JUDGMENT OF THE COURT (Fourth Chamber)

19 September 2013 (*)

(Area of freedom, security and justice – Return of illegally staying third-country nationals – Directive 2008/115/EC – Article 11(2) – Return decision coupled with an entry ban – Length of the entry ban restricted to five years in principle – National legislation providing for an entry ban of unlimited duration in the absence of an application for a limitation – Article 2(2)(b) – Third-country nationals subject to return as a criminal law sanction or as a consequence of a criminal law sanction – Non-application of the directive)

In Case C-297/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Amtsgericht Laufen (Germany), made by decision of 13 June 2012, received at the Court on 18 June 2012, in the criminal proceedings against

Gjoko Filev,

Adnan Osmani,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský, U. Lõhmus (Rapporteur), M. Safjan and A. Prechal, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 20 March 2013,

after considering the observations submitted on behalf of:

– the German Government, by T. Henze and N. Graf Vitzthum, acting as Agents,

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

– the European Commission, by M. Condou-Durande and V. Kreuschitz, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

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) and in particular Article 11(2) thereof.

2 The request has been made in the course of criminal proceedings brought against Messrs Filev and Osmani, nationals of the former Yugoslav Republic of Macedonia and of the Republic of Serbia respectively, following their entry into Germany more than five years after their expulsion from that country in breach of entry bans of unlimited duration which were coupled with the expulsion orders made against them.

Legal context

European Union Law

3 Recitals 4, 5 and 14 of the preamble to Directive 2008/115 state:

‘(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.

(5) This Directive should establish a horizontal set of rules, applicable to all third-country nationals who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State.

...

(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. ...’

4 Article 2 of that directive, headed ‘Scope’, provides in paragraph 2:

‘Member States may decide not to apply this Directive to third-country nationals who:

...

(b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.’

5 Point 6 of Article 3 of that directive defines an ‘entry ban’ as ‘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’.

6 The first subparagraph of Article 7(1) of Directive 2008/115 reads as follows:

‘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. Member States may provide in their national legislation that such a period shall be granted only following an application by the third-country national concerned. In such a case, Member States shall inform the third-country nationals concerned of the possibility of submitting such an application.’

7 Pursuant to Article 11(1) and (2) of that directive:

‘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.’

German law

8 Article 11(1) of the Law on the residence, gainful employment and integration of foreign nationals in Federal territory (Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet), in the version published on 25 February 2008 (BGBl. 2008 I, p. 162) (the ‘Aufenthaltsgesetz’), as amended by the Law on the implementation of European Union directives on the right of residence and bringing national legislation into conformity with the EU Visa Code (Gesetz zur Umsetzung aufenthaltsrechtlicher Richtlinien der Europäischen Union und zur Anpassung nationaler Rechtsvorschriften an den EU-Visakodex) of 22 November 2011 (BGBl. 2011 I, p. 2258) (the ‘Law of 22 November 2011’), is worded as follows:

‘A foreign national who has been expelled, removed or deported may not re-enter Federal territory and reside there. He shall not be issued with a residence permit even where the conditions of entitlement under this law are met. A time-limit shall, upon application by the person concerned, be placed on the effects referred to in the first and second sentences. The time-limit shall be established taking account of the circumstances of the individual case and may exceed five years only where the foreign national has been expelled on the ground of a criminal conviction or if he represents a serious threat to public order or security. The assessment of the length of the time-limit shall take account of whether the foreign national left voluntarily or otherwise within the period of time provided for that purpose. The time-limit shall run from the time of leaving the country. No time-limit shall be applicable where the foreign national has been removed on account of a crime against peace, a war crime or a crime against humanity, or on the basis of a removal order made pursuant to Paragraph 58a. The highest regional authority may permit exemptions from sentence 7 in individual cases.’

9 Pursuant to Article 14(1) of the Aufenthaltsgesetz, the entry of a foreign national into Germany is unlawful where, inter alia, he is not authorised to do so pursuant to Article 11(1) of that law, unless he has been granted leave to enter the country pursuant to Article 11(2).

10 Article 95 of the Aufenthaltsgesetz which is entitled ‘Criminal provisions’, provides at point 1 of its paragraph 2:

‘Any person who, in breach of the first sentence of Article 11(1)

1. (a) enters the Federal territory or

(b) resides there

shall be liable to a prison sentence of up to three years or a fine.'

11 Article 456a of the Code of Criminal Procedure states:

'1. The executing authority may suspend execution of a prison sentence, including one imposed as a result of a failure to pay a fine, or of a detention or expulsion order where the convicted person is delivered to a foreign government in relation to a separate offence, or remanded to an international criminal court, or if he is expelled from the territory to which this Federal law applies.

2. Execution may be resumed if the extradited, remanded or expelled person returns.

…'

The actions in the main proceedings and the questions referred for a preliminary ruling

The facts concerning Mr Filev

12 At the outcome of the procedure relating to his application for asylum, Mr Filev was ordered by decision of the Bundesamt für die Anerkennung ausländischer Flüchtlinge (Federal Office for the recognition of foreign refugees) of 29 October 1992 to leave Germany. In 1993 and 1994, he was the subject of removal orders to the Former Yugoslav Republic of Macedonia whose effects were not limited in time.

13 On 28 April 2012, Mr Filev again entered Germany, where he underwent a police check. That check disclosed that he had been the subject of a return decision in 1992. As a result of that check, criminal proceedings were brought against him and he was held in custody.

14 On 3 May 2012, at the hearing before the referring court, the public prosecutor requested that Mr Filev be given a 60 day sentence and a fine in the amount of EUR 15 for having committed the offences provided for and punished by Article 95(2)(1)(a) and (b) of the Aufenthaltsgesetz on account of his unlawful entry into Germany and subsequently of his illegal stay.

The facts relating to Mr Osmani

15 On 19 November 1999, Mr Osmani was the subject of an expulsion order made by the City of Stuttgart (Germany), in accordance with the provisions of the Law on foreigners (Ausländergesetz) then in force which provided for such an order in relation to offences against the law on narcotics. The effects of the expulsion order were not limited in time.

16 On 10 June 2003, Mr Osmani was again sentenced to a total of two years and eight months of prison in relation to two cases of illicit traffic in narcotics. On 30 June 2004, having served part of his sentence, he was released and made subject to a removal order

whose effects were not limited in time. Pursuant to Article 456a of the Code of Criminal Procedure, the Stuttgart prosecuting authority ordered that Mr Osmani serve the remaining 474 days of his prison sentence in the event that he again entered Germany.

17 On 29 April 2012, Mr Osmani again entered Germany and was subject to a police check which disclosed the expulsion order made against him. Criminal proceedings were then brought against him. At the hearing before the referring court on 3 May 2012, the public prosecutor requested that Mr Osmani be given a three month suspended prison sentence for having committed offences provided for and punished by Article 95(2)(1)(a) and (b) of the Aufenthaltsgesetz.

18 On the date that the request for a preliminary ruling was made, Mr Osmani was serving the remainder of the prison sentence which he received in 2003.

The questions referred in both disputes

19 The referring court is uncertain, having regard to Article 11(2) of Directive 2008/115 and recitals 4 and 5 thereof, as to the possibility of applying Articles 11(1) and 95(2)(1)(a) and (b) of the Aufenthaltsgesetz in the cases brought before it.

20 In that regard, it notes that Article 11(2) of Directive 2008/115 provides that the length of an entry ban may not in principle exceed five years. That provision is held to have had direct effect in Germany between 24 December 2010, which is the deadline laid down in the first paragraph of Article 20(1) of that directive for its implementation into national law, and 26 November 2011, which is the date of the entry into force of the Law of 22 November 2011 implementing that directive; accordingly, expulsion or removal orders made more than five years before the first of the dates above could no longer serve as a basis for a criminal conviction pursuant to Article 95 of the Aufenthaltsgesetz. That court notes in addition that Article 11(1) of that legislation, as amended by the Law of 22 November 2011, does not provide for the effects of such orders to be limited in time; it only permits the interested party to make an application seeking such a limitation.

21 The referring court makes clear on the one hand that Mr Filev does not appear to pose a serious threat to public policy, public security or national security within the meaning of the second sentence of Article 11(2) of Directive 2008/115. On the other hand, he did not make an application for the expulsion and removal orders made against him to be limited in time, as a consequence of which those orders have been producing effects for close to 20 years.

22 As regards Mr Osmani, the referring court notes first that Article 95(2) of the Aufenthaltsgesetz makes him subject to sanctions as a result of his entry into Germany following his expulsion in 1999 and/or his removal in 2004, and secondly that Article 2(2)(b) of Directive 2008/115 permits Member States to decide not to apply that directive where a person's return is provided for by a criminal law sanction or is a consequence thereof. However, that same court notes that no derogation was adopted in German law pursuant to that provision during the period in which that directive had direct effect in Germany, but that such a derogation was introduced by Article 11(1) of the Aufenthaltsgesetz as amended by the Law of 22 November 2011.

23 In those circumstances the Amtsgericht Laufen (Local Court of Laufen) decided to stay the proceedings and to refer the following questions, the first three of which are common to both disputes in the main proceedings and the fourth specific to Mr Osmani's case alone:

'1. Is Article 11(2) of Directive [2008/115] to be interpreted as precluding Member States from making breaches of administrative law expulsion or removal orders subject to criminal law sanctions, where the expulsion or removal order was made more than 5 years prior to re-entry?

2. Is Article 11(2) of Directive 2008/115 to be interpreted as precluding the Federal Republic of Germany from making breaches of administrative law expulsion or removal orders subject to criminal law sanctions where those orders were made more than five years before the [Law of 22 November 2011] came into force?

3. Does national legislation which provides that the effects of expulsion or removal orders are not in principle limited in time, unless the interested party lodges an application for a time-limit, comply with European Union law, in particular Article 11(2) of Directive [2008/115][?] Does such a provision comply with the requirements of recital 4 of the preamble to that directive in relation to a well managed migration policy by way of clear, transparent and fair rules?

[4.] Is Directive 2008/115 to be interpreted as precluding Member States from providing that expulsion or removal orders which predated the period during which the directive had not been implemented by 5 years or more may subsequently again serve as a basis for criminal proceedings, where the expulsion or removal order was based on a criminal conviction[?]'

24 At the referring court's request, the designated chamber assessed the need to deal with this case under the urgent procedure provided for in Article 104b of the Court's Rules of Procedure, in the version applicable at the date of this request. The said chamber decided, after hearing the Advocate General, not to accede to that request.

The questions referred

The third question

25 By its third question, which it is appropriate to consider first, the referring court asks essentially whether Article 11(2) of Directive 2008/115 must be interpreted as precluding a national provision, such as Article 11(1) of the Aufenthaltsgesetz, which makes the limitation of the length of an entry ban subject to the making by the third-country national concerned of an application seeking such a limit.

26 Pursuant to the first sentence of Article 11(2) of Directive 2008/115, 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.

27 It must be noted that it clearly follows from the terms '[t]he length of the entry ban shall be determined' that Member States are under an obligation to limit the effects in time of any entry ban in principle to a maximum of five years independently of an application made for that purpose by the relevant third-country national.

28 That interpretation is also apparent from the second sentence of recital 14 of the preamble to Directive 2008/115 which states that 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.

29 In addition, that interpretation is supported first by the definition of 'entry ban' set out at Article 3(6) of that directive as applying in particular to a decision prohibiting entry into and stay on the territory of the Member States 'for a specified period'.

30 Secondly, in relation to the period for voluntary departure to be determined in the course of a return decision, the first paragraph of Article 7(1) of Directive 2008/115 provides that Member States may provide in their national legislation that such a period shall be granted only following an application by the third-country national concerned. That wording tends to suggest that, if the European Union legislature had intended to provide Member States with a discretionary power in relation to determining a limit to the length of an entry ban, it would have done so expressly in Article 11(2) of that directive.

31 Contrary to what the German Government asserts in the observations submitted to the Court, the act of making in national law the benefit of a limitation of the length of an entry ban subject to the making of an application by the third-country national concerned is not sufficient to meet the objective of Article 11(2) of Directive 2008/115.

32 That objective consists inter alia in ensuring that the length of an entry ban does not exceed five years, except if the person concerned constitutes a serious threat to public order, public security or national security.

33 Even supposing that national law provides, as the German Government claims in relation to its national legislation, that the third-country national concerned is made aware of the possibility of applying for the length of the entry ban to which he is made subject to be limited and that competent national authorities consistently comply with their duty to make the relevant third-country national aware of that possibility, there is none the less no guarantee that such an application will actually be made by that national. In the absence of such an application, the objective of Article 11(2) of Directive 2008/115 cannot be considered as having been achieved.

34 In light of the foregoing, the reply to the third question is that Article 11(2) of Directive 2008/115 must be interpreted as precluding a provision of national law such as Article 11(1) of the Aufenthaltsgesetz, which makes the limitation of the length of an entry ban subject to the making by the third-country national concerned of an application seeking to obtain the benefit of such a limit.

The first and second questions

35 By its first and second questions, which it is appropriate to examine together, the referring court asks in essence whether Article 11(2) of Directive 2008/115 must be interpreted as precluding breach of an entry or residence ban in the territory of a Member State, which was handed down more than five years before the date either of the re-entry of the third-country national concerned into that territory or of the entry into force of the national legislation implementing that directive, from giving rise to a criminal sanction.

36 In that regard, the Court has already held that whilst 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 the first of those two provisions, precludes 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 European Union law. In particular, those States may not apply criminal legislation capable of imperilling the achievement of the objectives pursued by that directive, thus depriving it of its effectiveness (see Case C-61/11 PPU *El Dridi* [2011] ECR I-3015, paragraphs 54 and 55, and Case C-329/11 *Achughbabian* [2011] ECR I-0000, paragraph 33).

37 It follows that a Member State may not impose criminal sanctions for breach of an entry ban falling within the scope of Directive 2008/115 if the continuation of the effects of that ban does not comply with Article 11(2) of that directive.

38 It is therefore appropriate to examine, having regard to the circumstances of the case in the main proceedings, whether Article 11(2) precludes the continuation of the effects of entry bans of unlimited length which were decided before the date by which the Member State concerned should have implemented Directive 2008/115, beyond the maximum length of such a ban laid down by that provision, which is a length of five years in principle.

39 In that regard, it is important to note from the outset that that directive does not include a provision providing for transitional arrangements in relation to entry-ban decisions taken before it became applicable.

40 None the less, it follows from the Court's settled case-law that new rules apply immediately, except in the event of a derogation, to the future effects of a situation which arose under the old rules (see Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraph 50, Joined Cases C-395/08 and C-396/08 *Bruno and Others* [2010] ECR I-5119, paragraph 53, and Case C-393/10 *O'Brien* [2012] ECR I-0000, paragraph 25).

41 It follows that Directive 2008/115 is applicable to those effects which occur after the date of its applicability in the Member State concerned of entry-ban decisions taken under national rules which were applicable before that date (see, by analogy, Case C-357/09 PPU *Kadzoev* [2009] I-11189, paragraph 38).

42 Therefore in order to assess whether the continuation of the effects of such decisions is consistent with Article 11(2) of Directive 2008/115 in relation in particular to the maximum length of five years in principle under that provision for an entry ban, account should also be taken of the period during which that prohibition was in force before Directive 2008/115 became applicable (see, by analogy, *Kadzoev*, paragraph 36, and *Bruno and Others*, paragraph 55).

43 Indeed, failure to take account of that period would be inconsistent with the objective pursued by Article 11(2) of Directive 2008/115 which is, as has been noted at paragraph 32 of the present judgment, to ensure that the length of an entry ban does not exceed five years, except in the cases referred to in the second sentence of that provision (see, by analogy, *Kadzoev*, paragraph 37).

44 It follows that Article 11(2) of Directive 2008/115 precludes a continuation of the effects of entry bans of unlimited length made before the date on which Directive 2008/115

became applicable, as is the case for those entry bans at issue in the main proceedings, beyond the maximum length of entry ban laid down by that provision, except where those entry bans were made against third-country nationals constituting a serious threat to public order, public security or national security.

45 Consequently, the answer to the first and second question is that Article 11(2) of Directive 2008/115 must be interpreted as precluding breach of an entry and residence ban in the territory of a Member State, which was handed down more than five years before the date either of the re-entry into that territory of the third-country national concerned or of the entry into force of the national legislation implementing that directive, from giving rise to a criminal sanction, unless that national constitutes a serious threat to public order, public security or national security.

The fourth question

46 By its fourth question, the referring court asks, essentially, whether Directive 2008/115 must be interpreted as precluding a Member State from providing that an expulsion or removal order which predates by five years or more the period between the date on which that directive should have been implemented and the date on which it was actually implemented may subsequently be used as a basis for criminal proceedings, where that order was based on a criminal sanction within the meaning of Article 2(2)(b) of that directive.

Admissibility

47 The German Government submits that the fourth question is inadmissible in so far as it does not need to be answered in order for the dispute in the main proceedings concerning Mr Osmani to be decided. It notes that the latter's entry into Germany which gave rise to the criminal proceedings at issue did not take place during the period between the date on which Directive 2008/115 should have been implemented and the date on which it was actually implemented, but after that date. It therefore submits that the question whether the exception provided for in Article 2(2)(b) of that directive could have an effect during that period is not decisive.

48 In that regard, it is sufficient to note that the fourth question is not directed at the possible effects of that exception during the period referred to in the previous paragraph, but rather at the effect of the existence of that period on the possibility for a Member State to avail itself of such an exception after the entry into force of the national legislation implementing that directive. That question appears to be pertinent in order to solve the dispute concerning Mr Osmani.

49 It follows that the fourth question asked by the referring court is admissible.

Substance

50 It should be noted that Article 2(2)(b) of Directive 2008/115 allows Member States to decide not to apply that directive to third-country nationals who are the subject of, inter alia, return as a criminal law sanction or as a consequence of a criminal law sanction in accordance with the provisions of national law (see, to that effect, *El Dridi*, paragraph 49, and *Achughbabian*, paragraph 41).

51 It should be noted, in that regard, that the referring court has no doubt that Mr Osmani falls within the scope of persons covered by that provision. Indeed, it is apparent from the order for reference first that he was expelled in 1999 for an unlimited duration, in accordance with the provisions of the Ausländergesetz providing such a measure for foreign nationals committing an offence against the provisions of the German law on narcotics. Secondly, while he was serving a prison sentence following his conviction for drug trafficking in 2004, Mr Osmani was the subject of a removal order whose effects were not limited in time.

52 It is important to note that the consequence of the use by a Member State of the discretion provided for in Article 2(2)(b) of Directive 2008/115 at the latest upon expiry of the period for implementing that directive is that third-country nationals referred to therein will not at any time fall within the scope of that directive.

53 In contrast, in so far as a Member State has not yet made use of that discretion after expiry of the said time period for implementation, in particular because of the fact that it has not yet implemented Directive 2008/115 in national law, it may not avail itself of the right to restrict the scope of the persons covered by that directive pursuant to Article 2(2)(b) thereof with regard to those persons who were already able to avail themselves of the effects of that directive.

54 In those circumstances, a restriction of the scope of the persons covered by Directive 2008/115 pursuant to Article 2(2)(b), which is carried out only after expiry of the time period for implementing that directive, is not binding on a person such as Mr Osmani who was the subject of a removal order on 30 June 2004 and who entered into the territory of that Member State after national rules which availed themselves of the discretion provided for under that provision entered into force.

55 Indeed, the consequence of exercising the discretion provided for at Article 2(2)(b) of Directive 2008/115 against a person such as Mr Osmani who could already directly rely on the relevant provisions of that directive would be to worsen that person’s situation.

56 In view of the foregoing considerations, the answer to the fourth question is that Directive 2008/115 must be interpreted as precluding a Member State from providing that an expulsion or removal order, which predates by five years or more the period between the date on which that directive should have been implemented and the date on which it was implemented, may subsequently be used as a basis for criminal proceedings, where that order was based on a criminal law sanction within the meaning of Article 2(2)(b) of that directive and where that Member State exercised the discretion provided for under that provision.

Costs

57 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 (Fourth Chamber) hereby rules:

1. **Article 11(2) 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 must be interpreted as precluding a provision of national law, such as Article 11(1) of the Law on the residence, gainful employment and integration of foreign nationals on Federal territory (Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet), which makes the limitation of the length of an entry ban subject to the making by the third-country national concerned of an application seeking to obtain the benefit of such a limit.

2. **Article 11(2) of Directive 2008/115 must be interpreted as precluding breach of an entry and residence ban in the territory of a Member State, which was handed down more than five years before the date either of the re-entry into that territory of the third-country national concerned or of the entry into force of the national legislation implementing that directive, from giving rise to a criminal sanction, unless that national constitutes a serious threat to public order, public security or national security.**

3. **Directive 2008/115 must be interpreted as precluding a Member State from providing that an expulsion or removal order which predates by five years or more the period between the date on which that directive should have been implemented and the date on which it was implemented, may subsequently be used as a basis for criminal proceedings, where that order was based on a criminal law sanction within the meaning of Article 2(2)(b) of that directive and where that Member State exercised the discretion provided for under that provision.**

[Signatures]

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* Language of the case: German.