Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

10 March 2021 *

(Reference for a preliminary ruling – Border controls, asylum and immigration – Visa policy – Convention implementing the Schengen Agreement – Article 21(2a) – Charter of Fundamental Rights – Article 47 – Right to an effective remedy – Refusal of a long-stay visa by the consul – Obligation on a Member State to guarantee a remedy before a tribunal against a decision refusing such a visa)

In Case C-949/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), made by decision of 4 November 2019, received at the Court on 31 December 2019, in the proceedings

M.A.

v

Konsul Rzeczypospolitej Polskiej w N.,

THE COURT (First Chamber)

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

– M.A., by B. Grohman, adwokat,

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

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

– the German Government, by J. Möller and R. Kanitz, acting as Agents,

* Language of the case: Polish.

– the European Commission, by C. Cattabriga, A. Stobiecka-Kuik and G. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 21(2a) 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 (OJ 2000 L 239, p. 19), which was signed in Schengen on 19 June 1990 and entered into force on 26 March 1995, 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 CISA'), and of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between M.A. and Konsul Rzeczypospolitej Polskiej w N. (consul of the Republic of Poland; 'the consul') concerning the latter's refusal to issue M.A. with a national long-stay visa.

Legal context

EU law

The CISA

3 Article 18 of the CISA is worded as follows:

'1. Visas for stays exceeding 90 days (long-stay visas) shall be national visas issued by one of the Member States in accordance with its national law or Union law. Such visas shall be issued in the uniform format for visas as set out in Council Regulation (EC) No 1683/95 [(OJ 1995 L 164, p. 1)] with the heading specifying the type of visa with the letter "D". They shall be filled out in accordance with the relevant provisions of Annex VII to Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [(OJ 2009 L 243, p. 1)].

2. Long-stay visas shall have a period of validity of no more than one year. If a Member State allows an alien to stay for more than one year, the long-stay visa shall be replaced before the expiry of its period of validity by a residence permit.'

4 Article 21 of the CISA provides:

'1. Aliens who hold valid residence permits issued by one of the Member States may, on the basis of that permit and a valid travel document, move freely for up to 90 days in any 180-day period within the territories of the other Member States, provided that they fulfil the entry conditions referred to in Article 5(1)(a), (c) and (e) of Regulation (EC) No 562/2006 of the European

Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [(OJ 2006 L 105, p. 1)] and are not on the national list of alerts of the Member State concerned.

…

2a. The right of free movement laid down in paragraph 1 shall also apply to aliens who hold a valid long-stay visa issued by one of the Member States as provided for in Article 18.'

Directive (EU) 2016/801

5 Article 1 of Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (OJ 2016 L 132, p. 21) states:

'This Directive lays down:

(a) the conditions of entry to, and residence for a period exceeding 90 days in, the territory of the Member States, and the rights, of third-country nationals, and where applicable their family members, for the purpose of research, studies, training or voluntary service in the European Voluntary Service, and where Member States so decide, pupil exchange schemes or educational projects, voluntary service other than the European Voluntary Service or au pairing;

…'

6 Article 2(1) of that directive provides:

'This Directive shall apply to third-country nationals who apply to be admitted or who have been admitted to the territory of a Member State for the purpose of research, studies, training or voluntary service in the European Voluntary Service. Member States may also decide to apply the provisions of this Directive to third-country nationals who apply to be admitted for the purpose of a pupil exchange scheme or educational project, voluntary service other than the European Voluntary Service or au pairing.'

7 Article 3 of the directive states:

'For the purposes of this Directive, the following definitions apply:

…

(3) "student" means a third-country national who has been accepted by a higher education institution and is admitted to the territory of a Member State to pursue as a main activity a full-time course of study leading to a higher education qualification recognised by that Member State, including diplomas, certificates or doctoral degrees in a higher education institution, which may cover a preparatory course prior to such education, in accordance with national law, or compulsory training;

…

(21) "authorisation" means a residence permit or, if provided for in national law, a long-stay visa issued for the purposes of this Directive;

…

(23) "long-stay visa" means an authorisation issued by a Member State as provided for in Article 18 of the [CISA] or issued in accordance with the national law of Member States not applying the Schengen *acquis* in full.'

8 Article 34(5) of the directive is worded as follows:

'Any decision declaring inadmissible or rejecting an application, refusing renewal, or withdrawing an authorisation shall be open to legal challenge in the Member State concerned, in accordance with national law. The written notification shall specify the court or administrative authority with which an appeal may be lodged and the time limit for lodging the appeal.'

The Visa Code

9 Article 32(3) of Regulation No 810/2009, as amended by Regulation No 610/2013 ('the Visa 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.'

Polish law

10 Article 75 of the ustawa o cudzoziemcach (Law on foreign nationals) of 12 December 2013 (Dz. U. of 2018, item 2094), as amended ('the Law on foreign nationals'), provides:

'1. A refusal to issue a national visa shall be by way of a decision.

2. A decision refusing to issue a national visa shall be delivered using a form.'

11 Article 76(1) of the Law on foreign nationals states:

'A decision refusing to issue a Schengen visa or a national visa by:

(1) a consul – may be challenged by a request for a review of the case by that authority;

…'

12 Article 5 of the ustawa Prawo o postępowaniu przed sądami administracyjnymi (Law on the code of procedure before the administrative courts) of 30 August 2002 (Dz. U. of 2018, item 1302), as amended ('the Code of procedure before the administrative courts), in the version applicable at the material time, provides:

'The administrative courts shall not have jurisdiction in cases concerning:

…

(4) visas issued by consuls, other than visas:
   (a) referred to in Article 2(2) to (5) of [the Visa Code],
   (b) issued to a foreign national who is a member of the family of a citizen of a Member State of the European Union, a Member State of the European Free Trade Association party to the Agreement on the European Economic Area [(EEA)], or the Swiss Confederation, within the meaning of Article 2(4) of the Law on the entry into, residence in and departure from the Republic of Poland of citizens of the Member States of the European Union and the members of their families of 14 July 2006 (Dz. U. of 2017, item 900, and of 2018, item 650).

…'

13 As provided in Article 58(1)(1) of the Code of procedure before the administrative courts, 'the court shall dismiss an action … where the case does not come within the jurisdiction of an administrative court …'.

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

14 The applicant in the main proceedings, a third-country national, applied to the consul for a national long-stay visa in order to undertake postgraduate studies in Poland. As his application was rejected, he requested the consul to review the application. The consul refused a visa once again, because he had failed to justify the purpose or conditions of his proposed stay.

15 The applicant in the main proceedings brought an action before the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland) challenging the consul's decision to refuse a visa. In order to show that the action was admissible, he relied on the judgment of 13 December 2017, *El Hassani* (C-403/16, EU:C:2017:960), and submitted that the operative part of that judgment could be applied to the case in the main proceedings, since the latter and the case which gave rise to that judgment were similar in fact and in law.

16 By order of 12 March 2019, the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw) dismissed the action. Relying on Article 5(4) of the Code of procedure before the administrative courts, it held that the case in the main proceedings did not fall within the jurisdiction of the administrative courts. It also held that the solution adopted in the judgment of 13 December 2017, *El Hassani* (C-403/16, EU:C:2017:960), was not applicable to the case in the main proceedings, on the ground that the visa at issue in that judgment was a short-stay visa, that is to say, a Schengen visa, whereas, in the case in the main proceedings, the applicant had applied for a national long-stay visa, a visa which is issued in accordance with national law.

17 Since the applicant in the main proceedings took the view that the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw) had wrongly held that the consul's decision refusing to issue a national visa was not amenable to judicial review and that that court had, therefore, unjustifiably dismissed the action brought against that decision, he appealed on a point of law to the referring court, the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland).

18 The referring court states that, following the judgment of 13 December 2017, *El Hassani* (C-403/16, EU:C:2017:960), Article 5(4)(a) of the Code of procedure before the administrative courts was amended in order to introduce a right to bring judicial proceedings against decisions refusing a Schengen visa. It explains that that legislative amendment does not, however, apply to decisions refusing national visas, such as the decision at issue in the main proceedings. Thus, under national law, the consul's decision refusing to issue a national long-stay visa to a foreign national is not amenable to judicial review.

19 Consequently, the referring court raises the question whether EU law requires the same level of protection to be established for national long-stay visas as that applicable to Schengen visas, resulting from the judgment of 13 December 2017, *El Hassani* (C-403/16, EU:C:2017:960).

20 In that regard, the referring court observes that Article 21(2a) of the CISA grants the right of free movement to foreign nationals who hold a national long-stay visa. Thus, a national visa is one of the means enabling a foreign national to exercise the right of free movement and, as such, does not display fundamental differences vis-a-vis the exercise of that right under a Schengen visa granted to a third-country national. According to the referring court, although national visas and Schengen visas present differences as regards the rules, the requirements and the procedures for their issue that are applicable to them, both those types of visas concern the exercise by foreign nationals of the same right derived from EU law. The fact that it is not possible to challenge before a court the final decision refusing a national visa may therefore amount to an infringement of EU law, in particular the right to an effective remedy before a tribunal, set out in the first paragraph of Article 47 of the Charter.

21 In those circumstances, the Naczelny Sąd Administracyjny (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 21(2a) of the [CISA] in conjunction with the first paragraph of Article 47 of the [Charter] be interpreted as meaning that a third-country national who has been refused a long-stay visa and who cannot exercise the right to move freely within the territories of the other Member States under Article 21(1) of the [CISA] must have the right to an effective remedy before a tribunal?'

Jurisdiction of the Court

22 The Polish Government submits that the Court does not have jurisdiction to answer the question referred for a preliminary ruling on the ground that the case in the main proceedings does not fall within the scope of EU law.

23 In that regard, it is clear from Article 19(3)(b) TEU and the first paragraph of Article 267 TFEU that the Court has jurisdiction to give preliminary rulings on the interpretation of EU law or the validity of acts of the EU institutions.

24 Here, the referring court requests the Court to interpret Article 21(2a) of the CISA, an instrument which forms an integral part of EU law by virtue of the Protocol (No 19) on the Schengen *acquis* integrated into the framework of the European Union, annexed to the Treaty of Lisbon (OJ 2010 C 83, p. 290).

25 That being so, the Court has jurisdiction to answer the question referred.

Consideration of the question referred

26 By its question, the referring court asks, in essence, whether EU law, in particular Article 21(2a) of the CISA, read in the light of Article 47 of the Charter, must be interpreted as obliging the Member States to provide for a judicial appeal against decisions refusing a long-stay visa for the purpose of studies.

27 Article 21(2a) of the CISA lays down the right of free movement, under the conditions laid down in Article 21(1) thereof, of aliens who hold a valid long-stay visa issued by one of the Member States as provided for in Article 18 thereof.

28 It is thus apparent from the very wording of Article 21(2a) of the CISA that that provision relates exclusively to the rights of movement conferred upon nationals of third States who hold a long-stay visa.

29 Thus, that provision does not grant nationals of third States who have been refused such a visa any right or freedom that would be covered by the principle of effective judicial protection, enshrined in Article 47 of the Charter. Consequently, Article 21(2a) of the CISA does not impose upon the Member States any obligation in that regard in relation to those nationals of third States.

30 Accordingly, the situation at issue in the main proceedings, in that it relates to a decision refusing a national of a third State a long-stay visa, in particular to the legal remedies available against such a decision, does not fall within the scope of Article 21(2a) of the CISA.

31 However, it is clear from the settled case-law of the Court that the fact that the referring court's question refers only to certain provisions of EU law does not mean that the Court may not provide the national court with all the guidance on points of interpretation of EU law which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to those points in its question. It is, in this regard, for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation in view of the subject matter of the dispute (see inter alia, to that effect, judgment of 9 April 2014, *Ville d'Ottignies-Louvain-la-Neuve and Others*, C-225/13, EU:C:2014:245, paragraph 30).

32 Accordingly, it should be ascertained whether the obligation to provide for a judicial appeal against decisions refusing a long-stay visa for the purpose of studies, such as the visa at issue in the main proceedings, may result from a provision of EU law other than Article 21(2a) of the CISA.

33 In that regard, it is to be noted that, as is clear from Article 18(1) of the CISA, long-stay visas are national visas issued by the Member States in accordance with their national law or EU law.

34 As regards long-stay visas issued by the Member States in accordance with their national law, since the EU legislature has not adopted, on the basis of Article 79(2)(a) TFEU, any measure governing the procedures and conditions for issuing such visas, those conditions and procedures, including the procedures for appealing against decisions refusing their issue, fall exclusively within the scope of national law (see, to that effect, in respect of long-stay visas issued on humanitarian grounds, judgment of 7 March 2017, *X and X*, C-638/16 PPU, EU:C:2017:173, paragraph 44).

35 Since applications for such long-stay visas are not, therefore, governed by EU law, the provisions of the Charter, in particular Article 47, do not apply to the refusal of such applications (see, to that effect, in respect of long-stay visas issued on humanitarian grounds, judgment of 7 March 2017, *X and X*, C-638/16 PPU, EU:C:2017:173, paragraph 45 and the case-law cited).

36 The scope of the Charter, in so far as the action of the Member States is concerned, is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States when they are implementing EU law. That provision confirms the Court's settled case-law, which states that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations (judgment 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 78 and the case-law cited).

37 In the present instance, it is apparent from the order for reference that the applicant in the main proceedings applied to the consul for a long-stay visa in order to undertake postgraduate studies in Poland.

38 Regard must be had to the fact that, first, Directive 2016/801, as Article 1(a) thereof provides, lays down inter alia the conditions of entry and residence for a period exceeding 90 days of third-country nationals for the purpose of studies and, second, it follows from Article 3(21) and (23) thereof that the authorisation granted for the purposes of the directive may be issued by the Member States in the form of a residence permit or, if provided for in national law, in the form of a long-stay visa.

39 It is for the referring court to establish whether the visa application at issue in the main proceedings falls within the scope of that directive.

40 If it does so fall, it must be pointed out that, by virtue of Article 34(5) of Directive 2016/801, decisions refusing a visa that are covered by the directive are to be open to legal challenge in the Member State concerned, in accordance with national law.

41 It follows that, in the event of a decision refusing a visa that is covered by Directive 2016/801, Article 34(5) thereof expressly enables the applicant for such a visa to bring an appeal in accordance with the national legislation of the Member State which has taken that decision.

42 Thus, as in the case of Schengen visas, the EU legislature has left to the Member States the task of deciding on the nature and specific conditions of the remedies available to applicants for long-term visas covered by Directive 2016/801.

43 In that connection, it should be recalled that, according to 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 procedural rules for actions intended to safeguard the rights of individuals, 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 of 13 December 2017, *El Hassani*, C-403/16, EU:C:2017:960, paragraph 26 and the case-law cited).

44 Furthermore, in accordance with the case-law recalled in paragraph 36 of the present judgment, the characteristics of the appeal procedure envisaged in Article 34(5) of Directive 2016/801 must be determined in a manner that is consistent with Article 47 of the Charter.

45 That provision of the Charter requires the Member States to guarantee, at a certain stage of that procedure, a judicial appeal (see, to that effect, judgment of 13 December 2017, *El Hassani*, C-403/16, EU:C:2017:960, paragraph 41).

46 Consequently, so far as concerns decisions refusing a visa for the purpose of studies that is covered by Directive 2016/801, EU law, in particular Article 34(5) of that directive, read in the light of Article 47 of the Charter, requires the Member States to provide for an appeal procedure against such decisions, the procedural rules of which are a matter for the legal order of each Member State, in conformity with the principles of equivalence and effectiveness, and that procedure must, at a certain stage, guarantee a judicial appeal (see, by analogy, judgment of 13 December 2017, *El Hassani*, C-403/16, EU:C:2017:960, paragraph 42).

47 In the light of the foregoing considerations, the answer to the question asked by the referring court is that Article 21(2a) of the CISA must be interpreted as not being applicable to a national of a third State who has been refused a long-stay visa.

48 EU law, in particular Article 34(5) of Directive 2016/801, read in the light of Article 47 of the Charter, must be interpreted as meaning that it requires the Member States to provide for an appeal procedure against decisions refusing a visa for the purpose of studies, within the meaning of that directive, the procedural rules of which are a matter for the legal order of each Member State, in conformity with the principles of equivalence and effectiveness, and that procedure must, at a certain stage, guarantee a judicial appeal. It is for the referring court to establish whether the application for a national long-term visa for the purpose of studies that is at issue in the main proceedings falls within the scope of that directive.

Costs

49 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 21(2a) 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, which was signed in Schengen on 19 June 1990 and entered into force on 26 March 1995, as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013, must be interpreted as not being applicable to a national of a third State who has been refused a long-stay visa.**

2. **EU law, in particular Article 34(5) of Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it requires the Member States to provide for an appeal procedure against decisions refusing a visa for the purpose of studies, within the meaning of that directive, the procedural rules of which are a matter for the legal order of each Member State, in conformity with the principles of equivalence and effectiveness, and that procedure must, at a certain stage, guarantee a judicial appeal. It is for the referring court to establish whether the application for a national long-term visa for the purpose of studies that is at issue in the main proceedings falls within the scope of that directive.**

[Signatures]