Provisional text

JUDGMENT OF THE COURT (Tenth Chamber)

11 March 2021 (*)

(Reference for a preliminary ruling – Directive 2008/115/EC – Article 5 – Return decision – Father of a minor child who is a citizen of the European Union – Taking into account the best interests of the child at the time of the adoption of the return decision)

In Case C-112/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, Belgium), made by decision of 6 February 2020, received at the Court on 28 February 2020, in the proceedings

M. A.

v

État belge,

THE COURT (Tenth Chamber),

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

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– M. A., by D. Andrien, avocat,

– the Belgian Government, by M. Jacobs, M. Van Regemorter and C. Pochet, acting as Agents, and by D. Matray and S. Matray, avocats,

– the European Commission, by C. Cattabriga and E. Montaguti, 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 Article 5 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), read in conjunction with Article 13 of that directive and with Articles 24 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in the context of an appeal brought by M. A. against the judgment of the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium) dismissing his action for annulment of the decisions ordering him to leave Belgian territory and prohibiting him from entering that territory.

Legal context

International law

3 Article 3(1) of the International Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989, provides:

'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

EU law

4 Recitals 22 and 24 of Directive 2008/115 state:

'(22) In line with the 1989 United Nations Convention on the Rights of the Child, the "best interests of the child" should be a primary consideration of Member States when implementing this Directive. In line with the European Convention for the Protection of Human Rights and Fundamental Freedoms [signed in Rome on 4 November 1950], respect for family life should be a primary consideration of Member States when implementing this Directive.

…

(24) This Directive respects the fundamental rights and observes the principles recognised in particular by the [Charter].'

5 Article 2(1) of that directive provides:

'This Directive applies to third-country nationals staying illegally on the territory of a Member State.'

6 Article 5 of Directive 2008/115 states:

'When implementing this Directive, Member States shall take due account of:

(a) the best interests of the child;

(b) family life;

(c) the state of health of the third-country national concerned,

and respect the principle of non-refoulement.'

7 Under Article 6(1) of that directive:

‘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.’

8 Article 7(2) of Directive 2008/115 is worded as follows:

‘Member States shall, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.’

9 Article 13(1) of that Directive states:

‘1. The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12(1), before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.’

10 Article 14(1) of that directive states:

‘Member States shall, with the exception of the situation covered in Articles 16 and 17, ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure granted in accordance with Article 7 and during periods for which removal has been postponed in accordance with Article 9:

(a) family unity with family members present in their territory is maintained;

(b) emergency health care and essential treatment of illness are provided;

(c) minors are granted access to the basic education system subject to the length of their stay;

(d) special needs of vulnerable persons are taken into account.’

Belgian law

11 Article 74/13 of the loi du 15 décembre 1980 sur l’accès au territoire, l’établissement, le séjour et l’éloignement des étrangers (Law of 15 December 1980 on entry into the territory, residence, establishment and removal of foreign nationals) (*Moniteur belge* of 31 December 1980, p. 14584), provides:

‘When taking a decision on removal the Minister or his representative shall take due account of the best interests of the child, family life and the state of health of the third-country national concerned.’

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

12 On 24 May 2018, M. A. was the subject of an order to leave Belgian territory and an entry ban, which were notified to him the following day. Whilst noting that the applicant had stated that he had a partner of Belgian nationality and a daughter born in Belgium, those decisions were based on the offences that he had committed on that territory and the fact that, therefore, the applicant should be considered to be a threat to public order.

13 By judgment of 21 February 2019, the Conseil du contentieux des étrangers (Council for asylum and

immigration proceedings) dismissed the action brought by M. A. against those decisions.

14 On 15 March 2019, M. A. lodged an appeal against that judgment before the referring court.

15 In support of his appeal, M. A. submits, inter alia, that the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) wrongly considered that he had no interest in bringing his claim alleging infringement of Article 24 of the Charter, on the ground that he did not state that he was acting on behalf of his minor child. In that regard, M. A. notes, first, that his child has Belgian nationality, is not the person to whom the measures contested before the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) are addressed and therefore does not have *locus standi* and, secondly, that it is not necessary for him to act on behalf of the child for the best interests of that child to be protected. Moreover, M. A. observes that, in order to continue family life with him, his child is required to leave the territory of the European Union and to deny herself the effective enjoyment of the rights conferred on her by virtue of her status as a Union citizen.

16 The referring court considers that the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) has taken the view, implicitly but unequivocally, that the best interests of the child must be taken into account only if the administrative decision at issue expressly refers to that child. It observes that M. A.'s criticism of that assertion concerns the interpretation of Article 74/13 of the Law of 15 December 1980 on entry into the territory, residence, establishment and removal of foreign nationals, which transposes Article 5 of Directive 2008/115.

17 By contrast, that court considers that the applicant's obligation to challenge the lawfulness of that decision, on behalf of his child, in order for that child's interests to be taken into account, is a question of *locus standi,* which does not concern the interpretation of EU law.

18 In those circumstances, the Conseil d'État (Council of State, Belgium) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Should Article 5 of Directive 2008/115[…], which requires Member States, when implementing the directive, to take account of the best interests of the child, together with Article 13 of that directive and Articles 24 and 47 of the [Charter], be interpreted as requiring the best interests of the child, an EU citizen, to be taken into account even if the return decision is taken with regard to the child's parent alone?'

Consideration of the question referred

19 By its question, the referring court asks, in essence, whether Article 5 of Directive 2008/115, read in conjunction with Article 13 of that directive as well as Articles 24 and 47 of the Charter, must be interpreted as meaning that Member States are required to take due account of the best interests of the child before adopting a return decision, accompanied by an entry ban, even where the person to whom that decision is addressed is not a minor but his or her father.

20 As a preliminary point, first, it should be noted that, according to M. A., as the Conseil d'État (Council of State) has asked the Court about the interpretation of Article 47 of the Charter and Article 13 of Directive 2008/115, it is necessary to examine whether those provisions must be interpreted as precluding national legislation under which a third-country national, to whom a return decision accompanied by an entry ban is addressed, must act on behalf of his or her minor child before the court with jurisdiction to rule on the legality of that decision in order to ensure that the best interests of that

child are taken into account.

21 Under Article 267 TFEU, it is for the national court, not the parties to the main proceedings, to bring a matter before the Court of Justice. The right to determine the questions to be put to the Court thus devolves upon the national court alone and the parties may not change their tenor. Moreover, to answer requests to amend the questions formulated by the parties in the main proceedings would be incompatible with the function given to the Court by Article 267 TFEU and with its duty to ensure that the governments of the Member States and the parties concerned are given the opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union, bearing in mind that, under that provision, only the order of the referring court is notified to the interested parties (judgment of 6 October 2015, *T-Mobile Czech Republic and Vodafone Czech Republic*, C-508/14, EU:C:2015:657, paragraphs 28 and 29 and the case-law cited).

22 In the present case, it is clear from the reasoning of the order for reference that the question of *locus standi*, within the meaning of national procedural law, is not the subject of the present reference for a preliminary ruling.

23 Therefore, the question raised by the referring court must be answered without taking into account M. A.'s request. In addition, in that situation, the interpretation of Article 47 of the Charter and Article 13(1) of Directive 2008/115 does not appear to be necessary in order to provide the referring court with a useful answer.

24 Secondly, it should be noted that the question referred for a preliminary ruling is based on the premiss that M. A.'s stay on Belgian territory is illegal. It follows from Article 2(1) and Article 6(1) of Directive 2008/115 that a return decision may be adopted against a third-country national only if that third-country national is not staying or is no longer staying legally on the territory of the Member State concerned (see, to that effect, judgment of 19 June 2018, *Gnandi*, C-181/16, EU:C:2018:465, paragraphs 37 and 38).

25 However, it is apparent from the order for reference that M. A.'s daughter is a minor of Belgian nationality.

26 Such a circumstance may mean that M. A. must be granted permission to reside on Belgian territory pursuant to Article 20 TFEU. That is, in principle, the case if, in the absence of a residence permit, M. A. and his daughter would be obliged to leave the territory of the European Union as a whole (see, to that effect, judgment of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)*, C-836/18, EU:C:2020:119, paragraphs 41 to 44 and the case-law cited). In making that assessment, the competent authorities must take due account of the right to respect for family life and the best interests of the child, recognised in Article 7 and Article 24(2) of the Charter.

27 In that regard the Court has already held that for the purposes of such an assessment, the fact that the other parent is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would be compelled to leave the territory of the European Union if a right of residence were refused to that third-country national. In reaching such a conclusion, account must be taken, in the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of the child's emotional ties to each of his or her parents and the risk of separation from the third-country national parent for that child's equilibrium (see, to that effect, judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraphs 70 and 71).

28 However, it should be observed that, according to settled case-law, Article 267 TFEU establishes a procedure for direct cooperation between the Court and the courts of the Member States. In that procedure, which is based on a clear separation of functions between the national courts and the Court, any assessment of the facts of the case is a matter for the national court, which must determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court, whilst the Court is empowered to give rulings on the interpretation or the validity of an EU provision only on the basis of the facts which the national court puts before it (judgment of 25 October 2017, *Polbud – Wykonawstwo*, C-106/16, EU:C:2017:804, paragraph 27 and the case-law cited).

29 Therefore, the question referred must be answered on the basis of the premiss that M. A. is staying illegally on Belgian territory, the validity of which, however, is for the referring court to ascertain.

30 In that regard, it should be borne in mind that, where a third-country national falls within the scope of Directive 2008/115, he or she must, in principle, be subject to the common standards and procedures laid down by that directive for the purpose of his or her removal, as long as the stay has not, as the case may be, been regularised (see, to that effect, judgments of 7 June 2016, *Affum*, C-47/15, EU:C:2016:408, paragraph 61, and of 19 March 2019, *Arib and Others*, C-444/17, EU:C:2019:220, paragraph 39).

31 Article 5(a) of Directive 2008/115 requires Member States to take due account of the best interests of the child when implementing that directive.

32 As is apparent from its very wording, that provision constitutes a general rule binding on Member States as soon as they implement that directive, which is, in particular, the case where, as in the present case, the competent national authority adopts a return decision, accompanied by an entry ban, against a third-country national staying illegally on the territory of the Member State concerned and who is, moreover, the father of a minor residing legally on that territory.

33 Therefore, as the Court has already held, it cannot be inferred from that provision that the best interests of the child must be taken into account only when the return decision is issued in respect of a minor, to the exclusion of return decisions taken against the parents of that minor (see, to that effect, judgment of 8 May 2018, *K.A. and Others (Family reunification in Belgium)*, C-82/16, EU:C:2018:308, paragraph 107).

34 Such an interpretation is, moreover, supported both by the objective pursued by Article 5 of Directive 2008/115 and by the general scheme of that directive.

35 Thus, as regards, in the first place, the objective pursued by Article 5 of Directive 2008/115, it should be noted, first, that, as confirmed by recitals 22 and 24 of that directive, that article seeks to ensure, in the context of the return procedure established by that directive, respect for a number of fundamental rights, including the fundamental rights of the child, as enshrined in Article 24 of the Charter. It follows that, in the light of the objective which it pursues, Article 5 of the directive cannot be interpreted restrictively (see, by analogy, judgments of 14 February 2019, *Buivids*, C-345/17, EU:C:2019:122, paragraph 51, and of 26 March 2019, *SM (Child placed under Algerian kafala)*, C-129/18, EU:C:2019:248, paragraph 53).

36 Moreover, Article 24(2) of the Charter provides that, in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. It follows that such a provision is itself worded in broad terms and applies to decisions which, like a return decision adopted against a third-country national who is the parent of a minor, are not addressed

to that minor but have significant consequences for him or her.

37 That finding is confirmed by Article 3(1) of the International Convention on the Rights of the Child, to which the explanations relating to Article 24 of the Charter expressly refer.

38 According to Article 3(1), the best interests of the child are to be taken into account in all decisions concerning children. Therefore, such a provision covers, in general terms, all decisions and actions directly or indirectly affecting children, as was pointed out by the UN Committee on the Rights of the Child (see, in that regard, General Comment No. 14 (2013) of the Committee on the Rights of the Child on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1) CRC/C/GC/14, paragraph 19).

39 As regards, in the second place, the context of Article 5(a) of Directive 2008/115, it should be noted, first, that when the EU legislature intended the elements listed in Article 5 to be taken into account only in respect of the third-country national who is the subject of the return decision, it made express provision to that effect.

40 Thus, unlike Article 5(a) and (b) of Directive 2008/115, it is clear from Article 5(c) of that directive that Member States are required to take due account only of the state of health of the 'third-country national concerned', that is to say, exclusively the state of health of the person to whom the return decision is addressed.

41 Secondly, it follows from Article 5(b) of that directive that, when contemplating the adoption of a return decision, Member States must also take due account of family life. Article 7 of the Charter, relating inter alia to the right to respect for family life, on which an illegally staying third-country national may rely, who, like M. A., is the father of a minor child, must be read in conjunction with Article 24(2) of the Charter, which lays down the obligation to have regard to the best interests of the minor child (see, to that effect, judgment of 26 March 2019, *SM (Child placed under Algerian kafala)*, C-129/18, EU:C:2019:248, paragraph 67 and the case-law cited).

42 Thirdly, other provisions of Directive 2008/115, such as Article 7(2) and Article 14(1) thereof, implement the obligation to take into account the best interests of the child, including where the child is not the person to whom the decision at issue is addressed.

43 It follows from all the foregoing considerations that Article 5 of Directive 2008/115, read in conjunction with Article 24 of the Charter, must be interpreted as meaning that Member States are required to take due account of the best interests of the child before adopting a return decision accompanied by an entry ban, even where the person to whom that decision is addressed is not a minor but his or her father.

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 (Tenth Chamber) hereby rules:

Article 5 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, read in conjunction with Article 24 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that Member States are required to take due account of the best interests of the child before adopting a return decision accompanied by an entry ban, even where the person to whom that decision is addressed is not a minor but his or her father.

[Signatures]

---

* Language of the case: French.