

# JUDGMENT OF THE COURT (Grand Chamber)

7 June 2016 (\*)

(Reference for a preliminary ruling — Area of freedom, security and justice — Directive 2008/115/EC — Common standards and procedures for returning illegally staying third-country nationals — Police custody — National legislation providing for a sentence of imprisonment in the event of illegal entry — Situation of ‘transit’ — Multilateral readmission arrangement)

In Case C-47/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (Court of Cassation, France), made by decision of 28 January 2015, received at the Court on 6 February 2015, in the proceedings

**Séline Affum**

v

**Préfet du Pas-de-Calais,**

**Procureur général de la cour d’appel de Douai,**

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, M. Ilešič (Rapporteur), L. Bay Larsen, T. von Danwitz and C. Lycourgos, Presidents of Chambers, A. Rosas, E. Juhász, A. Borg Barthet, J. Malenovský, E. Levits, M. Berger, K. Jürimäe, M. Vilaras and E. Regan, Judges,

Advocate General: M. Szpunar,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 10 November 2015,

after considering the observations submitted on behalf of:

- Ms Affum, by P. Spinosi, avocat,
- the French Government, by D. Colas and F.-X. Bréchet, acting as Agents,
- the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,
- the Greek Government, by M. Michelogiannaki, acting as Agent,
- the Hungarian Government, by M.M. Tátrai, G. Koós and M. Fehér, acting as Agents,
- the Swiss Government, by C. Bichet, acting as Agent,
- the European Commission, by M. Condou-Durande, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 2 February 2016,

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).

2 The request has been made in proceedings between Sélina Affum, on the one hand, and the préfet du Pas-de-Calais (Prefect of Pas-de-Calais, France) and the procureur général de la cour d'appel de Douai (Principal State Prosecutor at the Court of Appeal, Douai, France), on the other, concerning Ms Affum's illegal entry into French territory and the extension of her administrative detention.

### **Legal context**

#### *EU law*

#### Directive 2008/115

3 Recitals 2, 4, 5, 10, 17 and 26 of Directive 2008/115 state:

'(2) The Brussels European Council of 4 and 5 November 2004 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.

(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.

...

(10) Where there are no reasons to believe that this would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and a period for voluntary departure should be granted. ...

...

(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.

...

(26) To the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code, this Directive constitutes a development of provisions of the Schengen *acquis* in which the United Kingdom [of Great Britain and Northern Ireland] does not take part ...; moreover, ... the United Kingdom is not taking part in the adoption of this Directive and is therefore not bound by it in its entirety or subject to its application.'

4 Article 1 of Directive 2008/115, headed 'Subject matter', provides:

'1. 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.'

5 Article 2 of Directive 2008/115, headed 'Scope', states:

'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 in accordance with Article 13 of the Schengen Borders Code, 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 and who have not subsequently obtained an authorisation or a right to stay in that 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 Directive 2008/115, headed ‘Definitions’, states:

‘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 the Schengen Borders Code or other 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 Article 4 of Directive 2008/115, headed ‘More favourable provisions’, states in paragraph 4:

‘With regard to third-country nationals excluded from the scope of this Directive in accordance with Article 2(2)(a), Member States shall:

- (a) ensure that their treatment and level of protection are no less favourable than as set out in Article 8(4) and (5) (limitations on use of coercive measures), Article 9(2)(a) (postponement of removal), Article 14(1)(b) and (d) (emergency health care and taking into account needs of vulnerable persons), and Articles 16 and 17 (detention conditions) and
- (b) respect the principle of non-refoulement.’

8 Article 6 of Directive 2008/115, headed ‘Return decision’, provides:

‘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.

...

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 under bilateral agreements or arrangements existing on the date of entry into force of this Directive. In such a case the Member State which has taken back the third-country national concerned shall apply paragraph 1.

...'

9 Article 7 of Directive 2008/115, headed 'Voluntary departure', provides in the first subparagraph of paragraph 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. ...'

10 Article 8 of Directive 2008/115, headed 'Removal', provides:

'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.

5. In carrying out removals by air, Member States shall take into account the Common Guidelines on security provisions for joint removals by air ...

...'

11 Article 9 of Directive 2008/115, headed 'Postponement of removal', states in paragraph 2(a):

'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'.

12 Article 11 of Directive 2008/115, headed 'Entry ban', provides in paragraphs 1 and 2:

'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. ...'

13 Article 14 of Directive 2008/115, headed 'Safeguards pending return', states in paragraph 1:

'1. Member States shall, with the exception of the situation covered in Articles 16 and 17, ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure granted in accordance with Article 7 and during

periods for which removal has been postponed in accordance with Article 9:

...

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

...

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

14 Article 15 of Directive 2008/115, headed ‘Detention’, provides:

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

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

15 Article 16 of Directive 2008/115, headed ‘Conditions of detention’, provides in paragraph 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.’

16 Article 17 of Directive 2008/115 lays down special conditions for the detention of minors and families.

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

The CISA and the Schengen Borders Code

18 The Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed in Schengen (Luxembourg) on 19 June 1990 (OJ 2000 L 239, p. 19; ‘the CISA’), forms part of the Schengen *acquis*.

- 19 In Chapter 4 of Title II of the CISA, headed ‘Conditions governing the movement of aliens’, Article 19(1) and (2), Article 20(1) and Article 21(1) and (2) lay down the conditions under which, respectively, aliens who hold a uniform visa, or a visa issued by one of the Contracting Parties, aliens not subject to a visa requirement, and aliens who hold a valid residence permit, or provisional residence permit, issued by one of those parties may move freely within the territories of the Contracting Parties. Those provisions refer in particular to some of the conditions laid down in Article 5(1) of the CISA for entry into their territories.
- 20 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) consolidated and developed the Schengen *acquis*.
- 21 The Schengen Borders Code, as stated in recital 27 thereof, ‘constitutes a development of provisions of the Schengen *acquis* in which the United Kingdom does not take part ... The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application’.
- 22 According to Article 1 thereof, the Schengen Borders Code ‘provides for the absence of border control of persons crossing the internal borders between the Member States of the European Union’ and ‘establishes rules governing border control of persons crossing the external borders of the Member States of the European Union’.
- 23 Article 2(1) and (2) of the Schengen Borders Code contains the following definitions:
- ‘1. “internal borders” means:
    - (a) the common land borders, including river and lake borders, of the Member States;
    - (b) the airports of the Member States for internal flights;
    - (c) sea, river and lake ports of the Member States for regular ferry connections;
  2. “external borders” means the Member States’ land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders’.
- 24 In Chapter I of Title II of the Schengen Borders Code, headed ‘Crossing of external borders and conditions for entry’, Article 4, headed ‘Crossing of external borders’, states:
- ‘1. External borders may be crossed only at border crossing points and during the fixed opening hours. The opening hours shall be clearly indicated at border crossing points which are not open 24 hours a day.
  - ...
  3. Without prejudice to the exceptions provided for in paragraph 2 or to their international protection obligations, Member States shall introduce penalties, in accordance with their national law, for the unauthorised crossing of external borders at places other than border crossing points or at times other than the fixed opening hours. These penalties shall be effective, proportionate and dissuasive.’
- 25 In that chapter, Article 5, headed ‘Entry conditions for third-country nationals’, provides:
1. For stays not exceeding three months per six-month period, the entry conditions for third-country nationals shall be the following:
    - (a) they are in possession of a valid travel document or documents authorising them to cross the border;
    - (b) they are in possession of a valid visa, if required ..., except where they hold a valid residence permit;

- (c) they justify the purpose and conditions of the intended stay, and they have sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin or transit to a third country into which they are certain to be admitted, or are in a position to acquire such means lawfully;
- (d) they are not persons for whom an alert has been issued in the [Schengen Information System (SIS)] for the purposes of refusing entry;
- (e) they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States ...

...

4. By way of derogation from paragraph 1,

- (a) third-country nationals who do not fulfil all the conditions laid down in paragraph 1 but hold a residence permit or a re-entry visa issued by one of the Member States or, where required, both documents, shall be authorised to enter the territories of the other Member States for transit purposes so that they may reach the territory of the Member State which issued the residence permit or re-entry visa ...

...

- (c) third-country nationals who do not fulfil one or more of the conditions laid down in paragraph 1 may be authorised by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations. ...'

26 In Chapter II of Title II of the Schengen Borders Code, headed 'Control of external borders and refusal of entry', Article 7, headed 'Border checks on persons', states:

'1. Cross-border movement at external borders shall be subject to checks by border guards. Checks shall be carried out in accordance with this chapter.

...

3. On entry and exit, third-country nationals shall be subject to thorough checks.

...'

27 In that chapter, Article 13, headed 'Refusal of entry', provides in paragraph 1:

'A third-country national who does not fulfil all the entry conditions laid down in Article 5(1) and does not belong to the categories of persons referred to in Article 5(4) shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.'

28 According to Article 20 of the Schengen Borders Code, which forms part of Chapter I of Title III of that code, headed 'Abolition of border control at internal borders', internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.

29 By virtue of Article 39(1) of the Schengen Borders Code, which forms part of Title IV, headed 'Final provisions', Articles 2 to 8 of the CISA were repealed with effect from 13 October 2006. In particular, the entry conditions, previously set out in Article 5(1) of the CISA, were thus replaced by the entry conditions laid down in Article 5 of the Schengen Borders Code.

30 After the time material in the main proceedings, the Schengen Borders Code was amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 182, p. 1).

31 Article 12 of the Schengen Borders Code as amended by Regulation No 610/2013, which is headed

‘Border surveillance’ and forms part of Chapter II of Title II of that code, headed ‘Control of external borders and refusal of entry’, states in paragraph 1:

‘The main purpose of border surveillance shall be to prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally. A person who has crossed a border illegally and who has no right to stay on the territory of the Member State concerned shall be apprehended and made subject to procedures respecting Directive 2008/115/EC.’

*French law*

Ceseda

32 Article L. 621-2 of the Code on the Entry and Stay of Foreign Nationals and the Right of Asylum (code de l’entrée et du séjour des étrangers et du droit d’asile; ‘Ceseda’), as amended by Law No 2012-1560 of 31 December 2012 on the holding of foreign nationals to verify their right to stay and amending the offence of aiding an illegal stay in order to exclude humanitarian and disinterested actions (loi No 2012-1560, du 31 décembre 2012, relative à la retenue pour vérification du droit au séjour et modifiant le délit d’aide au séjour irrégulier pour en exclure les actions humanitaires et désintéressées) (JORF of 1 January 2013, p. 48; ‘the Law of 31 December 2012’), states:

‘A foreign national who is not a national of a Member State of the European Union shall be liable to a sentence of one year’s imprisonment and a fine of EUR 3 750:

1. if he has entered the territory of Metropolitan France without satisfying the conditions referred to in Article 5(1)(a), (b) and (c) of [the Schengen Borders Code] and without having been admitted to that territory pursuant to Article 5(4)(a) and (c) of that [code]; the same shall apply where an alert has been issued for the purpose of refusing the foreign national entry pursuant to an enforceable decision adopted by another State party to the [CISA];

2. or if, arriving directly from the territory of a State party to that convention, he has entered the territory of Metropolitan France without complying with the requirements of Article 19(1) or (2), Article 20(1) and Article 21(1) or (2) thereof, with the exception of the conditions referred to in Article 5(1)(e) of [the Schengen Borders Code] and in Article 5(1)(d) where the alert for the purpose of refusing entry does not result from an enforceable decision adopted by another State party to the [CISA];

...

For the purposes of this article, criminal proceedings may be instituted only in cases where the facts have been found in the circumstances provided for in Article 53 of the Code of Criminal Procedure (code de procédure pénale).’

Code of Criminal Procedure

33 The Code of Criminal Procedure, in the version in force at the material time, provides in Article 53 :

‘A crime or other offence shall be classified as *in flagrante delicto* where it is in the course of being committed or has just been committed. A crime or other offence shall also be so classified where, at a time very close to the act, the person suspected is pursued by hue and cry, is found in the possession of articles or has on or about him traces or clues so as to give grounds for believing that he has taken part in the crime or other offence.

Following the discovery of a crime or other offence classified as *in flagrante delicto*, the investigation conducted under the direction of the public prosecutor under the conditions provided for by the present chapter may continue without interruption for eight days.

...’



34 Article 62-2 of the Code of Criminal Procedure states:

‘Police custody is a coercive measure decided upon by a senior police officer, under the supervision of the courts, whereby a person reasonably suspected on one or more grounds of having committed or attempted to commit a crime or other offence punishable by imprisonment is held at the disposal of investigators.

...’

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

35 On 22 March 2013, Ms Affum, a Ghanaian national, was subject to a check by French police officers in Coquelles (France), the point of entry to the Channel Tunnel, when she was on a bus from Ghent (Belgium) to London (United Kingdom).

36 After presenting a Belgian passport with the name and photograph of another person, and lacking any other identity or travel document in her name, she was placed in police custody on the ground of illegal entry into French territory, on the basis of Article L. 621-2(2) of *Ceseda*, as amended by the Law of 31 December 2012.

37 By order of 23 March 2013, the Prefect of Pas-de-Calais, who was dealing with Ms Affum’s administrative situation for the purpose of a decision on her possible removal from French territory, decided that she should be transferred to the Belgian authorities, with a view to her readmission, on the basis of the arrangement between the Government of the French Republic, of the one part, and the Governments of the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands, of the other part, concerning the taking charge of persons at the common borders between France and the territory of the Benelux States, signed in Paris on 16 April 1964.

38 By that order, the Prefect of Pas-de-Calais ordered that Ms Affum be placed in administrative detention in premises not administered by the prison authorities for a period of five days following the end of her police custody, pending her removal.

39 On 27 March 2013, the Prefect of Pas-de-Calais asked the judge responsible for matters relating to liberty and detention at the tribunal de grande instance de Lille (Regional Court, Lille, France) to extend the administrative detention pending a reply from the Belgian authorities concerning his request for readmission.

40 By way of defence, Ms Affum maintained that the request of the Prefect of Pas-de-Calais had to be rejected since it had been illegal to place her in police custody, in the light in particular of the judgment of 6 December 2011 in *Achughbabian* (C-329/11, EU:C:2011:807): under national law such an illegality invalidated the whole procedure and was punished by a refusal to extend the detention and by the release of the person concerned.

41 By order of 28 March 2013, the judge responsible for matters relating to liberty and detention at the tribunal de grande instance de Lille (Regional Court, Lille) held, however, that the police custody measure taken against Ms Affum was lawful and that she was therefore placed in administrative detention following a lawful procedure. Accordingly, the judge granted the request of the Prefect of Pas-de-Calais and ordered that Ms Affum’s administrative detention be extended for a maximum period of 20 days from that date.

42 That order, against which Ms Affum appealed, was confirmed by order of 29 March 2013 made by the First President of the cour d’appel de Douai (Court of Appeal, Douai).

43 Hearing an appeal on a point of law brought by Ms Affum against that last order, the Cour de cassation (Court of Cassation) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Is Article 3(2) of Directive 2008/115 to be interpreted as meaning that a third-country national is

staying illegally on the territory of a Member State and thus falls within the scope of that directive, as defined in Article 2(1) thereof, where that foreign national is merely in transit as a passenger on a bus travelling on the territory of that Member State from another Member State forming part of the Schengen area and bound for a different Member State?

2. Is Article 6(3) of Directive 2008/115 to be interpreted as meaning that that directive does not preclude national legislation under which a third-country national who has entered the territory of a Member State illegally is liable to a sentence of imprisonment where the foreign national in question may be taken back by another Member State pursuant to an agreement or an arrangement concluded with that State prior to the entry into force of the directive?
3. Depending on the answer given to the previous question, is Directive 2008/115 to be interpreted as precluding national legislation under which a third-country national who has entered the territory of a Member State illegally is liable to a sentence of imprisonment, under the same conditions as those laid down by the Court of Justice in the judgment [of 6 December 2011] in *Achughbabian* [(C-329/11, EU:C:2011:807)] so far as concerns illegal stay, which are contingent on the person concerned not having been previously subject to the coercive measures referred to in Article 8 of the directive and the duration of that person's detention?

### **Consideration of the questions referred**

44 A preliminary point to note is that the main proceedings relate to the situation of a third-country national who entered illegally the territory of a Member State forming part of the Schengen area by crossing a common border of that State and another Member State also forming part of that area, and who was then intercepted when she was preparing to go to the territory of a third Member State, which does not form part of that area.

#### *Question 1*

- 45 By its first question, the referring court asks, in essence, whether Article 2(1) and 3(2) of Directive 2008/115 must be interpreted as meaning that a third-country national is staying illegally on the territory of a Member State and therefore falls within the scope of that directive when, without fulfilling the conditions for entry, stay or residence, he passes in transit through that Member State as a passenger on a bus from another Member State forming part of the Schengen area and bound for a third Member State outside that area.
- 46 All the interested persons who have submitted observations in the proceedings before the Court agree that a third-country national is not excluded from the scope of Directive 2008/115 merely because he is in such a situation of 'mere transit' and is therefore present on the territory of the Member State concerned only temporarily or briefly.
- 47 It should be noted that, as regards the scope of Directive 2008/115, Article 2(1) provides that the directive applies to third-country nationals staying illegally on the territory of a Member State. The concept of 'illegal stay' is defined in Article 3(2) of the directive as '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 the Schengen Borders Code or other conditions for entry, stay or residence in that Member State'.
- 48 It follows from that definition that any third-country national who is present on the territory of a Member State without fulfilling the conditions for entry, stay or residence there is, by virtue of that fact alone, staying there illegally, without such presence being subject to a condition requiring a minimum duration or an intention to remain on that territory. Nor is the fact that such presence is merely temporary or by way of transit among the grounds, listed in Article 2(2) of Directive 2008/115, on which Member States may decide to exclude an illegally staying third-country national from the directive's scope.
- 49 Since a third-country national travelling on a bus across the territory of a Member State in breach of

the conditions for entry, stay or residence is clearly present on its territory, he is staying there illegally, within the meaning of Article 3(2) of Directive 2008/115, and falls within the directive's scope, in accordance with Article 2 thereof.

50 Accordingly, the answer to the first question is that Article 2(1) and Article 3(2) of Directive 2008/115 must be interpreted as meaning that a third-country national is staying illegally on the territory of a Member State and therefore falls within the scope of that directive when, without fulfilling the conditions for entry, stay or residence, he passes in transit through that Member State as a passenger on a bus from another Member State forming part of the Schengen area and bound for a third Member State outside that area.

#### *Questions 2 and 3*

51 By its second and third questions, which it is appropriate to deal with together, the referring court asks, in essence, whether Directive 2008/115 must be interpreted as precluding legislation of a Member State under which a third-country national who has entered its territory illegally and to whom the return procedure established by that directive has not yet been applied is liable to a sentence of imprisonment, and whether that is also the case where the third-country national may be taken back by another Member State pursuant to an agreement or arrangement within the meaning of Article 6(3) of that directive. In this connection, the referring court raises in particular the question of the relevance of the judgment of 6 December 2011 in *Achughbaban* (C-329/11, EU:C:2011:807).

52 In that judgment, the Court ruled that Directive 2008/115 precludes 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 on the territory of that 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 the directive and has not, if 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 (judgment of 6 December 2011 in *Achughbaban*, C-329/11, EU:C:2011:807, paragraph 50).

53 However, the Court explained that Directive 2008/115 does not does not preclude a third-country national being placed in administrative detention with a view to determining whether or not his stay is legal. In that regard, the competent authorities are required to act with diligence and take a position without delay on the legality of the stay of the person concerned (see, to this effect, judgment of 6 December 2011 in *Achughbaban*, C-329/11, EU:C:2011:807, paragraphs 29 to 31).

54 The Court also explained that Directive 2008/115 likewise does not preclude national legislation which permits the imprisonment of a third-country national to whom the return procedure established by the directive has been applied and who is staying illegally on the territory of the Member State without a justified ground for non-return (judgment of 6 December 2011 in *Achughbaban*, C-329/11, EU:C:2011:807, paragraph 50).

55 In particular, the Court observed that national legislation such as Article L.621-1 of *Ceseda* in the version prior to its amendment by the Law of 31 December 2012, which that judgment concerned and which provided for a term of imprisonment for any third-country national 'who has entered or resided in France without [holding the documents and visas required for entry and, in the event of a stay exceeding three months, a residence permit,] or who has remained in France beyond the period authorised by his visa', 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 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 (see judgment of 6 December 2011 in *Achughbaban*, C-329/11, EU:C:2011:807, paragraphs 10, 11, 14 and 38).

56 It is not in dispute that, following delivery of that judgment, *Ceseda* was amended by the Law of 31 December 2012, which in particular repealed the offence of staying illegally, while retaining the offence of illegal entry. Thus, Article L.621-1 of *Ceseda*, whose content has been noted in the previous paragraph, was repealed and Article L. 621-2 of *Ceseda* was accordingly amended. It is in those

circumstances that the referring court raises the question whether a national provision such as Article L. 621-2 of *Ceseda*, as amended by the Law of 31 December 2012, under which a third-country national who has entered the territory of a Member State illegally is liable to a sentence of imprisonment, is compatible with Directive 2008/115.

57 Ms Affum, the Czech, Greek, Hungarian and Swiss Governments and the European Commission submit, in essence, that the Court's interpretation in the judgment of 6 December 2011 in *Achughbabian* (C-329/11, EU:C:2011:807) can be applied to the cases covered by that national provision and that, in addition, a third-country national continues to fall within the scope of Directive 2008/115 even when he is taken back, pursuant to an agreement or arrangement, within the meaning of Article 6(3) thereof, by a Member State other than the one in which he was apprehended.

58 On the other hand, according to the French Government it follows from Article 2(2)(a) and Article 6(3) of Directive 2008/115 and Article 4(3) of the Schengen Borders Code that a national provision such as that at issue in the main proceedings is compatible with the directive.

#### Illegal entry under Directive 2008/115

59 It follows both from the definition of the concept of 'illegal stay', set out in Article 3(2) of Directive 2008/115 and recalled in paragraph 47 of the present judgment, and from recital 5 of the directive, according to which the directive applies 'to all third-country nationals who do not or who no longer fulfil the conditions for entry, stay or residence', that a third-country national who, after entering the territory of a Member State illegally, is present on that territory without fulfilling the conditions for entry, stay or residence is, on that basis, staying there illegally.

60 Thus, in the context of Directive 2008/115 the concepts of 'illegal stay' and 'illegal entry' are closely linked, as such entry is one of the factual circumstances that may result in the third-country national's stay on the territory of the Member State concerned being illegal.

61 Since third-country nationals who, like Ms Affum, have entered the territory of a Member State illegally and who, on that basis, are regarded as staying there illegally therefore fall, under Article 2(1) of Directive 2008/115, and without prejudice to Article 2(2), within the directive's scope, they must be subject to the common standards and procedures laid down by the directive for the purpose of their removal, as long as their stay has not, as the case may be, been regularised.

62 By virtue of those standards and procedures, such a third-country national must be the subject of a return procedure, the order of whose stages corresponds to a gradation of the measures to be taken in order to enforce the return decision and which permits, so far as concerns deprivation of liberty, at the very most detention in a specialised facility, a measure which is, however, strictly regulated, pursuant to Articles 15 and 16 of Directive 2008/115, in order to ensure observance of the fundamental rights of the third-country nationals concerned (see, in particular, judgment of 28 April 2011 in *El Dridi*, C-61/11 PPU, EU:C:2011:268, paragraphs 41 and 42).

63 Therefore, for the same reasons as those set out by the Court in the judgment of 6 December 2011 in *Achughbabian* (C-329/11, EU:C:2011:807), the Member States cannot permit third country nationals in respect of whom the return procedure established by Directive 2008/115 has not yet been completed to be imprisoned merely on account of illegal entry, resulting in an illegal stay, as such imprisonment is liable to thwart the application of that procedure and delay return, thereby undermining the directive's effectiveness.

64 Such a situation can thus be clearly distinguished from the situation at issue in the case giving rise to the judgment of 1 October 2015 in *Celaj* (C-290/14, EU:C:2015:640), in which an illegally staying third-country national to whom the common standards and procedures established by Directive 2008/115 were applied in order to end his first illegal stay on the territory of a Member State re-entered the territory of that Member State in breach of an entry ban.

65 Finally, it must be made clear that Directive 2008/115 does not prevent the Member States from being

able to impose a sentence of imprisonment to punish the commission of offences other than those stemming from the mere fact of illegal entry, including in situations where the return procedure has not yet been completed.

66 As regards the main proceedings, it is not in dispute that the French authorities have not yet begun a return procedure as provided for by Directive 2008/115 in respect of Ms Affum.

67 The French Government submits, however, that the Member States have, first, the power, pursuant to Article 2(2)(a) and Article 6(3) of Directive 2008/115, to exclude certain third-country nationals who have entered their territory illegally from the directive's scope and, secondly, the obligation, under Article 4(3) of the Schengen Borders Code, to prescribe penalties for such illegal entry.

Article 2(2)(a) of Directive 2008/115

68 In the first place, it should be recalled that, under Article 2(2)(a) of Directive 2008/115, Member States may decide not to apply the directive to third-country nationals who are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, 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 and who have not subsequently obtained an authorisation or a right to stay in that Member State.

69 It is clear from that provision that the two situations covered by it relate exclusively to the crossing of a Member State's external border, as defined in Article 2(2) of the Schengen Borders Code, and therefore do not concern the crossing of a common border of Member States forming part of the Schengen area. That provision thus cannot permit the Member States to exclude certain illegally staying third-country nationals from the directive's scope on the ground of illegal entry across an internal border.

70 Furthermore, so far as concerns the first of the situations covered in Article 2(2)(a) of Directive 2008/115, it is not in dispute that only third-country nationals wishing to cross an external border in order to enter the Schengen area are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code.

71 As regards the second of those situations, it follows from Article 2(2)(a) of Directive 2008/115, which specifies that those nationals 'have not subsequently obtained an authorisation or a right to stay in that Member State', namely, the Member State whose external border they have crossed and whose competent authorities have apprehended or intercepted them, that, as the Advocate General has observed in point 68 of his Opinion, this situation also concerns the case where those nationals have entered the territory of the Member State concerned and not the case where they have sought to leave that territory and the Schengen area. The latter case corresponds, moreover, to the directive's objective, as confirmed by recital 10 thereof, consisting in preferring the voluntary return of third-country nationals. The second of the situations covered in Article 2(2)(a) of Directive 2008/115 thus reflects the situation which is covered in the final sentence of Article 12(1) of the Schengen Borders Code as amended by Regulation No 610/2013.

72 Finally, still in relation to that second situation, Article 2(2)(a) of Directive 2008/115 specifies that the apprehension or interception of the third-country nationals concerned must take place 'in connection with the irregular crossing' of an external border, which, as Ms Affum, the Greek Government and the Commission submit in essence, and as the Advocate General has observed in point 41 of his Opinion, implies a direct temporal and spatial link with that crossing of the border. That situation therefore concerns third-country nationals who have been apprehended or intercepted by the competent authorities at the very time of the irregular crossing of the border or near that border after it has been so crossed.

73 In the second place, it is to be noted that the exception provided for in Article 2(2)(a) of Directive 2008/115, unlike the exception provided for in Article 2(2)(b), is coupled with certain obligations which are set out in Article 4(4) of the directive.

74 The fact that Article 4(4) of Directive 2008/115 thus regulates in detail the exercise by the Member

States of the power provided for in Article 2(2)(a) of the directive can be explained, as the Commission set out at the hearing, by the purpose of Article 2(2)(a), as apparent from the directive's history, of permitting the Member States to continue to apply simplified national return procedures at their external borders, without having to follow all the procedural stages prescribed by the directive, in order to be able to remove more swiftly third-country nationals intercepted when crossing those borders. Article 4(4) of Directive 2008/115 is intended in that context to ensure that those simplified national procedures observe the minimum guarantees prescribed by the directive, which include, in particular, the detention conditions laid down in Articles 16 and 17.

75 As regards the main proceedings, it is not in dispute that Ms Affum was placed in police custody on the basis not of Article L. 621-2(1) of *Ceseda*, as amended by the Law of 31 December 2012, which provides for a sentence of imprisonment where a third-country national enters French territory illegally by crossing an external border, but of Article L. 621-2(2) of *Ceseda*, as amended by the Law of 31 December 2012, because she entered French territory illegally by crossing the Franco-Belgian border.

76 That being so, it is not necessary to determine whether a provision such as Article L. 621-2(1) of *Ceseda*, as amended by the Law of 31 December 2012, meets the requirements of Article 2(2)(a) and Article 4(4) of Directive 2008/115.

77 As regards Article L. 621-2(2) of *Ceseda*, as amended by the Law of 31 December 2012, which provides for a sentence of imprisonment where a third-country national enters French territory illegally by crossing an internal border, it should be recalled that, as has been pointed out in paragraph 69 of the present judgment, Article 2(2)(a) of Directive 2008/115 cannot permit the Member States to exclude certain illegally staying third-country nationals from the directive's scope on the ground of illegal entry across an internal border.

78 As to the fact that Ms Affum was intercepted and apprehended not when she entered French territory by crossing an internal border but when trying to leave French territory and the Schengen area through the Channel Tunnel, it is clear from paragraph 71 of the present judgment that that fact is not in any event capable of excluding that illegally staying third-country national from the scope of Directive 2008/115 pursuant to Article 2(2)(a) thereof.

Article 6(3) of Directive 2008/115

79 Under Article 6(1) of Directive 2008/115, Member States are to issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in Article 6(2) to (5).

80 Under Article 6(3) of Directive 2008/115, 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 under bilateral agreements or arrangements existing on the date of entry into force of the directive. In such a case the Member State which has taken back the third-country national concerned is to apply Article 6(1).

81 As the French Government submits, and as the Advocate General has observed in point 77 of his Opinion, the arrangement referred to in paragraph 37 of the present judgment can be equated with a 'bilateral arrangement' within the meaning of Article 6(3) of Directive 2008/115 since, although concluded by four Member States, it treats the territory of the Benelux as a single territory.

82 However, contrary to the French Government's contentions, Article 6(3) of Directive 2008/115 cannot be interpreted as laying down an exception to the directive's scope, which would be additional to those set out in Article 2(2) and would enable the Member States to exclude illegally staying third-country nationals from the common return standards and procedures when they are taken back, pursuant to an agreement or arrangement existing on the date of the directive's entry into force, by a Member State other than the one in which they have been apprehended.

83 As all the other parties who have submitted observations in the present proceedings in essence contend, and as the Advocate General has noted in points 75 and 76 of his Opinion, an interpretation to

that effect would run counter to the wording of Article 6 of Directive 2008/115 and to the scheme and purpose of Directive 2008/115.

- 84 It must be found that it is apparent from the wording of Article 6(1) and (3) of Directive 2008/115 that the exception laid down in Article 6(3) concerns solely the obligation of the Member State on whose territory the national in question is present to issue a return decision to him and thus to attend to his removal, that obligation then falling, as the second sentence of Article 6(3) makes clear, to the Member State who has taken him back.
- 85 That finding is borne out by the scheme of Directive 2008/115, as that exception is indeed not among the derogations from the directive's scope, which are expressly laid down in Article 2(2) thereof.
- 86 Therefore, it is clear that, according to the wording and scheme of Directive 2008/115, the situation of an illegally staying third-country national who is taken back, pursuant to an agreement or arrangement within the meaning of Article 6(3) of the directive, by a Member State other than the one in which he has been apprehended remains governed by the directive and that the Member State which decides to transfer him to another Member State pursuant to that provision acts within the framework of the common standards and procedures established by the directive.
- 87 Since that decision to transfer the third-country national constitutes one of the measures provided for by Directive 2008/115 in order to bring his illegal stay to an end and a stage preparatory to his removal from the territory of the European Union, the Member State concerned must, in the light of the directive's objectives, adopt that decision with diligence and speedily so that he is transferred as soon as possible to the Member State responsible for the return procedure (see, to this effect, judgments of 6 December 2011 in *Achughbadian*, C-329/11, EU:C:2011:807, paragraphs 31 and 45, and of 15 February 2016 in *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 76).
- 88 Clearly, not to transfer that national to the latter Member State until a sentence of imprisonment has been imposed upon him and enforced would delay the triggering of that procedure and thus his actual removal, thereby undermining the directive's effectiveness.

#### Article 4(3) of the Schengen Borders Code

- 89 Under Article 4(3) of the Schengen Borders Code, Member States are to introduce penalties, in accordance with their national law, for the unauthorised crossing of external borders at places other than border crossing points or at times other than the fixed opening hours. These penalties are to be effective, proportionate and dissuasive.
- 90 First, that provision does not require the Member States to introduce sentences of imprisonment for the situations which it covers, but lets them choose the penalties that they wish to adopt, provided that those penalties are effective, proportionate and dissuasive. Therefore, even in the situations for which Article 4(3) of the Schengen Borders Code lays down an obligation to introduce penalties, the Member States may comply with that obligation while observing at the same time the obligations stemming from Directive 2008/115. The fact that Article 4(3) of the Schengen Borders Code is not in any way intended to derogate from the common standards and procedures established by that directive is, moreover, expressly confirmed in Article 12(1) of the Schengen Borders Code as amended by Regulation No 610/2013.
- 91 Secondly, Article 4(3) of the Schengen Borders Code limits the obligation on the Member States to introduce penalties solely to the case of 'unauthorised crossing of external borders at places other than border crossing points or at times other than the fixed opening hours' and Ms Affum's situation is not such a case. Nor does any other provision of the Schengen Borders Code prescribe a penalty for the cases not covered in Article 4(3), namely those of unauthorised crossing of external borders at border crossing points during the fixed opening hours and of unauthorised crossing of internal borders.
- 92 Accordingly, the French Government cannot invoke the obligations imposed on the Member States by the Schengen Borders Code to justify a failure to comply with Directive 2008/115.

93 It follows from all the foregoing considerations that the answer to the second and third questions is that Directive 2008/115 must be interpreted as precluding legislation of a Member State which permits a third country national in respect of whom the return procedure established by that directive has not yet been completed to be imprisoned merely on account of illegal entry across an internal border, resulting in an illegal stay. That interpretation also applies where the national concerned may be taken back by another Member State pursuant to an agreement or arrangement within the meaning of Article 6(3) of the directive.

### **Costs**

94 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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:

- 1. Article 2(1) and Article 3(2) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals must be interpreted as meaning that a third-country national is staying illegally on the territory of a Member State and therefore falls within the scope of that directive when, without fulfilling the conditions for entry, stay or residence, he passes in transit through that Member State as a passenger on a bus from another Member State forming part of the Schengen area and bound for a third Member State outside that area.**
- 2. Directive 2008/115 must be interpreted as precluding legislation of a Member State which permits a third country national in respect of whom the return procedure established by that directive has not yet been completed to be imprisoned merely on account of illegal entry across an internal border, resulting in an illegal stay.**

**That interpretation also applies where the national concerned may be taken back by another Member State pursuant to an agreement or arrangement within the meaning of Article 6(3) of the directive.**

[Signatures]