



## Reports of Cases

### JUDGMENT OF THE COURT (First Chamber)

17 March 2016\*

(Reference for a preliminary ruling — Directive 2004/38/EC — Decision withdrawing residence authorisation — Principle of respect for the rights of the defence — Right to be heard — Procedural autonomy of the Member States — Admissibility of grounds of appeal on a point of law — Plea based on public policy)

In Case C-161/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Belgium), made by decision of 19 March 2015, received at the Court on 9 April 2015, in the proceedings

**Abdelhafid Bensada Benallal**

v

**État belge,**

THE COURT (First Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, A. Arabadjiev, C.G. Fernlund, S. Rodin and E. Regan, Judges,

Advocate General: P. Mengozzi,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 19 November 2015,

after considering the observations submitted on behalf of:

- Mr Bensada Benallal, by R.-M. Sukennik and R. Fonteyn, avocats,
- the Belgian Government, by S. Vanrie, L. Van den Broeck and C. Pochet, acting as Agents, and by S. Cornelis, P. Lejeune and D. Matray, avocats,
- the French Government, by G. de Bergues, D. Colas and F.-X. Bréchet, acting as Agents,
- the European Commission, by R. Troosters and C. Tufvesson, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 January 2016,

gives the following

\* Language of the case: French.

## Judgment

- 1 This request for a preliminary ruling concerns the interpretation of the general principle of EU law of respect for the rights of the defence.
- 2 The request has been made in proceedings between Mr Bensada Benallal and État belge (the Belgian State) concerning an application for annulment of a decision withdrawing Mr Bensada Benallal's authorisation to reside in Belgium and ordering him to leave that country.

### Legal context

- 3 Article 27 of 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, and corrigendum in OJ 2005 L 197, p. 34) provides:

'1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.

4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.'

- 4 Article 28 of that directive provides that:

'1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

- (a) have resided in the host Member State for the previous 10 years; or
- (b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.'

5 Article 30 of Directive 2004/38 provides:

'1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.

2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.

3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.'

6 Article 31 of the same directive reads as follows:

'1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

- where the expulsion decision is based on a previous judicial decision; or
- where the persons concerned have had previous access to judicial review; or
- where the expulsion decision is based on imperative grounds of public security under Article 28(3).

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.'

7 Under Article 35 of Directive 2004/38:

‘Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.’

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

8 Mr Bensada Benallal, a Spanish national, arrived in Belgium on 24 May 2012. Following an application submitted on 31 May 2012, he was authorised, by a decision of 24 September 2012, to reside in that Member State as a salaried worker.

9 On 26 September 2013, the Belgian State, acting through the Immigration Office (Office des étrangers), withdrew Mr Bensada Benallal’s residence authorisation and ordered him to leave Belgium. That decision stated, *inter alia*, as follows:

‘It appears that the interested party used misleading information which was determinative in the recognition of his right to reside by the local council of Berchem-Sainte-Agathe [(Belgium)]. [It was] found that all the individuals declared by the company ... were not subject to the general social security regime for salaried workers: “Considerable detailed and consistent evidence establishes to the required legal standard the absence of genuine activity by the salaried workers of [that] company ... and consequently the absence of an employment contract between the individuals notified ... and that company.”’

10 On 2 January 2014, Mr Bensada Benallal submitted an application to the Belgian Asylum and Immigration Board (Conseil du contentieux des étrangers) for annulment of that decision.

11 In support of his application, Mr Bensada Benallal put forward a single plea alleging, *inter alia*, infringement of a legislative provision concerning the giving of formal reasons for administrative acts, infringement of the principles of sound administration, of legal certainty, of proportionality, of care and of detailed and exhaustive examination, of sound management and that the administration is required to take decisions on the basis of all the circumstances of the case, and breach of Article 35 of Directive 2004/38.

12 In his submissions clarifying the plea relied on, Mr Bensada Benallal contended, *inter alia*, that the decision of the Immigration Office was vitiated by a deficient statement of reasons. He submitted, in that respect, that the report of that office on which that decision was based had neither been attached to that decision nor sent to him prior to notification of that decision and also had not been substantially reproduced in that decision, with the result that he had been unable to understand the reasons for the decision taken against him.

13 That application was rejected by decision of the Asylum and Immigration Board of 30 April 2014. In its judgment the Board stated, *inter alia*, as follows:

‘In any event, the [Asylum and Immigration] Board finds that over a year passed between [Mr Bensada Benallal] producing his employment contract with the company ... and the report ... which led to the contested decision, a period during which [Mr Bensada Benallal] did not send or communicate any information to the [Immigration Office] concerning the issues raised in terms of the application and which [he] would have encountered in the contract of employment with that company.

If [Mr Bensada Benallal] was of the opinion that he could advance evidence that might prevent the withdrawal of his residence permit, it was for him to bring that evidence to the attention of the [Immigration Office] and not for the [latter] to invite [Mr Bensada Benallal] to make his observations in that regard. The Board reiterates that it is for the applicant to demonstrate that he fulfils the necessary conditions for the right that he claims and in order to maintain that right. In so far as [Mr Bensada Benallal] made an application for a registration certificate in Belgium as a “salaried worker”, he could/should reasonably expect that the non-fulfilment of his employment contract (even if that is nothing to do with [him]) would have consequences for his residence and would be aware that it was necessary to volunteer this information to [the Immigration Office], which was not the case here, as is apparent from the administrative file.

As to the fact that [Mr Bensada Benallal] “did not receive a registered letter as confirmed in the investigation and, therefore, did not have the opportunity to be heard”, he may not challenge that fact since [Mr Bensada Benallal’s] complaint relates to the hearing by the social inspector ... (that hearing, moreover, was not only based on statements but also on objective findings none of which has been contested by [Mr Bensada Benallal]) and does not relate directly to the contested decision.’

- 14 Mr Bensada Benallal brought an administrative appeal on a point of law against that judgment of the Asylum and Immigration Board before the referring court, the Conseil d’État. That appeal includes a plea in which Mr Bensada Benallal maintains that the administrative authority, namely the Immigration Office, ought to have given him the opportunity to set out his views before it adopted its decision of 26 September 2013. He also considers that the Asylum and Immigration Board should have taken the view that the administrative proceedings might have had a different outcome had he been in a better position to put forward his grounds of defence. In support of that plea, Mr Bensada Benallal pleads not only infringement, first, of the general principles of Belgian law of respect for the rights of the defence and the right to an adversarial procedure and, secondly, of the right to be heard (*‘audi alteram partem’*) but also infringement of Articles 41 and 51 of the Charter of Fundamental Rights of the European Union (*‘the Charter’*).
- 15 The Belgian State contends that that plea is inadmissible as it was raised for the first time before the referring court in the proceedings in the appeal on a point of law and does not allege infringement of a provision relating to public policy. Furthermore, it submits, the appellant did not explain in what respect Article 51 of the Charter had been infringed and did not submit any evidence whatsoever to enable an assessment to be made as to whether the administrative procedure might have had a different outcome if he had been heard prior to the administrative decision at issue.
- 16 On the substance, the Belgian State maintains that the right to be heard referred to in Article 41 of the Charter does not require that a discussion be entered into with the interested party concerning the circumstances on which that party relies. It suffices that the latter has had the opportunity to put forward his point of view, which occurred in the present case, as is apparent from the judgment delivered by the Asylum and Immigration Board.
- 17 The *auditeur* (court official) dealing with the case before the referring court found, in his opinion of 16 October 2014, that the single plea raised before the Asylum and Immigration Board did not allege infringement of either Articles 41 and 51 of the Charter or the general legal principles of respect for the rights of the defence and the right to be heard (*‘audi alteram partem’*). In view of the requirements of Belgian legal procedure in that respect, the *auditeur* concluded in his opinion that Mr Bensada Benallal was not entitled to raise, for the first time before the referring court hearing the appeal on a point of law, the infringement of those legal provisions and general principles of law since these were not matters relating to public policy.

- 18 In his statement lodged following that opinion, Mr Bensada Benallal argued that the ground alleging infringement of fundamental rights is a public-policy ground in so far as it is apparent from Article 41 of the Charter and from the Court's case-law that the right to be heard gives effect to the general EU-law principle of respect for the rights of the defence and that failure to respect those rights may be raised of a court's own motion.
- 19 The referring court finds that the plea raised by Mr Bensada Benallal, in so far as it alleges infringement of the right to be heard set out in Article 41 of the Charter, had not been raised by him before the Asylum and Immigration Board. Under Belgian law, however, such a plea cannot be raised for the first time before the court hearing the appeal on a point of law unless that plea is a matter of public policy.
- 20 It is on that basis that the Conseil d'État decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the general principle of EU law upholding the rights of the defence, including the right of an individual to be heard by a national authority before any decision is taken by that authority likely adversely to affect that individual's interests, such as a decision ending that individual's residence authorisation, carry in the legal system of the European Union an equivalent importance to that held by the rules of public policy in the Belgian legal system, and does the principle of equivalence require that a plea can be raised for the first time before the Conseil d'État hearing an appeal on a point of law based on breach of the general principle of EU law of the right to be heard as is permitted in the national law for pleas based on public policy?'

### **Consideration of the question referred**

- 21 By its question the referring court asks, in essence, whether EU law must be interpreted as meaning that where, in accordance with the applicable national law, a plea alleging infringement of national law raised for the first time before the national court hearing an appeal on a point of law is admissible only if it is a plea based on public policy, a plea alleging infringement of the right to be heard, as guaranteed by EU law, raised for the first time before that court must be held to be admissible.
- 22 In order to answer that question it should first be noted that, as is apparent from the decision to refer, the factual situation giving rise to the dispute in the main proceedings comes within the scope of EU law, including that of Directive 2004/38. That directive relates to, *inter alia*, the conditions governing the exercise of the rights of Union citizens to move and reside freely within the territory of the Member States and to the limitations on those rights on grounds of public policy, public security or public health. That directive applies to all Union citizens who move to or reside in a Member State other than that of which they are nationals.
- 23 While that directive sets out a number of rules to be respected by Member States for the purpose of a possible limitation on the right of residence of an EU citizen, namely, *inter alia*, those set out in Articles 30 and 31 of that directive, it does not, by contrast, contain provisions concerning the detailed rules governing administrative and judicial procedures relating to a decision which results in the withdrawal of an EU citizen's residence permit.
- 24 In that regard, it should be recalled that, according to the Court's settled case-law, in the absence of EU rules on the matter, it is for the national legal order of each Member State to establish them in accordance with the principle of procedural autonomy, on condition, however, that those rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness) (judgment in *Eturas and Others*, C-74/14, EU:C:2016:42, paragraph 32 and the case-law cited).

- 25 It follows that two cumulative conditions, namely respect for the principles of equivalence and effectiveness, must be satisfied in order for a Member State to be able to assert the principle of procedural autonomy in situations which are governed by EU law.
- 26 In the circumstances of the present case, and as the referring court observes, the ground of appeal on a point of law relied on by Mr Bensada Benallal alleging infringement of the right to be heard by the national authority which took the decision adversely affecting him, as is guaranteed by EU law, comes up, with regard to its admissibility, against the national procedural rules on pleas which may be raised for the first time at the stage of an appeal on a point of law.
- 27 As is apparent from paragraph 24 of the present judgment, EU law does not in principle preclude Member States, in accordance with the principle of procedural autonomy, from restricting or imposing conditions on the pleas which may be relied on in proceedings in an appeal on a point of law, subject to respect for the principles of effectiveness and equivalence.
- 28 As the Advocate General has observed in points 41 and 42 of his Opinion, in the main proceedings the question arises as to respect, not for the principle of effectiveness, but only for the principle of equivalence.
- 29 It should be noted that, according to the Court's settled case-law, the principle of equivalence requires that the national rule at issue be applied without distinction, whether the action is based on rights which individuals derive from EU law or whether it is based on an infringement of national law, where the purpose and cause of action are similar (judgment in *Agrokonsulting-04*, C-93/12, EU:C:2013:432, paragraph 39). Respect for that principle requires equal treatment of claims based on a breach of national law and of similar claims based on a breach of EU law (judgment in *Târșia*, C-69/14, EU:C:2015:662, paragraph 34).
- 30 Applied to a situation such as that at issue in the main proceedings, the condition linked to respect for the principle of equivalence requires, therefore, that where the provisions of national law relating to the procedural rules governing appeals on a point of law confer on a court hearing a case in that capacity the obligation to accept or to raise of its own motion a plea based on the infringement of national law, that same obligation must prevail in the same way for the same type of plea based on the infringement of EU law.
- 31 Consequently, if a national court hearing an appeal on a point of law considers the plea based on failure to respect the right to be heard to be a plea based on national public policy which may be raised for the first time before it in proceedings governed by national law, the principle of equivalence requires that, in the same proceedings, a similar plea alleging infringement of EU law may also be raised for the first time before that same court at the stage of an appeal on a point of law.
- 32 In the circumstances of the present case, it is not clear from the decision to refer that the right to be heard, as guaranteed by Belgian law, constitutes, in itself, a general principle of Belgian law coming under the national public policy of that Member State. However, the referring court observes in this regard that the rules of public policy are those which are of fundamental importance in the Belgian legal system, such as the rules relating to the powers of the administrative authorities, the jurisdiction of the courts, respect for the rights of the defence or those concerning other fundamental rights.
- 33 In that regard, in order to enable the referring court to determine whether the plea alleging infringement of the right to be heard in EU law is similar to a plea alleging infringement of such a right in Belgian law, it should be noted, as the Court held in its judgment in *Spain v Commission* (C-287/02, EU:C:2005:368, paragraph 37 and the case-law cited), that respect for the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of EU law which must be guaranteed even in

the absence of any rules governing the proceedings in question. That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views.

- 34 It is for the competent national court to examine whether the condition connected to the principle of equivalence is satisfied in the case before it. With more specific regard to the case in the main proceedings, it is for the national court to determine whether the right to be heard, as guaranteed by national law, satisfies the conditions required by national law for it to be classified as a matter of public policy.
- 35 The answer to the question referred is therefore that EU law must be interpreted as meaning that where, in accordance with the applicable national law, a plea alleging infringement of national law raised for the first time before the national court hearing an appeal on a point of law is admissible only if that plea is based on public policy, a plea alleging infringement of the right to be heard, as guaranteed by EU law, raised for the first time before that same court, must be held to be admissible if that right, as guaranteed by national law, satisfies the conditions required by national law for it to be classified as a plea based on public policy, this being a matter for the referring court to determine.

### **Costs**

- 36 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:

**EU law must be interpreted as meaning that where, in accordance with the applicable national law, a plea alleging infringement of national law raised for the first time before the national court hearing an appeal on a point of law is admissible only if that plea is based on public policy, a plea alleging infringement of the right to be heard, as guaranteed by EU law, raised for the first time before that same court, must be held to be admissible if that right, as guaranteed by national law, satisfies the conditions required by national law for it to be classified as a plea based on public policy, this being a matter for the referring court to determine.**

[Signatures]