C-181/16

European Court of Justice (Grand Chamber)
Judgment of 19 June 2018

In Case C-181/16, REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, Belgium), made by decision of 8 March 2016, received at the Court on 31 March 2016, in the proceedings

Sadikou Gnandi v. État belge,

the Court (Grand Chamber),
composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, T. von Danwitz (Rapporteur), J.L. da Cruz Vilaça, C.G. Fernlund and C. Vajda, Presidents of Chambers, E. Juhász, C. Toader, M. Safjan, D. Šváby, M. Berger, E. Jarašiūnas, K. Jürimäe and C. Lycourgos, Judges,
Advocate General: P. Mengozzi,
Registrar: R. Șereș, Administrator,

having regard to the written procedure and further to the hearing on 1 March 2017, after considering the observations submitted on behalf of:

- Mr Gnandi, by D. Andrien, avocat,
- the Belgian Government, by C. Pochet and M. Jacobs, acting as Agents, and by C. Pironț, S. Matray and D. Matray, avocats,
- the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,
- the European Commission, by C. Cattabriga and M. Heller, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 June 2017,
having regard to the order of 25 October 2017 reopening the oral procedure and further to the hearing on 11 December 2017,
after considering the observations submitted on behalf of:

- Mr Gnandi, by D. Andrien, avocat,
- the Belgian Government, by C. Pochet, M. Jacobs and C. Van Lul, acting as Agents, and by C. Pironț, S. Matray and D. Matray, avocats,
- the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,
- the German Government, by R. Kanitz, acting as Agent,
- the French Government, by E. de Moustier, E. Armoët and D. Colas, acting as Agents,
- the Netherlands Government, by K. Bulterman, P. Huurnink and J. Langer, acting as Agents,
- the European Commission, by C. Cattabriga, M. Heller and M. Condou-Durande, acting as Agents,

after hearing the additional Opinion of the Advocate General at the sitting on 22 February 2018, 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), Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13), and the principle of non-refoulement and the right to an effective remedy enshrined, respectively, in Article 18 and Article 19(2), and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between Mr Sadikou Gnandi and the État belge (Belgian State) concerning the lawfulness of a decision ordering Mr Gnandi to leave Belgian territory.

Legal context

The Geneva Convention

3 Article 33(1) of the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (United Nations Treaty Series, vol. 189, p. 150, No 2545 (1954)), as supplemented by the Protocol relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967 ('the Geneva Convention'), that article being headed 'Prohibition of expulsion or return ("refoulement")', provides:

> 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

EU law

Directives 2003/9/EC and 2013/33/EU

4 Article 2(c) of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18), defines the concept of 'applicant' or 'asylum seeker', for the purposes of that directive, as 'a third country national or a stateless person who has made an application for asylum in respect of which a final decision has not yet been taken'.

5 Article 3 of that directive, entitled 'Scope', states in its paragraph 1:

> 'This Directive shall apply to all third country nationals and stateless persons who make an application for asylum at the border or in the territory of a Member State as long as they are allowed to remain on the territory as asylum seekers, ...'

6 Article 2(c) and Article 3(1) of Directive 2003/9 have been respectively replaced, using substantially the same wording, by Article 2(b) and Article 3(1) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96).

Directives 2005/85 and 2013/32/EU

7 Recitals 2 and 8 of Directive 2005/85 state as follows:

> '(2) The European Council ... agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the [Geneva Convention], thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution.
>
> ...
>
> (8) This Directive respects the fundamental rights and observes the principles recognised in particular by the [Charter].'

8 Article 7 of that directive, entitled 'Right to remain in the Member State pending the examination of the application', provides:

> '1. Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. This right to remain shall not constitute an entitlement to a residence permit.
>
> 2. Member States can make an exception only where, in accordance with Articles 32 and 34, a subsequent application will not be further examined or where they will surrender or extradite, as appropriate, a person either to another Member State pursuant to obligations in accordance with a European arrest warrant ... or otherwise, or to a third country, or to international criminal courts or tribunals.'

9 Paragraph 1 of Article 39 of Directive 2005/85, entitled 'The right to an effective remedy', requires Member States to ensure that applicants for asylum have the right to an effective remedy. Article 39(3) of that directive is worded as follows:

> 'Member States shall, where appropriate, provide for rules in accordance with their international obligations dealing with:
>
> (a) the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome;
>
> (b) the possibility of legal remedy or protective measures where the remedy pursuant to paragraph 1 does not have the effect of allowing applicants to remain in the Member State concerned pending its outcome. ...'

10 Articles 7 and 39 of Directive 2005/85 have been replaced, respectively, by Articles 9 and 46 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60).

11 Article 9 of Directive 2013/32, entitled ‘Right to remain in the Member State pending the examination of the application’, provides:

> ‘1. Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. This right to remain shall not constitute an entitlement to a residence permit.
>
> 2. Member States may make an exception only where a person makes a subsequent application referred to in Article 41 or where they will surrender or extradite, as appropriate, a person either to another Member State pursuant to obligations in accordance with a European arrest warrant ... or otherwise, or to a third country or to international criminal courts or tribunals.
>
> ...’

12 Article 46 of that directive, entitled ‘The right to an effective remedy’, provides in its paragraph 5:

> ‘Without prejudice to paragraph 6, Member States shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy.’

Directive 2008/115

13 Recitals 2, 4, 6, 8, 9, 12 and 24 of Directive 2008/115 state as follows:

> ‘(2) The … European Council … called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.
>
> ...
>
> (4) Clear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well-managed migration policy.
>
> ...
>
> (6) Member States should ensure that the ending of illegal stay of third-country nationals is carried out through a fair and transparent procedure. ...
>
> ...
>
> (8) It is recognised that it is legitimate for Member States to return illegally staying third-country nationals, provided that fair and efficient asylum systems are in place which fully respect the principle of non-refoulement.
>
> (9) In accordance with [Directive 2005/85], a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker, has entered into force.’
>
> ...
>
> (12) The situation of third-country nationals who are staying illegally but who cannot yet be removed should be addressed. ...
>
> ...
>
> (24) This Directive respects the fundamental rights and observes the principles recognised in particular by the [Charter].’

14 Article 2(1) of Directive 2008/115 states that the directive applies to third-country nationals staying illegally on the territory of a Member State.

15 Under Article 3 of that directive:

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

16 Article 5 of Directive 2008/115, entitled ‘Non-refoulement, best interests of the child, family life and state of health’, provides:

> ‘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.’

17 Article 6 of that directive, entitled ‘Return decision’, reads as follows:

> ‘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.
>
> ...
>
> 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. Where a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay.
>
> ...
>
> 6. This Directive shall not prevent Member States from adopting a decision on the ending of a legal stay together with a return decision and/or a decision on a removal and/or entry ban in a single administrative or judicial decision or act as provided for in their national legislation, without prejudice to the procedural safeguards available under Chapter III and under other relevant provisions of Community and national law.’

18 Article 7 of that directive, entitled ‘Voluntary departure’, provides:

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

19 Article 8 of that directive, entitled ‘Removal’, states:

> ‘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.
>
> ...’

20 Article 9(1) of Directive 2008/115 reads as follows:

> ‘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 in accordance with Article 13(2).’

21 Paragraph 1 of Article 13 of that directive, entitled ‘Remedies’, which features in Chapter III relating to ‘Procedural safeguards’, provides:

> ‘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.’

22 Article 15(1) of that directive is worded as follows:

> ‘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.’

Belgian law

23 Article 39/70(1) of the loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Moniteur belge of 31 December 1980, p. 14584) (Law of 15 December 1980 on the entry to Belgian territory, stay, residence and removal of foreign nationals), in the version applicable to the facts of the main proceedings, ('the Law of 15 December 1980') provides:

> 'Unless the person concerned agrees, no order for removal from national territory or for refoulement may be enforced against a foreign national during the period prescribed for bringing an appeal or during the examination of that appeal.'

24 The first and second subparagraphs of Article 52/3(1) provide:

> 'Where the Commissioner General for Refugees and Stateless Persons does not take the asylum application into consideration or refuses to grant refugee status or the status of subsidiary protection to the foreign national, and that person is unlawfully present in the Kingdom of Belgium, the Minister or his representative shall issue, without delay, an order to leave Belgium, justified on one of the grounds set out in Article 7(1)(i) to (xii). That decision shall be notified to the person concerned in accordance with Article 51/2.
>
> Where the Council for asylum and immigration proceedings dismisses the appeal of a foreign national against a decision taken by the Commissioner General for Refugees and Stateless Persons pursuant to Article 39/2(1)(i), and the foreign national is unlawfully present in the Kingdom of Belgium, the Minister or his representative shall decide to extend without delay the order requiring him to leave Belgium provided for under the first subparagraph. That decision shall immediately be notified to the person concerned in accordance with Article 51/2.'

25 Article 75(2) of the arrêté royal du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Moniteur belge of 27 October 1981, p. 13740) (Royal Decree of 8 October 1981 on the entry to Belgian territory, stay, residence and removal of foreign nationals), in the version applicable to the facts in the main proceedings, provides:

> 'If the Commissioner General for Refugees and Stateless Persons refuses to grant refugee status and subsidiary protection to a foreign national or does not take the asylum application into consideration, the Minister or his representative shall issue the person concerned with an order requiring him to leave Belgium in accordance with Article 52/3(1) of the [Law of 15 December 1980].'

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

26 On 14 April 2011, Mr Gnandi, a Togolese national, submitted to the Belgian authorities an application for international protection, which was rejected on 23 May 2014 by the Commissaire général aux réfugiés et aux apatrides (Commissioner General for Refugees and Stateless Persons, Belgium; 'the CGRA'). On 3 June 2014, the Belgian State, acting through the Office des étrangers (Immigration Office, Belgium) ordered Mr Gnandi to leave Belgian territory.

27 On 23 June 2014, Mr Gnandi brought an appeal against the decision of the CGRA of 23 May 2014 before the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium) and requested the annulment and suspension of execution of the order of 3 June 2014 requiring him to leave the territory.

28 The Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) dismissed, by judgment of 31 October 2014, the appeal brought against the decision of the CGRA of 23 May 2014 and, by judgment of 19 May 2015, the appeal against the order of 3 June 2014 requiring Mr Gnandi to leave the territory. Mr Gnandi brought an appeal against those two judgments before the Conseil d'État (Council of State, Belgium), which, on 10 November 2015, set aside the judgment of the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) of 31 October 2014 and referred the case back to it. The main proceedings concern solely the appeal on a point of law brought by Mr Gnandi against the judgment of the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) of 19 May 2015.

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

> 'Must Article 5 of Directive [2008/115], which requires Member States to respect the principle of non-refoulement when they are implementing that directive, and the right to an effective remedy provided for under Article 13(1) of that directive and under Article 47 of the [Charter] be interpreted as precluding the adoption of a return decision, as provided for under Article 6 of Directive [2008/115] and under Article 52/3(1) of the [Law of 15 December 1980] and Article 75(2) of the Royal Decree of 8 October 1981 on the entry to Belgian territory, stay, residence and removal of foreign nationals, immediately after the rejection of the asylum application by the [CGRA] and therefore before the legal remedies available against that rejection decision can be exhausted and before the asylum procedure can be definitively concluded?'

Continued existence of the dispute in the main proceedings

30 Before the Court, the Belgian Government argued that there was no longer any need to rule on the question referred for a preliminary ruling since the order to leave the national territory at issue in the main proceedings had ceased to have any legal effect following the grant of a temporary residence permit to Mr Gnandi and the delivery of a judgment of the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) on 11 March 2016 annulling the decision of the CGRA of 23 May 2014.

31 In that regard, it is clear from both the wording and the scheme of Article 267 TFEU that a national court or tribunal is not empowered to bring a matter before the Court by way of a reference for a preliminary ruling unless a case is pending before it, in which it is called upon to give a decision that is capable of taking account of the Court's ruling. Consequently, the Court is required to verify, of its own motion, the continued existence of the dispute in the main proceedings (see, to that effect, judgment of 13 September 2016, Rendón Marín, C-165/14, EU:C:2016:675, paragraph 24 and the case-law cited).

32 In the present case, it is apparent from the documents before the Court that, subsequent to the present request for a preliminary ruling, Mr Gnandi was granted leave, by a decision of the Office des étrangers (Immigration Office) of 8 February 2016, to remain in Belgium until 1 March 2017 and that, following the judgment of the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) of 11 March 2016, his application for international protection was once again rejected by the CGRA on 30 June 2016.

33 When asked by the Court to indicate whether it still needed a reply to the question referred in order to give judgment in the main proceedings, the referring court stated that it wished to maintain its request for a preliminary ruling. It specified, in essence, that the judgment of the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) of 11 March 2016 annulling the decision of the CGRA of 23 May 2014 did not, in itself, have any legal effect on the order to leave the national territory at issue in the main proceedings and that the grant of a temporary residence permit to Mr Gnandi did not implicitly entail the withdrawal of that order. It added that that order became legally effective once again on 30 June 2016, when Mr Gnandi's application for international protection was again rejected by the CGRA.

34 In that regard, it is not for the Court, in the context of a request for a preliminary ruling, to rule on the interpretation of provisions of domestic law (judgment of 17 December 2015, Tall, C-239/14, EU:C:2015:824, paragraph 35 and the case-law cited). Thus, having regard to the information provided by the referring court, it must be held that the dispute in the main proceedings is still pending before the referring court and that a reply from the Court to the question referred remains useful for resolving that dispute. An answer should therefore be given in response to the request for a preliminary ruling.

Consideration of the question referred

35 By its question, the referring court asks, in essence, whether Directive 2008/115, read in conjunction with Directive 2005/85 and in the light of the principle of non-refoulement and the right to an effective remedy, enshrined in Article 18, Article 19(2) and Article 47 of the Charter, must be interpreted as precluding the adoption of a return decision under Article 6(1) of Directive 2008/115 in relation to a third-country national who has applied for international protection, immediately after the rejection of that application by the determining authority and thus before the conclusion of any appeal proceedings brought against that rejection.

36 As a preliminary point, it should be noted, as the referring court observed in its request for a preliminary ruling, that the order to leave the national territory at issue in the main proceedings constitutes a return decision within the meaning of Article 3(4) of Directive 2008/115. That provision defines a 'return decision' as 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.

37 Article 2(1) of Directive 2008/115 stipulates that that directive applies to third-country nationals staying illegally on the territory of a Member State. As regards return decisions more specifically, Article 6(1) of that directive provides that, in principle, Member States are to issue such a decision to any third-country national staying illegally on their territory.

38 Thus, in order to determine whether a return decision may be adopted in relation to a third-country national after his or her application for international protection has been rejected by the determining authority, it is necessary to examine, in the first place, whether, following that rejection, the person concerned is to be regarded as staying illegally on the territory of that Member State, within the meaning of Directive 2008/115.

39 In that regard, it follows from the definition of the concept of 'illegal stay', set out in Article 3(2) of Directive 2008/115, that any third-country national who is present on the territory of a Member State without fulfilling the conditions for entry, stay or residence is, by virtue of that fact alone, staying there illegally (judgment of 7 June 2016, Affum, C-47/15, EU:C:2016:408, paragraph 48).

40 In accordance with Article 7(1) of Directive 2005/85, an applicant for international protection is to be allowed to remain in the Member State, for the sole purpose of the procedure, until adoption of a decision at first instance refusing that person's application. Even though, according to the express wording of that provision, that right to remain does not constitute an entitlement to a residence permit, it is nevertheless apparent, inter alia, from recital 9 of Directive 2008/115, that that right to remain prevents an applicant for international protection from being regarded as 'staying illegally', within the meaning of that directive, during the period from submission of the application for international protection until adoption of a first-instance decision on that application.

41 As is quite clear from the wording of Article 7(1) of Directive 2005/85, the right to remain laid down in that provision ends upon the adoption of a first-instance decision, by the determining authority, rejecting the application for international protection. In the absence of a right to stay or a residence permit granted on another legal basis (such as Article 6(4) of Directive 2008/115) which would enable the third-country national whose application has been rejected to fulfil the conditions for entry, stay or residence in the Member State concerned, the consequence of that rejection decision, once adopted, is that the applicant no longer fulfils those conditions and, accordingly, that person's stay becomes illegal.

42 It is true that, under Article 39(3)(a) of Directive 2005/85, Member States may provide for rules allowing applicants for international protection to remain on their territory pending the outcome of an appeal against the decision rejecting the application for international protection. In the present instance, it is apparent that Article 39/70 of the Law of 15 December 1980 lays down such a rule since it grants applicants for international protection the right to remain on Belgian territory until expiry of the time limit for bringing such an appeal and pending examination of that appeal, that being a matter to be verified by the referring court.

43 It is also true that the Court has held, in paragraphs 47 and 49 of the judgment of 30 May 2013, Arslan (C-534/11, EU:C:2013:343), that an authorisation to remain for the purposes of exercising a right of appeal against a decision rejecting an application for international protection precludes the application of Directive 2008/115 to the third-country national who submitted that application until the conclusion of the appeal proceedings brought against that rejection decision.

44 However, it cannot be inferred from that judgment that such an authorisation to remain precludes the conclusion that, as soon as the application for international protection is rejected, and without prejudice to the existence of a right to stay or to a residence permit as discussed in paragraph 41 above, the stay of the person concerned becomes illegal, within the meaning of Directive 2008/115.

45 First, having regard to the context and scope of the questions referred for a preliminary ruling in the case which gave rise to that judgment, it is necessary to clarify that the interpretation given in that same judgment had as its sole purpose to ensure that a return procedure may not be pursued so long as the third-country national whose application has been rejected is authorised to remain pending the outcome of his appeal and, in particular, that, during that period, that person may not be held in detention, pursuant to Article 15 of that directive, with a view to his or her removal.

46 Secondly, neither Article 3(2) of Directive 2008/115 nor any other provision of that directive makes the illegality of the stay dependent on the outcome of an appeal against an administrative decision on the ending of a legal stay or on the absence of an authorisation to remain pending the outcome of such an appeal. On the contrary, whereas, as noted in paragraph 40 of the present judgment, it is clear from a combined reading of Article 7(1) of Directive 2005/85 and recital 9 of Directive 2008/115 that the right of an applicant for international protection to remain on the territory of the Member State concerned, during the period from submission of the application until adoption of a first instance decision on that application, acts to prevent the concerned person's stay from being regarded as 'illegal', within the meaning of Directive 2008/115, during that period; on the contrary, no provision or recital of Directive 2005/85 or of Directive 2008/115 provides that an authorisation to remain on the territory until resolution of an appeal against the rejection acts, in itself, to prevent that stay from being regarded as 'illegal'.

47 Thirdly, Directive 2008/115 is not based on the notion that the illegality of the stay and, accordingly, the applicability of that directive, presupposes that there is no lawful possibility for the third-country national to remain on the territory of the Member State concerned, inter alia pending the outcome of the appeal against the decision on the ending of a legal stay. On the contrary, as is apparent from recital 12, that directive is applicable to third-country nationals whose stay is classified as illegal, but who are permitted to remain lawfully on the territory of the Member State concerned because they cannot yet be removed. In particular, Article 7 of that directive requires the setting of an appropriate period for voluntary departure of the person concerned, during which, despite his stay being classified as illegal, he is authorised to remain. Moreover,

pursuant to Article 5 and Article 9(1) of that directive, Member States are required to respect the principle of non-refoulement in relation to illegally staying third-country nationals and to postpone their removal when it would violate that principle.

48 Fourthly, it should be noted that the main objective of Directive 2008/115, as apparent from recitals 2 and 4 thereof, is the establishment of an effective removal and repatriation policy that fully respects the fundamental rights and dignity of the persons concerned (see, to that effect, judgments of 7 July 2014, Pham, C-474/13, EU:C:2014:2096, paragraph 20, and of 15 February 2016, N., C-601/15 PPU, EU:C:2016:84, paragraph 75 and the case-law cited).

49 That objective finds specific expression in Article 6(6) of Directive 2008/115, which explicitly allows Member States to adopt a decision on the ending of a legal stay together with a return decision, in a single administrative act. The possibility of aggregating those two decisions in a single administrative act enables Member States to ensure the parallel treatment, or even the joint handling, of the administrative proceedings leading to such decisions and of the appeal proceedings brought against them. As observed by the Czech, German and Netherlands Governments, that possibility of joint handling also helps overcome practical difficulties relating to the notification of return decisions.

50 Adopting an interpretation of Directive 2008/115 to the effect that a stay may not be regarded as illegal solely on account of the authorisation to remain pending the outcome of an appeal against the decision rejecting the application for international protection, would render redundant that possibility of joint handling and would thus be contrary to the objective of establishing an effective removal and repatriation policy. Under such an interpretation, a return decision could be adopted only after the conclusion of the appeal proceedings, which could significantly delay the initiation of the return procedure and make that procedure more complex.

51 Fifthly, as regards the obligation to comply with the requirements arising from the right to an effective remedy and the principle of non-refoulement, highlighted by the referring court in its question, it should be pointed out that any interpretation of Directive 2008/115 or of Directive 2005/85, must, as is apparent from recital 24 of the former and recital 8 of the latter, be consistent with the fundamental rights and principles recognised, in particular, by the Charter (see, to that effect, judgment of 17 December 2015, Tall, C-239/14, EU:C:2015:824, paragraph 50).

52 As regards, more specifically, the remedies against decisions related to return, as set out in Article 13 of Directive 2008/115, and the remedies against decisions rejecting an application for international protection, as set out in Article 39 of Directive 2005/85, the characteristics of such remedies must be determined in a manner that is consistent with Article 47 of the Charter, which provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article (see, to that effect, judgments of 18 December 2014,

Abdida, C-562/13, EU:C:2014:2453, paragraph 45, and of 17 December 2015, Tall, C-239/14, EU:C:2015:824, paragraph 51).

53 It should also be noted that the principle of non-refoulement is guaranteed as a fundamental right in Article 18 and Article 19(2) of the Charter (judgment of 24 June 2015, H.T., C-373/13, EU:C:2015:413, paragraph 65) and is reiterated, inter alia, in recital 2 of Directive 2005/85 and in recital 8 and Article 5 of Directive 2008/115. Moreover, Article 18 of the Charter, like Article 78(1) TFEU, guarantees due respect for the rules of the Geneva Convention (see, to that effect, judgment of 21 December 2011, N.S. and Others, C-411/10 and C-493/10, EU:C:2011:865, paragraph 75).

54 According to the case-law of the Court, when a State decides to return an applicant for international protection to a country where there are substantial grounds for believing that he will be exposed to a real risk of ill-treatment contrary to Article 18 of the Charter, read in conjunction with Article 33 of the Geneva Convention, or to Article 19(2) of the Charter, the right to an effective remedy provided for in Article 47 of the Charter requires that that applicant have available to him a remedy enabling automatic suspension of enforcement of the measure authorising his removal (see, to that effect, judgments of 18 December 2014, Abdida, C-562/13, EU:C:2014:2453, paragraph 52, and of 17 December 2015, Tall, C-239/14, EU:C:2015:824, paragraph 54).

55 It is true that the Court has previously ruled that the lack of suspensory effect of an appeal brought solely against a decision rejecting an application for international protection is, in principle, compatible with the principle of non-refoulement and Article 47 of the Charter, since the enforcement of such a decision cannot, as such, lead to removal of the third-country national concerned (see, to that effect, judgment of 17 December 2015, Tall, C-239/14, EU:C:2015:824, paragraph 56).

56 By contrast, an appeal brought against a return decision within the meaning of Article 6 of Directive 2008/115 must, in order to ensure, as regards the third-country national concerned, compliance with the requirements arising from the principle of non-refoulement and Article 47 of the Charter, enable automatic suspensory effect, since that decision may expose the person concerned to a real risk of being subjected to treatment contrary to Article 18 of the Charter, read in conjunction with Article 33 of the Geneva Convention, or contrary to Article 19(2) of the Charter (see, to that effect, judgments of 18 December 2014, Abdida, C-562/13, EU:C:2014:2453, paragraphs 52 and 53, and of 17 December 2015, Tall, C-239/14, EU:C:2015:824, paragraphs 57 and 58). That applies, a fortiori, to a possible removal decision, within the meaning of Article 8(3) of that directive.

57 Nevertheless, neither Article 39 of Directive 2005/85, nor Article 13 of Directive 2008/115, nor Article 47 of the Charter, read in the light of the safeguards laid down in Article 18 and Article 19(2) of the Charter, require there to be two levels of judicial decision. The only requirement is that there must be a remedy

before a judicial body (see, to that effect, judgment of 28 July 2011, Samba Diouf, C-69/10, EU:C:2011:524, paragraph 69).

58 It follows that, in respect of a return decision and a possible removal decision, the protection inherent in the right to an effective remedy and in the principle of non-refoulement must be guaranteed by affording the applicant for international protection the right to an effective remedy enabling automatic suspensory effect, before at least one judicial body. Subject to strict compliance with that requirement, the sole fact that the stay of the person concerned is categorised as being illegal, within the meaning of Directive 2008/115, as soon as his application for international protection is rejected at first instance by the determining authority and that a return decision may, therefore, be adopted after that rejection decision or aggregated together in a single administrative act, does not infringe the principle of non-refoulement or the right to an effective remedy.

59 Having regard to all of those considerations, it must be concluded that, unless he has been granted a right to stay or a residence permit as referred to in Article 6(4) of Directive 2008/115, a third-country national is staying illegally, within the meaning of Directive 2008/115, as soon as his application for international protection is rejected at first instance by the determining authority, irrespective of the existence of an authorisation to remain pending the outcome of an appeal against that rejection. Thus, a return decision may, in principle, be adopted against such a third-country national after that rejection decision or aggregated together in a single administrative act.

60 Nevertheless, it should be pointed out, in the second place, that Member States are required to ensure that all return decisions are consistent with the procedural safeguards set out in Chapter III of Directive 2008/115 and with other relevant provisions of EU and national law. Article 6(6) of that directive explicitly lays down that requirement in the case where a return decision is adopted at the same time as the decision at first instance, from the determining authority, rejecting the application for international protection. That requirement must also apply in a situation, such as that at issue in the main proceedings, in which the return decision was adopted immediately after the decision rejecting the application for international protection, in a separate administrative act and by a different authority.

61 In that context, it is for the Member States to ensure the full effectiveness of an appeal against a decision rejecting an application for international protection, in accordance with the principle of equality of arms, which means, inter alia, that all the effects of the return decision must be suspended during the period prescribed for bringing that appeal and, if such an appeal is brought, until resolution of the appeal.

62 In that regard, it is not sufficient for the Member State concerned to refrain from enforcing the return decision. On the contrary, it is necessary that all the legal effects of that decision be suspended and, in particular, that the period granted for voluntary departure in accordance with Article 7 of Directive 2008/115 should not start to run as long as the person concerned is allowed to remain. In addition, during that period, that person may not be held in detention with a view to removal pursuant to Article 15 of that directive.

63 Furthermore, pending the outcome of an appeal against the rejection of his application for international protection at first instance by the determining authority, the person concerned must, in principle, be entitled to benefit from the rights arising under Directive 2003/9. Article 3(1) of that directive makes its application conditional only on the existence of an authorisation to remain on the territory as an applicant and, therefore, does not exclude the directive's application in the case where the person concerned has such an authorisation and is staying illegally, within the meaning of Directive 2008/115. In that regard, it is apparent from Article 2(c) of Directive 2003/9 that the person concerned is to retain his status as an applicant for international protection, within the meaning of that directive, until a final decision is adopted in relation to his application (see, to that effect, judgment of 27 September 2012, Cimade and GISTI, C-179/11, EU:C:2012:594, paragraph 53).

64 Moreover, given that, notwithstanding the adoption of a return decision either after adoption of a first instance decision from the determining authority rejecting the application for international protection or together in a single administrative act, an applicant for international protection must be allowed to remain pending the outcome of an appeal against that rejection, Member States are required to allow the person concerned to rely on any change in circumstances that occurred after the adoption of the return decision and that may have a significant bearing on the assessment of his situation under Directive 2008/115, and in particular under Article 5 thereof.

65 Lastly, as is apparent from recital 6 of Directive 2008/115, Member States must ensure that return procedures are fair and transparent (see, to this effect, judgments of 5 June 2014, Mahdi, C-146/14 PPU, EU:C:2014:1320, paragraph 40, and of 5 November 2014, Mukarubega, C-166/13, EU:C:2014:2336, paragraph 61). Accordingly, where a return decision is adopted after a first instance decision from the determining authority rejecting an application for international protection or together in a single administrative act, Member States are required to ensure that the person concerned is informed in a transparent way of their compliance with the safeguards discussed in paragraphs 61 to 64 above.

66 In the present case, the referring court states that even though the return decision at issue in the main proceedings cannot be enforced before resolution of the appeal brought by Mr Gnandi against the rejection of his application for international protection, it still adversely affects him in so far as it requires him to leave Belgian territory. Thus, subject to verification by the referring court, it is apparent that the safeguard discussed in paragraphs 61 and 62 above, requiring that the return procedure be suspended pending the outcome of such an appeal, is not met.

67 In the light of the foregoing considerations, the answer to the question referred is that Directive 2008/115, read in conjunction with Directive 2005/85 and in the light of the principle of non-refoulement and the right to an effective remedy, enshrined in Article 18, Article 19(2) and Article 47 of the Charter, must be interpreted as not precluding the adoption of a return decision, under Article 6(1) of Directive 2008/115, in

respect of a third-country national who has applied for international protection, immediately after the rejection of that application by the determining authority or together in the same administrative act, and thus before the conclusion of any appeal proceedings brought against that rejection, provided, inter alia, that the Member State concerned ensures that all the legal effects of the return decision are suspended pending the outcome of the appeal, that that applicant is entitled, during that period, to benefit from the rights arising under Directive 2003/9, and that he is entitled to rely on any change in circumstances that occurred after the adoption of the return decision which may have a significant bearing on the assessment of his situation under Directive 2008/115, and in particular under Article 5 thereof, those being matters for the referring court to determine.

Costs

68 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, read in conjunction with Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, and in the light of the principle of non-refoulement and the right to an effective remedy, enshrined in Article 18, Article 19(2) and Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding the adoption of a return decision, under Article 6(1) of Directive 2008/115, in respect of a third-country national who has applied for international protection, immediately after the rejection of that application by the determining authority or together in the same administrative act, and thus before the conclusion of any appeal proceedings brought against that rejection, provided, inter alia, that the Member State concerned ensures that all the legal effects of the return decision are suspended pending the outcome of the appeal, that that applicant is entitled, during that period, to benefit from the rights arising under Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, and that he is entitled to rely on any change in circumstances that occurred after the adoption of the return decision which may have a significant bearing on the assessment of his situation under Directive 2008/115, and in particular under Article 5 thereof, those being matters for the referring court to determine.