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Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

22 November 2022 (*)

(Reference for a preliminary ruling – Area of freedom, security and justice – Articles 4, 7 and 19 of the Charter of Fundamental Rights of the European Union – Prohibition of inhuman or degrading treatment – Respect for private and family life – Protection in the event of removal, expulsion or extradition – Right of residence on medical grounds – Common standards and procedures in Member States for returning illegally staying third-country nationals – Directive 2008/115/EC – Third-country national who is suffering from a serious illness – Medical treatment for pain relief – Treatment is not available in the country of origin – Conditions under which removal must be postponed)

In Case C-69/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the rechtbank Den Haag (District Court, The Hague, Netherlands), made by decision of 4 February 2021, received at the Court on 4 February 2021, in the proceedings

X

v

Staatssecretaris van Justitie en Veiligheid,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, K. Jürimäe, C. Lycourgos (Rapporteur), E. Regan, M. Safjan, P.G. Xuereb, D. Gratsias and M.L. Arastey Sahún, Presidents of Chambers, S. Rodin, F. Biltgen, I. Ziemele, J. Passer, M. Gavalec and Z. Csehi, Judges,

Advocate General: P. Pikamäe,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 March 2022,

after considering the observations submitted on behalf of:

– X, by J.W.F. Noot, advocaat,

– the Netherlands Government, by K. Bulterman and C.S. Schillemans, acting as Agents,

– the European Commission, by P.J.O. Van Nuffel, C. Cattabriga and A. Katsimerou, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 June 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 1, 4 and 7, as well as Article 19(2) of the Charter of Fundamental Rights of the European Union ('the Charter') and 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 X and the Staatssecretaris van Justitie en Veiligheid (Secretary of State for Justice and Security, Netherlands) ('the Secretary of State') concerning the lawfulness of a return procedure initiated by the Secretary of State against X.

Legal context

International law

3 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 amended by the Protocol relating to the Status of Refugees, concluded in New York on 31 January 1967, includes Article 33, entitled 'Prohibition of expulsion or return ("refoulement")', which provides in paragraph 1:

'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.'

European Union law

4 Recitals 2 and 4 of Directive 2008/115 state as follows:

'(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 Article 2(2) of that directive provides:

'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 [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 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 that directive states:

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

…

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;

…'

7 Article 4(3) of that directive provides:

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

8 Article 5 of Directive 2008/115 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.'

9 Article 6(1) and (4) of that directive states:

'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.'

10 Article 8 of the directive, entitled 'Removal', provides, in paragraph 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.'

11 Article 9 of that Directive provides:

'1. Member States shall postpone removal:

(a) when it would violate the principle of non-refoulement, or

(b) for as long as a suspensory effect is granted in accordance with Article 13(2).

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

(a) the third-country national's physical state or mental capacity;

(b) technical reasons, such as lack of transport capacity, or failure of the removal due to lack of identification.

…'

Netherlands law

12 Article 64 of the wet tot algehele herziening van de Vreemdelingenwet (Vreemdelingenwet 2000) (Law of 2000 providing for a comprehensive review of the Law on

foreign nationals) of 23 November 2000 (Stb. 2000, No 495, in the version applicable to the dispute in the main proceedings (‘the Law on foreign nationals’) provides:

‘Removal shall be postponed as long as the state of health of the foreign national or of a member of his or her family prevents him or her from travelling.’

13 The Vreemdelingencirculaire 2000 (Circular of 2000 on foreign nationals), in the version applicable to the dispute in the main proceedings (‘the Circular on foreign nationals’), provides:

‘…

7. No deportation on health grounds

7.1 General provisions

The [Immigratie- en naturalisatiedienst (IND) (Immigration and Naturalisation Service, Netherlands)] may grant the postponement of departure under Article 64 of the [Law on foreign nationals] where:

– from a medical point of view, the foreign national is unable to travel; or

– there is a real risk of a violation of Article 3 of the [Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950] on medical grounds.

7.1.1 The foreign national is unable to travel

The foreign national shall be granted a postponement of departure under Article 64 of the [Law on foreign nationals] if the [Bureau Medische Advisering (BMA) (Medical Advice Bureau of the Ministry of Security and Justice, Netherlands)] indicates that, from a medical point of view, the state of health of the foreign national or of a member of his or her family prevents him or her from travelling.

…

7.1.3 Real risk of a violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms on medical grounds

The foreign national shall be granted a postponement of departure under Article 64 of the [Law on foreign nationals] where there is a real risk of a violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms on medical grounds.

There is a real risk of a violation of Article 3 of that convention only where:

– it is apparent from the BMA’s opinion that it is highly likely that the absence of medical treatment will cause a medical emergency; and

– the necessary medical treatment is not available in the country of origin or permanent residence; or

– if medical treatment is available, it appears that it is manifestly not accessible.

Medical emergency

The IND defines a medical emergency as a situation in which the foreign national suffers from a condition which, according to current medical and scientific knowledge, if left untreated, will result in death, disability or other serious psychological or physical harm within three months.

…’

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

14 X is a Russian national, who was born in 1988 and who, at the age of 16, developed a rare form of blood cancer for which he is currently receiving treatment in the Netherlands. His medical treatment consists, inter alia, of phlebotomy and the administration of medicinal cannabis for analgesic purposes. Administering that treatment based on medicinal cannabis is not permitted in Russia.

15 On 31 October 2013, X lodged a first application for asylum in the Netherlands. However, the Secretary of State took the view that the Kingdom of Sweden was the Member State responsible for examining that application.

16 On 13 December 2013, on the basis of Article 64 of the Law on foreign nationals, X requested that his departure be postponed because of his state of health. By decision of 24 December 2013, the Secretary of State rejected that application.

17 On 19 May 2016, X lodged a new application for asylum in the Netherlands, the period within which he could be transferred to Sweden having, in the meantime, expired. In support of that new application, X claimed that the medical treatment he had received in Russia in order to relieve pain linked to his illness had caused him side effects and that he had discovered that taking medicinal cannabis suited him better, given his state of health. Since the use of medicinal cannabis is not permitted in his country of origin, X had grown cannabis plants in that country for medicinal purposes, which had exposed him to such difficulties in that country that he was now applying for international protection. At the time of that application for asylum, X also requested that his removal be postponed, on the basis of Article 64 of the Law on foreign nationals.

18 By decision of 29 March 2018, after receiving the opinion of the BMA, the Secretary of State rejected X’s application for asylum, taking the view that the problems which he claimed to have encountered in Russia, on account of cultivating cannabis for his personal use, were not credible. The Secretary of State also decided that X could not obtain another residence permit and refused X’s application to suspend, on the basis of Article 64 of the Law on foreign nationals, the enforcement of his obligation to return.

19 By judgment of 20 December 2018, the rechtbank Den Haag (District Court, The Hague, Netherlands) annulled that decision in part. While that court accepted that X could not

claim refugee status or subsidiary protection status, it did, however, order the Secretary of State to re-examine both X's arguments based on his right to obtain a residence permit, on the basis of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), and his application based on Article 64 of the Law on foreign nationals. That judgment was upheld by judgment of the Raad van State (Council of State, Netherlands) of 28 March 2019.

20 On 19 February 2020, the Secretary of State once more refused to grant X a residence permit for a limited duration, on the basis of Article 8 ECHR, and to postpone his removal. He also adopted a return decision ordering X to leave the territory of the Netherlands within four weeks.

21 X brought an action against that return decision before the referring court. He takes the view that he should be issued with a residence permit by reason of Article 8 ECHR or, at the very least, his removal should be postponed by reason of Article 64 of the Law on foreign nationals. In that regard, he maintains that the analgesic treatment based on medicinal cannabis, which he receives in the Netherlands, is so essential to him that he would no longer be able to lead to a decent life if that treatment was discontinued. He states, in particular, that, if that treatment were discontinued, the pain would be so great that he would no longer be able to sleep or eat, which would have significant consequences not only on his physical state, but also on his psychological state, making him depressed and suicidal.

22 According to the referring court, it is apparent from the judgment of 18 December 2014, *M'Bodj* (C-542/13, EU:C:2014:2452), that the state of health of a third-country national cannot justify his or her being granted subsidiary protection. In addition, it is common ground that X is no longer applying for refugee status.

23 Nevertheless, in the first place, the referring court notes that, in accordance with Netherlands legislation, removal may be postponed where, from a medical point of view, the foreign national is unable to travel or there is a real risk of a violation of Article 3 ECHR on medical grounds.

24 The second situation assumes that it is apparent from the BMA's opinion, first, that discontinuing the medical treatment in question would, in all probability, result in a 'medical emergency' within the meaning of point 7.1.3 of the Circular on foreign nationals for the person concerned, and, second, that the appropriate medical treatment is not available in the receiving country or that the foreign national concerned would not be able to access it.

25 In its opinion issued at the request of the Secretary of State, the BMA noted, inter alia, that although it was foreseeable that, without phlebotomy, X would, in the short term, find himself in such a 'medical emergency', such treatment was nevertheless available in Russia. However, the BMA took the view that, since the medicinal effect of cannabis has not been demonstrated, it was impossible to take a position on the medical consequences of discontinuing his analgesic treatment based on medicinal cannabis. The BMA also stated that there were no reports of pain-related disorders which would lead to fears of X dying or becoming dependent on others to perform everyday activities. It therefore took the view that it could not be claimed that the use of medicinal cannabis would make it possible to prevent such a short-term 'medical emergency' occurring. It also found that there were sufficient alternative painkillers on the market which could be administered to X.

26 According to the referring court, it is apparent, however, from the information submitted by X that the doctors treating him take the view that the use of medicinal cannabis constitutes the only appropriate pain relief treatment for the person concerned. Furthermore, that court takes the view that X has demonstrated that medicinal cannabis-based treatment is prescribed and used only when other pain relief is not only ineffective but also contraindicated.

27 The referring court also notes that no appropriate analgesic treatment is available in Russia. Therefore, if X's removal were not postponed, X's pain relief treatment would be discontinued and the intensity of the pain would increase. By contrast, it is not possible to determine whether the increase in X's pain due to his treatment being discontinued would cause his illness to worsen, even if, on the basis of the information available to that court, it is likely that that will not be the case. Before requesting a medical report be drawn up regarding the increase in the pain which X might suffer following treatment with medicinal cannabis being stopped, that court considers that it is necessary, by an interpretation of EU law, to establish how such a parameter should be taken into account.

28 In the second place, the referring court submits that, according to the settled case-law of the Raad van State (Council of State), which relies on the requirement of a rapid deterioration in the state of health of the person concerned, as provided for in the judgment of the European Court of Human Rights of 13 December 2016, *Paposhvili v. Belgium* (CE:ECHR:2016:1213JUD004173810) ('the judgment in *Paposhvili*'), only the medical consequences which occur within a period of three months after discontinuation of the medical treatment administered to the person concerned must be taken into account to determine whether a 'medical emergency' within the meaning of point 7.1.3 of the Circular on foreign nationals will arise if the treatment is discontinued.

29 According to the referring court, the European Court of Human Rights did not, however, set an express deadline in the judgment in *Paposhvili*. It is therefore necessary to determine whether the consequences of discontinuing the medical treatment of a third-country national who is seriously ill, if he [or she] is returned to his [or her] country of origin, may fall within the scope of Article 4 of the Charter only if they occur within a period of three months, irrespective of the medical conditions and of the medical consequences which may arise after that discontinuation.

30 In the third place, the referring court notes that the Raad van State (Council of State) has held that, in accordance with the judgment of 16 February 2017, *C.K. and Others* (C-578/16 PPU, EU:C:2017:127), Article 64 of the Law on foreign nationals also requires an assessment of whether the removal, as such, of a third-country national who has a particularly serious physical or mental condition may result in a real risk of a violation of Article 3 ECHR. However, that assessment should be made solely in the context of an examination of the circumstances in which the foreign national concerned may travel. It follows, first, that the BMA is never asked to assess whether the process of removal, as such, of that third-country national risks having medical consequences which appear after such foreign national has been removed to the receiving country and, second, that those consequences are not taken into account in order to determine whether a 'medical emergency' within the meaning of point 7.1.3 of the Circular on foreign nationals, precludes such removal.

31 Therefore, it would be difficult for such an examination to prevent the removal of the person concerned from being postponed even where a worsening of his mental health, such as a risk of suicide caused by the removal itself, might be feared.

32 The referring court asks however whether it may simply assess whether the medical consequences of removing the person concerned remain limited, by putting in place certain arrangements, during such removal. It also states that, in X's case, treatment based on medicinal cannabis cannot be administered during the removal, in the strict sense, and that X has submitted that his increased pain would make him depressed and suicidal.

33 In the fourth place, that court considers that it is necessary to determine whether the seriousness of the state of health of a third-country national and the fact that he is receiving medical treatment in the Member State in which he is staying illegally may constitute an aspect of his private life which must be respected, pursuant to Article 7 of the Charter and Article 8 ECHR.

34 In particular, that court asks itself whether the competent authorities of a Member State must examine whether it is appropriate to grant, by virtue of the right to respect for private life, a right of residence to such a national and whether respect for the private life of the person concerned is a factor to be taken into consideration for the purposes of deciding on his application to obtain a postponement of the removal order to which he is subject.

35 In those circumstances, the Rechtbank Den Haag (District Court, The Hague) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Can a significant increase in pain intensity due to a lack of medical treatment, while the clinical picture remains unchanged, constitute a situation which is contrary to Article 19(2) of the [Charter], read in conjunction with Article 1 of the Charter and Article 4 of the Charter, if no postponement of the departure obligation resulting from [Directive 2008/115] is permitted?

(2) Is the setting of a fixed period within which the consequences of the lack of medical treatment must materialise in order to constitute a medical obstacle to an obligation to return resulting from [Directive 2008/115] compatible with Article 4 of the Charter, read in conjunction with Article 1 of the Charter? If the setting of a fixed period is not contrary to EU law, is a Member State then permitted to set a general period that is the same for all possible medical conditions and all possible medical consequences?

(3) Is a determination that the consequences of expulsion should be assessed solely in terms of whether, and under what conditions, the foreign national can travel, compatible with Article 19(2) of the Charter, read in conjunction with Article 1 of the Charter and Article 4 of the Charter, and with [Directive 2008/115]?

(4) Does Article 7 of the Charter, read in conjunction with Article 1 of the Charter and Article 4 of the Charter, and in the light of [Directive 2008/115], require that the medical condition of the foreign national and the treatment he is undergoing in the Member State be assessed when determining whether private life considerations should result in permission to stay being granted? Does Article 19(2) of the Charter, read in conjunction with Article 1 of the Charter and Article 4 of the Charter, and in the light of [Directive 2008/115], require that

private life and family life, as referred to in Article 7 of the Charter, be taken into account when assessing whether medical problems may constitute an obstacle to expulsion?'

Consideration of the questions referred

The Court's jurisdiction and the admissibility of the questions referred for a preliminary ruling

36 The Netherlands Government disputes, in the first place, the admissibility of the questions referred for a preliminary ruling in so far as that they are premature. In its view, before putting the questions to the Court, the referring court ought to have rejected X's application seeking that he be granted a right of residence in the Netherlands, since Directive 2008/115 applies to him only if that third-country national is staying illegally in that territory.

37 However, national courts are free to refer questions to the Court at whatever stage of the proceedings they consider appropriate, even at an early stage of the proceedings (see, to that effect, judgments of 5 October 2010, *Elchinov*, C-173/09, EU:C:2010:581, paragraph 26, and of 14 November 2018, *Memoria and Dall'Antonia*, C-342/17, EU:C:2018:906, paragraph 33).

38 In the present case, it is apparent from the order for reference that X's application for asylum was rejected by the Secretary of State, with the result that he is, in principle, staying illegally on the territory of the Netherlands and, therefore, falls within the scope of Directive 2008/115, unless he is eligible for the grant of a right of residence in that territory on the basis, in particular, of EU law, which is precisely the subject of the fourth question referred.

39 It follows that it is necessary to reject the arguments of the Netherlands Government that the questions referred for a preliminary ruling are premature.

40 In the second place, the Netherlands Government takes the view that the second question referred for a preliminary ruling is irrelevant to the outcome of the main proceedings, since it is seeking, in essence, to determine whether a Member State may require the deterioration in the state of health of the third-country national, which is to be feared if he is returned, to materialise within a fixed period following that return. Such a period is not a decisive factor for the main proceedings, since the refusal to postpone X's removal has been justified, in essence, on the ground that there is no fear of a 'medical emergency' in the short term , within the meaning of point 7.1.3 of the Circular on foreign nationals, in his country of origin on account of X's pain not being linked to the symptoms of his illness and that there are alternative treatments in that country.

41 In that regard, it follows from the settled case-law of the Court that it is solely for the national court before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case in the main proceedings, the relevance of the question which it submits to the Court. Consequently, where the question submitted concerns the interpretation or the validity of a rule of EU law, the Court is, in principle, bound to give a ruling. It follows that questions referred for a preliminary ruling concerning EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is

hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 7 September 2022, *Cilevičs and Others*, C-391/20, EU:C:2022:638, paragraphs 41 and 42).

42 Contrary to the Netherlands Government's claims, the interpretation of EU law sought in the second question does not appear to be obviously unrelated to the subject matter of the main proceedings.

43 As the Advocate General stated, in essence, in point 35 of his Opinion, it is common ground that the return decision adopted in relation to X was based, inter alia, on the fact that no 'medical emergency', within the meaning of point 7.1.3 of the Circular on foreign nationals, would occur in the short term if he were returned to his country of origin. It is clear from the order for reference that, under the Netherlands legislation, the existence of such a 'medical emergency' is assessed in the light of the three-month period mentioned in the Circular on foreign nationals, such period being precisely the subject of the second question referred for a preliminary ruling.

44 In addition, it is apparent from the facts set out by the referring court that X's pain must be regarded as being caused by the illness from which he suffers and that, as regards that pain, no alternative treatment is available in his country of origin. The questions on the interpretation of EU law are referred by a national court in the factual and legislative context which that court is responsible for defining, the accuracy of which is not a matter for the Court to determine. Therefore, irrespective of the criticisms made by the Netherlands Government with regard to the findings of fact made by the referring court, the second question referred for a preliminary ruling must be examined on the basis of those assessments (see, to that effect, judgment of 7 April 2022 in *Caixabank*, C-385/20, EU:C:2022:278, paragraphs 34 and 38 and the case-law cited).

45 It follows that the second question referred for a preliminary ruling is admissible.

46 As regards, in the third place, the fourth question referred for a preliminary ruling, it should be stated, first, that, contrary to the Netherlands Government's claims, that question concerns the interpretation, not of Article 8 of the ECHR, but of Article 7 of the Charter, read in conjunction with other provisions thereof as well as of Directive 2008/115.

47 It follows that the Court has jurisdiction to answer that question.

48 Second, the Netherlands Government submits that that question is inadmissible on the ground that the referring court is seeking to determine whether Article 7 of the Charter must be interpreted as meaning that X must be granted a right of residence in the Netherlands when no substantive provision of EU law allows him to obtain such a right of residence.

49 In that regard, it is sufficient to note that the question whether the interpretation of Directive 2008/115, read in conjunction with Article 7 of the Charter, may lead to a third-country national, in a situation such as that at issue in the main proceedings, being granted a right of residence on the territory of a Member State falls, in any event, within the scope of the examination of the substance of that question.

50 Consequently, the fourth question referred for a preliminary ruling is admissible.

The first and second questions

51 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Directive 2008/115, read in conjunction with Articles 1 and 4, as well as Article 19(2) of the Charter, must be interpreted as precluding a return decision from being taken or a removal order from being made in respect of a third-country national who is staying illegally on the territory of a Member State and suffering from a serious illness, and who would be exposed, in the third country to which he would be removed, to the risk of a significant increase in the pain caused by that illness, on account of the only effective analgesic treatment being prohibited in that country. The referring court also asks whether a Member State may provide for a strict period during which such an increase must be likely to materialise in order for that return decision or that removal order to be precluded.

52 In the first place, it should be noted that, first, subject to the exceptions laid down in Article 2(2) of Directive 2008/115, that directive applies to any third-country national staying illegally on the territory of a Member State. Moreover, where a third-country national falls within the scope of that directive, he or she must therefore, in principle, be subject to the common standards and procedures laid down by that directive for the purpose of his or her removal, as long as his or her stay has not, as the case may be, been regularised (judgment of 24 February 2021, *M and Others (Transfer to a Member State)*, C-673/19, EU:C:2021:127, paragraphs 29 and 31 and the case-law cited).

53 From that point of view, it follows, first, from Article 6(1) of Directive 2008/115 that, once the unlawful nature of residence has been established, any third-country national must, without prejudice to the exceptions provided for in paragraphs 2 to 5 of that article and in strict compliance with the requirements laid down in Article 5 of that directive, be the subject of a return decision, which must identify, among the third countries referred to in Article 3(3) of Directive 2008/115, the country to which the third-country national must return (judgment of 24 February 2021, *M and Others (Transfer to a Member State)*, C-673/19, EU:C:2021:127, paragraphs 32 and 39 and the case-law cited).

54 Second, a Member State may not remove an illegally staying third-country national under Article 8 of Directive 2008/115 unless a return decision in respect of that third-country national has first been adopted in compliance with the substantive and procedural safeguards established by that directive (see, to that effect, judgment of 17 December 2020, *Commission* v *Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:1029, paragraph 253).

55 Second, Article 5 of Directive 2008/115, which is a general rule binding on the Member States as soon as they implement that directive, obliges the competent national authority to observe, at all stages of the return procedure, the principle of non-refoulement, which is guaranteed, as a fundamental right, in Article 18 of the Charter, read in conjunction with Article 33 of the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951, as amended by the Protocol relating to the Status of Refugees, and in Article 19(2) of the Charter. That is the case, in particular, as recalled in paragraph 53 of the present judgment, where that authority is contemplating, after hearing the person concerned, the adoption of a return decision in relation to that person (see, to that effect, judgment of 17 December 2020, *Commission* v *Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:1029, paragraph 250 and the case-law cited).

56 Therefore, Article 5 of Directive 2008/115 precludes a third-country national from being the subject of a return decision where that decision concerns, as the receiving country, a country in respect of which substantial grounds have been shown for believing that, if that decision is implemented, that third-country national would be exposed to a real risk of treatment contrary to Article 18 or Article 19(2) of the Charter.

57 Under Article 19(2) of the Charter, no one may be removed to a State where there is a serious risk that he or she would be subjected not only to the death penalty but also to torture or inhuman or degrading treatment within the meaning of Article 4 of the Charter. The prohibition of inhuman or degrading treatment or punishment, laid down in Article 4 of the Charter, is absolute in that it is closely linked to respect for human dignity, the subject of Article 1 of the Charter (judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 85).

58 It follows that, where there are substantial grounds for believing that a third-country national staying illegally on the territory of a Member State would be exposed, if he or she were returned to a third country, to a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter, read in conjunction with Article 1 thereof, and Article 19(2) of the Charter, that national cannot be the subject of a return decision to that country, while such a risk persists.

59 Similarly, that national cannot be removed during that period, as is expressly provided for in Article 9(1) of Directive 2008/115.

60 Third, in accordance with Article 52(3) of the Charter, in so far as the rights guaranteed by Article 4 thereof correspond to those guaranteed by Article 3 of the ECHR, the meaning and scope of those rights are the same as those laid down by Article 3 of the ECHR (judgment of 24 April 2018, *MP (Subsidiary protection of a victim of past torture)*, C-353/16, EU:C:2018:276, paragraph 37).

61 It follows from the case-law of the European Court of Human Rights relating to Article 3 of the ECHR that the pain caused by a naturally occurring illness, whether physical or mental, may be covered by that Article 3 if it is, or risks being, exacerbated by treatment, whether resulting from conditions of detention, removal or other measures for which the authorities can be held responsible, provided that the resulting pain reaches the severity threshold required under Article 3 of the ECHR (see, to that effect, judgment in *Paposhvili*, § 174 and 175, and judgment of 24 April 2018, *MP (Subsidiary protection of a victim of past torture)*, C-353/16, EU:C:2018:276, paragraph 38).

62 It should be recalled that, to fall within the scope of Article 3 of the ECHR, ill treatment must attain a minimum level of severity, the assessment of that minimum being relative and depending on all the circumstances of the case (ECtHR, 20 October 2016, *Muršić v. Croatia*, CE:ECHR:2016:1020JUD000733413, § 97; ECtHR, 7 December 2021, *Savran v. Denmark*, CE:ECHR:2021:1207JUD005746715, § 122 and the case-law cited).

63 In that regard, it follows from the case-law of the European Court of Human Rights that Article 3 of the ECHR precludes the removal of a seriously ill person where he or she is at risk of imminent death or where substantial grounds have been shown for believing that, although not at imminent risk of dying, he or she would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such

treatment, of suffering a serious, rapid and irreversible decline in his or her state of health resulting in intense pain or a significant reduction in life expectancy (see, to that effect, judgment in *Paposhvili*, §§ 178 and 183, and judgment of 24 April 2018, *MP (Subsidiary protection of a victim of past torture)*, C-353/16, EU:C:2018:276, paragraph 40).

64 It is also apparent from the case-law of the European Court of Human Rights that the judgment in *Paposhvili* lays down a standard which takes due account of all relevant considerations for the purposes of Article 3 of the ECHR in that it preserves the general right of States to control the entry, residence and removal of non-nationals, while recognising the absolute nature of that article (ECtHR, 7 December 2021, *Savran v. Denmark*, CE:ECHR:2021:1207JUD005746715, § 133).

65 It is settled case-law of the Court that the severity threshold required in this field for the purposes of applying Article 4 of the Charter is equivalent to the severity threshold required, in the same circumstances, under Article 3 ECHR (judgments of 16 February 2017, *C.K. and Other*s, C-578/16 PPU, EU:C:2017:127, paragraph 67, and of 24 April 2018, *MP (subsidiary protection of a victim of past torture)*, C-353/16, EU:C:2018:276, paragraph 37).

66 It follows from paragraphs 52 to 65 of the present judgment that Article 5 of Directive 2008/115, read in conjunction with Articles 1 and 4, as well as Article 19(2) of the Charter, precludes a Member State from adopting a return decision or removing a third-country national who is staying illegally on the territory of that Member State and suffering from a serious illness, where there are substantial grounds for believing that returning that third-country national would expose him or her, on account of appropriate care not being available in the receiving country, to a real risk of a significant reduction in his or her life expectancy or a rapid, significant and permanent deterioration in his or her state of health, resulting in intense pain.

67 In the second place, it is necessary to examine, for the purposes of the case in the main proceedings, whether a Member State must refrain from adopting a return decision or a removal order in respect of a third-country national who is staying illegally on the territory of that Member State and suffering from a serious illness, where there are substantial grounds for believing that that national would be exposed, if he or she were returned, to a real risk of an increase in his or her pain, on account of the only effective analgesic treatment being prohibited in the receiving country, it not being necessary that such a return would expose him or her to the risk that the illness from which he or she is suffering worsens.

68 In that regard, as stated in paragraphs 61, 63 and 65 of the present judgment, a Member State may infringe the prohibition of inhuman and degrading treatment, laid down in Article 4 of the Charter, where the return decision or removal order adopted by its authorities risks exacerbating the pain caused to a third-country national by a naturally occurring illness to the extent that that pain reaches the severity threshold referred to in those paragraphs.

69 Consequently, the fact that it is solely the pain linked to the serious illness of a third-country national who is staying illegally on the territory of a Member State which risks becoming worse if that national is returned does not suffice to preclude such a return from being contrary to Article 4 of the Charter. That is all the more so since an increase in pain linked to an illness may, itself, lead to a deterioration in the physical or mental state of health, in the strict sense, of the person concerned.

70 However, not all risks of an increase in pain resulting from the return of a third-country national expose that person to treatment contrary to Article 4 of the Charter. Indeed, by analogy with what is set out in paragraph 66 of the present judgment, there must also be substantial grounds for believing that, if that national were returned, he or she would be exposed to a real risk of a rapid, significant and permanent increase in his or her pain.

71 In that regard, it must be stated, first, that there are substantial grounds for believing that a third-country national risks, if he or she is returned, being exposed to a significant and permanent increase in the pain caused by his or her illness, in particular, where it is established that (i) in the receiving country, the only effective analgesic treatment cannot be lawfully administered to him or her and (ii) the absence of such treatment would expose him or her to pain of such intensity that it would be contrary to human dignity in that it could cause him or her serious and irreversible psychological consequences, or even lead him or her to commit suicide, which is a matter for the referring court to determine in the light of all of the relevant information, in particular the medical information. In particular, it is necessary to assess the irreversibility of the increase in pain, taking into account a multitude of factors, including the direct effects and the more remote consequences of such an increase (see, by analogy, ECtHR, *Savran v. Denmark*, CE:ECHR:2021:1207JUD005746715, § 138).

72 As regards, second, the requirement that returning the third-country national concerned risks causing that person a rapid increase in his or her pain, it must be pointed out that such a condition cannot be interpreted so strictly as to preclude the return of a seriously ill third-country national only in extreme cases in which that third-country national would suffer a significant and permanent increase in his or her pain as from his or her arrival on the territory of the receiving country or immediately following that arrival. Account must rather be taken of the fact that the increase in the pain of the person concerned, caused by his or her return to a country in which appropriate treatment is not available, may be gradual and that a certain period of time may be necessary for that increase to become significant and permanent.

73 In addition, the need to take account of all relevant factors, for the purposes of assessing the severity threshold required in this field under Article 4 of the Charter, and the degree of speculation inherent in such a forward-looking assessment, precludes, for it to be regarded as rapid, the increase in the pain of a third-country national, if he or she is returned, having to be liable to occur within a period which is predetermined in the law of the Member State concerned in an absolute manner.

74 The competent national authority must, indeed, be able to weigh up, on the basis of the medical condition from which the third-country national is suffering, the speed with which, if he or she is returned, such an increase may take place, on the one hand, against the intensity level of the increase in pain which is to be feared in such a situation, on the other.

75 If the Member States set a time limit, it must be purely indicative and will not exempt the competent national authority from an actual examination of the situation of the third-country national concerned in the light of all the relevant factors, in particular those mentioned in the preceding paragraph, having regard to the medical condition from which that national is suffering.

76 It follows from all the foregoing considerations that Article 5 of Directive 2008/115, read in conjunction with Articles 1 and 4 of the Charter as well as Article 19(2) thereof, must be interpreted as precluding a return decision from being taken or a removal order from being

made in respect of a third-country national who is staying illegally on the territory of a Member State and suffering from a serious illness, where there are substantial grounds for believing that the person concerned would be exposed, in the third-country to which he or she would be removed, to a real risk of a significant, permanent and rapid increase in his or her pain, if he or she were returned, on account of the only effective analgesic treatment being prohibited in that country. A Member State may not lay down a strict period within which such an increase must be liable to materialise in order to preclude that return decision or that removal order.

The third question

77 By its third question, the referring court asks, in essence, whether Directive 2008/115, read in conjunction with Articles 1, 4 and 19 of the Charter, must be interpreted as precluding the consequences of the removal order, in the strict sense, on the state of health of a third-country national from being taken into account by the competent national authority solely in order to examine whether that third-country national is able to travel.

78 It is apparent from the request for a preliminary ruling that the initial premiss of the referring court is that the Netherlands legislation concerned draws a distinction between, on the one hand, the assessment of the risk that discontinuing the treatment administered to a third-country national, caused by his or her return, gives rise in the short term to a 'medical emergency' within the meaning of point 7.1.3 of the Circular on foreign nationals, and, on the other hand, the assessment of the consequences of the removal order in the strict sense, which must form part of the examination of that person's ability to travel and which therefore involves taking into account solely the medical consequences which may occur during that removal, and not taking into account the medical consequences which may become apparent after that removal, in the receiving country.

79 The Netherlands Government disputes that that is the practice of the competent national authority concerned. However, in accordance with the case-law referred to in paragraph 44 above, the third question must be answered on the basis of the premiss set out by the referring court.

80 In the light of that clarification, it is apparent from the reasons for the answer to the first and second questions that Article 5 and Article 9(1)(a) of Directive 2008/115 require that, before adopting a return decision or removing a third-country national who is suffering from a serious illness, Member States must be able to rule out any serious doubts regarding the risk that returning that third-country national results in a rapid, significant and permanent worsening of that illness or of the pain caused by that illness. Where such doubts cannot be ruled out, the competent national authority may not adopt a return decision or remove the third-country national concerned.

81 Although such a prohibition also applies as long as the Member State concerned is not in a position to organise the removal in the strict sense of the third-country national concerned in a manner which ensures, inter alia, that that national will not be exposed to a risk of a significant and permanent increase in his or her illness or pain during that removal, it cannot be concluded that it is sufficient for that Member State to ensure that that national will receive appropriate treatment during his or her removal to be able to adopt a return decision in respect of that national or to remove him or her. The Member State concerned must ensure that, when the state of health of the person concerned so requires, that person receives not only health

care during removal in the strict sense but also after that removal, in the receiving country (see, by analogy, judgment of 16 February 2017, *C.K. and Others* (C-578/16 PPU, EU:C:2017:127, paragraphs 76 to 82).

82 It follows from all the foregoing considerations that Article 5 and Article 9(1)(a) of Directive 2008/115, read in conjunction with Articles 1 and 4 of the Charter as well as Article 19(2) thereof, must be interpreted as precluding the consequences of the removal order in the strict sense on the state of health of a third-country national from being taken into account by the competent national authority solely in order to examine whether he or she is able to travel.

The fourth question

83 By its fourth question, the referring court asks, in essence, whether Directive 2008/115, read in conjunction with Articles 7 as well as Articles 1 and 4 and of the Charter, must be interpreted as meaning that the state of health of a third-country national who is staying illegally on the territory of a Member State and the treatment which that national is undergoing on that territory, on account of the serious illness from which he or she is suffering, must be taken into account by that Member State in order to assess whether, in accordance with the right to respect for his or her private life, a right of residence on the territory of that Member State must be granted or the date of his or her removal must be postponed.

84 In the first place, it must be recalled that the common standards and procedures established by Directive 2008/115 concern only the adoption of return decisions and the implementation of those decisions, since that directive is not designed to harmonise in their entirety Member States rules on the stay of foreign nationals. Consequently, that directive does not lay down rules concerning either how to attribute a right of residence to third-country nationals or the consequences of the illegal residence on the territory of a Member State of third-country nationals in respect of whom no decision on their return to a third country can be issued (see, to that effect, judgments of 8 May 2018, *K.A. and Others (Family reunification in Belgium)*, C-82/16, EU:C:2018:308, paragraphs 44 and 45, and of 24 February 2021, *M and Others (Transfer to a Member State)*, C-673/19, EU:C:2021:127, paragraphs 43 and 44).

85 It follows that no provision of Directive 2008/115 can be interpreted as requiring a Member State to grant a right of residence to a third-country national who is staying illegally on its territory where that national cannot be the subject of a return decision or a removal order, on the basis that there are substantial grounds for believing that the person concerned would be exposed, in the receiving country, to a real risk of a rapid, significant and permanent increase in the pain caused by his or her illness.

86 As regards, in particular, Article 6(4) of Directive 2008/115, that provision does no more than permit Member States to grant, for compassionate or humanitarian reasons, a right of residence, on the basis of their national law, and not EU law, to third-country nationals who are staying illegally on their territory.

87 In accordance with Article 51(2) of the Charter, the provisions of the Charter do not extend the scope of EU law. Consequently, it cannot be held that, under Article 7 of the Charter, a Member State can be required to grant a right of residence to a third-country national who falls within the scope of that directive.

88 However, it must, in the second place, be stated 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 (judgment of 19 June 2018, *Gnandi*, C-181/16, EU:C:2018:465, paragraph 48 and the case-law cited).

89 It follows that, when they implement Directive 2008/115, including when they envisage adopting a return decision or making a removal order in respect of an illegally staying third-country national, Member States are required to respect the fundamental rights which the Charter grants to that national (judgment of 11 June 2015, *Zh. and O.*, C-554/13, EU:C:2015:377, paragraph 69).

90 That applies, in particular, to the right to respect for the private and family life of that national, as guaranteed in Article 7 of the Charter. That right, more specifically referred to by the referring court in its fourth question, corresponds to that guaranteed by Article 8 of the ECHR and must therefore be regarded as having the same meaning and the same scope (judgment of 18 June 2020, *Commission* v *Hungary (Transparency of associations)*, C-78/18, EU:C:2020:476, paragraph 122 and the case-law cited).

91 In that regard, the Court has held that point (b) of the first paragraph of Article 5 of Directive 2008/115 precludes a Member State from adopting a return decision without having taken into account the relevant details of the family life of the third-country national concerned (judgment of 8 May 2018, *K.A. and Others (Family reunification in Belgium)*, C-82/16, EU:C:2018:308, paragraph 104).

92 Furthermore, and although Article 5 does not mention the private life of an illegally staying third-country national among the factors which the Member States must take into account when implementing Directive 2008/115, the fact remains that it follows from paragraphs 88 to 90 above that a return decision or a removal order cannot be adopted if it infringes the right to respect for private life of the third-country national concerned.

93 In that regard, it should be noted that the medical treatment which a third-country national receives on the territory of a Member State, even if that national is staying there illegally, forms part of his or her private life, within the meaning of Article 7 of the Charter.

94 As the Advocate General observed, in essence, in point 114 of his Opinion, the physical and mental integrity of a person contributes to his or her personal development and, consequently, to the effective enjoyment of his or her right to respect for private life, which also encompasses, to a certain extent, the right of the individual to establish and develop relationships with other human beings (see, to that effect, ECtHR, judgment of 8 April 2021, *Vavricka and Others v. the Czech Republic*, CE:ECHR:2021:0408JUD004762113, § 261).

95 Consequently, as confirmed by point (c) of the first paragraph of Article 5 and Article 9(2)(a) of Directive 2008/115, the competent national authority may adopt a return decision or remove a third-country national only if it has taken into account that person’s state of health.

96 However, it should be recalled that the right to respect for private life, enshrined in Article 7 of the Charter, is not an absolute right, but must be considered in relation to its function in society. Indeed, as can be seen from Article 52(1) of the Charter, that provision

allows limitations to be placed on the exercise of those rights, provided that those limitations are provided for by law, that they respect the essence of those rights and that, in compliance with the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others (judgment of 5 April 2022, *Commissioner of An Garda Síochána and Others*, C-140/20, EU:C:2022:258, paragraph 48 and the case-law cited).

97 In that regard, it should be noted that the establishment of an effective removal and repatriation policy, which is pursued by Directive 2008/115, as stated in recital 2 thereof, is an objective of general interest recognised by EU law.

98 However, Article 52(1) of the Charter still requires an examination, in particular, of whether the adoption of a return decision or a removal order in respect of a third-country national who is suffering from a serious illness and receiving, in the Member State concerned, analgesic treatment which is unavailable in the receiving country does not affect the essence of his or her right to private life and respects the principle of proportionality.

99 Such an examination presupposes taking into account all the social ties which that national has created within the Member State where he or she is staying illegally, taking due account of the fragility and the state of particular dependency caused by his or her state of health. However, as the Advocate General stated, in essence, in point 112 of his Opinion, where that national has established his or her private life within that Member State without holding a right of residence there, only exceptional circumstances may preclude him or her from being the subject of a return procedure (see, by analogy, ECtHR, judgment of 28 July 2020, *Pormes v. the Netherland*s, CE:ECHR:2020:0728JUD002540214, § 53 and 58).

100 Moreover, the fact that, if he or she were returned, the same treatment as administered to him or her in the Member State in whose territory he or she is staying illegally would no longer be available to that national and could, therefore, in particular, affect the development of his or her social relations in the receiving country, cannot, in itself, under Article 7 of the Charter, preclude the adoption of a return decision or a removal order in respect of that national.

101 As recalled in paragraphs 60 and 64 above, Article 4 of the Charter precludes, under strict conditions, the return of a third-country national who is staying illegally and suffering from a serious illness.

102 It follows that, if those conditions are not to be rendered ineffective, Article 7 of the Charter cannot require a Member State to refrain from adopting a return decision or a removal order in respect of that national solely because of the risk of a deterioration in his or her state of health in the receiving country, where such conditions are not met.

103 It follows from all the foregoing considerations that Directive 2008/115, read in conjunction with Articles 7, as well as Articles 1 and 4 and of the Charter, must be interpreted as meaning that:

– it does not require the Member State on whose territory a third-country national is staying illegally to grant that national a right of residence where he or she cannot be the subject of a return decision or a removal order because there are substantial grounds for believing that he or she would be exposed, in the receiving country, to a real risk of a rapid,

significant and permanent increase in the pain caused by the serious illness from which he or she suffers;

– the state of health of that national and the care he or she receives on that territory, on account of that illness, must be taken into account, together with all the other relevant factors, by the competent national authority when it examines whether the right to respect for the private life of that national precludes him or her being the subject of a return decision or a removal order;

– the adoption of such a decision or measure does not infringe that right on the sole ground that, if he or she were returned to the receiving country, that national would be exposed to the risk that his or her state of health deteriorates, where such a risk does not reach the severity threshold required under Article 4 of the Charter.

Costs

104 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:

1. **Article 5 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, read in conjunction with Articles 1 and 4 of the Charter of Fundamental Rights of the European Union as well as Article 19(2) thereof**

must be interpreted as precluding a return decision from being taken or a removal order from being made in respect of a third-country national who is staying illegally on the territory of a Member State and suffering from a serious illness, where there are substantial grounds for believing that the person concerned would be exposed, in the third-country to which he or she would be removed, to a real risk of a significant, permanent and rapid increase in his or her pain, if he or she were returned, on account of the only effective analgesic treatment being prohibited in that country. A Member State may not lay down a strict period within which such an increase must be liable to materialise in order to preclude that return decision or that removal order.

2. **Article 5 and Article 9(1)(a) of Directive 2008/115, read in conjunction with Articles 1 and 4 of the Charter of Fundamental Rights as well as Article 19(2) thereof**

must be interpreted as precluding the consequences of the removal order in the strict sense on the state of health of a third-country national from being taken into account by the competent national authority solely in order to examine whether he or she is able to travel.

3. **Directive 2008/115, read in conjunction with Article 7, as well as Article 1 and 4 of the Charter of Fundamental Rights**

must be interpreted as:

– **meaning that it does not require the Member State on whose territory a third-country national is staying illegally to grant that national a right of residence where he or she cannot be the subject of a return decision or a removal order because there are substantial grounds for believing that he or she would be exposed, in the receiving country, to a real risk of a rapid, significant and permanent increase in the pain caused by the serious illness from which he or she suffers;**

– **the state of health of that national and the care he or she receives on that territory, on account of that illness, must be taken into account, together with all the other relevant factors, by the competent national authority when it examines whether the right to respect for the private life of that national precludes him or her being the subject of a return decision or a removal order;**

– **the adoption of such a decision or measure does not infringe that right on the sole ground that, if he or she were returned to the receiving country, that national would be exposed to the risk that his or her state of health deteriorates, where such a risk does not reach the severity threshold required under Article 4 of the Charter.**

[Signatures]

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* Language of the case: Dutch.