

Case C-669/23 [Zhang] ⁱ**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice of Justice****Date lodged:**

13 November 2023

Referring court:

Rechtbank Limburg (Netherlands)

Date of the decision to refer:

13 November 2023

Applicant:

C

Defendant:

Staatssecretaris van Justitie en Veiligheid (Secretary of State for Justice and Security)

Subject matter of the main proceedings

The applicant claims compensation for the unlawful enforcement of a measure for the detention of a foreign national, which he claims was not lifted in good time.

Subject matter and legal basis of the request

In this request for a preliminary ruling pursuant Article 267 TFEU, the referring court wishes to ascertain whether it follows from the Return Directive, in conjunction with the Charter of Fundamental Rights, that the return decision on which a detention measure was based in the main proceedings had become unlawful and, in particular, whether that return decision should have been withdrawn immediately as soon as it had become apparent that the removal would not be successful, with the result that the detention measure should also have been

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.

lifted at once, and whether the applicant’s living conditions in the Member State in which he is staying are relevant to the answer to that question.

Questions referred for a preliminary ruling

(1) Must Articles 3, 5, 6, 8 and 9 of the Return Directive be interpreted as meaning that it is only if the interests and principles referred to in Article 5 of the Return Directive precluding removal by the Member State to the country of destination also preclude a third-country national from not¹ voluntarily or independently being able to comply with the obligation to return by departing to another third country that no return decision may be adopted, or a return decision which has already been adopted must be withdrawn or suspended?

(2) Is national legislation under which entitlement to basic services is linked to lawful residence compatible with Article 5 of the Return Directive, in conjunction with recitals 12 and 24 thereof and Articles 1 and 7 of the Charter of Fundamental Rights, and, if so, must the existence of such legislation be taken into account in determining whether a return decision can be adopted and/or maintained where a third-country national cannot be removed?

Provisions of European Union law relied on

- Charter of Fundamental Rights of the European Union (‘the Charter’), Articles 1 and 7.
- 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 (‘the Return Directive’), recitals 2, 9, 12 and 24, Article 3(3), (4), (5), (8) and 9, Article 5, Article 6(1) and (4), and Article 9(1) and (2).
- 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 (‘the Qualification Directive’), Article 12(2), Article 14(4)(a) and (b), Article 17(1), and Article 19(3)(a).

ⁱ Translator’s note: The question arises as to whether or not the question referred is to be understood as meaning that the double negative should be eliminated by the deletion of the word ‘not’.

Provisions of national law relied on

- Wet van 23 november 2000 tot algehele herziening van de Vreemdelingenwet (Law of 23 November 2000 on the general reform of the law on foreign nationals) (2000 Law on foreign nationals), Article 10(1), (2) and (3).

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant was born in 1965 and holds Chinese nationality. He is infected with HIV, is deaf-mute, is wheelchair-dependent, and suffers from a severe skin condition.
- 2 He has stayed in the Netherlands since 25 March 2017 (after initial stays in 2015 and 2016) where he submitted a claim for asylum.
- 3 That claim for asylum was rejected by decision of 18 September 2017, which was also regarded as a return decision and stipulated that the applicant had to depart the Netherlands within four weeks.
- 4 On 27 March 2023, the applicant was placed in detention for the purpose of forced removal to China as he did not wish to leave the Netherlands voluntarily and was staying in the Netherlands illegally.
- 5 On 3 August 2023, the applicant was released following the lifting of the detention measure after the referring court had found that it was impossible to remove him to China. The applicant did not have a valid passport or other identity document and the Chinese authorities had stated that they would not provide him with a travel document. Nonetheless, the defendant maintained the return decision.
- 6 The two parties disagree as to whether or not implementation of the detention measure during the period from 2 August 2023 to 3 August 2023 was lawful.
- 7 In that context, the applicant lodged an appeal with the referring court against the continuation of the detention measure and sought compensation for the time he claims that he was unlawfully detained.

The essential arguments of the parties in the main proceedings

- 8 The applicant argues that the detention measure from 2 August 2023 to 3 August 2023 is unlawful because, before the measure was adopted, it was already clear to the defendant that the Chinese authorities would not provide a travel document for the purpose of his removal. Given the impossibility of removing him, he should be granted a right of residence in the Netherlands.
- 9 The defendant argues that although the Chinese authorities had previously informed it that they would not provide the applicant with a travel document, that

did not preclude his removal since the defendant had tried nevertheless to obtain the cooperation of the Chinese authorities. Finally, after weighing up the interests at issue, the defendant lifted the detention measure.

Succinct presentation of the reasoning in the request for a preliminary ruling

First question referred

- 10 In the view of the referring court, it is clear from the Return Directive that a return decision entails an obligation to return. An illegally staying third-country national does not necessarily have to return to his or her country of origin. He or she can also depart to another third country.
- 11 The question is whether the obligation to return can continue to exist if the Member State may not or cannot remove a third-country national. The referring court infers from the wording and scheme of the Return Directive that the impossibility of removing a foreign national does not always mean that the foreign national no longer has an obligation to return.
- 12 The Return Directive does not provide that if the Member State fails to enforce the obligation to return for reasons unrelated to the interests referred to in Article 5 (the best interests of the child, family life and the state of health of the third-country national), the obligation to return may not be imposed or maintained.
- 13 Where a Member State is unable to end a situation involving an illegal stay, an intermediate status arises, which, according to the Court of Justice, is incompatible with the purpose and scheme of the Return Directive. Where both the third-country national and the Member State are unable to comply with the obligation to return by reason of the interests referred to in Article 5 of the Return Directive, no return decision may be issued or maintained.
- 14 The rules laid down in Article 5 are further specified in Article 9 of the Return Directive. If removal would infringe the principle of non-refoulement, also referred to in Article 5, removal must be postponed. Thus, the EU legislature did not stipulate that in that case the return decision is not to be adopted or should be revoked or suspended, or that the obligation to return should then be postponed or suspended. It therefore remains unaffected, as is clear from the Court of Justice's judgment of 3 June 2021 in *BZ v Westerwaldkreis*. If that is the rule when the principle of non-refoulement applies, it is difficult to see, in the view of the referring court, why the obligation independently to comply with the obligation to return does not remain unaffected in respect of all illegally staying third-country nationals, except where they are unable to do so by reason of the interests referred to in Article 5 of the Return Directive. Moreover, the principle of non-refoulement does not prevent third-country nationals from departing to another third country.

- 15 In the view of the referring court, if the interests and principles referred in Article 5 precluding removal by the Member State do not also prevent the third-country national from complying voluntarily or independently with the obligation to return, a return decision which entails an obligation to return can and must be adopted, but the Member State must postpone enforcement of that obligation. Accordingly, Netherlands case-law holds that, if the removal is unsuccessful because the authorities of the country of origin will not provide a travel document and the third-country national does not have a valid passport, the impossibility of removing that national does not affect his or her obligation to return.
- 16 However, in its judgment of 6 July 2023 in *Bundesamt für Fremdenwesen und Asyl v A.A.*, the Court of Justice found that Article 5 of the Return Directive must be interpreted as precluding the adoption of a return decision in respect of a third-country national where it is established that removal of that third-country national to the intended country of destination is, by reason of the principle of non-refoulement, precluded for an indefinite period.
- 17 The referring court does not understand that interpretation of Article 5, which seems to be diametrically opposed to that adopted in *BZ v Westerwaldkreis*. It therefore asks the Court of Justice to clarify that interpretation. Specifically, it wishes to ascertain whether, unlike what is provided for in the Return Directive and seems to follow from previous judgments, the impossibility for the Member State to enforce the obligation to return always means that no return decision can be issued or that a return decision which has already been issued must be revoked. That would have significant consequences for Member States and would allow third-country nationals staying illegally in the territory of Member States who do not want to depart to adopt a wait-and-see approach.
- 18 Since the rationale and scheme of the Return Directive preclude an intermediate status where an illegal stay is tolerated, the referring court takes the view that, as a result of the above interpretation, the Member States would have to grant some form of residence authorisation if no return decision may or can be issued, even if the third-country national concerned does not meet the conditions for admission and residence. In its view, that cannot have been the intention of the EU legislature in situations where a third-country national staying illegally in the EU territory does not depart voluntarily and cannot be removed forcibly for reasons other than those referred to in Article 5 of the Return Directive.
- 19 Furthermore, the grounds for exclusion and withdrawal set out in the Qualification Directive, which are based on the protection of national security and public order, would be rendered ineffective if Article 5 of the Return Directive were to be interpreted as meaning that no return decision can be issued where it is established that removal to the intended country of destination is, by reason of the principle of non-refoulement, precluded for an indefinite period.

Second question referred

- 20 If the Court of Justice were to answer the first question to the effect that the return decision does not have to be revoked in all cases where removal is impossible, it would be necessary to determine whether the circumstances in which the illegally staying third-country national finds himself pending return must be taken into account in determining whether the return decision can be maintained.
- 21 The applicant is a vulnerable person but, pursuant to Paragraph 10 of the Law on foreign nationals, is deprived of basic services, such as food, and is also not entitled to medical and other care apart from emergency treatment because he is staying illegally in the Netherlands. The referring court is uncertain whether those consequences of his illegal stay, which arise from national legislation, preclude the return decision from being maintained.
- 22 It could be inferred from Article 5 of the Return Directive, in conjunction with Article 1 of the Charter of Fundamental Rights, that the issue and maintenance of a return decision is not permitted if the third-country national's human dignity would be thus affected. The referring court is uncertain whether or not the exclusion of access to basic services affects the essence of his or her right to private life, which, according to the judgment of 22 November 2022 in *X*, must be taken into account in determining whether a return decision may be issued and which the Member States must take into consideration when implementing the Returns Directive under Article 5 thereof, and whether it respects the principle of proportionality and does not affect the applicant's fundamental rights. Unlike in the judgment in *X*, private life in the country of destination is not at issue in this case, but the referring court is uncertain whether the circumstances in which the third-country national finds himself in the Member State where he is staying must be regarded as private life capable of precluding the issue of a return decision. In the view of the referring court, human dignity is an unconditional fundamental right and the right to basic services cannot therefore depend on the legal nature of the stay. It wishes to know from the Court of Justice whether this interpretation is correct. If so, Article 10 of the 2000 Law on foreign nationals is incompatible with EU law and must be disapplied.
- 23 If the Court of Justice does not already consider legislation linking the right to basic services to lawful residence per se to be incompatible with EU law, the referring court wishes to ascertain whether the deprivation of basic services must be classified as private life for the purposes Article 5 of the Return Directive and must therefore be taken into account in determining whether a return decision can be issued or maintained.
- 24 The referring court notes that between 23 000 and 58 000 'undocumented third-country nationals' are staying illegally in the Netherlands. The defendant generally has little or no ability to remove third-country nationals who do not have valid identity documents and who are not entitled to basic services under national

law. The answer to the second question may therefore have consequences for that large group.

- 25 Since the living conditions which will arise are already foreseeable at the time it is possible to establish that removal is excluded, the answer to the question whether those circumstances should be taken into account in determining whether the return decision could be maintained also determines the answer to the question whether the detention measure should have been lifted earlier.
- 26 Since there is no *acte clair* or *acte éclairé* in respect of any of the questions referred, the Rechtbank Limburg considers it necessary to refer the matter to the Court of Justice for a preliminary ruling.

WORKING DOCUMENT