OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 28 April 2015 (1)

Case C-290/14

Skerdjan Celaj

(Request for a preliminary ruling from the Tribunale di Firenze (Italy))

(Area of freedom, security and justice — Directive 2008/115/EC — Return of an illegally staying third-country national — Articles 15 and 16 — National legislation providing for a prison sentence on an illegally staying third-country national in the event of re-entry — Compatibility)

Introduction

1. ‘Is it a crime to be a foreigner? We do not think so.’

2. These are the closing words of a ‘Joint Partly Dissenting Opinion’ of six judges of the European Court of Human Rights (EHR Court) in the seminal case of *Saadi* v. *The United Kingdom*. (2)

3. In a similar vein, the European Union’s Fundamental Rights Agency believes that ‘[t]he simple fact of being an irregular migrant should never be considered as a sufficient ground for detention’. (3)

4. The prosecution and punishment of third-country nationals illegally staying on the territory of a Member State is the subject of heated debate. Even bodies responsible for assessments in the light of legal rules often cannot resist the temptation to drift into legal *policy* in their arguments, as the two above-cited statements attempt to illustrate.

5. The present case concerns a third-country national staying illegally on the territory of a Member State further to a re-entry into the territory of that Member State, in defiance of an entry ban, issued together with a return decision under Directive 2008/115/EC. (4) The Court is faced with the question whether Directive 2008/115 precludes the imprisonment of this person.

6. I propose (5) that the Court should refine and clarify the line of case-law which began with *El Dridi* (6) and continued with *Achughbabian* (7) and *Sagor* (8) by having recourse to the prime objective of the directive, which is the return of illegally staying third-country nationals. The Court should rule that such a criminal law sanction is precluded by Directive 2008/115, not for policy considerations such as the ones cited above, but in the interests of the effectiveness of Directive

2008/115.

Legal framework

European Union law

7. The purpose of Directive 2008/115 is defined as follows in its Article 1, entitled 'Subject matter':

'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.'

8. Article 2 of Directive 2008/115, headed 'Scope', provides:

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

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

(a) are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State;

(b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.

…'

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

'For the purposes of this Directive …:

…

2. "illegal stay" means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of … entry, stay or residence in that Member State;

3. "return" means the process of a third-country national going back — whether in voluntary compliance with an obligation to return, or enforced — to:

— his or her country of origin, or

— a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or

— another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted;

4. "return decision" means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return;

5. "removal" means the enforcement of the obligation to return, namely the physical transportation out of the Member State;

6. "entry ban" means an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision;

…'

10. Article 6(1) of Directive 2008/115, entitled 'Return decision', provides:

'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.'

11. Article 8(1) of Directive 2008/115 stipulates that '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.'

12. Article 11 of the said directive is headed 'Entry ban' and reads as follows:

'1. Return decisions shall be accompanied by an entry ban:

(a) if no period for voluntary departure has been granted, or

(b) if the obligation to return has not been complied with.

In other cases return decisions may be accompanied by an entry ban.

2. The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security.

3. Member States shall consider withdrawing or suspending an entry ban where a third-country national who is the subject of an entry ban issued in accordance with paragraph 1, second subparagraph, can demonstrate that he or she has left the territory of a Member State in full compliance with a return decision.

Victims of trafficking in human beings who have been granted a residence permit pursuant to Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (9) shall not be subject of an entry ban without prejudice to paragraph 1, first subparagraph, point (b), and provided that the third-country national concerned does not represent a threat to public policy, public security or national security.

Member States may refrain from issuing, withdraw or suspend an entry ban in individual cases for humanitarian reasons.

Member States may withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons.

4. Where a Member State is considering issuing a residence permit or other authorisation offering a right to stay to a third-country national who is the subject of an entry ban issued by another Member

State, it shall first consult the Member State having issued the entry ban and shall take account of its interests in accordance with Article 25 of the Convention implementing the Schengen Agreement. (10)

5. Paragraphs 1 to 4 shall apply without prejudice to the right to international protection, as defined in Article 2(a) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, (11) in the Member States.'

13. Article 15(1) of Directive 2008/115 provides as follows:

'Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

(a) there is a risk of absconding or

(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

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

Italian law

14. Article 13(13) of Legislative Decree No 286 of 25 July 1998 provides that 'a foreign national against whom a removal order has been made may not re-enter the territory of the State without special authorisation issued by the Ministry for the Interior. In the event of infringement, the foreign national shall be liable to a term of imprisonment of between one and four years and shall be expelled by immediate deportation'.

Facts, procedure and question referred

15. Mr Celaj, an Albanian national, entered Italian territory on an unknown date. On 26 August 2011, he was arrested by the Italian authorities for attempted robbery, following which he was sentenced to a term of imprisonment of one year (that sentence being suspended) and a fine of EUR 400. That judgment became final on 15 March 2012.

16. On 17 April 2012, a deportation order was made by the Prefect of Florence and a removal order was made by the Quaestor of Florence, accompanied by a ban on re-entry to Italy of three years. In his order, the Prefect of Florence stated that the option of voluntary repatriation had to be excluded, since the circumstances of the case required Mr Celaj's immediate deportation. In fact, the latter had not requested that he be granted a period within which to depart voluntarily and there was a risk of his absconding, in that there were no documents to show that he had anywhere to stay.

17. Given that no air carrier was available and that it was impossible to place Mr Celaj in a detention facility, he was not forcibly deported and the Quaestor of Florence ordered him to leave the national territory, failing which he would incur the penalties provided for by law.

18. Mr Celaj subsequently remained in Italy. He was identified on three occasions in three different places between 27 July 2012 and 30 August 2012 and charged on these occasions in connection with his status as an illegal immigrant and with the cultivation of narcotic drugs.

19. On 4 September 2012, Mr Celaj went, on his own initiative, to the border police station at Brindisi and voluntarily left the national territory.

20. Subsequently, Mr Celaj re-entered Italian territory. On 14 February 2014 he was arrested for breach of Article 13(13) of Legislative Decree No 286 of 1998 by carabinieri of the San Piero a Sieve station who carried out checks at the local railway station.

21. The public prosecutor brought criminal law proceedings against him before the Tribunale di Firenze (District Court, Florence) and sought a sentence of imprisonment of eight months on the basis of Article 13(13) of Legislative Decree No 286 of 1998.

22. It is in the context of these proceedings that, by order of 22 May 2014, received at the Court on 12 June 2014, the Tribunale di Firenze referred the following question for a preliminary ruling:

‘Do the provisions of Directive 2008/115 preclude a Member State’s legislation which provides for the imposition of a sentence of imprisonment of up to four years on an illegally staying third-country national who, having been returned to his country of origin neither as a criminal law sanction nor as a consequence of a criminal law sanction, has re-entered the territory of the State in breach of a lawful re-entry ban but has not been the subject of the coercive measures provided for by Article 8 of Directive 2008/115 with a view to his swift and effective removal?’

23. The governments of the Czech Republic, Germany, Greece, Italy, Norway and Switzerland submitted written observations, as did the European Commission.

Assessment

24. Once again, the Court is called upon to rule on the compatibility of a national criminal law sanction with the provisions of Directive 2008/115. At stake this time is a national criminal law sanction in the form of imprisonment to be imposed on a third-country national on the sole ground that, having returned from a Member State to his country of origin in the context of a previous return procedure he has re-entered the territory of the Member State concerned.

25. The Court has repeatedly held that whilst, in principle, criminal legislation and the rules of criminal procedure fall within the competence of the Member States and whilst neither Directive 2008/115 nor its legal basis (12) preclude Member States from having competence in criminal matters in the area of illegal immigration and illegal stays, Member States cannot apply criminal legislation capable of imperilling the realisation of the aims pursued by Directive 2008/115, thus depriving it of its effectiveness. (13)

26. Before turning to the national law at issue in the main proceedings, I would like to briefly recall, for the purposes of the present case, the system established by Directive 2008/115 and the Court’s case-law on criminal law sanctions in the context of this directive.

The return, removal and detention system established by Directive 2008/115

27. The return procedure established by Directive 2008/115 has already been amply described by the Court in various cases before it. (14) I can therefore be brief at this stage and limit myself to the crucial elements for the purposes of the case at issue.

28. Directive 2008/115 has the objective, according to recital 2 thereof, of establishing 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. (15) To that end, it establishes a return procedure which is centred on and begins with a return decision, which,

pursuant to Article 6(1) of Directive 2008/115, Member States are under a duty (16) to issue to any third-country national staying illegally on their territory. (17) This provision constitutes the key element of the directive. (18)

29. The ensuing procedure is underpinned by the principle of proportionality: (19) to that end, as a rule, a removal, i.e. the enforcement of the obligations to return by physical transportation out of the Member State, (20) is possible only if voluntary departure is not possible or is unsuccessful (21) and detention can only be resorted to as a matter of *ultima ratio*, only as long as strictly necessary and only pending removal. (22) The underlying rationale of the provisions on detention is that only the procedures for return and removal justify deprivation of liberty and that, if those procedures are not conducted with the requisite diligence, detention ceases to be justified under those provisions. (23) As I have stressed already in my View in *Mahdi*, (24) detention for removal purposes is neither punitive nor penal and does not constitute a prison sentence. (25) Moreover, Article 15(1) of Directive 2008/115 requires narrow interpretation because enforced detention constitutes, as a deprivation of liberty, an exception to the fundamental right of individual freedom. (26)

Admissible detention or imprisonment beyond situations provided for in Directive 2008/115

30. Thus, the directive itself contains no provisions on the possibility of Member States resorting to detention or imprisonment as a criminal law sanction in connection with an illegal stay. For me, it is clear why this is so: there is no room for such a sanction if the objective of the directive is to provide for the swift return of illegally-staying third-country nationals. Any detention or imprisonment not prescribed as part of a return procedure will ultimately delay such a procedure.

31. As is well known and has been mentioned already in the introduction of this Opinion, there is also case-law of this Court on the matter. Yet, to date, there has not been a case in which, on the basis of the facts of the case in the main proceedings, the Court has held that detention or imprisonment as a criminal law sanction was compatible with Directive 2008/115.

Case-law to date: from *El Dridi* via *Achughbabian* to *Sagor*

32. In *El Dridi* (27) the Court was asked to assess whether national legislation such as the Italian legislation in the main proceedings of that case (28) which provided for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remained, without valid grounds, on Italian territory, contrary to an order to leave that territory within a given period, was precluded by Directive 2008/115. The Court held that, indeed, the directive, in particular Articles 15 and 16 of Directive 2008/115, precluded such legislation. (29)

33. In *Achughbabian* (30) the Court was again called upon to determine whether national legislation, such as the French legislation in the main proceedings of that case (31) which provided for the imposition of a sentence of imprisonment on a third-country national on the sole ground of his illegal entry or residence in French territory was precluded by Directive 2008/115. Again, the Court held that the directive precluded such legislation 'in so far as that legislation permits the imprisonment of a third-country national who, though staying illegally in the territory of the said Member State and not being willing to leave that territory voluntarily, has not been subject to the coercive measures referred to in Article 8 of that directive and has not, being placed in detention with a view to the preparation and carrying out of his removal, yet reached the end of the maximum term of that detention'. (32) In the case in the main proceedings, Mr Achughbabian's situation fell into this category.

34. The Court's reasoning in those two cases was that imprisonment risked jeopardising the

attainment of the objective pursued by the directive and was liable to frustrate the application of the measures referred to in Article 8(1) of Directive 2008/115 and delay enforcement of the return decision. (33)

35. Furthermore, the Court employed a somewhat broader form of wording in *Achughbabian* than in *El Dridi*: it specified that this finding also applied to the *adoption* of a return decision. The Court held that 'the obligation imposed on the Member States by Article 8 of that directive, in the cases set out in Article 8(1), to carry out the removal, must be fulfilled as soon as possible. That would clearly not be the case if, after establishing that a third-country national is staying illegally, the Member State were to preface the implementation of the return decision, *or even the adoption of that decision*, (34) with a criminal prosecution followed, in appropriate cases, by a term of imprisonment.' (35)

36. This evolution from *El Dridi* to *Achughbabian* is noteworthy and I shall come back to it below. (36)

37. Moreover, it is interesting to note and not clear to me why the Court in its reasoning and the first indent of the operative part no longer included a reference to Articles 15 and 16 of Directive 2008/115, contrary to what it had done in *El Dridi*. (37) I shall also come back to this point below. (38)

38. In *Sagor*, the Court affirmed that a home detention order, imposed and enforced during the course of a return procedure, was 'liable to delay – and thus to impede – the measures, such as deportation and forced return by air, which can be used to achieve removal'. (39)

39. But *Achughbabian* (40) did not end with the statement cited above. Though there was no link to the facts in the main proceedings, the Court went on to state that Directive 2008/115 did not preclude legislation of a Member State laying down criminal penalties for illegal stays in so far as it 'permits the imprisonment of a third-country national to whom the return procedure established by [Directive 2008/115] has been applied and who is staying illegally in that territory with no justified ground for non-return'. (41)

40. It should once more be stressed that in both *El Dridi* (42) and *Achughbabian* (43) the facts of the case were such that the respective return procedures had *not* been fully applied. (44)

41. Subsequently, in *Sagor,* with regard to a criminal prosecution leading to a fine, the Court held that such a fine was not liable to impede the return procedure established by Directive 2008/115. (45) It went on to state that 'the imposition of a fine does not in any way prevent a return decision from being made and implemented in full compliance with the conditions set out in Articles 6 to 8 of Directive 2008/115, nor does it undermine the common standards relating to deprivation of liberty set out in Articles 15 and 16 of that directive'. (46)

42. The use of the term 'made' (47) is telling, for it demonstrates that the obligation to make a return order is permanent. It also demonstrates that the distinction whether a return procedure is or is not ongoing is in reality artificial. Even if a return procedure is not ongoing and the requirements of Article 6 are fulfilled, it should be commenced.

Imprisonment as a result of a re-entry

43. Let us turn to the case at issue.

44. It has been established by the referring court that Mr Celaj is staying illegally on Italian territory. By virtue of Article 2(1) of Directive 2008/115, the directive is therefore applicable. None

of the exceptions referred to in Article 2(2) and (3) apply. In particular, there is no indication that Mr Celaj is subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code. (48)

45. This raises the question whether, in the present case, the Italian authorities can impose a sentence of imprisonment on Mr Celaj.

46. The Italian, Czech, German, Greek, Norwegian and Swiss Governments, along with the Commission, take the view that this is possible. They consider that the facts of the present case can be distinguished from those in *El Dridi* and *Achughbabian*. Although some details of their arguments differ, they are of the opinion that a distinction must be made between a third-country national entering the territory of a Member State for the first time and his entering again subsequently, once a return procedure has been carried out. In the first situation, a Member State has no choice but to apply Directive 2008/115, while in the second situation a Member State could seek to have imposed a prison sentence so as to dissuade the third-country national from again entering its territory illegally.

47. The referring court, on the other hand, considers that the value judgement as to the conceptual and structural differences between the various situations in which a foreign national might find himself, according to whether his presence in national territory is the result of unlawful entry or re-entry following an earlier removal decision is irrelevant.

48. I agree with the approach taken by the referring court and I submit to the Court that such an approach is fully in line with its case-law to date.

49. The aim of Directive 2008/115, expressly and unequivocally stated in Article 1 thereof, is to return illegally staying third-country nationals. Member States are under a constant duty to begin a return procedure by issuing a return decision and then following the course of such a procedure, subject to the principle of proportionality.

50. The directive makes no distinction as to how many times a third-country national attempts to enter the territory of a Member State and this for a good reason: questions related to illegal entry are first and foremost a matter for the EU's legislation on entry, such as the Schengen Borders Code. Once, however, a third-country national is on the territory of a Member State and it has been established that he is staying there illegally, he must be returned. (49) The obligations incumbent on Member States as a result of Article 6 et seq. of Directive 2008/115 are persistent, continuous and apply without interruption in the sense that they arise automatically as soon as the conditions of these articles are fulfilled. If, once it is established that a third-country national is staying illegally on the territory of a Member State, that Member State were not to adopt a return decision but were to cause the person instead to be imprisoned, it would effectively suspend its obligations under the directive.

51. The Court appears fully aware of this, as is shown by its reasoning in *Achughbabian*, (50) where it stated that the adoption of a return decision should also not be prefaced by a criminal law sanction.

52. Imprisoning a third-country national for reasons other than those provided for in the directive amounts in effect to a unilateral temporary suspension of the directive by the Member State concerned. I submit to the Court that there is no room for such a suspension of the directive.

Entry ban

53. How is the existence of an entry ban to be evaluated in this context?

54. Case-law on the issue is scarce and offers little guidance to the present case. (51)

55. An entry ban is defined by the directive as an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period. (52) As is clear from Article 11 of Directive 2008/115, an entry ban accompanies a return decision. It is therefore merely ancillary to a return decision. (53)

56. Directive 2008/115 is, as stated above, about the return of illegally stating third-country nationals. Questions of entry to the territory of the European Union are first and foremost a matter for legislation of the Schengen *acquis* (54) and in particular the Schengen Borders Code. (55) Therefore, although the Union's entry and return policies are inextricably linked, the fact that they are governed by distinct legal instruments should not be lost sight of. This is also made clear by Article 2(2)(a) of the directive, according to which Member States may decide not to apply the directive to third-country nationals who are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code. It is furthermore made clear by the fact that it is but a recital (56) to Directive 2008/115, and not a prescriptive provision of that directive, which encourages Member States to have rapid access to information on entry bans by other Member States and which states that this information sharing should take place in accordance with the SIS II Regulation. (57)

57. The overriding objective of Directive 2008/115 is not to prevent but to end an illegal stay. (58) Given the ancillary nature of an entry ban, measures penalising its non-compliance cannot jeopardise this overriding objective. In other words, detention or imprisonment for the purposes of enforcing an entry ban must not jeopardise a future return procedure.

58. This in no way implies that the existence of an entry ban serves no purpose from a Member State perspective: by preventing a person from legally re-entering the territory of the Member State in future it may dissuade a third-country national from re-entering that territory illegally. Thus, the directive itself provides Member States with means to dissuade third-country nationals from re-entering their territory illegally.

59. Once, however, a third-country national has (illegally) (re-) entered the territory of a Member State, the obligations incumbent on Member States pursuant to the directive apply.

Final considerations

60. Whichever way you look at it: imprisoning a person ultimately delays a future return. The simple assertion that Directive 2008/115 does not preclude the law of a Member State from classifying an illegal stay as an offence and laying down criminal law sanctions to deter and prevent such an infringement of the national rules on residence (59) must be seen in this context. Therefore, detention or imprisonment should be confined to detention for criminal offences not connected with the illegality of a stay, (60) to detention in the administrative situations governed by Chapter IV of the directive, and to detention with a view to determining whether or not a stay is lawful. (61) The provisions in Chapter IV are exhaustive when it comes to detention or imprisonment connected with a stay which is established as being illegal. This is why the effect of these provisions, in particular Articles 15 and 16 of the directive, is that other situations of detention or imprisonment are precluded by the directive.

61. I am fully aware that my understanding of the provisions of Directive 2008/115 leads to a narrow interpretation of the second indent of the operative part in *Achughbabian*. (62) Yet, this is the only possible interpretation that can be reconciled with the provisions of that directive. (63) I therefore read the second indent of the operative part of *Achughbabian* as only covering situations

in which a return procedure has been pursued without success and the person in question *continues* to stay illegally on the territory of the Member State concerned with no justified ground for non-return. (64)

62. Attention should finally be drawn to the Court's settled case-law according to which a national court must, within the exercise of its jurisdiction, apply and give full effect to the provisions of EU law, and refuse to apply provisions of national law in so far as they are contrary to the provisions of Directive 2008/115. (65) The referring court must therefore refuse to apply Article 13(13) of Legislative Decree No 286/1998 in so far as it provides for a sentence of imprisonment to be imposed on Mr Celaj on the sole ground that, having returned to his country of origin, he has re-entered Italian territory.

Conclusion

63. In the light of all the foregoing considerations, I propose that the Court answer the question referred by the Tribunale di Firenze (Italy) as follows:

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, having returned to his country of origin in the context of a previous return procedure, he has re-entered the territory of the Member State.

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1 – Original language: English.

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2 – See Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä in *Saadi v.The United Kingdom* [GC], no. 13229/03, § 65, 29 January 2008.

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3 – See *Detention of third-country nationals in return procedures*, Report of the European Union Agency for Fundamental Rights, 2011, p. 19, available at: http://fra.europa.eu/sites/default/files/fra_uploads/1306-FRA-report-detention-december-2010_EN.pdf . This statement is made in the context of administrative detention only which is why I see it as appling *a fortiori* with respect to criminal law sanctions.

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4 – Directive 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).

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5 – In doing so I shall do my best to focus on legal arguments related to Directive 2008/115 instead of policy considerations such as those cited in points 1 and 3 of this Opinion.

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6 – Judgment in *El Dridi* (C-61/11 PPU, EU:C:2011:268).

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7 – Judgment in *Achughbabian* (C-329/11, EU:C:2011:807).

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8 – Judgment in *Sagor* (C-430/11, EU:C:2012:777).

9 – OJ 2004 L 261, p. 19.

10 – OJ 2000 L 239, p. 19.

11 – OJ 2004 L 304, p. 12.

12 – Article 63, point (3)(b) EC, reproduced in Article 79(2)(c) TFEU. On the legislative procedure, see my View in *Mahdi* (C-146/14 PPU, EU:C:2014:1936, point 45 and footnote 12).

13 – See in particular the judgment in *Achughbabian* (C-329/11, EU:C:2011:807, paragraph 33).

14 – See, for instance, judgment in *El Dridi* (C-61/11 PPU, EU:C:2011:268, paragraph 34 et seq.).

15 – For more details on the sources of inspiration of the directive, such as the case-law of the European Court of Human Rights and 'The Twenty Guidelines on Forced Return', adopted by the Committee of Ministers of the Council of Europe on 4 May 2005, see my View in *Mahdi* (C-146/14 PPU, EU:C:2014:1936, point 45).

16 – See judgment in *Achughbabian* (C-329/11, EU:C:2011:807, paragraph 31). The English text of the directive uses the prescriptive term 'shall'. On the mandatory character of Article 6 of Directive 2008/115, see also Slama, S., 'La transposition de la directive "retour": vecteur de renforcement ou de régression des droits des irréguliers?', in: L. Dubin, *La légalité de la lutte contre l'immigration irrégulière par l'Union européenne*, Bruylant 2012, pp. 289-345, at p. 330.

17 – This duty is without prejudice to a range of exceptions, enumerated in paragraphs 2 to 5 of the same article. Moreover, Article 6(6) allows Member States to adopt a decision on the ending of a legal stay together with a return decision.

18 – See also Hörich, D., 'Die Rückführungsrichtlinie: Entstehungsgeschichte, Regelungsgehalt und Hauptprobleme', *Zeitschrift für Ausländerrecht und Ausländerpolitik*, 2011, pp. 281-286, at p. 283.

19 – See recitals 13 and 16 of Directive 2008/115. See also judgment in *El Dridi* (C-61/11 PPU, EU:C:2011:268, paragraph 41).

20 – Articles 3, point 5, and 8 of Directive 2008/115.

21 – See Article 7 of Directive 2008/115.

22 – See Chapter IV: Detention for the purpose of removal, Articles 15-18 of Directive 2008/115.

23 – For more details, see my View in *Mahdi* (C-146/14 PPU, EU:C:2014:1936, points 46-55).

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24 – C-146/14 PPU, EU:C:2014:1936.

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25 – Ibid., point 47, as well as Opinion of Advocate General Bot in *Bero and Bouzalmate* (C-473/13 and C-514/13, EU:C:2014:295, point 91), View of Advocate General Mazák in *El Dridi* (C-61/11 PPU, EU:C:2011:205, point 35), and View of Advocate General Wathelet in *G. and R.* (C-383/13 PPU, EU:C:2013:553, point 54).

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26 – See my View in *Mahdi* (C-146/14 PPU, EU:C:2014:1936, point 47), as well as View of Advocate General Mazák in *Kadzoev* (C-359/07 PPU, EU:C:2009:691, point 70). With regard to Article 5(1)(f) ECHR, the EHR Court finds to the same effect (see, for example, *Quinn v. France,* § 42, 22 March 1995, Series A no. 311, and *Kaya v. Romania,* no. 33970/05, § 16, 12 October 2006).

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27 – Judgment in *El Dridi* (C-61/11 PPU, EU:C:2011:268).

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28 – At issue were different provisions of the same decree as in the present case.

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29 – Ibid., paragraph 62 and operative part.

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30 – Judgment in *Achughbabian* (C-329/11, EU:C:2011:807).

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31 – An article of the French code de l'entrée et du séjour des étrangers et du droit d'asile (Ceseda).

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32 – Ibid., paragraph 50 and first indent of the operative part.

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33 – See judgments in *El Dridi* (C-61/11 PPU, EU:C:2011:268, paragraph 59) and *Achughbabian* (C-329/11, EU:C:2011:807, paragraph 45). A number of academic writers have spoken of a certain paradox in such reasoning. See, for instance, Spitaleri, F., 'Il rimpatrio dell'immigrato in condizione irregolare: il difficile equilibro tra efficienza delle procedure e garanzie in favore dello straniero nella disciplina dell'Unione europea', in: S. Amadeo (ed.), *Le garanzie fondamentali dell'immigrato in Europa*, Torino, 2015 (forthcoming), p. 17: "ricostruzioni abbastanza paradossali"; Leboeuf, L., 'La directive retour et la privation de liberté des étrangers. Le rappel à l'ordre de la Cour de justice dans l'arrêt *El Dridi*', in: *Revue du droit des étrangers*, 2011, pp. 181-191, at p. 191: 'Paradoxalement, l'objectif de gestion efficace des flux migratoires permet à la Cour de justice de s'opposer à la pénalisation du séjour irrégulier'. Others even see some cynicism, see Kauff-Gazin, F., 'La directive «retour» au secours des étrangers?: de quelques ambiguïtés de l'affaire El Dridi du 28 avril 2011', in: *Europe* n° 6, Juin 2011, pp. 1-13, at p. 12: 'Cet argumentaire suscite la critique à la fois par son cynisme et par son manque d'audace'. In my view, one can indeed perceive such a paradox if one puts the focus on the presumed interests of the individuals concerned rather than on the legal obligations on Member States stemming from the directive. Yet, the only interests of the individuals concerned protected by the directive are their fundamental rights safeguards throughout the procedure, subject to the proportionality principle.

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34 – My emphasis.

35 – See judgment in *Achughbabian* (C-329/11, EU:C:2011:807, paragraph 45).

36 – In point 51 of this Opinion.

37 – Judgment in *El Dridi* (C-61/11 PPU, EU:C:2011:268). The Court did, however, subsequently in the judgment in *Sagor* (C-430/11, EU:C:2012:777, paragraph 36), repeated in its order in *Mbaye* (C-522/11, EU:C:2013:190, paragraph 28), refer to Articles 15 and 16 of Directive 2008/115 as part of its reasoning.

38 – In point 60 of this Opinion.

39 – Judgment in *Sagor* (C-430/11, EU:C:2012:777, paragraph 45).

40 – Judgment in *Achughbabian* (C-329/11, EU:C:2011:807).

41 – Ibid., paragraphs 48, 50 and second indent of the operative part. For me, although this passage is also part of the operative part of the case it clearly presents an *obiter dictum*, as it bears no link to the facts of the case at issue and concerns a hypothetical situation.

42 – Judgment in *El Dridi* (C-61/11 PPU, EU:C:2011:268).

43 – Judgment in *Achughbabian* (C-329/11, EU:C:2011:807).

44 – This point is also being made by Piccichè, F., 'Il reato di ingresso e soggiorno illegale nel territorio dello stato alla luce della Direttiva 2008/115/CE', in: *Rivista penale* 7-8-2012, pp. 712-715, at p. 715.

45 – Judgment in *Sagor* (C-430/11, EU:C:2012:777, paragraph 36).

46 – Judgment in *Sagor* (C-430/11, EU:C:2012:777, paragraph 36).

47 – It should be recalled that the directive, in its Article 6(1), does not use the term 'make', but refers instead to 'issue'. Other language versions of paragraph 36 of *Sagor* employ the same term as Article 6(1). See, for instance, the Italian version, i.e. the version of the language of that procedure ('che una decisione di rimpatrio sia *adottata*') as well as the French ('qu'une décision de retour soit *prise'*), Polish ('*wydaniu* […] decyzji nakazującej powrót') and German versions ('dem *Erlass* […] einer Rückkehrentscheidung'). All italics in this footnote are my emphasis. The fact that paragraph 36 of the English version of *Sagor* uses the term 'made' instead of 'issued' nevertheless has no bearing on my argument in the present case.

48 – Regulation (EC) No 562/2006 of the European Parliament and 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).

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49 – Without prejudice, of course, to the exceptions referred to in Article 6(2)-(5) of Directive 2008/115.

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50 – See judgment in *Achughbabian* (C-329/11, EU:C:2011:807, paragraph 45), cited in point 34 of this Opinion.

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51 – The questions the Court has thus far had to answer centred around the limitation on the length of an entry ban and the implementation date of the directive: see judgment in *Filev and Osmani* (C-297/12, EU:C:2013:569).

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52 – See Article 3, point 6, of Directive 2008/115. It should be pointed out that this only covers the Member States participating in the Schengen system, see also recitals 25 and 26 to Directive 2008/115.

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53 – See also Martucci, F., 'La directive "retour" : la politique européenne d'immigration face à ses paradoxes', in: *Revue trimestrielle du droit européen*, 2009, pp. 47-67, at p. 50.

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54 – For a concise overview, see Opinion of Advocate General Sharpston in *Zh. and O* (C-554/13, EU:C:2015:94, point 3 et seq.). See also Peers, S., *EU Justice and Home Affairs Law,* 3rd ed., Oxford, OUP 2011, p. 136 et seq.

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55 – It is this Code that specifies the categories of persons to be refused entry and entrusts border guards with a duty to prevent irregular entry of third-country nationals: see Article 13 of the Code. It should furthermore be pointed out that by this Code refers a number of times to a so-called 'SIS-alert' (SIS = Schengen Information System). The legal relationship between a refusal of entry further to such an alert and an entry ban under Directive 2008/115 is not very clear, see also Boeles, P., 'Entry Bans and SIS-alerts', in: K. Zwaan (ed), *The Returns Directive: central themes, problem issues and implementation in selected Member States*, WLP, Nijmegen, 2011, pp. 39-45, at p. 44.

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56 – See recital 18 to Directive 2008/115.

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57 – Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second Schengen Information System (SIS II) (OJ 2006 L 381, p. 4).

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58 – See also Brunessen, B., 'La Cour de justice et la directive Retour: la stratégie du Roseau', in: *Revue des affaires européennes*, 2011/4, pp. 845-858, at p. 854.

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59 – See judgment in *Achughbabian* (C-329/11, EU:C:2011:807, paragraph 28).

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60 – Such offences are obviously outside the scope of the directive.

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61 – See judgment in *Achughbabian* (C-329/11, EU:C:2011:807, paragraph 29). Similarly, with respect to the first limb of Article 5(1)(f) ECHR, see *Saadi v.The United Kingdom* [GC], no. 13229/03, § 65, 29 January 2008.

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62 – Judgment in *Achughbabian* (C-329/11, EU:C:2011:807).

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63 – It is always more difficult to determine the exact scope of a ground of judgment when it does not stand in direct relation with the facts of the case.

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64 – For instance if the person in question has actively thwarted the return procedure so as to prevent it from being successful, by absconding or otherwise, and *continues* to stay illegally, then indeed this Member State can cause this person to be prosecuted and punished by way of a criminal law sanction.

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65 – See judgment in *El Dridi* (C-61/11 PPU, EU:C:2011:268, paragraph 61 and case-law cited).