JUDGMENT OF THE COURT (Third Chamber)

30 May 2013 (*)

(Area of freedom, security and justice – Directive 2008/115/EC – Common standards and procedures for returning illegally staying third-country nationals – Applicability to asylum seekers – Possibility of keeping a third-country national in detention after an application for asylum has been made)

In Case C-534/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Nejvyšší správní soud (Czech Republic), made by decision of 22 September 2011, received at the Court on 20 October 2011, in the proceedings

Mehmet Arslan

v

Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie,

THE COURT (Third Chamber),

composed of M. Ilešič (Rapporteur), President of the Chamber, E. Jarašiūnas, A. Ó Caoimh, C. Toader and C.G. Fernlund, Judges,

Advocate General: M. Wathelet,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 7 November 2012,

after considering the observations submitted on behalf of:

– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the German Government, by N. Graf Vitzthum, acting as Agent,

– the French Government, by G. de Bergues and S. Menez, acting as Agents,

– the Slovak Government, by B. Ricziová, acting as Agent,

– the Swiss Government, by D. Klingele, acting as Agent,

– the European Commission, by M. Condou-Durande and M. Šimerdová, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 31 January 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(1) 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), read in conjunction with recital 9 in the preamble to that directive.

2 The request has been made in proceedings between Mr Arslan, a Turkish national arrested and detained in the Czech Republic with a view to his administrative removal, who, during that detention, made an application for international protection within the meaning of the national legislation on asylum, and the Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie (Police Force of the Czech Republic, Regional Police Directorate of the Ústí nad Labem Region, Foreigners Police Section), concerning that section's decision of 25 March 2011 to extend the initial detention of 60 days by a further 120 days.

Legal context

European Union law

Directive 2008/115

3 Recitals 2, 4, 8, 9 and 16 in the preamble to Directive 2008/115 state:

'(2) The … European Council … called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.

…

(4) Clear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well managed migration policy.

…

(8) It is recognised that it is legitimate for Member States to return illegally staying third-country nationals, provided that fair and efficient asylum systems are in place which fully respect the principle of non-refoulement.

(9) In accordance with Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [(OJ 2005 L 326, p. 13)], a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force.

…

(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.'

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) of that directive, entitled 'Scope', states:

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

6 Article 3(2) of that directive defines the term 'illegal stay' as 'the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions … for entry, stay or residence in that Member State'.

7 Article 6(1) of Directive 2008/115 provides that 'Member States shall issue a return decision to any third-country national staying illegally on their territory …'.

8 Under Article 15 of that directive:

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

(a) there is a risk of absconding or

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

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

…

4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

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

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

Directive 2005/85

9 The purpose of Directive 2005/85 is, in accordance with Article 1, to establish minimum standards on procedures for granting and withdrawing refugee status. In essence, it governs the submission of applications for asylum, the procedure for processing those applications, and the rights and obligations of asylum seekers.

10 Article 2 of that directive provides, inter alia, that, for the purposes of the directive:

'…

(b) "application" or "application for asylum" means an application made by a third-country national or stateless person which can be understood as a request for international protection from a Member State under the [Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954), entered into force on 22 April 1954]. Any application for international protection is presumed to be an application for asylum, unless the person concerned explicitly requests another kind of protection that can be applied for separately;

(c) "applicant" or "applicant for asylum" means a third-country national or stateless person who has made an application for asylum in respect of which a final decision has not yet been taken;

(d) "final decision" means a decision on whether the third-country national or stateless person be granted refugee status … and which is no longer subject to a remedy within the framework of Chapter V of this Directive irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome, subject to Annex III to this Directive;

(e) "determining authority" means any quasi-judicial or administrative body in a Member State responsible for examining applications for asylum and competent to take decisions at first instance in such cases, subject to Annex I;

…

(k) "remain in the Member State" means to remain in the territory, including at the border or in transit zones, of the Member State in which the application for asylum has been made or is being examined.'

11 Article 7 of that directive provides:

'1. Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. This right to remain shall not constitute an entitlement to a residence permit.

2. Member States can make an exception only where, in accordance with Articles 32 and 34, a subsequent application will not be further examined or where they will surrender or extradite, as appropriate, a person either to another Member State pursuant to obligations in accordance with a European arrest warrant … or otherwise, or to a third country, or to international criminal courts or tribunals.'

12 Article 18 of Directive 2005/85 states:

'1. Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum.

2. Where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review.'

13 Article 23(4) of Directive 2005/85 provides:

'Member States may also provide that an examination procedure … be prioritised or accelerated if:

…

(j) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/her removal; …

…'

14 Article 39(1) of that directive obliges Member States to ensure that applicants for asylum have the right to an effective remedy. Article 39(3) is worded as follows:

'Member States shall, where appropriate, provide for rules in accordance with their international obligations dealing with:

(a) the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome;

(b) the possibility of legal remedy or protective measures where the remedy pursuant to paragraph 1 does not have the effect of allowing applicants to remain in the Member State concerned pending its outcome. …

…'

Directive 2003/9

15 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18) lays down, inter alia, conditions for the residence and movement of asylum seekers. Article 7 of that directive states:

'1. Asylum seekers may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive.

2. Member States may decide on the residence of the asylum seeker for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application.

3. When it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law.

…'

16 Under Article 21(1) of that directive:

'Member States shall ensure that negative decisions relating to the granting of benefits under this Directive or decisions taken under Article 7 which individually affect asylum seekers may be the subject of an appeal within the procedures laid down in the national law. At least in the last instance the possibility of an appeal or a review before a judicial body shall be granted.'

Czech law

17 Directive 2008/115 was transposed into Czech law primarily by an amendment to Law No 326/1999 on the residence of foreigners in the Czech Republic ('Law No 326/1999').

18 Under Paragraph 124(1) of Law No 326/1999, the police are 'entitled to detain a foreigner over 15 years of age on whom notice has been served of the initiation of administrative removal proceedings, whose administrative removal has already been finally decided on, or on whom a prohibition of entry has been imposed by another Member State of the European Union which is valid for the territory of the Member States of the European Union, where the imposition of a special measure for the purpose of leaving the country is insufficient', and at least one of the conditions set out in Paragraph 124(1)(b) and (e) has been met, namely, 'there is a danger that the foreigner might frustrate or impede the enforcement of a decision on administrative removal' or 'the foreigner is registered in the information system of the Contracting States'.

19 Paragraph 125(1) of that law provides that the detention period must not, in principle, exceed 180 days.

20 Paragraph 127 of that law provides:

'1. Detention must be terminated without undue delay:

(a) where the grounds for detention no longer exist;

…

(d) if the foreigner is granted asylum or subsidiary protection, or

(e) if the foreigner is granted a long-term residence permit for the purpose of protection in the country.

2. The submission of an application for international protection during the period of detention is not a ground for ending the detention.'

21 Directive 2005/85 was transposed into Czech law essentially by an amendment to Law No 325/1999 on asylum. Paragraph 85a of that law provides:

'1. When a declaration for purposes of international protection is made, the validity of a long-term visa or long-term residence permit granted under the relevant specific legislation ceases.

2. The legal status of a foreigner arising from his being held in a detention centre is not affected by any declaration for purposes of international protection or by the making of an application for international protection (Paragraph 10).

3. A foreigner who has made a declaration for purposes of international protection or has made an application for international protection is, subject to the conditions set out in the specific legislation, required to remain in the detention centre.'

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

22 On 1 February 2011 Mr Arslan was arrested by a Czech police patrol unit and detained. On 2 February 2011 a decision was issued for his removal.

23 By decision of 8 February 2011, Mr Arslan's period of detention was extended to 60 days on the ground, inter alia, that in view of his past conduct it might be presumed that he would obstruct enforcement of the removal decision. In that decision it was stated that he had entered the Schengen area concealed so as to evade border controls and that he had stayed in Austria and subsequently in the Czech Republic without a travel document or visa. The decision also stated that in 2009 Mr Arslan had already been stopped for questioning in Greece in possession of a false passport and that, thereafter, he had been returned to his country of origin and had been registered in the Schengen Information System as a person to be refused entry into States in the Schengen Area from 26 January 2010 to 26 January 2013.

24 On the same day as that decision was adopted, Mr Arslan made a declaration for purposes of international protection to the Czech authorities.

25 By decision of 25 March 2011, Mr Arslan's detention was extended by a further 120 days on the ground that the extension was necessary for preparing for enforcement of the decision to remove him, in view of the fact, in particular, that the procedure relating to his application for international protection was still ongoing and it was not possible to enforce the removal decision while that application was being considered. In the decision of 25 March 2011 it was stated that the application for international protection had been made with the intention of hindering enforcement of the removal decision. The decision also disclosed that the embassy of the Republic of Turkey had not yet issued an emergency travel document for Mr Arslan, which was also capable of hindering enforcement of the removal decision.

26 Mr Arslan brought an action against the decision to extend his detention, claiming, inter alia, that at the time that decision was taken, in view of his application for international protection, there was no reasonable prospect that his removal could still take place within the maximum detention period of 180 days laid down by Law No 326/1999. In that connection, he stated that if his application for asylum were rejected he would make use of all available remedies. Given the usual length of judicial proceedings relating to that type of action, the enforcement of the removal decision before the expiry of the maximum duration of detention was not, in

his opinion, realistic. In those circumstances, Mr Arslan considered that the decision of 25 March 2011 was contrary to Article 15(1) and (4) of Directive 2008/115 and the case-law of the European Court of Human Rights.

27 That action having been dismissed by the court of first instance by judgment of 27 April 2011, in which it found that the action was based on purely self-serving and speculative arguments, Mr Arslan appealed on a point of law to the referring court, putting forward in essence the same arguments as those relied on at first instance.

28 In the meantime, the application for international protection was rejected by decision of 12 April 2011 of the Czech Ministry of the Interior, against which Mr Arslan brought an action.

29 On 27 July 2011 Mr Arslan's detention was terminated, on the ground that the detention had reached the maximum duration provided for by national law.

30 The referring court harbours doubts as to whether an applicant for international protection may, under Directive 2008/115, be lawfully kept in detention. In particular, it asks whether that directive should be interpreted as meaning that the detention of a foreigner for the purpose of return must be terminated if he applies for international protection. It considers, inter alia, that it follows from a systematic and teleological interpretation of the relevant provisions that, where an application for asylum has been made, detention may only be extended if a new decision, based not on Directive 2008/115 but on a provision specifically allowing the detention of an asylum seeker, is adopted. However, the referring court also expresses its concern that such an interpretation encourages the abuse of asylum procedures.

31 In those circumstances, the Nejvyšší správní soud (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Must Article 2(1) of, in conjunction with recital 9 in the preamble to, Directive [2008/115] be interpreted as meaning that the directive does not apply to a third-country national who has applied for international protection within the meaning of … Directive [2005/85]?

2. If the answer to the first question is in the affirmative, must the detention of a foreigner for the purpose of return be terminated if he applies for international protection within the meaning of Directive [2005/85] and there are no other reasons to keep him in detention?'

Admissibility of the request for a preliminary ruling

32 The French Government expresses doubts as to the admissibility of the request for a preliminary ruling, on the ground that it is not apparent from the order for reference that Mr Arslan disputed that Directive 2008/115 was applicable to him after he had made an application for asylum. In those circumstances, the request for a preliminary ruling is claimed to be hypothetical.

33 In that regard, it should be recalled at the outset that, in proceedings under Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling (see, inter alia, Case C-399/11 *Melloni* [2013] ECR, paragraph 28 and the case-law cited).

34 The presumption of relevance attaching to questions referred for a preliminary ruling by a national court may be set aside only exceptionally, where it is quite obvious that the interpretation of the provisions of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the

Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, *Melloni*, paragraph 29 and the case-law cited).

35 In the present case, however, it is not obvious from the case file submitted to the Court that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, or that the problem raised by the referring court is hypothetical.

36 First, it is admittedly evident that Mr Arslan disputed the extension of his detention not on the ground that Directive 2008/115 was not applicable but, inter alia, on the ground that that extension was contrary to Article 15 of that directive on account of the fact that, having regard to the length of the procedure in which an application for asylum is examined, there was no reasonable prospect that his removal could take place within the maximum detention period allowed by Czech law. The fact remains that, in order to determine whether that extension breaches Article 15 of Directive 2008/115, the referring court must first determine whether that directive is still applicable to Mr Arslan's situation after his application for asylum has been made. An answer to the first question is therefore necessary for the referring court to be able to rule on the validity of the argument adduced before it.

37 Next, it is apparent from the order for reference that the referring court considers that, if Directive 2008/115 were no longer applicable after an application for asylum has been made, Mr Arslan's detention could only be maintained on the basis of a new decision adopted under provisions specifically allowing the detention of an asylum seeker, so that the contested decision would already be unlawful on that ground. It is not inconceivable that the referring court is entitled to find such a defect, where relevant even of its own motion.

38 Finally, although the order for reference mentions the fact that, on 27 July 2011, Mr Arslan's detention was terminated and although, according to the additional information provided by the Czech Government, he absconded the day after his release, neither of those two facts allows it to be presumed, without the slightest indication to that effect in the case file, by the referring court or by any of the parties to the proceedings before the Court, that the referring court is, under national law, no longer obliged to rule on the action before it.

39 In those circumstances, the request for a preliminary ruling must be declared admissible.

Consideration of the questions referred

The first question

40 By its first question the referring court asks whether Article 2(1) of Directive 2008/115, read in conjunction with recital 9 in the preamble, must be interpreted as meaning that that directive does not apply to third-country nationals who have applied for international protection within the meaning of Directive 2005/85.

41 The German and Swiss Governments and the European Commission submit that this question should be answered in the affirmative, whereas the Czech, French and Slovak Governments consider, in essence, that that directive may also apply to an asylum seeker, possibly subject to certain conditions.

42 As a preliminary point, it must be borne in mind 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 their dignity. As is apparent from both its title and Article 1, Directive 2008/115 establishes for that purpose 'common standards and procedures' which must be applied by each Member State for returning illegally staying third-country nationals (Case C-61/11 PPU *El Dridi* [2011] ECR I-3015, paragraphs 31 and 32).

43 As regards the scope of Directive 2008/115, Article 2(1) provides that the directive applies to third-country nationals staying illegally on the territory of a Member State. The concept of 'illegal stay' is defined in Article 3(2) of the directive as 'the presence on the territory of a

Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions … for entry, stay or residence in that Member State'.

44 Recital 9 in the preamble to Directive 2008/115 specifies in that respect that '[i]n accordance with … Directive [2005/85], a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force'.

45 Directive 2005/85, the purpose of which, in accordance with Article 1, is to establish minimum standards on procedures for granting and withdrawing refugee status, lays down in Article 7(1) the right of asylum seekers to remain, for the sole purpose of the asylum procedure, in the Member State in which their application has been made or is being examined until the examining authority has made a decision at first instance regarding that application.

46 Article 7(2) of that directive allows an exception to the rule in Article 7(1) only under restrictive conditions, namely where the application for asylum in question is not a first application but a subsequent one which will not be further examined or where the applicant will be surrendered or extradited either to another Member State or to a third country or to an international criminal court.

47 Furthermore, Article 39(3) of Directive 2005/85 grants each Member State the possibility of extending the right established by Article 7(1) of the directive by providing that lodging an appeal against the decision of the responsible authority at first instance has the effect of allowing asylum applicants to remain on the territory of that State pending the outcome of that remedy.

48 Consequently, although Article 7(1) does not expressly confer entitlement to a residence permit but rather leaves the decision whether to grant such a permit to the discretion of each Member State, it is clearly apparent from the wording, scheme and purpose of Directives 2005/85 and 2008/115 that an asylum seeker, independently of the granting of such a permit, has the right to remain in the territory of the Member State concerned at least until his application has been rejected at first instance, and cannot therefore be considered to be 'illegally staying' within the meaning of Directive 2008/115, which relates to his removal from that territory.

49 It follows from the foregoing that the answer to the first question is that Article 2(1) of Directive 2008/115, read in conjunction with recital 9 in the preamble, must be interpreted as meaning that that directive does not apply to a third-country national who has applied for international protection within the meaning of Directive 2005/85 during the period from the making of the application to the adoption of the decision at first instance on that application or, as the case may be, until the outcome of any action brought against that decision is known.

The second question

50 By its second question the referring court seeks to ascertain, in essence, whether, despite Directive 2008/115 not being applicable to third-country nationals who have applied for international protection within the meaning of Directive 2005/85, it is possible to keep in detention such a national who has made that application after having been detained under Article 15 of Directive 2008/115 for the purposes of return or removal.

51 The German and Swiss Governments and the Commission consider that, in such a case, the detention may continue where it is justified in accordance with the rules of asylum law. Although the Czech, French and Slovak Governments did not, in the light of the answer which they suggested to the first question, answer that second question, it follows from their submissions that they consider that the making of an application for asylum does not mean that the detention has to be terminated.

52 As the Court has previously held, detention for the purpose of removal governed by Directive 2008/115 and detention of an asylum seeker in particular under Directives 2003/9 and

2005/85 and the applicable national provisions fall under different legal rules (see Case C-357/09 PPU *Kadzoev* [2009] ECR I-11189, paragraph 45).

53 As regards the rules applicable to asylum seekers, it should be noted that Article 7(1) of Directive 2003/9 lays down the principle that asylum seekers may move freely within the territory of the host Member State or within an area assigned to them by that Member State. However, Article 7(3) states that when it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law.

54 Under Article 18(1) of Directive 2005/85, Member States cannot hold a person in detention for the sole reason that he is an applicant for asylum and, in accordance with Article 18(2), where an applicant for asylum is held in detention, Member States are to ensure that there is a possibility of speedy judicial review. Judicial review is also provided for in Article 21 of Directive 2003/9 as regards decisions taken under Article 7 of that directive.

55 However, neither Directive 2003/9 nor Directive 2005/85 carries out, at the present stage, a harmonisation of the grounds on which the detention of an asylum seeker may be ordered. As the German Government pointed out, the proposal of an exhaustive list setting out those grounds was abandoned during the negotiations which preceded the adoption of Directive 2005/85 and it is only in the context of the recasting of Directive 2003/9, which is in the process of being adopted, that such a list is intended to be established at European Union level.

56 Therefore, for the time being it is for Member States to establish, in full compliance with their obligations arising from both international law and European Union law, the grounds on which an asylum seeker may be detained or kept in detention.

57 As regards a situation such as that at issue in the main proceedings, in which, firstly, the third-country national was detained on the basis of Article 15 of Directive 2008/115 on the ground that his conduct gave rise to the concern that, if not detained, he would abscond and frustrate his removal, and, secondly, the application for asylum seems to have been made with the sole intention of delaying or even jeopardising enforcement of the return decision taken against him, such circumstances can indeed justify that national being kept in detention even after an application for asylum has been made.

58 A national provision which allows, in such circumstances, an asylum seeker to be kept in detention is compatible with Article 18(1) of Directive 2005/85, since that detention does not result from the making of the application for asylum but from circumstances characterising the individual behaviour of the applicant before and during the making of that application.

59 In addition, in so far as maintaining the detention appears in such circumstances to be objectively necessary to prevent the person concerned from permanently evading his return, it is also permissible under Article 7(3) of Directive 2003/9.

60 In this respect, it must be noted that, although Directive 2008/115 is not applicable during the procedure in which an application for asylum is examined, that does not mean that the return procedure is thereby definitively terminated, as it may continue if the application for asylum is rejected. Moreover, as the Czech, German, French and Slovak Governments pointed out, the objective of that directive, namely the effective return of illegally staying third-country nationals, would be undermined if it were impossible for Member States to prevent, in circumstances such as those set out at paragraph 57 above, the person concerned from automatically securing release by making an application for asylum (see, by analogy, Case C-329/11 *Achughbabian* [2011] ECR I-12695, paragraph 30).

61 Furthermore, Article 23(4)(j) of Directive 2005/85 expressively provides that the fact that the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his removal may also be taken into account in the procedure in which that application is examined, since that fact may justify an accelerated or prioritised examination of the application. Directive 2005/85 thus ensures that Member States have the necessary instruments at their disposal to ensure the effectiveness

of the return procedure by avoiding suspension of the procedure beyond what is necessary to process the application properly.

62 However, it is necessary to state that the mere fact that an asylum seeker, at the time of the making of his application, is the subject of a return decision and is being detained on the basis of Article 15 of Directive 2008/115 does not allow it to be presumed, without an assessment on a case-by-case basis of all the relevant circumstances, that he has made that application solely to delay or jeopardise the enforcement of the return decision and that it is objectively necessary and proportionate to maintain detention.

63 It follows from all of the foregoing considerations that the answer to the second question is that Directives 2003/9 and 2005/85 do not preclude a third-country national who has applied for international protection within the meaning of Directive 2005/85 after having been detained under Article 15 of Directive 2008/115 from being kept in detention on the basis of a provision of national law, where it appears, after an assessment on a case-by-case basis of all the relevant circumstances, that the application was made solely to delay or jeopardise the enforcement of the return decision and that it is objectively necessary to maintain detention to prevent the person concerned from permanently evading his return.

Costs

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

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

1. **Article 2(1) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, read in conjunction with recital 9 in the preamble, must be interpreted as meaning that that directive does not apply to a third-country national who has applied for international protection within the meaning of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status during the period from the making of the application to the adoption of the decision at first instance on that application or, as the case may be, until the outcome of any action brought against that decision is known.**

2. **Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers and Directive 2005/85 do not preclude a third-country national who has applied for international protection within the meaning of Directive 2005/85 after having been detained under Article 15 of Directive 2008/115 from being kept in detention on the basis of a provision of national law, where it appears, after an assessment on a case-by-case basis of all the relevant circumstances, that the application was made solely to delay or jeopardise the enforcement of the return decision and that it is objectively necessary to maintain detention to prevent the person concerned from permanently evading his return.**