Case C-546/19

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:

16 July 2019

Referring court:

Bundesverwaltungsgericht (Federal Administrative Court, Germany)

Date of the decision to refer:

9 May 2019

Applicant, appellant and appellant on a point of law:

BZ

Defendant, respondent and respondent in the appeal on a point of law:

Westerwaldkreis (district of Westerwald)

Subject matter of the main proceedings

Entry ban ordered for purposes not related to migration

Subject matter and legal basis of the request

Applicability of Directive 2008/115 ('the Return Directive') to an entry ban ordered for purposes not related to migration; Article 267 TFEU

Questions referred

1.(a) Does an entry ban issued against a third-country national for purposes 'not related to migration' come within the scope 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), at any rate if the Member State has not made use of the option under Article 2(2)(b) of that directive?

(b) If Question 1.(a) is answered in the negative: Does such an entry ban not come under Directive 2008/115/EC if the third-country national is already staying illegally regardless of an expulsion order issued against him, to which the entry ban is linked, and therefore in principle comes within the scope of the Directive?

(c) Do entry bans issued for purposes 'not related to migration' include entry bans issued in connection with an expulsion ordered for reasons of public safety and order (in this case: solely on general preventive grounds with the objective of combating terrorism)?

2. If Question 1 is answered to the effect that the present entry ban does come within the scope of Directive 2008/115/EC:

(a) Does the administrative annulment of the return decision (in this case: the removal warning) have the result that an entry ban, within the meaning of Article 3.6 of Directive 2008/115/EC, ordered at the same time becomes unlawful?

(b) Does this legal consequence arise even if the administrative expulsion order preceding the return decision is or has become final?

Provisions of EU law cited

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), Article 1, Article 2(2)(b), Article 3.4 ('return decision') and 3.6 ('entry ban'), Article 7(1), Article 8(1) and Article 11(1)

Provisions of national law cited

Aufenthaltsgesetz (Law on Residence; 'AufenthG'), Paragraphs 11 (entry and residence ban), 50 (requirement to leave), 51 (termination of lawful residence; continued validity of restrictions), 53 (expulsion), 54 (interest in expulsion), 55 (interest in remaining), 58 (removal), 59 (removal warning) and 60a (temporary suspension of removal [temporary admission])

Brief summary of the facts and procedure

1 The applicant, who was born in Syria in 1986, is an ethnic Palestinian with undetermined nationality. Together with his parents, he entered the Federal Republic of Germany using false identities in 1990. His application for recognition as a person entitled to asylum was unsuccessful. Since then, he has been required to leave, but remains in Germany on the basis of continuously extended temporary admission pursuant to Paragraph 60a of the AufenthG.

2 By final judgment of 17 April 2013, the Oberlandesgericht Koblenz (Higher Regional Court, Koblenz) convicted him of recruiting members or supporters of a foreign terrorist organisation in 39 cases and of depicting violence in two cases, in one case in concomitance with the approval of criminal acts, and sentenced him to a custodial sentence totalling three years and four months. According to the findings of the Oberlandesgericht, the applicant distributed video and text messages of Islamic terrorist organisations on the internet over the period from September 2007 to December 2009. In March 2014, the enforcement of the remainder of the overall prison sentence was suspended, with the period of probation being set at four years.

3 By decision of 24 February 2014, the defendant expelled the applicant from the territory of the Federal Republic. It stated that the expulsion also included the prohibition on re-entry to the Federal Republic of Germany. In March 2018, the defendant shortened to four years the entry and residence ban originally fixed at six years in 2014 from any departure and limited it to no later than 21 July 2023 regardless of any departure.

4 The applicant's appeal on a point of law is directed against the judgment of the Oberverwaltungsgericht (Higher Administrative Court) of 5 April 2018, by which the latter dismissed the applicant's appeal.

5 The referring court has dismissed the applicant's appeal on a point of law in so far as it is directed against his expulsion. The subject matter of the proceedings relating to the appeal on a point of law remains now the decision to shorten the entry and residence ban accompanying the expulsion to four years from any departure and to limit it to no later than 21 July 2023 regardless of any departure. The questions set out above arise in this context.

6 Under national law (Paragraph 11 of the AufenthG), the conditions for an entry and residence ban are met. Under Paragraph 11(1) of the AufenthG, a foreign national who has been expelled may be permitted neither to re-enter nor to stay in the territory of the Federal Republic, nor may he be granted a residence permit, even if entitled to one under that legislation. The applicant has been expelled with legal finality. His appeals against the expulsion were ultimately unsuccessful, since the referring court dismissed the applicant's appeal on a point of law against the judgments of the lower courts which had dismissed his action.

7 The expulsion was lawful and permissible, even though the applicant cannot be deported to Syria for the foreseeable future due to a threatened breach of his rights under Article 3 ECHR. Under German residence law, an expulsion is not directly connected with a termination of residence and does not always have this as a result. Persons whose continued residence endangers public safety can instead be expelled even if removal is not possible due to the conditions in the country of destination. This then at least has the effect that the foreign national's residence permit expires (Paragraph 51(1).5 of the AufenthG) and surveillance measures under immigration law are taken in certain cases. However, foreign nationals

who — like the applicant — never had a residence permit and are only staying in Germany with temporary admission pursuant to Paragraph 60a of the AufenthG can also be expelled under German law. In this case, the expulsion has the effect that the foreign national may not be granted a residence permit until the duration of the expulsion has expired (Paragraph 11(1) of the AufenthG).

8 The defendant imposed, of its own motion, a time limit on the entry and residence ban in accordance with the first sentence of Paragraph 11(2) of the AufenthG. The defendant finally imposed a time limit of four years on the entry and residence ban linked to the departure without any errors of assessment.

Brief summary of the basis for the request

9 Clarification is required as to whether a (time limited) entry and residence ban that is possible under national law even without a removal warning and is linked to the expulsion itself is in accordance with EU law.

10 Assuming that Directive 2008/115 applies to stay-ending measures for reasons of public safety and order, 'return decision' within the meaning of Article 3.4 of that directive is, according to the national understanding of the law, not solely the expulsion itself (Paragraph 53 *et seq.* of the AufenthG), which in any event terminates the legality of a stay by operation of law (Paragraph 50(1) and (2), Paragraph 51(1).5 of the AufenthG), but first the removal warning (first sentence of Paragraph 59(1) of the AufenthG).

11 According to Article 3.4 of Directive 2008/115, the expression 'return decision' designates 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. Pursuant to Article 6(6) of Directive 2008/115, that directive does not prevent Member States from adopting a decision on the ending of a legal stay together with a return decision and/or a decision on a removal and/or entry ban in a single administrative or judicial decision or act as provided for in their national legislation, without prejudice to the procedural safeguards available under Chapter III and under other relevant provisions of EU and national law.

12 The expulsion decision under national law merely makes the stay illegal (in any event for lawfully staying foreign nationals). The removal warning alone is to set the administrative or judicial deadline for voluntary departure (Paragraph 59(1) of the AufenthG), which is fundamentally required in the case of a return decision under Article 7(1) of Directive 2008/115 and the expiry of which without effect is a condition of compulsory enforcement of the requirement to leave through removal (Paragraph 58 of the AufenthG).

13 The referring court proceeds on the assumption that migration-related entry and residence bans are covered by the Directive without restriction. By contrast, clarification is required as to whether this also applies to 'entry bans not related to migration'.

14 Whether entry bans not related to migration do not in fact come within the scope of the Return Directive in principle, or do so only under certain conditions, has not yet been clarified in the case-law of the Court of Justice.

15 For the decision on the legality of the 'entry and residence ban' of Paragraph 11(1) of AufenthG at issue here, which is linked to an expulsion within the meaning of Paragraph 51(1).5, in conjunction with Paragraph 53 *et seq.*, of the AufenthG and is therefore 'not related to migration' in the above sense, it is relevant whether this comes within the scope of Directive 2008/115. If that is found to be the case, it is further to be clarified whether the entry and residence ban not related to migration also proves to be compatible with Directive 2008/115 following an administrative annulment of the return decision accompanying it (in this case: the removal warning under the first sentence of Paragraph 59(1) of the AufenthG).

The first question

16 By Question 1(a), the referring court seeks to ascertain whether 'entry bans not related to migration' also come within the scope of Directive 2008/115, in any event if — like the Federal Republic of Germany in the present case — the Member State has not made use of the option under Article 2(2)(b) of Directive 2008/115. The referring court has doubts concerning the applicability of the Directive against the background of 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).

17 Pursuant to Article 3.6 of Directive 2008/115, the expression 'entry ban' designates 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. The Commission defines a 'migration-related entry ban' as an entry ban which is linked to the infringement of the migration rules in the Member States, that is to say, those rules which regulate the entry and stay of the third-country national in the respective Member State (see section 11 of Recommendation 2017/2338). If the infringement of the migration rules concerned has the effect that it is or becomes unlawful for the third-country national to stay in the respective Member State, the common standards and procedures which apply in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of [EU] law as well as international law, including refugee protection and human rights obligations, are to be applied to the return thereof pursuant to Article 1 of Directive 2008/115. By contrast, the term 'entry ban not related to migration' within the meaning of section 11 of Recommendation 2017/2338 designates an entry ban which is not linked to the infringement of the migration rules in the Member States, but is issued for other purposes. These include in particular those entry bans which are issued as a result of the commission of serious criminal

offences by third-country nationals and the administrative or judicial sanctioning thereof and which serve to safeguard public safety and order in the Member State.

18 The wording of neither Article 3.6 nor Article 11(1) of Directive 2008/115 provides a corresponding restriction of the scope of the Directive.

19 Nor is the referring court able to identify any indications of such a restriction of the scope of the Directive from a systematic perspective. It refers, however, to a decision of the French Conseil d'État, according to which the Return Directive is intended to apply only to those return decisions of the Member States which are made due to the illegal stay of a third-country national. From the point of view of the referring court, it can, however, be seen from *inter alia* Article 1, Article 2(2)(b) and the second sentence of Article 11(2) of the Directive that the Directive does not distinguish between the reasons for which an obligation to return is imposed on illegally staying third-country nationals. Rather, the provisions mentioned indicate that the Directive has a fundamentally comprehensive, but restrictable, scope.

20 According to recital 14, Article 3.6 and Article 11 of Directive 2008/115 serve the purpose, by way of introducing an entry ban prohibiting any entry into and stay within the territory of all the Member States, of giving a European dimension to the effects of national return measures. The aim is to prevent illegal immigration and illegally staying third-country nationals from being able to circumvent stay-ending measures on account of diverging regulations in the Member States. These objectives also fundamentally suggest a broad formulation of the scope.

21 Section 11 of Recommendation 2017/2338 attributes to the return-related entry bans contemplated in Directive 2008/115 a preventive effect and the function of fostering the credibility of the return policy. However, that provision also provides that such entry bans remain unaffected by the provisions of the Return Directive on return-related entry bans which are issued for 'purposes not related to migration'. Expressly designated in this connection are entry bans for 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. Section 11 of Recommendation 2017/2338 refers in this respect to Article 24(2), in conjunction with Article 24(1), 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).

22 The historical interpretation of Directive 2008/115 does not reveal any clear indications regarding the assumption stated in section 11 of Recommendation 2017/2338 that entry bans ordered for purposes 'not related to migration' remain unaffected by the provisions of the Return Directive on return-related entry bans.

23 In Point 3.12 of its Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning

illegally staying third-country nationals (COM/2005/0391 final), the Commission states that, even if there was a case for further harmonising the issue of 'expulsion for reasons of public order/security', such harmonisation should not be proposed within the context of a directive dealing with the ending of illegal stay/return, but rather within the context of the Directives regulating the conditions of entry and stay and ending of legal residence/stay. However, once the legal stay of a third-country national has been ended for reasons of public order, this person becomes a third-country national staying illegally in the territory of a Member State for the purposes of the Return Directive and the provisions of that directive will be applied to that person.

24 If Question 1(a) is answered in the negative, this raises Question 1(b) as to whether an entry ban ordered for 'purposes not related to migration' does not come under Directive 2008/115 even if — like the applicant in this case — the third-country national is already staying illegally regardless of an expulsion order issued against him, to which the entry ban is linked, and therefore in principle comes within the scope of the Directive. By Question 1(c), the referring court seeks to ascertain whether an entry ban not related to migration is also such an entry ban which is connected to the general preventive expulsion of a third-country national convicted of serious criminal offences.

The second question

25 Question 2 is raised in the event that an entry ban not related to migration does come within the scope of Directive 2008/115.

26 By Question 2(a), the referring court seeks to ascertain whether the annulment of the return decision (in this case: annulment of the removal warning) means that an entry ban ordered at the same time as the issue of the return decision within the meaning of Article 3.6 of the Directive becomes unlawful. In the opinion of the referring court, it is not essential that the annulment of the return decision should deprive the entry ban accompanying it of its basis, that is to say, that a substantive link necessarily and always also follows from the temporal coupling under EU law.

27 If the question of the coupling is in principle answered in the affirmative, the referring court also wishes to establish, by Question 2(b), how it should proceed in the event that an administrative expulsion order under Paragraph 53 of the AufenthG preceding the return decision has become final. Question 2(b) is therefore aimed at a possible decoupling of a (still existing) return decision and entry ban in cases in which: — through administrative or judicial decision, the illegal stay is finally established, that is to say, it can no longer be contested with legal remedies by the third-country national, — under national law, this results in the obligation for the third-country national to leave, which fundamentally also requires leaving European Union territory and — there is merely a lack of an administrative decision (under national law: removal warning) to also

compulsorily enforce this objectively existing obligation to return through removal.