Case C-226/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

14 March 2019

Referring court:

Rechtbank Den Haag, zittingsplaats Haarlem (Netherlands)

Date of the decision to refer:

5 March 2019

Applicant:

K.A.

Defendant:

Minister van Buitenlandse Zaken

Subject matter of the action in the main proceedings

The dispute in the main proceedings concerns the refusal of a short-stay visa application on the ground that a Member State, after prior consultation in accordance with Article 22 of the Visa Code, raised an objection, and the possibly inadequate legal protection against that ground for refusal.

Subject matter and legal basis of the request for a preliminary ruling

The present request under Article 267 TFEU concerns, first, the question of the manner in which the refusal of a visa because of the objections of another Member State can be evaluated in an appeal against such a refusal, and whether that method of evaluation constitutes an effective remedy within the meaning of Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’) and, second, whether, in the circumstances of the present case, such a refusal demonstrates good administration within the meaning of Article 41 of the Charter.

Questions referred

1. In the case of an appeal as referred to in Article 32(3) of the Visa Code against a final decision refusing a visa on the ground referred to in Article 32(1)(a)(vi) of the Visa Code, can it be said that there is an effective remedy within the meaning of Article 47 of the EU Charter under the following circumstances:

- where, in its reasons for the decision, the Member State merely stated: 'you are regarded by one or more Member States as a threat to public policy, internal security, public health as defined in Article 2.19 or 2.21 of the Schengen Borders Code, or to the international relations of one or more Member States';

- where, in the decision or in the appeal, the Member State does not state which specific ground or grounds of those four grounds set out in Article 32(1)(a)(vi) of the Visa Code is being invoked;

- where, in the appeal, the Member State does not provide any further substantive information or substantiation of the ground or grounds on which the objection of the other Member State (or Member States) is based?

2. In the circumstances outlined in Question 1, can there be said to be good administration within the meaning of Article 41 of the EU Charter, in particular, because of the duty of the services concerned to give reasons for their decisions?

3(a) Should Questions 1 and 2 be answered differently if, in the final decision on the visa, the Member State refers to an actual and sufficiently clearly specified possibility of appeal in the other Member State against the specifically named authority responsible in that other Member State (or Member States) that has (or have) raised the objection referred to in Article 32(1)(a)(vi) of the Visa Code, in which that ground for refusal can be examined?

3(b) Does an affirmative answer to Question 1 in connection with Question 3(a) require that the decision in the appeal in and against the Member State that made the final decision be suspended until the applicant has had the opportunity to make use of the option of appealing in the other Member State (or Member States) and, if the applicant does make use of that opportunity, until the (final) decision on that appeal has been obtained?

4. For the purpose of answering the questions, does it matter whether (the authority in) the Member State (or Member States) that has (or have) objected to the issuing of the visa can be given the opportunity, in the appeal against the final decision on the visa, to act as second defendant and on that basis to be given the opportunity to introduce a substantiation of the ground or grounds on which its objection is based?

Provisions of EU law cited

Charter of Fundamental Rights of the European Union: Articles 41 and 47.

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): Articles 22 and 32.

Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation): Articles 38 to 40.

Provisions of national law cited

Algemene Wet Bestuursrecht (General Law on Administrative Law; 'Awb'): Articles 1:2, 8:26, 8:28, 8:29, 8:31, 8:45.

Brief summary of the facts and the procedure in the main proceedings

1 The applicant has Syrian nationality and lives in Saudi Arabia. She is a widow and has adult children, with one child living in Sweden and three children living in the Netherlands. On 2 January 2018 she lodged an application for a visa to visit her children living in the Netherlands. After prior consultation with other Member States as provided for in Article 22 of the Visa Code, the Netherlands representation in Amman, Jordan, refused the application. The reasons provided state: 'you are regarded by one or more Member States as a threat to public policy, internal security, public health as defined in Article 2(19) or 2(21) of the Schengen Borders Code, or to the international relations of one or more Member States'. It appears from the contested decision that the objection to the issuing of the visa was raised by the German authorities.

2 In the notice of objection the applicant stated that she could surmise what the basis of the refusal was. In the past, when the applicant's husband was studying in Germany, she lived with him in Germany. Four or five years previously, as far as she could remember, she had obtained a short-stay visa for Germany through an intermediary. She had paid an intermediary for the visa (a course of events that is not unusual in Saudi Arabia), after which she in fact obtained the visa. Before the applicant's departure, the German embassy verified the visa. It turned out not to be registered there. The applicant then did not travel to Germany. According to the applicant, that incident is not indicative of a threat to public order and national security. She also points out that in 2007 she visited family members in the Netherlands with a Netherlands visa and returned to Saudi Arabia.

3 The applicant raised an objection to the refusal and subsequently brought an action before the rechtbank Den Haag (District Court, The Hague) which in visa cases adjudicates at first and sole instance.

Main submissions of the parties to the main proceedings

4 Under Article 22 of the Visa Code, Member States may require that they be consulted before a decision is taken on visa applications lodged by (specific categories of) nationals of specific third countries. If another Member State objects to the issuing of the visa, the Schengen visa will be refused on the basis of Article 32(1)(a)(vi) of the Visa Code. Such an objection to the issuing of a visa relates to national reasons for considering the applicant to be a threat to public policy, internal security, public health or international relations. Under that article, the objection can also be based on an alert in a European data-sharing system such as the Visa Information System ('VIS') or the Schengen Information System ('SIS'). However, there was no such alert relating to the applicant in a European system of that kind with a view to refusing her access.

5 The question which arises in the main proceedings is whether and in what way the ground for refusal in the appeal against the final decision to refuse the visa can be evaluated and whether that evaluation method provides an effective remedy.

6 The applicant argues that there is no question of effective legal protection here. Because the motives of the German authorities are unknown, she is confronted with a decision by the Netherlands against which she cannot put forward any substantive arguments. Moreover, her arguments against the ground for refusal are not being substantively evaluated. The contested decision was also adopted in breach of the right to good administration (Article 41 of the Charter). The ground for refusal is so broadly formulated that it is impossible to dispute it. The defendant should have contacted the German authorities to find out why the applicant is regarded as a danger. In the objection procedure, the applicant in fact asked the defendant to do so, but the defendant refused. He was of the view that, on the basis of the Visa Code, he was not obliged to make that enquiry. The applicant maintains that, even if that were to be the case, EU law gives rise to such an obligation. She refers in this regard to recitals 13 and 18 of the Visa Code, to Article 41 of the Charter and to the judgment of the Court of Justice of the European Union ('the Court of Justice') of 31 January 2006, *Commission* v *Spain*, C-503/03, EU:C:2006:74. Finally, the applicant points out that Germany had not entered an alert on her in the SIS and therefore did not consider it necessary to introduce an EU-wide ban.

7 The defendant takes the position that, on the basis of Article 32(1)(a)(vi) of the Visa Code, he has the authority and the obligation to refuse a visa when a Schengen Member State sees the foreign national as a threat to public policy, internal security, public health or the international relations of one of the Member States. Furthermore, the Visa Code does not give rise to an obligation to inquire

from the German authorities why an objection was raised to the issuing of the visa and to inform the applicant thereof. Such an obligation cannot be inferred from recitals 13 and 18 of the Visa Code. After all, recital 13 shows that Member States should consider different forms of cooperation to facilitate the visa procedure. And recital 18 shows the importance of cooperation for the harmonised application of the common visa policy. Nor has the applicant made a plausible case for infringement of the right to good administration within the meaning of Article 41 of the Charter. The defendant refers to the judgment of the Court of Justice of 23 October 2014, *Unitrading*, C-437/13, EU:C:2014:2318 ('the *Unitrading* judgment'). Moreover, it has not been shown that the applicant has no effective legal remedy in the Netherlands. In the Netherlands she has the right to a fair and public hearing of her case, with the result that there is no question of an infringement of Article 47 of the Charter. Furthermore, the applicant has not shown that she has no access to an effective remedy in Germany.

Brief summary of the reasons for the referral

8 In the case-law of this rechtbank, it has been assumed up to now, in more or less comparable situations, that an adequate judicial process was available in the other Member State for addressing the objection raised by that other Member State. However, in such cases there had also always been an entry in a European data-sharing system such as the VIS. In other judgments, the rechtbank has ruled that such a judicial process did not exist or was inadequate.

9 With regard to the question of whether there can be said to be an adequate judicial access in the present case, it is first of all important that in the final decision the defendant did not state whether, and if so, how, and in respect of which German authority, the objection to the issuing of a visa could be challenged. Nor is any information supplied anywhere about the court or tribunal before which the applicant can bring an action in Germany.

10 In addition, Articles 38 to 40 of Regulation No 767/2008 (the VIS Regulation) provide that any person may request the competent authorities to correct inaccurate data and to delete data recorded unlawfully. A legal action must also be available for this purpose. In the present case, the refusal of a visa is not based on an entry in the VIS. Although the VIS Regulation is thus not directly applicable, it does show that inaccurate data that have been taken into account in a visa assessment process should be amenable to rectification.

11 In view of that, the crux of the discussion is whether, in the final decision on the visa application, the other Member State's objection to the issuing of a visa should be regarded as a fact that cannot be substantively evaluated in the appeal that an applicant may lodge under Article 32(3) of the Visa Code. In Netherlands administrative procedural law, a threat to public policy, internal security or public health, as has been put forward in the present case, can normally be substantively evaluated on appeal if it forms the basis for a refusal of, for example, a long-term

residence permit. If another administrative body has established that that ground for refusal obtains, judicial proceedings, with adequate safeguards, should be available before that administrative body. Only then can the evaluation of the ground for refusal be withdrawn from the assessment in the appeal against the final decision, because adequate legal protection is provided elsewhere.

12 For the time being, the referring court is of the opinion that such adequate legal protection can be said to exist only if the ground for refusal can also be examined substantively. If, in line with the defendant's position, it is established that the ground for refusal cannot be evaluated in the present appeal, then adequate legal protection is lacking.

13 In the present case, it is unclear whether the German authorities, because of their objection to the issuing of a visa on the grounds of public policy, internal security, public health or international relations, have taken a decision against which remedies with adequate guarantees are or have been available and which the applicant actually can make use of or could have made use of. The defendant did not provide any information in that regard in the final decision. In the present proceedings, that works to the disadvantage of the applicant. According to the referring court, having regard to the principle of sound administration enshrined in Article 41 of the Charter and the principle of effective legal protection enshrined in Article 47 of the Charter, it is not true that that uncertainty or lack of clarity on the existence of an option to appeal is to the disadvantage of the applicant.

14 The referring court acknowledges that the applicant herself possibly has or may have more information about the previously submitted visa application. That does not alter the fact that in the present case the defendant, whether or not in cooperation with Germany, may be expected to provide the rechtbank with adequate information in that regard. Only then will the rechtbank be in a position fully to assess the appeal, so that it could be said that there is an effective remedy. The rechtbank further notes that it cannot be inferred from the mere fact that Germany has previously refused the applicant a visa that she is a threat to public policy, internal security, public health or international relations.

15 If the applicant were compelled to rely on a legal remedy against Germany's objection in Germany, the question would then arise as to whether the present action should await the outcome of that German appeal (if it is still available), because the final decision depends on it. That viewpoint is supported by the fact that, according to the referring court, an effective remedy can be said to exist only if the applicant has raised or was able to raise the question in Germany or the Netherlands as to whether the objection was properly raised.

16 There is the question, however, whether the reference to a procedure in another country is in accordance with the one-stop principle (set out, inter alia, in recital 7 of the Visa Code) and the principle that decisions on visa applications should be taken as quickly as possible. If legal proceedings must first take place elsewhere, the present appeal could become more complex and lengthy and therefore less

effective. That would strengthen the case for a substantive evaluation of Germany's objection in the present proceedings. However, the defendant and the German authority that raised the objection would then have to provide the rechtbank with the necessary information about the ground for refusal.

17 The defendant also referred to the judgment of the Court of Justice of 23 October 2014, *Unitrading*, C-437/13, EU:C:2014:2318. In that case, the Court held, in essence, that Article 47 of the Charter does not preclude proof based on an investigation by a third party about which that third party refuses to disclose further information, which makes it difficult or impossible to disprove the conclusions of that investigation, provided that the principles of effectiveness and equivalence are upheld. The Court of Justice proceeded on the assumption that the parties were able to provide proof to the contrary by substantiating their arguments with other evidence and that they could thus refute the investigation results of a third party presented as evidence.

18 The referring court has doubts as to whether the objection raised by another Member State to the issuing of a visa can also be regarded as such evidence based on an investigation by third parties. Moreover, it is not clear in the present case what Germany's objection entails and on what facts it is based. Therefore, even if Germany's objection could be regarded as evidence, the applicant cannot adduce useful evidence against it. The referring court is therefore of the view that the *Unitrading* judgment is not relevant in the present case.