Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 23 December 2015 [1]

Case C-558/14

Mimoun Khachab
v
Subdelegación del Gobierno en Álava
(Request for a preliminary ruling

from the Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco (High Court of Justice of the Basque Country, Spain))

(Reference for a preliminary ruling — Right to family reunification — Third country national — Directive 2003/86/EC — Conditions — Article 7(1)(c) — Stable and regular resources which are sufficient — Prospective assessment — Method of assessment — Likelihood of the family reunification sponsor retaining such resources after submission of the application for family reunification — Length of time during which the family reunification sponsor is required to have the resources)

1. In the present case, the Court is called upon to rule on the conditions which the Member States may impose on the entry and residence in their territories of families of third country nationals. Under Article 7 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, [2] which governs the entry and residence of family members of third country nationals, the Member States may require family reunification sponsors to have accommodation, sickness insurance and stable and regular resources which are sufficient to maintain themselves and the members of their family, and to comply with integration measures.

2. The national court's question to the Court concerns the resources condition. More specifically, the national court asks whether a family reunification sponsor meets that condition where he has resources sufficient to maintain his family at the date on which he submits the application for family reunification to the competent authorities of the Member State concerned, or whether the Member State may require him to have such resources after that date, so as to ensure that he will be in a position to continue to maintain his family after it is admitted to the Member State's territory.

1 — Original language: French.
2 — OJ 2003 L 251, p. 12.

3. The Court has already had to rule on the integration measures which the Member State concerned may require the family reunification sponsor to comply with [3] and on whether the resources are sufficient so that the sponsor need not have recourse to the social assistance system of that Member State. [4] However, the Court has never been asked whether the family reunification sponsor may be required to prove that, in all likelihood, he will retain his resources after submitting the application for family reunification and, if so, for how long. The present case will therefore give the Court the opportunity to examine this matter.

I – **Legal framework**

A – *EU law*

4. The aim of Directive 2003/86, according to Article 1 thereof, is 'to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States'.

5. This directive applies, according to Article 3(1) thereof, 'where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status'.

6. Article 4(1) of Directive 2003/86 provides:

'The Member States shall authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, as well as in Article 16, of the following family members:

(a) the sponsor's spouse …'

7. Article 7(1) of Directive 2003/86, which forms part of Chapter IV, states:

'When the application for family reunification is submitted, the Member State concerned may require the person who has submitted the application to provide evidence that the sponsor has:

(a) accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned;

(b) sickness insurance in respect of all risks normally covered for its own nationals in the Member State concerned for himself/herself and the members of his/her family;

3 — See my Opinion in *Dogan* (C-138/13, EU:C:2014:287, points 44 to 61) and the judgment in *K and A* (C-153/14, EU:C:2015:453). I should point out that the Court has ruled on measures of integration in the context of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2003 L 16, p. 44). See judgment in *P and S* (C-579/13, EU:C:2015:369).

4 — Judgments in *Chakroun* (C-578/08, EU:C:2010:117) and *O and Others* (C-356/11 and C-357/11, EU:C:2012:776, paragraphs 70 to 81). The Court has also ruled on the sufficiency of the resources that the family reunification sponsor is required to have where he is not, as in this case, a third country national, but a Union citizen, whose situation is governed by 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). See, in particular, judgments in *Brey* (C-140/12, EU:C:2013:565, paragraph 61) and *Dano* (C-333/13, EU:C:2014:2358, paragraph 63).

(c) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members.'

8. Article 16(1) of Directive 2003/86 provides:

'Member States may reject an application for entry and residence for the purpose of family reunification, or, if appropriate, withdraw or refuse to renew a family member's residence permit, in the following circumstances:

(a) where the conditions laid down by this Directive are not or are no longer satisfied.

When renewing the residence permit, where the sponsor has not sufficient resources without recourse to the social assistance system of the Member State, as referred to in Article 7(1)(c), the Member State shall take into account the contributions of the family members to the household income;

…'

9. Under Article 17 of Directive 2003/86, 'Member States shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family'.

B – *Spanish law*

10. Article 16(2) of Organic Law 4/2000 on the rights and freedoms of foreign nationals in Spain and their social integration (Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social) of 11 January 2000[5] ('Organic Law 4/2000') provides that 'foreign nationals resident in Spain shall have the right to be joined by the family members specified in Article 17'. Under Article 17(1)(a) of this law, foreign nationals have the right to be joined by, inter alia, 'the resident's spouse, provided that the latter is not separated from him in fact or in law, and that the marriage is not a sham'.

11. Article 18(2) of Organic Law 4/2000, relating to the 'conditions for family reunification', provides that 'the sponsor must provide evidence, on the conditions to be fixed by regulation, that he has suitable accommodation and resources sufficient to maintain himself and his family once reunited. The assessment of income for the purposes of reunification shall not include income from the social assistance system, but shall take into account other income contributed by the spouse residing in Spain and living with the sponsor'.

5 — BOE No 10 of 12 January 2000.

12. Article 54(1) of Royal Decree 557/2011 approving the Regulation implementing Organic Law 4/2000 on the rights and freedoms of foreign nationals in Spain and their social integration, as recast by Organic Law 2/2009 (Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009), of 20 April 2011[6] ('Royal Decree 557/2011') provides:

'A foreign national applying for a residence permit for members of his family on grounds of reunification shall, when submitting the application for such a permit, enclose documentary evidence that he has resources sufficient to maintain his family, including health care if this is not covered by social security, and equal to the amount indicated below, which, representing a minimum value, shall be expressed at the time of the application for the permit, in EUR or its legal equivalent in foreign currency, by reference to the number of persons he is seeking to have join him and taking into account also the number of family members who are already living with him as dependants in Spain:

(a) in the case of family units which, including the sponsor and, on arrival in Spain, the person joining him, comprise two members: the amount required shall be 150% of the monthly [Indicador Público de Renta de Efectos Múltiples ("IPREM")] …'

13. The IPREM is an index used in Spain as a reference for the grant of assistance, scholarships, subsidies and unemployment benefits, among others. It was created in 2004 and replaced the "minimum inter-professional wage as the benchmark for the grant of such assistance.

14. The first subparagraph of Article 54(2) of Royal Decree 557/2011 provides that 'residence permits shall not be granted if it is determined beyond doubt that there is no likelihood of the resources in question being retained in the year following the date of submission of the application. In this determination, the forecast as to whether a source of income will be retained in that year shall be made by reference to the pattern of the sponsor's resources in the six months preceding the date of submission of the application'.

II – **The facts, main proceedings and question referred for a preliminary ruling**

15. Mr Khachab holds a long-term residence permit in Spain. He has been married to Ilham Aghadar since 2009.

16. On 20 February 2012, Mr Khachab applied to the Subdelegación del Gobierno en Álava (Central Government Assistant Representative's Office in Alava) for a temporary residence permit for his spouse on grounds of family reunification.

17. By decision of 26 March 2012, the Central Government Assistant Representative's Office in Alava refused the application because Mr Khachab had 'provided no evidence that he [had] resources sufficient to maintain his family once reunited'.

18. Mr Khachab lodged an administrative appeal against that decision. The appeal was dismissed by decision of the Central Government Assistant Representative's Office in Alava of 25 May 2012. It found that the contract of employment produced by Mr Khachab, which he had signed on 16 February 2012 with the undertaking Construcciones y distribuciones constru-label SL, had come to an end on 1 March 2012, that Mr Khachab had worked for that undertaking for only 15 days in 2012

6 — BOE No 103 of 30 April 2011.

and 48 days in 2011, and that, when the decision under appeal was taken, he was not in any form of employment. It concluded that he did not have resources sufficient to maintain his family once reunited. It also stated that there was no prospect of him retaining those resources in the year following submission of the application.

19. By judgment of 29 January 2013, the Juzgado de lo Contencioso-Administrativo No 1 de Vitoria-Gasteiz (Administrative Court No 1 of Vitoria-Gasteiz) confirmed the decision of the Central Government Assistant Representative's Office in Alava of 25 May 2012. It found that Mr Khachab had worked for the undertaking Construcciones y distribuciones constru-label SL for only 63 days during the six months preceding submission of the application, for which he received a wage of EUR 929. It also pointed out that the contracts of employment produced by Mr Khachab relating to the period prior to his contract with this undertaking were for a limited term. The court inferred that it could not be concluded that Mr Khachab would continue to have resources sufficient to maintain his family in the year following submission of the application.

20. Mr Khachab appealed against the judgment of 29 January 2013 before the referring court. He complains, in particular, that the Juzgado de lo Contencioso-Administrativo No 1 de Vitoria-Gasteiz failed to take account of a new fact, namely that, since 26 November 2012, he has worked as a citrus fruit collector and therefore has resources sufficient to maintain his family. The Abogado del Estado claimed that the appeal should be dismissed, arguing that the new facts could not be taken into account and that it was apparent from the administrative case file that there was no likelihood of the applicant retaining sufficient resources in the year following submission of his application.

21. The Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco (High Court of Justice of the Basque Country) therefore decided to stay the proceedings and to refer to the Court the following question for a preliminary ruling:

'Must Article 7(1)(c) of Directive 2003/86 be interpreted as precluding national legislation, such as that at issue in the main proceedings, which allows an application for family reunification to be refused on the grounds that the sponsor does not have stable and regular resources sufficient to maintain himself and the members of his family, according to a prospective assessment by the national authorities of the likelihood of the economic resources in question being retained in the year following the date of submission of the application, taking into account the pattern of those resources in the six months preceding that date?'

22. The question was the subject of written observations from the Spanish, German, French, Hungarian and Netherlands Governments and from the European Commission.

III – **Assessment**

23. The referring court asks the Court, in essence, whether Article 7(1)(c) of Directive 2003/86, which provides that the Member State concerned may require the family reunification sponsor to have 'stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family', allows the competent authorities of that State to conduct a prospective assessment of the sponsor's resources, namely to take into account not only the resources he has when the application for family reunification is submitted and/or considered, but also the resources he will have in the year following submission of the application, in the knowledge that the likelihood of the sponsor retaining those resources for one year is assessed by reference to the resources he had during the six months preceding submission of the application.

24. I should point out that the question referred for a preliminary ruling relates not to the 'sufficiency' of the resources, that is to say their amount in the light of, in particular, the amount of minimum national wages and pensions, but to their 'regular' and 'stable' nature, since at issue is whether the competent authorities of the Member State concerned may require the sponsor not only to have had sufficient resources in the past, but also to have such resources in the future, for a duration and of a frequency to be established.

25. Consequently, in this Opinion I will not address the question whether the Spanish authorities may, without infringing Article 7(1)(c) of Directive 2003/86, require the family reunification sponsor to have a minimum income of 150% of the IPREM.[7] Nonetheless, I note that in its judgment in *Chakroun*, the Court held that 'the Member States may indicate a certain sum as a reference amount, but not as meaning that they may impose a minimum income level below which all family reunifications will be refused, irrespective of an actual examination of the situation of each applicant',[8] and that this interpretation was supported by Article 17 of Directive 2003/86,[9] which requires a case-by-case examination.

26. More specifically, the question referred to the Court for a preliminary ruling seems to me to consist of two parts. First, the national court asks the Court about the power of the competent authorities of the Member State concerned to take the future resources of the family reunification sponsor into account, that is to say, about the actual principle of conducting a prospective assessment of the resources condition, laid down in Article 7(1)(c) of Directive 2003/86. Secondly, the national court asks the Court about the factors to be taken into account in the context of that assessment, namely the duration of the period during which the sponsor will have to have sufficient resources (under Spanish law, one year after the date of submission of the application for family reunification) and the likelihood of the resources remaining available during that period (under Spanish law, the likelihood of the sponsor retaining his resources after submission of the application is assessed by reference to the pattern of his resources during the six months preceding the application).

27. I will therefore examine, first of all, whether Article 7(1) of Directive 2003/86 permits the prospective assessment of the applicant's resources. I should state at the outset that in my opinion there is no doubt that this directive allows the Member States to provide for such an assessment. I will then consider the method used by the competent authorities of the Member State concerned in order to assess whether and for how long the sponsor is likely to retain the resources he has. I note that although the Member States are free to establish the method for assessing the resources of the sponsor given that Directive 2003/86 is silent in this respect, they may only exercise that power in a manner which observes the objective of the directive, which is to promote family reunification. It is in the light of this objective that I will examine the assessment method established under Spanish law, as outlined in the previous point.

A – *The power of the competent authorities of the Member State concerned to conduct a prospective assessment of the resources mentioned in Article 7(1)(c) of Directive 2003/86*

28. Article 7(1)(c) of Directive 2003/86 states that the Member State concerned 'may require the person who has submitted the application to provide evidence that the sponsor has', inter alia, 'stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned'. However, this article does not define what is meant by 'stable and regular' resources. Although it makes clear that the Member States are to 'evaluate these resources by reference to their nature and

7 — See points 12 and 13 of this Opinion.

8 — C-578/08, EU:C:2010:117, paragraph 48.

9 — See point 9 of this Opinion.

regularity',[10] this guidance is so vague that it is not of great assistance in determining whether the resources in question are 'stable and regular'. Conversely, not only does this article define, at least in negative terms, what is meant by 'sufficient' resources (resources the level of which enables the family reunification sponsor and his family to live without recourse to social assistance), it also provides guidance as to how such resources are to be assessed. The last sentence of Article 7(1)(c) states that the Member States may, in order to assess these resources, 'take into account the level of minimum national wages and pensions as well as the number of family members'.

29. In other words, paragraph 1 of this article does not make clear whether the stability and regularity of the resources may be subject to a prospective assessment. It seems to me that no special significance should be attached to the use in that article of the present indicative ('the Member State concerned may require … that the sponsor *has*'):[11] it cannot, to my mind, be inferred from the use of the present tense rather than the future tense ('the Member State concerned may require … that the sponsor *will have*') that such a prospective assessment is precluded.[12] Similarly, this article cannot be construed as meaning that it is 'when the application … is submitted' that the sponsor must have sufficient resources. In my opinion, the time complement relates not to the possession of the resources, but to the power of the Member State concerned to require proof of them: it is 'when the application … is submitted' that 'the Member State concerned may require' the applicant to provide evidence that the sponsor has sufficient resources.[13]

30. However, although Article 7(1) of Directive 2003/86 does not make clear whether the stability and regularity of the resources may be subject to a prospective assessment, I think that Article 16 thereof provides an answer to this question.

31. Article 16(1)(a) of Directive 2003/86 provides that 'Member States may reject an application for entry and residence for the purpose of family reunification, or, if appropriate, *withdraw* or refuse to renew *a family member's residence permit*', inter alia, 'where the conditions laid down by this Directive are not *or are no longer* satisfied'.[14] In other words, if, after authorising the entry and residence of family members, one of the conditions for family reunification laid down in Directive 2003/86 is 'no longer satisfied', the competent authorities of the Member State concerned have the power to withdraw the family members' residence permits. The possession by the family reunification sponsor of resources sufficient to maintain himself and his family without recourse to the social assistance system of the Member State concerned is one of the 'conditions' to which the authorisation of family reunification is expressly subject under Directive 2003/86. Article 7(1)(c) of the directive is included in the provisions of Chapter IV thereof, entitled 'Requirements for the exercise of the right to family reunification'.[15] Consequently, it is apparent from Article 16(1) of Directive 2003/86 that the Member States concerned have the *power* to require the family reunification sponsor to have resources

10 — I note that the amended proposal for a Council directive on the right to family reunification, presented by the Commission on 2 May 2002 (COM(2002) 225 final), drew a clear distinction between the 'stability' and 'regularity' of the resources, which was not reproduced in the final version of Article 7(1)(c) of Directive 2003/86. According to this proposal, 'the stable resources criterion shall be evaluated by reference to the nature and regularity of the resources'.

11 — My emphasis.

12 — Nor, in my opinion, can it be inferred from the use of the present indicative in Article 7(1)(c) of Directive 2003/86 that a sponsor who produces an indefinite-term or fixed-term employment contract which has been signed *but is not yet in force* should automatically be regarded as not meeting the resources condition: an examination of his personal situation is necessary. See points 25 and 39 of this Opinion and, as regards Directive 2004/38, my Opinion in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:197, points 23 to 30).

13 — Subject, of course, to the national procedural rules permitting such evidence to be adduced during proceedings. See, in this respect, my Opinion in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:197, points 31 and 32).

14 — My emphasis.

15 — I note that the second subparagraph of Article 16(1)(a) of Directive 2003/86 expressly refers to the resources mentioned in Article 7(1)(c) thereof. Indeed, it provides that 'when renewing the residence permit, where the sponsor has not sufficient resources without recourse to the social assistance system of the Member State, as referred to in Article 7(1)(c), the Member State shall take into account the contributions of the family members to the household income'.

sufficient to maintain his family *for as long as it resides* in the territory of the Member State concerned, that is to say until the family members obtain a residence permit that is independent of that of the sponsor. They will then no longer fall within the scope of Directive 2003/86 on the right to family reunification.

32. A review of the *travaux préparatoires* of Articles 7 and 16 of Directive 2003/86 confirm the conclusion reached in the previous point. They show that Article 16, as it appeared in the Commission's original proposal for a directive, provided that the only grounds for withdrawing or refusing to renew the residence permits of family members were to be falsification of documents, fraud, and marriages and adoptions of convenience.[16] As originally worded, Article 16 did not therefore provide that the residence permits of family members could be withdrawn if the family reunification sponsor no longer had resources sufficient to maintain them. In response to a proposal put forward by the delegations of several Member States to insert into the wording of Article 7(1) a minimum period during which the sponsor had to satisfy, in particular, the condition of sufficient resources,[17] and as it was impossible for the delegations to agree on the length of such a period,[18] Article 16 was amended so as to empower the Member States to withdraw the residence permits of family members if the sponsor no longer met the condition laid down in Article 7(1)(c) of Directive 2003/86. Accordingly, since the Member States may require the sponsor to have resources sufficient to maintain his family after it enters their territory, Article 16(1) of the directive allows them to withdraw the residence permits of family members if, after authorising family reunification, the sponsor no longer satisfies this condition.

33. The power of the Member States to permit their competent authorities to conduct a prospective assessment of the resources of the family reunification sponsor is supported by another provision of Directive 2003/86. Article 3(1) of Directive 2003/86 provides that the directive 'shall apply where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more *who has reasonable prospects of obtaining the right of permanent residence*, if the members of his or her family are third country nationals of whatever status'.[19] This article does not make clear what is meant by 'reasonable prospects of obtaining the right of permanent residence'. By contrast, the Communication from the Commission to the European Parliament and the Council of 3 April 2014 on guidance for application of Directive 2003/86[20] ('the Commission Communication') states that sponsors holding residence permits 'issued for a specific purpose with a limited validity and that are

16 — See Article 14(1) of the proposal for a Council directive on the right to family reunification, presented by the Commission on 1 December 1999 (COM(1999) 638 final).

17 — Several delegations raised the question 'whether the fact that the applicant met the requirements laid down in this provision had to be established solely at the time the application was lodged or whether it could also be established at a later stage'. In particular, they enquired how an application for family reunification should be dealt with where the sponsor met the resources requirement when the application was lodged but subsequently ceased to do so because, for example, he lost his job. See, in this connection, Council document 11524/00 of 4 January 2011 which can be accessed from the website of the public register of Council documents (the footnote to Article 9 of the proposal for a directive, which became Article 7 in the final version of the directive, sets out the proposals of the German and Austrian delegations relating to when the assessment of whether the sponsor meets the resources requirement should be carried out).

18 — In response to queries from several national delegations mentioned in the previous footnote, the Presidency of the Council suggested inserting the following subparagraph into Article 9(1) of the proposal for a directive: 'The Member State concerned may require the sponsor to meet the conditions referred to in paragraph 1 for a period not exceeding two years after the entry of the family member(s). …' (Council document 7145/01 of 23 March 2001). However, various delegations (Germany, Greece, Netherlands and Austria) stated that they preferred a longer period, between three and five years (Council documents 7144/01 of 23 March 2001; 7612/01 of 11 April 2001; and 9019/01 of 21 May 2001). Some delegations (Germany, Greece and Austria) proposed aligning the period during which the sponsor is required to have resources sufficient to maintain his family members with the length of the period of residence enabling them to secure an autonomous residence permit, independent of that of the sponsor, in other words four years at the time the proposal was made (five years in the final version of Directive 2003/86, as provided for in Article 15(1) thereof) (Council documents 7144/01 of 23 March 2001; 8491/01 of 10 May 2001; and 9019/01 of 21 May 2001). Conversely, other delegations (Belgium, Spain and France) wished to reduce to one year the period during which the sponsor is required to have resources sufficient to maintain his family (Council documents 7144/01 of 23 March 2001; 7612/01 of 11 April 2001; 8491/01 of 10 May 2001; 9019/01 of 21 May 2001; and 11330/01 of 2 August 2001). Noting that there was no consensus between the Member States' delegations, the Presidency of the Council suggested inserting different maximum periods for the spouse and minor children (one year), direct ascendants and children of full age (two years) and the unmarried partner (three years, then two). However, this proposal was not pursued (Council documents 10922/01 of 20 July 2001 and 11542/01 of 11 September 2001).

19 — My emphasis.

20 — COM(2014) 210 final.

not renewable' have no such prospects.[21] Since Article 3(1) of Directive 2003/86 gives the competent authorities of the Member State concerned the power to conduct a prospective assessment of obtaining the right of permanent residence, it would be inconsistent to deny them the power to carry out such an assessment in relation to the resources the sponsor will have after family reunification has been authorised.

34. I note that this is, moreover, the Commission's interpretation of Article 7(1) of Directive 2003/86. The Commission Communication states that 'the evaluation of the stability and regularity of the resources has to be based on a prognosis that the resources can reasonably be expected to be available in the foreseeable future, so that the applicant will not need to seek recourse to the social assistance system'.[22]

35. In the present case, the first subparagraph of Article 54(2) of Royal Decree 557/2011 requires the competent authorities to carry out a prospective assessment of the sponsor's resources, since it provides that the authorities are to assess 'the forecast as to whether a source of income will be retained in [the] year' following the date of submission of the application for family reunification. As we have seen, Directive 2003/86 permits such an assessment.

36. Accordingly, the answer to the question raised by the national court should be that Article 7(1) of Directive 2003/86, read in conjunction with Article 16(1)(a) and Article 3(1) thereof, does not preclude the Member States from permitting their competent authorities to carry out a prospective assessment of the resources of the family reunification sponsor, that is to say to take account not only of the resources the sponsor has when the application for family reunification is submitted, but also the resources he will have after submission of that application.

B – *The assessment by the competent authorities of the Member States of the likelihood of the family reunification sponsor retaining his resources after submission of the application for family reunification*

37. Although it is clear from Directive 2003/86 that the Member States have the power to authorise their competent authorities to carry out a prospective assessment of the family reunification sponsor's resources, the directive does not make clear what method should be used to assess whether the sponsor will retain his resources, or for how long the resources should be retained in order to be regarded as 'stable and regular' within the meaning of Article 7(1)(c) thereof.[23] Therefore, it is for the Member States to define the method of assessment and to specify for how long the sponsor is required to retain the resources he has when family reunification is authorised.[24]

21 — Commission Communication, section 2.1. In this connection, the Commission states that 'since the type and purpose of residence permits differ substantially between [Member States], it is for [Member States] to determine what kind of residence permits they accept as sufficient to consider that there are reasonable prospects' (Commission Communication, section 2.1). I should point out that the condition of 'reasonable prospects of obtaining the right of permanent residence' may, in my opinion, be interpreted as a reference to the acquisition of long-term resident status provided for in Directive 2003/109. Article 8(1) of the directive states that 'the status as long-term resident shall be *permanent*, subject to Article 9' (my emphasis). See Beck, C.H., *EU Immigration and Asylum Law. Commentary on EU Regulations and Directives*, K. Hailbronner (ed.), Hart, Nomos, 2010 (see Chapter III, commentary on Article 3, points 5 and 6); and Schaffrin, D., 'Which standard for family reunification of third-country nationals in the European Union?', in *Immigration and Asylum Law of the EU: current debates*, dir. Carlier, J.-Y., Bruylant, Brussels, 2005, p. 90 et seq. (see p. 102).

22 — See paragraph 2 of section 4.4 of the Commission Communication.

23 — See point 28 of this Opinion.

24 — I note that under Article 16(1)(a) of Directive 2003/86, mentioned in point 31 of this Opinion, the Member States 'may' withdraw a family member's residence permit where the sponsor does not have resources sufficient to maintain that family member. This is a power, not an obligation, of the Member States. Consequently, Directive 2003/86 cannot be interpreted as meaning that the Member States must require the sponsor to prove that he has resources sufficient to maintain his family *for the entire duration of the family's stay* in the territory of the host Member State, that is to say until the family members satisfy the condition of five years' residence enabling them to apply for an autonomous residence permit. There is nothing to prevent the Member States from requiring, when the application for family reunification is examined, simple proof that the sponsor has resources sufficient to maintain his family for, for example, two years after submission of the application. This is supported by the *travaux préparatoires* of Directive 2003/86, mentioned in footnote 18 of this Opinion.

38. However, the Court has held that 'since authorisation of family reunification is the general rule, the faculty provided for in Article 7(1)(c) of the Directive must be interpreted strictly' and that 'the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification'. [25] I note that the authorisation of family reunification is 'the general rule' because such reunification is a right. The Court has held that Article 4(1) of Directive 2003/86, according to which the Member States 'shall authorise' the entry and residence of some family members, 'imposes precise positive obligations, with corresponding clearly defined *individual rights*, on the Member States, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation'. [26]

39. Furthermore, it follows from the case-law that the power which Article 7(1)(c) of Directive 2003/86 recognises the Member States as having, to require the sponsor to have stable and regular resources of a sufficient nature, must be interpreted in the light of the right to respect for family life. [27] That power must also be exercised in accordance with the principle of proportionality. [28] Lastly, account should be taken of Article 17 of Directive 2003/86, which requires a specific examination of the situation of each applicant. [29]

40. Since the power of the Member States to require evidence of stable and regular resources of a sufficient nature must be interpreted strictly, it is self-evident that the power of the Member States to require their competent authorities to carry out a prospective assessment of these resources, which flows from it, must also be interpreted strictly. Similarly, it must be exercised in accordance with the principle of proportionality and Article 17 of Directive 2003/86.

41. In the present case, it should be recalled that the first subparagraph of Article 54(2) of Royal Decree 557/2011 provides that the sponsor must retain resources sufficient to maintain his family in the year following the date of submission of the application for family reunification and that the likelihood of him retaining those resources for that period is to be assessed by reference to the pattern of his resources during the six months preceding the date of submission of the application.

42. The period of one year during which, under Spanish law, the sponsor is required to retain sufficient resources, does not seem to me to be disproportionate. I note in this respect that in the context of the *travaux préparatoires* of Directive 2003/86, some delegations had proposed longer periods, ranging between two and five years. I also recall that some Member States had suggested aligning the period during which the sponsor was required to meet the resources condition set out in Article 7(1)(c) of Directive 2003/86 with the length of the period of residence enabling members of his family to obtain an autonomous residence permit, no longer dependent on that of the sponsor, in other words, under Article 15(1) of the directive, up to five years. [30]

25 — Judgments in *Chakroun* (C-578/08, EU:C:2010:117, paragraph 43) and *O and Others* (C-356/11 and C-357/11, EU:C:2012:776, paragraph 74) and my Opinion in *Noorzia* (C-338/13, EU:C:2014:288, point 44). Also see, as regards Article 7(2) of Directive 2003/86, judgment in *K and A* (C-153/14, EU:C:2015:453, paragraph 50) and, as regards Directive 2003/109, judgment in *Kamberaj* (C-571/10, EU:C:2012:233, paragraph 86).

26 — Judgment in *Parliament* v *Council* (C-540/03, EU:C:2006:429, paragraph 60) (my emphasis). See also judgments in *Chakroun* (C-578/08, EU:C:2010:117, paragraph 41); *O and Others* (C-356/11 and C-357/11, EU:C:2012:776, paragraph 70); and *K and A* (C-153/14, EU:C:2015:453, paragraph 46). Finally, see Beck, C.H., *EU Immigration and Asylum Law. Commentary on EU Regulations and Directives*, K. Hailbronner (ed.), Hart, Nomos, 2010, pp. 171-172.

27 — Judgments in *Chakroun* (C-578/08, EU:C:2010:117, paragraph 44) and *O and Others* (C-356/11 and C-357/11, EU:C:2012:776, paragraph 77).

28 — See, as regards Article 7(2) of Directive 2003/86, judgment in *K and A* (C-153/14, EU:C:2015:453, paragraph 51). See also, as regards Directive 2003/109, judgment in *Commission* v *Netherlands* (C-508/10, EU:C:2012:243, paragraph 75).

29 — Judgment in *Chakroun* (C-578/08, EU:C:2010:117, paragraph 48). See, as regards Article 7(2) of Directive 2003/86, judgment in *K and A* (C-153/14, EU:C:2015:453, paragraphs 58 to 60).

30 — See footnote 24 of this Opinion.

43. As regards the method to be used to determine whether the sponsor will retain the resources he has for one year from the date of submission of the application, I do not see how taking account of the pattern of the sponsor's resources during the preceding six months could undermine the objective or the effectiveness of Directive 2003/86. Taking account of a longer period, for instance one year, would not necessarily be more favourable to the sponsor and his family. It would be if, for example, the sponsor had worked for seven months before losing his job and finding another one four months later.[31] It would not be if, in the previous year, he had only worked for the five months preceding submission of the application.[32]

44. In the present case, Mr Khachab submitted the application for family reunification on 20 February 2012. The order for reference shows that during the preceding six months, he worked for only 63 days (for the undertaking Construcciones y distribuciones constru-label SL).[33] If that is in fact his situation, I do not think it possible to consider that he will have resources sufficient to maintain his spouse after she enters Spanish territory. However, I note that Mr Khachab appears to hold a long-term residence permit and states that he has paid more than five years' social security contributions in Spain, which suggests that he has regular income, or, at least, had such income when he was granted the permit. I also note that he found employment on 26 November 2012, a fact which, admittedly, the referring court is seemingly unable to take into account under national procedural rules.

45. It is therefore for the national court to determine, in the light of this information, subject to the principle of proportionality and by examining the personal circumstances of Mr Khachab, as provided for in Article 17 of Directive 2003/86, whether he is likely to have resources sufficient to maintain his spouse and, if so, whether he is likely to retain those resources after family reunification has been authorised.

IV – **Conclusion**

46. In view of all of the foregoing, I suggest that the Court respond as follows to the question referred by the Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco (High Court of Justice of the Basque Country):

(1) Article 7(1) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, read in conjunction with Article 16(1)(a) and Article 3(1) thereof, does not preclude the Member States from permitting their competent authorities to carry out a prospective assessment of the resources of the family reunification sponsor, that is to say to take account not only of the resources the sponsor has when the application for family reunification is submitted, but also the resources he will have after submission of that application.

(2) The power of the competent authorities of the Member State concerned to carry out a prospective assessment of the sponsor's resources must not undermine the objective of Directive 2003/86, which is to promote family reunification, and must be exercised in accordance with the principle of proportionality and Article 17 of Directive 2003/86, particularly as regards the length of time during which the sponsor will have to retain the resources that he has.

31 — If the reference period is one year prior to submission of the application, the sponsor will have worked eight months out of twelve. If, by contrast, the reference period is six months prior to submission of the application, he will have worked two months out of six.

32 — If the reference period is one year prior to submission of the application, the sponsor will have worked five months out of twelve. If, by contrast, the reference period is six months prior to submission of the application, he will have worked five months out of six.

33 — See point 18 of this Opinion.