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Judgment of the Court of Justice in Case C-503/03

Commission of the European Communities v Kingdom of Spain

THE COURT EXPLAINS, FOR THE FIRST TIME, THE RELATIONSHIP BETWEEN THE CONVENTION IMPLEMENTING THE SCHENGEN AGREEMENT AND FREEDOM OF MOVEMENT FOR PERSONS

Where third country nationals who are the spouses of Member State nationals are persons for whom alerts are entered in the Schengen Information System for the purpose of refusing them entry, a Member State must verify whether the presence of those persons constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society before refusing them entry into the Schengen Area.

Where a Member State national travels within the Community in order to exercise the rights which are conferred on him by the EC Treaty, his spouse, who is a national of a third country, is covered to a large extent by the regulations and directives on freedom of movement for persons. Although Member States may require such a spouse to have an entry visa they must accord him every facility in order to obtain it. A 1964 directive[1] also enables Member States to refuse entry into their territory to nationals of other Member States or their spouses, who are third country nationals, on grounds of public policy or public security.

[1]Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117). That directive was repealed by Directive 2004/38 of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the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 (OJ 2004 L 158, p. 77). The time-limit for transposition into national law expires on 30.04.06.

The Treaty of Amsterdam[2] integrated the Schengen Agreement and its implementing convention (CISA) into the framework of the European Union by means of a protocol.[3] The CISA has enabled checks at internal borders between the signatory States to be abolished and a single external border to be created. Common rules on visas, right to asylum, and control at external borders have been adopted in order to facilitate freedom of movement for persons in the signatory States without disrupting public policy. An information system (SIS) has been set up so that the national authorities may exchange data on the identity of persons and the description of wanted property.

Under the CISA, the assessment of whether circumstances exist which justify the entry of an alert in the SIS for an alien falls within the competence of the State which issued that alert, which is responsible for the data it entered into the SIS and is the only State authorised to add to, correct or delete that data. The other Contracting States are obliged to refuse entry or a visa to an alien for whom an alert has been issued for the purposes of refusing him entry.

The European Commission brought proceedings against Spain before the Court of Justice of the European Communities following complaints from two Algerian nationals, Mr Farid and Mr Bouchair, who were the spouses of Spanish nationals, living in Dublin and London respectively. The Spanish authorities refused them entry into the Schengen Area simply because they had been placed, by Germany, on the SIS list of persons to be refused entry.

The Court explained, first of all, **the relationship between the CISA and Community law on freedom of movement for persons.**

It observes that the Schengen Protocol confirms that the provisions of the Schengen *acquis* are applicable only if and in so far as they are compatible with European Union and European Community law. Closer cooperation in the Schengen field must be conducted within the legal and institutional framework of the European Union and with respect for the Treaties.

It follows that **the compliance of an administrative practice with the provisions of the CISA may justify the conduct of the competent national authorities only in so far as the application of the relevant provisions is compatible with the Community rules governing freedom of movement for persons.**

Next, **the Court holds that the concept of public policy within the meaning of the 1964 Directive does not correspond to that in the CISA.**

The directive states that measures taken on grounds of public policy or public security are to be based exclusively on the personal conduct of the individual concerned, so that previous criminal convictions are not in themselves to constitute grounds for the taking of such measures. The Court has always emphasised that the public policy exception is a derogation from the

[2] Signed in 1997, in force since 1999.

[3] In 1985 the first agreement was signed; the CISA was signed in 1990, it entered into force in 1995. The Schengen Area has gradually increased in size, even to third countries. Belgium, Denmark, Germany, Greece, Spain, France, Italy, Luxembourg, the Netherlands, Austria, Portugal, Finland, Sweden, Norway and Iceland form part of that area. The European Union, the European Community and the Swiss Confederation signed an agreement on 26.10.04 concerning the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*.

fundamental principle of freedom of movement for persons which must be interpreted strictly: reliance by a national authority on the concept of public policy presupposes a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

However, circumstances such as a penalty involving deprivation of liberty of at least one year or a measure based on a failure to comply with national regulations on the entry or residence of aliens may provide a basis for the entry of an alert in the SIS for the purpose of refusing entry on grounds of public policy, irrespective of any specific assessment of the threat represented by the person concerned. Entry into the Schengen Area or the issue of a visa for that purpose cannot, in principle, be granted to an alien for whom an alert has been issued for the purposes of refusing entry.

The Court finds, therefore, that **a national of a third country who is the spouse of a Member State national risks being deprived of the protection provided for by the 1964 directive where an alert has been issued for the purposes of refusing him entry. It observes that in a 1996 declaration the Contracting States undertook not to issue an alert for the purposes of refusing entry in respect of a person covered by Community law unless the conditions required by that law are fulfilled. That means that a Contracting State may issue an alert for such a person only after establishing that his presence constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society within the meaning of the directive.**

Furthermore, **a Member State which consults the SIS must be able to establish, before refusing entry into the Schengen Area to the person concerned, that his presence in that area constitutes such a threat.** The Court recalls, in that connection, that the Schengen system has the means to answer requests for information made by national authorities faced with difficulties in enforcing an alert.

Therefore, **the Court finds against Spain on the ground that the Spanish authorities refused entry to Mr Farid and Mr Bouchair without having first verified whether their presence constituted a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.**

For further information, please contact Christopher Fretwell
Tel: (00352) 4303 3355 Fax: (00352) 4303 2731