**Case C-233/19**

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

**Date lodged:**

18 March 2019

**Referring court:**

Cour du travail de Liège (Belgium)

**Date of the decision to refer:**

11 March 2019

**Appellant:**

B.

**Respondent:**

Centre public d'action sociale de Liège (CPAS)

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## I. Facts of the case and main proceedings

1 Ms B was born on 1 January 1955 in Guinea. She arrived in Belgium on 2 September 2015 and submitted an application for asylum on 4 September 2015 which was rejected by judgment of the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium) ('the CCE') of 27 April 2016.

2 Ms B suffers from several illnesses: high blood pressure; type 2 diabetes with diabetic neuropathy; and post-operative hyperthyroidism.

3 On 26 September 2016, she submitted an application for regularisation (an application for leave to reside) on medical grounds under Article 9b of the Law of 15 December 1980 on the entry in Belgian territory, residence, establishment and removal of foreign nationals (*Moniteur belge* of 31 December 1980, p. 14584) ('the Law of 15 December 1980').

4 That application was declared admissible on 22 December 2016. Ms B was accordingly issued with a temporary residence permit and became eligible for

social assistance from the Centre public d'action sociale de Liège (Public Centre for Social Welfare, Liège) ('the CPAS').

5 However, a decision of the Belgian Immigration Office of 28 September 2017, notified to the appellant on 23 October 2017, rejected the application for medical leave to reside on the merits. Ms B was notified of the order to leave Belgian territory and the Schengen area within 30 days on that same date. Ms B therefore had the right to reside in Belgium until 22 November 2017 and her stay became illegal on 23 November 2017.

6 On 28 November 2017, Ms B brought an action before the judicial body having jurisdiction in the matter — the CCE — for annulment and suspension of the refusal to grant her leave to reside and the order to leave the national territory. The parties stated during the oral submissions that, to their knowledge, the action is still pending.

7 By two decisions of 28 November 2017 ('the contested decisions'), the CPAS withdrew Ms B's entitlement to financial and medical social assistance with effect from 23 October 2017. It is apparent from the documents in the file that the medical assistance which has been withdrawn was intended for foreign nationals residing lawfully, contrary to the provision of emergency medical assistance granted in the case of illegally staying foreign nationals. The two contested decisions invited the applicant in the main proceedings to submit an application for emergency medical assistance if she considered it necessary. She was granted emergency medical assistance with follow-up care for chronic illnesses on 1 November 2017.

8 The courts having jurisdiction in matters relating to social assistance are the tribunal du travail (Labour Court, Belgium) and the cour du travail (Higher Labour Court, Belgium). By application of 28 December 2017, Ms B requested the tribunal du travail de Liège (Labour Court, Liège) to reinstate her entitlement to medical and social assistance for a foreign national residing lawfully with effect from 23 October 2017.

9 On 1 February 2018, Ms B also submitted a fresh application for social assistance which was refused by decision of the CPAS of 20 February 2018. That refusal has been the subject of a new action currently pending before the tribunal de travail, with the result that the period at issue in the dispute is limited from 23 October 2017 to 31 January 2018.

10 By its judgment of 15 March 2018, the tribunal de travail interpreted the decision withdrawing medical assistance of 28 November 2017 as a decision refusing the grant of emergency medical assistance It found Ms B's application to be unfounded, in so far as it concerns financial social assistance. However, it found it to be well founded with regard to emergency medical assistance and ordered the CPAS to uphold it in that regard.

11 Ms B brought an appeal against that judgment.

## II. Legal context

### *1. Belgian law*

12 Under Article 9b of the Law of 15 December 1980, a foreign national residing in Belgium who suffers from an illness occasioning a genuine risk to his life or physical integrity or a genuine risk of inhuman or degrading treatment where there is no appropriate treatment in his country of origin or in the country in which he resides may apply to the Minister or his representative for leave to reside in the Kingdom of Belgium. This constitutes a derogation from the general rule provided for in Article 9 according to which the application for leave to reside for more than three months must be submitted to the Belgian diplomatic or consular post competent for the place of residence or place of stay of the person concerned.

13 The procedure involves two stages: an examination initially designed to be formal and quick, which results in a decision on admissibility and a temporary residence permit (which creates an entitlement to social assistance), followed by a decision on the merits.

14 If the decision on the merits is unfavourable towards the person seeking regularisation, the latter may bring an appeal before the CCE.

15 In accordance with that law and subject to the Court's interpretation of the case-law, 'straightforward' actions for suspension and annulment do not have suspensive effect, with the result that the foreign national may be staying illegally during the examination of those actions.

16 Pursuant to Article 57(2) of the Basic Law of 8 July 1976 on public social welfare centres (CPAS), the consequence of an illegal stay is the refusal of all social assistance, except the provision of emergency medical assistance and, for families with minors, accommodation in a federal accommodation centre.

17 Under Article 159 of the Belgian Constitution, however, 'the courts may only apply the general, provincial and local decisions and regulations to the extent to which they are consistent with the laws'.

18 Article 74/13 of the Law of 15 December 1980 also provides that, in taking an expulsion decision, the Minister or his representative is to take account of the state of health of the foreign national in question.

### *2. EU law*

19 The Court held in the judgment of 18 December 2014 in *Abdida* (C-562/13, EU:C:2014:2453) ('the *Abdida* judgment'):

'Articles 5 and 13 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, taken in conjunction with Articles 19(2) and 47 of the Charter of Fundamental Rights of the European Union and Article 14(1)(b) of that directive, are to be interpreted as precluding national legislation which:

– does not endow with suspensive effect an appeal against a decision ordering a third-country national suffering from a serious illness to leave the territory of a Member State, where the enforcement of that decision may expose that third-country national to a serious risk of grave and irreversible deterioration in his state of health, and

– does not make provision, in so far as possible, for the basic needs of such a third-country national to be met, in order to ensure that that person may in fact avail himself of emergency health care and essential treatment of illness during the period in which that Member State is required to postpone removal of the third-country national following the lodging of the appeal'.

20 Article 19(2) and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and 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) are also relied on.

### *3. Other provisions*

21 In addition, the applicant in the main proceedings invokes Articles 3 and 13 of the European Convention on Human Rights.

## III. Subject matter of the dispute in the main proceedings

22 As far as the Court is concerned, the question at issue in the present case is whether it is necessary, pursuant to the *Abdida* judgment, to endow with suspensive effect the actions for annulment and suspension brought before the CCE and, in the affirmative, under what conditions.

## IV. Positions and forms of order sought

### *1. The position of the applicant in the main proceedings*

23 Ms B claims that the judgment should be reversed and the CPAS ordered to grant her financial social assistance with effect from 23 October 2017.

24 She relies on the absence of an enforceable order to leave the territory, taking the view that, by reason of the action brought before the CCE, the order to leave the territory which she received has no effect.

25 Ms B relies on the *Abdida* judgment, Article 159 of the Belgian Constitution, Articles 3 and 13 of the European Convention on Human Rights, Article 47 of the Charter, Article 6(5) and Article 9(1)(a) of Directive 2008/115 and Article 74/13 of the Law of 15 December 1980 to claim a right to social assistance whilst her action directed against the refusal to uphold her application for medical leave to reside is pending before the CCE.

26 She places great emphasis on drawing attention to the seriousness of her illnesses.

27 She also puts forward the argument that, in accordance with the *Abdida* judgment, a straightforward serious and arguable complaint should guarantee the suspensive effect of the action brought before the CCE. Ms B considers her complaints to be serious, in so far as she claims before the CCE that no valid reasons were given for the medical evaluation carried out by the Immigration Office doctor on which the refusal to grant leave to reside is based.

28 She concludes that her action before the CCE has suspensive effect, that she can no longer therefore be considered to be staying illegally and that she is entitled to financial social assistance.

***2. The position of the CPAS***

29 The CPAS contends that the contested judgment and the decisions under challenge should be upheld.

30 The CPAS considers that Ms B is staying illegally within the meaning of Article 57(2) of the Law of 8 July 1976 and that there is no reason to disregard the order that she was given to leave the national territory issued in accordance with Article 159 of the Constitution.

31 As for the *Abdida* case-law, the CPAS argues that the lesson to be drawn from that judgment is not that the action has automatic suspensive effect but rather that it has suspensive effect only if the foreign national demonstrates the seriousness of his illness and the serious risk of grave deterioration in his state of health if he is returned to the country of origin.

**V. Findings of the cour du travail**

32 The cour du travail is therefore called upon to rule on the suspensive effect of the actions pending before the CCE.

33 Academic legal writing has provided a detailed summary of several complex issues and reference must be made to this review. [1] The cour de travail notes, however, that it refers to that publication because it provides a panoramic, specific

[1] MAES, C., in *Aide sociale — Intégration sociale. Le droit en pratique*, Brussels, la Charte, Second edition, to be published shortly.

and exhaustive view but that, at this stage, it has not yet decided on the course of action to adopt, does not follow the views expressed by the author and will not predetermine the outcome of the proceedings.

‘Scope of the medical review to be carried out by the social courts

x The *Abdida* judgment does not endow with suspensive effect an action directed against an expulsion measure taken following a negative decision adopted under Article 9b, only “an appeal against a decision ordering a third-country national suffering from a serious illness to leave the territory of a Member State, where the enforcement of that decision may expose that third-country national to a serious risk of grave and irreversible deterioration in his state of health”.

Must the social courts merely establish that an action exists in order to endow it with suspensive effect [2] or it is necessary to verify whether the conditions attached to suspensive effect laid down in the *Abdida* judgment have been met?

Case-law is divided on that question.

One line of thinking considers that it is necessary only to establish the existence of an action in order to endow it with suspensive effect. That position is based on the fact that the Court of Justice adopted a general view “with regard to all persons subject to an order to leave the national territory and who have brought an action directed against a refusal to grant leave to reside pursuant to Article 9b”, that it “‘is materially impossible to know ‘in advance’ whether a situation is exceptional in that respect such that the action must be given suspensive effect. It cannot be considered, *a priori*, that the action would have suspensive effect for some applicants but not others” and that “that is the assessment of the Conseil du Contentieux des étrangers. To deprive a foreign national of the right to an effective remedy would amount to predetermining the assessment that the Conseil du Contentieux will carry out of the complaints put forward”.

By contrast, another line of thinking considers that suspensive effect may be endowed only if the conditions laid down in the *Abdida* judgment are met and that the social courts thus enjoy a prima facie degree of discretion, to the extent that the suspension is justified only if the application is manifestly unfounded or the medical evidence is manifestly inadequate.

We believe that that latter view should be adopted.

[2] To that effect: NISSEN, T., ‘Aide Sociale et régularisation 9 ter: le point sur la question après l’arrêt Abdida’, *Fiche pratique de l’accueil 16*, CIRE, 2015, which considers that any action brought against a negative decision adopted under Article 9b must be given suspensive effect; TSOURDI, L., ‘Régularisation médicale en Belgique: quelles répercussions pour l’arrêt Abdida?’, *Newsletter EDEM*, May 2015, p. 3.

Indeed, the third paragraph of Article 288 of the Treaty on the Functioning of the European Union provides: 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'.

On the basis of that provision, the EU Court of Justice considers that national courts are bound '*to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive ... The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it. ... In this instance, the principle of interpretation in conformity with Community law thus requires the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that [the directive] is fully effective'*. [3]

In verifying whether the conditions laid down by the EU Court of Justice have been met, the social court is not disregarding the effectiveness of the action brought against the order to leave the national territory but rather, on the contrary, ensuring the application, within the limits of its competences and in the context of the dispute before it, of directly applicable EU law in a manner which is consistent with the interpretation of that law by the EU Courts. In addition, in so far as the prima facie examination merely verifies whether the complaint is manifestly well founded, we take the view that the position is fully consistent with the requirements set out by the European Court of Human Rights which links the effectiveness of an action with automatic suspensive effect which should be endowed in the event of a breach of Article 3 of the European Convention on Human Rights, provided that there is an arguable complaint'.

34 In reality, it is apparent that there is a third possible interpretation of the *Abdida* judgment, according to which it is for the labour courts to verify, not whether there is a serious and arguable complaint, but to go so far as to examine whether the enforcement of an expulsion decision may expose the third-country national concerned to a serious risk of grave and irreversible deterioration in his state of health.

35 That third interpretation raises other problems, however.

36 While the labour courts are familiar with addressing the question of impossibility of return on medical grounds, the crux of the issue is social assistance (granted, by way of exception, in the case of an illegally staying foreign national) in respect of

[3] Judgment of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraphs 110 to 118 and the case-law cited).

which they are the courts having jurisdiction. When it comes to determining whether an action brought before the CCE against a refusal to grant leave to reside should be endowed with suspensive effect, the issue concerns whether the residence in question is lawful. In turn, where the residence is considered lawful, there is entitlement to social assistance. However, proceedings for judicial review of the legality of the residence come within the jurisdiction of another court specialised in that field, the CCE.

37 As can be seen, the difficulty arises in part from the fact that the court before which the suspensive effect has been raised (the labour court, having jurisdiction to grant social assistance) is not the court before which the action has been brought (the CCE, having jurisdiction in matters relating to the right of residence).

38 Likewise, in the interpretation according to which the labour court must verify whether there is an arguable complaint, that duality results in general uneasiness and a lack of legitimacy on the part of the labour courts to assess the chances of success of an action brought before the CCE, in matters in which they are not the proper court and in which they are not as specialised to the same degree as in matters relating to social law.

39 What is the scope of the review which must be carried out by the labour court before which the suspensive effect of an action brought before another court has been raised?

40 Of course, that question could be brushed aside by arguing that it is a problem of domestic law, falling outwith the jurisdiction of the EU Court of Justice. The cour de travail nevertheless chooses to make a reference for a preliminary ruling to the Court of Justice, in so far as that question also concerns clarification of the scope of Article 47 of the Charter of Fundamental Rights of the European Union. Does the right to an effective remedy before court A automatically create an entitlement to assistance, which comes within the jurisdiction of court B? Does the right to an effective remedy before court A mean that the complaints raised before it should be examined by court B? Does the right to an effective remedy before court A require judicial review, which comes within the jurisdiction of that court, by court B?

## VI. Question referred for a preliminary ruling

41 In order to clarify this important matter, the following question should be referred to the Court of Justice for a preliminary ruling:

42 ‘Must Articles 5 and 13 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, read in the light of Articles 19(2) and 47 of the Charter of Fundamental Rights of the European Union, and Article 14(1)(b) of that directive, read in the light of the

judgment in Case C-562/13, *Abdida*, delivered on 18 December 2014 by the Court of Justice of the European Union (Grand Chamber),

be interpreted as endowing with suspensive effect an appeal brought against a decision ordering a third-country national suffering from a serious illness to leave the territory of a Member State, in the case where the appellant claims that the enforcement of that decision is liable to expose him to a serious risk of grave and irreversible deterioration in his state of health:

– without it being necessary to examine the appeal, its mere introduction being sufficient to suspend the enforcement of the decision ordering the third-country national to leave the territory of that Member State; or

– following a marginal review as to whether there is an arguable complaint, lack of grounds for inadmissibility or whether the action brought before the Conseil du contentieux des étrangers is manifestly unfounded; or

– following a full and comprehensive judicial review carried out by the labour courts in order to determine whether the enforcement of that decision is indeed liable to expose the appellant to a serious risk of grave and irreversible deterioration in his state of health?'