Case C-136/19

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:

20 February 2019

Referring court:

Conseil d'État (Belgium)

Date of the decision to refer:

31 January 2019

Applicants:

B.M.M.

B.M.

Defendant:

État belge

I. Facts and main proceedings

1 In response to a second application for a family reunification visa submitted on 9 December 2013 by B. M., the second applicant, at the Embassy of Belgium in Dakar, the État belge (Belgian State), the defendant, rejected that application on 25 March 2014, on the ground that the second applicant, having failed to establish her relationship with the sponsor, cannot rely on Article 10(1)(4) of the Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Law of 15 December 1980 on entry to the territory, residence, establishment and removal of foreign nationals). The visa application had been supported by a birth certificate stating that the second applicant, born on 22 December 1997, is the daughter of B.M.M., although he never mentioned the existence of that child (B.M.) when he applied for asylum in Belgium.

2 The judgment of 31 January 2018 delivered by the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium) dismissed the action for suspension and annulment of the decision of 25 March 2014 on the

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ground of absence of interest, holding that, since the second applicant was born on 22 December 1997 as she asserts in her application, if the decision in question were annulled and the defendant were required to reconsider the application, it could only conclude that the visa application was inadmissible, since, as she is over the age of 18, the second applicant 'no longer fulfils the conditions laid down in the provisions which she claims should be applied'.

3 By application lodged on 8 March 2018, B.M.M. and B.M. claim that the judgment of the Council for asylum and immigration proceedings should be quashed.

II. Applicable legislation

1. National law

4 The second applicant's action has been brought against a decision refusing a family reunification visa, requested on the basis of point 4 of the first subparagraph of Article 10(1) of the Law of 15 December 1980 on entry to the territory, residence, establishment and removal of foreign nationals, which, as applicable in the present case, provides as follows:

'Art. 10(1). Subject to Articles 9 and 12, the following persons shall be granted leave to reside in the Kingdom for more than three months as of right:

…

4° the following family members of a foreign national who, for at least 12 months, has been admitted or granted leave to reside in the Kingdom for an unlimited period, or who, for at least 12 months, has been granted leave to become established there. This 12-month period shall be deleted if the marital relationship or the registered partnership pre-existed the arrival of the foreign national who is being joined in the Kingdom or if they have a common minor child, or if the persons concerned are family members of a foreign national recognised as a refugee or a beneficiary of subsidiary protection status:

– his foreign spouse or the foreign national with whom he is in a registered partnership considered to be equivalent to marriage in Belgium, who is coming to live with him, provided that both parties concerned are over the age of 21 years. This minimum age shall be reduced to 18 years, however, where the marital relationship or the registered partnership, as the case may be, pre-exists the arrival in the Kingdom of the foreign national who is being joined;

– their children, who are coming to live with them before they have reached the age of 18 years and are unmarried;

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– the children of the foreign national who is being joined, his spouse or the registered partner referred to in the first indent, who are coming to live with them before they have reached the age of 18 years and are unmarried, provided that the foreign national who is being joined, his spouse or that registered partner has the right of custody and control of those children and, in the event of shared custody, on condition that the other person sharing custody has given his agreement'.

5 As regards the interest in bringing proceedings before the Council for asylum and immigration proceedings, Article 39/56 of that law provides that 'the actions referred to in Article 39/2 may be brought before the Council by a foreign national who is able to show an injury or an interest'.

2. European Union law

6 The second applicant relies in her action on, in particular, Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

7 Article 4 of that directive provides, in particular, as follows:

'1. The Member States shall authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, as well as in Article 16, of the following family members:

(a) the sponsor's spouse;

(b) the minor children of the sponsor and of his/her spouse, including children adopted in accordance with a decision taken by the competent authority in the Member State concerned or a decision which is automatically enforceable due to international obligations of that Member State or must be recognised in accordance with international obligations;

(c) the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement;

(d) the minor children including adopted children of the spouse where the spouse has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement.

The minor children referred to in this Article must be below the age of majority set by the law of the Member State concerned and must not be married.

…'.

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The second applicant also relies on Article 47 of the Charter of Fundamental Rights of the European Union.

III. Essential arguments of the parties to the main proceedings

1. Arguments of the second applicant

8 The second applicant puts forward a single plea in law, alleging manifest error of assessment and infringement of Articles 10(1)(4), 12*bis*, 39/2, 39/56 and 39/65 of the Law of 15 December 1980 on entry to the territory, residence, establishment and removal of foreign nationals, Articles 6, 8 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 47 of the Charter of Fundamental Rights of the European Union, Articles 4, 5 and 8 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, and breach of the principles of equal treatment, of the child's best interests and of legal certainty.

This plea is divided into two parts.

9 In the first part, the second applicant criticises the judgment under appeal for failure to state reasons, in that the court below substitutes itself for the assessment of the defendant, by prejudging what the defendant might decide if it were to reconsider the matter. She claims that in order to determine whether she retained an interest in bringing an action, it was necessary to address the question of the time when the age conditions laid down in Article 10 of the Law of 15 December 1980 must be assessed.

10 She claims that the defendant did not argue absence of interest before the administrative court and thus seems to accept that it was required to adjudicate on the basis of her situation on the date on which her application for leave to reside was submitted, or at the very least on the date on which it was led to adjudicate for the first time. She maintains that where the decision is annulled, the authority required to reconsider her application has a new period equal to the period which it initially had, and she submits that the situation could not reasonably be otherwise for the age of the foreign national seeking leave to reside, and more particularly still where, as in the present case, the right to reside depends specifically on that age, since she was under the age of 18 years when she submitted her application for leave to reside and since, moreover, she was still a minor not only when the administrative act rejecting her application was adopted but also when she brought her action before the Council for asylum and immigration proceedings.

11 The second applicant submits, referring to the judgment of the Council for asylum and immigration proceedings of 25 February 2010, that it may be considered that recognition of the right to reside is of a declaratory nature. Accordingly, and contrary to the decision in the judgment under appeal, the prescribed conditions

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must be satisfied at the time of the application for recognition of the right to reside and not up to the time when the decision recognising that right is taken, save as regards the conditions that may depend on the intention of the applicant or the sponsor, which is not the case of a minimum or maximum age condition, failing which recognition of the right to reside will be subject to an uncertain element, depending on the goodwill of the administration and how quickly it processes an application.

12 She criticises the position adopted by the Conseil d'État (Council of State, Belgium) in its judgment of 18 October 2016, in which it held that the age condition laid down in point 4 of the first subparagraph of Article 10(1) of the abovementioned law must be assessed at the time when the administration makes its determination, on the ground that there is no uncertain element and that it is for applicants to seek leave to reside in good time so that they are minors and are therefore entitled to family reunification until the expiry of the period within which Member States must determine an application pursuant to Directive 2003/86. That position takes account only of the period prescribed for making a substantive determination of the application for leave to reside under Article 10 of the law, while the examination of the admissibility of the application is not subject to any binding time limit, so that there is indeed an uncertain element, as the right to family reunification may then depend solely on how quickly the administration acts. The second applicant adds that the position adopted by the Council of State is difficult to reconcile with the principles which the European legislature seeks to protect, since, on a reading of Article 4(1)(c) in conjunction with Article 4(6) of Directive 2003/86/EC, the legislature intended to fix the examination, in time, of the criterion of the age of minor children at the time when they submitted their application for leave to reside.

13 The second applicant relies, moreover, on the judgments of the Court of Justice of the European Union of 17 July 2014, *Marjan Noorzia* v *Austria* (C-338/13), and of 12 April 2018, *A and S* v *Netherlands* (C-550/16), concerning, respectively, the time when the age criterion for spouses applying for family reunification and the status of 'minor' or otherwise for the purpose of claiming family reunification must be assessed, in order to emphasise that Court's desire to ensure the effectiveness of EU law, to comply with the principles of equal treatment and legal certainty, to take into account the child's best interests, which are a primary consideration in the context of family reunification, and to ensure that the outcome of applications for family reunification cannot depend solely on how quickly the administration acts.

14 In the alternative, the second applicant claims that, according to the case-law, where an administrative act is annulled, the administration is, as it were, transported back to the day before the act which has been annulled, so that the age to be taken into consideration by the defendant where the decision refusing leave to reside is annulled is the second applicant's age at the time when the administration was requested to adjudicate on her application for leave to reside,

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within the period prescribed by the legislation, and therefore at the most her age on 24 March 2014, or 16 years.

15 Last, the second applicant maintains that the assessment of her legal situation made in the judgment under appeal is contrary to Article 47 of the Charter of Fundamental Rights of the European Union, which guarantees that everyone whose rights and freedoms guaranteed by the law of the Union are violated is to have the right to an effective remedy.

16 In the second part of the plea, the second applicant criticises the judgment under appeal for failure to state reasons in that her interest could also be accepted by recognition of her relationship with her father, who has leave to reside in Belgium, whereas that indirect interest was not examined by the court below.

17 She claims, in essence, that the administrative act initially contested calls in question only her relationship with her father and the date of birth stated in the documents produced, that the action for suspension and annulment tended to show that both the relationship with her father and the age asserted are in reality established by the case file, and that the court below ought to have considered the indirect actual interest, that is to say, the advantage that she might derive from the annulment for the purposes of the recognition of her relationship, on which she might rely in the context of a fresh application for leave to reside, even if it were submitted on a different legal basis.

2. *Arguments of the defendant*

18 The defendant contends that the plea is inadmissible in that it claims that there has been an infringement of Articles 10(1)(4), 12*bis*, 39/2, 39/56 and 39/65 of the Law of 15 December 1980 and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, since it does not show how those provisions were infringed by the court below, that it is also inadmissible in that it claims that there has been an infringement of Articles 5 and 8 of Directive 2003/86/EC, as it does not maintain that those provisions were not correctly transposed into domestic law or have direct effect, and a breach of the principle of legal certainty, which is applicable only to acts of the active administration.

19 As regards the first part, the defendant claims that according to the wording of the judgment under appeal, the second applicant merely referred to the discretion of the court below, and that she has thus never maintained, in order to claim that she retains her interest in bringing an action, that the age condition laid down in point 4 of the first subparagraph of Article 10(1) of the Law of 15 December 1980 ought to have been assessed at the time of the submission of the visa application or, at the very least, at the time when the defendant was called upon to adjudicate, and that the grounds of cassation relied on, which are not a matter of public policy, are therefore new grounds, with the consequence that the first part of the plea is inadmissible. The defendant adds that the assessment of the continuing interest in bringing an action is a matter for the sovereign appraisal of the court

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below and cannot be called in question by the Council of State, that the fact that the defendant did not raise the argument alleging lack of interest before the Council for asylum and immigration proceedings is irrelevant, since the question of the interest in bringing proceedings is a matter of public policy, and that it cannot be maintained that the defendant acquiesced in the argument that the age condition must be assessed at the time of submission of the application or, at the very least, on the day on which the defendant was called upon to adjudicate for the first time.

20 Recalling the words of point 4 of the first subparagraph of Article 10(1) of the Law of 15 December 1980, the defendant claims that the court below does not in any way prejudge the decision that the authority might adopt or substitute itself for that authority, but that it finds only that one of the legal conditions for obtaining the requested right is no longer fulfilled and correctly concludes that there is no interest in bringing an action, since the authority is required to apply the legislation in force at the time when it adjudicates and cannot adopt a decision *contra legem*; the law is clear and provides that it is imperative that the unmarried child of the sponsor with leave to reside is 'coming to live' with him before having reached the age of 18 years and not that that child initiates the procedure before having reached the age of 18 years. The defendant refers to the case-law of the Council of State in order to emphasise that if the right at issue pre-exists its recognition, it can nonetheless be recognised only in so far as the foreign national still has that right and that if he satisfied the legal conditions but no longer fulfils them, the authority cannot recognise a right which the law no longer confers on the foreign national. The defendant explains that the fact that the second applicant attained her majority not during the period during which her application was being processed by the authority but during the procedure, after the action brought against the administrative act rejecting her visa application, is not capable of altering the principles recalled.

21 As for the difference in treatment between foreign nationals, which the second applicant criticises and which is alleged to exist depending on the time taken to process their actions before the Council for asylum and immigration proceedings on the ground that no period is prescribed by law, the defendant claims that a specific legal time period is allowed for the administration to adjudicate, a period which was observed in the present case, that the decision taken against the second applicant is specifically stated to be based on the fact that she does not establish her relationship with the sponsor and that, in the light of those circumstances, the second applicant cannot claim any discrimination by comparison with other, otherwise unspecified, foreign nationals.

22 The defendant concludes, as concerns the first part, that there is no need to refer any questions for a preliminary ruling to the Court of Justice of the European Union.

23 As regards the second part, the defendant contends that, as the court below found that there was no interest in bringing an action, it was not required to adjudicate

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on the substance of the second applicant's arguments and to recognise a purely hypothetical interest on her part. The ordinary courts alone have jurisdiction to hear and determine disputes concerning a refusal by the competent authority to give effect to a foreign act and that, once again, the second applicant is putting forward a new argument.

IV. Considerations of the referring court

24 The defendant claims that the only persons permitted to bring an action to quash a judgment of the Council for asylum and immigration proceedings are the parties to the proceedings before that court. According to the case file, the first applicant did not act before the Council for asylum and immigration proceedings on his own behalf, but only in his capacity as legal representative of the second applicant, who was then a minor. The action is therefore inadmissible, in so far as it is brought by B.M.M.

1. Second part

25 The interest referred to in Article 39/56 of the Law of 15 December 1980 must exist at the time when the action is brought and continue until judgment is delivered..

26 The rules on the admissibility of an action, including the interest in bringing an action, are a matter of public policy. However, even though it is based on a public policy provision, a plea may be properly raised in cassation proceedings only where the factual elements necessary for its assessment served to support the argument raised before the administrative court on the specific question, and were established by that court or are apparent from the documents to which the Council of State may have regard.

27 In the present case, the judgment states, without being challenged on this point, that the question of the interest in bringing an action was put to the second applicant at the hearing and that, as regards the maintenance of her interest in the action, she merely referred to the Council's discretion. None of the elements, such as the moral interest or the interest in recognition of the second applicant's relationship with her father, put forward in the second part of the plea in cassation as a ground for claiming that she retains an interest in the action for suspension and annulment, was submitted to the court with jurisdiction to determine whether an administrative authority has exceeded its powers.

28 The second part of the plea is inadmissible.

2. First part

29 As regards the admissibility of the first part, the second applicant states to the requisite legal standard how in her view the judgment under appeal infringed point

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4 of the first subparagraph of Article 10(1) and Article 39/56 of the Law of 15 December 1980.

30 Furthermore, the fact that, when invited by the court with jurisdiction to determine whether an administrative authority has exceeded its powers to explain how she retained an interest in bringing an action, the second applicant merely referred to the Council's discretion does not mean that she cannot develop a ground of cassation based on the breach, by the judgment under appeal, of the concept of interest in bringing an action, which is a matter of public policy, since it is for the Council of State to ascertain whether, in deciding that the action was inadmissible on the ground of absence of interest, the judgment under appeal does not breach the concept of interest referred to in Article 39/56 of the Law of 15 December 1980 and since, in doing so, it does not substitute its own assessment for that of the court with jurisdiction to determine whether an administrative authority has exceeded its powers, but reviews the legality of the judgment under appeal.

31 In those respects, the first part of the plea is admissible.

32 Under point 4 of the first subparagraph of Article 10(1) of the Law of 15 December 1980, the right to reside for more than three months is recognised to the following family members of a foreign national who has been admitted or granted leave to reside in the Kingdom for an unlimited period: 'their children, who are coming to live with them before they have reached the age of 18 years and are unmarried'. Furthermore, according to the third subparagraph of Article 12*bis*(2) of that law, as applicable when the administrative act initially contested was adopted, the administration must adopt its decision within a specific period, in principle 'within six months of the date of submission of the application'.

33 Point 4 of the first subparagraph of Article 10(1) of the Law of 15 December 1980 therefore confers a right to family reunification on a foreign national who satisfies the conditions laid down in that provision.

34 The second applicant maintains, in essence, that the interpretation which the Council for asylum and immigration proceedings puts on Article 10(1)(4) of the Law of 15 December 1980, according to which she no longer enjoys a right to family reunification because she attained her majority during the judicial proceedings, breaches the principle of effectiveness of European law, by preventing her from enjoying the right to family reunification which, in her submission, is conferred on her by Article 4 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification and which she sought when she was still a minor.

35 The second applicant also maintains, in essence, that the judgment under appeal, which decides that she no longer has the requisite interest in bringing an action for annulment, on the ground that she attained her majority during the judicial proceedings, breaches her right to an effective remedy by depriving her of the

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possibility of securing a determination of her action against the defendant's decision refusing to recognise that she has the right to family reunification which she claims, which was not only adopted but also contested when she was still a minor.

36 In the judgment, cited above, of 12 April 2018, *A and S* v *Netherlands* (C-550/16), on the question as to the time at which a refugee's age must be assessed in order for him to be able to be regarded as a 'minor' and thus to be able to enjoy the right to family reunion referred to in Article 10(3)(a) of Directive 2003/86/EC, the Court of Justice of the European Union held that 'Article 2(f) of Directive 2003/86/EC of 22 September 2003 on the right to family reunification, read in conjunction with Article 10(3)(a) thereof, must be interpreted as meaning that a third-country national or stateless person who is below the age of 18 at the time of his or her entry into the territory of a Member State and of the introduction of his or her asylum application in that State, but who, in the course of the asylum procedure, attains the age of majority and is thereafter granted refugee status must be regarded as a "minor" for the purposes of that provision'.

37 The present case is not analogous to the dispute in the main proceedings that gave rise to that decision of the Court of Justice, in particular in that it does not concern the family reunification of a minor who is recognised as a refugee and in that in the present case a specific period is prescribed for the adoption of a decision, so that the right to family reunification does not depend 'on how quickly or slowly the application … is processed' (paragraph 55).

V. Succinct presentation of the grounds for the reference for a preliminary ruling

38 According to the referring court, the Court of Justice of the European Union must be asked whether, in order to ensure the effectiveness of EU law and not to render it impossible to benefit from the right to family reunification which, in the second applicant's submission, is conferred on her by Article 4 of Directive 2003/86/EC, that provision must be interpreted as meaning that the sponsor's child may enjoy the right to family reunification when he attains his majority during the judicial proceedings against the decision which refuses him that right and which was taken when he was still a minor.

39 It is also necessary to determine whether Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as precluding an action for annulment, brought against the refusal of a right to family reunification of a minor child, being held to be inadmissible on the ground that the child has attained his majority during the judicial proceedings, since he would be deprived of the possibility of securing a determination of his action against that decision and there would be a breach of his right to an effective remedy.

40 It is therefore necessary to stay proceedings and to refer the questions set out below to the Court of Justice of the European Union for a preliminary ruling.

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VI. Questions for a preliminary ruling

(1) In order to ensure the effectiveness of EU law and not to render it impossible to benefit from the right to family reunification which, in the second applicant's submission, is conferred on her by Article 4 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, must that provision be interpreted as meaning that the sponsor's child may enjoy the right to family reunification when he attains his majority during the judicial proceedings against the decision which refuses him that right and which was taken when he was still a minor?

(2) Must Article 47 of the Charter of Fundamental Rights of the European Union and Article 18 of Directive 2003/86/EC be interpreted as precluding an action for annulment, brought against the refusal of a right to family reunification of a minor child, being held to be inadmissible on the ground that the child has attained his majority during the judicial proceedings, since he would be deprived of the possibility of securing a determination of his action against that decision and there would be a breach of his right to an effective remedy?

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