

## CJEU ? Case C-181/16 Ghandi, 19 June 2018

**Country of Applicant:**

Togo

**Date of Decision:**

19-06-2018

**Citation:**

Court of Justice of the European Union, Case C-181/16 Ghandi, 19 June 2018

**Court Name:**

Court of Justice of the European Union

**Keywords:**[Right to remain pending a decision \(Suspensive effect\)](#) [1][Reception conditions](#) [2][Return](#) [3]**Relevant Legislative Provisions:**

International Law

International Law > [1951 Refugee Convention](#) [4]International Law > [1951 Refugee Convention](#) [4] > [Art 33](#) [5] > Art 33.1International Law > [1951 Refugee Convention](#) [4] > [Art 33](#) [5]European Union Law > [EN - Asylum Procedures Directive, Council Directive 2005/85/EC of 1 December 2005](#) [6] > Recital 2European Union Law > [EN - Asylum Procedures Directive, Council Directive 2005/85/EC of 1 December 2005](#) [6] > Recital 8European Union Law > [EN - Asylum Procedures Directive, Council Directive 2005/85/EC of 1 December 2005](#) [6] > [Art 7](#) [7]European Union Law > [EN - Asylum Procedures Directive, Council Directive 2005/85/EC of 1 December 2005](#) [6] > [Art 39](#) [8]European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [9] > [Recital \(2\)](#) [10]European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [9] > [Recital \(4\)](#) [11]European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [9] > [Recital \(6\)](#) [12]European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [9] > [Recital \(8\)](#) [13]European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [9] > [Recital \(9\)](#)

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European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [9] > [Article 3](#) [18]  
European Union Law > [EN - Recast Asylum Procedures Directive 2013/32/EU of the European Parliament and of the Council](#) [19] > [Recital \(9\)](#) [20]  
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European Union Law > [EN - Recast Reception Conditions Directive, Directive 2013/33/EU of 26 June 2013](#) [23] > [Article 2](#) [24]  
European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [9] > [Article 8](#) [25]  
European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [9] > [Article 9](#) [26]  
European Union Law > [EN - Recast Reception Conditions Directive, Directive 2013/33/EU of 26 June 2013](#) [23] > [Article 3](#) [27]

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**Headnote:**

Member States can issue a return decision together with, or right after, a negative decision on an asylum application at first instance, as long as they ensure that all judicial effects of the return decision are suspended during the time allowed to appeal and pending that appeal.

During that period, and despite being subjected to a return decision, an asylum applicant must enjoy all the rights under the Reception Conditions Directive. The applicant can rely upon any changes in circumstances affecting his claim that came up after the return decision, before the appeals authority.

**Facts:**

The applicant, a Togolese national, made an application for international protection in Belgium April 2011. In May 2014, the application was rejected; in June 2014 the applicant was ordered to leave Belgium.

The applicant brought an appeal against the decision to reject his application for international protection and requested the annulment and suspension of execution of the order requiring him to leave the territory.

The Belgian Courts refer the following question to the CJEU for a preliminary ruling:

?Must Article 5 of Directive [2008/115], which requires Member States to respect the principle of non-refoulement when they are implementing that directive, and the right to an effective remedy provided for under Article 13(1) of that directive and under Article 47 of the [Charter] be interpreted as precluding the adoption of a return decision, as provided for under Article 6 of Directive

[2008/115] and under Article 52/3(1) of the [Law of 15 December 1980] and Article 75(2) of the Royal Decree of 8 October 1981 on the entry to Belgian territory, stay, residence and removal of foreign nationals, immediately after the rejection of the asylum application by the [CGRA] and therefore before the legal remedies available against that rejection decision can be exhausted and before the asylum procedure can be definitively concluded??

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### **Decision & Reasoning:**

First, the Court noted that for a return order to be adopted, the individual must be regarded as staying unlawfully in the territory of the Member State within the meaning of Directive 2008/115. Based on the wording of Article 7(1) of Directive 2005/85, in conjunction with recital 9 of Directive 2008/115, the right to remain on the basis of an application for international protection ceases to exist once the competent authority rejects that application. Following that rejection, the applicant cannot be considered as fulfilling the conditions for stay and is, therefore, illegally staying in that Member State. Moreover, the Court [has previously held](#) [28] that an authorisation to remain in order to appeal against that first rejection of the individual's application precludes the application of Directive 2008/115 but this does not necessarily mean that that individual's stay is rendered illegal immediately upon rejection.

The Court considered that the provisions of Directive 2008/115 do not make the illegal character of the stay dependent on the outcome of any sort of appeal. The right of the applicant to remain under Article 7 (1) of Directive 2005/85 does aim to prevent the applicant's stay from being characterised as illegal up until the adoption of a first instance decision on the application for international protection but there is no other provision in Directives 2005/85 and 2008/115 that would aim to prevent this characterisation until the ending of the appeal proceedings too. Moreover, the scope of Directive 2008/15 and the concept of illegal stay do not presuppose that the individual will not have any other lawful possibility to remain, as is evidenced by Recital 12 of that Directive.

Looking into the objective of the Directive, the Court noted that the main aim is to establish an effective removal and repatriation policy which respects human rights, an aim that is reflected in Article 6 (6) which allows a single administrative act both ending the stay and ordering the return. Not considering a stay as illegal because an appeal is pending would undermine the purpose of the Directive as it would not permit joint handling of the two decisions (end of stay and order of return).

However, the CJEU reiterated that the implementation of the Return Directive must respect fundamental rights and legal principles, in particular those enshrined in the Charter of Fundamental Rights of the European Union (CFEU). With regard to a return decision and a possible removal, the right to an effective remedy under Article 47 CFEU and the principle of non-refoulement requires Member States to grant an asylum applicant the right to challenge the execution of a return decision at least before one judicial body, and this appeal shall have automatic suspensive effect.

According to the CJEU, it follows that while a Member State can adopt a return decision following a negative decision on an asylum application, that Member State is required to provide an effective remedy in accordance with the principle of equality of arms. This means that, all the effects of the return decision must be suspended during the period prescribed for lodging such an appeal and, if an appeal is lodged, until the judicial body takes a decision. To comply with its obligations, Member States must go beyond simply refraining from enforcing the return decision: it is necessary that the period for voluntary departure does not start running as long as the person concerned is allowed to stay and that the person is not placed in pre-deportation detention.

Moreover, Member States must inform the applicant, in a transparent manner, about his or her right to appeal against a negative decision and about the nature of this appeal.

Finally, the person concerned is to retain his status as an applicant for international protection until a final decision is adopted in relation to that application. Under Directive 2003/9, Article 3(1) is applied when there is an authorisation to remain on the territory as an applicant without excluding the Directive's application in cases where the individual has an authorisation but is staying illegally within the meaning of Directive 2008/115. Thus, that person must benefit from the rights under the Reception Conditions Directive. In addition, Member States must allow applicants to rely on any change in circumstances occurred after the adoption of the return decision which may have a significant bearing on the assessment of their situation.

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#### **Outcome:**

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 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, and in the light of the principle of non-refoulement and the right to an effective remedy, enshrined in Article 18, Article 19(2) and Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding the adoption of a return decision, under Article 6(1) of Directive 2008/115, in respect of a third-country national who has applied for international protection, immediately after the rejection of that application by the determining authority or together in the same administrative act, and thus before the conclusion of any appeal proceedings brought against that rejection, provided, inter alia, that the Member State concerned ensures that all the legal effects of the return decision are suspended pending the outcome of the appeal, that that applicant is entitled, during that period, to benefit from the rights arising under Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, and that he is entitled to rely on any change in circumstances that occurred after the adoption of the return decision which may have a significant bearing on the assessment of his situation under Directive 2008/115, and in particular under Article 5 thereof, those being matters for the referring court to determine.

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#### **Case Law Cited:**

CJEU - C-373/13, H.T., 24 June 2015

CJEU - C-601/15 PPU, 15 February 2016

CJEU - C-47/15, Affum, 7 June 2016

CJEU - C 239/14, Tall, 17 December 2015

CJEU - C 165/14, Rendón Marín, 13 September 2016

National Asylum Court decision n°18011742 of 23 July 2018

[ECRE : Preliminary Deference? The impact of the Court of Justice of the EU in cases X.Y.Z., A.B.C. and Cimade and Gisti on national law and the use of the EU Charter of Fundamental Rights \[29\]](#)

[CJEU - C-166/13, Sophie Mukarubega v Préfet de police, Préfet de la Seine-Saint-Denis](#)

[30]

C-146/14 Bashir Mohamed Ali Mahdi

[CJEU - C-474/13, Thi Ly Pham v Stadt Schweinfurt, Amt für Meldewesen und Statistik](#) [31]

[CJEU - C-562/13, Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida](#) [32]

[CJEU - C-69/10, Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration](#) [33]

[CJEU - C-411-10 and C-493-10, Joined cases of N.S. v United Kingdom and M.E. v Ireland](#) [34]

[CJEU - C-534/11 Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie](#) [35]

**Attachment(s):**



[CJEU Case C-181-16 Gnandi 19 June 2018.pdf](#)[36]

**Authentic Language:**

English

**Country of preliminary reference:**

Belgium

**National / Other Legislative Provisions:**

Belgium - Aliens Law of 15 December 1980 - Article 52/3(1)

Belgium - Royal Decree of 8 October 1918 - Article 75(2)

Belgium - Aliens Law of 15 December 1980 - Article 39/70 (1)

**Links:**

- [1] [https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field\\_keywords%3A71](https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A71)
- [2] [https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field\\_keywords%3A753](https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A753)
- [3] [https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field\\_keywords%3A2490](https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A2490)
- [4] <http://www.asylumlawdatabase.eu/en/content/1951-refugee-convention>
- [5] <http://www.asylumlawdatabase.eu/en/content/1951-refugee-convention#33>
- [6] <http://www.asylumlawdatabase.eu/en/content/asylum-procedures-directive>
- [7] <http://www.asylumlawdatabase.eu/en/content/asylum-procedures-directive#Art%207>
- [8] <http://www.asylumlawdatabase.eu/en/content/asylum-procedures-directive#Art 39>
- [9] <https://www.asylumlawdatabase.eu/node/1306>
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- [18] [https://www.asylumlawdatabase.eu/node/1306#toc\\_52](https://www.asylumlawdatabase.eu/node/1306#toc_52)
- [19] <https://www.asylumlawdatabase.eu/node/3946>

[20] [https://www.asylumlawdatabase.eu/node/3946#toc\\_18](https://www.asylumlawdatabase.eu/node/3946#toc_18)

[21] [https://www.asylumlawdatabase.eu/node/1306#toc\\_86](https://www.asylumlawdatabase.eu/node/1306#toc_86)

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[25] [https://www.asylumlawdatabase.eu/node/1306#toc\\_101](https://www.asylumlawdatabase.eu/node/1306#toc_101)

[26] [https://www.asylumlawdatabase.eu/node/1306#toc\\_109](https://www.asylumlawdatabase.eu/node/1306#toc_109)

[27] [https://www.asylumlawdatabase.eu/node/4039#toc\\_73](https://www.asylumlawdatabase.eu/node/4039#toc_73)

[28]

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=137831&pageIndex=0&do>

[29] <https://www.asylumlawdatabase.eu/en/content/ecre-preliminary-deference-impact-court-justice-eu-cases-xyz-abc-and-cimade-and-gisti>

[30] <https://www.asylumlawdatabase.eu/en/content/cjeu-c-16613-sophie-mukarubega-v-pr%C3%A9fet-de-police-pr%C3%A9fet-de-la-seine-saint-denis>

[31] <https://www.asylumlawdatabase.eu/en/content/cjeu-c%E2%80%919147413-thi-ly-pham-v-stadt-schweinfurt-amt-f%C3%BCr-meldewesen-und-statistik>

[32] <https://www.asylumlawdatabase.eu/en/content/cjeu-c-56213-centre-public-d%E2%80%99action-sociale-d%E2%80%99ottignies-louvain-la-neuve-v-moussa-abdida>

[33] <https://www.asylumlawdatabase.eu/en/content/cjeu-c-6910-brahim-samba-diouf-v-ministre-du-travail-de-l%E2%80%99emploi-et-de-l%E2%80%99immigration>

[34] <https://www.asylumlawdatabase.eu/en/content/cjeu-c-411-10-and-c-493-10-joined-cases-ns-v-united-kingdom-and-me-v-ireland>

[35] <https://www.asylumlawdatabase.eu/en/content/cjeu-c-53411-mehmet-arслан-v-policie-%C4%8Dr-krajsek%C3%A9-%C5%99editelstv%C3%AD-policie-%C3%BAsteck%C3%A9ho-kraje-odbor>

[36] <https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/CJEU%20Case%20C-181-16%20Gnandi%2019%20June%202018.pdf>