tasks related to returning illegally staying third-country nationals.

12 The Return Handbook contains a paragraph 11, entitled 'Entry bans', the fifth subparagraph of which reads as follows:

'The rules on return-related entry bans under [Directive 2008/115] leave unaffected entry bans issued for other purposes not related to migration, such as entry bans to third-country nationals who have committed serious criminal offences or for whom there is a clear indication that there is an intention to commit such an offence [(see Article 24(2) of Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ 2006 L 381, p. 4)] or entry bans constituting a restrictive measure adopted in accordance with Chapter 2 of Title V TEU, including measures implementing travel bans issued by the United Nations Security Council.'

National law

13 The Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Law on the residence, employment and integration of foreign nationals in the Federal territory) (BGBl. 2008 I, p. 162), in the version applicable at the material time in the main proceedings ('the Aufenthaltsgesetz'), contains a Paragraph 11, entitled 'Prohibition on entry and residence', which is worded as follows:

'1. A foreign national who has been placed under an order for expulsion, forcible return or removal may neither re-enter the territory of the Federal Republic nor reside there and cannot be issued with a residence permit even where the conditions of entitlement under this law are met (prohibition on entry and residence).

2. The duration of the prohibition on entry and residence shall be determined ex officio. It shall commence at the time of the foreign national's departure. In the case of expulsion, the duration of the prohibition shall be determined at the same time as the expulsion order is made. In other cases, it shall be determined at the same time as the removal warning is issued and at the latest at the time of removal or forcible return. In order to avert a threat to public security and public policy, that period may be subject to a condition, in particular relating to the proven absence of criminal sanctions or drug use or trafficking. If that condition is not satisfied on expiry of the period, a longer period shall apply, which shall automatically be set at the same time as the period set under the fifth sentence.

3. The duration of the prohibition on entry and residence shall be determined by discretionary decision. It may exceed five years only if the foreign national has been expelled in consequence of a criminal conviction or if he or she represents a serious threat to public security and public policy. The duration of the prohibition shall in no case exceed ten years.

…'

14 Paragraph 50 of the Aufenthaltsgesetz, entitled 'Obligation to leave the territory', provides:

'1. A foreign national shall be under an obligation to leave the territory if he or she does not hold, or no longer holds the necessary residence permit …

2. The foreign national shall be required to leave the territory of the Federal Republic without delay or, if he or she has been granted a period of time in which to leave the territory, before the expiry of that period.

…'

15 Paragraph 51 of the Aufenthaltsgesetz, entitled 'Termination of lawful residence; Maintenance of restrictions', provides, in subparagraph 1(5) thereof:

'1. A residence permit shall cease to be valid in any of the following cases: …

(5) in the event of the expulsion of the foreign national, …'

16 Paragraph 53(1) of the Aufenthaltsgesetz, headed 'Expulsion', states:

'A foreign national whose residence represents a threat to public security and public policy, to the free and democratic constitutional order or to any other overriding interest of the Federal Republic of Germany shall be placed under an expulsion order if, regard being had to all the circumstances of the case, it is apparent, after the interest in the foreign national's departure has been weighed against his or her interest in remaining on the territory of the Federal Republic, that the public interest in his or her departure prevails.'

17 Paragraph 54(1)(1) of the Aufenthaltsgesetz is worded as follows:

'1. The interest in the expulsion of the foreign national in accordance with Paragraph 53(1) shall be particularly significant if:

(1) he has been given a custodial sentence … by decision which has acquired the force of *res judicata* …'

18 Paragraph 58 of the Aufenthaltsgesetz, entitled 'Removal', provides, in subparagraphs 1 and 2 thereof:

'1. A foreign national shall be placed under a removal order if his or her obligation to leave the territory has become enforceable, if he or she has not been granted a period of time in which to leave the territory or such period of time has expired, and if there is no assurance of voluntary compliance with his or her obligation to leave the territory or if surveillance of the foreign national appears necessary for reasons of public security and public policy. …

2. … In all other cases, the obligation to leave the territory shall become enforceable only after a refusal to issue a residence permit becomes enforceable or after a different administrative act pursuant to which the foreign national is required to leave the territory in accordance with Paragraph 50(1) becomes enforceable.

…'

19 Paragraph 59 of the Aufenthaltsgesetz, entitled 'Removal warning', provides, in subparagraphs 1 and 2 thereof:

'1. Removal is preceded by a removal warning setting a reasonable period for voluntary departure of between seven and 30 days. …

2. The removal warning shall designate the State to which the foreign national will be removed and specify that the foreign national may also be removed to another State in whose territory he or she is authorised to enter or which is required to admit him or her.

…'

20 Paragraph 60a of the Aufenthaltsgesetz, entitled 'Temporary stay of removal (discretionary leave to remain)', states, in subparagraphs 2 to 4 thereof:

'2. The removal of a foreign national shall be suspended for such time as his or her removal is impossible for factual and legal reasons and no temporary residence permit has been granted. …

3. The suspension of the removal of a foreign national is without prejudice to his or her obligation to leave the territory.

4. A foreign national who has been granted the benefit of a suspension of removal shall be provided with a certificate.

…'

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

21 BZ, who was born in Syria and is of indeterminate nationality, has resided since 1990 in Germany. Although he has been subject, since that date, to an obligation to leave the territory, he has continued to reside in that Member State by virtue of a 'temporary stay of removal (discretionary leave to remain)', which has been regularly extended, on the basis of Paragraph 60a of the Aufenthaltsgesetz.

22 On 17 April 2013, BZ was given a custodial sentence of three years and four months for offences relating to supporting terrorism. In March 2014, the enforcement of the remainder of his prison sentence was suspended.

23 On account of that criminal conviction, the District of Westerwald, by decision of 24 February 2014, ordered the expulsion of BZ, on the basis of Paragraph 53(1) of the Aufenthaltsgesetz. That decision also included a prohibition on entry into and residence in

Germany for a period of six years, subsequently reduced to four years, beginning on the date on which BZ actually leaves German territory, and ending no later than 21 July 2023. At the same time, the District of Westerwald issued a removal warning against BZ.

24 BZ appealed against those decisions. At the hearing before the opposition committee, the District of Westerwald withdrew the removal warning. BZ's appeal was dismissed as to the remainder.

25 He then brought before the Verwaltungsgericht Koblenz (Administrative Court, Koblenz, Germany) an action against the measures adopted against him. That action having been dismissed, BZ brought an appeal against the rejection decision before the Oberverwaltungsgericht Rheinland-Pfalz (Higher Administrative Court, Rhineland-Palatinate, Germany).

26 BZ's application for asylum was then rejected by the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees, Germany) by decision of 21 July 2017 as being manifestly unfounded. That authority also found that BZ could not be returned to Syria, since the conditions for a prohibition on removal were satisfied in so far as that country was concerned.

27 By judgment of 5 April 2018, the Oberverwaltungsgericht Rheinland-Pfalz (Higher Administrative Court, Rhineland-Palatinate) dismissed BZ's appeal seeking annulment of the expulsion order and determination of the duration of the entry and residence ban. BZ therefore brought an appeal on a point of law against that judgment before the referring court.

28 The referring court states that it dismissed BZ's appeal on a point of law, in so far as that appeal concerned the expulsion order made against him, which thus became final. The referring court split the appeal on a point of law, pursuing it only in so far as it concerned the decision to reduce the duration of the entry and residence ban accompanying that order to four years from any departure of BZ from German territory and to 21 July 2023 at the latest.

29 It is apparent from the explanations provided by the referring court that, according to German law, the adoption of an expulsion order, pursuant to Paragraph 53 of the Aufenthaltsgesetz, has the consequence (i) of terminating the validity of the residence permit of the person concerned, in accordance with Paragraph 51(1)(5) of the Aufenthaltsgesetz and (ii) of prohibiting entry and residence and precluding the issue of a new residence permit to that person before the expiry of the expulsion order.

30 The referring court also states that, under German law, an expulsion order does not constitute a 'return decision' within the meaning of Article 3(4) of Directive 2008/115. However, that is the case, according to the referring court, as regards the removal warning provided for in the first sentence of Paragraph 59(1) of the Aufenthaltsgesetz.

31 The referring court adds that an expulsion order adopted pursuant to Paragraph 53 of the Aufenthaltsgesetz does not necessarily result in the removal of the foreign national concerned. Individuals whose residence represents a threat to public security may be placed under such an order even if their removal from German territory is not possible on account of the situation prevailing in their country of destination. In that situation, national law does not require the withdrawal of the prohibition on entry and residence imposed under Paragraph 11(1) of the Aufenthaltsgesetz.

32 The referring court entertains doubts as to whether a prohibition on entry and residence ordered against a third-country national for purposes 'not related to migration', and in particular when associated with an expulsion order, falls within the scope of Directive 2008/115. Its doubts arise, in particular, from the statement in the fifth subparagraph of paragraph 11 of the Return Handbook that the rules on return-related entry bans under Directive 2008/115 'leave unaffected entry bans issued for other purposes not related to migration'.

33 The referring court notes, moreover, that the Federal Republic of Germany has not exercised the option conferred on it by Article 2(2)(b) of Directive 2008/115 of not applying the directive to third-country nationals who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, in accordance with national law.

34 In those circumstances, the Bundesverwaltungsgericht (Federal Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) (a) Does a prohibition on entry issued against a third-country national for purposes "not related to migration" come within the scope of [Directive 2008/115], at any rate if the Member State has not exercised the option under Article 2(2)(b) of that directive?

(b) If Question 1(a) is answered in the negative, does such a prohibition on entry still fall outside the scope of Directive 2008/115 if, leaving aside the expulsion order issued against him, with which the entry ban is associated, the third-country national is already staying illegally and therefore, in principle, comes within the scope of the directive?

(c) Do prohibitions on entry issued for purposes "not related to migration" include entry bans issued in connection with an expulsion order that has been issued for reasons of public security and public policy (in the present case, this being an expulsion order issued solely on general preventive grounds with the objective of combating terrorism)?'

(2) If Question 1 is answered to the effect that the prohibition on entry in question in the present case does come within the scope of Directive 2008/115:

(a) Does the administrative annulment of a return decision (in the present case, this being the removal warning) have the consequence that the entry ban, within the meaning of Article 3(6) of Directive 2008/115, that was issued at the same time becomes unlawful?

(b) Does this legal consequence ensue even if the expulsion order on the basis of which the return decision was issued has become final?'

Consideration of the questions referred

Admissibility

35 In its observations submitted to the Court, the German Government contended that, contrary to what is stated by the referring court, the Federal Republic of Germany had exercised of the option provided for in Article 2(2)(b) of Directive 2008/115 of not applying the directive to third-country nationals who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, in accordance with national law.

36 The German Government referred, in particular, to the explanatory memorandum to the law which transposed Directive 2008/115 into the German legal system, from which it is apparent that the derogation from the maximum five-year period for the ban on entry and residence laid down in the second sentence of Paragraph 11(3) of the Aufenthaltsgesetz was, inter alia, based on Article 2(2)(b) of Directive 2008/115.

37 According to the German Government, since the provisions of national law applicable to the dispute in the main proceedings were adopted by exercising the option left to the Member States in Article 2(2)(b) of Directive 2008/115, the interpretation of that directive sought by the referring court is irrelevant to the dispute before it. Consequently, in its view, the questions put by the referring court must be rejected as inadmissible.

38 However, it should be borne in mind that, according to settled case-law, questions on the interpretation of EU law referred by a national court, in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 22 December 2008, *Régie Networks*, C-333/07, EU:C:2008:764, paragraph 46 and the case-law cited).

39 In the present case, the referring court confirmed, in response to a request for clarification from the Court, that, according to its interpretation of German law, the German legislature has not decided, pursuant to Article 2(2)(b) of Directive 2008/115, to exclude third-country nationals who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction entirely from the scope of the Directive. It states that it is apparent from the explanatory memorandum relied on by the German Government that the German legislature only intended to derogate specifically from the particular provision of Article 11(2) of that directive relating to the maximum period of validity of the ban on entry and residence.

40 In the light of such information provided by the referring court, it cannot be held that the interpretation of EU law sought by that court bears no relation to the actual facts of the main action or its purpose, so that it is not obvious that the questions on the interpretation of EU law are irrelevant.

41 The request for a preliminary ruling is therefore admissible.

The first question

42 By its first question, the referring court asks, in essence, whether Article 2(1) of Directive 2008/115 must be interpreted as meaning that that directive applies to a ban on entry and residence issued by a Member State which has not exercised the option provided for in Article 2(2)(b) of that directive against a third-country national who is on its territory and is the subject of an expulsion order, for reasons of public security and public policy, on the basis of a previous criminal conviction.

43 In that regard, it should first be recalled that, under Article 2(1) of Directive 2008/115, the directive applies to third-country nationals staying illegally on the territory of a Member State. The concept of an ‘illegal stay’ is defined in Article 3(2) of that 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'.

44 It follows from that definition that any third-country national who is present on the territory of a Member State without fulfilling the conditions for entry, stay or residence there is, by virtue of that fact alone, staying there illegally and, therefore, falls within the scope of Directive 2008/115 (see, to that effect, judgments of 7 June 2016, *Affum*, C-47/15, EU:C:2016:408, paragraph 48, and of 19 June 2018, *Gnandi*, C-181/16, EU:C:2018:465, paragraph 39).

45 It follows that the scope of that directive is defined by reference solely to the situation of the illegal stay in which a third-country national finds him- or herself, irrespective of the reasons for that situation or the measures that may be adopted in respect of that national.

46 In the second place, Article 2(2)(b) of Directive 2008/115, under which Member States may decide to exclude from the scope of that directive third-country nationals who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, in accordance with national law, or who are the subject of extradition procedures, confirms that interpretation. It would not have been necessary to provide, in a specific provision, for such an option for the Member States, if the third-country nationals in question did not fall within the scope of that directive, as defined in Article 2(1) thereof.

47 In the third place, the foregoing considerations cannot be called into question by the fifth subparagraph of paragraph 11 of the Return Handbook. The scope of Directive 2008/115, as set out unequivocally in Article 2(1) thereof, cannot be amended by a Commission recommendation, which has no binding effect.

48 In the light of all the foregoing considerations, the answer to the first question is that Article 2(1) of Directive 2008/115 must be interpreted as meaning that that directive applies to a ban on entry and residence issued by a Member State which has not exercised the option provided for in Article 2(2)(b) of that directive against a third-country national who is on its territory and is the subject of an expulsion order, for reasons of public security and public policy, on the basis of a previous criminal conviction.

The second question

49 By its second question, the referring court asks, in essence, whether Directive 2008/115 must be interpreted as precluding the maintenance in force of an entry and residence ban issued by a Member State against a third-country national who is on its territory and is the subject of an expulsion order, which has become final, adopted on grounds of public security and public policy on the basis of a previous criminal conviction, where the return decision adopted in respect of that national by that Member State has been withdrawn.

50 It should be recalled that Article 3(6) of Directive 2008/115 defines an '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'. Article 3(4) of the Directive defines a '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'.

51 Under Article 11(1) of Directive 2008/115, return decisions must be accompanied by an entry ban if no period for voluntary departure has been granted or if the obligation to return has not been complied with. In other cases, return decisions may be accompanied by an entry ban.

52 It follows from the wording of those provisions that an 'entry ban' is intended to supplement a return order by prohibiting the person concerned, for a specified period of time following his return – the term 'return' being understood, in accordance with the definition in Article 3(3) of Directive 2008/115, to mean after leaving the territory of the Member States – from again entering and staying in that territory (judgments of 26 July 2017, *Ouhrami*, C-225/16, EU:C:2017:590, paragraph 45, and of 17 September 2020, *JZ (Custodial sentence in the case of an entry ban)*, C-806/18, EU:C:2020:724, paragraph 32). Consequently, an entry ban produces its effects only from the point in time at which the person concerned actually leaves the territory of the Member States (see, to that effect, judgment of 17 September 2020, *JZ (Custodial sentence in the case of an entry ban)*, C-806/18, EU:C:2020:724, paragraph 33).

53 In the present case, the referring court stated, first, that under German law, it is the removal warning, within the meaning of Paragraph 59 of the Aufenthaltsgesetz, which constitutes a 'return decision', within the meaning of Article 3(4) of Directive 2008/115, and, secondly, that although BZ was initially the subject of such a warning, that warning was subsequently withdrawn, so that the ban on entry and residence issued against BZ does not currently accompany any return decision.

54 As the Advocate General observed in point 82 of his Opinion, if an entry ban under Directive 2008/115 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.

55 In that context, it should also be specified that it is apparent from Article 6(1) of Directive 2008/115 that, without prejudice to the exceptions laid down in paragraphs 2 to 5 of that article, Member States are required to issue a return decision to any third-country national staying illegally on their territory.

56 It follows that, where a Member State is faced with a third-country national who is on its territory and does not have, or no longer has, a valid residence permit, that Member State must determine, in accordance with the relevant provisions, whether that national should be issued with a new residence permit. If that is not the case, the Member State concerned is required to adopt a return decision in respect of that national which, in accordance with Article 11(1) of Directive 2008/115, may or must be accompanied by an entry ban within the meaning of Article 3(6) of that directive.

57 Consequently, as the Advocate General observed, in essence, in point 81 of his Opinion, it would be contrary both to the purpose of Directive 2008/115, as set out in Article 1 thereof, and to the wording of Article 6 of that directive to tolerate the existence of an intermediate status of third-country nationals who are in the territory of a Member State without a right to stay or a residence permit and, where applicable, are the subject of an entry ban, but in respect of whom no return decision subsists.

58 The foregoing considerations remain valid also as regards third-country nationals staying illegally on the territory of a Member State who, like BZ, cannot be removed, since the principle of non-refoulement precludes this.

59 As the Advocate General noted in point 87 of his Opinion, it is apparent from Article 9(1)(a) of Directive 2008/115 that that circumstance does not justify the failure to adopt a return decision in respect of a third-country national in such a situation, but only the postponement of his or her removal, pursuant to that decision.

60 In the light of the foregoing, the fact that an expulsion order, such as that to which BZ is subject, has become final cannot justify maintaining in force a ban on entry and residence, when no return decision subsists with respect to him.

61 In the light of all those considerations, the answer to the second question is that Directive 2008/115 must be interpreted as precluding the maintenance in force of an entry and residence ban issued by a Member State against a third-country national who is on its territory and is the subject of an expulsion order, which has become final, adopted on grounds of public security and public policy on the basis of a previous criminal conviction, where the return decision adopted in respect of that national by that Member State has been withdrawn even if that expulsion order has become final.

Costs

62 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:

1. **Article 2(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 must be interpreted as meaning that that directive applies to a ban on entry and residence issued by a Member State which has not exercised the option provided for in Article 2(2)(b) of that directive against a third-country national who is on its territory and is the subject of an expulsion order, for reasons of public security and public policy, on the basis of a previous criminal conviction.**

2. **Directive 2008/115 must be interpreted as precluding the maintenance in force of an entry and residence ban issued by a Member State against a third-country national who is on its territory and is the subject of an expulsion order, which has become final, adopted on grounds of public security and public policy on the basis of a previous criminal conviction, where the return decision adopted in respect of that national by that Member State has been withdrawn even if that expulsion order has become final.**

[Signatures]