

Case C-441/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date of the decision to refer:**

12 June 2019

Referring court:

Rechtbank Den Haag, zittingsplaats 's-Hertogenbosch (Netherlands)

Date of the decision to refer:

12 June 2019

Appellant:

TQ

Respondent:

Staatssecretaris van Justitie en Veiligheid

Subject of the action in the main proceedings

By decision of 23 March 2018 (the contested decision), the respondent rejected the appellant's application for asylum and a residence permit of limited duration as unfounded. The decision imposes on the appellant an obligation to return but grants a provisional postponement of departure. The appellant lodged an appeal against the contested decision with the referring court.

Subject and legal basis of the request for a preliminary ruling

Request pursuant to Article 267 TFEU and Article 107 of the Rules of Procedure of the Court of Justice.

The request for a preliminary ruling essentially raises the question whether the policy and practice of the respondent in the main proceedings is compatible with Article 5(a), Article 6(1) and (4), Article 8(1) and Article 10 of Directive 2008/115/EC, Article 15 of Directive 2011/95/EU, and Articles 4 and 24 of the Charter of Fundamental Rights of the European Union; more specifically, the

questions concern the fact that an unaccompanied minor over the age of 15 years is obliged to return to his country of origin without the authorities first having checked whether, in principle, adequate reception facilities exist and are available in that country.

Questions referred

1. Should Article 10 of Directive 2008/115/EC ('the Return Directive'), read in conjunction with Articles 4 and 24 of the Charter of Fundamental Rights of the European Union ('the Charter'), recital 22 of the preamble and Article 5(a) of the Return Directive and Article 15 of Directive 2011/95/EU ('the Qualification Directive'), be interpreted as meaning that, before imposing an obligation to return on an unaccompanied minor, a Member State should ascertain and then should investigate whether, at least in principle, adequate reception facilities exist and are available in the country of origin?
2. Should Article 6(1) of the Return Directive, read in conjunction with Article 21 of the Charter, be interpreted as meaning that a Member State is not permitted to make distinctions on the basis of age when granting lawful residence on a territory if it is established that an unaccompanied minor does not qualify for refugee status or subsidiary protection?
3. Should Article 6(4) of the Return Directive be interpreted as meaning that, if an unaccompanied minor does not comply with his obligation to return and the Member State does not and will not undertake any concrete actions to proceed with removal, the obligation to return should be suspended and lawful residence should be granted? Should Article 8(1) of the Return Directive be interpreted as meaning that, where a Member State imposes a return decision on an unaccompanied minor without then undertaking any removal actions until the unaccompanied minor reaches the age of eighteen, that must be considered to be contrary to the principle of loyalty and the principle of sincere cooperation in the Union?

Provisions of European Union law cited

Article 5(a), Article 6(1) and (4), Article 8(1), and Article 10 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 (Return Directive)

Article 15 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Qualification Directive)

Articles 4 and 24 of the Charter of Fundamental Rights of the European Union

Provisions of national law cited

Article 14(1)(e), Article 28, Article 64 van de Vreemdelingenwet 2000 (Law on Foreign Nationals 2000)

Article 3.6a of the Vreemdelingenbesluit 2000 (Decree on Foreign Nationals 2000)

Paragraph B8/6 of the Vreemdelingencirculaire 2000 (Circular on Foreign Nationals 2000)

Brief summary of the facts and the procedure in the main proceedings

- 1 The appellant was born in Guinea on 14 February 2002. He does not know where his parents are living and knows no other family members. After a stay in Sierra Leone through an intermediary from Nigeria, he arrived in the Netherlands. In the Netherlands he was the victim of human trafficking and sexual violence. It appears from the order for reference that he is now in the care of a foster family in the Netherlands.
- 2 He lodged an application for a residence permit of limited duration issued to persons granted asylum. That request was rejected as unfounded (the contested decision). According to the respondent, he is not eligible for a residence permit on grounds of asylum law. Because the appellant was older than 15 years at the time of the asylum application, the respondent maintains that he is also not eligible for a regular residence permit based on the so-called ‘no-fault policy’ for minors. A return decision also forms part of the contested decision. Postponement of departure for medical reasons was provisionally granted in the contested decision but subsequently rejected in a later decision after a medical examination.

Main submissions of the parties to the main proceedings

- 3 At the heart of the dispute is the respondent’s policy and practice regarding the imposition of an obligation to return on unaccompanied minors who are older than 15 years of age. On the basis of the ‘no-fault policy’, minors up to 15 years of age are granted a permit for ‘residence as an unaccompanied minor foreign national’ (‘verblijf als alleenstaande minderjarige vreemdeling’; ‘AMV’) because up to that age they are deemed to have no ‘fault’ in relation to their situation. Such a residence permit is issued if, after an investigation, it appears that there are no adequate reception facilities in the country of origin. From the age of fifteen years such an investigation is not carried out and a minor is also deemed to be able to return independently.

- 4 The parties to the main proceedings agree that the appellant is not eligible for asylum protection on the basis of the facts prior to his arrival in the Netherlands. However, the appellant takes the position that he was wrongly not granted a residence permit as an AMV. He is of the view that the AMV policy is unreasonable, or at least that its consequences in his situation are disproportionate due to special circumstances. The appellant was only four months older than 15 years when he lodged his asylum application and furthermore, the respondent did not take his best interests as a child sufficiently into account in its decision-making. In addition, he argues that there are no adequate reception facilities for him in his country of origin and that in that regard the respondent has an active duty to investigate. The appellant also takes the position that he is eligible for protection because of his medical problems.

Brief summary of the reasons for the referral

- 5 It follows from the decision that the appellant has lawful residence during the period that he is availing himself of a legal remedy. As soon as the referring court makes a final decision, the return decision and the obligation to leave will be revived. The referring court observes that the respondent is therefore only suspending the legal effects for procedural reasons, thereby preventing the appellant from being removed and consequently suffering serious and irreparable damage before the court has had the opportunity to give a final judgment. The suspensory effect granted by the respondent as a result of the pursuit of a legal remedy does not therefore rule on the substance of the appeal lodged by the appellant against the imposition of a return decision, so that a real dispute exists and the Court of Justice is not being presented with a hypothetical question.
- 6 The referring court finds that the period between the issuing of a return decision to an unaccompanied minor and the actual departure, having regard to the best interests of the child in general, and having regard to the serious consequences for the appellant in particular, raises several legal questions.
- 7 In the asylum procedure in the case of unaccompanied minors under the age of fifteen years, when assessing whether residence on regular grounds should be granted, a further test is carried out in order to determine whether adequate reception facilities are available in the country of origin. If there are no adequate reception facilities in the country of origin, and the minor cannot therefore return, residence is granted.
- 8 If adequate reception facilities are available, the unaccompanied minor who is younger than fifteen years is not eligible for residence and then, if there is no entitlement to protection, a rejection of the asylum application follows. That rejection also constitutes a return decision.
- 9 Therefore, if it wishes to reject an application for asylum from an unaccompanied minor who is less than 15 years old, the decision-making authority has an

obligation to investigate whether there are adequate reception facilities in the country of origin.

- 10 The referring court considers that Article 10(2) of the Return Directive relates to the removal of unaccompanied minors. The obligation to investigate laid down in Article 10(2) of the Return Directive, which precedes the possibility of removal, is prompted by the particular vulnerability of unaccompanied minors. According to the referring court, the removal of minors to a country which does not make provision for adequate reception facilities is undoubtedly contrary to the best interests of the child.
- 11 In any case, when a Member State proceeds to removal, the minor does not have to organise the departure himself and he is moreover accompanied during the departure and the arrival in the country of origin. No provision at all is made for an unaccompanied minor who leaves independently as a result of his obligation to leave. According to the referring court, a minor is not only a minor because of his mental, physical and socio-emotional development, but also because of his legal status. It considers that, because of his vulnerability, an unaccompanied minor should not be considered capable of bearing the responsibility for his departure independently.
- 12 The referring court therefore wishes to ascertain from the Court of Justice whether the EU legislature's task in relation to the adoption of the Return Directive was incomplete or whether Article 10(2) of the Return Directive should be interpreted as meaning that the investigation referred to in that provision should always take place before an unaccompanied minor is obliged to leave the territory of the Union independently. It appears from the wording of that provision that due regard for the best interests of the child only requires assistance to be offered before a return decision is taken. However, that would mean that those safeguards are only required during the asylum procedure and until the negative decision on the asylum application has been taken. In that interpretation, Article 10 of the Return Directive would not regulate the time period between paragraphs 1 and 2 of that article. No specific duty of care would then rest on the Member State in the period between the issuing of the return decision and the time of removal. In the view of the referring court, however, such a finding is contrary to the best interests of the child.
- 13 The referring court also asks the Court of Justice to indicate whether the obligation to reside in a country of origin where no adequate reception facilities are actually available, where this results from a return decision, implies that an unaccompanied minor will be in a situation which must be deemed to be contrary to Article 4 of the Charter and Article 15(2) of the Qualification Directive. If so, the question, according to the court, is whether subsidiary protection should still be granted if there are indeed no adequate reception facilities actually available.
- 14 According to the referring court, a solution must be found whereby the Member States, on the one hand, satisfy the requirement that a return decision should be

imposed where it is established that there can be no question of lawful residence while, on the other hand, making the best interests of the child their primary consideration as required by the Convention on the Rights of the Child (CRC), the Charter and the Return Directive. It is of the view that the suspension of the obligation to return can be such a solution, which also provides clarity to the unaccompanied minor himself.

- 15 According to the order for reference, the Dutch legislation and policy do not provide any insight into how the best interests of the child are taken into account and what weight they should carry when a return decision is imposed on an unaccompanied minor of 15 years of age or older. Nor is it clear from the contested decision how the obligation as laid down in Article 24 of the Charter, recital 22 and Article 5 of the Return Directive has been fulfilled when an obligation to return is imposed. The respondent has limited itself to assessing whether the appellant needs asylum protection. The respondent has also argued that the appellant has not explained how the decision is detrimental to the best interests of the child. However, the referring court finds that the burden of proof does not rest on the appellant, but rather, that the respondent is obliged to take the best interests of the child into account and must expressly determine what the best interests of the child are and how those interests have been taken into account.
- 16 The referring court considers that the view that the appellant cannot return to the country of origin because he has no parents should be assessed when the return decision is reviewed and not when the actual removal is challenged. In view of the consequences of imposing an obligation to return on the appellant, as well as the right to access to justice and the right to an effective remedy, as laid down in Article 47 of the Charter, Article 13 of the Return Directive and the established case-law of the Court of Justice, the appellant should have the right to have a return decision reviewed by the court, even if the return decision does not immediately lead to removal. The fact that a remedy must be available against the return decision also follows from Article 12 of the Return Directive which stipulates, among other things, that a return decision must give information about available legal remedies.
- 17 The Rechtbank (District Court) therefore wishes to ascertain from the Court of Justice whether Article 10(2) of the Return Directive must be interpreted as meaning that a return decision may only be taken if an investigation into adequate reception facilities has taken place. The Rechtbank requests the Court of Justice to state explicitly whether a distinction should be made between the existence of adequate reception facilities in principle, and the actual availability of adequate reception facilities, and whether those assessments may or must take place at various times, and the extent to which an unaccompanied minor can challenge them.
- 18 The respondent has imposed an obligation to return on the appellant but has not undertaken any of the required actions to expel the appellant as an unaccompanied minor. The Rechtbank wishes to ascertain from the Court of Justice whether such

conduct is permissible in view of the provisions of Article 6(4) of the Return Directive. That provision makes it possible to suspend a return decision that has already been issued. The Rechtbank considers that the respondent's conduct seems to indicate that that has *de facto* also happened in the case of the appellant. The referring court points out that the aforementioned Article does not relate to the temporary suspension of the legal effects when recourse is made to an effective remedy (see the judgment of 19 June 2018, *Gnandi*, C-181/16, ECLI:EU:C:2018:465, and the order of 5 July 2018, *C.J. and S.*, C-269/18 PPU, ECLI:EU:C:2018:544), but to the suspension of a return decision.

- 19 Instead of undertaking actions relating to removal, the respondent appears to be waiting for the appellant to reach the age of eighteen years and thus attain the age of majority so that the investigation as referred to in Article 10(2) of the Return Directive is no longer required. The Rechtbank therefore wishes to ascertain whether Article 6(4) of the Return Directive should be interpreted as meaning that the suspension of the return decision should happen *de jure*, after which lawful residence must be granted. The situation that has arisen as a result of the respondent's conduct has the legal nature of a situation of toleration. Thus, the appellant does not have lawful residence and he therefore does not acquire any identity document issued by the Netherlands in order, if necessary, to be able to identify himself and provide proof of his legitimate status. However, the appellant has been placed with a foster family, has access to medical care and can receive education in the Netherlands until he reaches the age of eighteen years. The appellant has indicated that he is in a state of great uncertainty and his doctors have indicated that that state of affairs adversely affects the appellant's medical condition.
- 20 The referring court concludes from the facts that the appellant meets all the conditions for eligibility for regular residence on the basis of the 'no fault policy' except for the condition relating to age. The appellant was 15 years and 4 months old when he applied for asylum. According to the referring court, if the respondent's attitude is one of waiting for the appellant to reach the age of majority before then being able to remove him without an investigation into the adequacy of reception facilities in the country of origin, this is a circumvention of the Return Directive.
- 21 The referring court also refers to Article 8(1) of the Return Directive, which requires Member States to establish and implement an effective removal policy. In its view, the respondent also has a duty vis-à-vis the other Member States to actually remove unaccompanied minor third-country nationals staying illegally on Union territory or, if that is not possible given the requirements laid down in Article 10(2) of the Return Directive, to grant lawful residence. The referring court takes into account the principle of sincere cooperation in the European Union under Article 4(3) TEU.