

Case C-636/23**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 submission:**

24 October 2023

Referring court:

Raad voor Vreemdelingenbetwistingen (Belgium)

Date of the decision to refer:

16 October 2023

Appellant:

W

Respondent:

Belgian State

Subject of the action in the main proceedings

The applicant brought an action for annulment of a return decision before the referring court. That appeal was upheld by judgment for failure to state reasons for the decision not to grant a period for voluntary departure. The respondent appealed in cassation to the Raad van State (Council of State), Belgium, the Supreme Administrative Court. Following the appeal in cassation against its first judgment, the referring court must rule again on the return decision.

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

The referring court is uncertain whether the grant of a period for departure is merely a measure enforcing the return decision or a constituent element of that decision which must be challenged and which, in the event of nullity, has the effect of rendering the return decision null and void in its entirety. The answer to that question also affects the conditions under which an entry ban may be issued. Article 267 TFEU.

Questions referred for a preliminary ruling

1. Must Article 7(4), Article 8(1) and (2) and Article 11(1) of Directive 2008/115, read either in isolation or together, in the light of Article 13 of Directive 2008/115 and Article 47 of the Charter of Fundamental Rights of the European Union, be interpreted as precluding the refusal to grant a period for voluntary departure from being regarded as a mere means of enforcement which does not alter the legal position of the foreign national concerned, given that the grant or otherwise of a period for voluntary departure does not alter the primary finding of an illegal stay in the territory?

2. If the answer to the first question is in the affirmative, must the words ‘together with’ in Article 3(6) and the words ‘accompanying’ in Article 11(1) of Directive 2008/115 be interpreted as meaning that they do not preclude the competent authority from being able or having to issue, even after a considerable period of time, an entry ban based on a return decision that has not granted a period for voluntary departure?

If the answer to that question is in the negative, does that wording mean that a return decision which has not granted a period for voluntary departure must be accompanied simultaneously by an entry ban or within a reasonably short period of time?

If the answer to that question is in the affirmative, does the right to an effective remedy guaranteed by Article 13 of Directive 2008/115 and Article 47 of the Charter of Fundamental Rights of the European Union mean that it is possible, in the context of an appeal against a return decision, to challenge the legality of a decision not to grant a period for voluntary departure, whereas otherwise the legality of the legal basis of the entry ban could no longer be effectively challenged?

3. If the answer to the first question is in the affirmative, must the terms ‘an appropriate period’ in the first subparagraph of Article 7(1) and ‘an obligation to return’ in Article 3(4) of Directive 2008/115 be interpreted as meaning that a provision laying down a period of time, or in any event the refusal to grant a period of time, within the framework of the obligation to depart is an essential element of a return decision, in the sense that, if that period is found to be unlawful, the return decision lapses in its entirety and a new return decision must be issued?

If the Court considers that the refusal to grant a period of time is not an essential element of a return decision, and if the Member State concerned has not made use of the option, under Article 7[(1)] of Directive 2008/115, to grant a period of time only upon application by the [third-country] national concerned, what is the practical scope and enforceability of a return decision, within the meaning of Article 3(4) of Directive 2008/115, from which the element relating to the period would disappear?

Provisions of EU law relied on and case-law of the EU judicature cited

Article 3, points (4), (6) and (8), Article 6(1), Article 7(1) and (4), Article 8(1), (2) and (4), Article 11(1) and Article 13 of Directive 2008/115 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

Article 47 of the Charter of Fundamental Rights of the European Union

Judgments of the Court of 11 June 2015, *Zh. and O.* (C-554/13, paragraphs 46, 47, 49, 50 and 54), 28 April 2011, *El Drifi* (C-61/11 PPU, paragraphs 35-38 and 51), 11 December 2014, *Boudjlida* (C-249/13, paragraph 51), and 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU, paragraph 115)

Provisions of national law cited

The following paragraphs of the Law on entry to the territory, residence, establishment and removal of foreign nationals (*Vreemdelingenwet*):

Paragraph 1(1), points (6) and (8), defining the terms ‘removal decision’ and ‘entry ban’, in transposition of Article 3, points 4 and 6, respectively, of Directive 2008/115.

Paragraph 7, opening words, first and third subparagraphs, under which the national authorities may issue an order to leave the national territory if the foreigner does not possess the required documents and his conduct is likely to harm public order or national security.

Paragraph 74/11(1): ‘The duration of the entry ban is determined by taking into account the specific circumstances of each case. The expulsion decision shall be accompanied by an entry ban for a maximum of three years ... if no period for voluntary departure has been granted ... [and] of more than five years if the third-country national poses a serious threat to public order or national security.’

Paragraph 74/14(1): ‘The expulsion decision shall stipulate a period of 30 days to leave the territory ... (2) As long as the period for voluntary departure is running, the third-country national is protected against forced expulsion. ... (3) There may be a derogation from the time limit provided for in (1) if ... there is a risk of absconding, or ... the third-country national is a threat to public order or national security In such a case, the removal decision shall stipulate a period of less than seven days or no period at all.’

Cassation judgment No 254.377 of 1 September 2022 of the Council of State

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

- 1 The applicant, a Moroccan national, was sentenced to imprisonment for a drug offence on 7 June 2019. On 18 July 2019, Belgium ordered him to leave the Belgian territory ('the return decision') and imposed on him an eight-year re-entry ban.
- 2 The grounds of the return decision stated that the applicant had no valid residence documents and that there was a danger that his behaviour would harm public order and that he would abscond. Due to that risk, he did not obtain a period for voluntary return.
- 3 The action for suspension and annulment of the return decision and the entry ban which the applicant brought before the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings) (the 'Council') was upheld by the latter. The defendant then appealed in cassation to the Council of State only against the annulment of the return decision and not against the annulment of the entry ban. That court, given the subject matter of the cassation appeal, overturned only the ruling on the return decision. The Council must now rule again on that return decision.
- 4 The Council initially annulled the return decision on the ground that the refusal to grant a period for voluntary departure had been poorly reasoned. The risk of harming public order and absconding had not been assessed individually for the applicant, contrary to the Court's case-law. Since the decision not to grant a period for voluntary departure was an essential or constitutive element of the return decision, that decision had therefore to be annulled in its entirety.
- 5 By contrast, in its cassation judgment, the Council of State held that the period for voluntary departure was merely an implementing measure, since the applicant's legal situation already existed at the time the return decision was adopted and, in any event, he had no legal residence. The time limit does not therefore constitute a constituent element of the return decision. The Council had therefore infringed Paragraphs 7 and 74/14 of the Law on foreign nationals by finding otherwise.

Principal arguments of the parties in the main proceedings

- 6 According to the applicant, the return decision constitutes an indivisible administrative decision, which must contain two components, namely the reason for an order to leave the territory and an enforcement period. It relies, in that regard, on Article 3(4) and (8) of Directive 2008/115. A manifest illegality in the statement of reasons for not granting a period for voluntary departure renders the entire return decision unlawful. According to the Court's judgment of 11 June 2015, *Zh. and O.* (C-554/13), a shorter or non-existent period for voluntary departure can be granted only in exceptional circumstances and must, in that case, be subject to an effective remedy.

- 7 According to the defendant, a period for the enforcement of the return decision is merely a measure enforcing that decision, which does not alter the applicant's legal situation. Under Article 7(1) of Directive 2008/115, Member States may provide that the period is to be granted only on application by the third-country national concerned. That period cannot therefore constitute an essential element of a return decision. Therefore, the challenge to that period or to its absence cannot render the return decision unlawful.

Brief summary of the reasons for the referral

- 8 The judgment of the Council of State in the present case does not stand alone. Under Belgian law, the Council is required to follow the case-law of that supreme administrative court. Since it has doubts as to the interpretation of the Court's case-law in the light of the judgments of the Council of State, the Council is obliged, given the primacy of EU law, to determine whether the solution proposed by the Council of State is consistent with EU law.
- 9 The first question concerns the nature of the grant of a period for voluntary departure. According to the Council of State, that time limit is a mere implementing measure – which cannot be challenged – and, according to the Council, an essential element which can be challenged.
- 10 The Council sees indications in support of its position in the judgments in *El Drifi* (C-61/11 PPU), *Zh. and O.* (C-554/13) and *Boudjlida* (C-249/13). Although the Court refers to measures 'to enforce return decisions', such measures must comply with the principle of proportionality, be adopted on a case-by-case basis, be based on objective criteria and allow the person concerned to be heard before the adoption of the decision. It could be inferred from this that, in order to ensure the effectiveness of Article 7(4) of Directive 2008/115, a foreign national must have an effective remedy against the decision not to grant a period for voluntary departure.
- 11 Furthermore, it could be inferred from the Court's case-law that such a decision not only has the legal effect of allowing immediate enforcement, in accordance with Article 8(2) of Directive 2008/115, but also that that decision entails, pursuant to Article 11(1)(a) of that directive, an obligation to impose an entry ban when a return decision is adopted. Consequently, if no appeal is available against the failure to grant a return period, which therefore constitutes the basis of an entry ban, an entry ban cannot be the subject of an appeal either.
- 12 The second question is raised by the Council because, following the appeal in cassation, that court is no longer called upon to rule only on the return decision, but not on the initial entry ban, which was annulled, which was based on that decision. In the context of the examination of the plea directed against the failure to grant a period for voluntary departure, it is necessary to clarify how the words 'accompanied' in Article 11(1) or 'together with a return decision' should be interpreted in the definition of an entry ban in Article 3(6) of Directive 2008/115.

This is important to determine whether the competent authority also has the possibility or the obligation, to impose a new entry ban on the remaining return decision after the annulment of the initial entry ban, or whether no new entry ban can be imposed on this old return decision.

- 13 Neither Directive 2008/115 nor the case-law of the Court specifies the period between a return decision and an entry ban.
- 14 The Court has repeatedly confirmed the obligation, under Article 11(1) of Directive 2008/115, to link an entry ban to a return decision which does not provide for a period for voluntary departure. According to the Commission's Return Handbook (OJ 2017 L 339, p. 83), an entry ban may still be issued at a later stage as a measure supplementing a return decision already issued.
- 15 However, from the judgment of 3 June 2021, *BZ v Westerwaldkreis* (C-546/19), the Council notes that it follows from the wording of Article 11(1) of Directive 2008/115 that an 'entry ban' is deemed to 'supplement' a return decision. The term 'supplement' seems to indicate that an entry ban can only be linked to the return decision simultaneously or after a short period.
- 16 If the words 'together with' and 'accompanying' preclude that an entry ban can or must still be imposed for a considerable time after a return decision, the question is whether an entry ban must be imposed at the same time as such a return decision or whether it must be imposed within a reasonably short period of time.
- 17 If that wording does not preclude it, it remains to be ascertained whether the right to an effective remedy implies that the legality of a decision not to grant a period for voluntary departure must be capable of being challenged, since otherwise the legality of the legal basis of the entry ban could no longer be challenged.
- 18 The third question serves to assess the plea alleging failure to grant a period for voluntary departure. If the answer to the first question is that the indication of the time limit in a return decision is an arguable legal act and that period is found to be unlawful because of a violation of Article 7(4) of Directive 2008/115, does this invalidate the return decision in its entirety? In other words, does a return decision consist of determining whether there is an illegal stay in the territory and a decision whether or not to grant a period for voluntary departure, and can these elements not be split?
- 19 It may be inferred from the term 'and' in the definition of a return decision in Article 3(4) of Directive 2008/115 that the obligation to return, with an indication of the period within which that return must take place, is an essential or constituent element of such a decision. According to the judgment in *Országos Iéen rendszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU), the imposition or issuance of an obligation to return is one of the two elements of a return decision. If it is established in court that the time limit was unlawful, does this change an essential point of the return decision?

- 20 It seems to follow from the words ‘an appropriate period shall be fixed’ in Article 7(1) of Directive 2008/115 that a return decision must always contain an indication of a time limit, while Article 7(1) provides that ‘Member States may provide in their national legislation that such a period shall be granted only upon application by the third-country national concerned’ that an indication of the period for the enforcement of the return decision does not constitute an essential or constitutive element.
- 21 It should be noted that Belgium has not made use of the option mentioned in the previous paragraph for the Member States and that the Council is not competent to set a time limit itself or adopt a new return decision.
- 22 If the failure to grant a period is not an essential element of a return decision, the Council considers that the question arises as to the practical scope and enforceability of a return decision from which the element relating to the period would disappear.

WORKING DOCUMENT