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Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

17 September 2020 (*)

(Reference for a preliminary ruling – Area of freedom, security and justice – Return of illegally staying third-country nationals – Directive 2008/115/EC – Article 11 – Entry ban – Third-country national against whom an entry ban was issued but who never left the Member State concerned – National legislation providing for a custodial sentence in the event of the third-country national staying in that Member State despite notice of the entry ban issued against him)

In Case C-806/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 27 November 2018, received at the Court on 20 December 2018, in the criminal proceedings against

JZ

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, I. Jarukaitis, E. Juhász, M. Ilešič (Rapporteur) and C. Lycourgos, Judges,

Advocate General: M. Szpunar,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 February 2020,

after considering the observations submitted on behalf of:

– JZ, by S.J. van der Woude and J.P.W. Temminck Tuinstra, advocaten,

– the Netherlands Government, by M.K. Bulterman, M.H.S. Gijzen and J. Langer, acting as Agents,

– the Czech Government, by M. Smolek, J. Vláčil, A. Brabcová and A. Pagáčová, acting as Agents,

– the German Government, by R. Kanitz, acting as Agent,

– the European Commission, by C. Cattabriga and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 April 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of 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 (OJ 2008 L 348, p. 98).

2 The request has been made in criminal proceedings brought against JZ, born in Algeria in 1969 and allegedly a national of that third country, on the ground that he stayed in the Netherlands on 21 October 2015 despite knowing that an entry ban had been ordered against him by a decision adopted on 19 March 2013.

Legal context

European Union law

3 Recitals 2, 4 and 14 of Directive 2008/115 state:

‘(2) The Brussels European Council of 4 and 5 November 2004 called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.

…

(4) Clear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well managed migration policy.

…

(14) The effects of national return measures should be given a European dimension by establishing an entry ban prohibiting entry into and stay on the territory of all the Member States. The length of the entry ban should be determined with due regard to all relevant circumstances of an individual case and should not normally exceed five years. In this context, particular account should be taken of the fact that the third-country national concerned has already been the subject of more than one return decision or removal order or has entered the territory of a Member State during an entry ban.’

4 Article 1 of Directive 2008/115, under the heading ‘Subject matter’, provides:

‘This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of [EU] law as well as international law, including refugee protection and human rights obligations.’

5 Article 3 of that directive, under the heading ‘Definitions’, states:

‘For the purpose of this Directive the following definitions shall apply:

…

(2) “illegal stay” means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of [Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1)] or other conditions for entry, stay or residence in that Member State;

(3) “return” means the process of a third-country national going back – whether in voluntary compliance with an obligation to return, or enforced – to:

– his or her country of origin, or

– a country of transit in accordance with [EU] or bilateral readmission agreements or other arrangements, or

– another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted;

(4) “return decision” means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return;

(5) “removal” means the enforcement of the obligation to return, namely the physical transportation out of the Member State;

(6) “entry ban” means an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision;

…

(8) “voluntary departure” means compliance with the obligation to return within the time limit fixed for that purpose in the return decision;

…’

6 Article 6 of the directive, under the heading ‘Return decision’, provides:

‘1. Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5.

…

6. This Directive shall not prevent Member States from adopting a decision on the ending of a legal stay together with a return decision and/or a decision on a removal and/or entry ban in a single administrative or judicial decision or act as provided for in their national legislation, without prejudice to the procedural safeguards available under Chapter III and under other relevant provisions of [EU] and national law.’

7 Article 7 of the directive, under the heading ‘Voluntary departure’, provides:

‘1. A return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days, without prejudice to the exceptions referred to in paragraphs 2 and 4. …

…

4. If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.’

8 Article 8 of Directive 2008/115, under the heading ‘Removal’, provides:

‘1. Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7.

…

3. Member States may adopt a separate administrative or judicial decision or act ordering the removal.’

…’

9 Article 11 of that directive, under the heading ‘Entry ban’, states:

‘1. Return decisions shall be accompanied by an entry ban:

(a) if no period for voluntary departure has been granted, or

(b) if the obligation to return has not been complied with.

In other cases return decisions may be accompanied by an entry ban.

2. The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security.

3. Member States shall consider withdrawing or suspending an entry ban where a third-country national who is the subject of an entry ban issued in accordance with paragraph 1, second subparagraph, can demonstrate that he or she has left the territory of a Member State in full compliance with a return decision.

…’

10 Under Article 20 of the directive, the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 24 December 2010.

Netherlands law

The Vw

11 Article 61(1) of the Wet tot algehele herziening van de Vreemdelingenwet (Vreemdelingenwet 2000) (Law on Foreign Nationals 2000) of 23 November 2000 (Stb. 2000, No 495), as amended with effect from 31 December 2011 for the purposes of transposing Directive 2008/115 into Netherlands law ('the Vw'), provides that a third-country national who is not, or is no longer, legally resident must leave the Kingdom of the Netherlands voluntarily within the period laid down in Article 62 of that law, paragraphs 1 and 2 of which transpose Article 7(1) and (4) of Directive 2008/115.

12 Article 66a(1) of the Vw, which is intended to transpose Article 11(2) of Directive 2008/115 into Dutch law, provides that an entry ban is to be issued against a third-country national who has not left the Kingdom of the Netherlands voluntarily within the period provided.

13 Under Article 66a(4) of the Vw, the entry ban is to be issued for a specified period, which may not exceed five years, unless the third-country national represents a serious threat to public policy, public security or national security. That period is to be calculated from the date on which the third-country national has actually left the Kingdom of the Netherlands.

14 Under Article 66a(7) of the Vw, a third-country national who is subject to an entry ban may not, under any circumstances, be lawfully resident in the Kingdom of the Netherlands in any of the following cases:

'(a) if he has been convicted by a judgment, which has become final, for an offence with a custodial sentence of three years or more;

(b) if he represents a threat to public policy or national security;

(c) if he represents a serious threat within the meaning of paragraph 4; or

(d) if, pursuant to a treaty or in the interests of the international relations of the Kingdom of the Netherlands, he should be denied any form of stay'.

The Code of Criminal Law

15 Under Article 197 of the Wetboek van Strafrecht (Code of Criminal Law), in the version resulting from the Law of 15 December 2011 (Stb. 2011, No 663), a third-country national who remains in the Kingdom of the Netherlands while knowing, or having serious reason to suspect, that he has been declared 'undesirable' pursuant to a statutory provision or that an entry ban has been imposed on him pursuant to Article 66a(7) of the Vw is, inter alia, liable to be sentenced to a term of imprisonment not exceeding six months.

The dispute in the main proceedings and the question referred for a preliminary ruling

16 By an order of 14 April 2000, JZ was declared ‘undesirable’ under the national legislation in force at that time.

17 By an order of the Staatssecretaris van Veiligheid en Justitie (State Secretary for Security and Justice, Netherlands) of 19 March 2013, that declaration of undesirability was lifted upon application by JZ following the entry into force of the provisions transposing Directive 2008/115 into Dutch law. That order, however, imposes an obligation on JZ to leave the Kingdom of the Netherlands immediately, specifying that, under Dutch law, notice of the order constitutes a ‘return decision’ within the meaning of Article 6 of that directive. That order also imposes an entry ban on JZ for a period of 5 years on the ground that JZ has been convicted of a number of criminal offences.

18 On 21 October 2015, it was found that, in breach of the order of 19 March 2013, JZ had resided in Amsterdam (Netherlands).

19 Having been convicted of that offence at first instance, pursuant to Article 197 of the Code of Criminal Law, JZ submitted, on appeal, before the Gerechtshof Amsterdam (Court of Appeal, Amsterdam, Netherlands) that that article was solely intended to criminalise a stay in breach of an entry ban which would, however, be binding only once JZ had left the territory of the Member States. It was submitted that, since JZ did not leave the territory of the Kingdom of the Netherlands after the entry ban was issued against him, the constituent elements of that offence were not satisfied so that a penalty could not be imposed on him under that article of the Code of Criminal Law.

20 Nonetheless, in a judgment of 4 May 2017, the Gerechtshof Amsterdam (Court of Appeal, Amsterdam) sentenced JZ, pursuant to Article 197 of the Code of Criminal Law, to a term of imprisonment of 2 months.

21 JZ lodged an appeal on a point of law against that judgment before the referring court, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). The referring court notes that, in the judgment of 26 July 2017, *Ouhrami* (C-225/16, EU:C:2017:590), the Court held, inter alia, that an entry ban produces legal effects only from the time at which the third-country national actually returned to his country of origin or to another third country. Certain authors infer from that judgment that it is not possible to prosecute, on the basis of Article 197 of the Code of Criminal Law, a third-country national who has not yet actually returned to his country of origin or to another third country. Others, however, contend that that judgment cannot be interpreted to that effect, since that article of the Code of Criminal Law only refers to the date on which the entry ban is issued and the third-country national’s notice thereof.

22 In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is … national law which criminalises the stay of a third-country national in the territory of the Netherlands after an entry ban has been imposed on him pursuant to Article 66a(7) of the [Vw] compatible with EU law, in particular with the finding of the Court … in the judgment of 26 July 2017, *Ouhrami* v *Netherlands* (C-225/16, EU:C:2017:590, paragraph 49), according to which the entry ban provided for in Article 11 of Directive [2008/115] produces its ‘legal effects’ only from the point in time the third-country national has returned to his

country of origin or to another third country, when national law also holds that that third-country national has no lawful residence and moreover it is established that the steps of the return procedure set out in that directive have been followed but the actual return has not taken place?'

Consideration of the question referred

23 By its question, the referring court seeks to ascertain, in essence, whether Directive 2008/115, and in particular Article 11 thereof, must be interpreted as precluding legislation of a Member State which provides that a custodial sentence may be imposed on an illegally staying third-country national for whom the return procedure set out in that directive has been exhausted but who has not actually left the territory of the Member States, where the criminal act consists in an unlawful stay with notice of an entry ban, issued in particular on account of that third-country national's criminal record or the threat he represents to public policy or national security. In that context, the referring court raises in particular the question of the inferences to be drawn from the judgment of 26 July 2017, *Ouhrami* (C-225/16, EU:C:2017:590).

24 In that regard, in the first place, it must be borne in mind that recital 2 of Directive 2008/115 states that it pursues the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and their dignity. Recital 4 of that directive adds in that regard that an effective return policy is a necessary element of a well managed migration policy. As is apparent from both its title and Article 1, Directive 2008/115 establishes for that purpose 'common standards and procedures' which must be applied by each Member State for returning illegally staying third-country nationals (judgments of 28 April 2011, *El Dridi*, C-61/11 PPU, EU:C:2011:268, paragraphs 31 and 32, and of 30 May 2013, *Arslan*, C-534/11, EU:C:2013:343, paragraph 42).

25 However, Directive 2008/115 concerns only the return of illegally staying third-country nationals and is thus not designed to harmonise in their entirety the rules of the Member States on the stay of foreign nationals. Therefore, that directive does not preclude the law of a Member State from classifying an illegal stay as an offence and laying down criminal sanctions to deter and penalise such an infringement (judgments of 6 December 2011, *Achughbabian*, C-329/11, EU:C:2011:807, paragraph 28, and of 6 December 2012, *Sagor*, C-430/11, EU:C:2012:777, paragraph 31).

26 However, according to settled case-law, a Member State may not apply criminal law rules which are liable to jeopardise the achievement of the objectives pursued by Directive 2008/115 and thus to deprive it of its effectiveness. Although in principle criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible, this branch of the law may nevertheless be affected by EU law. Therefore, notwithstanding the fact that neither point (3)(b) of the first paragraph of Article 63 EC, a provision which was reproduced in Article 79(2)(c) TFEU, nor Directive 2008/115, adopted inter alia on the basis of that provision of the EC Treaty, precludes the Member States from having competence in criminal matters in the area of illegal immigration and illegal stays, they must adjust their legislation in that area in order to ensure compliance with EU law (see, to that effect, judgments of 28 April 2011, *El Dridi*, C-61/11 PPU, EU:C:2011:268, paragraphs 53 to 55; of 6 December 2011, *Achughbabian*, C-329/11, EU:C:2011:807, paragraph 33; and of 6 December 2012, *Sagor*, C-430/11, EU:C:2012:777, paragraph 32).

27 The Court has therefore held that Directive 2008/115 precludes legislation of a Member State laying down criminal penalties for illegal stays, in so far as that legislation permits the imprisonment of a third-country national who, though staying illegally in the territory of the said Member State and not being willing to leave that territory voluntarily, has not been subject to the coercive measures referred to in Article 8 of that directive and has not, being placed in detention with a view to the preparation and carrying out of his removal, yet reached the end of the maximum term of that detention (judgment of 6 December 2011, *Achughbabian*, C-329/11, EU:C:2011:807, paragraph 50).

28 The Court did, however, explain that that does not exclude the right of the Member States to adopt or maintain provisions, which may be of a criminal nature, governing, in accordance with the principles of Directive 2008/115 and its objective, the situation in which coercive measures have not made it possible for the removal of an illegally staying third-country national to be effected. Accordingly, that directive does not preclude national legislation permitting the imprisonment of a third-country national to whom the return procedure established by the said directive has been applied and who is staying illegally in the territory of the relevant Member State with no justified ground for non-return (judgment of 6 December 2011, *Achughbabian*, C-329/11, EU:C:2011:807, paragraphs 46, 48 and 50).

29 Therefore, it must be found that, in accordance with that case-law, the Kingdom of the Netherlands may, in principle, enact legislation permitting a custodial sentence to be given to a third-country national in a situation such as that at issue in the main proceedings, in which, according to the findings set out in the request for a preliminary ruling, the return procedure set out in Directive 2008/115 has been exhausted but that third-country national continues to reside unlawfully in its territory without a justified ground for non-return.

30 In the second place, it is necessary to examine whether it is compatible with Directive 2008/115 for an illegal stay by a third-country national regarded as a criminal act following the unsuccessful exhaustion of the return procedure to be defined in relation to that national's notice of an entry ban issued against him, in particular on account of his criminal record or the threat he represents to public policy or national security.

31 It should be noted, in that regard, that, according to Article 11(1) of Directive 2008/115, return decisions must be accompanied by an entry ban if no period for voluntary departure has been granted or if the obligation to return has not been complied with. In other cases, such return decisions may be accompanied by an entry ban.

32 In paragraphs 45 to 51 of the judgment of 26 July 2017, *Ouhrami* (C-225/16, EU:C:2017:590), on the scope of which the referring court harbours doubts, the Court noted, in essence, that it follows both from the use of the term 'entry ban', the wording of Article 3(4) and (6) of Directive 2008/115, the wording and aim of Article 11(1) and from the general scheme of that directive, which draws a clear distinction between, on the one hand, a return decision and a possible removal decision, and on the other hand, an entry ban, that such a ban is intended to supplement a return order by prohibiting the person concerned, for a specified period of time following his return, thus after leaving the territory of the Member States, from again entering and staying in that territory. A possible entry ban thus constitutes a means of increasing the effectiveness of the European Union's return policy by ensuring that, for a certain period after the removal of a third-country national who was staying illegally, that person can no longer lawfully return to the territory of the Member States.

Accordingly, in order for an entry ban to come into effect, the person concerned must previously have left that territory.

33 It follows that, until the point in time at which the obligation to return is voluntarily complied with or enforced, the illegal stay of the third-country national is governed by the return decision and not by the entry ban, which produces its effects only from the point in time at which that national actually leaves the territory of the Member States.

34 It must thus be found that, in a situation such as that at issue in the main proceedings, in which the person concerned did not leave the Netherlands following the adoption of the return decision and, consequently, the obligation to return prescribed by that decision was never fulfilled, that person is in an unlawful situation as a consequence of an initial illegal stay, and not as a consequence of a subsequent illegal stay resulting from a breach of an entry ban, within the meaning of Article 11 of Directive 2008/115 (see, to that effect, judgment of 26 July 2017, *Ouhrami*, C-225/16, EU:C:2017:590, paragraph 55).

35 In such a situation, a third-country national cannot be punished for breaching an entry ban, since no entry ban has been breached.

36 JZ has submitted that it follows in particular from the legislative history of Article 197 of the Code of Criminal Law that that provision is intended to criminalise only the infringement of an entry ban and not that of an initial illegal stay. If that were indeed the case, which it is for the referring court to determine, Directive 2008/115, and in particular Article 11 thereof, would preclude that national provision from being applied in a situation such as that at issue in the main proceedings, in which the third-country national has not yet left the territory of the Member States.

37 By contrast, according to the Netherlands Government, Article 197 of the Code of Criminal Law is intended to criminalise any illegal stay by a third-country national with notice that an entry ban has been imposed on him, irrespective of whether that prohibition was actually infringed by the national concerned. In its submission, the Netherlands legislature decided, by that provision, to criminalise ‘a qualifying illegal stay’, namely any illegal stay by a third-country national who knows or has serious reason to suspect that he has been the subject of an entry ban pursuant to Article 66a(7) of the Vw, whereas an ‘illegal stay per se’ is not penalised under Dutch law. Article 66a(7) applies where the third-country national has been the subject of a conviction, which has become final, for an offence with a custodial sentence of 3 years or more, if he represents a threat to public policy or national security, if he represents a serious threat within the meaning of Article 66a(4), or if, pursuant to a treaty or in the interests of the international relations of the Kingdom of the Netherlands, he must be denied any form of stay.

38 If the referring court were to adopt the second interpretation of Article 197 of the Code of Criminal Law, it should be noted that, in so far as, in accordance with the case-law cited in paragraph 28 of the present judgment, it is in principle open to the Member States to impose a custodial sentence on any third-country national who has been the subject of the return procedure and who continues to stay illegally in their territory without a justified ground for non-return, it is, a fortiori, open to them to provide for such a sentence solely in respect of those nationals who, for example, have a criminal record or represent a threat to public policy or national security.

39 Furthermore, it is not, as a matter of principle, incompatible with Directive 2008/115 and, in particular, with Article 11 thereof, for national law to regard as a criminal act a third-country national's illegal stay in the Member State concerned in the knowledge that an entry ban had been issued to him on account of such an act or threat.

40 Nevertheless, as stated in paragraphs 32 to 36 above, an entry ban does not produce any effects in the absence of compliance with the obligation to return and cannot therefore be regarded as having been infringed in a situation such as that at issue in the main proceedings, in which the third-country national has not yet left the territory of the Member States. Therefore, in order to apply to that situation, the criminal act cannot be regarded as requiring such a breach.

41 Lastly, it should be noted that the imposition of penal sanctions on third-country nationals to whom the return procedure has been applied and who are illegally staying in the territory of a Member State without there being any justified ground for non-return is subject to full observance of fundamental rights, particularly those guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (judgment of 6 December 2011, *Achughbabian*, C-329/11, EU:C:2011:807, paragraph 49). According to the case-law of the European Court of Human Rights, any law empowering a court to deprive a person of his or her liberty must be sufficiently accessible, precise and foreseeable in its application in order to avoid all risk of arbitrariness (ECtHR, 21 October 2013, *Del Río Prada v. Spain*, CE:ECHR:2013:1021JUD 004275009, § 125).

42 It is for the referring court to ascertain whether the application of Article 197 of the Code of Criminal Law to a situation such as that at issue in the main proceedings meets those requirements.

43 In the light of all of the foregoing considerations, the answer to the question referred is that Directive 2008/115, and in particular Article 11 thereof, must be interpreted as not precluding legislation of a Member State which provides that a custodial sentence may be imposed on an illegally staying third-country national for whom the return procedure set out in that directive has been exhausted but who has not actually left the territory of the Member States, where the criminal act consists in an unlawful stay with notice of an entry ban, issued in particular on account of that third-country national's criminal record or the threat he represents to public policy or national security, provided that the criminal act is not defined as a breach of such an entry ban and that that legislation is sufficiently accessible, precise and foreseeable in its application in order to avoid all risk of arbitrariness, which is for the referring court to ascertain.

Costs

44 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

[Signatures]

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