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JUDGMENT OF THE COURT (First Chamber)

28 April 2011(*)

(Area of freedom, security and justice – Directive 2008/115/EC – Return of illegally staying third-country nationals – Articles 15 and 16 – National legislation providing for a prison sentence for illegally staying third-country nationals in the event of refusal to obey an order to leave the territory of a Member State – Compatibility)

In Case C-61/11 PPU,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Corte d'appello di Trento (Italy), made by decision of 2 February 2011, received at the Court on 10 February 2011, in the criminal proceedings against

Hassen El Dridi alias Soufi Karim,

THE COURT (First Chamber),

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

Advocate General: J. Mazák,

Registrar: A. Impellizzeri, Administrator,

having regard to the request by the national court of 2 February 2011, received at the Court on 10 February 2011 and supplemented on 11 February 2011, that the reference for a preliminary ruling be dealt with under an urgent procedure, in accordance with Article 104b of the Court's Rules of Procedure,

having regard to the decision of 17 February 2011 of the First Chamber granting that request,

having regard to the written procedure and further to the hearing on 30 March 2011,

after considering the observations submitted on behalf of:

- Mr El Dridi, by M. Pisani and L. Masera, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and by L. D'Ascia, avvocato dello Stato,
- the European Commission, by M. Condou-Durande and L. Prete, acting as Agents,

after hearing the Advocate General,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 15 and 16 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 reference has been made in proceedings brought against Mr El Dridi, who was sentenced to one year's imprisonment for the offence of having stayed illegally on Italian territory without valid grounds, contrary to a removal order made against him by the Questore di Udine (chief of police, Udine).

Legal context

European Union legislation

- 3 Recitals 2, 6, 13, 16 and 17 in the preamble to 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.

...

(6) Member States should ensure that the ending of illegal stay of third-country nationals is carried out through a fair and transparent procedure. ...

...

(13) The use of coercive measures should be expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued. ...

...

(16) The use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient.

(17) Third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law. 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.

- 4 Article 1 of Directive 2008/115, entitled 'subject-matter', provides:

'This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.'

- 5 Article 2(1) and (2) of that directive provides:

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

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

...

(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(4) of Directive 2008/115 defines the term 'return decision', for the purposes of that directive, as 'an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return'.

- 7 Article 4(3) of that directive states:

'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 According to Article 6(1) of the same directive, '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'.

9 Article 7 of Directive 2008/115, entitled 'voluntary departure', is worded as follows:

'1. A return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days, without prejudice to the exceptions referred to in paragraphs 2 and 4. Member States may provide in their national legislation that such a period shall be granted only following an application by the third-country national concerned. In such a case, Member States shall inform the third-country nationals concerned of the possibility of submitting such an application.

...

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

4. If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.'

10 Article 8(1) and (4) of that directive 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.'

11 Article 15 of that same directive, under Chapter IV thereof, relating to detention for the purpose of removal, reads as follows:

'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.

...

3. In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

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.'

12 Article 16 of Directive 2008/115, entitled '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.'

13 According to Article 18 of Directive 2008/115, entitled 'emergency situations':

'1. In situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, decide ... to take urgent measures in respect of the conditions of detention derogating from those set out in [Article] 16(1)

2. When resorting to such exceptional measures, the Member State concerned shall inform the Commission. It shall also inform the Commission as soon as the reasons for applying these exceptional measures have ceased to exist.

3. Nothing in this Article shall be interpreted as allowing Member States to derogate from their general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under this Directive.'

14 According to the first subparagraph of Article 20(1) of Directive 2008/115, Member States were to bring into force the laws, regulations and administrative provisions necessary to comply therewith, with the exception of Article 13(4), by 24 December 2010.

15 Pursuant to Article 22 thereof, that directive entered into force on 13 January 2009.

National legislation

16 Article 13(2) and (4) of Legislative Decree No 286/1998 of 25 July 1998 consolidating the provisions regulating immigration and the rules relating to the status of foreign national (Ordinary Supplement to GURI No 191 of 18 August 1998), as amended by Law No 94 of 15 July 2009 on public security (Ordinary Supplement to GURI No 170 of 24 July 2009) ('Legislative Decree No 286/1998'), provides:

'2. The expulsion shall be ordered by the prefect where the foreign national:

- (a) entered the territory of the State without going through border control and has not been returned ...;
- (b) has remained on the territory of the State ... without applying for a residence permit within the period imposed, except where that delay is due to force majeure, or despite the revocation or cancellation of the residence permit, or without applying for renewal of a residence permit which had expired over 60 days previously. ...

...

4. The expulsion shall always be carried out by the Questore with deportation by the law enforcement authorities, except as provided for in paragraph 5.'

17 Article 14 of Legislative Decree No 286/1998 is worded as follows:

'1. Where it is not possible to effect immediately the expulsion by deportation or return because it is necessary to provide assistance to the foreign national, conduct further checks on his identity or nationality, acquire travel documents, or because of the unavailability of the carrier or other suitable means of transport, the Questore shall order that the foreign national is to be detained, for the length of time which is strictly necessary, in the nearest detention centre among those identified or established by decree of the Minister for the Interior, in agreement with the Ministers for Social Solidarity and the Treasury, for the Budget and for Economic Planning.

...

5a. Where it is not possible to place the foreign national in a detention centre, or where the stay in such a centre has not allowed for the expulsion or return by deportation to be carried out, the Questore shall order the foreign national to leave the territory of the State within five days. The order shall be in writing and state the consequences of the illegal stay on the territory of the State in terms of penalties, including in the event of a repeat offence. The order of the Questore may include the presentation to the person concerned of the documents necessary to go to the diplomatic mission or consular post of his country in Italy, and also to return to the country to which he belongs or, if that is not possible, to the country from which he came.

5b. A foreign national who remains illegally and without valid grounds on the territory of the State, contrary to the order issued by the Questore in accordance with paragraph 5a, shall be liable to a term of imprisonment of one to four years if the expulsion or the return has been ordered following an illegal entry into the national territory ..., or if application has not been made for a residence permit or the person concerned has not declared his presence on the territory of the State within the period imposed where there is no force majeure, or if his residence permit has been revoked or cancelled. A term of imprisonment of six months to one year shall apply if the expulsion was ordered because the residence permit expired more than 60 days previously and application for renewal has not been made, or if the application for a residence permit was rejected In any event, save where the foreign national is placed in detention, a new expulsion order with deportation by the law enforcement authorities shall be issued for the non-execution of the removal order issued by the Questore pursuant to paragraph 5a. Where deportation is not possible, the provisions of paragraphs 1 and 5a of the present Article shall apply

5c. A foreign national who is the recipient of the expulsion order referred to in paragraph 5b and a new removal order as referred to in paragraph 5a and who remains illegally on the territory of the State shall be liable to a term of imprisonment of between one and five years. In any event, the provisions of the third and last sentences of paragraph 5b shall apply.

5d. Where the offences referred to in the first sentence of paragraph 5b and paragraph 5c are committed, the rito direttissimo [expedited procedure] shall be followed and the arrest of the perpetrator shall be mandatory.'

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

18 Mr El Dridi is a third-country national who entered Italy illegally and does not hold a residence permit. A deportation decree was issued against him by the Prefect of Turin on 8 May 2004.

19 An order requiring his removal from the national territory, issued on 21 May 2010 by the Questore di Udine pursuant to that deportation decree, was notified to him on the same day. The reasons for that removal order were that no vehicle or other means of transport was available, that Mr El Dridi had no identification documents and that it was not possible for him to be accommodated at a detention facility as no places were available in the establishments intended for that purpose.

20 A check carried out on 29 September 2010 revealed that Mr El Dridi had not complied with that removal order.

21 Mr El Dridi was sentenced at the conclusion of an expedited procedure by a single judge of the Tribunale di Trento (District Court, Trento) to one year's imprisonment for the offence set out in

Article 14(5b) of Legislative Decree No 286/1998.

22 He appealed against that decision before the Corte d'appello di Trento (Appeal Court, Trento).

23 That court is in doubt as to whether a criminal penalty may be imposed during administrative procedures concerning the return of a foreign national to his country of origin due to non-compliance with the stages of those procedures, since such a penalty seems contrary to the principle of sincere cooperation, to the need for attainment of the objectives of Directive 2008/115 and for ensuring the effectiveness thereof, and also to the principle that the penalty must be proportionate, appropriate and reasonable.

24 It states in that regard that the criminal penalty provided for in Article 14(5b) of Legislative Decree No 286/1998 comes into play subsequent to the finding of an infringement of an intermediate stage of the gradual procedure for implementing the return decision, provided for by Directive 2008/115, namely non-compliance simply with the removal order. A term of imprisonment of one to four years seems, moreover, to be extremely severe.

25 In those circumstances, the Corte d'appello di Trento decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'In the light of the principle of sincere cooperation, the purpose of which is to ensure the attainment of the objectives of the directive, and the principle that the penalty must be proportionate, appropriate and reasonable, do Articles 15 and 16 of Directive 2008/115... preclude:

- the possibility that criminal penalties may be imposed in respect of a breach of an intermediate stage in the administrative return procedure, before that procedure is completed, by having recourse to the most severe administrative measure of constraint which remains available?
- the possibility of a sentence of up to four years' imprisonment being imposed in respect of a simple failure to cooperate in the deportation procedure on the part of the person concerned, in particular where the first removal order issued by the administrative authorities has not been complied with?'

The urgent procedure

26 The Corte d'appello di Trento asked for the reference for a preliminary ruling to be dealt with under the urgent procedure pursuant to Article 104b of the Court's Rules of Procedure.

27 The referring court justified its request by stating that Mr El Dridi is being detained in order to enforce the sentence imposed on him by the Tribunale di Trento.

28 The First Chamber of the Court, after hearing the Advocate General, decided to grant the referring court's request for the reference for a preliminary ruling to be dealt with under the urgent procedure.

Consideration of the question referred

29 By its question, the referring court asks, in essence, whether Directive 2008/115, in particular Articles 15 and 16 thereof, must be interpreted as precluding a Member State's legislation, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period.

30 The national court refers in that regard to the principle of sincere cooperation laid down in Article 4 (3) TEU, and to the objective of ensuring the effectiveness of European Union law.

31 It must be borne in mind in that regard that recital 2 in the preamble to Directive 2008/115 states that it pursues 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 also their dignity.

- 32 As is apparent from both its title and Article 1, Directive 2008/115 establishes 'common standards and procedures' which must be applied by each Member State for returning illegally staying third-country nationals. It follows from that expression, but also from the general scheme of that directive, that the Member States may depart from those standards and procedures only as provided for therein, inter alia in Article 4.
- 33 It follows that, although Article 4(3) allows Member States to adopt or maintain provisions that are more favourable than Directive 2008/115 to illegally staying third-country nationals provided that such provisions are compatible with it, that directive does not however allow those States to apply stricter standards in the area that it governs.
- 34 It should also be observed that Directive 2008/115 sets out specifically the procedure to be applied by each Member State for returning illegally staying third-country nationals and fixes the order in which the various, successive stages of that procedure should take place.
- 35 Thus, Article 6(1) of the directive provides, first of all, principally, for an obligation for Member States to issue a return decision against any third-country national staying illegally on their territory.
- 36 As part of that initial stage of the return procedure, priority is to be given, except where otherwise provided for, to voluntary compliance with the obligation resulting from that return decision, with Article 7(1) of Directive 2008/115 providing that the decision must provide for an appropriate period for voluntary departure of between seven and thirty days.
- 37 It follows from Article 7(3) and (4) of that directive that it is only in particular circumstances, such as where there is a risk of absconding, that Member States may, first, require the addressee of a return decision to report regularly to the authorities, deposit an adequate financial guarantee, submit documents or stay at a certain place or, second, grant a period shorter than seven days for voluntary departure or even refrain from granting such a period.
- 38 In the latter situation, but also where the obligation to return has not been complied with within the period for voluntary departure, Article 8(1) and (4) of Directive 2008/115 provides that, in order to ensure effective return procedures, those provisions require the Member State which has issued a return decision against an illegally staying third-country national to carry out the removal by taking all necessary measures including, where appropriate, coercive measures, in a proportionate manner and with due respect for, inter alia, fundamental rights.
- 39 In that regard, it follows from recital 16 in the preamble to that directive and from the wording of Article 15(1) that the Member States must carry out the removal using the least coercive measures possible. It is only where, in the light of an assessment of each specific situation, the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned that the Member States may deprive that person of his liberty and detain him.
- 40 Under the second subparagraph of Article 15(1) of Directive 2008/115, that deprivation of liberty must be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence. Under Article 15(3) and (4), such deprivation of liberty is subject to review at reasonable intervals of time and is to be terminated when it appears that a reasonable prospect of removal no longer exists. Article 15(5) and (6) fixes the maximum duration of detention at 18 months, a limit which is imposed on all Member States. Article 16(1) of that directive further requires that the persons concerned are to be placed in a specialised facility and, in any event, kept separated from ordinary prisoners.
- 41 It follows from the foregoing that the order in which the stages of the return procedure established by Directive 2008/115 are to take place corresponds to a gradation of the measures to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility; the principle of proportionality must be observed throughout those stages.
- 42 It is clear that even the use of the latter measure, which is the most serious constraining measure allowed under the directive under a forced removal procedure, is strictly regulated, pursuant to Articles 15 and 16 of that directive, inter alia in order to ensure observance of the fundamental

rights of the third-country nationals concerned.

- 43 In particular, the maximum period laid down in Article 15(5) and (6) of Directive 2008/115 serves the purpose of limiting the deprivation of third-country nationals' liberty in a situation of forced removal (Case C-357/09 PPU *Kadzoev* [2009] ECR I-11189, paragraph 56). Directive 2008/115 is thus intended to take account both of the case-law of the European Court of Human Rights, according to which the principle of proportionality requires that the detention of a person against whom a deportation or extradition procedure is under way should not continue for an unreasonable length of time, that is, its length should not exceed that required for the purpose pursued (see, inter alia, ECHR, *Saadi v United Kingdom*, 29 January 2008, not yet published in the *Reports of Judgments and Decisions*, § 72 and 74), and of the eighth of the 'Twenty guidelines on forced return' adopted on 4 May 2005 by the Committee of Ministers of the Council of Europe, referred to in recital 3 in the preamble to the directive. According to that guideline, any detention pending removal is to be for as short a period as possible.
- 44 It is in the light of those considerations that it must be assessed whether the common rules introduced by Directive 2008/115 preclude national legislation such as that at issue in the main proceedings.
- 45 It should be observed in that regard first that, as is apparent from the information provided both by the referring court and by the Italian Government in its written observations, Directive 2008/115 has not been transposed into Italian law.
- 46 According to settled case-law, where a Member State fails to transpose a directive by the end of the period prescribed or fails to transpose the directive correctly, the provisions of that directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise may be relied on by individuals against the State (see, to that effect, inter alia, Case 152/84 *Marshall* [1986] ECR I-723, paragraph 46, and Case C-203/10 *Auto Nikolovi* [2011] ECR I-0000, paragraph 61).
- 47 That is true of Articles 15 and 16 of Directive 2008/115, which, as is clear from paragraph 40 of this judgment, are unconditional and sufficiently precise, so that no other specific elements are required for them to be implemented by the Member States.
- 48 Moreover, a person in Mr El Dridi's situation comes within the personal scope of Directive 2008/115, since, under Article 2(1) thereof, that directive applies to third-country nationals staying illegally on the territory of a Member State.
- 49 As observed by the Advocate General in points 22 to 28 of his View, that finding is not affected by Article 2(2)(b) of that directive, which allows Member States to decide not to apply the directive to third-country nationals who 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. The order for reference indicates that the obligation to return results, in the main proceedings, from a decree of the Prefect of Turin of 8 May 2004. Moreover, the criminal penalties referred to in that provision do not relate to non-compliance with the period granted for voluntary departure.
- 50 It must be observed, second, that even though the decree of the Prefect of Turin of 8 May 2004, in so far as it establishes an obligation for Mr El Dridi to leave the national territory, is a 'return decision' as defined in Article 3(4) of Directive 2008/115 and referred to, inter alia, in Articles 6(1) and 7(1) thereof, the removal procedure provided for by the Italian legislation at issue in the main proceedings is significantly different from that established by that directive.
- 51 Thus, whilst that directive requires that a period of between seven and 30 days be granted for voluntary departure, Legislative Decree No 286/1998 does not provide for recourse to that measure.
- 52 Next, as regards the coercive measures which the Member States may implement under Article 8 (4) of Directive 2008/115, such as, inter alia, deportation as provided for by Article 13(4) of Legislative Decree No 286/1998, it is clear that in a situation where such measures have not led to the expected result being attained, namely, the removal of the third-country national against whom they were issued, the Member States remain free to adopt measures, including criminal law measures, aimed inter alia at dissuading those nationals from remaining illegally on those States' territory.

- 53 It should be noted, however, that, although in principle criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible, this branch of the law may nevertheless be affected by European Union law (see, to that effect, Case 203/80 *Casati* [1981] ECR 2595, paragraph 27; Case 186/87 *Cowan* [1989] ECR 195, paragraph 19; and Case C-226/97 *Lemmens* [1998] ECR I-3711, paragraph 19).
- 54 It follows that, notwithstanding the fact that neither point (3)(b) of the first paragraph of Article 63 EC, a provision which was reproduced in Article 79(2)(c) TFEU, nor Directive 2008/115, adopted inter alia on the basis of that provision of the EC Treaty, precludes the Member States from having competence in criminal matters in the area of illegal immigration and illegal stays, they must adjust their legislation in that area in order to ensure compliance with European Union law.
- 55 In particular, those States may not apply rules, even criminal law rules, which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness.
- 56 According to the wording of the second and third subparagraphs respectively of Article 4(3) TEU, the Member States inter alia 'shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union' and 'shall ... refrain from any measure which could jeopardise the attainment of the Union's objectives', including those pursued by directives.
- 57 Regarding, more specifically, Directive 2008/115, it must be remembered that, according to recital 13 in the preamble thereto, it makes the use of coercive measures expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued.
- 58 Consequently, the Member States may not, in order to remedy the failure of coercive measures adopted in order to carry out forced removal pursuant to Article 8(4) of that directive, provide for a custodial sentence, such as that provided for by Article 14(5b) of Legislative Decree No 286/1998, on the sole ground that a third-country national continues to stay illegally on the territory of a Member State after an order to leave the national territory was notified to him and the period granted in that order has expired; rather, they must pursue their efforts to enforce the return decision, which continues to produce its effects.
- 59 Such a penalty, due inter alia to its conditions and methods of application, risks jeopardising the attainment of the objective pursued by that directive, namely, the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals. In particular, as observed by the Advocate General in point 42 of his View, national legislation such as that at issue in the main proceedings is liable to frustrate the application of the measures referred to in Article 8 (1) of Directive 2008/115 and delay the enforcement of the return decision.
- 60 That does not preclude the possibility for the Member States to adopt, with respect for the principles and objective of Directive 2008/115, provisions regulating the situation in which coercive measures have not resulted in the removal of a third-country national staying illegally on their territory.
- 61 In the light of the foregoing, it will be for the national court, which is called upon, within the exercise of its jurisdiction, to apply and give full effect to provisions of European Union law, to refuse to apply any provision of Legislative Decree No 286/1998 which is contrary to the result of Directive 2008/115, including Article 14(5b) of that legislative decree (see, to that effect, Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 24; Case C-462/99 *Connect Austria* [2003] ECR I-5197, paragraphs 38 and 40; and Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-0000, paragraph 43). In so doing, the referring court will have to take due account of the principle of the retroactive application of the more lenient penalty, which forms part of the constitutional traditions common to the Member States (Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraphs 67 to 69, and Case C-420/06 *Jager* [2008] ECR I-1315, paragraph 59).
- 62 Consequently, the answer to the question referred is that Directive 2008/115, in particular Articles 15 and 16 thereof, must be interpreted as precluding a Member State's legislation, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on

the territory of that State, contrary to an order to leave that territory within a given period.

Costs

- 63 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, in particular Articles 15 and 16 thereof, must be interpreted as precluding a Member State's legislation, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period.

[Signatures]

* Language of the case: Italian.