



Reports of Cases

ORDER OF THE COURT (First Chamber)

10 January 2019*

(Reference for a preliminary ruling — No need to adjudicate)

In Case C-169/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Court of Appeal (Ireland), made by decision of 23 February 2018, received at the Court on 2 March 2018, in the proceedings

Atif Mahmood,

Shabina Atif,

Mohammed Ahsan,

Mohammed Haroon,

Nik Bibi Haroon,

Noor Habib and Others

v

Minister for Justice, Equality and Law Reform,

THE COURT (First Chamber),

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

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Mahmood and Ms Atif, by U. O'Brien and C. Sinnott, Solicitors, C. O'Dwyer, Senior Counsel, and D. Leonard, Barrister-at-Law,
- Mr Ahsan, by U. O'Brien and C. Sinnott, Solicitors, C. O'Dwyer, Senior Counsel, and S. Michael Haynes, Barrister,

* Language of the case: English.

- Mr Haroon and Ms Haroon, by S. Kirwan, Solicitor, M. Lynn, Senior Counsel, and A. Lowry, Barrister-at-Law,
- Mr Habib, by E. Larney, Solicitor, M. Lynn, Senior Counsel, and A. Lowry, Barrister-at-Law,
- Ireland, by M. Browne, G. Hodge and A. Joyce, acting as Agents, and by M. Collins, Senior Counsel, and S. Kingston, Barrister-at-Law,
- the German Government, by T. Henze and R. Kanitz, acting as Agents,
- the United Kingdom Government, by S. Brandon and R. Fadoju, acting as Agents, and by D. Blundell, Barrister,
- the European Commission, by J. Tomkin and E. Montaguti, acting as Agents,

after hearing the Advocate General,

makes the following

Order

- 1 The present request for a preliminary ruling concerns the interpretation of Article 5(2) 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 corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).
- 2 The request has been made in the context of proceedings between, on the one hand, Mr Atif Mahmood, Ms Shabina Atif, Mr Mohammed Ahsan, Mr Mohammed Haroon, Ms Nik Bibi Haroon and Mr Noor Habib and Others and, on the other hand, the Minister for Justice, Equality and Law Reform ('the Minister') regarding the processing time for visa applications made by members of the families of Mr Mahmood, Mr Ahsan, Mr Haroon and Mr Habib.

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

- 3 Mr Mahmood, Mr Ahsan, Mr Haroon and Mr Habib, who are United Kingdom nationals, brought actions, on 16 November 2015, 18 March 2016, 21 December 2015 and 16 December 2015 respectively, before the High Court, Ireland, against the Minister, by reason of the alleged delay in processing applications for visas to enter Ireland for members of their families, nationals of third States, namely the Islamic Republic of Pakistan and the Islamic Republic of Afghanistan.
- 4 After the High Court had upheld those actions, the Minister brought appeals before the Court of Appeal, which decided to group them together in order to consider them jointly.
- 5 Mr Mahmood is a UK national who is habitually resident in the United Kingdom. He has been married since 2013 to a Pakistani national, Ms Atif. As he intended to travel to Ireland with his wife, Mr Mahmood applied to the Consulate of Ireland in Karachi (Pakistan) for an entry visa for her on 9 July 2015. They have both been living in Pakistan since then, pending the outcome of that application.

- 6 Mr Ahsan is a UK national who has been working in Ireland since May 2015. In June 2012 he married, in Pakistan, Ms Malaika Gulshan, a Pakistani national, with whom he has had a son. On 7 August 2015 Ms Gulshan applied to the Visa Applications Centre in Lahore (Pakistan) for a visa to enter Ireland for herself and her son.
- 7 Mr Haroon is a UK national who operates a takeaway business in Ireland. He has been married to Ms Haroon, an Afghan national, since 2013. On 4 June 2015 Ms Haroon, through her solicitors, made an application in Ireland for a visa to enter Ireland in order to join her husband.
- 8 Mr Habib is a UK national who has been living and working in Ireland since February 2015 in a self-employed capacity. Born in Afghanistan in 1968, he married his first wife, with whom he had three children, in 1990. In June 2015 an application was lodged with the Irish Visa Office in Abu Dhabi (United Arab Emirates) for an entry visa for his mother, and applications for entry visas for his two sons and four of his grandchildren were made in Ireland by their solicitor.
- 9 The applicants in the main proceedings claim that the periods for processing the visa applications at issue in the main proceedings amount to a breach of the requirements set out in Article 5(2) of Directive 2004/38.
- 10 By contrast, according to the Minister, first, the periods for processing those visa applications are not unreasonable in so far as they are justified by the need to carry out verifications and checks in order to identify fraud, abuse of rights or cases of marriages of convenience. In that regard, the Minister states that there are criminal networks in Ireland and the United Kingdom engaged in the facilitation of marriages of convenience, as well as for-profit businesses helping EU citizens come to Ireland solely for the artificial purpose of generating an obligation under EU law.
- 11 Next, the Minister takes the view that the periods for processing the visa applications at issue in the main proceedings are not unreasonable in so far as they are justified by the need to carry out detailed security checks in order to rule out the potential threat of terrorist attack in cases where the persons to whom those applications relate come from third States presenting particular concerns, as is the situation in the present case.
- 12 Finally, the Minister draws attention to the very significant increase in visa applications from spouses of EU nationals based in such third States. He points out that there has been a 1 417% increase in volume over the period from 2013 to 2015, the number of applications having risen from 663 in 2013 to 10 062 in 2015. According to the Minister, this unforeseeable increase justifies an extension of the processing time for visa applications.
- 13 The Minister also submits that the applicants in the main proceedings cannot invoke Article 5(2) of Directive 2004/38 so long as the verifications and checks have not been carried out. In his view, before that provision can be invoked, the onus is on the person applying for a visa for a member of the family of an EU citizen to establish that there is a genuine relationship allowing the family member who is a national of a third State to obtain a right of residence.
- 14 The referring court takes the view that that defence submission should be rejected, as the real question is whether delays in the processing of entry visa applications such as those at issue in the main proceedings amount to a breach of that provision and whether they can be justified by the circumstances mentioned.
- 15 According to the referring court, a delay of up to two years in processing entry visa applications amounts, in principle, to a breach of Article 5(2) of Directive 2004/38. It also doubts whether such a delay can be justified on the grounds put forward by the Minister, taking the view that, if that were the case, the directive would have made express provision to that effect.

- 16 Moreover, the referring court notes that approximately 7 300 entry visa applications are currently pending before the Minister and that the outcome of the case before it will affect all of those applications.
- 17 In those circumstances, the Court of Appeal decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- (1) Subject to the potential justifications described in Questions 2, 3 and 4, is a Member State in breach of the requirement in Article 5(2) of Directive 2004/38 to issue a visa as quickly as possible to the spouse and family members of a Union citizen exercising free movement rights in the Member State in question or intending to exercise such rights where the delays in processing such an application exceed 12 months or more?
 - (2) Without prejudice to Question 1, are delays in processing or otherwise deciding on an application for a visa pursuant to Article 5(2) arising from the necessity to ensure in particular by way of background checks that the application is not fraudulent or an abuse of rights, including that the marriage [does not amount] to a marriage of convenience, whether by virtue of Article 35 of Directive [2004/38] or otherwise and thus not a breach of Article 5(2) [of that directive]?
 - (3) Without prejudice to Question 1, are delays in processing or deciding on an application for a visa pursuant to Article 5(2) arising from the necessity to conduct extensive background and security checks on persons coming from certain third countries because of specific concerns relating to security in respect of travellers coming from those third countries, whether by virtue of Article 27 or Article 35 of Directive [2004/38] or otherwise justifiable and thus not in breach of Article 5(2) [of that directive]?
 - (4) Without prejudice to Question 1, are delays in processing or deciding on an application for a visa pursuant to Article 5(2) arising from a sudden and unanticipated surge in such applications coming from certain third countries which are thought to present real security concerns justifiable and thus not in breach of Article 5(2) [of Directive 2004/38]?

Procedure before the Court

- 18 At the stage of the written procedure, Ireland observed that decisions rejecting the visa applications at issue in the main proceedings had been taken in March 2017. The appeals brought against those decisions were dismissed in July 2017 as regards Mr Mahmood's wife, in December 2017 as regards Mr Ahsan's wife and son, in February 2018 as regards Mr Haroon's wife and in January 2018 as regards Mr Habib's mother, two sons and four grandchildren.
- 19 Following this disclosure, pursuant to Article 101(1) of the Court's Rules of Procedure, the Court Registry requested the referring court, by letter of 18 October 2018, to indicate to the Court whether the main proceedings had become devoid of purpose or whether the Court's response was still necessary for the resolution of the dispute pending before the referring court.
- 20 By letter of 31 October 2018 the referring court replied that, although the Court's answer was not necessary for the applicants in the main proceedings, it wished, nonetheless, to maintain the request for a preliminary ruling since such an answer would have implications for thousands of cases currently being processed.

Consideration of the request for a preliminary ruling

- 21 According to settled case-law of the Court, the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts and tribunals, by means of which the former provides the latter with interpretation of such EU law as is necessary for them to give judgment in cases upon which they are called to adjudicate (order of 15 November 2017, *Aranyosi*, C-496/16, not published, EU:C:2017:866, paragraph 22).
- 22 It is thus clear, from both the wording and the scheme of Article 267 TFEU, that the preliminary-ruling procedure presupposes that a dispute is actually pending before the national courts in which they are called upon to give a decision which is capable of taking account of the preliminary ruling (order of 3 March 2016, *Euro Bank*, C-537/15, not published, EU:C:2016:143, paragraph 32).
- 23 The justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered, but rather that it is necessary for the effective resolution of a dispute (order of 3 March 2016, *Euro Bank*, C-537/15, not published, EU:C:2016:143, paragraph 33).
- 24 In the present case, it is clear from the order for reference that the dispute in the main proceedings concerned the alleged delay on the part of the Minister in the processing of the visa applications at issue and that it sought an order requiring the Minister to take a decision on those applications.
- 25 Since, however, all of the visa applications at issue in the main proceedings were the subject of negative decisions, which were contested by means of court actions which were not upheld, and since the referring court has noted that the Court's answer can no longer benefit the applicants in the main proceedings, as is clear from paragraphs 18 and 20 of the present order, the dispute in the main proceedings has become devoid of purpose and, consequently, an answer to the questions referred appears to be no longer necessary.
- 26 Accordingly, even though the request for a preliminary ruling has not been withdrawn by the referring court, which, in principle, is responsible for drawing the consequences of the decisions refusing visas and, in particular, for reaching a conclusion on whether it is appropriate to maintain the request for a preliminary ruling, to amend it or to withdraw it, it must be held that, in the present case, there is no need to give a ruling on that request (see, to that effect, order of 24 March 2009, *Nationale Loterij*, C-525/06, EU:C:2009:179, paragraph 11).

Costs

- 27 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 orders:

There is no need to give a ruling on the request for a preliminary ruling made by the Court of Appeal (Ireland) by decision of 23 February 2018 in Case C-169/18.

Luxembourg, 10 January 2019.

A. Calot Escobar
Registrar

J.-C. Bonichot
President of the First Chamber