

JUDGMENT OF THE COURT (Grand Chamber)

6 December 2011 \*

In Case C-329/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Cour d'appel de Paris (France), made by decision of 29 June 2011, received at the Court on 5 July 2011, in the proceedings

**Alexandre Achughbabian**

v

**Préfet du Val-de-Marne,**

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, J. Malenovský, U. Lohmus and M. Safjan, Presidents of Chambers, A. Borg Barthet, M. Ilešič (Rapporteur), A. Arabadjiev, C. Toader and J.-J. Kasel, Judges

Advocate General: J. Mazák,  
Registrar: R. Şereş, Administrator,

\* Language of the case: French.

having regard to the Order of the President of the Court of Justice of 30 September 2011 deciding to make the reference for a preliminary ruling subject to an accelerated procedure in accordance with Article 23a of the Statute of the Court of Justice of the European Union and Article 104a, first paragraph, of the Rules of Procedure of the Court of Justice,

having regard to the written procedure and further to the hearing on 25 October 2011,

after considering the observations submitted on behalf of:

- Mr Achughbabian, by C. Papazian and P. Spinosi, *avocats*,
- the French Government, by E. Belliard, G. de Bergues and B. Beaupère-Manokha, acting as Agents,
- the Danish Government, by C. Vang, acting as Agent,
- the German Government, by T. Henze and N. Graf Vitzthum, acting as Agents,
- the Estonian Government, by M. Linntam, acting as Agent,
- the European Commission, by M. Condou Durande, acting as Agent,

after hearing the Advocate General,

gives the following

### **Judgment**

- <sup>1</sup> 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).
- <sup>2</sup> The reference was made in the context of a dispute between Mr Achughbabian and the Prefect of Val-de-Marne concerning Mr Achughbabian's illegal stay in French territory.

### **Legal context**

#### *Directive 2008/115*

- <sup>3</sup> Recitals 4, 5 and 17 in 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.

...

- (17) Without prejudice to the initial apprehension by law-enforcement authorities, regulated by national legislation, detention should, as a rule, take place in specialised detention facilities.’

<sup>4</sup> Article 1 of Directive 2008/115, entitled ‘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 Community law as well as international law, including refugee protection and human rights obligations.’

<sup>5</sup> Article 2 of the Directive, headed ‘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 who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air 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.

...'

6 Article 3 of the said directive, headed 'Definitions' provides:

'For the purposes of this Directive ...:

...

- 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 ... 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 Community 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;

...’

7 Articles 6 to 9 of Directive 2008/115 state:

*‘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.

2. Third-country nationals staying illegally on the territory of a Member State and holding a valid residence permit or other authorisation offering a right to stay issued by another Member State shall be required to go to the territory of that other Member State immediately. ...

3. Member States may refrain from issuing a return decision to a third-country national staying illegally on their territory if the third-country national concerned is taken back by another Member State ...

4. Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued. ...

5. If a third-country national staying illegally on the territory of a Member State is the subject of a pending procedure for renewing his or her residence permit or other authorisation offering a right to stay, that Member State shall consider refraining from issuing a return decision, until the pending procedure is finished ...

...

### *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. ...

...

2. 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.

3. Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure.



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.

## *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.

...

4. Where Member States use — as a last resort — coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force. They shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned.

...

*Article 9*

Postponement of removal

1. Member States shall postpone removal:

- (a) when it would violate the principle of non-refoulement, or
- (b) for as long as a suspensory effect is granted [following an action brought against a decisions related to return].

2. Member States may postpone removal for an appropriate period taking into account the specific circumstances of the individual case. Member States shall in particular take into account:

- (a) the third-country national's physical state or mental capacity;
- (b) technical reasons, such as lack of transport capacity, or failure of the removal due to lack of identification.

3. If a removal is postponed as provided for in paragraphs 1 and 2, the obligations set out in Article 7(3) may be imposed on the third-country national concerned.'

8 Articles 15 and 16 of Directive 2008/115 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.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

...

4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

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.

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

(a) lack of cooperation by the third-country national concerned, or

(b) delays in obtaining the necessary documentation from third countries.

## *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 are to be kept separated from ordinary prisoners.

...

- 9 Under Article 20 of Directive 2008/115, Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the directive no later than 24 December 2010.

*National legislation*

The code de l'entrée et du séjour des étrangers et du droit d'asile

- 10 According to Article L. 211-1 of the code de l'entrée et du séjour des étrangers et du droit d'asile français ('Ceseda'), 'in order to enter France, any foreign national must hold ... the documents and visas required by the international conventions and the regulations in force ...'
- 11 According to Article L-311-1 of that code, 'any foreign national aged over 18 years wishing to stay in France must, after the expiry of a period of three months from his entry into France, hold a residence permit.'
- 12 Article L. 551-1 of Ceseda, in the version in force at the material time, was worded as follows:

'The detention of a foreign national in premises not falling under the prisons administration may be ordered where that foreign national:

...

3° although subject to a deportation order ... issued less than one year previously, or having to be deported pursuant to a prohibition from French territory under the penal code, cannot immediately leave French territory; or

...

6° although subject to an obligation to leave French territory imposed ... less than one year previously and in respect of which the one-month period for voluntarily leaving the territory has expired, cannot immediately leave that territory.'

<sup>13</sup> The first sentence of Article L. 552-1 of *Ceseda*, in the version in force at the material time, provided that 'where a period of 48 hours has elapsed since the detention decision, application must be made to the *juge des libertés et de la détention* [liberty and custody judge] for extending the detention.'

<sup>14</sup> Article L. 621-1 of *Ceseda* provides:

'A foreign national who has entered or resided in France without complying with the provisions of Articles L. 211-1 and L. 311-1 or who has remained in France beyond the period authorised by his visa commits an offence punishable by one year's imprisonment and a fine of EUR 3 750.

The court may, further, prohibit a convicted foreign national, for a period which may not exceed three years, from entering or residing in France. Prohibition from the territory automatically entails deportation, where appropriate at the expiry of the term of imprisonment.'

- <sup>15</sup> Some of the provisions of Ceseda were amended by Law No 2011-672 of 16 June 2011 on immigration, integration and nationality (loi n° 2011-672 du 16 juin 2011 relative à l'immigration, à l'intégration et à la nationalité (JORF of 17 July 2011, p. 10290)), which entered into force on 18 July 2011. Article 621-1 of Ceseda is not among the amended provisions.

### The Code of Criminal Procedure

- <sup>16</sup> Article 62-2 of the Code of Criminal Procedure (code de procédure pénale), in the version in force at the material time, provides:

‘Police custody is a coercive measure decided upon by a police officer, under the control of the courts, whereby a person reasonably suspected on one or more grounds of committing or attempting to commit an offence punishable by imprisonment is held at the disposal of investigators’

### **The dispute in the main proceedings and the reference for a preliminary ruling**

- <sup>17</sup> On 24 June 2011, at Maisons-Alfort (France), identity checks were carried out on the public highway by the police. One of the individuals questioned in the course of those checks stated that his name was Alexandre Achughbabian and that he was born in Armenia on 9 July 1990.
- <sup>18</sup> According to the police record, Mr Achughbabian also stated that he was of Armenian nationality. He denies making that statement, however.

- 19 Being suspected of committing and continuing to commit the offence set out in Article L. 621-1 of *Ceseda*, Mr Achughbabian was placed in police custody.
- 20 A more detailed examination of Mr Achughbabian's situation then revealed that he had entered France on 9 April 2008 and had applied there for a residence permit, that that application had been rejected on 28 November 2008, and that that rejection had been confirmed on 27 January 2009 by the Prefect of Val-d'Oise accompanied by an order of the latter, notified to Mr Achughbabian on 14 February 2009, imposing an obligation to leave French territory within one month.
- 21 On 25 June 2011, a deportation order and an administrative detention order were adopted by the Prefect of Val-de-Marne and served on Mr Achughbabian.
- 22 On 27 June 2011, the juge des libertés et de la détention of the Tribunal de grande instance de Créteil, to whom application had been made under Article L. 552-1 of *Ceseda* for an extension of the detention beyond 48 hours, ordered that extension and dismissed the objections of invalidity raised by Mr Achughbabian against, inter alia, the police custody into which he had just been placed.
- 23 One of those objections was based on the judgment of 28 April 2011 in Case C-61/11 *PPU El Dridi* [2011] ECR I-3015, in which the Court of Justice held that Directive 2008/115 precludes legislation of a Member State, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period. According to Mr Achughbabian, it follows from that judgment that the sentence of imprisonment provided for by Article L. 621-1 of *Ceseda* is incompatible with EU law. Having regard to that incompatibility and the rule that police custody may be imposed only where there is suspicion of an offence punishable



by a sentence of imprisonment, the procedure followed in this case is, he submits, unlawful.

<sup>24</sup> On 28 June 2011, Mr Achughbabian appealed against the order of the juge des libertés et de la détention of the Tribunal de grande instance de Créteil to the Cour d'appel de Paris. The latter took note that Mr Achughbabian was of Armenian nationality, that he had been placed in police custody and then in detention for an unlawful stay, and that he had argued that Article L. 621-1 of Ceseda is incompatible with Directive 2008/115, as interpreted in *El Dridi*.

<sup>25</sup> In those circumstances, the Cour d'appel de Paris decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

‘Taking into account its scope, does Directive [2008/115] preclude national legislation, such as Article L. 621-1 of [Ceseda], which provides for the imposition of a sentence of imprisonment on a third-country national on the sole ground of his illegal entry or residence in national territory?’

<sup>26</sup> The referring court, moreover, terminated Mr Achughbabian’s detention.

<sup>27</sup> At the request of the referring court, the designated chamber examined the need to deal with the present case under the urgent preliminary ruling procedure provided for in Article 104b of the Rules of Procedure. The said chamber decided, after hearing the Advocate General, not to accede to that request.

**The question referred for a preliminary ruling**

- 28 It should be noted at the outset that Directive 2008/115 concerns only the return of illegally staying third-country nationals in a Member State and is thus not designed to harmonise in their entirety the national rules 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 penal sanctions to deter and prevent such an infringement of the national rules on residence.
- 29 Since the common standards and procedures established by Directive 2008/115 concern only the adoption of return decisions and the implementation of those decisions, it should also be pointed out that that directive does not preclude a third-country national being placed in detention with a view to determining whether or not his stay is lawful.
- 30 That finding is corroborated by recital 17 of that directive, from which it is apparent that the conditions for the initial arrest of third-country nationals suspected of staying in a Member State illegally remain governed by national law. Moreover, as the French Government has observed, the objective of Directive 2008/115, namely, the effective return of illegally-staying third-country nationals, would be compromised if it were impossible for Member States to prevent, by deprivation of liberty such as police custody, a person suspected of staying illegally from fleeing before his situation could even be clarified.
- 31 It should be held, in that regard, that the competent authorities must have a brief but reasonable time to identify the person under constraint and to research the information enabling it to be determined whether that person is an illegally-staying third-country national. Determination of the name and nationality may prove difficult

where the person concerned does not cooperate. Verification of the existence of an illegal stay may likewise prove complicated, particularly where the person concerned invokes a status of asylum seeker or refugee. That being so, the competent authorities are required, in order to prevent the objective of Directive 2008/115, as stated in the paragraph above, from being undermined, to act with diligence and take a position without delay on the legality or otherwise of the stay of the person concerned. Once it has been established that the stay is illegal, the said authorities must, pursuant to Article 6(1) of the said directive and without prejudice to the exceptions laid down by the latter, adopt a return decision.

<sup>32</sup> Whilst it is apparent from the above that Directive 2008/115 does not preclude either national legislation, such as Article L. 621-1 of *Ceseda*, in so far as the latter classifies an illegal stay by a third-country national as an offence and provides for penal sanctions, including a term of imprisonment, to prevent such a stay, or the detention of a third-country national in order to determine whether or not his stay is legal, it needs next to be examined whether that directive precludes legislation such as Article L. 621-1 of *Ceseda* in so far as it is capable of leading to an imprisonment in the course of the return procedure governed by the said directive.

<sup>33</sup> In that respect, the Court has already held that whilst, in principle, criminal legislation and the rules of criminal procedure fall within the competence of the Member States, this area of 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. Those States cannot apply criminal legislation capable of

imperilling the realisation of the aims pursued by the said directive, thus depriving it of its effectiveness (*El Dridi*, paragraphs 53 to 55 and case-law cited).

34 In considering the question whether, for reasons similar to those set out by the Court in *El Dridi*, Directive 2008/115 precludes legislation such as Article L. 621-1 of Cese-da, it must be held, first of all, that the situation of the applicant in the main proceedings falls within that referred to in Article 8(1) of that directive.

35 It is apparent from the documents before the Court and from the reply given by the referring court to a request for clarification from the Court of Justice that an order to leave French territory, setting a period of one month for a voluntary departure, was served on Mr Achughbabian on 14 February 2009, and that the latter did not comply with that order. As that return decision was no longer operative on 24 June 2011, the date on which Mr Achughbabian was apprehended and placed in police custody, a fresh return decision was adopted on 25 June 2011, this time taking the form of a deportation order, not accompanied by a period for voluntary departure. It follows that, independently of the question whether the situation of the applicant in the main proceedings must be regarded as that of a person who has not complied with a return obligation in the time-limit granted for a voluntary departure or as that of a person subject to a return decision without the fixing of a time-limit for a voluntary departure, the said situation is in any event covered by Article 8(1) of Directive 2008/115 and thus gives rise to the obligation imposed by that article on the Member State concerned to take all measures necessary to carry out removal, namely, pursuant to Article 3, point 5, of the said directive, the physical transportation of the person concerned out of the said Member State.

36 It should be stated, next, that it is obvious from Article 8(1) and (4) of Directive 2008/115 that the expressions ‘measures’ and ‘coercive measures’ contained therein refer to any intervention which leads, in an effective and proportionate manner, to the return of the person concerned. Article 15 of the said directive provides that detention of the person concerned is permitted only for the purposes of preparing and permitting the removal and that that deprivation of liberty can be maintained only

for a maximum duration of 6 months, an additional period of detention of 12 months being capable of being added only where non-implementation of the return decision during the said 6 months is due to a lack of cooperation from the person concerned or delays in obtaining the necessary documentation from third countries.

<sup>37</sup> Clearly, the imposition and enforcement of a sentence of imprisonment during the course of the return procedure provided for by Directive 2008/115 do not contribute to the carrying through of the removal which that procedure is intended to achieve, namely, the physical transportation of the person concerned out of the Member State concerned. Such a sentence does not therefore constitute a 'measure' or a 'coercive measure' within the meaning of Article 8 of Directive 2008/115.

<sup>38</sup> Finally, it is undisputed that the national legislation at issue in the main proceedings, in that it provides for a term of imprisonment for any third-country national aged over 18 years who stays in France illegally after the expiry of a period of three months from his entry into French territory, is capable of leading to imprisonment whereas, following the common standards and procedures set out in Articles 6, 8, 15 and 16 of Directive 2008/115, such a third-country national must, as a matter of priority, be made the subject-matter of a return procedure and may, as regards deprivation of liberty, at the very most be ordered to be detained.

<sup>39</sup> National legislation such as that at issue in the main proceedings is, consequently, likely to thwart the application of the common standards and procedures established by Directive 2008/115 and delay the return, thereby, like the legislation at issue in *El Dridi*, undermining the effectiveness of the said directive.

40 The above conclusion is not called into question either by the fact, invoked by the French Government, that, pursuant to circulars sent to the courts, the penalties laid down by the national legislation at issue in the main proceedings are rarely imposed outside cases where the person staying illegally has, in addition to the offence of staying illegally, also committed another offence, or by the fact, likewise invoked by that government, that Mr Achughbabian has not been sentenced to those penalties.

41 In that respect, it is important to note at the outset that third-country nationals who, in addition to staying illegally, have also committed one or more other offences may in certain cases, under Article 2(2)(b) of Directive 2008/115, be removed from the scope of the latter. However, there is nothing in the evidence before the Court to suggest that Mr Achughbabian has committed any offence other than that consisting in staying illegally on French territory. The situation of the applicant in the main proceedings cannot therefore be removed from the scope of Directive 2008/115, as Article 2(2)(b) of the latter clearly cannot, without depriving that directive of its purpose and binding effect, be interpreted as making it lawful for Member States not to apply the common standards and procedures set out by the said directive to third-country nationals who have committed only the offence of illegal staying.

42 As regards the fact that Mr Achughbabian has, hitherto, not been sentenced to the penalties of imprisonment and fine laid down by Article L. 621-1 of *Ceseda*, it should be noted that the adoption against him of a deportation order has undeniably been based on the finding of the offence of illegal staying provided for by that article, and that the latter is, whatever the content of the circulars mentioned by the French Government, capable of leading to a sentence to the said penalties. Consequently, Article L. 621-1 of *Ceseda*, and the question of its compatibility with EU law, are relevant in the file of the applicant in the case in the main proceedings, the referring court and the French Government having moreover mentioned neither a withdrawal of

proceedings nor, more generally, any decision definitively excluding the possibility of prosecution against Mr Achughbabian for the said offence.

- <sup>43</sup> Moreover, and analogously with what has been stated in paragraph 33 of this judgment, this Court emphasises the duty of the Member States, following from Article 4(3) TEU and referred to in paragraph 56 of the judgment in *El Dridi*, to take any appropriate measure to ensure fulfilment of the obligations arising from Directive 2008/115 and to refrain from any measure which could jeopardise the attainment of the objectives of the latter. It is important that the national provisions applicable must not be capable of compromising the proper application of the common standards and procedures introduced by the said directive.
- <sup>44</sup> Finally, this Court cannot accept the line of argument of the German and Estonian Governments, according to which, whilst Articles 8, 15 and 16 of Directive 2008/115 prevent a term of imprisonment from being imposed during the removal procedure provided for in those articles, they do not prevent a Member State from sentencing an illegally staying third-country national to a term of imprisonment before carrying out the removal of that person in accordance with the rules laid down by the directive.
- <sup>45</sup> It is sufficient to note in that respect that it follows both from the duty of loyalty of the Member States and the requirements of effectiveness referred to, for example, in recital 4 of Directive 2008/115, that the obligation imposed on the Member States by Article 8 of that directive, in the cases set out in Article 8(1), to carry out the removal, must be fulfilled as soon as possible. That would clearly not be the case 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 followed, in appropriate cases, by a term of imprisonment. Such a step would delay the removal (*El Dridi*, paragraph 59) and does not, moreover, appear amongst the justifications for a postponement of removal referred to in Article 9 of Directive 2008/115.

- 46 Whilst it is apparent from the above considerations as a whole that Member States bound by Directive 2008/115 cannot provide for a term of imprisonment for illegally-staying third-country nationals in situations in which the latter must, by virtue of the common standards and procedures established by that directive, be removed and may, with a view to the preparation and carrying out of that removal, at the very most be ordered to be detained, 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 that directive 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 (*El Dridi*, paragraphs 52 and 60).
- 47 Having regard to that right, it must be held that the argument put forward by the governments which have made submissions before the Court, that an interpretation such as that given above would put an end to the possibility for Member States to deter illegal stays, is unfounded.
- 48 In particular, Directive 2008/115 does not preclude penal sanctions being imposed, following national rules of criminal procedure, on third-country nationals to whom the return procedure established by that directive has been applied and who are illegally staying in the territory of a Member State without there being any justified ground for non-return.
- 49 In that regard, it should be emphasised that, in the context of the application of the said rules of criminal procedure, the imposition of the sanctions mentioned in the previous paragraph 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.



50 In the light of all the foregoing, the answer to the question is that Directive 2008/115 must be interpreted as:

- precluding 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; and
- not precluding such legislation in so far as the latter permits 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 that territory with no justified ground for non-return.

## Costs

51 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 (Grand 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:**

- **precluding 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; and**
- **not precluding such legislation in so far as the latter permits 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 that territory with no justified ground for non-return.**

[Signatures]