

Case C-409/20

Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

2 September 2020

Referring court:

Juzgado Contencioso Administrativo No 1 de Pontevedra
(Administrative Court No 1, Pontevedra, Spain)

Date of the decision to refer:

20 August 2020

Applicant:

UN

Defendant:

Subdelegación del Gobierno en Pontevedra

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

Reference for a preliminary ruling on a question of interpretation – Article 267 TFEU – Compatibility of national legislation with 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 ('Directive 2008/115') – National legislation that penalises illegally staying foreign nationals in the absence of aggravating circumstances, initially, with a fine together with a request to return voluntarily to the country of origin followed, thereafter, by the penalty of removal if the foreign national neither regularises his situation nor returns voluntarily to his country – Whether an interpretation of the Court of Justice judgment of 23 April 2015 (*Zaizoune*, C-38/14, EU:C:2015:260) according to which the Spanish authorities and courts

may directly apply Directive 2008/115, 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.

Questions referred for a preliminary ruling

1. Must 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 4(3), 6(1), 6(5) and 7(1)) be interpreted as meaning that it precludes national legislation (Articles 53(1)(a) and 55(1)(b), Article 57 and Article 28(3)(c) of Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social (Basic Law 4/2000 of 11 January 2000 on the rights and freedoms of foreign nationals in Spain and their social integration)) that penalises illegally staying foreign nationals in the absence of aggravating circumstances, initially, with a fine together with a request to return voluntarily to the country of origin followed, thereafter, by the penalty of removal if the foreign national neither regularises his situation nor returns voluntarily to his country?
2. Is an interpretation of the judgment of the Court of Justice of 23 April 2015 (*Zaizoune*, C-38/14, EU:C:2015:260) as meaning that the Spanish authorities and courts can directly apply Directive 2008/115/EC to the detriment of an individual, ignoring more advantageous national penalty legislation and thereby aggravating that individual's liability to a penalty and possibly disregarding the principle that criminal penalties must be defined by law, compatible with its case-law on the limits on the direct effect of directives; or, conversely, should the national law more favourable to the individual continue to be applied until such time as it is amended or repealed by means of the corresponding legislative reform?

Provisions of EU law relied upon

Legislation

Directive 2008/115: Articles 4(3), 6(1), 6(5), 7(1) and 21(1).

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

Case-law of the Court of Justice

1. Judgment of 23 April 2015, (*Zaizoune*, C-38/14, EU:C:2015:260), paragraphs 24, 29, 32, 37 and operative part.
2. Judgment of 22 October 2009 (*Zurita and Choque*, C-261/08 and C-348/08, EU:C:2009:648, paragraphs 61 and 65).
3. Judgment of 18 September 2014 (*Vueling Airlines, S.A.*, C-487/12, EU:C:2014:2232, paragraphs 26 and 27).
4. Judgment of 11 June 1987 (*Pretore di Salò*, C-14/86, EU:C:1987:275).
5. Judgment of 12 December 1996 (C-74/95).
6. Judgment of 3 May 2005 (C-387/02, C-391/02 and C-403/02).

Provisions of national law relied upon

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 Laws 8/2000, 14/2003 and 2/2009 ('Basic Law 4/2000')).

Article 28(3)(c): 'Departure [from Spanish territory] shall be compulsory in the following cases: ... (c) In the event of administrative refusal of applications to remain on Spanish territory submitted by an alien, or in the absence of authorisation to be in Spain.'

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 a residence permit, or on the ground that these have expired more than three months previously, and that person has not applied for renewal of that permission to stay or residence permit within the period laid down by law.'

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.'

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.'

Article 57(3): 'Under no circumstances may the penalties of removal and a fine be imposed concurrently.'

Real Decreto 240/2007, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo (Royal Decree 240/2007 on the entry, free movement and residence in Spain of citizens of Member States of the European Union and of other States parties to the Agreement on the European Economic Area) of 16 February 2007.

Real Decreto 557/2011, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social (Royal Decree 557/2011 approving the rules for the implementation of Basic Law 4/2000 on the rights and freedoms of foreign nationals in Spain and their social integration) of 20 April 2011, as amended by Basic Law 2/2009.

Judgments of the Tribunal Constitucional (Constitutional Court, Spain): No 260/2007 of 20 December 2007, (ES:TC:2007:260); No 140/2009 of 15 June 2009, (ES:TC:2009:140); No 145/2011, of 26 September 2011 (ES:TC:2011:145); and No 169/2012 of 1 October 2012 (ES:TC:2012:169).

Judgments of the Tribunal Supremo (Supreme Court, Spain): of 22 February 2007; of 23 October 2007, appeal No 1624/2004 (ES:TS:2007:6962); of 5 July 2007, appeal No 1060/2004 (ES:TS:2007:4767); of 19 December 2006; of 28 February 2007; of 4 October 2007, appeal No 2244/2004 (ES:TS:2007:6676); of 8 November 2007 appeal No 2448/2004 (ES:TS:2007:7390) and of 24 October 2019 appeal No 1808/2018 (ES:TS:2019:3416).

Brief account of the facts and the main proceedings

- 1 UN, of full age, a Colombian national, entered the territory of the European Union legally, as a tourist, on 9 May 2017, with a letter of invitation from their son, also of full age, who holds Spanish nationality and is resident in Spain. UN's stay as a tourist was for a maximum period of 90 days, and they were obliged to leave the territory of the European Union on expiry of that period. However, UN did not return to Colombia but remained in Spain and registered in the register of residents in the municipality of the address of their Spanish son.
- 2 On 13 February 2019 the Ministerio del Interior (Interior Ministry) brought penalty proceedings against UN under Article 63*bis* of Basic Law 4/2000 for not having permission to stay in Spain.
- 3 In March 2019 UN applied to the Oficina de Extranjería de Pontevedra (Aliens Office, Pontevedra, Spain) for a residence permit as a family member of a citizen of the Union, claiming family reunification with their Spanish son in accordance with Royal Decree 240/2007 transposing Directive 2004/38.
- 4 At the same time UN filed written submissions in the penalty proceedings claiming family ties with Spain, on the grounds that all their children are lawfully resident in that Member State and one of them has been granted Spanish

nationality. UN also argued that they now have no family in Colombia or any means of subsistence in that country and have no criminal record or been arrested previously. UN also adduced humanitarian and family protection grounds and infringement of the principle of proportionality.

- 5 On 30 April 2019 the director of the Aliens Office issued a decision refusing UN leave to remain because, in his view, UN had failed to demonstrate that they were dependent on their Spanish son in their country of origin and, furthermore, did not have private health insurance in Spain. It is known that UN has appealed against that refusal decision to the Juzgado Contencioso Administrativo No 2 de Pontevedra (Administrative Court No 2, Pontevedra, Spain) in proceedings that are still pending.
- 6 On 8 May 2019 the Subdelegada del Gobierno en Pontevedra (Representative of the Spanish State in Pontevedra) issued the contested decision, imposing on UN the penalty of removal from Spanish territory with a three-year entry ban. The grounds of the decision merely state that UN had committed the serious offence under Article 53(1)(a) of Basic Law 4/2000 (illegally staying in Spain) and that UN had not been found to be in any of the situations conferring a right to asylum.
- 7 On 31 October 2019 UN appealed against the removal penalty to the referring court, seeking annulment and complete withdrawal of the contested decision or, in the alternative, that it be replaced by a financial penalty. UN also applied for provisional suspension of the removal, which was granted by an order of 19 December 2019.

Fundamental arguments of the parties in the main proceedings

- 8 In the application, UN claims, inter alia, that because they have strong ties with Spain and their illegal situation does not involve any aggravating factors, and since that situation was capable of being regularised given that UN is a family member of a citizen of the European Union, the penalty imposed should have been, at most, the fine under Article 55(1)(b) of Basic Law 4/2000 instead of the penalty of removal. UN also takes the view that the Spanish legislation, interpreted in that way, is compatible with Directive 2008/115.
- 9 The defendant authority refutes the application and applies for it to be dismissed in full. It states that in Spain, since the Court of Justice's judgment of 23 April 2015 in *Zaizoune*, illegal staying can no longer be penalised by a fine. It must always and in all cases be penalised with removal by operation of the 'direct effect' of Directive 2008/115, which prevails over Spanish law.

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

- 10 The referring court states that before the judgment in *Zaizoune*, staying illegally in Spanish territory without obtaining a residence permit or similar documentation

where required was a serious offence under Basic Law 4/2000 (Article 53(1)(a)). That serious offence gave rise to a fine (Article 55(1)(b)) or to removal from Spanish territory with a statement of reasons in accordance with the principle of proportionality (Article 57(1)). Under that law, the penalties of a fine and of forced removal could not be imposed concurrently in a single decision (Article 57(3)), but they could be imposed successively, first the fine and subsequently removal. Removal was also accompanied by the ancillary imposition of a bar on entry to Spanish territory for a specified period (Article 58(1)).

- 11 The referring court notes that under Basic Law 4/2000 the imposition of a fine, which includes the resulting obligation to leave voluntarily within a specified time limit, has precedence over the penalty of removal with an entry bar. The aim of that legislation is not to tolerate an illegal situation in return for payment of a fine, but to enable illegally staying foreign nationals who are not subject to aggravating circumstances to regularise their situation by applying for and obtaining the corresponding residence permit if they satisfy the relevant requirements. They must otherwise return voluntarily to their country of origin, although with no bar on entry to the European Union, thereby enabling them, from that country, to apply for and obtain the relevant visas or permits in order to return to Spain legally where applicable.
- 12 The referring court states that, in any event, the penalty of a fine does not relieve foreign nationals of the obligation to leave Spain under Article 28(3)(c) of Basic Law 4/2000 unless they obtain the necessary visa or residence permit. If they do not regularise their situation within a reasonable time, new penalty proceedings can be brought against them which will culminate in forced removal.
- 13 Where an immigrant's situation includes aggravating circumstances, a removal order can be made immediately without previously imposing a fine or giving a warning to leave voluntarily. The Tribunal Supremo (Supreme Court) has defined those circumstances on a case-by-case basis.
- 14 The Spanish Tribunal Constitucional (Constitutional Court) has held that the legislation at issue is in line with the Constitution, since the choice between a fine or removal is not discretionary but regulated by statute, and has upheld the statutory requirement that a fine should be preferred to removal, emphasising the need to state reasons for a removal in the light of the specific circumstances of the case.
- 15 In *Zurita and Choque* the Court of Justice confirmed that the courts can choose between a fine and removal. In that judgment, the Court found that EU law 'favours the voluntary departure of a third-country national who does not fulfil, or no longer fulfils, the short-stay conditions applicable within the territory of the Member State concerned' and that Spanish law is compatible with the EU law according to which illegally staying foreign nationals must be removed, since in Spain 'a decision imposing a fine is not a permit for a third-country national who is unlawfully present in Spain to remain legally on Spanish territory', because

‘irrespective of whether that fine is paid or not, that decision is notified to the person concerned with a warning that he should leave the territory within 15 days and, that, should he fail to comply, he may be prosecuted under Article 53(a) of the Law on Aliens and risks being expelled with immediate effect.’

- 16 Following the adoption of Directive 2008/115, Spain enacted Basic Law 2/2009 of 11 December 2009, amending Basic Law 4/2000 in order to bring the Spanish legislation into line with EU law and Directive 2008/115 in particular, with the aim of strengthening the fight against illegal immigration. The requirement, that previously existed in the case-law, to state specific grounds for penalties of removal, was included in Article 57(1) of Basic Law 4/2000, specifying that such decisions had to have regard to the principle of proportionality and state reasons in the form of an assessment of the facts which constituted the offence. New Rules implementing Basic Law 4/2000 were also approved by means of Royal Decree 557/2011 of 20 April 2011, according to which the offender’s personal and family circumstances had to be assessed when determining the penalty.
- 17 The referring court indicates that, before *Zaizoune*, most Spanish courts followed the case-law of the Spanish Tribunal Supremo (Supreme Court) on the need to privilege fines and the obligation to state reasons in accordance with the principle of proportionality for removal decisions in situations involving aggravating circumstances. It also states that under no circumstances was annulment of the removal and its replacement with a fine understood as giving rise to covert ‘regularisation’ of the foreign national. Following the fine, an immigrant was still obliged to apply for and obtain a residence permit if the necessary requirements were satisfied, or otherwise to return to the country of origin, with the effect that the penalty of a fine was always considered to be compatible with a subsequent penalty of removal.
- 18 On 23 April 2015 the Court of Justice delivered its judgment in *Zaizoune*, resolving a question referred for a preliminary ruling by the Tribunal Superior de Justicia del País Vasco (Supreme Court of Justice, Basque Country, Spain) in proceedings brought by a third-country national against a removal order with a five-year entry ban. That case did involve aggravating circumstances, meaning that the penalty of removal with no previous fine could have been upheld in accordance with the Spanish law in force.
- 19 Nevertheless, the Tribunal Superior de Justicia del País Vasco (Supreme Court of Justice, Basque Country) referred its question to the Court of Justice in the following terms: ‘In the light of the principles of sincere cooperation and the effectiveness of directives, must Articles 4(2), 4(3) and 6(1) of Directive 2008/115 be interpreted as meaning that they preclude legislation such as the national legislation at issue in the main proceedings and the case-law which interprets it, pursuant to which the illegal stay of a foreign national may be punishable **just** by a financial penalty, which, moreover, **may not be imposed concurrently** with the penalty of removal?’

- 20 In reply to that question, the Court held that Directive 2008/115 precludes the Spanish mechanism for dealing with illegally staying third-country nationals which, as interpreted by the Tribunal Superior de Justicia del País Vasco (Supreme Court of Justice, Basque Country), allows those persons to be punished only by a financial penalty not specifically accompanied by an obligation to return and which, moreover, may not be imposed concurrently with the penalty of removal. Accordingly, the Court of Justice held that the Spanish legislation, as interpreted by the Tribunal Superior de Justicia del País Vasco (Supreme Court of Justice, Basque Country), was incompatible with the ‘effectiveness’ of that directive.
- 21 In the view of the referring court, the Tribunal Superior de Justicia del País Vasco (Supreme Court of Justice, Basque Country) presented the Court of Justice with its own particular interpretation of the applicable Spanish law. Furthermore, the case that gave rise to that judgment concerned a situation involving aggravating circumstances, which are not present in the case under analysis.
- 22 The referring court believes that the system laid down in Spanish law is in fact different, as the Court itself was able to find in its earlier judgment in *Zurita and Choque*, in which the EU legislation applied was earlier than Directive 2008/115 but very similar to it. According to the referring court, under the Spanish legislation, as set out in paragraphs 11 to 13 of this summary, the fine is accompanied by an obligation on illegally staying foreign nationals to leave Spain and a penalty of removal can be imposed if they fail to regularise their situation and to comply with that obligation to return.
- 23 In the referring court’s view, had the Tribunal Superior de Justicia del País Vasco (Supreme Court of Justice, Basque Country) provided the Court of Justice with a more realistic interpretation of Spanish law, in factual circumstances such as those now before it, the Court would probably have concluded that Spanish law was in conformity with Directive 2008/115.
- 24 In the present case, if the Spanish legislation had been applied, the financial penalty of a fine would initially have been imposed on UN, and a time limit would simultaneously have been set for their voluntary return to their country of origin or in which to obtain regularisation. If UN did not regularise their situation, or return voluntarily by expiry of that time limit, the penalty of removal could then be imposed, with a bar on entry for a number of years. The referring court submits that the Spanish legislation applied in those terms, as it was being construed by the majority of Spanish courts until *Zaizoune*, is entirely compatible with Directive 2008/115. It secures the effectiveness of the directive and produces a result that is proportionate and appropriate, tailored to Spain’s individual situation. Accordingly, mindful also of the *Zurita and Choque* precedent, the referring court believes that a further ruling by the Court of Justice is required to clarify those points.

- 25 The referring court notes here that *Zaizoune* is silent on the consequences of the fact that the Spanish law, which is more favourable to citizens, is apparently incompatible with Directive 2008/115, which is more detrimental. It also states that, in the context of the specific proceedings being heard, that directive has not been found to have direct effect enabling the Spanish law on penalties to be simply disapplied to the detriment of the individual.
- 26 The referring court indicates that, according to the settled case-law of the Court of Justice and specialist academic thinking, it is inappropriate to give direct effect to a directive in an ‘inverse vertical relationship’ such as that under examination here, and accordingly, even were it to be conceded that the penalty regime under Basic Law 4/2000 is incompatible with Directive 2008/115, the only option available to the institutions of the European Union to ensure that it was effectively disapplied or abolished would be to order the Spanish State, using formal requests and periodic penalty payments, to amend its legislation. However, until that amendment is made, the Spanish public authorities and courts and tribunals remain obliged to apply Basic Law 4/2000 strictly in accordance with its terms.
- 27 According to the referring court, there is no doubt that applying the Spanish legislation is more advantageous to the person concerned than directly applying Directive 2008/115 interpreted as meaning that it offers only the possibility of forced non-voluntary removal.
- 28 Nevertheless, following *Zaizoune*, the Spanish State authorities and most of the courts have been disapplying the Spanish law on penalties, to the detriment of individuals, offering no other option than imposition, at the outset, of the penalty of removal with an entry bar, including where the foreign national’s situation may be amenable to regularisation, thereby causing disproportionate harm and unfairness which, by applying Basic Law 4/2000, could be avoided without jeopardising the effectiveness of Directive 2008/115. Seeking to clarify that matter, the Tribunal Superior de Justicia de Castilla La Mancha (High Court of Justice, Castilla-La Mancha, Spain) has referred two questions to the Court of Justice for a preliminary ruling (Cases C-568/19 and C-731/19) to determine whether that interpretation of *Zaizoune* is compatible with the Court’s case-law on the limits on the direct effect of directives. The referring court reiterates that question.