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JUDGMENT OF THE COURT (Third Chamber)

11 June 2015 (*)

(Reference for a preliminary ruling — Area of freedom, security and justice — Directive 2008/115/EC — Return of illegally staying third-country nationals — Article 7(4) — Concept of ‘risk to public policy’ — Circumstances in which Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days)

In Case C-554/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (the Netherlands), made by decision of 23 October 2013, received at the Court on 28 October 2013, in the proceedings

Z. Zh.

v

Staatssecretaris voor Veiligheid en Justitie

and

Staatssecretaris voor Veiligheid en Justitie

v

I. O.,

THE COURT (Third Chamber),

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

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 October 2014,

after considering the observations submitted on behalf of:

- Mr Zh., by J.J.D. van Doleweerd, advocaat,
- the Netherlands Government, by M. Bulterman, B. Koopman and C. Schillemans, acting as Agents,
- the Belgian Government, by C. Pochet, M. Jacobs and T. Materne, acting as Agents,
- the Czech Government, by M. Smolek and J. Vláčíl, acting as Agents,
- the Greek Government, by M. Michelogiannaki, acting as Agent,
- the French Government, by D. Colas and F.-X. Bréchet, acting as Agents,
- the Polish Government, by B. Majczyna, K. Pawłowska and M. Pawlicka, acting as Agents,
- the European Commission, by M. Condou-Durande and G. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 February 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 7(4) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

2 The request has been made in the context of two sets of proceedings between, first, Mr Zh., a third-country national, and the Minister voor Immigratie en Asiel (Minister for Immigration and Asylum), which has been replaced by the Staatssecretaris voor Veiligheid en Justitie (Secretary of State for Security and Justice) (together, ‘the Staatssecretaris’) and, secondly, the Staatssecretaris and Mr O., a third-country national, concerning decisions refusing to grant them a period for voluntary departure and obliging them to leave European Union territory immediately.

Legal context

EU law

3 Recitals 2, 6, 10, 11 and 24 in the preamble to Directive 2008/115 state as follows:

‘(2) The Brussels European Council of 4 and 5 November 2004 called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.

...

(6) Member States should ensure that the ending of [the] illegal stay of third-country nationals is carried out through a fair and transparent procedure. According to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay. When using standard forms for decisions related to return, namely return decisions and, if issued, entry-ban decisions and decisions on removal, Member States should respect that principle and fully comply with all applicable provisions of this Directive.

...

(10) Where there are no reasons to believe that this would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and a period for voluntary departure should be granted. An extension of the period for voluntary departure should be provided for when considered necessary because of the specific circumstances of an individual case. ...

(11) A common minimum set of legal safeguards on decisions related to return should be established to guarantee effective protection of the interests of the individuals concerned. ...

...

(24) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.’

4 Article 1 of Directive 2008/115, entitled ‘Subject matter’, provides as follows:

‘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 provides as follows:

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

6 According to Article 3 of that directive:

‘For the purpose of this Directive the following definitions shall apply:

...

(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;

...

(8) “voluntary departure” means compliance with the obligation to return within the time-limit fixed for that purpose in the return decision;

...’

7 Article 4 of that directive, entitled ‘More favourable provisions’, provides, in paragraph 3 thereof, as follows:

‘This Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive.’

8 Article 5 of Directive 2008/115, headed ‘Non-refoulement, best interests of the child, family life and state of health’, provides as follows:

‘When implementing this Directive, Member States shall take due account of:

- (a) the best interests of the child,
- (b) family life,
- (c) the state of health of the third-country national concerned,

and respect the principle of non-refoulement.’

9 Article 6(1) and (2) of that directive provides:

‘1. 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.

2. Third-country nationals staying illegally on the territory of a Member State and holding a valid residence permit or other authorisation offering a right to stay issued by another Member State shall be required to go to the territory of that other Member State immediately. In the event of non-compliance by the third-country national concerned with this requirement, or where the third-country national’s immediate departure is required for reasons of public policy or national security, paragraph 1 shall apply.’

10 Article 7 of that directive provides:

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

The time period provided for in the first subparagraph shall not exclude the possibility for the third-country nationals concerned to leave earlier.

2. Member States shall, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.

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

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

Netherlands law

11 Under the introductory part and point (d) of Article 12(1) of the Law of 2000 on Foreign Nationals (Vreemdelingenwet 2000), in the version applicable to the facts in the main proceedings (‘the Law on Foreign Nationals’), a foreign national who, upon entry, satisfied the obligations to which a person is subject when crossing the border is entitled

to stay in the Netherlands for a period to be determined by a general administrative measure, provided that he does not pose a risk to public policy or national security.

12 Under Article 61(1) of that law, a foreign national who is not, or is no longer, legally resident must leave the Netherlands voluntarily within the period laid down in Article 62 of that Law.

13 Under Article 62(1) of that law, after a return decision has been issued against him, the foreign national must leave the Netherlands voluntarily within four weeks. That provision was adopted in order to transpose Article 7(1) of Directive 2008/115 into Netherlands law.

14 Under Article 62(2) of that law, the Staatssecretaris may shorten the period applicable to a foreign national to whom Article 62(1) applies or, by way of derogation from paragraph 1, determine that a foreign national must leave the Netherlands immediately if:

- a. there is a risk that the foreign national may evade surveillance;
- b. the foreign national's application for the granting or extension of the period of validity of a residence permit has been refused as being manifestly unfounded or on the ground that incorrect or incomplete information was provided;
- c. the foreign national poses a risk to public policy, public security or national security.

15 Article 62(2) of the Law on Foreign Nationals was adopted in order to transpose Article 7(4) of Directive 2008/115 into Netherlands law.

16 Under Article 62a(1) of the Law on Foreign Nationals, the Staatssecretaris must, in writing, inform a foreign national who is not a European Union national and is no longer legally resident of the obligation to leave the Netherlands voluntarily and of the period within which he must comply with that obligation.

17 As of 9 February 2012, it is stated in paragraph A3/3 of the Circular of 2000 on Foreign Nationals (Vreemdelingencirculaire 2000, 'the Circular on Foreign Nationals') that, under Article 62(2) of the Law on Foreign Nationals, the departure period may be shortened or not applied if the foreign national poses a danger to public policy, public security or national security. Paragraph A3/3 also states that any person suspected or convicted in respect of an act punishable as a criminal offence under national law is deemed to pose a risk to public policy. The acceptance of a compromise in relation to an offence is also deemed to constitute a risk to public policy. A suspicion must be capable of being confirmed by the chief of police.

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

The facts concerning Mr Zh.

18 Mr Zh., a third-country national, was detained on 8 June 2011 at Schiphol Airport (the Netherlands), while in transit to Canada, on the ground that he was travelling with a false travel document. By judgment of the politierechter te Haarlem (Magistrate's Court, Haarlem) of 21 June 2011, he was given a custodial sentence, under Article 231(2) of the Netherlands Criminal Code (Wetboek van Strafrecht), of two months for being in possession of a travel document which he knew to be false. By decision of 4 August 2011, the Staatssecretaris ordered Mr Zh. to leave European Union territory immediately. On 5 August 2011, following the custodial sentence, Mr Zh. was placed in pre-deportation detention under the introductory part and point (a) of Article 59(1) of the Law on Foreign Nationals.

19 By decision of 2 September 2011, the Staatssecretaris dismissed the complaint brought by Mr Zh. against the return decision of 4 August 2011, on the basis that the offence committed by Mr Zh. made it necessary to dispense with a voluntary departure period. By judgment of 8 November 2011, the Rechtbank 's-Gravenhage (District Court, The Hague) declared the action brought by Mr Zh. against that decision unfounded.

20 The Rechtbank 's-Gravenhage was of the view that, in the case of Mr Zh., who was residing illegally within the territory of a Member State, had no ties with any citizen of the European Union and, in addition, had been given a custodial sentence of two months for being in possession of a travel document which he knew to be false, the Staatssecretaris was entitled to assume that he posed a risk to public policy within the meaning of Article 7(4) of Directive 2008/115. Although the Rechtbank 's-Gravenhage stated that such a finding was not such as to dispense the Staatssecretaris from the obligation to set out the reasons why no period for voluntary departure had been granted to Mr Zh., that court nevertheless found that the facts relied on by Mr Zh. did not warrant the Staatssecretaris departing from the principle that a period for voluntary departure is not granted where there is a risk to public policy.

21 Mr Zh. lodged an appeal against the judgment of the Rechtbank 's-Gravenhage before the Raad van State (Council of State).

22 On 14 December 2011, the detention measure imposed on Mr Zh. was lifted on the ground that he had been deported.

The facts concerning Mr O.

23 Mr O., a third-country national, entered the Netherlands on a 21-day short-stay visa on 16 January 2011. On 23 November 2011, Mr O. was detained on the basis of Articles 300(1) and 304(1) of the Netherlands Penal Code on suspicion of domestic abuse of a woman. By decision of 24 November 2011, the Staatssecretaris ordered Mr O. to immediately leave European Union territory. The same day, Mr O. was placed in detention.

24 By decision of 17 January 2012, the Staatssecretaris dismissed as inadmissible, primarily, and as unfounded, in the alternative, the complaint lodged by Mr O. against the decision of 24 November 2011. The Staatssecretaris relied on the fact that Mr O. had been detained on 23 November 2011 under Articles 300(1) and 304(1) of the Netherlands Penal Code, on the ground that he was suspected of domestic abuse of a woman. The Staatssecretaris therefore held that Mr O. posed a risk to public policy within the meaning of Article 7(4) of Directive 2008/115 and that, for that reason, it was necessary to dispense with a voluntary departure period.

25 By order of 1 February 2012, the voorzieningenrechter van de Rechtbank 's-Gravenhage (the court hearing the application for interim measures of the District Court, the Hague) declared the action brought by Mr O. against the decision of the Staatssecretaris of 17 January 2012 to be well-founded, annulled that decision and requested the Staatssecretaris to adopt a new decision taking into consideration the findings in that order. In particular, that court held, first, that Mr O. had a legitimate interest in obtaining a decision on the complaint which he had brought and that the Staatssecretaris had erred in declaring that complaint inadmissible. Secondly, that court held that there were no policy guidelines on shortening the period for voluntary departure in the interests of public policy and that the Staatssecretaris had failed to provide adequate reasons as to why Mr O. posed a risk to public policy. According to that court, the report which stated, essentially, that Mr O. had been detained on grounds of domestic abuse was an inadequate basis on which to determine that public policy justified the refusal of a voluntary departure period. In that regard, the Rechtbank 's-Gravenhage also took into consideration the fact that the Staatssecretaris did not have any documentation substantiating the alleged abuse.

26 The Staatssecretaris lodged an appeal against that order of the voorzieningenrechter van de Rechtbank 's-Gravenhage before the Raad van State.

27 On 23 February 2012, the detention measure imposed on Mr O. was lifted on the ground that he had been deported.

The questions referred for a preliminary ruling

28 The referring court joined the proceedings concerning Mr Zh. to those concerning Mr O. at the hearing which took place before that court on 10 July 2013.

29 That court observes that Directive 2008/115 does not contain any definition of the concept of 'risk to public policy' in Article 7(4) of that directive and adds that the history of that concept provides no clues as to its scope. It points out that, since that provision also does not contain any express reference to the law of the Member States, that concept should, according to the settled case-law of the Court (see, inter alia, judgments in *Ekro*, 327/82, EU:C:1984:11, paragraph 11, and *Brouwer*, C-355/11, EU:C:2012:353, paragraph 36), be given an independent and uniform interpretation, considering its usual meaning in everyday language, and taking into account the context in which it occurs and the purposes of the rules of which it forms part.

30 The referring court concludes from the foregoing that, contrary to the submission made by the Staatssecretaris, the Member States are not at liberty to give their own interpretation, based solely on national law, to the concept of ‘risk to public policy’ in Article 7(4) of Directive 2008/115.

31 That court observes that, on the basis of Article 27(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35 and OJ 2005 L 197, p. 34), of Article 6(1) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44) and of Article 6(1) and (2) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12), a Member State may on grounds of public policy restrict the freedom of movement and residence of EU citizens and members of their families, refuse to grant long-term residence status, reject an application for entry and residence of a family member of an EU citizen and withdraw or refuse to renew a family member’s residence permit. It observes, however, that the concept of ‘grounds of public policy’ is interpreted differently in each of those directives, since the factors which a Member State is required to take into account in its assessment of that concept vary.

32 The referring court also notes that the objective, the context and the wording of those directives are materially different from the objective, the context and the wording of Directive 2008/115. Whereas Directives 2004/38, 2003/109 and 2003/86 concern the legal residence in the European Union of EU citizens and the members of their families and long-term residents and members of their families, Directive 2008/115 is concerned with the return of third-country nationals staying illegally within the territory of an EU Member State. Refraining from granting a period for voluntary departure to third-country nationals in relation to whom it has already been established that they are staying illegally in the territory of a Member State constitutes, according to that court, a less restrictive measure than a decision resulting in the refusal, limitation or termination of their lawful residence in the territory of a Member State on the basis of Directives 2004/38, 2003/109 and 2003/86.

33 The referring court therefore takes the view that, having regard to the material differences between those three directives, on the one hand, and Directive 2008/115, on the other, the interpretation of the concept of public policy within the meaning of Directives 2004/38, 2003/109 and 2003/86 should not serve as a basis for the purposes of the interpretation of the concept of public policy within the meaning of the directive at issue in the main proceedings.

34 In particular, the referring court is of the opinion that the concept of ‘risk to public policy’ in Article 7(4) of Directive 2008/115 may be interpreted more broadly than the concept of ‘grounds of public policy’ in Directives 2004/38, 2003/109 and 2003/86, with

the consequence that the mere suspicion that a third-country national has committed an act punishable as a criminal offence under national law may be sufficient to establish that that third-country national poses a ‘risk to public policy’ within the meaning of Article 7(4) of Directive 2008/115. However, in the light of its uncertainty concerning that issue, that court seeks guidance from the Court as to whether Article 7(4) must be interpreted to that effect, or whether a final and absolute conviction of the person concerned is necessary if he is to fall within the scope of that provision.

35 The referring court also raises the issue of what circumstances, other than the fact that a third-country national is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law, must be taken into account by the national authority in assessing whether that national poses a risk to public policy within the meaning of Article 7(4) of Directive 2008/115.

36 In that regard, the referring court states that Mr Zh., at the hearing in connection with his detention for the purposes of deportation, declared that he was in transit to Canada and that he had never had any intention of staying in the Netherlands. Mr O., for his part, submitted in his action that there had, wrongly, been no weighing up of the individual interests at stake as regards the risk to public policy. The referring court is of the opinion that it might even be inferred from the judgment in *El Dridi* (C-61/11 PPU, EU:C:2011:268) and from Directives 2008/115, 2003/109 and 2003/86 that the Member States must take into consideration circumstances such as the nature and seriousness of the act punishable as an offence under national law, the time which has elapsed since that act was committed and the intention of the person concerned to leave the European Union.

37 According to that court, the outcome of the disputes before it thus depends on the interpretation of Article 7(4) of Directive 2008/115.

38 In those circumstances, the Raad van State decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does a third-country national who is staying illegally within the territory of a Member State pose a risk to public policy, within the meaning of Article 7(4) of Directive 2008/115 ..., merely because he is suspected of having committed a criminal offence under national law, or is it necessary that he should have been convicted in a criminal court for the commission of that offence and, in the latter case, must that conviction have become final and absolute?’

(2) In the assessment as to whether a third-country national who is staying illegally within the territory of a Member State poses a risk to public policy within the meaning of Article 7(4) of [Directive 2008/115], do other facts and circumstances of the case, in addition to a suspicion or a conviction, also play a role, such as the severity or type of criminal offence under national law, the time that has elapsed and the intention of the person concerned?’

(3) Do the facts and circumstances of the case which are relevant to the assessment referred to in [the second question] also have a role to play in the option provided for in Article 7(4) of [Directive 2008/115], in a case where the person concerned poses a risk to public policy within the meaning of that provision, of being able to choose between, on the one hand, refraining from granting a period for voluntary departure and, on the other hand, granting a period for voluntary departure which is shorter than seven days?’

Consideration of the questions referred

The first question

39 By its first question, the referring court asks, in essence, whether Article 7(4) of Directive 2008/115 must be interpreted as precluding a national practice whereby a third-country national who is staying illegally within the territory of a Member State is deemed to pose a risk to public policy within the meaning of that provision on the sole ground that he is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law. It also asks whether, in the event that a criminal conviction is required, it must have become final and absolute.

40 In the present case, as is apparent from the information provided by the Netherlands Government at the hearing, at the date of the facts at issue in the main proceedings, the Staatssecretaris’ practice consisted in following the approach which is now set out, essentially, in the Circular on Foreign Nationals, which provides, as paragraph 17 above shows, that any suspicion confirmed by the chief of police or any conviction in connection with an act punishable as a criminal offence in national law is considered to be a risk to public policy.

41 It must be observed at the outset that the concept of ‘risk to public policy’ is neither included in the concepts defined in Article 3 of Directive 2008/115 nor defined by other provisions of that directive.

42 It is settled case-law that the meaning and scope of terms for which EU law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part. When those terms appear in a provision which constitutes a derogation from a principle, they must be read so that that provision can be interpreted strictly. Furthermore, the preamble to a European Union measure may explain the measure’s content (see, to that effect, judgment in *Wallentin-Hermann*, C-549/07, EU:C:2008:771, paragraph 17 and the case-law cited).

43 Thus, it must first be observed that Directive 2008/115, in Chapter II thereof, entitled ‘Termination of Illegal Stay’, lays down the conditions under which the illegal stay of third-country nationals in the territory of a Member State comes to an end. The provisions relating to the voluntary departure of those nationals, set out in Article 7 of that directive, directly follow those relating to the return decision, set out in Article 6.

44 As is apparent from recital 10 in the preamble to Directive 2008/115, priority is to be given, except where otherwise provided for, to voluntary compliance with the obligation resulting from that return decision, Article 7(1) of Directive 2008/115 providing that the decision must provide for an appropriate period for voluntary departure of between 7 and 30 days (see judgment in *El Dridi*, C-61/11 PPU, EU:C:2011:268, paragraph 36).

45 Under Article 7(2) of Directive 2008/115, Member States must, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.

46 Article 7(4) of that directive provides that it is only in particular circumstances, such as where there is a risk to public policy, that Member States may grant a period shorter than seven days for voluntary departure or even refrain from granting such a period (see, to that effect, judgment in *El Dridi*, C-61/11 PPU, EU:C:2011:268, paragraph 37). As the Advocate General observed in point 43 of her Opinion, to be able to rely on the derogation provided for in that provision on the ground that there is a risk to public policy, a Member State must be able to prove that the person concerned in fact constitutes such a risk.

47 Secondly, by providing that the Member States are, in principle, required to grant a period for voluntary departure to illegally-staying third-country nationals, Article 7 of Directive 2008/115 seeks, inter alia, to ensure that the fundamental rights of those nationals are observed in the implementation of a return decision taken under Article 6 of that directive. In accordance with Article 79(2) TFEU, the objective of Directive 2008/115 is, as is apparent from recitals 2 and 11 in the preamble thereto, to establish an effective removal and repatriation policy, based on common standards and common legal safeguards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity (see judgment in *Mahdi*, C-146/14 PPU, EU:C:2014:1320, paragraph 38).

48 It follows from this that, while Member States essentially retain the freedom to determine the requirements of public policy in accordance with their national needs, which can vary from one Member State to another and from one era to another, the fact still remains that, in the European Union context and particularly when relied upon as a justification for derogating from an obligation designed to ensure that the fundamental rights of third-country nationals are respected when they are removed from the European Union, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union (see, by analogy, judgment in *Gaydarov*, C-430/10, EU:C:2011:749, paragraph 32 and the case-law cited).

49 Lastly, recital 6 in the preamble to Directive 2008/115 states that the Member States should ensure that the ending of the illegal stay of third-country nationals is carried out through a fair and transparent procedure. That recital also states that, according to

general principles of EU law, decisions taken under that directive should be adopted on a case-by-case basis and be based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay (see judgment in *Mahdi*, C-146/14 PPU, EU:C:2014:1320, paragraph 40). In particular, as the Court has already held, the principle of proportionality must be observed throughout all the stages of the return procedure established by that directive, including the stage relating to the return decision, in the context of which the Member State concerned must rule on the grant of a period for voluntary departure under Article 7 of that directive (see, to that effect, judgment in *El Dridi*, C-61/11 PPU, EU:C:2011:68, paragraph 41).

50 Accordingly, it must be held that a Member State is required to assess the concept of ‘risk to public policy’, within the meaning of Article 7(4) of Directive 2008/115, on a case-by-case basis, in order to ascertain whether the personal conduct of the third-country national concerned poses a genuine and present risk to public policy. When it relies on general practice or any assumption in order to determine such a risk, without properly taking into account the national’s personal conduct and the risk that that conduct poses to public policy, a Member State fails to have regard to the requirements relating to an individual examination of the case concerned and to the principle of proportionality. It follows that the fact that a third-country national is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law cannot, in itself, justify a finding that that national poses a risk to public policy within the meaning of Article 7(4) of Directive 2008/115.

51 It must nevertheless be stated that, in the event of a criminal conviction, a Member State may find that there is a risk to public policy even where that conviction has not become final and absolute, where that conviction, taken together with other circumstances relating to the situation of the person concerned, justifies such a finding. The fact that a criminal conviction has not become final and absolute therefore does not preclude a Member State from relying on the derogation provided for in Article 7(4) of Directive 2008/115. As the Advocate General observed in point 65 of her Opinion, there is no basis in the wording of that directive for applying such a condition and it would run counter to the purpose pursued by Article 7 of that directive of laying down a specific time-limit for voluntary departure, since the time-limit laid down to that effect might be overrun in many cases by dint of the length of the national legal proceedings.

52 Moreover, the mere suspicion that a third-country national has committed an act punishable as a criminal offence under national law may, together with other factors relating to the case in question, be used as a basis for a finding that he poses a risk to public policy within the meaning of Article 7(4) of Directive 2008/115 since, as is apparent from paragraph 48 above, the Member States essentially retain the freedom to determine the requirements of the concept of public policy in accordance with their national needs and neither Article 7 nor any other provision of that directive permits the inference that a criminal conviction is necessary in that regard.

53 Consequently, in the present case it is for the referring court to ascertain whether, as the file before the Court seems to show, the findings of the Staatssecretaris in the cases

of Mr Zh. and Mr O., according to which those individuals each pose a risk to the public policy of the Netherlands, are based, in Mr Zh.'s case, on the sole ground that he was convicted of an act punishable as a criminal offence under Netherlands law and, in Mr O.'s case, on the sole ground that he was suspected of such an act.

54 In the light of the foregoing considerations, the answer to the first question is that Article 7(4) of Directive 2008/115 must be interpreted as precluding a national practice whereby a third-country national, who is staying illegally within the territory of a Member State, is deemed to pose a risk to public policy within the meaning of that provision on the sole ground that he is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law.

The second question

55 By its second question, the referring court asks, in essence, whether Article 7(4) of Directive 2008/115 must be interpreted to the effect that, in the case of a third-country national who is staying illegally within the territory of a Member State and is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law, other factors, such as the nature and seriousness of that act, the time which has elapsed since it was committed and the fact that that national was in the process of leaving the territory of that Member State when he was detained by the national authorities, may be relevant in the assessment of whether he poses a risk to public policy within the meaning of that provision.

56 It must be observed at the outset that the factors relevant to the determination of whether there is a risk to public policy within the meaning of Article 7(4) of Directive 2008/115 are not materially the same as those which are relevant to the assessment of whether there is a risk of absconding within the meaning of that provision, the concept of 'risk of absconding' being distinct from that of 'risk to public policy' (as regards the concept of 'risk of absconding' within the meaning of that provision, see, in particular, judgment in *Mahdi*, C-146/14 PPU, EU:C:2014:1320, paragraphs 65 to 74).

57 Secondly, as is apparent from paragraph 50 above, the assessment of the concept of 'risk to public policy' within the meaning of Article 7(4) of Directive 2008/115 must be made on a case-by-case basis, in order to ascertain whether the personal conduct of the third-country national concerned poses a genuine and present risk to the public policy of the Member State concerned.

58 Although article 7(4) of Directive 2008/115 is not identically worded in all language versions, since some use the term 'danger' while others use the term 'risk', having regard to the usual meaning of the terms 'danger' and 'risk' in everyday language and in the light of the context in which they occur and the purposes of the rules of which they are part, as described in paragraphs 43 to 49 above, those terms must, on any view, be understood in the sense of 'threat'.

59 Moreover, a specific appraisal of the interests inherent in protecting the requirements of public policy within the meaning of Article 7(4) of Directive 2008/115 does not necessarily coincide with the appraisals which form the basis of a criminal conviction (see, by analogy, judgment in *Bouchereau*, 30/77, EU:C:1977:172, paragraph 27).

60 In those circumstances, it must be held that the concept of ‘risk to public policy’, as set out in Article 7(4) of that directive, presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (see, by analogy, judgment in *Gaydarov*, C-430/10, EU:C:2011:749, paragraph 33 and the case-law cited).

61 It follows that any factual or legal matter relating to the situation of the third-country national concerned which may throw light on whether his personal conduct poses such a threat is relevant to the assessment of that concept.

62 Consequently, the relevant matters in that regard, in the case of a third-country national who is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law, include the nature and the seriousness of that act and the time which has elapsed since it was committed.

63 Moreover, in the present case, it is apparent from the file sent to the Court that Mr Zh. was in transit to Canada when he was detained by the Netherlands authorities. The fact that he was in the process of leaving the Kingdom of the Netherlands when he was arrested may be relevant to the determination of whether, when the return decision against him was taken, he posed a risk to the public policy of that Member State. That is for the referring court to determine. That court is under an obligation in this connection to assess all the facts and, in particular, to evaluate the weight to be attributed to that circumstance in the context of the case before it.

64 In Mr O.’s case, it is apparent from the order for reference that the Staatssecretaris did not possess any documentation substantiating the accusation of abuse made against him. That fact is relevant to the assessment of whether he posed a risk to public policy within the meaning of Article 7(4) of Directive 2008/115 since it relates to the credibility of the suspicion that he committed the alleged act and it may therefore throw light on the issue of whether his personal conduct posed a risk to the public policy of the Netherlands when the return decision against him was taken.

65 Having regard to the foregoing considerations, the answer to the second question is that Article 7(4) of Directive 2008/115 must be interpreted to the effect that, in the case of a third-country national who is staying illegally within the territory of a Member State and is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law, other factors, such as the nature and seriousness of that act, the time which has elapsed since it was committed and the fact that that national was in the process of leaving the territory of that Member State when he was detained by the

national authorities, may be relevant in the assessment of whether he poses a risk to public policy within the meaning of that provision. any matter which relates to the credibility of the suspicion that the third-country national concerned committed the alleged criminal offence is also relevant to that assessment.

The third question

66 By its third question, the referring court asks, in essence, whether Article 7(4) of Directive 2008/115 must be interpreted as meaning that it is necessary, in order to make use of the option offered by that provision to refrain from granting a period for voluntary departure when the third-country national poses a risk to public policy, to conduct a fresh examination of the matters which have already been examined in order to establish the existence of that risk.

67 In the present case, the Netherlands Government explains that, in practice, a finding that there is a risk to public policy constitutes, as a general rule, a ground for the competent national authorities not to grant the person concerned a period for voluntary departure but that those authorities may depart from that rule in the event that the particular circumstances of the case warrant it, in which case a period of 28 days is granted.

68 It must first be observed that Article 7(4) of Directive 2008/115 provides that Member States ‘may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days’ without however stating how that choice must be made.

69 Secondly, as the Court has already held, the right to be heard before the adoption of a return decision implies that the competent national authorities are under an obligation to enable the person concerned to express his point of view on the detailed arrangements for his return, such as the period allowed for departure and whether return is to be voluntary or coerced (see the judgment in *Boudjlida*, C-249/13, EU:C:2014:2431, paragraph 51). Moreover, as is apparent from recitals 2, 6, 11 and 24 in the preamble to Directive 2008/115 and from Article 5 thereof, according to general principles of EU law, including the principle of proportionality, decisions taken under that directive must be adopted on a case-by-case basis and properly take into account the fundamental rights of the person concerned.

70 It follows from the foregoing that a Member State cannot refrain automatically, by legislative means or in practice, from granting a voluntary period for departure where the person concerned poses a risk to public policy. The correct exercise of the option to that effect provided for in Article 7(4) of Directive 2008/115 requires that there must be a case-by-case assessment of whether the refusal to grant such a period is compatible with that person’s fundamental rights.

71 It is for the referring court to examine to what extent the return procedure in force in the Netherlands complies with the requirements set out in the preceding paragraph of this judgment.

72 Lastly, although, as is apparent from paragraph 47 above, the Member States are, in principle, required to grant a period for voluntary departure to third-country nationals against whom a return decision has been taken pursuant to Article 6 of Directive 2008/115 in order to ensure that their fundamental rights are observed in the implementation of such a decision, it nevertheless follows from the wording of Article 7(4) of that directive and the general scheme of that article that the derogation provided for in Article 7(4) is also intended to allow the Member State concerned to ensure the protection of its public policy.

73 Consequently, where it is established, on the basis of an examination conducted in accordance with the requirements set out in connection with the first and second questions referred, that the individual concerned poses a genuine and present risk to public policy, Article 7(4) of Directive 2008/115 provides for the option to refrain from granting him a period for voluntary departure. That option arises as a result of that risk and the Member State may therefore, provided the general principles of EU law and the fundamental rights of the individual concerned are respected, make use of that option without needing to conduct a fresh examination of the matters found to be relevant in establishing the existence of that risk.

74 That said, it is open to the Member State concerned to take account of those matters, which may in particular be relevant when that Member State evaluates whether it is appropriate to grant a period for voluntary departure shorter than seven days.

75 In the light of the foregoing considerations, the answer to the third question is that Article 7(4) of Directive 2008/115 must be interpreted as meaning that it is not necessary, in order to make use of the option offered by that provision to refrain from granting a period for voluntary departure when the third-country national poses a risk to public policy, to conduct a fresh examination of the matters which have already been examined in order to establish the existence of that risk. Any legislation or practice of a Member State on this issue must nevertheless ensure that a case-by-case assessment is conducted of whether the refusal to grant such a period is compatible with that person's fundamental rights.

Costs

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

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

- 1. Article 7(4) 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 must be interpreted as precluding a national practice whereby a third-country national, who is staying**

illegally within the territory of a Member State, is deemed to pose a risk to public policy within the meaning of that provision on the sole ground that that national is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law.

2. Article 7(4) of Directive 2008/115 must be interpreted to the effect that, in the case of a third-country national who is staying illegally within the territory of a Member State and is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law, other factors, such as the nature and seriousness of that act, the time which has elapsed since it was committed and the fact that that national was in the process of leaving the territory of that Member State when he was detained by the national authorities, may be relevant in the assessment of whether he poses a risk to public policy within the meaning of that provision. Any matter which relates to the reliability of the suspicion that the third-country national concerned committed the alleged criminal offence, as the case may be, is also relevant to that assessment.

3. Article 7(4) of Directive 2008/115 must be interpreted as meaning that it is not necessary, in order to make use of the option offered by that provision to refrain from granting a period for voluntary departure when the third-country national poses a risk to public policy, to conduct a fresh examination of the matters which have already been examined in order to establish the existence of that risk. Any legislation or practice of a Member State on this issue must nevertheless ensure that a case-by-case assessment is conducted of whether the refusal to grant such a period is compatible with that person's fundamental rights.

[Signatures]

* Language of the case: Dutch.
