

**Case C-568/19****Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

25 July 2019

**Referring court:**

Tribunal Superior de Justicia de Castilla-La Mancha (High Court of Justice, Castilla-La Mancha, Spain)

**Date of the decision to refer:**

11 July 2019

**Applicant:**

MO

**Defendant:**

Subdelegación del Gobierno en Toledo

**Subject matter of the main proceedings**

Removal of a third-country national from Spanish territory

**Subject matter and legal basis of the request for a preliminary ruling**

Whether an interpretation of the judgment of 23 April 2015 of the Court of Justice (C-38/14, *Zaizoune*) as meaning that the Spanish authorities and courts can directly apply 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, to the detriment of a third-country national, is compatible with the case-law of the Court of Justice on the limits on the direct effect of directives.

Whether the fact that the Spanish legislation is not in conformity with that Directive should be resolved by applying the directive directly to the detriment of that national rather than by legislative reform or by the remedies provided by EU law whereby a State can be required properly to transpose directives.

The legal basis is Article 267 TFEU.

### The question referred

Is an interpretation of the judgment of the Court of Justice of 23 April 2015 (Case C-38/14, *Zaizoune*) as meaning the Spanish authorities and courts can directly apply Directive 2008/115/EC to the detriment of the third-country national, thereby ignoring and disapplying more advantageous national penalty provisions, aggravating that national's liability to a penalty and possibly disregarding the principle that criminal penalties must be defined by law, compatible with the case-law of the Court of Justice on the limits on the direct effect of directives, and should the fact that the Spanish legislation is not in conformity with that directive be resolved not in that way but by legislative reform or by the remedies provided by EU law whereby a State can be required properly to transpose directives.

### Provisions of EU law relied upon

- a. 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, Articles 6(1) and 8(1), in conjunction with Article 4(2) and (3).
- b. Judgment of 23 April 2015, *Zaizoune*, C-38/14, EU:C:2015:260, paragraph 41 and operative part.
- c. Judgment of 5 April 1979, *Ratti*, C-148/78, EU:C:1979:110.
- d. Judgment of 26 February 1986, *Marshall*, C-152/84, EU:C:1986:84.
- e. Judgment of 8 October 1987, *Kolpinghuis Nijmegen*, C-80/86, EU:C:1987:431.
- f. Judgment of 14 July 1994, *Faccini Dori v Recreb*, C-91/92, EU:C:1994:292.
- g. Judgment of 26 September 1996, *Arcaro*, C-168/95, EU:C:1996:363.
- h. Judgment of 11 June 1987, *Pretore di Salò*, C-14/86, EU:C:1987:275.
- i. Judgment of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835.
- j. Judgment of 5 December 2017, *M.A.S and M.B*, C-42/17, EU:C:2017:936.
- k. Judgment of 9 December 2003, *Commission v Italy*, C-129/00, EU:C:2003:656.

**Provisions of national law relied upon**

- a.** Basic Law 4/2000 of 11 January 2000 on the rights and freedoms of foreign nationals in Spain and their social integration, as amended by Basic Law 2/2009 of 11 December 2009.
- i.** Article 53(1)(a): ‘The following are serious offences: (a) Being unlawfully present on Spanish territory, on the ground that the person concerned has not obtained an extension of permission to stay or does not have a residence permit, or on the ground that the residence permit has expired more than three months previously, and that person has not applied for renewal of that permit within the period laid down by law.’
  - ii.** Article 55(1)(b): ‘The offences described in the previous articles shall be punishable in the following terms: ... (b) Serious offences: by a fine of between EUR 501 and a maximum of EUR 10 000.’
  - iii.** Article 57(1): ‘Where an offender is a foreign national and commits offences which may be classified as very serious or serious, within the meaning of Article 53(1)(a), (b), (c), (d) and (f) of this law, having regard to the principle of proportionality, it is possible to order removal from Spanish territory, instead of a fine, following the appropriate administrative procedure and by means of a reasoned decision which includes an assessment of the facts which constitute the offence.’
  - iv.** Article 57(3): ‘Under no circumstances may the penalties of removal and a fine be imposed concurrently.’
  - v.** Article 63*bis*(2): ‘The decision ordering removal, made under the ordinary procedure, will include a voluntary compliance period for the person concerned to leave national territory. That period will vary between 7 and 30 days and will begin to run when the aforementioned decision is served. The period for complying voluntarily with the removal order may be extended for an appropriate period having regard to the circumstances of each case, for example, the length of stay, the existence of dependent children attending school and the existence of other family and social links.’
  - vi.** Article 63(7) (on the priority procedure): ‘In the situations covered by this article the removal order will be enforced immediately.’
- b.** Judgment of the Tribunal Supremo (Supreme Court, Spain) No 734 of 30 May 2019 (ES:TS:2019:1813) and the judgments cited therein, such as the following: judgments of 12 June 2018 (ES:TS:2018:2523); of 4 December 2018 (ES:TS:2018:4270); of 19 December 2018 (ES:TS:2018:4386), and of 19 December 2018 (ES:TS:2018:4387).

**b. Brief account of the facts and the main proceedings**

- 1 On 14 January 2017, administrative removal proceedings were brought against MO, a Colombian national, alleging infringement of Article 53(1)(a) of Basic Law 4/2000 of 11 January 2000 on the rights and freedoms of foreign nationals in Spain and their social integration ('Basic Law 4/2000'). The proceedings were heard under the 'priority' procedure.
- 2 MO lodged written submissions in which she stated that she had entered Spain in 2009, at the age of 17, with the corresponding visa and with a permit for family reunification with her mother. Those two documents were produced as part of those written submissions. She also submitted her current passport, a residence card in force until 2013 and a 2015 residence registration in the municipality of Talavera de la Reina. She also annexed a number of documents relating to her employment background, and certain documents to demonstrate her ties to Spain and that she had no criminal record and was permanently resident in that municipality. She stated that she had attempted to regularise her situation, which had not been possible, and that, in accordance with Basic Law 4/2000, she should be fined, but not removed, having regard to her ties to Spain and the lack of any adverse factors.
- 3 On 3 February 2017, the Subdelegado del Gobierno en Toledo (Representative of the Spanish State in Toledo) issued a removal order. That order cited Article 53(1)(a) of Basic Law 4/2000 and the Court of Justice judgment of 23 April 2015 (C-38/14, *Zaizoune*) which held, according to the Representative of the Spanish State, that the general rule is that the person concerned will be removed, and that a fine cannot therefore be imposed.
- 4 MO brought an action against that order before the Juzgado de lo Contencioso-Administrativo (Administrative Court, Spain), claiming that the removal penalty was disproportionate because, according to Spanish legislation, merely staying illegally, where the person has ties to Spain, should give rise only to the imposition of a fine.
- 5 The Juzgado de lo Contencioso-Administrativo (Administrative Court) dismissed the appeal. It took the view that MO's arguments were unfounded in the light of the Court of Justice judgment of 23 April 2015 (C-38/14, *Zaizoune*), applied to the legislation to which the main proceedings relate. According to that judgment, 'Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, in particular, Articles 6(1) and ... 8(1), read in conjunction with Article 4(2) and (3), must be interpreted as precluding legislation of a Member State such as that at issue in the main proceedings, which provides, in the event of third-country nationals illegally staying in the territory of that Member State, depending on the circumstances, for either a fine or removal, since the two measures are mutually exclusive.'

- 6 MO brought an appeal against that judgment of the Juzgado de lo Contencioso-Administrativo (Administrative Court) before the Tribunal Superior de Justicia de Castilla-La Mancha (High Court of Justice, Castilla-La Mancha, Spain), the referring court, which entertains doubts as to the consequences that the aforementioned judgment of the Court of Justice has for the Spanish administrative authorities and courts as regards the direct effect of directives. The referring court therefore stayed the proceedings and made the present request for a preliminary ruling to the Court of Justice.

### **Fundamental arguments of the parties in the main proceedings**

- 7 MO submits that the penalty of removal is disproportionate because she has strong ties to Spain. She gives details of and submits documents that demonstrate her employment, economic, social and family ties. She argues that the Tribunal Supremo (Supreme Court) has permitted removal instead of a fine only where there are circumstances in addition to a mere illegal stay (such as, for example, amongst other aggravating factors, where the person concerned has no documents and it is not known when and where he or she entered national territory), but that she is not in that situation, since she does have documents and is fully settled in Spain. MO applies for the penalty of removal to be annulled or, in the alternative, replaced by a fine.
- 8 The Subdelegación del Gobierno en Toledo (Representation of the Spanish State in Toledo) claims that MO has no permit to reside in Spain because her permit has expired. It states that, since the Court of Justice judgment of 23 April 2015 (C-38/14, *Zaizoune*), only the penalty of removal can be applied in such cases, not that of a fine. It also questions MO's ties with Spain, since there is no evidence of any current job or economic capability or existing family ties based on dependence.

### **Brief account of the grounds for the request for a preliminary ruling**

- 9 The referring court states that, under Article 53(1)(a) of Basic Law 4/2000, illegally staying is an administrative offence which the State punishes by means of administrative proceedings enjoying the safeguards inherent in public criminal or punitive law and giving rise to the imposition of administrative penalties. As originally worded, that law penalised illegal staying with a fine only. The reform enacted by Basic Law 8/2000 included removal as an alternative to a fine, but gave no specific guidance in terms of choosing one penalty or the other. Furthermore, Basic Law 4/2000 establishes two procedures for carrying out removal: the ordinary procedure (see Article 63*bis*(2)) and the priority procedure (see Article 63(7)).
- 10 In that situation, the Tribunal Supremo (Supreme Court) had established consistent case-law according to which the principles of administrative law required that, where the more serious penalty (removal) was chosen, reasons had

to be stated based on an negative factor in addition to the mere illegal stay (for example, the commission of a criminal offence, lack of identity documents or the use of false documents), since if none of those factors were present there would be no valid ground for not imposing the more common penalty laid down, the fine. For a period, that criterion for selecting the appropriate penalty was, therefore, the result of interpretation by the courts.

- 11 However, Basic Law 2/2009 gave that interpretation statutory status when it worded the new Article 57 to state that 'having regard to the principle of proportionality, it is possible to order removal from Spanish territory, instead of a fine, following the appropriate administrative procedure and by means of a reasoned decision which includes an assessment of the facts which constitute the offence.'
- 12 The referring court recalls that, in its judgment of 23 April 2015 (C-38/14, *Zaizoune*), which concerns the legislation to which the main proceedings relate, the Court of Justice held that 'Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, in particular, Articles 6(1) and ... 8(1), read in conjunction with Article 4(2) and (3), must be interpreted as precluding legislation of a Member State such as that at issue in the main proceedings, which provides, in the event of third-country nationals illegally staying in the territory of that Member State, depending on the circumstances, for either a fine or removal, since the two measures are mutually exclusive.'
- 13 The referring court notes that, although the Court of Justice delivered that judgment when the 2009 legislative amendment referred to in paragraph 11 was already in force, it was delivered as if the situation was still that described in paragraph 10, that is to say, as if everything was merely interpretation by the courts (since the question for a preliminary ruling was put to the Court of Justice in that way). The referring court highlights the need to bear in mind that as a result of Basic Law 2/2009, the requirement that there must be an additional reason for imposing removal, which was originally based on interpretation, had become, as it continues to be, a clear, decisive statutory requirement that cannot be circumvented.
- 14 The referring court notes that the Tribunal Supremo (Supreme Court) and many lower courts have been interpreting the Court of Justice judgment of 23 April 2015 (C-38/14, *Zaizoune*) as meaning that it authorises the Spanish administrative authorities and courts to disapply the provisions of Basic Law 4/2000 according to which the penalty of a fine takes precedence and there must be express reasons stated for removal.
- 15 According to the referring court, that interpretation entails applying Directive 2008/115/EC directly, to the detriment of the person concerned and aggravating his or her liability in criminal law, and therefore removing any illegally staying third-country national (in the case of the priority procedure, without even a period

for voluntary compliance). That is to say, that interpretation gives the Directive ‘inverse or descending vertical effect’ (relied on by the State against the individual) which is very different from the ‘direct or ascending vertical effect’ (relied on by the individual against the State) which the Court of Justice has held should obtain where a directive has not been transposed.

- 16 The referring court submits that the decisions by the Tribunal Supremo (Supreme Court) and other lower courts do not, in its view, involve interpreting Spanish law in conformity with the Directive (which might perhaps have been possible before Basic Law 4/2000 was amended by Basic Law 2/2009), but purely and simply disapplying national provisions, and that in relation to penalties and to the detriment of the defendant. The referring court asserts that the national courts have an obligation to interpret national law in conformity with EU law (to that effect, the judgment of 8 November 2016, *Ognyanov*, C-554/2014, and many others), but that this obligation is subject to limitations even in the case-law of the Court of Justice.
- 17 According to the referring court, the Tribunal Supremo (Supreme Court) believes that the Court of Justice has already determined the issue of ‘inverse or descending vertical effect’, by authorising it, in its judgment of 23 April 2015 (C-38/14, *Zaizoune*). As the Tribunal Supremo (Supreme Court) interprets it, that judgment contains not only a declaration that Spanish law is incompatible with EU law, but also an instruction to the Spanish courts to apply the directive directly, to the detriment of the individual. The referring court considers that a number of paragraphs of the judgment, such as paragraph 39, can indeed give rise to a degree of doubt in that regard. However, in its view, that judgment could never give rise to that consequence, since if it did, the Court of Justice would be contradicting abundant earlier case-law.
- 18 As regards the fact that the State cannot apply a directive directly to the detriment of an individual and in particular by ignoring national legislation (inverse or descending vertical effect), the referring court recalls first that, in its judgment of 26 February 1986 (C-152/84, *Marshall*), the Court of Justice held (paragraph 46) that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person. To the same effect, it refers to the judgment of 11 June 1987 (C-14/86, *Pretoire di Salò*).
- 19 The judgment of 8 October 1987 (C-80/86, *Kolpinghuis Nijmegen*), for its part, established that, although in applying its national legislation, a court of a Member State is required to interpret that legislation in the light of the wording and the purpose of the directive, a directive cannot, of itself and independently of a national law adopted for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive. The obligation to interpret national law in conformity with EU law, as can be seen in paragraph 13, ‘is limited by the general principles of law which form part of Community law and in particular the principles of legal

certainty and non-retroactivity. Thus the court ruled in its judgment of 11 June 1987, *Pretore de Salò*, C-14/86, ECR p. 2545, that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive.’

- 20 The referring court also mentions the judgment of 26 September 1996 (C-168/95, *Arcaro*), in which the Court of Justice states that ‘there is no method of procedure in Community law allowing the national court to eliminate national provisions contrary to a provision of a directive which has not been transposed where that provision may not be relied upon before the national court’, and in which, after recalling the obligation on national courts to interpret national rules in the light of EU rules, holds in paragraph 42 that ‘however, that obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive’s provisions (see the judgment in *Kolpinghuis Nijmegen*, cited above, paragraphs 13 and 14).’
- 21 Last, the judgment of 5 December 2017 (Case C-42/17), emphasises that there can be limitations on the obligation to interpret national law in accordance with EU law, including the principle that criminal offences and penalties must be defined by law. According to the referring court, that principle that penalties must be defined by law is called into question when the courts fail to apply a more favourable rule of criminal law (the rule providing for a fine and only allowing removal where reasons are stated) and directly apply a directive, to the detriment of an individual.
- 22 In the light of the foregoing, the referring court has referred this question to the Court of Justice for a preliminary ruling, and applied for it to be dealt with using the expedited procedure under Article 105 of the Rules of Procedure.