

Case C-637/23 [Boghni]ⁱ**Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

24 October 2023

Referring court:

Conseil du Contentieux des Étrangers (Council for asylum and immigration proceedings, Belgium)

Date of the decision to refer:

16 October 2023

Applicant:

X

Defendant:

État belge, represented by the Secrétaire d'État à l'Asile et la Migration

1. Subject matter and facts of the dispute:

- 1 According to the applicant, he arrived in Belgium two years ago, where he claims to be staying with his brother. He states that he is of Algerian nationality.
- 2 On 27 January 2023, he was deprived of his liberty following an administrative report on the monitoring of a foreign national.
- 3 On 28 January 2023, he was served with an order to leave the territory with deportation and detention for the purpose of removal, and a two-year entry ban.
- 4 The reasons for the absence of a period for voluntary departure are essentially the following:

ⁱ The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

- ‘1. The person concerned did not submit an application for residence or for international protection following his illegal entry or during his illegal stay or within the period provided for by this law.
2. The person concerned claims to have resided in Belgium for two years. The administrative file does not show that he has tried to regularise his stay in the legally prescribed manner.
3. The person concerned is not cooperating or has not cooperated in his relations with the authorities.
4. The person concerned did not report to the local authority within the [legal] time limit and provides no proof that he is staying in a hotel’.
- 5 The applicant’s release was ordered by judgment of 6 February 2023, confirmed on appeal by judgment of 21 February 2023.
- 6 By application lodged on 6 February 2023, the applicant brought before the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) actions directed against the order to leave Belgium with deportation (first and second contested measures) and against the entry ban (third contested measure), issued on 28 January 2023.

2. Provisions of EU law at issue:

Charter of Fundamental Rights of the European Union

- 7 Article 47 provides:

‘Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

...’

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

- 8 Article 3 provides:

‘Definitions

For the purpose of this Directive the following definitions shall apply:

...

4. “return decision” means 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;

...’

9 Article 7 provides:

‘Voluntary departure

1. A return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days, without prejudice to the exceptions referred to in paragraphs 2 and 4. Member States may provide in their national legislation that such a period will be granted only following an application by the third-country national concerned. In such a case, Member States shall inform the third-country nationals concerned of the possibility of submitting such an application.

The time period provided for in the first subparagraph shall not exclude the possibility for the third-country nationals concerned to leave earlier.

...

4. If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days’.

10 Article 8 provides:

‘Removal

1. Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7.

2. If a Member State has granted a period for voluntary departure in accordance with Article 7, the return decision may be enforced only after the period has expired, unless a risk as referred to in Article 7(4) arises during that period’.

11 Article 11 provides:

‘Entry ban

1. Return decisions shall be accompanied by an entry ban:

- (a) if no period for voluntary departure has been granted, or
- (b) if the obligation to return has not been complied with.

In other cases return decisions may be accompanied by an entry ban.

...’

12 Articles 12 and 13 read as follows:

‘Article 12

Form

1. Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies.

...

Article 13

Remedies

1. The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12(1), before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.

2. The authority or body mentioned in paragraph 1 shall have the power to review decisions related to return, as referred to in Article 12(1), including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation.

...’

3. Positions of the parties:

13 At this stage of the proceedings, the debate is focused on the nature of the decision not to grant a period for voluntary departure from the territory. Is it a unilateral legal act of individual scope, emanating from an administrative body, which produces legal effects for the person concerned or prevents such legal effects from occurring, which is open to administrative appeal or, on the contrary, merely a

measure enforcing the order to leave the territory, which does not produce legal effects in itself, with the result that it does not constitute a legal act which is open to administrative appeal?

A. *The applicant*

- 14 The applicant submits in essence that, in so far as it creates legal effects, in particular as regards detention and the entry ban which, in the present case, is based solely on the period of 0 (zero) days, the decision not to grant a period of time in which to leave the territory is not merely an enforcement measure and must therefore be open to challenge.

B. *État belge (Belgian State)*

- 15 The Belgian State considers that the decision not to grant a period of time in which to leave the territory is not open to appeal. It refers to the judgment of the Conseil d'État (Council of State) No 254.377 of 1 September 2022 which describes that period as a means of enforcing an order to leave the territory and questions the impact of Article 7(1) of Directive 2008/115 on the Council of State's analysis, since that article allows Member States to provide that there is no period for voluntary return. In its view, the wording of Article 7(1) of Directive 2008/115, and in particular the option given to Member States to grant a period only at the request of the national concerned, suggests that an indication of the period for enforcement of the return decision is not an essential or constituent element of a return decision.

4. Assessment of the Council for asylum and immigration proceedings:

- 16 The Council for asylum and immigration proceedings limits its examination to two questions: is not granting a period for voluntary departure merely an enforcement measure which is not open to appeal, in that it does not alter the legal situation of the third-country national staying illegally on the territory? Is whether or not a period for voluntary departure is granted a constituent element of a return decision?

Enforcement measure not open to challenge or act open to appeal?

- 17 The Council for asylum and immigration proceedings recalls first of all that, in its judgment of 28 April 2011, *El Dridi* (C-61/11 PPU, EU:C:2011:268), the Court stated:

‘35. Thus, Article 6(1) of the directive provides, first of all, principally, for an obligation for Member States to issue a return decision against any third-country national staying illegally on their territory.

36 As part of that initial stage of the return procedure, priority is to be given, except where otherwise provided for, to voluntary compliance with the obligation resulting from that return decision, with Article 7(1) of Directive 2008/115 providing that the decision must provide for an appropriate period for voluntary departure of between seven and thirty days.

37 It follows from Article 7(3) and (4) of that directive that it is only in particular circumstances, such as where there is a risk of absconding, that Member States may, first, require the addressee of a return decision to report regularly to the authorities, deposit an adequate financial guarantee, submit documents or stay at a certain place or, second, grant a period shorter than seven days for voluntary departure or even refrain from granting such a period.

...

41. It follows from the foregoing that the order in which the stages of the return procedure established by Directive 2008/115 are to take place corresponds to a gradation of the measures to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility; the principle of proportionality must be observed throughout those stages’.

- 18 In the judgment of 5 June 2014, *Mahdi* (C-146/14 PPU, EU:C:2014:1320, paragraph 40), the Court stated: ‘Recital 6 in the preamble to Directive 2008/115 states that the Member States should ensure that the ending of the illegal stay of third-country nationals is carried out through a fair and transparent procedure. That recital also states that, according to general principles of EU law, decisions taken under Directive 2008/115 should be adopted on a case-by-case basis and be based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay’.
- 19 In the judgment of 11 December 2014, *Boudjlida* (C-249/13, EU:C:2014:2431, paragraphs 51 and 59), the Court took the view that, ‘last, the right to be heard before the adoption of a return decision implies that the competent national authorities are under an obligation to enable the person concerned to express his point of view on the detailed arrangements for his return, such as the period allowed for departure and whether return is to be voluntary or coerced. ... It follows from the foregoing that the right to be heard before the adoption of a return decision must allow the competent national authority to investigate the matter in such a way as be able to adopt a decision in full knowledge of the facts and to state reasons for that decision adequately, so that, where appropriate, the person concerned can duly exercise his right to bring legal proceedings’.
- 20 As regards more specifically the legal effects of not granting a period for voluntary departure, it follows from Article 8(1) of Directive 2008/115 that if no period for voluntary departure has been granted, the Member State is to take the

necessary measures to enforce the return decision. It follows from Article 8(2) of Directive 2008/115 that if a Member State grants a period for voluntary departure, the return decision may be enforced only after the period has expired. Article 11(1)(a) further provides that if no period for voluntary departure has been granted, the return decision is to be accompanied by an entry ban.

- 21 In the judgment of 28 April 2011, *El Dridi* (C-61/11 PPU, EU:C:2011:268), the Court stated:

‘37 It follows from Article 7(3) and (4) of that directive that it is only in particular circumstances, such as where there is a risk of absconding, that Member States may, first, require the addressee of a return decision to report regularly to the authorities, deposit an adequate financial guarantee, submit documents or stay at a certain place or, second, grant a period shorter than seven days for voluntary departure or even refrain from granting such a period.

38 In the latter situation, but also where the obligation to return has not been complied with within the period for voluntary departure, Article 8(1) and (4) of Directive 2008/115 provides that, in order to ensure effective return procedures, those provisions require the Member State which has issued a return decision against an illegally staying third-country national to carry out the removal by taking all necessary measures including, where appropriate, coercive measures, in a proportionate manner and with due respect for, *inter alia*, fundamental rights’.

- 22 In the judgment of 8 May 2018, *K.A. and Others (Family reunification in Belgium)* (C-82/16, EU:C:2018:308, paragraph 86), the Court states that:

‘under Article 11(1) of Directive 2008/115, Member States must impose an entry ban where a third-country national who has been the subject of a return decision has not complied with his obligation to return or where no period for voluntary departure was granted to him ...’

- 23 In the judgment of 16 January 2018, *E* (C-240/17, EU:C:2018:8, paragraph 48), the Court states:

‘... it is clear from the wording of Article 6(2) of Directive 2008/115 that those authorities were required to issue such a return decision and, in accordance with Article 11 thereof, to accompany it with an entry ban, provided that public order and national security so require which is, however, for the national court to ascertain in the light of the relevant case-law of the Court (see, to that effect, judgment of 11 June 2015, *Zh. and O.*, C-554/13, EU:C:2015:377, paragraphs 50 to 52 and 54)’.

- 24 In the judgment of 3 June 2021, *Westerwaldkreis* (C-546/19, EU:C:2021:432, paragraph 51), the Court confirms that ‘under Article 11(1) of Directive 2008/115, return decisions must be accompanied by an entry ban if no period for voluntary departure has been granted or if the obligation to return has not been complied with. In other cases, return decisions may be accompanied by an entry ban’.

- 25 It could be inferred from this that not granting a period for voluntary departure (0 days), such as in the present case, although it does not in any way detract from finding that the stay on the territory is illegal, entails not only the immediate application of substantive enforcement (Article 8(2) of the directive), but also the obligation to attach an entry ban to the return decision (Article 11(1)(a) of the directive). As long as the fact that a period for voluntary departure is not granted is included in the return decision and reasons for doing so are given therein, it seems necessary to provide for an effective remedy against that aspect of the return decision. The Council of State, for its part, does not accept that, in the context of an action directed solely against the entry ban, a plea can be raised against the fact that a period for voluntary departure is not granted, particularly since that is a different decision. The above could lead to situations where the very legal basis for issuing the entry ban (no period for voluntary departure granted [zero days]) cannot be challenged and only the duration can still be challenged in an action against the entry ban.
- 26 Since the interpretation of EU law raises doubts, the Council for asylum and immigration proceedings considers it necessary for the Court to rule on the first question set out below.

Is the period for voluntary departure a constituent element of the return decision?

- 27 In order to assess the relevance of the plea directed against the fact that a period for voluntary departure was not granted, the Council also considers it necessary to know how to interpret the words ‘provide for an appropriate period’ in Article 7 of Directive 2008/115 and ‘and ... an obligation to return’ in Article 3(4) of Directive 2008/115. The question arises as to whether or not the granting of a period for voluntary departure constitutes an essential or constituent element of a return decision. In particular, if the Court were to answer the first question to the effect that an indication of a period in a return decision constitutes a challengeable legal act, and if that period is found to be unlawful by reason of an infringement of the provision of Belgian law transposing Article 7(4) of the Return Directive, does the return decision become null and void in its entirety and does the foreign national no longer have to comply with it? In other words, does a return decision necessarily include, in addition to a finding that the third-country national is on the territory illegally, a decision as to whether or not to grant a period for voluntary departure, and are those two parts of the return decision indivisible?
- 28 Article 3(4) of Directive 2008/115 defines a return decision as follows: ‘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’. It could be inferred from the word ‘and’ that the obligation to return, which gives an indication of the period within which it must be carried out, is an essential or constituent element of a return decision.

- 29 In the judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 115), the Court states that ‘it therefore follows from the very wording of paragraph 4 of Article 3 of Directive 2008/115 that the actual imposition or declaration of an obligation to return constitutes one of the two components of a return decision’. The question therefore arises as to whether, by analogy to the present case, after the national court has found that the provision relating to the period is unlawful and the competent administration is required to include a new one, that constitutes an amendment of an essential point of the return decision, and therefore the administration must issue an entirely new return decision within the meaning of Article 3(4) of the directive.
- 30 Furthermore, it seems possible to infer from the words ‘provide for an appropriate period’ in Article 7(1) of Directive 2008/115 that a return decision systematically contains an indication of a period, so that there can be no derogation from the granting of a period and a period of zero days can be imposed only in the situations listed exhaustively in Article 7(4) of the directive. The Council seems to find confirmation of this in the judgments of 28 April 2011, *El Dridi* (C-61/11 PPU, EU:C:2011:268, paragraphs 36, 37 and 51); and of 3 March 2022, *Subdelegación del Gobierno en Pontevedra (Fine in the event of illegal stay)* (C-409/20, EU:C:2022:148, paragraph 57).
- 31 In order to take a decision in the present case, the Council for asylum and immigration proceedings therefore considers it necessary for the Court of Justice to rule on the second question set out below.
- 32 Next, the Council for asylum and immigration proceedings points out that the Belgian legislature did not make use of the option given to Member States by Article 7(1) of the Return Directive to set a period only at the request of the national concerned and that, under Belgian law, the Council for asylum and immigration proceedings does not itself have the power to set a period within which the third-country national must leave the territory or to issue a new return decision itself.
- 33 Consequently, in the alternative, in the event that the second question is answered in the negative, the Council for asylum and immigration proceedings questions the practical scope and enforceability of a return decision, within the meaning of Article 3(4) of Directive 2008/115, which would be deprived of its component relating to the period.

5. The questions referred for a preliminary ruling:

- 34 The Council for asylum and immigration proceedings refers the following questions:
1. Must Article 7(4), Article 8(1) and (2) and Article 11(1) of Directive 2008/115, read together or separately 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 meaning that they preclude the decision not to grant a period for voluntary departure from being regarded as a mere enforcement measure which does not alter the legal position of the foreign national concerned, since the granting or not of a period for voluntary departure in no way alters the first finding of an illegal stay on the territory?

Moreover, does the right to an effective remedy, guaranteed by Article 13 of Directive 2008/115 and by Article 47 of the Charter of Fundamental Rights of the European Union, mean that it is possible to challenge, in an appeal against the return decision, the lawfulness of a decision not to grant a period for voluntary departure where, if that is not the case, the lawfulness of the legal basis for the entry ban can no longer be effectively challenged?

2. If the answer to the first question is in the affirmative, must the words ‘provide for an appropriate period’ in Article 7(1) and ‘and ... an obligation to return’ in Article 3(4) of Directive 2008/115 be interpreted as meaning that a provision relating to the period [, or, in any event, not granting a period,] in the context of the departure obligation, constitutes an essential element of a return decision, with the result that if that period is found to be unlawful, the return decision becomes null and void in its entirety and a new return decision must be issued?

If the Court of Justice is of the opinion that the refusal to grant a period is not an essential element of the return decision, and if the Member State concerned has not made use, under Article 7(1) of Directive 2008/115, of the option of setting a period only following an application by the third-country national concerned, what practical scope and enforceability is to be given to a return decision within the meaning of Article 3(4) of Directive 2008/115 which would be deprived of its component relating to the period?

35 The Council for asylum and immigration proceedings points out that it has referred similar questions for a preliminary ruling relating to the period for voluntary departure for an illegally staying third-country national by judgment No 295 507 of 16 October 2023 (case entered in the register of the Court of Justice under number C-636/23). It requests that the Court of Justice examine the two cases together.