

Case C-143/22

Request for a preliminary ruling

Date lodged:

1 March 2022

Referring court:

Conseil d'État (France)

Date of the decision to refer:

24 February 2022

Applicants:

Association Avocats pour la défense des droits des étrangers (ADDE)

Association nationale d'assistance aux frontières pour les étrangers (ANAFE)

Association de recherche, de communication et d'action pour l'accès aux traitements (ARCAT)

Comité inter-mouvements auprès des évacués (CIMADE)

Fédération des associations de solidarité avec tou-te-s les immigré-e-s (FASTI)

Groupe d'information et de soutien des immigré.e.s (GISTI)

Ligue des droits de l'homme (LDH)

Le Paria

Syndicat des avocats de France (SAF)

SOS – Hépatites Fédération

Defendant:

Ministre de l'Intérieur

CONSEIL D'ETAT

acting in a
judicial
capacity

[OMISSIS]

Having regard to the following proceedings:

1. In Case No 450285, [OMISSIS] [proceedings], [OMISSIS] [the applicants] request that the Conseil d'État (Council of State, France):

(1) annul Order No 2020-1733 of 16 December 2020 on the legislative part of the Code on the entry and residence of foreigners and the right to asylum ['CESEDA' or 'the Code'] as having been adopted *ultra vires*;

(2) [OMISSIS] [proceedings]

They claim that:

[OMISSIS] [with no relevance to the question referred]

– in so far as they make the regime for the refusal of entry applicable in the event of the reintroduction of border control at internal borders under Article 25 of the Schengen Borders Code, while carrying out border checks at internal borders, the new provisions of Article L. 33203 of the Code infringe the provisions [of Article 2(2)(a)] of Directive 2008/115/EU as interpreted by the Court of Justice of the European Union in the judgment [of 19 March 2019, *Arib and Others*, C-444/17, EU:C:2019:220] and breach the principle of *res judicata* by the Conseil d'État, acting in a judicial capacity in Decision No 428178 of 27 November 2020; if the Conseil d'État did not follow that reasoning, it would be for the Conseil d'État to refer a question on interpretation to the Court of Justice of the European Union for a preliminary ruling;

[OMISSIS] [with no relevance to the question referred]

By its defence, registered on 18 October 2021, the ministre de l'intérieur (Minister for the Interior) [OMISSIS] [with no relevance to the question referred] contends that the other forms of order sought in the application should be rejected. The ministre de l'intérieur submits that the pleas put forward in support of the forms of order sought are unfounded.

2. In Case No 450288, [OMISSIS] [proceedings], [OMISSIS] [the applicants] request that the Conseil d'État:

(1) annul Decree No 2020-1734 of 16 December 2020 on the regulatory part of the Code on the entry and residence of foreigners and the right to asylum as having been adopted ultra vires;

(2) [OMISSIS] [proceedings]

They claim that:

[OMISSIS] [with no relevance to the question referred]

– in so far as they make the regime for the refusal of entry applicable in the event of the reintroduction of border control at internal borders, while carrying out border checks at internal borders, the provisions of Article R. 332-1 of the CESEDA infringe the provisions [of Article 2(2)(a)] of Directive 2008/115/EU as interpreted by the Court of Justice of the European Union in the judgment [of 19 March 2019, *Arib and Others*, C-444/17, EU:C:2019:220] and Decision No 428178 of the Conseil d’État, acting in a judicial capacity; mentioned above; if the Conseil d’État did not follow that reasoning, it would be for the Conseil d’État to refer a question on interpretation to the Court of Justice of the European Union for a preliminary ruling;

[OMISSIS] [with no relevance to the question referred]

By its defence, registered on 18 October 2021, the ministre de l’intérieur contends that the application should be rejected. The ministre de l’intérieur submits that the pleas in law are unfounded.

[OMISSIS] [proceedings]

Having regard to:

[OMISSIS] [with no relevance to the question referred]

– the Treaty on the Functioning of the European Union;

[OMISSIS] [with no relevance to the question referred]

– Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016;

[OMISSIS] [with no relevance to the question referred]

– Directive No 2008/115/EC of the European Parliament and of the Council of 16 December 2008;

[OMISSIS] [with no relevance to the question referred]

– the judgment [of 19 March 2019, *Arib and Others*, C-444/17, EU:C:2019:220];

[OMISSIS] [with no relevance to the question referred]

[OMISSIS] [proceedings]

Having regard to:

Legal framework:

- 1 Under Article 52 of the Law on controlled immigration, effective right of asylum and successful integration of 10 September 2018: *‘Under the conditions set out in Article 38 of the Constitution, and within a period of 24 months from the promulgation of this law, the Government shall be authorised, by way of order: 1. To redraft the legislative part of the Code on the entry and residence of foreigners and the right to asylum in order to adjust the structure, to clarify the wording and to include provisions from other codes or uncodified legislation and directly concerning the entry and residence of foreigners in France. The new codification carried out in application of paragraph 1 shall be carried out without any change to the law and subject to any modifications necessary to ensure compliance with the hierarchy of standards and editorial consistency of the drafts, to harmonise the rule of law, remedy errors and shortcomings in codification and repeal provisions, codified or not, obsolete, or no longer applicable; ... [OMISSIS]’*
- 2 On the basis of that legislative authorisation, [OMISSIS] [irrelevant] the Government adopted the Order of 16 December 2020 on the legislative part of the Code on the entry and residence of foreigners and the right to asylum (CESEDA). On the same day, a Decree on the regulatory part of the Code on the entry and residence of foreigners and the right to asylum was adopted. The Association Avocats pour la défense des droits des étrangers (ADDE) and the other applicants request that the Order and Decree of 16 December 2020 be annulled as having been adopted *ultra vires* by means of applications that are very similar and which should therefore be joined in order to give judgment by a single decision.
- 3 [OMISSIS] [admissibility]

With regard to the formal legality of the order and decree at issue:

- 4 [OMISSIS] [with no relevance to the question referred]

With regard to the substantive legality of the order:

[OMISSIS]

- 5 [OMISSIS]

- 6 [OMISSIS]

- 7 [OMISSIS]

- 8 [OMISSIS] [with no relevance to the question referred]

With regard to Book III containing the provisions relating to the entry of foreigners into France:

As for the provisions of Article L. 332-3 of the CESEDA relating to the possibility of refusing entry to third-country nationals at internal borders:

- 9 On the one hand, Article 32 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) provides that, where border control at internal borders is reintroduced under the conditions laid down in Chapter II of Title III, the relevant provisions of Title II of that regulation, relating to external borders, ‘*shall apply mutatis mutandis*’. Article 14 of the Schengen Borders Code, which falls under Title II of that regulation, provides for the possibility of refusing entry to third-country nationals who do not fulfil the entry conditions laid down in Article 6(1) and do not belong to the categories of persons referred to in Article 6(5) of that regulation. On the other, it follows from Article 2(2)(a) of Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals that Member States may decide not to apply this Directive to third-country nationals who are subject to ‘*a refusal of entry in accordance with Article [14] of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State*’.
- 10 In its judgment of 19 March 2019, *Arib and Others* (C-444/17), the Court of Justice of the European Union held that: ‘*Article 2(2)(a) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 [...] read in conjunction with Article 32 of [the Schengen Borders Code], must be interpreted as not applying to the situation of an illegally staying third-country national who was apprehended in the immediate vicinity of an internal border of a Member State, even where that Member State has reintroduced border control at that border, pursuant to Article 25 of the regulation, on account of a serious threat to public policy or internal security in that Member State.*’
- 11 In Decision No 428175 of 27 November 2020, the Conseil d’État, acting in a judicial capacity, held that the provisions of Article L. 213-3-1 of the CESEDA, as resulting from the Law of 10 September 2018 cited above, which provided that in the event of the temporary reintroduction of border control at internal borders, a foreign national arriving directly from the territory of a State party to the Schengen Convention signed on 19 June 1990 may be refused entry under the conditions laid down in Article L. 213-2 of the same code if he has entered the territory of Metropolitan France crossing an internal land border without being authorised to do so and was checked in an area between the border and a line drawn 10 kilometres inside that border, are contrary to the provisions of Directive

2008/115/EC as interpreted by the judgment of the Court of Justice of the European Union cited above.

- 12 The provisions of the order at issue do not repeat the provisions of Article L. 213-3-1 of the CESEDA in its previous version and do not therefore breach the principle of *res judicata* by the Conseil d'État. However, the second paragraph of Article L. 332-3 of the CESEDA, in the version resulting from the order at issue, provides for the adoption of a refusal of entry 'while carrying out border checks at internal borders' in the event of the temporary reintroduction of border control at internal borders.
- 13 Having regard to the provisions set out in paragraph 9 above and the grounds for the judgment of the Court of Justice of the European Union cited above, the question whether, in the event of the temporary reintroduction of border controls at internal borders, under the conditions laid down in Chapter II of Title III of Regulation (EU) 2016/399, foreign nationals arriving directly from the territory of a State party to the Schengen Convention signed on 19 June 1990 who present themselves at an authorised stationary or mobile border crossing point, without being in possession of documents justifying an authorisation to enter or right to stay in France, may be refused entry, when entry checks are carried out at that border, on the basis of Article 14 of that regulation, without Directive 2008/115/EC being applicable, is decisive for the outcome of the dispute before the Conseil d'État and presents a serious difficulty in interpreting European Union law. It is therefore necessary to stay the proceedings concerning the form of order sought in Case No 450285 directed against Article L. 332-3 of the CESEDA, in the version resulting from the order at issue, and to make a reference to the Court of Justice of the European Union for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union.

[OMISSIS]

14 [OMISSIS]

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59 [OMISSIS] [with no relevance to the question referred]

Consequences to be drawn from the foregoing:

60 [OMISSIS] [with no relevance to the question referred]

61 It is also necessary to stay the proceedings concerning the claim for the annulment in Case No 450285, in so far as they concern the second paragraph of Article L. 332-3 CESEDA, in the version resulting from the order at issue, pending a preliminary ruling by the Court of Justice of the European Union on the question set out in paragraph 13 above.

[OMISSIS]

62 [OMISSIS] [with no relevance to the question referred]

DECIDES:

Article 1: The proceedings concerning the form of order sought in Case No 450285 directed against Article L. 332-3 of the CESEDA shall be stayed pending the preliminary ruling of the Court of Justice of the European Union on the following question: In the event of the temporary reintroduction of border controls at internal borders, under the conditions laid down in Chapter II of Title III of Regulation (EU) 2016/399, can foreign nationals arriving directly from the territory of a State party to the Schengen Convention signed on 19 June 1990 be refused entry, when entry checks are carried out at that border, on the basis of Article 14 of that regulation, without Directive 2008/115/EC being applicable?

[OMISSIS] [with no relevance to the question referred]

[OMISSIS]

[OMISSIS] [proceedings]

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