



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 13 December 2017¹

Case C-240/17

E

(Request for a preliminary ruling from the
Korkein hallinto-oikeus (Supreme Administrative Court, Finland))

(Request for a preliminary ruling — Area of freedom, security and justice — Schengen area — Return decision and entry ban against a third-country national — Alert for the purposes of refusing entry in the Schengen Information System — Third-country national convicted of criminal offences — Third-country national with a valid residence permit in another Member State within the Schengen area — Obligation to consult — Effects of ongoing consultations on enforcement of the return decision and the coming into force of the entry ban — Article 25(2) of the Convention implementing the Schengen Agreement — Directive 2008/115/EC)

I. Introduction

1. Since 1985, the name of the commune of Schengen in Luxembourg has been synonymous with the vision of free travel in a Europe without internal border controls. In the great majority of European Union Member States and in several neighbouring third countries, which together constitute the Schengen area, this vision has now become a reality. Today, the Schengen system is one of the cornerstones of the European area of freedom, security and justice.²

2. However, in order to ensure that this system functions in the long term and continues to enjoy the greatest possible public acceptance, common rules which effectively and consistently ensure that greater freedom within this area without internal borders does not come at the cost of security are indispensable. This means that countries concerned must retain control over the entry and residence of third-country nationals without neglecting the requirements of EU law and the rights and interests of the individuals concerned.

3. It is the delicate balance between these aspects that the Court must consider when examining the request for a preliminary ruling before it in the present case. It is necessary to determine how to proceed when a third-country national who has a valid residence permit in a Member State within the Schengen area is also subject to an entry ban imposed by another Member State within the Schengen area. In the absence of internal border controls, such an entry ban has, in principle, a European dimension and is valid for the entire Schengen area, and even beyond that, for all Member States of the European Union.

¹ Original language: German.

² See in that regard Article 3(2) TEU and Article 67(2) TFEU, as well as Protocol No 19 to the TEU and to the TFEU (Protocol on the Schengen *acquis* integrated into the framework of the European Union, OJ 2008 C 115, p. 290; this protocol dates back to the Treaty of Amsterdam).

4. Specifically, this case concerns Mr E, a Nigerian national who committed criminal offences in Finland. The Finnish authorities wish to return him to Nigeria, his home country, and have issued him with a Schengen-wide entry ban although he is still permitted to reside in Spain.

5. The EU legislation on the Schengen area provides in such cases for consultation between the Member States so as to facilitate coherent and consistent action by all authorities involved. The Member State issuing the entry ban must consult the Member State which issued the residence permit as to whether it intends to withdraw that residence permit. But what if the Member State consulted — in this case the Kingdom of Spain — does not respond for a prolonged period, although the consulting Member State — in this case the Republic of Finland — regards the individual in question as posing a threat to public safety and order and therefore wishes to deport him to his country of origin without delay?

6. This question, which is of great practical significance, is as yet unresolved. By its answer, the Court of Justice can contribute to the development of the common rules applicable in the Schengen area and also ensure the correct balance between the security interests of the Member States and the individual rights and interests of third-country nationals.³

II. Legal context

7. The EU law relevant to this case comprises, firstly, the Convention implementing the Schengen Agreement (CISA)⁴ and, secondly, 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.⁵ The Schengen Borders Code as amended by Regulation (EC) 2016/399⁶ is also relevant.⁷

A. The Convention implementing the Schengen Agreement

8. The CISA was signed by five Member States⁸ in Schengen (Luxembourg) on 19 June 1990 and entered into force on 26 March 1995. Pursuant to Protocol No 19 to the TEU and to the TFEU,⁹ it is today part of the Schengen *acquis*, which is integrated into the framework of the European Union and is applicable to the Schengen area, i.e. to almost all of the Member States of the European Union, including both the Republic of Finland and the Kingdom of Spain. The Schengen area also comprises a handful of third countries, such as the Swiss Confederation.¹⁰

³ Regarding the latter aspect, see judgments of 5 June 2014, *Mahdi* (C-146/14 PPU, EU:C:2014:1320, paragraph 46); of 5 November 2014, *Mukarubega* (C-166/13, EU:C:2014:2336, paragraph 39); and of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraph 38).

⁴ OJ 2000 L 239, p. 19.

⁵ OJ 2008 L 348, p. 98.

⁶ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1).

⁷ Regulation 2016/399 repealed and replaced the previous version of the Schengen Borders Code set out in Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 (OJ 2006 L 105, p. 1). The relevant provisions in the present case are in substance unchanged, however, and in the following I therefore refer exclusively to the version of the Schengen Borders Code currently in force.

⁸ The Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands.

⁹ Additionally, Council Decision 1999/436/EC of 20 May 1999 (OJ 1999 L 176, p. 17) determined the legal basis, in conformity with the various founding treaties of the European Union, of the individual provisions which constitute the Schengen *acquis*; pursuant to Annex A to that decision, Article 25 of the Convention Implementing the Schengen Agreement falls within the scope of Article 62 point 3 and Article 63 point 3 EC (now Articles 77 and 79 TFEU).

¹⁰ See in this regard the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*, which was signed in Luxembourg on 26 October 2004 and entered into force on 1 March 2008 (OJ 2008 L 53, p. 52), (the 'Swiss Schengen Association Agreement').

9. Article 25(2) of the CISA, which is contained in Chapter 5 (entitled ‘Residence permits and alerts for the purposes of refusing entry’) in Title II (entitled ‘Abolition of checks at internal borders and movement of persons’), reads as follows:

‘Where it emerges that an alert for the purposes of refusing entry has been issued for an alien who holds a valid residence permit issued by one of the Contracting Parties, the Contracting Party issuing the alert shall consult the Party which issued the residence permit in order to determine whether there are sufficient reasons for withdrawing the residence permit.

If the residence permit is not withdrawn, the Contracting Party issuing the alert shall withdraw the alert but may nevertheless put the alien in question on its national list of alerts.’

10. Title II of the CISA also contains Article 19, which is part of Chapter 4 (‘Conditions governing the movement of aliens’); paragraph 1 of that Article gives aliens the right to travel within the Schengen area:

‘Aliens who hold uniform visas and who have legally entered the territory of a Contracting Party may move freely within the territories of all the Contracting Parties during the period of validity of their visas, provided that they fulfil the entry conditions referred to in Article 5(1)(a), (c), (d) and (e).’

11. According to the definitions in Article 1 of the CISA, an ‘alien’ in this connection is any person other than a national of a Member State of the European Union. This term is therefore synonymous with ‘third-country national’, which is likewise frequently used in EU law. The same provision defines an ‘alien for whom an alert has been issued for the purposes of refusing entry’ as ‘an alien for whom an alert has been introduced into the Schengen Information System in accordance with Article 96 with a view to that person being refused entry’; a ‘residence permit’ is defined as ‘an authorisation of whatever type issued by a Contracting Party which grants right of residence within its territory ...’.

B. The Schengen Borders Code

12. Mention should also be made of the Schengen Borders Code as amended by Regulation 2016/399, Article 6 of which, concerning entry conditions for third-country nationals, provides as follows:

‘1. For intended stays on the territory of the Member States of a duration of no more than 90 days in any 180-day period, which entails considering the 180-day period preceding each day of stay, the entry conditions for third-country nationals shall be the following:

...

(d) they are not persons for whom an alert has been issued for the purposes of refusing entry in the [Schengen Information System].

...

5. by way of derogation from paragraph 1:

(a) third-country nationals who do not fulfil all the conditions laid down in paragraph 1 but who hold a residence permit or a long-stay visa shall be authorised to enter the territory of the other Member States for transit purposes so that they may reach the territory of the Member State which issued the residence permit or the long-stay visa, unless their names are on the national list of alerts of the Member State whose external borders they are seeking to cross and the alert is accompanied by instructions to refuse entry or transit;

...'

13. Paragraph 1 of Article 14 of the Schengen Borders Code, entitled 'Refusal of entry' further provides:

'A third-country national who does not fulfil all the entry conditions laid down in Article 6(1) and does not belong to the categories of persons referred to in Article 6(5) shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.'

C. Directive 2008/115

14. Finally, Directive 2008/115 is also worth mentioning; Chapter I of that Directive ('General Provisions') contains the following definitions in points in 3, 4, 6 and 8 of Article 3:

'...

3. "return" means the process of a third-country national going back — whether in voluntary compliance with an obligation to return, or enforced — to:

- his or her country of origin, or
- a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or
- another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted;

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;

...

6. "entry ban" means an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision;

...

8. "voluntary departure" means compliance with the obligation to return within the time-limit fixed for that purpose in the return decision;

...'

15. Chapter II of Directive 2008/115 ('Termination of illegal stay') contains inter alia Articles 6, 7 and 11.

16. Article 6 of Directive 2008/115 is entitled 'Return decision'. The first two paragraphs of that Article are worded as follows:

'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.'

17. The first two paragraphs of Article 7 ('Voluntary Departure') of Directive 2008/115 provide as follows:

- '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.'

18. Article 8 of Directive 2008/115, entitled 'Removal', reads in extract:

'1. Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7.

2. If a Member State has granted a period for voluntary departure in accordance with Article 7, the return decision may be enforced only after the period has expired, unless a risk as referred to in Article 7(4) arises during that period.

3. Member States may adopt a separate administrative or judicial decision or act ordering the removal.
...'

19. Article 9(2) of Directive 2008/115, which deals with 'postponement of removal', reads:

'Member States may postpone removal for an appropriate period taking into account the specific circumstances of the individual case ...'

20. Article 11 of Directive 2008/115, entitled 'Entry ban', provides in addition:

'1. Return decisions shall be accompanied by an entry ban:

- (a) if no period for voluntary departure has been granted, or
- (b) if the obligation to return has not been complied with.

In other cases return decisions may be accompanied by an entry ban.

2. The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years.

...'

21. Recitals 4, 6 and 14 of Directive 2008/115 also contain some points of clarification regarding these provisions:

'(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.

...

(6) Member States should ensure that the ending of illegal stay of third-country nationals is carried out through a fair and transparent procedure.

...

(14) The effects of national return measures should be given a European dimension by establishing an entry ban prohibiting entry into and stay on the territory of all the Member States. ...'

III. Facts and main proceedings

22. Mr E is a Nigerian national. On 24 January 2014, he was sentenced to a total of five years in prison by a Finnish criminal court for a number of serious narcotics offences¹¹ committed in Finland in 2013. That judgment has become final. Mr E served part of his custodial sentence in Finland.

23. Mr E has a residence permit for Spain, where he lived for 14 years and his family resides, which is valid until 11 February 2018. Accordingly, Mr E requested to be returned to Spain.

24. On 21 January 2015, however, the Maahanmuuttovirasto (Finnish Immigration Service) ordered the appellant to be returned to his home country, Nigeria, on the grounds that he posed a threat to public safety and order on account of the serious crimes he had committed in Finland. Alongside the expulsion order, an entry ban for the entire Schengen area was issued against Mr E for an indefinite period. He was not granted a period within which to depart voluntarily.

25. On 26 January 2015, the Immigration Service began consultations with the Kingdom of Spain, pursuant to Article 25(2) of the CISA, requesting the authorities in that Member State to give their opinion regarding the possibility of withdrawing Mr E's residence permit for that country. As the Spanish authorities did not respond, the Immigration Service repeated the request on 20 June 2016, and on 21 June 2016, at Spain's request, sent it the operative part of the judgment of the criminal court against Mr E. On 28 June 2016 and 9 November 2016, the Immigration Service again renewed its request to the Spanish authorities. According to the order for reference, the Spanish authorities have not yet made any substantive comments.

26. An action against the expulsion order brought by Mr E was dismissed at first instance by the Helsingin hallinto-oikeus (Administrative Court, Helsinki, Finland).¹² An appeal brought by Mr E is now pending before the referring court, the Korkein hallinto-oikeus (Supreme Administrative Court, Finland).

¹¹ The appellant was in possession of and sold, inter alia, at least 850 ecstasy tablets, imported 438 g of cocaine into Finland for the purpose of sale or delivery, and attempted to obtain at least 30 g of cocaine for the purpose of sale.

¹² The judgment at first instance was delivered on 5 April 2016.

27. The national courts seised of the dispute in the main proceedings consider that Mr E may be regarded as posing a threat to public safety and order. By order of 27 October 2016, however, the Korkein hallinto-oikeus (Supreme Administrative Court) suspended Mr E's expulsion for an indefinite period.

IV. Request for a preliminary ruling and procedure before the Court

28. By order of 2 May 2017, received on 10 May 2017, the Korkein hallinto-oikeus (Supreme Administrative Court) referred the following questions to the Court of justice for a preliminary ruling under Article 267 TFEU:

- '(1) Is Article 25(2) of the CISA to be interpreted as meaning that the obligation to consult among Contracting States has legal effects that can be relied on by third-country national in a situation in which a Contracting State imposes an entry ban for the entire Schengen Area and orders his return to his home country on the ground that he constitutes a threat to public order and public safety?
- (2) If Article 25(2) of Convention applies to the imposition of an entry ban,

must the consultations begin before the imposition of the entry ban or may the consultation start only after the imposition of the ban when the decision to deport that person and to impose an entry ban has been taken?
- (3) If the consultations may begin only afterwards, when the decision to return that person and to impose an entry ban has been taken,

does the fact that negotiations between Contracting States are on-going and that the other Contracting State has not indicated its intention to withdraw the residence permit of the third-country national prevent the decision to deport the third country national and the imposition of an entry ban with respect to the entire Schengen Area from taking effect?
- (4) How is a Contracting State to proceed in circumstances in which the Contracting State which granted the residence permit, despite repeated requests, has not expressed its views regarding the withdrawal of the residence permit granted to a third country national?'

29. As well as requesting a preliminary ruling, the referring court also asked the Court to apply the urgent preliminary ruling procedure in accordance with Article 107 of the Rules of Procedure. In response to a request by the Court pursuant to Article 101 of the Rules of Procedure, however, the referring court clarified on 2 June 2017 that Mr E's custodial sentence has been suspended since 24 January 2016 and that he is not currently in custody. Under the circumstances, the designated chamber decided pursuant to Article 108 of the Rules of Procedure not to apply the urgent preliminary ruling procedure. On 12 June 2017, however, the President of the Court of Justice, pursuant to Article 53(3) of the Rules of Procedure, decided that the case be given priority over others.

30. In the preliminary ruling proceedings before the Court, written observations were submitted by the Finnish, Belgian, German, Polish and Swiss¹³ Governments and the European Commission. Mr E, the Maahanmuuttovirasto (Finnish Immigration Service), the Finnish and Spanish Governments and the Commission were represented at the hearing on 9 November 2017. It should be noted that the Spanish Government participated in the hearing at the express request of the Court and in that connection presented observations regarding the questions referred and a number of questions put by the Court.

V. Admissibility of the request for a preliminary ruling

31. It emerged at the hearing that, on 2 November 2017, the Spanish authorities asked the Immigration Service for the expulsion order issued against Mr E in Finland for the purpose of commencing the procedure for withdrawing Mr E's residence permit in Spain. The Immigration Service complied with this request and sent Spain a copy of the expulsion order on 6 November 2017.

32. Even leaving aside the fact the Court was informed of the recent developments in the main proceedings by the parties and not officially notified of them by the referring court,¹⁴ one may wonder at first sight whether the request for a preliminary ruling has become devoid of purpose¹⁵ because the questions referred to the Court, which were originally admissible, were rendered purely hypothetical by the events of November 2017.

33. It must be borne in mind, however, that the Spanish authorities have not yet reached a final decision on withdrawal of Mr E's residence permit. In fact, they are reported merely to have commenced the proceedings that may result in the residence permit being withdrawn. As the Spanish Government clarified when specifically asked by the Court, it is not possible to predict when and with what result those national proceedings will be concluded. Mr E would also have access to the normal remedies before the Spanish courts against any withdrawal of his residence permit.

34. Until such time as there is a final decision from the Spanish authorities regarding withdrawal of Mr E's residence permit, it cannot be presumed that there are sufficient reasons for withdrawing the residence permit within the meaning of Article 25(2) of the CISA, or that that residence permit has already been withdrawn.

35. In light of this, it should be considered that the questions have lost none of their relevance for resolution of the dispute in the main proceedings, and the Court remains required to answer them.

VI. Substantive assessment of the questions referred

36. The focus of interest in the present case is the rule laid down in Article 25(2) of the CISA, which the referring court has requested this Court to interpret.

37. That provision, which is part of the Schengen *acquis*, stipulates that Member States within the Schengen area have an obligation to consult if one of these States issues a third-country national with a Schengen-wide entry ban even though another Member State has issued a residence permit, which is still valid, to the same third-country national. This is intended to encourage effective, coherent and consistent action by of the national authorities in the Schengen area.

¹³ Regarding Switzerland's right to participate in the preliminary ruling proceedings, see Article 8(2) of the Swiss Schengen Association Agreement in conjunction with the fourth paragraph of Article 23 of the Statute of the Court of Justice of the European Union.

¹⁴ The Immigration Office and the Spanish Government representative gave consistent statements to this effect to the Court.

¹⁵ See, to that effect, judgment of 20 January 2005, *García Blanco* (C-225/02, EU:C:2005:34), and orders of 3 March 2016, *Euro Bank* (C-537/15, EU:C:2016:143), and of 23 March 2016, *Overseas Financial and Oaktree Finance* (C-319/15, EU:C:2016:268).

38. By its four questions, the Korkein hallinto-oikeus (Supreme Administrative Court) seeks to ascertain the specific effects of a consultation process under Article 25(2) of the CISA which has not yet been concluded but which has been ongoing for some considerable time on the enforcement of decisions to return and impose an entry ban on a third-country national (second, third and fourth questions), and whether the third-country national himself can rely directly on that provision before the national courts (first question).

39. In answering these questions regarding Article 25(2) of the CISA, care must be taken to ensure harmonious treatment of all relevant provisions of EU law in relation to the area of freedom, security and justice. Therefore, the provisions both of Directive 2008/115 and of the Schengen Borders Code must be taken into account when considering the present case.

40. I think it useful to begin by discussing the second, third and fourth questions, regarding substantive interpretation of Article 25(2) of the CISA, before moving on to the first question, concerning the direct effect of that provision.

41. Mindful of the division of functions between the Court of Justice and the referring court, I will in all my comments on this case take it as given that Mr E does indeed pose a threat to public safety and order, as was explicitly stated in the request for a preliminary ruling and not called into question by any of the parties to the proceedings.¹⁶

42. Only such a threat to public safety and order posed by Mr E would permit the Finnish authorities in this case to remove the individual concerned directly to his home country of Nigeria without first allowing him to travel to Spain, where he holds a valid residence permit (see the second sentence of Article 6(2), in conjunction with Article 6(1), of Directive 2008/115).

A. The proper time to begin consultations under Article 25(2) of the Convention implementing the Schengen Agreement (second question)

43. The second question referred serves to determine the date for commencement of consultations under Article 25(2) of the CISA. Specifically, the referring court asks whether such consultations must begin before the issue of a return decision and imposition of an entry ban on a third-country national, or whether an obligation to consult under EU law commences only after the administrative decisions to return and impose an entry ban on that individual have been taken.

44. By its wording in most language versions — not least in the German, French and English versions — Article 25(2) of the CISA concerns cases in which *an alert has been issued* for a third-country national for the purpose of refusing entry (see the first subparagraph of that provision), and the consultations between the Member States concerned may result in the alert being *withdrawn* (see the second subparagraph of the same provision). In other words, Article 25(2) of the CISA provides for mandatory consultations only *after* an alert has been issued for the third-country national for the purpose of refusing entry. On the other hand, this provision — unlike in the European Commission's current reform proposals on this matter¹⁷ — does not at present require prior consultation.

¹⁶ I assume that this finding of a threat to public safety and order was made in accordance with the standards applicable under EU law and is in particular founded on a careful prognosis carried out on a case-by-case basis which takes into account not just the criminal offences committed by the individual concerned in the past, but also primarily the genuine and present threat posed by that individual which ultimately proved the deciding factor; see judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, in particular paragraphs 50 to 52 and 54).

¹⁷ Article 26(2) of the Proposal for a regulation of the European Parliament and of the Council on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, amending Regulation (EU) No 515/2014 and repealing Regulation (EC) No 1987/2006, presented by the Commission on 21 December 2016, COM(2016) 882 final.

45. That assessment is confirmed when Article 25(2) of the CISA is considered in conjunction with Directive 2008/115, which lays down common standards and procedures in Member States for returning illegally staying third-country nationals. That Directive also does not currently provide for any mandatory consultations with other Member States if the authorities of a Member State are preparing to issue a return decision and entry ban (Article 6 in conjunction with Article 11 of Directive 2008/115).

46. To achieve the objective of an effective return policy, to which the European Union is committed,¹⁸ it is crucial that the authorities of the Member States can act quickly if necessary, particularly if — as in this case — the illegally staying third-country national poses a threat to public safety and order. A legal obligation requiring systematic prior consultation with any other Member States concerned would run counter to this objective.

47. However, the absence of an obligation to consult other Member States before issuing decisions regarding return and imposition of an entry ban in no way means that Article 25(2) of the CISA precludes such consultation.¹⁹ As the German Government and the Commission rightly emphasise, it is actually desirable for the authorities of the Member State considering issuing a return decision and simultaneous entry ban on an illegally staying third-country national to consult with all other Member States concerned as quickly as possible. First, this would give those other Member States, as soon as possible, the information needed to take measures of their own to protect public safety and order. Second, it would encourage maximum convergence between the actions of the Member States within the Schengen area with the objective of avoiding conflicting decisions.

Interim conclusion

48. The answer to the second question referred must therefore be that Article 25(2) of the CISA is to be interpreted as meaning that the consultations prescribed in that provision should, as EU law currently stands, take place as soon as possible, but do not have to begin before a decision to return a person and impose an entry ban has been taken.

B. The effects of ongoing consultations under Article 25(2) of the Convention implementing the Schengen Agreement on the enforcement of decisions to return an individual and impose an entry ban (third and fourth questions)

49. By its third and fourth questions, which due to their close substantive links I will discuss together, the referring court essentially asks whether a return decision²⁰ can be enforced and a Schengen-wide entry ban can take effect before the consultations under Article 25(2) of the CISA have been concluded.

50. Unlike the second question²¹ discussed previously, which concerned only the *issue* of a return decision and entry ban, the third and fourth questions raise the issue of whether such decisions may be *enforced* or *put into effect* while consultations within the meaning of Article 25(2) of the CISA are still ongoing.

¹⁸ See on that point recital 4 of Directive 2008/115 and judgments of 5 November 2014, *Mukarubega* (C-166/13, EU:C:2014:2336, paragraph 39); of 23 April 2015, *Zaizoune* (C-38/14, EU:C:2015:260, paragraph 34); and of 26 July 2017, *Ouhrami* (C-225/16, EU:C:2017:590, paragraph 51).

¹⁹ As shown by the second sentence of Article 26(2) of Proposal COM(2016) 882 final (cited in footnote 17), prior consultation in the Schengen area is quite conceivable.

²⁰ In this connection the referring court — presumably relying on the wording of the relevant provisions of national law — uses the term ‘deportation’. In the absence of any indications to the contrary, however, I assume that this refers simply to a return decision within the meaning of Directive 2008/115, and will therefore use the term familiar from the directive.

²¹ See in that regard points 43 to 48 of this Opinion, above.

Preliminary remark on the scope of the third and fourth questions

51. The Polish Government argues forcefully that return decisions are not the subject matter of consultations within the meaning of Article 25(2) of the CISA, with the consequence that the outcome of such consultations cannot a priori have any effect on enforcement of return decisions.

52. That analysis seems to me not to go far enough. It may well be that, by its wording, Article 25(2) of the CISA concerns only entry bans, or more specifically a particular practical aspect of such entry bans, namely the alert for the purposes of refusing entry in the Schengen Information System. It must be borne in mind, however, that an entry ban in a case such as this is accompanied by a return decision (see the end of point 6 of Article 3 and Article 11(1) of Directive 2008/115) and takes effect only once the illegally staying third-country national has actually left the territory of the Member States, i.e. has effectively left the European Union.²²

53. Accordingly, the issues of when a return decision against the third-country national concerned may be enforced and the extent to which such enforcement is affected by ongoing consultations under Article 25(2) of the CISA are of significant practical importance for the coming into force of the return decision directed against a third-country national.

54. Consequently, the referring court expects the Court to provide a useful answer concerning not just the effects of ongoing consultations under Article 25(2) of the CISA on the entry ban, but also the effects of such consultations for the return decision underlying the entry ban.

The practical problems of the operation of Article 25(2) of the Convention implementing the Schengen Agreement

55. If — as here — a Member State within the Schengen area has issued a return decision against and imposed a Schengen-wide entry ban on a third-country national who holds a residence permit in another Member State, and has issued an alert for the purposes of refusing that person entry, Article 25(2) of the CISA provides that the first Member State must consult the second to determine whether there are sufficient reasons for withdrawing the residence permit.

56. The existence of a return decision and a Schengen-wide entry ban on the one hand alongside a valid residence permit on the other produces a state of inconsistent action on the part of the authorities within the Schengen area which the consultations under Article 25(2) of the CISA are intended to resolve.

57. If the Member State consulted withdraws the residence permit issued by it, or if that residence permit becomes invalid for other reasons — in particular expiry of the stay authorised therein — the Schengen-wide entry ban can remain in force.

58. If, on the other hand, the result of the consultations is that the residence permit is not withdrawn and remains valid, the Member State that imposed the Schengen-wide entry ban must convert it into a purely national entry ban applicable only to its own territory, and can at most include the third-country national concerned in its national list of alerts for the purposes of refusing entry (second subparagraph of Article 25(2) of the CISA).

59. If a return decision is enforced and an entry ban is therefore put into effect although the consultations between the Member States under Article 25(2) of the CISA are still ongoing, the third-country national is, as EU law currently stands, in a kind of grey area. During such time, the third-country national is subject to a Schengen-wide entry ban and remains the subject of an alert for

²² Judgment of 26 July 2017, *Ouhrami* (C-225/16, EU:C:2017:590, paragraph 45 to 53, in particular paragraphs 45 and 53).

the purposes of refusing entry to the entire Schengen area in the Schengen Information System. However, under the common rules applicable in the Schengen area, the Member State that issued the valid residence permit must nevertheless continue to allow the third-country national to enter its territory, and every other Member State within the Schengen area must allow the individual concerned to enter their territory for transit purposes, unless that person appears on the national lists of alerts of those countries (see Article 21 of the CISA in conjunction with Article 6(5)(a) and Article 14(1) of the Schengen Borders Code).

60. Ultimately, then, the present request for a preliminary ruling presents the Court with the practically highly relevant problem of how the aforementioned grey area can be kept as small as possible without jeopardising the effectiveness of the European Union's return policy and the protection of public safety and order in the entire Schengen area.

The obligation to take account of ongoing consultations under Article 25(2) of the Convention implementing the Schengen Agreement when enforcing return decisions accompanied by an entry ban

61. Taking only the wording of Article 25(2) of the CISA and of Directive 2008/115 into account, ongoing consultations between Member States appear to impose no limitations as regards the enforcement of a return decision and the ensuing entry into force of an entry ban on an illegally staying third-country national. On the contrary, Article 8(1) of Directive 2008/115, on removal, requires the Member States to take all necessary measures to enforce return decisions.

62. The objective of the consultation process provided for in Article 25(2) of the CISA must be borne in mind, however. That objective is to encourage maximum coherence and consistency in the actions of the authorities in all Schengen area Member States concerned, and to ensure that a valid residence permit and a Schengen-wide entry ban do not exist side by side for long. In particular, as previously mentioned,²³ a Schengen-wide entry ban must, under the second subparagraph of Article 25(2) of the CISA, be converted into a national entry ban if the Member State which issued the valid residence permit to the third-country national concerned does not withdraw that permit.

63. At the same time, the third-country national should be treated fairly²⁴ and enabled to travel to the Member State which issued the residence permit to him in order to exercise his right to reside there, instead of being required to return to his third country of origin (see the first sentence of Article 6(2) of Directive 2008/115 and subparagraph 2 of Article 25(2) of the CISA).

64. The twin objectives of the consultation process under Article 25(2) of the CISA — coherent and consistent action by the authorities on the one hand and facilitating the exercise of a valid residence permit on the other — would be far less achievable if the consulting Member State were free to enforce a return decision taken by its authorities before the conclusion of consultations, with the result that the third-country national concerned would be required to leave the territory of the European Union and would henceforth be subject to a valid entry ban.

65. Thus it follows from the objective of Article 25(2) of the CISA that ongoing consultations under that provision in principle preclude the enforcement of a return decision and the coming into force of an entry ban. In my view, such pending consultation process should also be regarded as a specific circumstance of the individual case, as a result of which, under Article 9(2) of Directive 2008/115, removal of the third-country national to his home country must normally be postponed.

²³ In this regard, see point 58 of this Opinion, above.

²⁴ Regarding the third-country national's entitlement to a fair and transparent procedure, see recital 6 of Directive 2008/115 and judgments of 5 June 2014, *Mahdi* (C-146/14 PPU, EU:C:2014:1320, paragraph 40), and of 5 November 2014, *Mukarubega* (C-166/13, EU:C:2014:2336, paragraph 61).

The possibility of enforcing return decisions before conclusion of the consultations under Article 25(2) of the Convention implementing the Schengen Agreement

66. Nonetheless, there may of course be situations in which, in view of the specific circumstances of the individual case, it would not be justified to wait until conclusion of consultations under Article 25(2) of the CISA and the third-country national must be removed under Article 8 of Directive 2008/115 immediately.

67. Reconciling the specific manner in which the consultation process is handled as harmoniously as possible with the other relevant rules regarding the area of freedom, security and justice, and viewing Article 25(2) of the CISA in conjunction with the provisions of Directive 2008/115, two groups of cases in particular become apparent in which it appears appropriate, exceptionally, to enforce the return decision and put the entry ban into effect before the conclusion of consultations under Article 25(2) of the CISA:

- firstly, cases where the observations of the Member State consulted are not received although a reasonable period for response has passed (*first group of cases*);
- secondly, cases where the third-country national presents a threat to public safety and order (*second group of cases*).

In both groups of cases, rapid enforcement of the return decision against an illegally staying third-country national and thus effective implementation of the entry ban against him is consistent with the fundamental objective of an effective return policy.²⁵

First group of cases: A reasonable period for response has passed

68. As regards the first group of cases, it should be noted that the CISA as such does not provide for a specific period within which a Member State consulted under Article 25(2) of the Convention must present its observations. However, it follows from the principle of sincere cooperation (Article 4(3) TEU)²⁶ that the Member State consulted must present its observations within a reasonable period using the form²⁷ provided for this purpose.

69. Moreover, taking Article 7(1) of Directive 2008/115 as a guide,²⁸ a specific period for response which is to be considered reasonable can be identified: The Member State consulted should normally be given 7 to 30 days to present its observations, i.e. a period ultimately comparable to the period for voluntary departure that can be granted to the third-country national concerned.

²⁵ See again in this regard recital 4 of Directive 2008/115 and judgments of 5 November 2014, *Mukarubega* (C-166/13, EU:C:2014:2336, paragraph 39); of 23 April 2015, *Zaizoune* (C-38/14, EU:C:2015:260, paragraph 34); and of 26 July 2017, *Ouhrami* (C-225/16, EU:C:2017:590, paragraph 51).

²⁶ Regarding the principle of sincere cooperation between Member States generally, see judgments of 22 March 1983, *Commission v France* (42/82, EU:C:1983:88, paragraph 36); of 27 September 1988, *Matteucci* (235/87, EU:C:1988:460, paragraph 19); and of 11 June 1991, *Athanasopoulos and Others* (C-251/89, EU:C:1991:242, paragraph 57). Recently, the Court has stressed the importance of sincere cooperation between Member States in connection with the area of freedom, security and justice, firstly as regards the Schengen area (judgment of 31 January 2006, *Commission v Spain*, C-503/03, EU:C:2006:74, paragraph 56), and secondly with a view to the processing of applications for international protection (judgment of 26 July 2017, *Jafari*, C-646/16, EU:C:2017:586, end of paragraph 88).

²⁷ See point 4.5.1 of the Sirene Manual, reproduced in the Annex to Commission Implementing Decision 2013/115/EU of 26 February 2013 (OJ 2013 L 71, p. 1).

²⁸ Taking the periods provided for in Directive 2008/115 as guidance would appear all the more justified because, as is clear from Article 21 of that directive, it replaces certain provisions of the Convention implementing the Schengen Agreement.

70. A period for response of 7 to 30 days for consultations under Article 25(2) of the CISA may seem relatively short considering that the involvement of regional or local authorities and an examination of the personal circumstances of the third-country national concerned may be necessary in the Member State consulted.²⁹ However, such a short period for response is in no way unusual in the area of freedom, security and justice.³⁰ In the present context, it can be explained by the fundamental objective, mentioned previously, of giving effect to the return policy of the European Union, something that requires considerable effort and an extremely rapid response from all national bodies involved.³¹ Further, the shortness of the period helps to ensure coherence between the actions of all authorities in the Schengen area.

71. Furthermore, a short period for response is, on the one hand, in the interests of the third-country national concerned in legal certainty and — if he is detained — in as short as possible a period of detention. On the other hand, a short period also serves the interests of the consulting Member State, which should not be unduly burdened with the effort and any costs associated with the illegal stay of the third-country national.

72. Nevertheless, if the Member State consulted requires more time to present its observations under Article 25(2) of the CISA, the principle of sincere cooperation (Article 4(3) TEU) requires it to contact the consulting Member State and give sufficient grounds for extending the period for response. For its part, the consulting Member State must engage constructively with the assertions of the Member State consulted in a spirit of sincere cooperation. Ideally, both States should agree on a reasonable extension of time, taking Article 7(2) of Directive 2008/115 as a guide. The consulting Member State should normally grant the Member State consulted an extension of 30 days on the period for response at least.

73. In the absence of clear rules, the Member State consulted cannot be deemed to have given a positive or negative response if this extended period also passes without result.³² However, the consulting Member State may in that case safely assume that a reasonable period for response has passed.

74. The consulting Member State may then enforce its return decision and thus put the entry ban into effect regardless of the fact that the consultations are still without result. That entry ban will apply Schengen-wide (and also for all non-Schengen EU Member States);³³ with the stipulation that — as mentioned above³⁴ — the third-country national concerned must be permitted to enter or transit to the Member State consulted for which he (still) holds a valid residence permit (see Article 21 of the CISA in conjunction with Article 6(5)(a) and Article 14(1) of the Schengen Borders Code).

²⁹ Regarding the last aspect, see in particular Article 12 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).

³⁰ Such as certain time limits for response applicable under the 'Dublin III' system, which play a role in the pending *X* case (joined cases C-47/17 and C-48/17); see Article 22(1) and (6) and Article 25 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31).

³¹ The Commission takes an even stricter line in the second sentence of Article 26(2) of its proposal COM(2016) 882 final (cited in footnote 17), where it considers the extremely short period of seven days to be appropriate.

³² Regarding individual areas of law in which the Union legislator has given effect to the failure by a public authority to respond, see my Opinion in *Housieaux* (C-186/04, EU:C:2005:70, paragraph 35).

³³ See in this regard point 6 of Article 3 of Directive 2008/115, which provides that an entry ban within the meaning of that Directive prohibits entry into the *territory of the Member States*; see also recital 14 of that Directive, which affirms that the effects of national return measures should be given a *European dimension* by establishing an entry ban prohibiting entry into and stay on the *territory of all Member States*.

³⁴ See in this regard point 59 of this Opinion, above.

Second group of cases: Threat to public safety and order

75. As regards the second group of cases, in which the third-country national concerned poses a threat to public safety and order, it goes without saying that the return decision may be enforced and the entry ban may thus be put into effect without waiting for the outcome of consultations under Article 25(2) of the CISA.

76. In view of the lack of internal border controls within the Schengen area, it can normally be assumed that a threat to public safety and order posed by the third-country national concerned in one Schengen area Member State may quickly manifest itself in all the other Schengen States. Accordingly, the Member State which issues a return decision and imposes an entry ban acts to protect safety and order not just on its own territory, but in the entire Schengen area.

77. In such case, the security interests of all Member States within the Schengen area and the population living on their territory take precedence over efforts towards coherence and consistency in official decisions in the Schengen area and also over the interest of the third-country national concerned in making use of his existing residence permit in the Member State consulted.³⁵

78. This conclusion is confirmed by Article 7(4) of Directive 2008/115, under which persons who pose a risk to public order and safety may be granted no period for voluntary departure, or only a very short period. Taking this rule as guidance, the consulting Member State cannot be required to wait for the Member State consulted to present its observations before enforcing its return decision and putting its entry ban into effect.

Consequences for the main proceedings

79. In light of all the information before the Court, a case such as Mr E's falls within both of the groups of cases described above. On the one hand, Spain has substantially exceeded³⁶ the period for response reasonable under Article 25(2) of the CISA, without — as far as can be seen — requesting any extension of time, much less presenting sufficient grounds for such extension of time (first group of cases). On the other hand, the national authorities have found Mr E to pose a threat to public safety and order (second group of cases). For both of these reasons, either of which alone would be sufficient, the fact that consultations under Article 25(2) of the CISA have not been concluded does not, in a case like this, preclude enforcement of the return decision and the coming into force of the entry ban.

Interim conclusion

80. All in all, therefore, it can be stated in answer to the third and fourth questions regarding interpretation of Article 25(2) of the CISA that:

The return decision may be enforced and the entry ban put into effect only after the State consulted under Article 25(2) of the CISA has presented its observations or has failed to do so although a reasonable period for response has passed. Both decisions may be enforced even before expiry of such period if the third-country national presents a threat to public safety and order.

³⁵ Accordingly, in cases of this kind, the second sentence of Article 6(2) of Directive 2008/115 does not impose any obligation to permit travel to the Member State which issued the residence permit to the third-country national concerned; instead, it refers directly to the rule in Article 6(1) which provides that the third-country national must be returned to his home country.

³⁶ When the request for a preliminary ruling was lodged, the consultations under Article 25(2) of the Convention implementing the Schengen Agreement had already been pending for over two years, during which time the Kingdom of Spain had not presented any definitive observations.

C. The direct effect of Article 25(2) of the Convention implementing the Schengen Agreement (first question)

81. Finally, it remains to be examined, in connection with the first question, whether the third-country national concerned may directly rely on Article 25(2) of the CISA before national courts.

82. Article 25(2) of the CISA was not originally an EU instrument but a provision in an international agreement outside the framework of the European Union. However, the Treaty of Amsterdam, which integrated the Schengen *acquis* into the framework of the European Union,³⁷ made this agreement an integral part of EU law applicable by Member States participating in the Schengen area.

83. Unlike in the case of framework decisions,³⁸ it is not excluded that agreements between Member States in connection with the area of freedom, security and justice may have direct effect. The CISA itself does not in any way preclude direct application of its provisions.³⁹

84. The direct effect of provisions of the CISA must therefore be examined according to the same general criteria as those applied when considering the direct effect of international agreements binding on the European Union⁴⁰ and other provisions of EU secondary law.

85. For a rule of EU law to apply directly, it must appear, as regards its content, to be unconditional and sufficiently precise. That is the case when it contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.⁴¹

86. Article 25(2) of the CISA requires a Member State within the Schengen area which issues an alert for the purposes of refusing entry to a third-country national in the Schengen Information System to consult any other Member State within the Schengen area which has issued a valid residence permit to that third-country national as to whether that Member State intends to withdraw the residence permit.

87. In that respect, therefore, Article 25(2) of the CISA contains a clear and precise obligation which is not subject, in its implementation and effects, to the adoption of any subsequent measures. While Article 25(2) of the CISA does not expressly state the precise consequences of the absence of consultation or incorrect consultation, the requirement for such consultation and its subject matter are stipulated so clearly that any court may readily apply it.⁴² Consequently, Article 25(2) of the CISA satisfies the requirements for direct application.

³⁷ See in this regard Protocol No 19 to TEU and to the TFEU.

³⁸ See in this regard the third sentence of Article 34(2)(b) TEU as amended in the version of the Treaty of Amsterdam.

³⁹ On the contrary, it is recognised that provisions of the Convention implementing the Schengen Agreement may, before domestic courts, supplant national law or practices (see the leading judgment of 11 February 2003, *Gözütok and Brügge*, C-187/01 and C-385/01, EU:C:2003:87, particularly the end of paragraph 33, in relation to Article 54 of the Convention implementing the Schengen Agreement).

⁴⁰ In accordance with established case-law, these can include agreements to which the EU itself is not party; see in particular judgments of 12 December 1972, *International Fruit Company and Others* (21/72 to 24/72, EU:C:1972:115, paragraph 18), and of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 62).

⁴¹ Judgments of 30 September 1987, *Demirel* (12/86, EU:C:1987:400, paragraph 14), and of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraphs 54 and 55); the judgment of 5 February 1963, *van Gend & Loos* (26/62, EU:C:1963:1, p. 13) is also fundamental in this connection.

⁴² Judgment of 22 May 1980, *Santillo* (131/79, EU:C:1980:131, paragraph 13); similar judgments of 26 February 1986, *Marshall* (152/84, EU:C:1986:84, paragraph 55), and of 2 August 1993, *Marshall* (C-271/91, EU:C:1993:335, paragraph 37), and Opinion of Advocate General Van Gerven in *Banks* (C-128/92, EU:C:1993:860, paragraph 27, final subparagraph).

88. Moreover, it cannot be argued, against direct application of Article 25(2) CISA that that provision is purely procedural in nature and, in addition, merely regulates the relationship between Member States. On the one hand, it is recognised in EU law that rules which, according to their wording, are addressed solely to Member States can also have direct effect.⁴³ And on the other hand, as the Court held only recently in connection with another aspect of the area of freedom, security and justice, individuals may rely on provisions of EU law which are merely procedural in nature before the national courts.⁴⁴

89. In any event when the application or non-application of a procedural rule which is addressed to Member States and regulates the relationship between them may have concrete effects on the rights and interests of individuals, those individuals must, to protect their rights and interests, be able to rely directly on that procedural rule, provided always that such rule is unconditional as regards its content and sufficiently precise.

90. The rule under discussion here, that laid down in Article 25(2) of the CISA, demonstrates this very tangibly: if the Member State consulted presents observations to the effect that there are not sufficient grounds to withdraw the residence permit of the third-country national concerned, the consulting Member State must, under the second subparagraph of Article 25(2) of CISA, convert the Schengen-wide entry ban imposed by it into a purely national ban restricted to its own territory, and may only include the third-country national in its national list of alerts for the purposes of refusing entry.

91. Thus, the consultation process under Article 25(2) of the CISA — contrary to the view expressed by some parties to the proceedings — in no way necessarily adversely affects the legal situation of the third-country national concerned by way of withdrawal of his valid residence permit. In fact, the consultation process may well significantly improve that legal situation, specifically if the Member State consulted upholds the residence permit issued by it, so forcing the consulting Member State to impose a national entry ban instead of a Schengen-wide entry ban.

92. As I also discussed in connection with the third and fourth questions,⁴⁵ the consulting Member State may — except in cases of a threat to public safety and order — enforce a return decision and put a Schengen-wide entry ban into effect only after it has received the observations of the Member State consulted under Article 25(2) of the CISA or in any case after it has granted that Member State a reasonable period to present its observations and that period has elapsed without result.

93. All in all, then, the third-country national concerned may derive concrete benefits in terms of his legal situation and of his interests from application of Article 25(2) of the CISA, and may suffer actual disadvantage if that provision is not applied or is applied incorrectly. Accordingly, that third-country national must be able to rely on the obligation to consult established in Article 25(2) of the CISA in order to challenge the legality or the enforcement of a return decision concerning him or a Schengen-wide entry ban within the meaning of Directive 2008/115 imposed on him. Not least, this was the stance taken, correctly, by the Finnish, Spanish and Swiss Governments.⁴⁶

⁴³ Judgments of 5 February 1963, *van Gend & Loos* (26/62, EU:C:1963:1, p. 13), and of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56, paragraphs 30 to 37).

⁴⁴ Judgment of 26 July 2017, *Mengesteab* (C-670/16, EU:C:2017:587, in particular paragraph 56); to the same effect, judgment of 25 October 2017, *Shiri* (C-201/16, EU:C:2017:805, in particular paragraphs 39 and 44).

⁴⁵ See in particular points 61 to 80 of this Opinion, above.

⁴⁶ The Belgian Government also argued in favour of the direct application of Article 25(2) of the Convention implementing the Schengen Agreement to the extent that this enables the third-country national concerned to have an alert for the purposes of refusing entry in the Schengen Information System against him deleted.

Interim conclusion

94. In summary, therefore, I propose the following answer to the first question:

A third-country national can rely directly on Article 25(2) of the CISA before national courts in order to contest the legality and the enforcement of a return decision issued against him and of an entry ban within the meaning of Directive 2008/115 imposed on him.

VII. Conclusion

95. In light of the foregoing, I propose that the Court's answer to the request for a preliminary ruling from the Korkein hallinto-oikeus (Supreme Administrative Court, Finland) on interpretation of the Convention implementing the Schengen Agreement signed on 19 June 1990 should be as follows:

- (1) A third-country national can rely directly on Article 25(2) of the Convention implementing the Schengen Agreement before national courts in order to contest the legality and the enforcement of a return decision issued against him and of an entry ban within the meaning of Directive 2008/115/EC imposed on him.
- (2) Article 25(2) of the Convention implementing the Schengen Agreement is to be interpreted as meaning that the consultations prescribed in that provision should, as EU law currently stands, take place as soon as possible, but do not have to begin before a decision to return a person and impose an entry ban has been made.
- (3) The return decision may be enforced and the entry ban put into effect only after the State consulted under Article 25(2) of the Convention implementing the Schengen Agreement has presented its observations or has failed to do so although a reasonable period for response has passed. Both decisions may be enforced even before expiry of such period if the third-country national presents a threat to public safety and order.