Case C-288/23 [El Baheer] [1]

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

Date lodged:

3 May 2023

Referring court:

Verwaltungsgericht Stuttgart (Germany)

Date of the decision to refer:

2 May 2023

Applicant:

HE

Defendant:

Federal Republic of Germany

Subject matter of the case in the main proceedings

Action for granting of refugee status or, in the alternative, for granting of subsidiary protection status or, in the alternative, for establishment of the existence of a national prohibition of removal

Subject matter and legal basis of the request

Interpretation of the second sentence of Article 3(1) of Regulation No 604/2013, of the second sentence of Article 4(1) and Article 13 of Directive 2011/95, of Article 10(2) and (3) and Article 33(1) and (2)(a) of Directive 2013/32 and of Article 6(2) of Directive 2008/115, the legal basis being Article 267 TFEU

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

Questions referred for a preliminary ruling

1. Where a Member State is not permitted to exercise the option provided by Article 33(2)(a) of Directive 2013/32/EU to reject as inadmissible an application for international protection based on the granting of refugee status in another Member State, because the conditions of life in that Member State would expose the applicant to a serious risk of subjection to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights, are the second sentence of Article 3(1) of Regulation (EU) No 604/2013, the second sentence of Article 4(1) and Article 13 of Directive 2011/95/EU and Article 10(2) and (3) and Article 33(1) and (2)(a) of Directive 2013/32/EU, to be interpreted as meaning that the granting of refugee status which has previously taken place prevents a Member State from undertaking an open-ended examination of the application for international protection made to it, obliging it to grant refugee status to the applicant without examining the substantive conditions for such protection?

2. If the answer to question 1 is that the Member State is not bound by the granting of refugee status in another Member State and is obliged to undertake an open-ended examination of the application for international protection made to it:

Do conditions in the recognising Member State which expose the applicant to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights preclude a requirement under the first sentence of Article 6(2) of Directive 2008/115/EC for the applicant to go immediately to the territory of that Member State and so enable the examining Member State to issue a decision on the applicant's return to his or her country of origin under the second sentence of Article 6(2) of Directive 2008/115/EC, read in conjunction with Article 6(1) thereof, without previously imposing the requirement specified in the first sentence of Article 6(2) of Directive 2008/115/EC?

In that context, must the conditions in the recognising Member State be considered in isolation, in other words must the same criterion be applied that Article 33(2)(a) of Directive 2013/32/EU applies to a decision, or may the possibility be envisaged that, as a result of the Member State's open-ended examination, the applicant does not obtain protection status in that Member State and therefore has the choice to return to the other Member State which granted him or her refugee status or to his or her country of origin?

3. If the answer to question 2 is that, pursuant to the first sentence of Article 6(2) of Directive 2008/115/EC, the applicant must be required to go immediately to the territory of the recognising Member State:

Is it possible for the decision taken under the first sentence of Article 6(2) of Directive 2008/115/EC requiring the applicant to go immediately to the territory of the recognising Member State and the decision requiring the applicant's return to his or her country of origin under the second sentence of Article 6(2) of

Directive 2008/115/EC, read in conjunction with Article 6(1) thereof, to be issued in a single administrative decision?

4. If the answer to question 2 is that the applicant is not required to go immediately to the territory of the recognising Member State pursuant to the first sentence of Article 6(2) of Directive 2008/115/EC:

Does the principle of non-refoulement (Articles 18 and 19(2) of the Charter of Fundamental Rights, Article 5 of Directive 2008/115/EC and Article 21(1) of Directive 2011/95/EU) preclude a decision to return the applicant to his country of origin pursuant to the second sentence of Article 6(2) of Directive 2008/115/EC, read in conjunction with Article 6(1) thereof, if the applicant has been granted refugee status in another Member State but the Member State in which he or she is currently present and has lodged an asylum application concludes, in an open-ended examination, that the applicant cannot be granted any protection status?

5. If the answer to question 4 is that the principle of non-refoulement precludes a return decision:

Must the principle of non-refoulement (Articles 18 and 19(2) of the Charter of Fundamental Rights, Article 5 of Directive 2008/115/EC and Article 21(1) of Directive 2011/95/EU) be examined when the return decision is being issued pursuant to the second sentence of Article 6(2) of Directive 2008/115/EC, read in conjunction with Article 6(1) thereof, with the consequence that no return decision can be issued, or is it mandatory to issue a return decision pursuant to the second sentence of Article 6(2) of Directive 2008/115/EC, read in conjunction with Article 6(1) thereof, and then postpone the removal pursuant to Article 9(1)(a) of Directive 2008/115/EC?

Provisions of EU law cited

Charter of Fundamental Rights of the European Union ('the Charter'), Articles 4, 18 and 19(2)

Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person ('Regulation No 604/2013'), Article 3

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 ('Directive 2008/115'), Articles 5, 6(2) and 9(1)

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 ('Directive 2011/95'), Articles 4, 13 and 21

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection ('Directive 2013/32'), Articles 10 and 33(2)

Provisions of national law cited

Grundgesetz (Basic Law), Article 16a

Asylgesetz (Law on asylum; 'the AsylG'): Paragraph 1 ('Scope of application'), subparagraph (1), point 2, Paragraph 3 ('Grant of refugee status'), subparagraphs (1), (3) and (4), Paragraph 4 ('Subsidiary protection'), subparagraph 1, Paragraph 29 ('Inadmissible applications'), subparagraph (1), point 2, and Paragraph 34 ('Removal warning'), first sentence of subparagraph (1)

Aufenthaltsgesetz (Law on residence of foreign nationals; 'the AufenthG'): Paragraph 50 ('Obligation to leave the territory'), subparagraph (3), Paragraph 59 ('Removal warning'), first sentence of subparagraph (1), Paragraph 60 ('Prohibition of removal'), subparagraphs (1), (5) and (7), and Paragraph 60a ('Temporary stay of removal (discretionary leave to remain)'), first sentence of subparagraph 2

Succinct presentation of the facts and procedure

1 The applicant, whose asylum application was rejected in its entirety by the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees – 'the Federal Office') seeks, through his action, to be granted refugee status or, in the alternative, to be granted subsidiary protection status or, in the alternative, to establish the existence of a national prohibition of removal.

2 The applicant was born in 1996 and is a stateless Palestinian. On 12 August 2020 he was granted refugee status in Greece. He has a Greek refugee residence permit, which is valid until 11 August 2023. He cannot return to Greece because, according to the internal finding of the Federal Office, he would face a serious risk there of inhuman or degrading treatment within the meaning of Article 4 of the Charter.

3 In a decision dated 30 November 2022, the Federal Office did not grant refugee status, rejected the application for asylum qualification, did not grant subsidiary protection status and found that there were no prohibitions of removal under Paragraph 60(5) and the first sentence of Paragraph 60(7) of the Law on residence. It required the applicant to leave the Federal Republic of Germany within 30 days of notification of the decision, the period for departure ending, if an appeal was

lodged, 30 days after the final conclusion of the asylum procedure. It threatened him, in the event of failure to comply with the time limit for departure, with removal to the autonomous Palestinian areas, the Gaza Strip or another State which he is authorised to enter or which is under an obligation to readmit him.

4 In the action of 22 December 2022 against that decision, the applicant seeks an order requiring the defendant to grant him refugee status on the ground that the defendant is bound by the decision to grant refugee status which has previously been issued in Greece. In the alternative, he seeks an order requiring the defendant to grant him subsidiary protection status or, in the alternative, establishing the existence of a national prohibition of removal under Paragraph 60(5) and the first sentence of Paragraph 60(7) of the Law on residence.

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

5 The outcome of the dispute before the referring court depends on the answer to the questions referred for a preliminary ruling.

Question 1

6 Question 1 concerns the interpretation of the second sentence of Article 3(1) of Regulation No 604/2013, the second sentence of Article 4(1) and Article 13 of Directive 2011/95 and Article 10(2) and (3) and Article 33(1) and (2)(a) of Directive 2013/32. The referring court points out that this question is already the subject of proceedings which are pending before the Court (Case C-735/22). As reasoning for the first question referred, the referring court refers in full, in its explanations relating to question 1, to the grounds for the order for reference of the Bundesverwaltungsgericht (Federal Administrative Court, Germany) in Case C-753/22.

Questions 2 to 5

7 By means of questions 2 to 5, the referring court seeks further clarification regarding the return decision in the event that the Court answers the first question referred by stating that the Member State is not bound by the fact that refugee status has previously been granted in another Member State and that the Member State is to undertake an open-ended examination of the application for international protection submitted to it.

8 According to the decision issued by the Federal Office, the applicant not only has no entitlement to be granted refugee status but also has no asylum qualification and no entitlement to be granted subsidiary protection status or to have it established that a national prohibition of removal exists.

9 One reason why the applicant is not entitled to be granted subsidiary protection status is that, according to his submission to the Federal Office, he is not

threatened with the death penalty or execution or with torture or inhuman or degrading treatment or punishment. Nor does he risk a serious and individual threat to his life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

10 Nor is the applicant entitled on humanitarian grounds to have it established that a prohibition of removal exists under Paragraph 60(5) or the first sentence of Paragraph 60(7) of the Law on residence. The referring court assumes that, despite the generally poor living conditions in the Gaza Strip, the applicant will be able to earn a subsistence income if he returns there.

11 Since the applicant therefore has no entitlement to protection status and is not in possession of any other residence authorisation, a deportation warning, specifying a reasonable time limit for voluntary departure, must be issued pursuant to Paragraph 34 of the Law on asylum, read in conjunction with the first sentence of Paragraph 59(1) of the Law on residence. This corresponds to a return decision within the meaning of Article 3(4) of Directive 2008/115.

12 The Federal Office, however, did not require the applicant to go immediately to Greece pursuant to the second sentence of Paragraph 50(3) of the Law on residence, which transposes the provision set out in the first sentence of Article 6(2) of Directive 2008/115. As regards the legality of the warning notice regarding removal to the applicant's country of origin, the question therefore arises as to whether it would have been necessary beforehand to require the applicant to go to Greece.

13 In connection with that return decision, which must be issued under national law, questions 2 to 5 arise, concerning the compatibility of a decision ordering the applicant's return to his country of origin with the requirements of the first sentence of Article 6(2) of Directive 2008/115 and the second sentence of Article 6(2) of Directive 2008/115, read in conjunction with Article 6(1) thereof, and with the principle of non-refoulement.

Question 2

14 Question 2 asks whether, before the return decision is issued, a requirement for the applicant to go immediately to the territory of the other Member State granting him or her refugee status must be set in accordance with the first sentence of Article 6(2) of Directive 2008/115 or whether that requirement may be waived if, as in the present case, conditions exist in the recognising Member State which would expose the applicant to inhuman or degrading treatment within the meaning of Article 4 of the Charter.

15 The first sentence of Article 6(2) of Directive 2008/115 provides that no return decision should be issued against a third-country national staying illegally on the territory of a Member State if he or she has an authorisation offering a right to stay in another Member State. In such cases, the third-country national should first be

required to return immediately to the Member State where he or she has an authorisation offering a right to stay. Only if the person concerned does not comply with this requirement or if there is a threat to public order or national security is a return decision to be issued (see point 5.4 of Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks).

16 As far as is apparent to the referring court, a requirement for the third-country national to depart immediately for reasons of public policy or national security (second sentence, second alternative, of Article 6(2) of Directive 2008/115/EC) is the only exception provided for by that directive to the stipulation set out in the first sentence of Article 6(2) that the third-country national be required to go immediately to the territory of the Member State which granted him or her refugee status.

17 However, the question arises in the present case whether there must not be another exception to the requirement to go to the territory of the other Member State. In a situation such as that in the present case, in which no decision under Article 33(2)(a) of Directive 2013/32 can be issued on the ground that adverse conditions prevailing in the Member State which granted refugee status, where the applicant would be exposed to inhuman or degrading treatment within the meaning of Article 4 of the Charter, would make it irrational to require the applicant beforehand to go to that very Member State (on the criterion for assessing whether conditions prevail which would expose the applicant to inhuman or degrading treatment, see, for example, the judgment of the Court of Justice of the European Union ('the Court of Justice') of 19 March 2019 in *Ibrahim and Others*, C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219).

18 The position would be different if the assessment were not only to focus on the conditions in the recognising Member State (in this case Greece) in isolation but also on the fact that the applicant did not obtain protection status after the open-ended examination by the assessing Member State (in this case Germany), for if the Member State is not bound by the granting of refugee status by the other Member State (which is the subject of question 1) and concludes in its own examination of the applicant's asylum application that there is no reason why the applicant cannot return to his or her country of origin, then the applicant could be free to choose whether he or she wished to return to the other Member State which granted him refugee status or to his country of origin.

Question 3

19 If the answer to question 2 is that the applicant must be required to go immediately to the territory of the recognising Member State pursuant to the first sentence of Article 6(2) of Directive 2008/115, the question arises whether it is possible to issue the decision imposing the requirement stipulated in that first

sentence of Article 6(2) and the return decision pursuant to the second sentence of Article 6(2) of Directive 2008/115, read in conjunction with Article 6(1) thereof, in a single administrative decision or whether the decisions must be issued at separate times (question 3).

20 This question requires clarification, because, according to the referring court, it is not clear from the second sentence of Paragraph 50(3) of the Law on residence, which is intended to transpose the first sentence of Article 6(2) of Directive 2008/115 into national law, whether a temporal separation is necessary between the requirement to go to the other Member State and the warning notice regarding removal to the country of origin.

21 The clarifications contained in point 5.4 of Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks suggest that a period of time must elapse between the decisions in question.

Question 4

22 If the answer to the second question referred is that it is not necessary to require the applicant to go immediately to the territory of the recognising Member State in accordance with the first sentence of Article 6(2) of Directive 2008/115, the question arises whether a decision may be issued on the basis of the second sentence of Article 6(2) of Directive 2008/115, read in conjunction with Article 6(1) thereof, ordering the applicant's return to his or her country of origin, or whether that is precluded by the principle of non-refoulement (Articles 18 and 19(2) of the Charter, Article 5 of Directive 2008/115 and Article 21(2) of Directive 2011/95) because another Member State has granted the applicant refugee status (question 4).

23 Since this question only arises if the answer to question 1 is that the recognition decision of the other Member State has no binding effect, that recognition decision of the other Member State would at least have a 'limited binding effect' if question 4 were answered to the effect that the principle of non-refoulement precludes a return decision.

24 In a case such as the present one, in which the Member State concludes in its assessment that the applicant should not be granted protection status but that the Member State cannot issue a return decision on account of the principle of non-refoulement, the applicant could not return to the other Member State because of the conditions prevailing there, nor could he or she obtain an authorisation offering a right to stay in the Member State in which he or she is currently present. However, according to national law, he or she could be granted what is known as a 'Duldung' (discretionary leave to remain), that is to say a suspension of removal, under the first sentence of Paragraph 60a(2) of the Law on residence.

25 Tolerating the existence of such an 'intermediate status' for third-country nationals who are in the territory of a Member State without a right to stay or a residence permit but against whom a valid return decision cannot be issued is contrary both to the purpose of Directive 2008/115 and to the wording of Article 6 thereof (see judgment of the Court of Justice of 3 June 2021 in *Westerwaldkreis*, C-546/19, EU:C:2021:432, paragraph 57).

26 Article 6(1) of Directive 2008/115 requires Member States to issue a return decision to any third-country national staying illegally on their territory, unless EU law provides for an express exception. Member States are not permitted to tolerate the presence of illegally staying third-country nationals on their territory without either initiating a return procedure or issuing an authorisation offering a right to stay. Directive 2008/115 cannot be interpreted as requiring a Member State to grant a residence permit to a third-country national staying illegally on its territory if neither a return decision nor a measure terminating that person's stay may be taken. As regards, in particular, Article 6(4) of Directive 2008/115, that provision does no more than permit Member States to grant, for compassionate or humanitarian reasons, a right of residence, on the basis of their national law, and not EU law, to third-country nationals who are staying illegally on their territory (see judgment of the Court of Justice of 22 November 2022 in *Staatssecretaris van Justitie en Veiligheid* (*Removal – Medicinal cannabis)*, C-69/21, EU:C:2022:913, paragraphs 85-86).

Question 5

27 That is the context in which question 5 arises: if the answer to question 4 is that a decision requiring the applicant's return to his country of origin is precluded by the principle of non-refoulement, the question arises whether this must be examined when the return decision is being issued pursuant to the second sentence of Article 6(2) of Directive 2008/115, read in conjunction with Article 6(1) thereof – with the consequence that no return decision can be issued – or whether it is mandatory to issue a return decision under the second sentence of Article 6(2) of that directive, read in conjunction with Article 6(1) thereof, and then to postpone the removal on the basis of Article 9(1)(a) of that directive.

28 According to the referring court, the case-law of the Court of Justice on this matter is contradictory.

29 First, the Court of Justice has ruled that, where there are substantial grounds for believing that a third-country national staying illegally on the territory of a Member State would be exposed, if he or she were returned to a third country, to a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter, that national cannot be the subject of a return decision to that country while such a risk persists (see judgment of the Court of Justice of 22 November 2022 in *Staatssecretaris van Justitie en Veiligheid* (*Removal – Medicinal cannabis*), C-69/21, EU:C:2022:913, paragraph 58; also to that effect, judgment of 24 February 2021, *M. and Others* (*Transfer to another Member State*), C-673/19,

EU:C:2021:127, paragraphs 42 and 45, as well as order of 15 February 2023, *GS*, C-484/22, EU:C:2023:122, paragraph 28).

30 Secondly, the Court of Justice has ruled that it would be contrary both to the purpose of Directive 2008/115, as set out in Article 1 thereof, 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 and, where applicable, are the subject of an entry ban, but in respect of whom no return decision subsists. Those considerations remain valid also as regards third-country nationals staying illegally on the territory of a Member State who cannot be removed since the principle of non-refoulement precludes this. According to that ruling, it is apparent from Article 9(1)(a) of Directive 2008/115 that that circumstance does not justify the failure to adopt a return decision in respect of a third-country national in such a situation, but only the postponement of his or her removal, pursuant to that decision (see judgment of 3 June 2021, *Westerwaldkreis*, C-546/19, EU:C:2021:432, paragraphs 57-59).

31 The fact that it follows neither from the wording of Article 5 of Directive 2008/115 nor from its place within the scheme of that directive that the principle of non-refoulement can only be considered in the context of the return decision is an affirmation of the said ruling. Article 5 merely requires Member States to respect the principle of non-refoulement when implementing that directive. Under Article 19(2) of the Charter, no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. Adherence to that principle, however, may be achieved not only by the Member State not issuing a return decision, but also by its postponing enforcement of the return decision.

32 The possibility of postponing removal provided for in Article 9(1)(a) of Directive 2008/115 also covers situations which are not merely temporary. Neither the wording nor the scheme nor the legislative history of that directive indicates that Member States are restricted to temporary prohibitions of removal. Whereas Article 9(2) of Directive 2008/115 provides that Member States may postpone removal for an appropriate period, taking into account the specific circumstances of the individual case, and in particular the circumstances referred to in paragraph 2(a) and (b) of that article, Article 9(1)(a) of that directive, significantly, contains no such temporal restriction to an ‘appropriate period’.

Request for expedited procedure

33 The referring court is aware that the conditions for an expedited procedure under Article 105 of the Rules of Procedure of the Court of Justice are not met. In view of the large number of refugees residing in Germany who have lodged a new asylum application in that Member State, although they were previously granted international protection in another Member State, and who cannot return to that

other Member State, however, rapid clarification does seem desirable. The referring court therefore requests an expedited procedural treatment.