

JUDGMENT OF THE COURT (First Chamber)

6 December 2012 [\(*\)](#)

(Area of freedom, security and justice – Directive 2008/115/EC – Common standards and procedures for returning illegally staying third-country nationals – National legislation providing for a fine which may be replaced by an order for expulsion or home detention)

In Case C-430/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Tribunale di Rovigo (Italy), made by decision of 15 July 2011, received at the Court on 18 August 2011, in the criminal proceedings against

Md Sagor,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Ilešič (Rapporteur), E. Levits, J.-J. Kasel and M. Safjan, Judges,

Advocate General: J. Mazák,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 13 September 2012,

after considering the observations submitted on behalf of:

- Mr Sagor, by C. Tessarin and L. Masera, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and F. Urbani Neri, avvocato dello Stato,
- the German Government, by T. Henze and N. Graf Vitzthum, acting as Agents,
- the Netherlands Government, by B. Koopman, acting as Agent,
- the European Commission, by M. Condou-Durande and L. Prete, acting as Agents,

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

gives the following

Judgment

- 1 This reference 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 of Article 4(3) TEU.

- 2 The reference has been made in proceedings brought against Mr Sagor concerning his illegal stay in Italy.

Legal context

European Union law

- 3 Article 2 of Directive 2008/115, entitled 'Scope', provides:

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

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

(a) are subject to a refusal of entry ... or intercepted by the competent authorities in connection with the irregular crossing ... of the external border of a Member State ...;

(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.

... '

- 4 Article 3 of that directive, entitled 'Definitions', states:

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

...

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 Under Article 4(3) of that directive:

'This Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive.'

- 6 Articles 6 to 8 of Directive 2008/115 provide:

'Article 6

Return decision

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 ...

Article 7

Voluntary departure

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 ...

Article 8

Removal

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.

...'

7 Article 11 of that directive, entitled '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.

...'

8 Articles 15 and 16 of that directive are worded as follows:

'Article 15

Detention

1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the

subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

- (a) there is a risk of absconding or
- (b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

...

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

...

Article 16

Conditions of detention

1. Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners.

...'

- 9 Under Article 20 of Directive 2008/115, the Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 24 December 2010.

Italian law

Legislative Decree No 286/1998

- 10 Legislative Decree No 286/1998 of 25 July 1998 consolidating the provisions regulating immigration and the rules relating to the status of foreign nationals (Ordinary Supplement to GURI No 191 of 18 August 1998) ('Legislative Decree No 286/1998') codifies the immigration rules applicable in the Italian Republic.

- 11 That decree was amended, inter alia, by Law No 94 of 15 July 2009 on public security (Ordinary Supplement to GURI No 170 of 24 July 2009) and by Decree-Law No 89/2011 of 23 June 2011 on urgent measures to implement Directive 2004/38/EC on the free movement of citizens of the Union and to transpose Directive 2008/115/EC on returning illegally staying third-country nationals (GURI No 144 of 23 June 2011), converted into a law by Law No 129 of 2 August 2011 (GURI No 181 of 5 August 2011).

- 12 Article 6(3) of Legislative Decree No 286/1998 states:

'A foreign national who ..., without valid grounds, does not comply with the order to present his passport or other identification document, and his residence permit or other document to prove legal presence in the national territory, shall be imprisoned for up to a year and fined up to EUR 2 000.'

- 13 Article 10a of that legislative decree provides:

'1. Save where the act constitutes a more serious offence, a foreign national who enters or stays in the national territory in breach of the provisions of this decree ... shall be liable to a fine of between EUR 5 000 and EUR 10 000. ...

...

4. For the purposes of carrying out the expulsion of a foreign national convicted under paragraph 1, it is not necessary for the judicial authority which has jurisdiction to convict him of that offence to issue the authorisation provided for in Article 13(3). The Questore [Chief of Police] shall inform the judicial authority which has jurisdiction to convict the foreign national concerned of the offence that the expulsion ... has been carried out.

5. Once the court has been informed that the expulsion ... has been carried out, it shall discontinue the proceedings ...

...'

14 Article 13 of that legislative decree provides, under the heading 'Administrative expulsion':

'...

2. The expulsion shall be ordered by the prefect, on a case-by-case basis, where the foreign national:

...

(b) has remained on the territory of the State ... without applying for a residence permit within the period imposed ...

...

3. In all circumstances, the decision to expel a foreign national shall be made by reasoned decree which shall be immediately enforceable, even if that measure is contested by the person concerned. Where the foreign national is the subject of criminal proceedings and he is not in pre-trial detention, the Questore shall, prior to carrying out that expulsion, request authorisation from the judicial authority ... After having obtained that authorisation, the Questore shall carry out the expulsion pursuant to the rules provided for in paragraph 4. ... Pending the decision on that request for authorisation, the Questore may place the foreign national in a temporary detention centre, in accordance with Article 14.

...

4. The expulsion shall be carried out by the Questore by means of deportation by the law enforcement authorities:

(a) in the circumstances provided for in paragraphs 1 and 2(c) of this article ...;

(b) where there is the risk of absconding referred to in paragraph 4a ...;

...

(f) in the circumstances provided for in Articles 15 and 16 and in other circumstances under which the expulsion of a foreign national has been provided for as a criminal law sanction or as a consequence of a criminal law sanction; ...

...

4a. The risk of absconding mentioned in paragraph 4(b) shall be realised when at least one of the following circumstances, on the basis of which the prefect shall assess, on a case-by-case basis, the likelihood that the foreign national may avoid voluntary compliance with the decision to expel him, are present:

(a) lack of valid passport or any other equivalent document;

...

5. Where the conditions for immediate deportation referred to in paragraph 4 are not met, a foreign national receiving an expulsion order may ask the prefect, for the purposes of carrying out the expulsion, to grant him a period within which to depart voluntarily ... The Questura [police headquarters], having obtained proof that the return of the foreign national has indeed taken place, shall inform the judicial authority which has jurisdiction to find that the offence set out in Article 10a has been committed, for the purposes stated in paragraph 5 of that article ...'.

15 Article 14(1) of Legislative Decree No 286/1998 states:

'Where it is not possible to effect immediately the expulsion by deportation or return, because of temporary circumstances which hamper the preparation of the return or the carrying out of the removal process, the Questore shall order that the foreign national is to be detained, for the length of time which is strictly necessary, in the nearest detention centre ...'.

16 Article 16 of that legislative decree, entitled 'Expulsion as an alternative or substitute penalty for detention', provides in paragraph 1:

'Where the circumstances referred to in Article 14(1) of this decree, which preclude the immediate carrying out of the expulsion by means of deportation by the law enforcement authorities, do not apply, the court ..., when finding a person guilty of the offence set out in Article 10a, may substitute for the penalty provided for in that provision an expulsion order for a period of not less than five years ...'.

Legislative Decree No 274/2000

17 Article 6(2) of Legislative Decree No 274/2000 on the criminal jurisdiction of the magistrates' court, under Article 14 of Law No 468 of 24 November 1999 (Ordinary Supplement to GURI No 234 of 10 October 2000), in the version applicable to the events in the main proceedings ('Legislative Decree No 274/2000'), states:

'Where, in the event of related cases, some of those cases fall within the jurisdiction of the magistrates' court and others fall within the jurisdiction of the court of assizes or the district court, the higher court shall have jurisdiction for the entirety of the cases.'

18 Article 53 of that legislative decree, entitled 'Home detention order', provides:

'1. The penalty of home detention involves an obligation to remain in one's own home, or any other private residence, or in a place of treatment, assistance or day-care, every Saturday and Sunday. The court, in view of the family, work or study commitments or the state of health of the convicted person, may order that that penalty be carried out on different days of the week, or, at the convicted person's request, continuously.

2. The duration of the home detention may not be less than six days and may not exceed 45 days. The convicted person shall not be regarded as being in custody.'

19 Article 55 of Legislative Decree No 274/2000 states, under the heading ‘Conversion of fines’:

‘1. Regarding offences falling within the jurisdiction of the magistrates’ court, a fine which remains unpaid because the convicted person is unable to pay shall be converted, on application by that person, into an order for community work to be carried out for a period of not less than one month and no longer than six months ...

...

5. If the convicted person does not apply to carry out community work, fines which remain unpaid because that person is unable to pay shall be converted into an order for home detention, in the forms and in accordance with the rules provided for in Article 53(1) ...

6. For the purposes of conversion ..., the duration of home detention may not exceed 45 days.’

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

20 On 13 August 2009, in Rosolina Mare (Italy), an individual questioned by the police declared that his name was Md Sagor and that he had been born on 10 October 1990 in Bangladesh.

21 Upon examination of Mr Sagor’s situation, it then became apparent that that individual, who had no fixed abode in Italy and operated there as a street vendor, did not and never had possessed a residence permit. According to the report drawn up by the police, Mr Sagor declared that he had entered Italy in March 2009.

22 On 22 July 2010, Mr Sagor was summoned before the Tribunale di Rovigo (District Court, Rovigo) for the offence of illegal entry or stay referred to in Article 10a of Legislative Decree No 286/1998 and for the offence referred to in Article 6(3) of that legislative decree.

23 According to that court, it has not been established that Mr Sagor entered Italy illegally as it has not been demonstrated to the requisite legal standard that he avoided border controls.

24 Concerning illegal stay, on the other hand, that court found that that offence had been duly proven. It explained, moreover, that it has jurisdiction to pronounce judgment regarding that offence. It is true that the offence referred to in Article 10a of Legislative Decree No 286/1998 falls within the jurisdiction of the magistrates’ court. However, as that offence is related to the offence referred to in Article 6(3) of that legislative decree which falls within the jurisdiction of the district courts, Mr Sagor was rightly summoned before the Tribunale di Rovigo.

25 On 22 February 2011, the proceedings against Mr Sagor were removed from the register in so far as they concerned the offence referred to in Article 6(3).

26 Being required in principle to punish Mr Sagor’s illegal stay with the penalty set out in Article 10a of Legislative Decree No 286/1998, but having some doubts as to the compatibility of that national legislation with European Union law (‘EU law’), on 15 July 2011 the Tribunale di Rovigo decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. In the light of the principles of sincere cooperation and the effectiveness of directives, do Articles 2, 4, 6, 7 and 8 of [Directive 2008/115] preclude the possibility that a third-country national who is considered by the Member State to be illegally staying there

may be liable to a fine for which home detention is substituted by way of criminal-law sanction, solely as a consequence of that person's illegal entry and stay, even before any failure to comply with a removal order issued by the administrative authorities?

2. In the light of the principles of sincere cooperation and the effectiveness of directives, do Articles 2, 15 and 16 of [Directive 2008/115] preclude the possibility that, subsequent to the adoption of the directive, a Member State may enact legislation which provides that a third-country national who is considered by that Member State to be illegally staying there may be liable to a fine for which an enforceable order for expulsion with immediate effect is substituted by way of criminal-law sanction, without respecting the procedure and the rights of the foreign national laid down in the directive?
3. Does the principle of sincere cooperation established in Article 4(3) TEU preclude national rules adopted during the period prescribed for transposition of [that] directive in order to circumvent or, in any event, limit the scope of the directive, and what measures must the national court adopt in the event that it concludes that there was such an objective?'

Consideration of the questions referred

First and second questions

- 27 By its first and second questions, the referring court asks, in essence, whether Directive 2008/115 must be interpreted as precluding Member State legislation, such as that at issue in the main proceedings, which penalises illegal stays by third-country nationals by means of a fine which may be replaced by an order for expulsion or home detention.

Admissibility

- 28 The Italian Government claims that these questions are hypothetical in the main proceedings and are, thus, inadmissible. They are, it submits, based on the premiss that Mr Sagor is unable to pay and, in addition, is not interested in undertaking community work in lieu of the fine once it is imposed. As the accuracy of that premiss has not been established, the referring court's decision to request an interpretation of Directive 2008/115, enabling it to rule on the legality of the fine and the conversion of that fine into an order for expulsion or home detention, is premature.
- 29 That line of argument must be rejected. The fact that Mr Sagor has, hitherto, not been sentenced to the fine laid down by Article 10a of Legislative Decree No 286/1998 and that, consequently, it is not yet possible to ascertain whether, if that fine were to be imposed, the conditions for its conversion into an order for expulsion or home detention would be met, is attributable specifically to the fact that the referring court is unsure as to the compatibility of those various sanctions with EU law and is thus refraining from imposing them in the absence of clarity in that regard. In the order for reference, it is stated that the offence of illegal stay has been established in the present case and that the penalising mechanism provided for in the legislation at issue in the main proceedings will, providing it is compatible with EU law, have to be applied to Mr Sagor. It follows that that legislation, and the question of its compatibility with EU law, are relevant in the main proceedings (see, by analogy, Case C-329/11 *Achughbabian* [2011] ECR I-0000, paragraph 42).
- 30 The questions are, therefore, admissible.

Fine for which an expulsion order may be substituted

- 31 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 (*Achughbaban*, paragraph 28).
- 32 However, a Member State may not apply criminal law rules which are liable to undermine the application of the common standards and procedures established by Directive 2008/115 and thus to deprive it of its effectiveness (see Case C-61/11 PPU *El Dridi* [2011] ECR I-0000, paragraph 55, and *Achughbaban*, paragraph 39).
- 33 The Court has already had occasion to state that those standards and procedures would be undermined if, after establishing that a third-country national is staying illegally, the Member State were to preface the implementation of the return decision, or even the adoption of that decision, with a criminal prosecution which could lead to a term of imprisonment during the course of the return procedure. Such a step would risk delaying the removal (see *El Dridi*, paragraph 59, and *Achughbaban*, paragraphs 37 to 39 and 45).
- 34 However, as the Italian, German and Netherlands Governments have observed, legislation which provides, in circumstances such as those laid down by Legislative Decree No 286/1998, for a criminal prosecution which can lead to a fine for which an expulsion order may be substituted has markedly different effects from those of legislation providing for a criminal prosecution which may lead to a term of imprisonment during the course of the return procedure.
- 35 In that regard, it should be observed, first, that the adoption and implementation of the return measures envisaged by Directive 2008/115 are not delayed or otherwise impeded by the fact that a criminal prosecution such as that provided for in Legislative Decree No 286/1998 is pending. The return provided for in Articles 13 and 14 of that legislative decree may be achieved regardless of that criminal prosecution, without requiring that prosecution to have come to an end. That finding is confirmed by Article 10a(5) of that legislative decree, pursuant to which the court must, once it has been informed that the individual in question has been returned, bring the criminal proceedings to a close by discontinuing them.
- 36 It should be noted, second, that the possibility that that criminal prosecution may lead to a fine is also not liable to impede the return procedure established by Directive 2008/115. Indeed, the imposition of a fine does not in any way prevent a return decision from being made and implemented in full compliance with the conditions set out in Articles 6 to 8 of Directive 2008/115, nor does it undermine the common standards relating to deprivation of liberty set out in Articles 15 and 16 of that directive.
- 37 Third, regarding the option given to the criminal court of replacing the fine with an expulsion order accompanied by an entry ban of at least five years, it is apparent from Article 16(1) of Legislative Decree No 286/1998 that the Italian legislature has restricted the use of that option to situations where it is possible to effect the immediate return of the individual concerned.
- 38 It must be stated that such an option is also not, in itself, prohibited by Directive 2008/115.
- 39 Indeed, as confirmed by the flexible definition of 'return decision' set out in Article 3(4) thereof, that directive does not preclude the decision imposing the obligation to return from being taken – in certain circumstances as determined by the Member State concerned – in the form of a criminal judgment. Thus, nothing in Directive 2008/115 precludes the removal referred to in Article 8(1) of that directive from being carried out in the context of criminal

proceedings. Moreover, the fact that an expulsion order, such as that provided for in the legislation at issue in the main proceedings, includes an immediately enforceable obligation to return and thus does not require the subsequent adoption of a separate decision concerning the removal of the individual concerned, also does not conflict with the common standards and procedures established by Directive 2008/115, as witnessed by the wording of Article 6(6) of that directive and the term 'may' employed by Article 8(3) of that directive.

40 It is true that, as the European Commission has observed, an expulsion order such as that provided for in the legislation at issue in the main proceedings is characterised by there being no opportunity for the individual concerned to be granted a period for voluntary departure as referred to in Article 7 of Directive 2008/115.

41 However, in that regard, it should be noted that Article 7(4) allows the Member States to refrain from granting a period for voluntary departure, in particular where there is a risk that the person concerned may abscond in order to avoid the return procedure. Any assessment in that regard must be based on an individual examination of that person's case.

42 Lastly, it should be noted that, in order for a provision worded in a similar way to Article 16 of Legislative Decree No 286/1998 to comply with Directive 2008/115, that provision must be applied in such a way that the duration of the entry ban which it imposes corresponds to that provided for in Article 11(2) of the directive.

Fine for which a home detention order may be substituted

43 It follows both from the duty of loyalty of the Member States and from the requirements of effectiveness referred to in Directive 2008/115 that the obligation imposed on the Member States by Article 8 of that directive to carry out the removal must be fulfilled as soon as possible (*Achughbabian*, paragraph 45).

44 Clearly, the imposition and enforcement of a home detention order during the course of the return procedure provided for by Directive 2008/115 do not contribute to the achievement of the removal which that procedure pursues, namely the physical transportation of the relevant individual out of the Member State concerned. Such an order does not therefore constitute a 'measure' or a 'coercive measure' within the meaning of Article 8 of Directive 2008/115 (see, by analogy, *Achughbabian*, paragraph 37).

45 In addition, the home detention order is liable to delay – and thus to impede – the measures, such as deportation and forced return by air, which can be used to achieve removal. Such a risk of undermining the return procedure is present in particular where the applicable legislation does not provide that the enforcement of a home detention order imposed on an illegally staying third-country national must come to an end as soon as it is possible to effect that person's removal.

46 It is for the referring court to assess whether there exists in the national legislation a provision by virtue of which removal overrides enforcement of the home detention order. If no such provision exists, it should be concluded that Directive 2008/115 precludes a mechanism replacing a fine with a home detention order, such as the mechanism provided for in Articles 53 and 55 of Legislative Decree No 274/2000, from being applied to illegally staying third-country nationals.

47 In the light of all of the foregoing, the answer to the first and second questions referred is that Directive 2008/115 must be interpreted as:

- not precluding Member State legislation, such as that at issue in the main proceedings, which penalises illegal stays by third-country nationals by means of a fine which may be replaced by an expulsion order, and
- precluding Member State legislation which allows illegal stays by third-country nationals to be penalised by means of a home detention order without guaranteeing that the enforcement of that order must come to an end as soon as the physical transportation of the individual concerned out of that Member State is possible.

Third question

- 48 If the referring court were required, on the basis of the answers to the first and second questions and following the examinations described in paragraphs 41 and 46 of this judgment, to conclude that the present case does not correspond to one of the situations referred to in Article 7(4) of Directive 2008/115 and that the option provided by Article 16 of Legislative Decree No 286/1998 cannot therefore be made use of, or to conclude that Directive 2008/115 precludes the application of Articles 53 and 55 of Legislative Decree No 274/2000 to illegally staying third-country nationals, it would be for that court to refuse to apply those provisions of national law (see, by analogy, *El Dridi*, paragraph 61).
- 49 In view of that statement, there is no longer any need to answer the third question.

Costs

- 50 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 (First Chamber) hereby rules:

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:

- **not precluding Member State legislation, such as that at issue in the main proceedings, which penalises illegal stays by third-country nationals by means of a fine which may be replaced by an expulsion order, and**
- **precluding Member State legislation which allows illegal stays by third-country nationals to be penalised by means of a home detention order without guaranteeing that the enforcement of that order must come to an end as soon as the physical transportation of the individual concerned out of that Member State is possible.**

[Signatures]

* Language of the case: Italian.