

Case C-244/24 [Kaduna]ⁱ

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:

4 April 2024

Referring court:

Rechtbank Den Haag, zittingsplaats Amsterdam (Netherlands)

Date of the decision to refer:

29 March 2024

Appellant:

P

Respondent:

Staatssecretaris van Justitie en Veiligheid

Subject matter of the main proceedings

Appeal against a return decision concerning a Nigerian national with a temporary residence permit in Ukraine who fled to the Netherlands when war broke out in Ukraine.

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of Directive 2008/115/EC (Return Directive) and Decisions 2022/382 and 2023/2409 implementing Directive 2001/55/EC (Temporary Protection Directive) to clarify whether the staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security; ‘the State Secretary’) could take a return decision against a foreign national as early as 7 February 2024 and whether the foreign national’s temporary protection was terminated on 4 March 2024.

ⁱ This is a fictitious name, which does not correspond to the actual name of any party to these proceedings.

Questions referred for a preliminary ruling

1. Is Article 6 of the Return Directive to be interpreted as precluding the issuing of a return decision on a date when a foreign national is still lawfully resident on the territory of a Member State?
2. Does it make any difference to the answer to the foregoing question if the return decision contains a date on which the lawful residence ends, where that date is in the near future and, moreover, where the legal consequences of the return decision do not take effect until that later date?
3. Is Article 1 of the Extension Decision to be interpreted as meaning that this extension also covers a group of third-country nationals who have already been brought within the scope of the Temporary Protection Directive by a Member State via the optional provision of Article 2(3) of the Implementing Decision, even though the Member State has chosen at a later point in time to no longer grant temporary protection to that group of third-country nationals?

Provisions of EU law relied on

Treaty on the Functioning of the European Union: Article 2, 4 and 77.

Protocol 25 to the TFEU on the Exercise of Shared Competence.

Declaration 18 in relation to the delimitation of competences of the Declarations concerning provisions of the Treaties of 13 December 2007, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (Temporary Protection Directive): Articles 4, 5, 6 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 (Return Directive): Articles 2 and 6.

Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection (hereafter also: ‘the Implementing Decision’): recitals 1, 2, 7 and 10 and Articles 1 and 2.

Council Implementing Decision (EU) 2023/2409 of 19 October 2023 extending temporary protection as introduced by Implementing Decision (EU) 2022/382 (hereafter also: ‘the Extension Decision’): recital 7 and Article 1.

Court of Justice case-law relied on

Judgment of 6 October 1982, *Cilfit and Others*, 283/81, EU:C:1982:335.

Order of the President of the Court of 22 February 2008, *Kozłowski*, C-66/08, not published, EU:C:2008:116.

Judgment of 30 May 2013, *Arslan*, C-534/11, EU:C:2013:343.

Judgment of 10 September 2013, *G. and R.*, C-383/13 PPU, EU:C:2013:553.

Judgment of 11 December 2014, *Boudjlida*, C-249/13, EU:C:2014:2032.

Opinion of Advocate General Szpunar in *Germany v Council*, C-600/14, EU:C:2017:296.

Opinion of Advocate General Sharpston, Opinion Procedure 2/15 (*Free Trade Agreement with Singapore*), EU:C:2016:992.

Opinion of Advocate General Mengozzi in *Gnandi*, C-181/16, EU:C:2018:90.

Order of the President of the Court of 15 February 2017, *Jafari*, C-646/16, unpublished, EU:C:2017:138.

Order of the President of the Court of 15 February 2017, *Mengesteab*, C-670/16, unpublished, EU:C:2017:120.

Judgment of 19 June 2018, *Gnandi*, C-181/16, EU:C:2018:465.

Judgment of 14 January 2021, *TQ (Return of an unaccompanied minor)*, C-441/19, EU:C:2021:9.

Provisions of national law relied on

Vreemdelingenwet 2000 (Law on Foreign Nationals 2000; ‘the Vw’): Articles 8 and 62a.

Vreemdelingenbesluit 2000 (Decision on Foreign Nationals 2000): Article 3.1a.

Voorschrift Vreemdelingen 2000 (Regulations on Foreign Nationals 2000; ‘the VV’): Article 3.9a.

Succinct presentation of the facts and procedure in the main proceedings

- 1 The appellant was born in 1994 and is a Nigerian national. He had a temporary residence permit in Ukraine, valid until 31 January 2023. After Russia's invasion of Ukraine on 24 February 2022, he fled to the Netherlands.
- 2 Following the invasion, the Council stipulated in Article 2 of Implementing Decision 2022/382 of 4 March 2022 implementing Directive 2001/55/EC that Ukrainian nationals, stateless persons and nationals of countries other than Ukraine, who benefited from international protection or equivalent national protection in Ukraine before 24 February 2022, and stateless persons and nationals of third countries other than Ukraine with a valid permanent residence permit who are unable to return to their country of origin in safe and durable conditions, would be granted temporary protection in accordance with the Directive. The appellant does not fall within the categories of persons to be granted temporary protection under the Implementing Decision.
- 3 However, when transposing the Directive into Netherlands law, the Netherlands made use of the possibility offered by Article 7 of the Directive and Article 2(3) of the Implementing Decision to also apply the Implementing Decision to other persons, including stateless persons and nationals of third countries other than Ukraine, who were residing legally in Ukraine before 24 February 2022 and who cannot return to their country or region of origin in safe and durable conditions (safe country of origin test). The State Secretary explained in a letter to the Tweede Kamer (Second Chamber, House of Representatives) dated 30 March 2022, that he intended to apply the Directive generously and use this opportunity to extend temporary protection to third-country nationals who held a temporary residence permit in Ukraine on 23 February 2022 (also: 'the optional group') and to waive the safe country of origin test for that group.
- 4 In a subsequent letter to the Tweede Kamer dated 18 July 2022, the State Secretary announced that the further granting of temporary protection to the optional group would be terminated with effect from 19 July 2022. For members of that group who were already enjoying temporary protection at that time, temporary protection would be terminated on 4 March 2023. By letter to the Tweede Kamer dated 10 February 2023, the State Secretary extended the temporary protection for the optional group until 4 September 2023. The optional group was therefore limited to stateless persons or third-country nationals who had a valid temporary residence permit in Ukraine on 23 February 2022 and had registered in the Netherlands Personal Records Database before 19 July 2022.
- 5 On 17 August 2022, the State Secretary amended the VV to include a new provision, Article 3.9a. By this amendment, the State Secretary intended to incorporate the content of the letters to the Tweede Kamer referred to in paragraph 4 into these regulations.

- 6 The appellant registered in the Personal Records Database on 1 June 2022 and is therefore covered by the protection of the Temporary Protection Directive. In accordance with the letter to the Tweede Kamer of 30 March 2022, the State Secretary did not assess whether the appellant could safely and permanently return to Nigeria.
- 7 On 24 Augustus 2023 the State Secretary decided to terminate the appellant's temporary protection under the Temporary Protection Directive with effect from 4 September 2023.
- 8 By Implementing Decision (EU) 2023/2409 of 19 October 2023, the Council extended protection for the displaced persons concerned by a year to 4 March 2025.
- 9 The State Secretary withdrew his decision of 24 August 2023 after the Afdeling bestuursrechtspraak (Administrative Jurisdiction Division) of the Raad van State (Council of State) ('the Afdeling') ruled on 17 January 2024 in the appeal brought in a similar case (ECLI:NL:RVS:2024:32) that the State Secretary could not terminate the temporary protection of the optional group as of 4 September 2023. In that ruling, the Afdeling also considered that the temporary protection of the optional group would end by operation of law on 4 March 2024. The State Secretary informed the appellant of this by letter dated 24 January 2024.
- 10 By decision of 7 February 2024, the State Secretary subsequently imposed a return decision. In that decision, he referred to the Afdeling's judgment of 17 January 2024, from which it follows that the appellant's lawful residence ends by operation of law as of 4 March 2024. The appellant had to leave the territory of the European Union and was given four weeks to do so.
- 11 The appellant lodged an appeal against that return decision with the referring court.

The essential arguments of the parties in the main proceedings

- 12 The appellant has argued that the return decision is premature. Moreover, the return decision is unlawful because the temporary protection of third-country nationals such as the appellant continues in any event until 4 March 2025. The appellant derives his right of residence directly from the application of EU law. Since he already belonged to the group to whom the Temporary Protection Directive applied, he is also covered by the extension of temporary protection by the Extension Decision of 19 October 2023. In his view, the Afdeling's ruling of 17 January 2024 is based on an incorrect interpretation of the provisions of the Temporary Protection Directive. Because he still enjoys temporary protection, a return decision cannot be imposed.
- 13 The State Secretary argued before the referring court that the temporary protection ended by operation of law on 4 March 2024, as extensively reasoned in the

Afdeling's ruling. The appellant's arguments are broadly consistent with those made before the Afdeling.

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

Question 1 and 2: is the return decision premature?

- 14 The State Secretary made the decision on 7 February 2024, while at that time the appellant still had lawful residence under the Temporary Protection Directive. The Rechtbank (District Court) is of the view that the answer to the question of whether this rendered the decision premature, is not so obvious as to be beyond reasonable doubt.
- 15 Article 2(1) of the Return Directive provides that this Directive applies to third-country nationals staying illegally on the territory of a Member State. Article 6(1) of the Return Directive (transposed in the Netherlands in Article 62a(1) Vw) provides that a return decision will be issued to any third-country national staying illegally on such territory. Article 6(6) provides that the Directive does not prevent a decision on the ending of a legal stay and a return decision being adopted in Member States in a single decision or act. These articles seem to imply that illegal residence must be established no later than the time at which the return decision is issued. Against this background, it could be held that no return decision can be issued as long as there is no unlawful residence.
- 16 The Rechtbank finds support for this reading in paragraph 59 of the *Gnandi* judgment, which considered that a return decision can be issued immediately after a rejection (of an application for international protection) or together with it in a single administrative act. Advocate General Mengozzi takes the same view in his Opinion in this case. In point 49, he says in so many words that third-country nationals who are not illegally staying on the territory or who fall under one of the exceptions, are in principle excluded from the procedures of that Directive as long as the grounds for exclusion remain. The *Arslan* judgment, which the Advocate General cites several times, also seems to point in this direction. It can be inferred from paragraphs 48 and 49 of that judgment that the Return Directive does not apply to a third-country national as long as he or she is still lawfully resident on the territory of the Member State.
- 17 There are thus several indications that the State Secretary was not competent to make the return decision as early as 7 February 2024, because the appellant still had lawful residence at that time. This could therefore constitute a premature decision.
- 18 However, there were good reasons for issuing the appellant's return decision in this way. In the judgment of 17 January 2024, the Afdeling not only ruled that residence under the Temporary Protection Directive ended by operation of law as of 4 March 2024, but also considered that it was up to the State Secretary to

determine the form in which he would communicate this to the foreign nationals concerned. For legal protection purposes, the State Secretary then sent an information letter to the optional group and decided to issue the return decisions in two batches on 7 February and 23 February 2024. The foreign nationals would thus be informed earlier of the consequences of the ending of lawful residence and would have more time to file any legal appeals. Moreover, the fact that the return decision was issued a few weeks before the moment at which, according to the State Secretary, lawful residence was to end could, according to the Rechtbank, be expedient because the Member State must proceed to remove the foreign national as soon as possible, as follows from paragraphs 79 and 80 of the *TQ* judgment.

- 19 Moreover, it follows from the Return Decision itself that its consequences do not take effect until the moment when lawful residence ceases to exist. The Decision clearly states that, as from 5 March 2024, the appellant will no longer be lawfully residing in the Netherlands and that the departure notice period will start running on that date. From that point onwards, the Return Directive applies. On the other hand, any legal appeals would have to be lodged within four weeks of the date of the Decision and not only within four weeks of 4 March 2024.

Question 3: was the temporary protection terminated by operation of law on 4 March 2024?

- 20 According to the State Secretary, the temporary protection under the Temporary Protection Directive ended by operation of law on 4 March 2024. He refers in this regard to the Afdeling's ruling of 17 January 2024.
- 21 In that ruling, the Afdeling reasoned as follows. The Netherlands initially chose to apply the Temporary Protection Directive generously. For this reason, the Netherlands applied the optional provision of Article 2(3) of the Implementing Decision to grant temporary protection also to the optional group. According to the Afdeling, the Temporary Protection Directive fully applies to this group. For the duration of the protection, there should therefore be compliance with Article 4 of that Directive. According to the Afdeling, the duration of the temporary protection could not be arbitrarily terminated at any given moment by national law. The general scheme of Article 4 of the Directive means that the temporary protection of this group could not be terminated as of 4 September 2023. According to the Afdeling, the text of the first paragraph of this article does not provide any grounds for assuming that the temporary protection of the optional group could be assessed differently from that of other categories of displaced persons enjoying temporary protection. The Afdeling considers it decisive here that there is no separate assessment moment in the case of automatic extensions of protection under the Temporary Protection Directive.
- 22 According to the Afdeling, the situation is different in the case of the extension of the temporary protection from 4 March 2024 to 4 March 2025. According to the Afdeling, the first and second paragraphs of Article 4 address different situations.

The first paragraph provides for the initial duration and its automatic renewal. This situation is provided for in the Implementing Decision.

- 23 The second paragraph deals with a new situation, in which the Council, on a proposal from the Commission, reassesses whether there are still grounds to grant temporary protection. This was laid down for displaced persons from Ukraine in the Extension Decision. The Afdeling deduces from the Extension Decision that the extension only applies to other beneficiaries to the extent that Member States were still applying the optional provision at that time. That is not the case for the Netherlands: since 19 July 2022, the Netherlands no longer grants temporary protection under the optional provision to third-country nationals other than Ukrainians who had not yet registered in the Personal Records Database at that time. Temporary protection for the optional group therefore ends by operation of law on 4 March 2024. In this regard, the Afdeling refers to Article 1 of the Extension Decision, which stipulates that the temporary protection given to persons displaced from Ukraine referred to in Article 2 of the Implementing Decision is extended for a period of one year until 4 March 2025. Since this Extension Decision dates from after 19 July 2022, Article 1 of the Extension Decision and the extension until 4 March 2025 provided for therein do not apply to the optional group. The Afdeling finds support for this interpretation in the Commission’s proposal for an extension decision of 19 September 2023.¹ The explanatory memorandum to that proposal, in particular footnote 2, does not mention the optional provision of Article 2(3) of the Implementing Decision. This leads the Afdeling to infer that Article 2(3) of the Implementing Decision is relevant to the Extension Decision only to the extent that Member States were applying that provision at the time the Extension Decision was adopted by the Council.
- 24 The Rechtbank is of the view that there could be reasonable doubt as to whether the Afdeling proceeded on a correct interpretation of EU law in that regard.
- 25 As a matter of principle, in the event of shared competence between the European Union and the Member States in a particular area, the Member States may no longer exercise their competence in that area once the European Union exercises its competence. This follows from Article 2(2) TFEU, Protocol 25 to the TFEU on the exercise of shared competence, and Declaration 18 in relation to the delimitation of competences. In his Opinion in *Germany v Council*, Advocate General Szpunar considers that where, and to the extent that, the European Union exercises its power to legislate and adopt legally binding acts in an area, the Member States may no longer act. In point 61 of her Opinion in Opinion 2/15, Advocate General Sharpston explains this ‘right of pre-emption’ as follows: ‘every competence exercised in a shared area is either exercised by the European Union or exercised by the Member States. It cannot be in limbo between the two.’ It follows from Articles 4(2)(j) and 77 TFEU that asylum and immigration is an

¹ Proposal for a Council Implementing Decision extending temporary protection as introduced by Implementing Decision (EU) 2022/382, COM (2023) 546 final.

area of shared competence. This means that Member States can no longer regulate a particular aspect of asylum and immigration if the European Union exercises its competence in that area.

- 26 Given this division of competences, the Rechtbank cannot support the distinction drawn by the Afdeling with regard to the duration of temporary protection, between the optional group and the other groups. The Netherlands has applied the optional provision of Article 2(3) of the Implementing Decision to the group of third-country nationals with temporary residence permits in Ukraine who entered before 19 July 2022. The appellant belongs to this group. This brought this group fully within the scope of the Directive under Article 7 of the Temporary Protection Directive. The text of Article 7 of the Directive clearly expresses this, as it refers to temporary protection ‘as provided for in this Directive’.
- 27 These words were not included in the original proposal, but were added later at the suggestion of the European Parliament, with the following explanation being given, ‘Other categories of persons who are offered temporary protection by the Member States should be subject to the same rules as those coming under European legislation.’² The addition followed a discussion on the proposal, with the German delegation questioning whether the other provisions of the Directive, including those relating to duration, would apply if Member States implemented Article 7 of the Directive. The Irish delegation wanted to add to the provision that, in that case, national law would apply.³ The agreement reached by the Council did not adopt the Irish proposal, but chose to add the words ‘as provided for in this Directive’ to Article 7.
- 28 The Rechtbank reads Article 7 of the Temporary Protection Directive as meaning that the protection that Member States may extend to additional groups of displaced persons under this provision must be consistent with the other provisions of the Directive, including its duration. This means that Articles 4 and 6 of the Temporary Protection Directive lay down mandatory and exhaustive rules on the duration and termination options of temporary protection even for the categories of persons to whom Member States have granted temporary protection under the optional provision. Thus, where Member States have granted temporary protection on the basis of the optional provision under the Directive, this temporary protection can only end once the maximum duration of the temporary protection has been reached, or earlier if the Council decides to terminate the temporary protection. Thus, also for this group of beneficiaries, Member States have no independent power to go back on the decision to grant temporary protection under the optional provision. Indeed, the Union legislator has exercised

² Report on the proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof of 28 February 2001 (A5-0077/2001).

³ Document 6128/01 (ASILE 15) of the Council of 16 February 2001.

the power to determine the duration of temporary protection for all beneficiaries under the Temporary Protection Directive.

- 29 The Rechtbank sees no reason to assume that this will change with the Council's decision to extend the duration of temporary protection until 4 March 2025. The Extension Decision itself does not seem to distinguish between the different groups either. According to its text, Article 1 of the Decision refers to the temporary protection granted to displaced persons from Ukraine referred to in Article 2 of the Implementing Decision. This includes the optional group mentioned in paragraph 3 of this provision. This implies that a group brought within the scope of the Temporary Protection Directive through the optional provision is also covered by that Extension Decision.
- 30 The distinction made by the Afdeling between the different groups in Article 2 of the Implementing Decision is difficult to reconcile with the foregoing. In addition, that distinction seems to conflict with the pre-emption rule outlined in paragraph 27, according to which a Member State may not exercise powers in an area to the extent that, and for as long as, the European Union does so. Given that the European Union has exercised its power to determine the duration of temporary protection, it is obvious that, following the per se non-mandatory application of the optional provision and the waiver of the safe country of origin test, the State Secretary has no power to adopt a scheme for the duration of temporary protection that differs from the Directive. This interpretation is also consistent with the Commission's explanatory memorandum to the proposal for the Extension Decision that the Temporary Protection Directive should ensure that the same standards and a harmonised set of rights are applied to people who were received in the European Union at the time of the Extension Decision (see page 5 of the proposal). In this regard, it does not seem appropriate that the duration of temporary protection under the Directive should vary for different groups of displaced persons.
- 31 The Rechtbank also has other doubts about the Afdeling's interpretation of the provisions of the Temporary Protection Directive. In its ruling, the Afdeling argues that there is a relevant difference between the first and second paragraphs of Article 4 of the Temporary Protection Directive: the first paragraph deals with automatic renewal and thus does not imply a separate assessment moment, while the second paragraph (the renewal following a Council decision to that effect) does require a new assessment, according to the Afdeling. The Rechtbank does not see why it should be possible to infer from the fact that, according to the second paragraph of Article 4, a Council decision is required for the further extension of the temporary protection granted, that the circle of beneficiaries would also be subject to a new assessment by the Member States. It seems more in line with the text of this article and of Article 1 of the Extension Decision that only the Council should decide whether protection should be extended for the group already receiving protection at that time, thus including the group of persons brought under the Temporary Protection Directive by the Netherlands under the optional provision.

- 32 The Rechtbank sees no basis for the view that in this situation the Member States have a competence to change the circle of beneficiaries. The situation for the group brought under the protection of the Temporary Protection Directive through the optional provision has not changed any more than for the group that was directly covered by the Temporary Protection Directive. The State Secretary applied the optional provision generously on 19 March 2022, voluntarily waiving the safe country of origin test. It is therefore obvious that the State Secretary should bear the consequences for the reception of this group. In this regard, the explanatory memorandum to the proposal for the Extension Decision states that the Decision provides for the extension of the temporary protection by one year for the specific group of persons to whom it already applies (page 5). This is the case in respect of the appellant and the others in the optional group.
- 33 Nor does the Afdeling's reference in the judgment of 17 January 2024 to footnote 2 in the proposed Extension Decision convince the Rechtbank. That footnote does not mention the third paragraph of Article 2 of the Implementing Decision. This leads the Afdeling to infer that Article 2(3) of the Implementing Decision is relevant to the Extension Decision only to the extent that Member States applied this provision at the time the Extension Decision was adopted by the Council. Rather, according to the Rechtbank, it is obvious that the Commission did not mention Article 2(3) because this passage refers only to the group of persons for whom the Council activated the temporary protection in the first place. Instead, the optional provision refers to groups activated by Member States, namely in the case of the Netherlands, the group of third-country nationals with a temporary right of residence in Ukraine who entered before 19 July 2022.
- 34 The Rechtbank considers that there is sufficient reason to assume that a correct interpretation of EU law means that the group that was brought within the scope of the Temporary Protection Directive by application of the optional provision also falls within the scope of the Extension Decision and is thus entitled to temporary protection under the Directive until 4 March 2025. However, the Afdeling's ruling of 17 January 2024 says otherwise.

Request for determination pursuant to the expedited procedure

- 35 It is likely that, if the normal procedure is followed, the questions referred for a preliminary ruling will not be answered before the maximum duration of temporary protection is reached. The Rechtbank therefore requests the Court of Justice to deal with the case under the expedited procedure. According to the Rechtbank, the nature of this case requires that it be dealt with within a short time as referred to in Article 105(1) of the Rules of Procedure of the Court of Justice. Indeed, prolonged uncertainty about the outcome may impede the functioning of the temporary protection system established by the Temporary Protection Directive. The Rechtbank refers in this regard to the orders of the President of the Court in the *Mengesteab*, *Kozlowski* and *Jafari* cases.