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Advocate General's Opinion in Case C-877/24 | [Shamsi ¹]

Illegal stay: according to Advocate General Spielmann, a return decision may be issued against an illegally staying third-country national who is serving a long prison sentence

However, a Member State is not obliged to grant a temporary residence permit in such a situation

In 2015, an Azerbaijani national was sentenced by a Netherlands court to life imprisonment for several murders committed in May 2011. In 2018, following that conviction, his residence permit was withdrawn with retroactive effect from 12 May 2011. He was also ordered to leave the territory of the European Union immediately.

In 2020, an Afghan national was sentenced by a Netherlands court to 25 years' imprisonment for two attempted terrorist murders committed on the day of his entry into the Netherlands. He had entered the Netherlands from Germany in 2018, after his asylum application, lodged in Germany, had been definitively rejected. In 2023, the Minister for Asylum and Migration ordered him to leave the territory of the European Union immediately.

The question is whether a removal decision could validly be taken in those two cases, given that removal was impossible on account of the execution of a long prison sentence.

Hearing those cases, the Netherlands Council of State decided to refer questions to the Court of Justice. It notes that Directive 2008/115 ² appears to impose an obligation to adopt a return decision in such a situation, but that it does not clearly determine the relationship between that obligation and the fact that any possibility of actual return is ruled out for a long period.

Moreover, in the event that the Minister was not entitled to take a return decision, the Netherlands Council of State wishes to ascertain whether he was then obliged to grant a residence permit to the two persons concerned in order to avoid a situation in which they could not be subject of a return procedure, without, however, being legally resident.

In his Opinion delivered today, Advocate General Dean Spielmann considers that Directive 2008/115 **does not preclude the adoption of a return decision against an illegally staying third-country national who is serving a long-term prison sentence, and whose removal will take place only at the end of that sentence.** However, the authorities must verify periodically whether removal may actually be envisaged, depending on changes in the criminal situation of the person concerned.

On the other hand, the directive precludes the adoption of a return decision where an irreducible life sentence eliminates any prospect of removal, as it then becomes impossible in practice. ³ Furthermore, the directive does not place a Member State under the obligation to grant a residence permit to an illegally staying third-country national during the execution of his or her custodial sentence.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges

of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

Unofficial document for media use, not binding on the Court of Justice.

The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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

² [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.

³ In that regard, Advocate General Spielmann notes that such a scenario remains largely theoretical, since a situation of that kind would most likely come up against Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, as it is interpreted by the European Court of Human Rights. In particular, according to that court, in order to be compatible with Article 3 of the ECHR, a life sentence must be *de jure* and *de facto* reducible, that is to say it must offer a prospect of release and a possibility of review.