



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

4 March 2021 *

(Reference for a preliminary ruling – Area of freedom, security and justice – Border controls, asylum and immigration – Convention implementing the Schengen Agreement – Consultation of the Schengen Information System (SIS) in the examination of an application for a residence permit made by a third-country national for whom an alert has been issued in the SIS for the purposes of refusing entry – Article 25(1) – Schengen Borders Code – Entry conditions for third-country nationals – Article 6(1) and (5) – Charter of Fundamental Rights of the European Union – Article 7 and Article 24(2) – Refusal to renew a residence permit for the purposes of family reunification on the ground that the applicant’s identity cannot be established with certainty)

In Case C-193/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Förvaltningsrätten i Malmö – Migrationsdomstolen (Administrative Court for Immigration Matters, Malmö, Sweden), made by decision of 15 February 2019, received at the Court on 27 February 2019, in the proceedings

A

v

Migrationsverket,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra (Rapporteur), D. Šváby, S. Rodin and K. Jürimäe, Judges,

Advocate General: J. Richard de la Tour

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– A, by T. Bodin, advokat,

* Language of the case: Swedish.

- Migrationsverket, by C. Bexelius and H. Forssell, acting as Agents,
- the Swedish Government, initially by J. Lundberg, A. Falk, H. Eklinder, C. Meyer-Seitz and H. Shev, and subsequently by H. Eklinder, C. Meyer-Seitz, and H. Shev, acting as Agents,
- the Netherlands Government, by M. Bulterman and M. de Ree, acting as Agents,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by G. Wils, K. Simonsson and G. Tolstoy, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 July 2020,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed in Schengen (Luxembourg) on 19 June 1990 and entering into force on 26 March 1995 (OJ 2000 L 239, p. 19), as amended by Regulation (EU) No 265/2010 of the European Parliament and of the Council of 25 March 2010 (OJ 2010 L 85, p. 1; ‘the CISA’), and 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; ‘the Schengen Borders Code’).
- 2 The request has been made in proceedings between A, a Gambian national, and the Migrationsverket (Immigration Board, Sweden) concerning the latter’s decision to reject A’s application for an extension of his residence permit for the purposes of family reunification, on the ground that his identity could not be established with certainty.

Legal context

European Union law

The CISA

- 3 Article 25(1) of the CISA states:

‘Where a Member State considers issuing a residence permit, it shall systematically carry out a search in the Schengen Information System [(SIS)]. Where a Member State considers issuing a residence permit to an alien for whom an alert has been issued for the purposes of refusing entry, it shall first consult the Member State issuing the alert and shall take account of its interests; the residence permit shall be issued for substantive reasons only, notably on humanitarian grounds or by reason of international commitments.

Where a residence permit is issued, the Member State issuing the alert shall withdraw the alert but may put the alien concerned on its national list of alerts.’

The Schengen Borders Code

4 Under the second paragraph of Article 1 of the Schengen Borders Code, that regulation ‘lays down rules governing border control of persons crossing the external borders of the Member States of the Union’.

5 Article 6 of that code, entitled ‘Entry conditions for third-country nationals’, provides:

‘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:

(a) they are in possession of a valid travel document entitling the holder to cross the border ...;

...

(d) they are not persons for whom an alert has been issued in the SIS for the purposes of refusing entry;

(e) they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States’ national data bases for the purposes of refusing entry on the same grounds.

...

5. By way of derogation from paragraph 1:

...

(c) third-country nationals who do not fulfil one or more of the conditions laid down in paragraph 1 may be authorised by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations. Where the third-country national concerned is the subject of an alert as referred to in paragraph 1(d), the Member State authorising him or her to enter its territory shall inform the other Member States accordingly.’

Swedish law

6 Chapter 2, Paragraph 1, of the utlänningslagen (2005:716) (Law (2005:716) on Aliens; ‘the UL’) provides:

‘An alien entering or residing in Sweden must hold a passport.’

7 Chapter 5, Paragraph 3, first subparagraph, of the UL provides:

‘A residence permit shall be issued, subject to the provisions of Paragraphs 17 to 17b, to:

1. any foreign national whose spouse or cohabiting partner is resident or has been issued a residence permit in Sweden;

...’

8 Chapter 5, Paragraph 8, of that law provides:

‘A residence permit issued to an alien pursuant to the first subparagraph of Paragraph 3, point 1, ... shall be limited in time at the time of the first decision, unless

1. the foreign national has been cohabiting abroad for a long time with his or her spouse or partner, or
2. if it is clear, otherwise, that the relationship is well established.

...’

9 Chapter 5, Paragraph 16, first subparagraph, of the UL is worded as follows:

‘An alien who, by virtue of Paragraph 8, has been granted a temporary residence permit on account of a family relationship can obtain a new temporary or permanent residence permit on that ground only if the relationship in question continues to exist.’

10 Chapter 5, Paragraph 17a, first and second subparagraphs, of that law provides:

‘In the situations referred to in Paragraph 3, the issue of a residence permit may be refused if:

1. incorrect information has deliberately been given or facts have deliberately been withheld, where that information and those facts are relevant to obtaining a residence permit, [or]
2. an alien has been adopted or has entered into a marriage or co-habiting relationship exclusively with the aim of giving that alien the right to a residence permit, or
3. the alien poses a threat to public order or public security.

A residence permit may also be refused in the situations referred to in Paragraph 3, first subparagraph, point 1, if:

1. the spouses or partners do not live together or have no intention of doing so;

...’

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

- 11 On 9 December 2013 A, a Gambian national, was issued with a temporary residence permit by the Swedish authorities in order to join his wife, who holds Swedish nationality.
- 12 Before entering Swedish territory, A had applied for a residence permit and had furnished proof of his identity by presenting a passport from his country of origin.
- 13 On 9 November 2015, A applied to the Migrationsverket for an extension of that temporary residence permit.
- 14 At the time of the examination of that application, the Migrationsverket obtained information from the Norwegian authorities to the effect that the person concerned had been detained in Norway and had used a number of false identities there. In addition, the person concerned, under one of those identities, had been sentenced in Norway to a custodial sentence for possession and sale of narcotic drugs, had been definitively deported from Norway and was the subject of an alert in the SIS for the purposes of refusing him entry into the Schengen area. In addition, another application for a residence permit, made in Dakar (Senegal), had been registered in Sweden under that identity and had been rejected on the ground that it was based on a marriage of convenience.
- 15 It is also apparent from the referring court's answers to the Court's requests for clarification that A and his wife of Swedish nationality have been divorced since 13 February 2018 and have no children in common. That court states that A now lives in cohabitation with a Norwegian national, with whom he has two minor children who also hold Norwegian nationality.
- 16 The referring court also states, in its replies to the requests for clarification, that, in Sweden, Norwegian nationals have 'almost the same rights of residence as Swedish citizens', under the Nordic passport union, to which the Kingdom of Sweden and the Kingdom of Norway, inter alia, are parties, and that, on the date on which the application for an extension of the residence permit was investigated, the only connection relied on by A is that which exists with those Norwegian nationals. It adds that, although it is stated in the national population registers that those Norwegian nationals are not resident in Sweden, that information 'is likely to be altered at any time and is therefore not necessarily correct', 'several reasons [being able] to explain the fact of their being registered as having emigrated'. However, it states that A is still registered as being resident in Malmö (Sweden).
- 17 By decision of 2 June 2017, the Migrationsverket rejected A's application for an extension of the temporary residence permit on the ground, in particular, that his identity had not been proved.
- 18 A appealed against that decision to the Förvaltningsrätten i Malmö –Migrationsdomstolen (Administrative Court for Immigration Matters, Malmö, Sweden).
- 19 The referring court is doubtful as to the requirements stemming from EU law in relation to establishing the identity of a third-country national whose application for a residence permit, lodged when that person is already on national territory, is based neither on grounds of international protection nor on humanitarian grounds, but is for the purposes of the family reunification of the applicant. That court asks, in particular, whether EU law requires the identity of the third-country national applicant to be established with certainty in order for such a document to be issued to him, even if he is already domiciled in the national territory.

- 20 That court states that, under Swedish law, the issue of a residence permit which is not based on grounds of international protection or humanitarian grounds is subject to proof that the applicant's identity is established with certainty, by means of a passport valid for the duration of the residence authorisation sought. Some exceptions to that rule are, however, accepted in certain situations which do not correspond to that at issue in the main proceedings.
- 21 The referring court notes that the Migrationsöverdomstolen (Court of Appeal for Immigration Matters, Sweden) held, on the one hand, in judgment No MIG 2011:11 of 12 May 2011, that the issue to a third-country national of a fixed-term residence permit on the basis of a link with the Kingdom of Sweden, in particular marriage, presupposes that the identity of the applicant is established with certainty, that condition being necessary in order to satisfy the commitments resulting from the CISA and the Schengen Borders Code. It states, on the other hand, that that appeal court set aside a judgment of the Förvaltningsrätten i Stockholm – Migrationsdomstolen (Administrative Court for Immigration Matters, Stockholm, Sweden), holding that the CISA and the Schengen Borders Code preclude the application of a low level of proof of identity as permitted under Paragraph 16f of the lagen (2016:752) om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige (Law (2016:752) on temporary restrictions on the possibility of obtaining a residence permit in Sweden), which relates specifically to the grant of a residence permit for purposes of secondary school studies. The Migrationsöverdomstolen (Court of Appeal for Immigration Matters) has also stated that the obligation to establish identity with certainty, set out in its judgment No MIG 2011:11 of 12 May 2011, applies only to applications for residence permits made by third-country nationals who are not yet on Swedish territory.
- 22 In those circumstances, the Förvaltningsrätten i Malmö, migrationsdomstolen (Administrative Court for Immigration Matters, Malmö) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘(1) Do the provisions of the [CISA], including, in particular, the provisions on the systematic consultation of the [SIS] and the Schengen Borders Code and including, in particular, the requirement to hold a valid passport laid down therein, constitute obstacles to the grant of a residence permit on the basis of an application which was submitted in Sweden and which is not based on grounds of protection or humanitarian grounds, when the identity of the person making the application is unclear?
- (2) If that is the case, can the exception on establishment of identity be governed by national law or by case-law?
- (3) If the situation described in [the second question] is not the case, what, if any, derogation is provided for in EU law?’

The procedure before the Court

- 23 Having decided to give judgment without holding a hearing, owing to the health risks associated with the coronavirus pandemic, the Court posed a number of questions, to be answered in writing, to the parties and interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union, to which A, the Migrationsverket, the Swedish Government and the European Commission replied.

Admissibility of the request for a preliminary ruling

- 24 The Swedish Government contends that the request for a preliminary ruling is inadmissible on the ground, first, that the order for reference does not contain a sufficient statement of the factual and legal context of the dispute in the main proceedings to enable the Court to give a useful answer to the questions referred to it. Second, the relationship between the interpretation of EU law sought and the actual facts or subject matter of the main proceedings is not apparent from that order for reference, in particular since, in the present dispute, the applicable national legislation requires an applicant for a residence permit to provide conclusive proof of his identity, since the conditions under which an identity which cannot be established with certainty is accepted are not satisfied. Finally, the order for reference also fails to show clearly the link between the provisions of EU law of which an interpretation is sought and the provisions of national law applicable to the dispute in the main proceedings, which therefore makes it difficult to grasp the relevance of the questions referred for the resolution of the dispute.
- 25 In accordance with 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 in the main proceedings, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it refers to the Court. Consequently, where the questions referred concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (see, inter alia, judgments of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 97, and of 19 December 2019, *Junqueras Vies*, C-502/19, EU:C:2019:1115, paragraph 55 and the case-law cited).
- 26 It follows that questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, 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 (see, inter alia, judgments of 19 December 2019, *Airbnb Ireland*, C-390/18, EU:C:2019:1112, paragraph 29, and of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraph 16 and the case-law cited).
- 27 In the present case, the referring court has set out the reasons for its view that the interpretation of the provisions of both the CISA, relating to searches in the SIS, and the Schengen Borders Code, requiring all third-country nationals to be in possession of a travel document valid throughout the period of residence applied for, is necessary in order to resolve the dispute before it. It has also provided the Court with sufficient factual and legal elements for the Court to give a useful answer to the questions referred. Thus, it does not appear that the questions of interpretation of those provisions bear no relation to the actual facts of the main action or its purpose or that they relate to a hypothetical problem. Furthermore, the link between the provisions of EU law of which an interpretation is sought and the national provisions applicable to the dispute in the main proceedings, relating to the requirement of proof of the identity of an applicant for a residence permit, is clear in the light of the national case-law on those requirements, referred to in paragraph 21 of this judgment, the objective of which, stated by the referring court itself, is to satisfy the commitments arising from the CISA and the Schengen Borders Code.

28 It follows that the request for a preliminary ruling is admissible.

Consideration of the questions referred

The first question

- 29 By its first question, the referring court asks, in essence, whether the provisions of the CISA, in particular Article 25(1) thereof, and/or the Schengen Borders Code must be interpreted as precluding a Member State's legislation which permits the issue, extension or renewal of a residence permit for the purposes of family reunification, applied for from within the territory of that Member State by a third-country national for whom an alert has been issued in the SIS for the purposes of refusing entry into the Schengen area and whose identity it has not been possible to establish by means of a valid travel document.
- 30 In the first place, the first subparagraph of Article 25(1) of the CISA provides that a Member State which intends to issue a residence permit must systematically question the SIS and, where an applicant is requested for the purpose of refusing entry into the Schengen area, that State may issue such a permit to it 'for substantive reasons only, notably on humanitarian grounds or by reason of international commitments', after having consulted the Member State issuing the alert and taking into account the interests of that State. It is apparent from the second subparagraph of that provision that, where that residence permit is issued, the Member State issuing the alert must withdraw the alert in the SIS, but may, however, enter the applicant on its national list of alerts.
- 31 Those provisions thus seek to prevent a situation in which a third-country national is issued with a residence permit while being the subject of an alert in the SIS for the purpose of refusing entry into the Schengen area (see, inter alia, judgment of 16 January 2018, *E*, C-240/17, EU:C:2018:8, paragraph 38).
- 32 However, the provisions of Article 25(1) of the CISA do not determine the legal conditions which such a national must satisfy in order to enter and stay in the Schengen area, including the establishment of his identity.
- 33 Moreover, as the Advocate General observed in point 62 of his Opinion, the preliminary consultation mechanism provided for in Article 25(1) of the CISA does not have the effect of systematically rejecting an application for a residence permit made by a third-country national for whom an alert has been issued in the SIS for the purposes of refusing entry into the Schengen area. The Member State in which that national has made such an application retains the right, after taking into account the interests of the Member State issuing the alert, to issue that residence permit, solely for 'substantive reasons', to that national.
- 34 In that regard, although it is apparent from the very wording of that provision that it seeks to limit exclusively to 'substantive reasons' the grounds on which a Member State may issue a residence permit to a third-country national for whom an alert has been issued in the SIS for the purposes of refusing entry into the Schengen area and that those grounds expressly include 'humanitarian grounds or [grounds] by reason of international commitments', it does not follow that those two grounds are exhaustive. Since those grounds are introduced by the adverb 'notably', they cannot be exhaustive.

- 35 As the Advocate General observed, in essence, in point 66 of his Opinion, the grounds relating to respect for the fundamental rights of the third-country national concerned, in particular the right to respect for family life and the rights of the child, as enshrined in Articles 7 and 24 of the Charter of Fundamental Rights of the European Union, the observance of which is binding on the Member States when the CISA is implemented, which forms an integral part of EU law by virtue of Protocol No 19 on the Schengen *acquis*, is an integral part of EU law, annexed to the Treaties (OJ 2010 C 83, p. 290), are likely to fall within the scope of the concept of ‘substantive reasons’, within the meaning of that provision.
- 36 It follows that Article 25(1) of the CISA cannot be interpreted as depriving Member States of the possibility of issuing a residence permit on grounds relating to family reunification on the sole ground that the identity of the third-country national concerned cannot be established with certainty by means of a valid travel document.
- 37 Furthermore, as the Advocate General observed in point 58 of his Opinion, Article 25(1) of the CISA must be interpreted as applying not only to an application for the issue of a residence permit, but also to an application for the extension or renewal of such a permit, submitted by a third-country national already on the territory of the Member State concerned.
- 38 Accordingly, the competent national authority must consult the SIS prior to the extension or renewal of a residence permit and, where the applicant is the subject of an alert in the SIS for the purposes of refusing entry into the Schengen area, that authority must consult the Member State issuing the alert and take into account the interests of that Member State, since such a residence permit may be renewed or renewed only for ‘substantive reasons’, within the meaning of Article 25(1) of the CISA, as interpreted in paragraph 35 of the present judgment.
- 39 For its part, the competent authority of the Member State consulted is required, in accordance with the principle of cooperation in good faith laid down in Article 4(3) TEU, to take a position on the issue, extension or renewal of the residence permit of the third-country national concerned, within a reasonable time, adapted to the nature of the case, so as to give it the time necessary to collect the relevant information (see, to that effect, judgment of 16 January 2018, *E*, C-240/17, EU:C:2018:8, paragraph 53).
- 40 As regards, in the second place, the Schengen Borders Code, it must be borne in mind that Article 6(1)(a) of that code requires third-country nationals, when crossing the external borders of the Member States, for a stay in the Schengen area ‘not exceeding 90 days throughout a period of 180 days’, to be in possession of a valid travel document entitling the holder to cross the border.
- 41 It follows that the Schengen Borders Code does not govern the situation of third-country nationals, such as the applicant in the main proceedings, who are already in the territory of a Member State and are entitled there to a residence permit for the purposes of family reunification (see, to that effect, judgment of 22 October 2009, *Zurita García and Choque Cabrera*, C-261/08 and C-348/08, EU:C:2009:648, paragraph 45).
- 42 In the light of all the foregoing considerations, the answer to the first question is that:
- Article 25(1) of the CISA must be interpreted as not precluding legislation of a Member State which permits the issue, extension or renewal of a residence permit for the purposes of family reunification, requested from within the territory of that Member State by a third-country national who is the subject of an alert in the SIS for the purposes of refusing entry in the

Schengen area and whose identity has not been able to be established by means of a valid travel document, only where the interests of the Member State which issued the alert and which has first been consulted have been taken into account and where the residence permit is issued, extended or renewed only for ‘substantive reasons’ within the meaning of that provision;

- the Schengen Borders Code, in particular Article 6(1)(a) thereof, must be interpreted as meaning that it does not apply to a third-country national who is in such a situation.

The second and third questions

- 43 In view of the answer to the first question, there is no need to reply to the second and third questions.

Costs

- 44 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 (Fourth Chamber) hereby rules:

Article 25(1) of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed in Schengen (Luxembourg) on 19 June 1990 and entering into force on 26 March 1995, as amended by Regulation (EU) No 265/2010 of the European Parliament and of the Council of 25 March 2010, must be interpreted as not precluding legislation of a Member State which permits the issue, extension or renewal of a residence permit for the purposes of family reunification, requested from within the territory of that Member State by a third-country national who is the subject of an alert in the Schengen Information System for the purposes of refusing entry in the Schengen area and whose identity has not been able to be established by means of a valid travel document, only where the interests of the Member State which issued the alert and which has first been consulted have been taken into account and where the residence permit is issued, extended or renewed only for ‘substantive reasons’ within the meaning of that provision;

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) and, in particular, Article 6(1)(a) thereof, must be interpreted as meaning that it does not apply to a third-country national who is in such a situation.

[Signatures]