



INSIGHT

## ASYLUM AND RETURN: THE *GNANDI* CASE, OR A CLARIFICATION OF THE RIGHT TO AN EFFECTIVE REMEDY

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ABSTRACT: In *Gnandi* (Court of Justice, Judgment of 19 June 2018, case C-181/16 [GC]), the Court of Justice has clarified under which conditions a negative asylum decision may be combined with a return decision and which effects the combination of the two has in the light of the right to an effective remedy.

KEYWORDS: asylum procedure – EU Return Directive– return decision – forced return – right to an effective remedy – suspensive effect.

### I. INTRODUCTION

In June 2018, in its *Gnandi* judgment, the Court of Justice of the European Union confirmed that a return decision may be adopted immediately after or together with the rejection of an asylum application, and this even before the conclusion of any appeal proceedings brought against the rejection of the asylum application. However, Member States must make sure that the legal effects of the return decision are *suspended* pending the outcome of the appeal and that the applicant is entitled to rely on any change in circumstances that occurred after the adoption of the return decision.<sup>1</sup>

The Court therefore approved a practice existing in many Member States, consisting of combining the two decisions in a single administrative act. However, the judgment makes it very clear that in case of an appeal against the negative decision regarding the application for international protection, the applicant has the right to remain on the territory of the Member State and cannot be removed. His or her appeal must have suspensive effect.

The decision is of great importance for Member States not granting (full) suspensive effect until the termination of the appeal proceedings concerning the asylum claim or

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<sup>1</sup> Court of Justice, judgment of 19 June 2018, case C-181/16, *Sadikou Gnandi v. Etat belge* [GC].

not providing for full cognition of the court seized with the appeal against the negative asylum decision.

The following note will summarize the facts and explain the context of the case, followed by an overview of the Grand Chamber's judgment. Finally the important aspects of the case and their future implications will be highlighted and discussed.

## II. FACTS AND CONTEXT

Directive 2008/115/EC (Return Directive),<sup>2</sup> adopted in 2008, sets up a common standard regarding returns of illegally staying third-country nationals from the Member States to their respective countries. It obliges Member States to issue a return decision, which shall provide for an appropriate period for voluntary departure. If the third-country national does not depart, the return decision must be enforced. The Directive allows Member States to use coercive measures to carry out the removal. Detention is also allowed for a period of up to 18 months in order to ensure an effective removal.

The Directive is highly contested due to its many vague provisions, giving rise to numerous requests for preliminary rulings submitted to the Court of Justice in the past ten years.<sup>3</sup>

The case to be discussed here concerned Mr. Sadikou Gnandi, a Togolese national, and the Belgian State, who were arguing on the lawfulness of a decision ordering Mr. *Gnandi* to leave Belgium. In 2011, Mr. *Gnandi* had submitted an application for international protection in Belgium. The application was rejected by the Commissioner General for refugees and stateless persons in May 2014. On 3 June 2014, the Immigration Office ordered Mr. Gnandi to leave Belgian territory. On 23 June 2014, Mr. Gnandi brought an appeal against the decision rejecting his asylum claim and requested the annulment

<sup>2</sup> 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.

<sup>3</sup> See F. LUTZ, *The Negotiations on the Return Directive*, Nijmegen: Wolf Legal Publishers, 2010; A. BALDACCINI, *The EU Directive on Return: Principles and Protest*, in *Refugee Survey Quarterly*, 2009, p. 114 *et seq.*; A. BALDACCINI, *The return and removal of irregular migrants under EU law: An analysis of the Returns Directive*, in *European Journal of Migration and Law*, 2009, p. 1 *et seq.*; D. ACOSTA, *The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly? (The Adoption of Directive 2008/115: The Returns Directive)*, in *European Journal of Migration and Law*, 2009, p. 19 *et seq.*; P. BOELES, M. DEN HEIJER, GE. LODDER, K. WOUTERS (eds), *European Migration Law*, Cambridge: Intersentia, 2014; S. PEERS, E. GUILD, D. ACOSTA ARCARAZO, K. GROENENDIJK, V. MORENO-LAX (eds), *EU Immigration and Asylum Law (Text and Commentary). Volume 2: EU Immigration Law*, Leiden: Martinus Nijhoff Publishers, 2012, p. 483 *et seq.*; F. MAIANI, *Directive de la honte ou instrument de progrès ? Avancées, régressions et statu quo en droit des étrangers sous l'influence de la Directive sur le retour*, in A. EPINEY, N. GAMMENTHALER (eds), *Schweizerisches Jahrbuch für Europarecht 2008/2009*, Zurich/Basel/Genève: Schulthess, 2009, p. 289 *et seq.*; C. HÖRICH, *Die Rückführungsrichtlinie : Entstehungsgeschichte, Regelungsgehalt und Hauptprobleme*, in *Zeitschrift für Ausländerrecht*, 2011, p. 281 *et seq.*; S. PROGIN-THEUERKAUF, *Return Me – If You Can, 10th Anniversary of the Adoption of the EU Return Directive. A Success Story?*, in *NCCR-On the move Working Papers*, no. 18, 2018, nccr-onthemove.ch.

and suspension of execution of the order of 3 June 2014. Both appeals, considered separately, were dismissed in October 2014 and May 2015 respectively. Mr. Gnandi brought an appeal against the two judgments before the Council of State, which decided to set aside the judgment of the Council for asylum and immigration proceedings and referred the case back to it. The main proceedings concern solely the appeal on a point of law brought by Mr. Gnandi against the judgment of the Council for asylum and immigration proceedings of May 2015.

In that context, the Belgian Council of State decided to refer the case to the Court for a preliminary ruling. The question submitted was whether Art. 5 of the Return Directive precludes the adoption of a return decision immediately after the rejection of the asylum application and therefore before the legal remedies available against that rejection decision can be exhausted (and the asylum procedure definitely concluded).

### III. JUDGMENT OF THE COURT OF JUSTICE

After some remarks on the admissibility of the preliminary ruling, which was challenged by Belgium, arguing that in the meantime, Mr. Gnandi was granted a temporary residence permit, the Court holds that it is possible to adopt a return decision in respect of a third-country national who has applied for international protection immediately after the rejection of that application.

The Court bases its conclusion on Art. 7 of the 2005 Asylum Procedures Directive,<sup>4</sup> which states that an applicant for international protection is allowed to remain in the Member State for the purpose of the procedure until adoption of a decision at first instance refusing that person's application. The consequence of the rejection decision is that the person's stay becomes illegal.

The Court then further concretises its ruling in *Arslan*,<sup>5</sup> in which it had said that an authorisation to remain for the purposes of exercising a right of appeal against a decision rejecting an application for international protection precludes the application of the Return Directive. However, the Court now makes clear that such an authorization to remain does not preclude the conclusion that, as soon as the application for international protection is rejected, the stay of the person becomes "illegal" within the meaning of the Return Directive.

The Directive is indeed applicable to third-country nationals whose stay is classified as "illegal", but who are permitted to remain lawfully on the territory of the Member State concerned because they cannot (yet) be removed.

<sup>4</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status. See also Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection. The recast Directive was not yet binding at the time of the facts.

<sup>5</sup> Court of Justice, judgment of 30 May 2013, case C-534/11, *Arslan*.

To underline this, the Court cites Art. 7 of the Directive, which requires the setting of an appropriate period for voluntary departure of the person concerned, during which, despite his or her stay being classified as illegal, he or she is authorized to remain. Another example is that the removal is postponed in case the *non-refoulement* principle applies (Arts 5 and 9 of the Directive).

The Court also emphasizes that the main objective of the Return Directive is the establishment of an effective removal and repatriation policy. Not being able to aggregate the negative asylum decision and the return decision would undermine this objective.

However, the Court reminds us that the Return Directive must be interpreted in the light of the right to an effective remedy (Art. 47 of the Charter of Fundamental Rights of the European Union) and the *non-refoulement* principle (Arts 18 and 19 of the Charter and Art. 33 of the Geneva Convention). In that sense, an appeal brought against a return decision within the meaning of Art. 6 of the Directive must have automatic suspensive effect, since the return decision may expose the person concerned to a real risk of being subjected to treatment contrary to Art. 18 or Art. 19 of the Charter. This applies *a fortiori* to a removal decision within the meaning of Art. 8, para. 3, of the Directive.

In order to ensure full effectiveness of an appeal against a decision rejecting an application for international protection, in accordance with the principle of equality of arms, the effects of the return decision must therefore be suspended during the period prescribed for bringing the appeal and, if such an appeal is brought, until resolution of the appeal. Nevertheless, no provision in European Union law requires there to be *two* levels of judicial decisions.

However, Member States must allow the person concerned to rely on any change in circumstances that occurred after the adoption of the return decision. Additionally, Member States are also obliged to inform the person concerned in a transparent way. In the current case, the safeguards mentioned above were not met.

#### IV. COMMENT

The *Gnandi* judgment makes clear that the Return Directive is indeed applicable to asylum seekers whose application was rejected by a first instance. Their stay may therefore be considered as “illegal” in the sense of the Directive, even if the person has a right to remain on the territory of the Member States during appeal proceedings. It is also in line with the Return Directive to aggregate the negative asylum decision and the return decision.

However, Member States must suspend the effects of the return decision during the period prescribed for bringing the appeal. If an appeal is brought, the suspension must be extended until resolution of the appeal. Moreover, changes in circumstances that occurred after the adoption of the return decision must be taken into account. Last but not least, the person concerned must duly be informed on his or her procedural safeguards.

The judgment is rather solomonic: On the one hand, the Court seems to be conscious of the trouble Member States have with returning irregular migrants (many of

whom are rejected asylum seekers) and shows them ways to render the whole procedure more efficient; on the other hand, it also emphasizes the importance of procedural safeguards, especially the right to an effective remedy, and the respect of the *non-refoulement* principle.

The *Gnandi* judgment will have an enormous impact on Member States which do not grant full suspensory effect or which limit the cognition of a court seized with the appeal against a decision rejecting the asylum application. It is an important step towards a better legal protection of rejected asylum seekers and a recognition of their right to remain on the territory of the EU during their appeal proceedings, already called for by the European Court of Human Rights.<sup>6</sup>

The *Gnandi* judgment, together with many others, will also have to be taken into account when reforming the Return Directive. The European Commission has already published a proposal for a recast Directive in September 2018,<sup>7</sup> which is as controversial as the existing Directive.<sup>8</sup> The proposal contains an obligation for the Member States to issue a return decision immediately after a decision rejecting or terminating the legal stay. It also mentions that if the decision is a rejection of an application for international protection, the enforcement of the return decision must be suspended until the rejection becomes final (Art. 8 of the recast). This would basically codify the *Gnandi* judgment.

<sup>6</sup> European Court of Human Rights, judgment of 5 February 2002, no. 51564/99. *Conka v. Belgium*; judgment of 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece*. See also C. HRUSCHKA, S. MOTZ, *Das Recht auf eine wirksame Beschwerde – die Auswirkungen der neueren Rechtsprechung zu Art. 13 EMRK auf nationale Asylverfahren*, in *ASYL*, 2014, p. 9.

<sup>7</sup> Commission Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), COM(2018) 634 final.

<sup>8</sup> For a detailed discussion of the suggested modifications see S. PEERS, *Lock 'em up: the proposal to amend the EU's Returns Directive*, in *EULawAnalysis*, 12 September 2018, eulawanalysis.blogspot.com. See also European Parliament, *The proposed Return Directive (recast)*, Substitute Impact Assessment, February 2019, www.europarl.europa.eu.

