Op-Ed

Aniel Pahladsingh

"Obligation for national Courts to review ex officio whether the Non-Refoulement Principle is violated in Situations where the Member State has issued a Return Decision against a third-country National (C-156/23, Ararat)"

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Aniel Pahladsingh

On 17 October 2024, the Court of Justice ruled that a national court is obliged to review of its own initiative (*ex officio)* whether the principle of non-refoulement is violated in cases in which the Member State has issued a return decision under the EU Return Directive (Directive 2008/115/EC) against a third-country national. This obligation for national courts also applies in the context of an international protection procedure, as well as in the context of a procedure initiated with an application for a residence permit under national law given the compelling importance of Articles 1, 4 and 19 paragraph 2 of the EU Charter in the event of return (*Ararat*, C-156/23 (the 'Judgment')).

Facts and reference

In 2011, four third-country nationals (K, L, M and N, all Armenian nationals) submitted an application for international protection in the Netherlands. These applications were rejected by the immigration authorities and return decisions were issued against these third-country nationals after assessing the risk of refoulement and inhuman and degrading treatment in the country of origin (the non-refoulement principle). The third-country nationals did not return, but instead have submitted several new applications for a residence permit due to the long-term stay of their children in the Netherlands, most recently in 2019. They now argue that due to their westernisation there is a risk of inhuman and degrading treatment upon return. The referring court (District Court, The Hague, sitting in Roermond, the Netherlands) has submitted a number of questions to the Court of Justice in connection with the proceedings initiated by the third-country nationals against this. First, the referring court asks the Court of Justice whether, in a situation in which a competent national authority establishes the illegality of the stay of a third-country national with respect to whom an earlier return decision was issued and which has become final, that authority is required, before resuming the return proceedings, to carry out an updated assessment of the risks which that

national will encounter in the event of return to the intended country of destination. Second, the referring court asks the Court of Justice whether the judicial authority is required, in the context of the review of legality pending before it, and on the basis of the material available to it, to review *ex officio* the breach of the principle of non-refoulement where the competent national authority has not carried out such an assessment.

The ruling: Updated assessment by the competent authority regarding the non-refoulement principle

The Court of Justice points out that any illegal third-country national under the EU Return Directive must be the subject of a return decision (see Judgment, para. 34 and judgments *Staatssecretaris van Justitie en Veiligheid* (C-69/21), para. 53, and *Bundesamt für Fremdenwesen und Asyl* (C-663/21), para. 46). According to the Court of Justice, Article 5 of the Return Directive obliges the competent national authority to observe, at all stages of the return procedure, the principle of non-refoulement (Judgment, para. 35). Article 5 of the Return Directive has direct effect and may therefore be relied on by an individual and applied by the administrative authorities and by the courts of Member States (see Judgment, para. 35 and judgment in *M.D.* (Ban on entering Hungary) (C-528/21), para. 97).

The Court of Justice points out the absolute character of the non-refoulement principle (Articles 19(2) of the Charter, read in conjunction with Article 4): it prohibits in absolute terms the removal, expulsion or extradition to a State where there is a serious risk of that person being subjected to the death penalty, torture or inhuman or degrading treatment or punishment. (see para. 36). The Court of Justice explains that the non-refoulement principle reflects one of the fundamental values of the European Union and its Member States, as enshrined in Article 2 TEU, and its absolute nature is closely linked to the respect for human dignity referred to in Article 2 TEU and Article 1 of the Charter (see, to that effect, judgment of *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU), paras. 85 and 87). In addition, in his Opinion of 16 May 2024, Advocate General De La Tour also explained the role of the courts in relation to the non-refoulement principle as an absolute right and that courts 'must rule on situations that are very distant from them and of which they do not necessarily have full and direct knowledge. In addition, non-refoulement cases are generally cases concerning fluctuating situations – situations which are changing all the time'(Opinion in Case C-156/23, point 2).

Member States are required to allow the person concerned to rely on any change in circumstances that occurred after the adoption of the return decision and that may have a significant bearing on the assessment of his or her situation under, in particular, Article 5 of Directive 2008/115 (see judgment in *Gnandi* (C-181/16), para. 64).

The Court of Justice ruled that EU law (Article 5 of Directive 2008/115, read in the light of Article 4 and Article 19(2) of the EU Charter), requires the national authority to carry out, prior to enforcing the return decision, an updated assessment of the risks faced by the third-country national of being exposed to treatment prohibited in absolute terms by those two provisions of the

Charter (see Judgment, para. 38). Such assessment, which must be distinct and independent from that carried out at the time of the adoption of that return decision, must enable the national authority to assess, taking into account any change in circumstances and any new elements presented by the third-country national, whether there are any compelling and factual grounds to believe that, upon return to a third country, that third-country national would run a real risk of being subjected to the death penalty, torture or inhuman or degrading treatment. According to the Court of Justice, this updated assessment is the only assessment that allows this authority to ensure that the removal complies with the legal conditions, and in particular the requirements of Article 5 of the EU Return Directive.

If, after the said assessment, the competent national authority concludes that the removal of the third-country national concerned would expose him or her to a serious risk of being subjected to the death penalty, torture or inhuman or degrading treatment or punishment, that authority shall, in accordance with Article 9 of the Return Directive, postpone that removal as long as that risk persists (see Judgment, para. 39). However, the Court of Justice did not explain how long the Member State can postpone the removal. In other words, how many years can the State postpone the removal ?

A national rule or practice under which compliance with the principle of non-refoulement can only be examined in the context of an international protection procedure (and not in the context of a procedure initiated by an application for a residence permit to national law), is contrary to EU law (see Judgment, para. 40).

The Court of Justice explains, just as the Advocate General does (in points 52 and 57 of his Opinion), that there is no requirement for the applicants to lodge an application for international protection pursuant to Directive 2011/95/EU (see Judgment, para. 41). The fact that the applicants K and L relied on their 'westernisation' should therefore have led the competent authority to examine whether the principle of non-refoulement precludes the enforcement of the return decision (see Judgement, para. 42). This ruling of the Court of Justice strengthens the fundamental rights protection of illegal third-country nationals in the Member States as the State is obliged to assess in every stage whether the return of an illegal third-country national would not violate the non-refoulement principle.

Ruling: Ex officio review by the national court

Under Article 13(1) of the Return Directive, the illegal third-country national concerned must be afforded an effective remedy to appeal against or seek review of decisions related to their return before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy the necessary safeguards.

The Court of Justice ruled that it is for the competent national courts to ensure, where appropriate of their own initiative, that the principle of non-refoulement is observed where information from the file brought to their attention suggests that that principle could be undermined (see Judgment, para. 49). This

obligation of the national court applies in the same way in the context of an international protection procedure as in the context of a procedure initiated with an application for a residence permit under national law. The principle of non-refoulement is absolute and it is for the competent judicial authorities to ensure, if necessary *ex officio*, that it is observed if the file contains information that suggests that that principle could be compromised (see Judgment, para. 51). That protection would not be effective and complete if there were no official obligation to establish this. This ruling strengthens the legal protection of the applicant in return procedures as the national courts must review of their own initiative whether the return of the illegal migrants would violate the non-refoulement principle. The *ex officio* review by the national courts is limited to the non-refoulement principle in return cases and does not apply to other fundamental rights such as the right to private and family life and the best interest of the child (Article 5 of the Return Directive).

As Advocate General De La Tour described, 'EU law does not, in principle, require a national court to examine ex officio a plea alleging infringement of provisions of EU law where the examination of that plea would oblige it to go beyond the ambit of the dispute defined by the parties themselves. That limitation on the power of a national court is justified by the principle that, in a civil suit, it is for the parties to take the initiative' (see Opinion De La Tour, point 44). The national court can review *ex officio* only in exceptional cases where the public interest requires its intervention, such as in cases of the protection of consumers (see judgment in *Tuk Tuk Travel* (C-83/22), paras. 45 to 47 and the case-law cited) or in immigration detention cases (judgment of 8 November 2022, *Staatssecretaris van Justitie en Veiligheid* (Ex officio review of detention) (C-704/20 and C-39/21)). In immigration detention cases the obligation for the national court to review ex officio is related to the importance of the right to liberty guaranteed in Article 6 of the EU Charter and to the gravity of the interference with that right represented by detention and the requirement of a high level of judicial protection. Another example in which the Court of Justice concluded that the national court must review ex officio is the ruling of 4 October 2024, in which the Court of Justice ruled that the national court called upon to verify the lawfulness of an administrative decision on international protection must raise of its own initiative, as part of its full examination, a failure to take account of the rules of EU law relating to the designation of safe countries of origin (*Ministerstvo vnitra České republiky, Odbor azylové a migrační politiky* (C-406/22)).

Final remarks

The referring court ruled in an interim ruling on 7 November 2024 (ECLI:NL:RBDHA:2024:18269) that the immigration authority must assess the non-refoulement risk as thoroughly as possible and set a period of four weeks so that the applicants are given the opportunity to further substantiate why the immigration authority must come to a different conclusion with regard to the non-refoulement risk.

This ruling of the Court of Justice points out that the absolute nature of the non-refoulement principle. A national rule or practice under which

compliance with the principle of non-refoulement can only be examined in the context of an international protection procedure (and not in the context of a procedure initiated by an application for a residence permit to national law), is contrary to EU law. This ruling of the Court of Justice strengthens the fundamental rights protection of illegal third-country nationals in the Member States as the State is obliged to assess in every stage whether the return of an illegal third-country national would violate the non-refoulement principle.

Furthermore, this ruling of the Court of Justice strengthens the legal protection of migrants as the national courts have the obligation to review ex officio whether a return decision and the return of the illegal third-country national would violate the non-refoulement principle. The national court must also review the non-refoulement principle in international protection procedures as well as in national procedures. This will mean an increase in the tasks of the national court.

However, the Court of Justice missed a chance in this ruling to explain the consequences of cases in which a return decision cannot be issued due to a violation of the non-refoulement principle, and the rights of the third-country nationals in the Member States, as was the issue in Case C-663/21, *AA*.

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