Case C-352/23 [Changu] [1]

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

7 June 2023

Referring court:

Administrativen sad Sofia-grad (Bulgaria)

Date of the decision to refer:

29 May 2023

Applicant:

LF

Defendant:

Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite

Subject matter of the main proceedings

The main proceedings were instituted by way of an action brought by a third-country national against the decision rejecting his application for international protection and refusing to grant him refugee status and humanitarian status (subsidiary protection).

Subject matter and legal basis of the request

The request for a preliminary ruling is made under the second paragraph of Article 267 TFEU and concerns the interpretation of recital 15 and Article 2(h) and Article 3 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, of recital 12 and Article 14(2) of

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

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, and of Articles 1, 4 and 7 of the Charter of Fundamental Rights of the European Union ('the Charter'). The request for a preliminary ruling raises the question as to whether the Bulgarian legislation which provides for the possibility of granting humanitarian status (which is the equivalent in Bulgarian law of subsidiary protection within the meaning of Directive 2011/95) to a foreign national not in the case where he or she might be exposed to a real risk of suffering serious harm but in the case where 'other humanitarian grounds' are present is compatible with the abovementioned provisions. The referring court wishes to ascertain in particular whether the fact that the foreign national has been staying in Bulgaria for a considerable length of time, some 27 years, constitutes a 'humanitarian ground' justifying the grant of humanitarian status (subsidiary protection), given that he is staying illegally, that no identity documents have been issued to him, and that, for most of his stay, he has not been able to afford to meet his most basic needs – food, personal hygiene and accommodation. That raises the further question as to whether the inaction of the national authorities, in having failed during this long period of time to regularise the foreign national's status on Bulgarian territory in accordance with the applicable national law, infringes the abovementioned provisions of the Charter.

Questions referred for a preliminary ruling

1. Must recital 15, Article 2(h) and Article 3 of Directive 2011/95 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, be interpreted as allowing a Member State to introduce national legislation on the grant of international protection on the basis of compassionate or humanitarian grounds which bears no relation to the logic and spirit of Directive 2011/95 in accordance with recital 15 and Article 2(h) of Directive 2011/95 (another kind of protection), or must, in that case also, the possibility provided for in national law of granting protection on 'humanitarian grounds' be compatible with the standards of international protection under Article 3 of Directive 2011/95?

2. Do recital 12 and Article 14(2) of Directive 2008/[1]15 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, in conjunction with Articles 1 and 4 of the Charter, categorically compel a Member State to provide third-country nationals with written confirmation attesting that they are staying illegally but cannot yet be removed?

3. In the case of a national legal framework whose only provision on regularising the status of a third-country national on 'humanitarian grounds' is

contained in Article 9(8) of the Zakon za ubezhishteto i bezhantsite (Law on Asylum and Refugees; 'the ZUB'), is an interpretation of that national provision which bears no relation to the character and grounds of Directive 2011/95 compatible with recital 15 and Article 2(h) and Article 3 of Directive 2011/95?

4. Do Articles 1, 4 and 7 of the Charter require, for the purposes of the application of Directive 2011/95, an assessment of whether the fact that a third-country national has been staying in a Member State for a long time without a regularised status constitutes an independent reason for granting international protection on 'compelling humanitarian grounds'?

5. Does the positive obligation of a Member State to ensure compliance with Articles 1 and 4 of the Charter allow a broad interpretation of the national measure envisaged in Article 9(8) of the ZUB that goes beyond the logic and standards of international protection as provided for in Directive 2011/95, and does it call for an interpretation that is consistent exclusively with the observance of the absolute fundamental rights enshrined in Articles 1 and 4 of the Charter?

6. Is the fact of not granting the protection provided for in Article 9(8) of the ZUB to a third-country national in the applicant's situation capable of constituting a failure by the Member State to fulfil its obligations under Articles 1, 4 and 7 of the Charter?

Provisions of international law relied on

Convention relating to the Status of Refugees, adopted in Geneva on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons ('the Geneva Convention')

European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'): Article 1, Article 3 and Article 8(1)

Provisions of European Union law and case-law relied on

Charter of Fundamental Rights of the European Union: Articles 1, 4 and 7 and Article 19(2)

Directive 2011/95: recital 15, Article 2(h) and Article 3

Directive 2008/115: recital 12, Article 6(4) and Articles 8 and 14

The referring court cites the Court's case-law on the following: concept of 'compelling humanitarian grounds' – judgment of 18 December 2014, *M'Bodj* (C-542/13, EU:C:2014:2452, paragraphs 39 and 40); period for removal of an illegally staying third-country national – judgment of the Court of Justice of 20 October 2022, *Centre public d'action sociale de Liège (Withdrawal or suspension of a return decision)* (C-825/21, EU:C:2022:810, paragraph 50);

unlawfulness of the existence of an intermediate status of third-country nationals – judgment of 3 June 2021, *Westerwaldkreis* (C-546/19, EU:C:2021:432); indifference of the authorities of a Member State which puts the person concerned in a state of degradation incompatible with human dignity – judgment of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218, paragraph 92).

Provisions of national law relied on

Zakon za ubezhishteto i bezhantsite (Law on Asylum and Refugees; 'the ZUB'): Article 1, Article 8(1), Article 9(1) and (8), Article 29, Article 40(1) and (3), Articles 76a and 76c

Zakon za chuzhdentsite v Republika Bulgaria (Law on foreign nationals in the Republic of Bulgaria; 'the ZChRB'): Article 9e, Article 9h(1) and (4), Article 10(2), Article 14(1), Article 14(5)(1), Article 22(1), Articles 27 and 28, and Article 44b [(1)](16) of the Dopalnitelni razporedbi (Additional Provisions) to that Law

Pravilnik za prilozhenie na Zakona za chuzhdentsite v Republika Bulgaria (Rules on applying the ZChRB): Articles 3 and 11

Zakon za bulgarskite lichni dokumenti (Law on Bulgarian identity documents): Article 14(1), Article 55(1) and (3), Article 57

Succinct presentation of the facts and procedure in the main proceedings

1 The applicant, a Tanzanian national, left his country of origin illegally and entered Bulgaria in 1996. Since then, the applicant has made several attempts to have his status in Bulgaria regularised, by submitting a total of 11 successive applications for international protection in 1997, 2004, 2006, 2007, 2008, 2009 (two applications for protection), 2012, 2014, 2017 and 2021. His applications were rejected mainly on the ground that there were no grounds for granting him refugee status or humanitarian status (subsidiary protection).

2 As the applicant does not have any identity documents, he can neither take up employment nor pay for food and accommodation. He has been the subject of a number of final convictions for the acquisition and possession of narcotics. The applicant submits that he has been arrested several times by the police and spent three years in prison as well as a period of time in a closed reception centre run by the Darzhavna agentsia za bezhantsite (State Agency for Refugees; 'the DAB'). A number of coercive administrative measures as provided for in the ZChRB were imposed on the applicant with a view to his removal and return to his country of origin. None of those measures has been enforced.

3 The proceedings before the referring court were initiated in connection with the eleventh application for international protection, which the applicant filed on

13 April 2021. In that application, he submitted that there is no Tanzanian embassy in Bulgaria, that, in order to obtain a Tanzanian passport, he has to go to that country's nearest embassy, which is in Berlin, that he cannot afford to travel there, and that, because of his worsened state of health, such a long journey would endanger his life. The applicant stated that he cannot undergo treatment in his country of origin because he has no access to medical care there. He further submitted that he has spent half of his conscious life in Bulgaria, that he has integrated into Bulgarian society and that he is proficient in the Bulgarian language.

4 By decision of 29 April 2021, the competent authority of the DAB found the application to be inadmissible. It held that the provisions of the ZUB are not applicable in the present case and that the applicant must be returned to his country of origin by the Direktsia 'Migratsia' kam Ministerstvo na vatreshnite raboti ('Migration' Directorate of the Ministry of the Interior) or by the International Organisation for Migration, in accordance with the procedure provided for in the ZChRB.

5 That decision was annulled by judgment of the Administrativen sad Sofia-grad (Administrative Court, Sofia City) of 25 November 2021. In that judgment, it was held that the principle of non-refoulement was applicable to the applicant, in the light of his assertion that his worsened state of health meant that long journeys would directly endanger his life. That court ruled that the non-observance of that principle constituted a ground for granting humanitarian status, which also rendered the application for protection admissible.

6 In the administrative proceedings conducted as a result, the defendant, the Zamestnik-predsedatel na DAB (Deputy Chairperson of the DAB), on 10 August 2022, adopted the decision being challenged before the referring court, by which the defendant refused to grant the applicant refugee or humanitarian status on the ground that he had failed to prove the existence of a well-founded fear of persecution or a real risk of suffering serious harm. The defendant found that the personal grounds cited, in connection with the applicant's integration into Bulgarian society, did not constitute a ground for granting humanitarian status and that the alleged integration was disproved by the final convictions against the applicant.

The essential arguments of the parties in the main proceedings

7 The applicant claims that the ZChRB does not apply to him and that the only possible means of having his status regularised is that provided for in Article 9(8) of the ZUB, according to which 'humanitarian status may also be granted on other humanitarian grounds'. He submits that he has lived in Bulgaria for almost 27 years and is entitled to respect for his private life, his human dignity and the fundamental rights enshrined in the Charter. The applicant asserts that the legal

vacuum in which he finds himself constitutes inhuman and degrading treatment in breach of Article 3 of the ECHR.

8 The defendant contends that the action should be dismissed, since the applicant has failed to establish the presence either of circumstances justifying the grant of refugee status under Article 8(1) of the ZUB – that is to say, there is no 'well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group' – or of grounds for granting humanitarian status (subsidiary protection) under Article 9(1) of the ZUB – that is to say, no indications of a 'real risk of suffering serious harm such as the death penalty or execution, or torture, inhuman or degrading treatment or punishment, or a serious threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'. In the defendant's view, the applicant's legal position should be regularised in accordance with the ZChRB.

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

9 The referring court proceeds on the premiss that it is indeed the case that the facts of the proceedings do not indicate the presence in relation to the applicant of either a 'well-founded fear of persecution' or a 'real risk of suffering serious harm'. The reason for that, according to the referring court, is that the question of the measures to be taken by the competent national authorities in respect of the applicant arises not in the context of his persecution or a risk of his suffering serious harm in his country of origin if he were to be returned to that country, but in connection with the applicant's particular situation in Bulgaria.

10 As regards the possibility of a residence permit being granted on humanitarian grounds, the referring court states that national law, in particular the ZChRB, does not provide for such a possibility, unlike the possibility provided for in Article 6(4) of Directive 2008/115, according to which 'Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory'. The referring court states, however, that EU law does not impose any obligation on the Member States to grant a right of residence to an illegally staying third-country national on humanitarian grounds alone. The introduction of such a possibility is, rather, a matter for their discretion.

11 After having spent a considerable time submitting applications for international protection with a view to being granted asylum or humanitarian status (subsidiary protection), in the proceedings before the referring court, the applicant is seeking the grant of humanitarian status under Article 9(8) of the ZUB on humanitarian grounds connected with the fact that he has been staying in Bulgaria for a long time, without being in possession of any identity documents, and, for much of that time, without being able to afford food and accommodation. The referring court is

of the view that, in the light of the situation in which the applicant finds himself, the only way in which his status can be regularised under Bulgarian law is precisely by applying Article 9(8) of the ZUB, granting him humanitarian status (subsidiary protection) on humanitarian grounds.

12 However, the referring court is unsure whether Article 9(8) of the ZUB is consistent with Directive 2011/95, in particular recital 15, Article 2(h) and Article 3 thereof. According to recital 15 of that directive, 'those third-country nationals or stateless persons who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds fall outside the scope of this Directive'. In the view of the referring court, it follows from the definition of the concept of 'application for international protection' in Article 2(h) of that directive that EU law allows for the possibility that a third-country national 'explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately'.

13 At the same time, Article 3 of Directive 2011/95 provides that 'Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive'.

14 In the view of the referring court, the foregoing raises the question of whether the abovementioned provisions of Directive 2011/95 allow national legislation which provides for the possibility of granting international protection on the basis of an assessment on 'compassionate or humanitarian grounds' (recital 15 of the abovementioned directive) rather than on the grounds referred to in that directive, or, conversely, whether the grant of such protection much be compatible with Directive 2011/95 pursuant to Article 3 thereof.

15 The referring court notes that, in accordance with the case-law of the Varhoven administrativen sad (Supreme Administrative Court; 'the VAS'), the concept of 'other humanitarian grounds' provided for in Article 9(8) of the ZUB concerns cases which differ from those referred to in paragraph 1 of that article and which establish an equally high real risk that a foreign national will suffer serious harm to his or her person if he or she is returned to his or her country of origin.

16 In its case-law, the VAS proceeds on the premiss that Article 9(8) grants special protection applicable only in exceptional cases which relate to the situation of the foreign national in his or her country of origin and do not include any economic, social or family related grounds that are exclusively dependent on the wishes of the person seeking protection. In a number of decisions, the VAS has upheld the grant of humanitarian status under Article 9(8) in cases in which that provision was applied on special grounds such as, for example, to safeguard the best interests of minor children, to preserve the family unit, to protect against domestic

violence, to respond to a humanitarian crisis in the country of origin in question, and so on.

17 According to national case-law, the excessive length of the foreign national's illegal stay in Bulgaria in a situation such as that in the main proceedings does not constitute a ground for the grant of refugee status and humanitarian status (subsidiary protection).

18 In the view of the referring court, however, the question arises as to whether the abovementioned long duration of the foreign national's stay without identity documents and with no means of paying for food and accommodation constitutes an independent reason for granting international protection on 'compelling humanitarian grounds' within the meaning of paragraph 39 of the judgment of the Court of Justice of 18 December 2014, *M'Bodj* (C-542/13, EU:C:2014:2452). In that paragraph 39, the Court held that, 'according to the case-law of the European Court of Human Rights[,] …, a decision to remove a foreign national suffering from a serious physical or mental illness to a country where the facilities for the treatment of the illness are inferior to those available in that State may raise an issue under Article 3 [of the] ECHR in very exceptional cases, where the humanitarian grounds against removal are compelling (see, inter alia, European Court of Human Rights, judgment in *N. v. the United Kingdom* [GC], no. 26565/05, § 42, ECHR 2008)'. In paragraph 40 of that judgment, however, the Court found that the fact that, in such a situation, the foreign national may not be removed to a country in which appropriate treatment is not available 'does not mean that that person should be granted leave to reside in a Member State by way of subsidiary protection'.

19 The referring court considers that the applicant's worsened state of health should be examined in the context of the principle of non-refoulement enshrined in Article 33 of the Geneva Convention and in Article 19(2) of the Charter, and that any failure to observe that principle may raise questions concerning the application of Article 3 of the ECHR and Article 4 of the Charter, which prohibit inhuman and degrading treatment.

20 The referring court cites paragraph 57 of the judgment of 3 June 2021, *Westerwaldkreis* (C-546/19, EU:C:2021:432), in which the Court of Justice held that 'it would be contrary both to the purpose of Directive 2008/115 … and to the wording of Article 6 of that directive to tolerate the existence of an intermediate status of third-country nationals who are in the territory of a Member State without a right to stay or a residence permit …, but in respect of whom no return decision subsists'.

21 The referring court further cites paragraph 50 of the judgment of the Court of Justice of 20 October 2022, *Centre public d'action sociale de Liège (Withdrawal or suspension of a return decision)* (C-825/21, EU:C:2022:810), according to which 'the obligation imposed on the Member States by Article 8 [of Directive 2008/115], in the cases referred to in Article 8(1), to carry out the removal [of an

illegally staying third-country national], must be fulfilled as soon as possible (see, to that effect, judgment of 6 December 2011, *Achughbabian*, C-329/11, EU:C:2011:807, paragraph 45)'. That requirement was not met in the case of the applicant, who has been resident in Bulgaria since his entry into Bulgarian territory in 1996 to date, even though several coercive administrative measures aimed at returning him to his country of origin have been imposed on him.

22 The referring court also cites the judgment of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218), in paragraph 92 of which the Court of Justice refers to the case in which 'the indifference of the authorities of a Member State would result in a person wholly dependent on State support finding himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity (see, to that effect, ECtHR, 21 January 2011, *M.S.S. v. Belgium and Greece*, CE:ECHR:2011:0121JUD003069609, paragraphs 252 to 263)'.

23 That, in the referring court's view, raises the question as to whether the long-standing inaction or indifference of the national authorities when it comes to regularising the status of a third-country national in the territory of Bulgaria in accordance with the applicable national law, constitutes an infringement of Articles 1, 4 and 7 of the Charter and Articles 3 and 8 of the ECHR.

24 In the view of the referring court, the situation in which the applicant finds himself constitutes a failure to observe his fundamental rights under Articles 1, 4 and 7 of the Charter, since he is exposed to inhuman and degrading treatment, his human dignity is violated and his private life is not respected. In a case such as that in the main proceedings, the abovementioned provisions do not allow an illegally staying third-country national whose removal has in fact been deferred in order to enable his action to be examined to be deprived of the possibility of meeting his most basic needs, namely food, personal hygiene and accommodation.

25 The referring court therefore states that Article 9(8) of the ZUB should be interpreted broadly in this case by being applied not in the light of the grounds for granting subsidiary protection provided for in Directive 2011/95, but with regard for the observance of the fundamental rights enshrined in the Charter.

26 The referring court states that national law does not contain any provision which confers on an illegally staying third-country national the right to be provided with a written confirmation of his or her situation, as provided for in Article 14(2) in conjunction with recital 12 of Directive 2008/115. In the case under examination in the main proceedings, the applicant's non-regularised status is 'tolerated' by the State, inasmuch as the State has allowed his long illegal stay in its territory, without issuing a written confirmation of his situation in accordance with the abovementioned provisions of that directive.