Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

29 July 2019*

(Reference for a preliminary ruling — Area of freedom, security and justice — Community Visa code — Regulation (EC) No 810/2009 — Article 5 — Member State competent for examining and deciding on a visa application — Article 8 — Representation arrangement — Article 32(3) — Appeal against a decision to refuse a visa — Member State competent to rule on the appeal where a representation arrangement is in place — Persons entitled to bring an appeal)

In Case C-680/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Rechtbank Den Haag, zittingsplaats Utrecht (District Court, The Hague, sitting in Utrecht, Netherlands), made by decision of 30 November 2017, received at the Court on 5 December 2017, in the proceedings

Sumanan Vethanayagam,

Sobitha Sumanan,

Kamalaranee Vethanayagam

v

Minister van Buitenlandse Zaken,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, R. Silva de Lapuerta (Rapporteur), Vice-President of the Court, C. Toader, A. Rosas and M. Safjan, Judges

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 December 2018,

after considering the observations submitted on behalf of:

– Mr Vethanayagam, Ms Sumanan and Ms Vethanayagam, by M.J.A. Leijen, advocaat,

– the Netherlands Government, by K. Bulterman and P. Huurnink, acting as Agents,

– the Czech Government, by M. Smolek, J. Vláčil, T. Müller and A. Brabcová, acting as Agents,

* Language of the case: Dutch.

– the Danish Government, by J. Nymann-Lindegren, M. Wolff and P. Ngo, acting as Agents,

– the Estonian Government, by N. Grünberg, acting as Agent,

– the French Government, by D. Colas, E. de Moustier and E. Armoët, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by F. De Luca, avvocato dello Stato,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Parliament, by G. Corstens, R. van de Westelaken and O. Hrstková Šolcová, acting as Agents,

– the Council of the European Union, by E. Moro and S. Boelaert, acting as Agents,

– the European Commission, by C. Cattabriga, F. Wilman and G. Wils, acting as Agents,

– the Swiss Government, by E. Bichet, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 28 March 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 8(4) and 32(3) of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (OJ 2009 L 243, p. 1), as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 182, p. 1) ('the Visa Code').

2 The request was made in proceedings between Mr Sumanan Vethanayagam, Ms Sobitha Sumanan and Ms Kamalaranee Vethanayagam, on one hand, and the Minister van Buitenlandse Zaken (the Minister for Foreign Affairs, Netherlands; 'the Netherlands Minister for Foreign Affairs'), on the other, concerning the rejection of short stay visa applications for Mr Vethanayagam and Ms Sumanan.

Legal context

The Swiss Confederation Schengen acquis association agreement

3 The 8th and 10th recitals of 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 (OJ 2008 L 53, p. 52; 'the Swiss Confederation Schengen acquis association agreement') state as follows:

'CONVINCED of the need to organise cooperation between the European Union and the Swiss Confederation as regards the implementation, practical application and further development of the Schengen *acquis*;

…

WHEREAS Schengen cooperation is based on the principles of freedom, democracy, the rule of law and respect for human rights, as guaranteed in particular by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.'

4 According to Article 1(2) of the Swiss Confederation Schengen acquis association agreement:

'This Agreement creates reciprocal rights and obligations in accordance with the procedures set out herein.'

5 Article 2 of that agreement provides:

'1. The provisions of the Schengen *acquis* as listed in Annex A to this Agreement as they apply to the Member States of the European Union, hereinafter referred to as "Member States", shall be implemented and applied by Switzerland.

2. The provisions of the acts of the European Union and of the European Community listed in Annex B to this Agreement, to the extent that they have replaced and/or developed corresponding provisions of, or provisions adopted pursuant to, the Convention signed in Schengen on 19 June 1990 implementing the Agreement on the gradual abolition of checks at common borders, hereinafter referred to as the Convention Implementing the Schengen Agreement, shall be implemented and applied by Switzerland.

3. The acts and measures taken by the European Union and the European Community amending or building upon the provisions referred to in Annexes A and B, to which the procedures set out in this Agreement have been applied, shall also, without prejudice to Article 7, be accepted, implemented and applied by Switzerland.'

The Visa Code

6 Recitals 4, 18, 28, 29 and 34 of the Visa Code state:

'(4) Member States should be present or represented for visa purposes in all third countries whose nationals are subject to visa requirements. Member States lacking their own consulate in a given third country or in a certain part of a given third country should endeavour to conclude representation arrangements in order to avoid a disproportionate effort on the part of visa applicants to have access to consulates.

…

(18) Local Schengen cooperation is crucial for the harmonised application of the common visa policy and for proper assessment of migratory and/or security risks. Given the differences in local circumstances, the operational application of particular legislative provisions should be assessed among Member States' diplomatic missions and consular posts in individual locations in order to ensure a harmonised application of the legislative provisions to prevent visa shopping and different treatment of visa applicants.

…

(28) Since the objective of this Regulation, namely the establishment of the procedures and conditions for issuing visas for transit through or intended stays in the territory of the Member States … cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of

subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

(29) This Regulation respects fundamental rights and observes the principles recognised in particular by the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms and by the Charter of Fundamental Rights of the European Union.

…

(34) As regards Switzerland, this Regulation constitutes a development of the provisions of the Schengen *acquis* within the meaning of the [the Swiss Confederation Schengen acquis association agreement], which fall within the area referred to in Article 1, point B, of [Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis (OJ 1999 L 176, p. 31),] read in conjunction with Article 3 of Council Decision 2008/146/EC [of 28 January 2008] on the conclusion of that Agreement [(OJ 2008 L 53, p. 1)].'

7 Article 1(1) of the Visa Code reads as follows:

'This Regulation establishes the procedures and conditions for issuing visas for transit through or intended stays on the territory of the Member States not exceeding 90 days in any 180-day period.'

8 According to Article 2(2) of that code:

'For the purposes of this Regulation, the following definitions shall apply:

…

(2) "visa" means an authorisation issued by a Member State with a view to:
   (a) transit through or an intended stay on the territory of the Member States of a duration of no more than 90 days in any 180-day period;
   (b) transit through the international transit areas of airports of the Member States;

…'

9 Article 4(1) of that code reads:

'Applications shall be examined and decided on by consulates.'

10 Article 5 of that code provides:

'1. The Member State competent for examining and deciding on an application for a uniform visa shall be:

(a) the Member State whose territory constitutes the sole destination of the visit(s);

…

4. Member States shall cooperate to prevent a situation in which an application cannot be examined and decided on because the Member State that is competent in accordance with paragraphs 1 to 3 is neither present nor represented in the third country where the applicant lodges the application in accordance with Article 6.'

11 Article 6(1) of the Visa Code, that article being headed 'Consular territorial competence', states:

'An application shall be examined and decided on by the consulate of the competent Member State in whose jurisdiction the applicant legally resides.'

12 Under Article 8 of that code, on representation arrangements:

'1. A Member State may agree to represent another Member State that is competent in accordance with Article 5 for the purpose of examining applications and issuing visas on behalf of that Member State. A Member State may also represent another Member State in a limited manner solely for the collection of applications and the enrolment of biometric identifiers.

2. The consulate of the representing Member State shall, when contemplating refusing a visa, submit the application to the relevant authorities of the represented Member State in order for them to take the final decision on the application within the time limits set out in Article 23(1), (2) or (3).

…

4. A bilateral arrangement shall be established between the representing Member State and the represented Member State containing the following elements:

(a) it shall specify the duration of such representation, if only temporary, and procedures for its termination;

(b) it may, in particular when the represented Member State has a consulate in the third country concerned, provide for the provision of premises, staff and payments by the represented Member State;

(c) it may stipulate that applications from certain categories of third-country nationals are to be transmitted by the representing Member State to the central authorities of the represented Member State for prior consultation as provided for in Article 22;

(d) by way of derogation from paragraph 2, it may authorise the consulate of the representing Member State to refuse to issue a visa after examination of the application.

5. Member States lacking their own consulate in a third country shall endeavour to conclude representation arrangements with Member States that have consulates in that country.

6. With a view to ensuring that a poor transport infrastructure or long distances in a specific region or geographical area does not require a disproportionate effort on the part of applicants to have access to a consulate, Member States lacking their own consulate in that region or area shall endeavour to conclude representation arrangements with Member States that have consulates in that region or area.

…'

13 Article 32(3) of that code provides:

'Applicants who have been refused a visa shall have the right to appeal. Appeals shall be conducted against the Member State that has taken the final decision on the application and in accordance with the national law of that Member State. Member States shall provide applicants with information regarding the procedure to be followed in the event of an appeal, as specified in Annex VI.'

14 According to Article 47(1) of the Visa Code:

'Member States' central authorities and consulates shall provide the general public with all relevant information in relation to the application for a visa, in particular:

…

(h) that negative decisions on applications must be notified to the applicant, that such decisions must state the reasons on which they are based and that applicants whose applications are refused have a right to appeal, with information regarding the procedure to be followed in the event of an appeal, including the competent authority, as well as the time limit for lodging an appeal;

…'

The Visa Handbook

15 The Handbook for the processing of visa applications and the modification of issued visas, established by Commission Decision C(2010) 1620 final of 19 March 2010, explains that 'for the purpose of the Visa Code and this Handbook the term "Member State" refers to those EU Member States applying the Schengen *acquis* in full and the associated states, and "territory of the Member States" refers to the territory … of these "Member States"'.

The representation arrangement between the Kingdom of the Netherlands and the Swiss Confederation

16 The representation arrangement between the Kingdom of the Netherlands and the Swiss Confederation applicable at the material time entered into force on 1 October 2014. It states that the Swiss Confederation will represent the Kingdom of the Netherlands as regards all types of Schengen visas, inter alia, in Sri Lanka.

17 In accordance with point 2 of that agreement, 'representation' includes, inter alia, 'refusing to issue the visa when appropriate in conformity with Article 8(4)(d) of the Visa Code and dealing with appeals, in accordance with the national law of the representing Party (Article 32(3) of the Visa Code)'.

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

18 On 16 August 2016 Mr Vethanayagam and Ms Sumanan, who are Sri Lankan nationals, married and resident in Sri Lanka, applied for short-term visas for the Netherlands in order to visit Ms Vethanayagam, Mr Vethanayagam's sister, who is a Dutch national and resides in Amsterdam (Netherlands). Those applications were made, through VFS Global, a service provider, at the Swiss Consulate in Colombo (Sri Lanka) under the representation arrangement between the Kingdom of the Netherlands and the Swiss Confederation.

19 By decisions of 19 August 2016, the Swiss consular authorities, acting on behalf of the Kingdom of the Netherlands, rejected the visa applications on the grounds that Mr Vethanayagam and Ms Sumanan had not shown that they had sufficient means of support, both for the duration of their intended stay and as a guarantee of their return to their country of origin.

20 Mr Vethanayagam and Ms Sumanan lodged an appeal against those decisions with the Netherlands Minister for Foreign Affairs. By decisions of 28 September 2016, the minister declared that he lacked competence to hear that appeal.

21 Furthermore, by a decision of 2 December 2016, the Staatssekretariat für Migration (Secretariat of State for Migration, Switzerland) rejected the appeal lodged by the persons concerned against the decisions of 19 August 2016. The Bundesverwaltungsgericht (Federal Administrative Court, Switzerland), dismissed, as a preliminary issue, the applicants' application to bring proceedings without incurring costs and declined to hear the appeal lodged against the decision of 2 December 2016 on the grounds that the sum required as a deposit had not been paid.

22 Mr Vethanayagam and Ms Sumanan, together with Ms Vethanayagam, as sponsor, made a further application for short-term visas to the Visadienst (Visa Service, Netherlands) for Mr Vethanayagam and Ms Sumanan. That application was rejected by decision of the Netherlands Minister for Foreign Affairs of 18 October 2016.

23 By decision of 23 November 2016, the Netherlands Minister for Foreign Affairs dismissed as being inadmissible the challenge brought by the applicants in the main proceedings against the decision of 18 October 2016.

24 The applicants in the main proceedings brought an appeal before the Rechtbank Den Haag, zittingsplaats Utrecht (District Court, The Hague, sitting in Utrecht, Netherlands) against the decisions of 28 September and 23 November 2016, arguing that examining their objections and their visa applications was a matter for the Kingdom of the Netherlands and that the Swiss Confederation had acted only as the representative of the Kingdom of the Netherlands. The applicants in the main proceedings contend that, under EU law, they were entitled to apply for visas to the country of their main destination, and argue that the complete surrender of visa procedures to another country is contrary to the principle of an effective legal remedy under Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

25 The Netherlands Minister for Foreign Affairs submits that he was not competent to determine the visa applications of the applicants in the main proceedings.

26 First, he argues that competence to examine visa applications made in Sri Lanka has been transferred to the Swiss Confederation under Article 8(4) of the Visa Code and the *note verbale* based on that article.

27 Second, since the Swiss consular authorities in Colombo are competent to refuse visas, according to Article 32(3) of the Visa Code the applicants in the main proceedings should have lodged their appeal against the Swiss Confederation as the State that made the final decision on their applications.

28 Third, visa applications from third country nationals residing in Sri Lanka cannot be lodged directly with the visa service in the Netherlands. In fact, because the Kingdom of the Netherlands is represented in Sri Lanka by the Swiss Confederation, under Article 6(1) of the Visa Code applicants must lodge their visa applications with the Swiss consular authorities.

29 Against that background, the referring court has doubts as to the interpretation of the Visa Code regarding, first, the position of sponsors in visa procedures, second, the concept of 'representation' and, last, whether the consular representation system is compatible with the right to effective legal protection laid down in Article 47 of the Charter.

30 In those circumstances, the Rechtbank Den Haag, zittingsplaats Utrecht (District Court, The Hague, sitting in Utrecht) stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Does Article 32(3) of the Visa Code preclude a sponsor, as an interested party in connection with the visa applications of applicants, from having a right of objection and appeal in his or her own name against the refusal of those visas?

(2) Should representation, as regulated in Article 8(4) of the Visa Code, be interpreted as meaning that responsibility (also) remains with the represented State, or that responsibility is wholly transferred to the representing State, with the result that the represented State itself is no longer competent?

(3) In the event that Article 8(4)(d) of the Visa Code allows both forms of representation as referred to in Question 2, which Member State must then be regarded as the Member State that has taken the final decision as referred to in Article 32(3) of the Visa Code?

(4) Is an interpretation of Article 8(4) and Article 32(3) of the Visa Code according to which visa applicants can lodge an appeal against the rejection of their applications solely with an administrative or judicial body of the representing Member State, and not in the represented Member State for which the visa application was made, consistent with effective legal protection as referred to in Article 47 of the Charter? Is it relevant to the answer to that question that the avenue of legal recourse offered should guarantee that an applicant has the right to be heard, that he or she has the right to bring proceedings in a language of one of the Member States, that the level of the charges or court fees for the procedures governing the lodging of objections and appeals are not disproportionate for the applicant and that there is a possibility of funded legal aid? Given the margin of discretion enjoyed by the State in matters relating to visas, is it relevant to the answer to this question whether a Swiss court has sufficient insight into the situation in the Netherlands to be able to provide effective legal protection?'

Consideration of the questions referred

The first question

31 By its first question, the referring court asks, in essence, whether Article 32(3) of the Visa Code must be interpreted as meaning that it allows a sponsor to bring an appeal in his or her own name against a decision refusing a visa.

Admissibility

32 As a preliminary matter, the European Commission claims that the first question referred is inadmissible, contending that the Netherlands legislation does not apply to the case in the main proceedings since, in this instance, it was the Swiss rather than the Netherlands authorities that made the final decision on the visa application.

33 That argument cannot be accepted.

34 First, ascertaining the State to which an appeal against a decision to refuse a visa should be brought, under Article 32(3) of the Visa Code, is one of the questions to which this referral relates, and the answer to that question therefore cannot be prejudged in the context of analysing whether the first question referred is admissible.

35 Second, according to the Court's settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle required to give a ruling (judgment of 4 December 2018, *Minister for Justice and Equality and Commissioner of An Garda Síochána*, C-378/17, EU:C:2018:979, paragraph 26 and the case-law cited).

36 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 4 December 2018, *Minister for Justice and Equality and Commissioner of An Garda Síochána*, C-378/17, EU:C:2018:979, paragraph 27 and the case-law cited).

37 In the present case, the first question referred concerns the interpretation of EU law, in particular whether a sponsor has standing to appeal against a visa refusal decision under Article 32(3) of the Visa Code.

38 Furthermore, besides the fact that the order for reference gives sufficient factual and legal context to determine the scope of the question submitted, it is not apparent that the interpretation of EU law sought bears no relation to the actual facts of the main action or its purpose or that the problem is hypothetical.

39 Indeed, as can be seen from the order for reference, the sponsor, Ms Vethanayagam, who is the sister and sister-in-law respectively of the visa applicants, and who lives in the Netherlands, lodged an appeal, as did the applicants, against the visa service's rejection of the application for visas for the applicants.

40 It is therefore apparent that the referring court needs an answer from the Court of Justice on the interpretation it is seeking if it is to be able to give a ruling.

41 The first question referred is, accordingly, admissible.

Substance

42 As regards the interpretation of Article 32(3) of the Visa Code, in accordance with the Court's settled case-law, in interpreting provisions of EU law it is necessary to consider not only their wording but also the context in which they occur and the objectives pursued by the rules of which they are part (judgment of 7 February 2018, *American Express*, C-304/16, EU:C:2018:66, paragraph 54 and the case-law cited).

43 First, as regards the wording of Article 32(3) of the Visa Code, its first sentence states that 'applicants who have been refused a visa shall have the right to appeal'. It is therefore clear from the wording of that article that the right to appeal against the decision refusing a visa expressly lies with the visa applicant concerned.

44 Recognition of that right does not conflict with the fact that the second sentence of Article 32(3) of the Visa Code provides that appeals against decisions to refuse visas must be brought against the Member State that has taken the final decision and 'in accordance with the national law of that Member State'.

45 The Court of Justice has already held in that regard that, by referring back to the legislation of the Member States in that way, the EU legislature left to the Member States the task of deciding both the nature and the specific conditions of the remedies available to visa applicants (judgment of 13 December 2017, *El Hassani*, C-403/16, EU:C:2017:960, paragraph 25).

46 It follows that this referral back to the national legislation of the Member States is confined to the regulation of detailed procedural rules, whereas the matter of who is entitled to bring an appeal is expressly determined by Article 32(3) of the Visa Code.

47 Second, that finding is confirmed by the surrounding context of Article 32(3) of the Visa Code. It is clear from Article 47(1)(h) of that code that the Member States' central authorities and consulates must provide the general public with all relevant information in relation to the application for a visa, in particular that refusal decisions must be notified to applicants and that applicants whose applications are refused have a right to appeal.

48 Furthermore, as can be seen from Annex VI to the Visa Code, the standard form contained in that annex, to be used to notify a decision refusing, annulling or revoking a visa and to give the reasons on which it is based, is addressed to the visa applicant or holder. That form also contains a list of the grounds that can justify refusal under Article 32(1) of the Visa Code. It is clear from the foregoing that the grounds for a refusal decision must only be grounds relating specifically to the visa applicant.

49 Indeed, after the competent authority states, on the form that it is required to complete, that it has 'examined [the] visa application' or 'examined [the] visa', as applicable, it must indicate the reason or reasons for the refusal, revocation or annulment of the visa, from among the eleven reasons shown on the form, namely that: the applicant presented a false travel document; justification for the purpose and conditions of the intended stay was not provided; the applicant did not provide proof of sufficient means of subsistence for the duration of the intended stay; the applicant has already stayed for 90 days during the current 180-day period on the territory of the Member States on the basis of a uniform visa or a visa with limited territorial validity; an alert has been issued against the applicant in the Schengen Information System (SIS) for the purpose of refusing entry; one or more Member State(s) consider the applicant to be a threat to public policy, internal security or public health, or to the international relations of one or more of the Member States; the applicant has not provided proof of holding an adequate and valid travel medical insurance; the information submitted by the applicant regarding the justification for the purpose and conditions of the intended stay is not reliable; the applicant's intention to leave the territory of the Member States before the expiry of the visa could not be ascertained; the applicant has not provided sufficient proof that he or she was not in a position to apply for a visa in advance, justifying application for a visa at the border; or that revocation of the visa was requested by the visa holder.

50 It is therefore apparent from the context of Article 32(3) of the Visa Code that only the visa applicant has a right to lodge an appeal against a decision refusing a visa.

51 Third, as regards the objectives of the Visa Code, it can be seen from Article 1 of that code, in the light of recitals 18 and 28, that the purpose of the code, in order to ensure the harmonised application of the common visa policy, is to establish the procedures and conditions for issuing visas for transit through or intended stays in the territory of the Member States not exceeding 90 days in any 180-day period.

52 In that respect, according to Article (2)(2)(a) and (b) of the Visa Code, a visa is defined as an authorisation issued by a Member State with a view to either transit through or an intended stay in the territory of the Member States of a duration of no more than 90 days in any 180-day period, or transit through the international transit areas of airports of the Member States. As a corollary of that authorisation, therefore, there must be specific rights enjoyed by the visa applicant.

53 Since the appeal referred to in Article 32(3) of the Visa Code seeks to alter the decision to refuse the visa, it is the visa applicant, as the addressee of that decision, who has a direct and specific interest in bringing an appeal against it.

54 That finding does not prevent the Member States, in accordance with the case-law cited in paragraph 45 of this judgment, when deciding on the nature and specific conditions of the remedies available to visa applicants, from authorising the sponsor to intervene in the appeal procedure under Article 32(3) of the Visa Code jointly with the visa applicant.

55 However, in the light of what was held in paragraph 47 of the present judgment, the sponsor cannot act independently but only as a subsidiary and secondary party in relation to the visa applicant.

56 Furthermore, in view of the foregoing considerations, Article 32(3) of the Visa Code likewise does not preclude the addressee of a visa refusal decision from appointing a third party to represent him or her in court proceedings.

57 In the light of all the foregoing, the answer to the first question is that Article 32(3) of the Visa Code must be interpreted as meaning that it does not allow a sponsor to bring an appeal in his or her own name against a decision to refuse a visa.

The second and third questions

58 By its second and third questions, which can appropriately be answered together, the referring court asks, in essence, whether Article 8(4)(d) and Article 32(3) of the Visa Code must be interpreted as meaning that, where there is a bilateral representation arrangement providing that the consular authorities of the representing Member State are authorised to make decisions refusing visas, it is for the competent authorities of that State to rule on appeals brought against a visa refusal decision.

59 In order to answer those questions, it is worth noting that Title III of the Visa Code lays down the rules relating to the procedures and conditions for issuing visas.

60 To the extent that those provisions refer to the Member States, they refer equally to the Swiss Confederation, as can be seen, in particular, from Article 2 of the Swiss Confederation Schengen acquis association agreement, read in the light of recital 34 of the Visa Code.

61 First, it is apparent from Article 4(1) of the Visa Code that visa applications are, in principle, examined by the consulates.

62 Second, Article 5(1) of the Visa Code designates as the Member State competent for examining and deciding on an application for a uniform visa either the Member State whose territory constitutes the sole destination of the visit or visits or, if the visit includes more than one destination, the Member State whose territory constitutes the main destination of the visit(s) in terms of the length or purpose of stay, or, if no main destination can be determined, the Member State whose external border the applicant intends to cross in order to enter the territory of the Member States.

63 Further, as regards consular territorial competence, it follows from Article 6(1) of the Visa Code that visa applications must, in principle, be made at the consulate of the competent State in whose jurisdiction the applicant legally resides.

64 However, it is apparent from Article 8(5) and (6) of the Visa Code, read in the light of recital 4 thereof, that, in order to avoid a disproportionate effort on the part of visa applicants to have access to consulates, Member States lacking their own consulate in a given third country or in a certain part of a given third country should endeavour to conclude representation arrangements.

65 To that end, Article 8 of the Visa Code expressly states that Member States may establish bilateral arrangements with each other whereby one Member State agrees to represent another Member State for the purpose of deciding on visa applications.

66 The fact remains that under Article 8 of the Visa Code the extent of the representation varies depending on what decision is envisaged for the visa application and on the terms of the representation arrangement.

67 On the one hand, where it is envisaged that the visa application will be granted, Article 8(1) of the Visa Code provides that 'a Member State may agree to represent another Member State that is competent in accordance with Article 5 for the purpose of examining applications and issuing visas on behalf of that Member State' and adds that 'a Member State may also represent another Member State in a limited manner solely for the collection of applications and the enrolment of biometric identifiers'.

68 Accordingly, where visas are issued, Article 8(1) of the Visa Code envisages two levels of representation, that is to say, a first level, which includes examining the application and issuing the visa, and a second, more limited level, confined to collecting applications.

69 On the other hand, where the decision contemplated is a refusal of the visa, Article 8 of the Visa Code likewise provides for two different levels of representation, the first operating as the general rule and the other as a special rule.

70 The general rule, under Article 8(2) of the Visa Code, is that, when it contemplates refusing a visa, the consulate of the representing Member State must submit the application to the relevant authorities of the represented Member State in order for them to take the final decision on that application.

71 The special rule, under Article 8(4)(d) of that code, is that, by way of derogation from the general rule, the bilateral representation arrangement established between two Member States may authorise the consulate of the representing Member State to refuse to issue a visa after examination of the application.

72 In other words, where the representing Member State considers that a visa application should be refused, it must, unless provided otherwise in the bilateral representation arrangement, submit that application to the authorities of the represented Member State. It is for those authorities to take the final decision. In contrast, where the bilateral representation arrangement so provides, it is for the authorities of the representing Member State to refuse the visa application and, therefore, to take the final decision.

73 Accordingly, since Article 32(3) of the Visa Code provides that appeals against decisions refusing visas are brought against the Member State that took the final decision on the application, the matter of which State is competent to take the final decision and, accordingly, against which the appeal must be brought, depends, where a representation arrangement between two Member States is in place, on the terms of that arrangement.

74 In the present case, since the territory of the Kingdom of the Netherlands was the sole destination of the visit by the applicants in the main proceedings, if there were no representation arrangement, the visa applications should have been made, under Articles 5 and 6 of the Visa Code, at that Member State's consulate in Sri Lanka. However, as can be seen from the request for a preliminary ruling, since the Kingdom of the Netherlands does not have its own consulate in that country, on 1 October 2014 it concluded a representation arrangement with the Swiss Confederation. That arrangement enabled the applicants in the main proceedings to lodge their visa applications for a short-term stay in the Netherlands at the Swiss Consulate in Colombo.

75 That arrangement in fact provides that, when representing the Netherlands, Switzerland is responsible, inter alia, for 'refusing to issue visas when appropriate, in conformity with Article 8(4)(d) of the Visa Code', and for 'dealing with appeals, in accordance with the national law of the representing Party'.

76 Accordingly, since, under that arrangement, it was for the Swiss Confederation to take the final decision on the short stay visa applications for the Netherlands lodged by the applicants in the main proceedings, it was also the Swiss Confederation that was competent to entertain the appeals brought, in accordance with Article 32(3) of the Visa Code, against the decisions to refuse visas.

77 In the light of the foregoing, the answer to the second and third questions is that Article 8(4)(d) and Article 32(3) of the Visa Code must be interpreted as meaning that, where there is a bilateral representation arrangement providing that the consular authorities of the representing Member State are authorised to decide to refuse visas, it is for the competent authorities of that Member State to rule on appeals brought against decisions to refuse visas.

The fourth question

78 By its fourth question, the referring court asks, in essence, whether an interpretation of Article 8(4)(d), read in conjunction with Article 32(3) of the Visa Code, as meaning that an appeal against a visa refusal decision must be brought against the representing State is consistent with the fundamental right to effective judicial protection.

79 It must be noted in that respect that, as is clear from recital 29 of the Visa Code, the provisions of that code, including the right to appeal under Article 32(3) of that code, must be interpreted in accordance with the fundamental rights and principles recognised by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR') and by the Charter.

80 The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR, now reaffirmed by Article 47 of the Charter (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 35).

81 In the specific context of Article 32(3) of the Visa Code, it is for each Member State to ensure that fundamental rights, in particular effective judicial protection, are upheld when deciding the nature and specific conditions of the remedies against decisions refusing visas, in accordance with the principles of equivalence and effectiveness (see to that effect, judgment of 13 December 2017, *El Hassani*, C-403/16, EU:C:2017:960, paragraphs 25 and 42).

82 Accordingly, irrespective of whether, depending on the terms of the representation arrangement, the State against which the appeal against a decision to refuse a visa must be brought is the representing State or the represented State, fundamental rights, in particular the right of visa applicants to effective judicial protection, must be upheld.

83 In particular, the fact that the final decision to refuse a visa is taken by the representing State, as in the main proceedings, does not alter the obligation to uphold that right.

84 Here, as is stated in its recital 34, the Visa Code constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Swiss Confederation Schengen acquis association agreement which fall within the area referred to in Article 1, point B, of Decision 1999/437, read in conjunction with Article 3 of Decision 2008/146.

85 Under that code, the Swiss Confederation may issue uniform visas valid for the whole of the Schengen area.

86 Although the Swiss Confederation is not an EU Member State, it is, as a member of the Council of Europe since 6 May 1963, not only a party to the ECHR but first and foremost an associated state by virtue of the Swiss Confederation Schengen acquis association agreement, which provides in its 10th recital that 'Schengen cooperation is based on the principles of freedom, democracy, the rule of law and respect for human rights, as guaranteed in particular by the [ECHR]'.

87 Moreover, as can be seen from Article 1(2) of the Swiss Confederation Schengen acquis association agreement, that agreement creates reciprocal rights and obligations, so that, as Article 2 of that agreement provides, the Swiss Confederation must implement all the provisions of the Schengen *acquis* in accordance with the procedures laid down in that agreement.

88 In the light of the foregoing considerations, the answer to the fourth question is that an interpretation of Article 8(4)(d) read in conjunction with Article 32(3) of the Visa Code as meaning that an appeal against a visa refusal decision must be brought against the representing State is consistent with the fundamental right to effective judicial protection.

Costs

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

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

1. **Article 32(3) of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas, as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013, must be interpreted as meaning that it does not allow a sponsor to bring an appeal in his or her own name against a decision to refuse a visa.**

2. **Article 8(4)(d) and Article 32(3) of Regulation No 810/2009, as amended by Regulation No 610/2013, must be interpreted as meaning that, where there is a bilateral representation arrangement providing that the consular authorities of the representing Member State are authorised to decide to refuse visas, it is for the competent authorities of that Member State to rule on appeals brought against decisions to refuse visas.**

3. **An interpretation of Article 8(4)(d) and Article 32(3) of Regulation No 810/2009, as amended by Regulation No 610/2013, as meaning that an appeal against a decision refusing a visa must be brought against the representing State is consistent with the fundamental right to effective judicial protection.**

[Signatures]