

Case C-462/20

Request for a preliminary ruling

Date lodged:

25 September 2020

Referring court:

Tribunale di Milano (Italy)

Date of the decision to refer:

14 September 2020

Applicants:

Associazione per gli Studi Giuridici sull'Immigrazione (ASGI)

Avvocati per niente onlus (APN)

Associazione NAGA – Organizzazione di volontariato per l'Assistenza Socio-Sanitaria e per i Diritti di Cittadini Stranieri, Rom e Sinti

Defendants:

Presidenza del Consiglio dei Ministri – Dipartimento per le politiche della famiglia

Ministero dell'Economia e delle Finanze

TRIBUNALE DI MILANO – Sezione Lavoro

(DISTRICT COURT, MILAN – Employment Division)

[...]

In the proceedings between:

- ASGI – Associazione per gli Studi Giuridici sull'Immigrazione
- APN – Avvocati per niente onlus

- ASSOCIAZIONE NAGA – Organizzazione di volontariato per l’Assistenza Socio-Sanitaria e per i Diritti di Cittadini Stranieri, Rom e Sinti

[...]

applicants

v

- Presidenza del Consiglio dei Ministri – Dipartimento per le politiche della famiglia
- Ministero dell’economia e delle finanze

both represented by the Avvocatura dello Stato (State Legal Service), [...]

defendants

[...]

WHEREAS

1 – National law and the facts of the case

Article 1(391) of Law No 208/2015, as amended by Law No 145/2018, provides: ‘*A family card shall be introduced with effect from 2016. The family card is for families whose members are Italian nationals or nationals of other countries of the European Union legally residing in Italy and having at least three children of not more than 26 years of age living at home. A family card shall be issued to families upon request, in accordance with the criteria and rules laid down by decree of the Presidente del Consiglio dei ministri (President of the Council of Ministers) or of the Ministro per la famiglia e le disabilità (Minister for Families and Disability), acting together with the Ministro dell’economia e delle finanze (Minister for the Economy and Finance), which shall be issued within three months of the entry into force of the present provision. The family card entitles the holder to discounts on the purchase of goods and services and to price reductions offered by public bodies and private entities participating in the scheme. Participating bodies and entities offering discounts or reductions greater than those normally offered on the market shall be entitled to refer to their participation in the scheme for promotional and advertising purposes.*’

The abovementioned provision was implemented by government regulation [...] of 27 June 2019. That regulation provides that applicants are to receive the ‘family card’ from the Dipartimento per le politiche della famiglia della Presidenza del Consiglio dei Ministri (Department for Family Policies of the Office of the President of the Council of Ministers) on completing an application in due form. Applications are made via a website and applicants must declare that they fulfil the statutory requirements, in particular, that they are Italian nationals or nationals

of [OR. 2] a Member State of the European Union legally residing in Italy. The website has recently gone live [...] The Avvocatura dello Stato (State Legal Service) has confirmed that the website is managed by Sogei s.p.a., an in-house company entirely controlled by the Ministero dell'economia (Ministry of the Economy).

Public and private-sector suppliers of goods and services (traders, for example) may join the scheme voluntarily. To that end, they may enter into an agreement with the Department for Family Policies of the Office of the President of the Council of Ministers. They must undertake to guarantee 'family card' holders a discount of at least 5% off the normal price on certain goods and services which they select themselves. The names of participating suppliers are published on the abovementioned website.

Article 90a of Legislative Decree No 18/2020, inserted by Conversion Law No 27/2020, provides: *'For 2020, the family card referred to in Article 1(391) of Law No 208 of 28 December 2015 shall be available to families having at least one dependent child.'* Article 90a was adopted along with a number of other measures to counter the economic and social effects of the Covid-19 pandemic. It reduced the requirements regarding dependent children but left unchanged the other characteristics of the 'family card', in particular, the requirements relating to the applicant's nationality. In any event, the parties have confirmed that, as a matter of fact, third-country nationals are not currently permitted to apply for a 'family card'.

On 31 March 2020, ASGI, along with two other associations that are not applicants in this case, sent a letter to the Department for Family Policies of the Office of the President of the Council of Ministers. In that letter, it complained that the rules governing the 'family card', as described above, discriminate, on grounds of nationality or ethnicity, against third-country nationals and infringe Article 11 of Directive 2003/109/EC, Article 24 of Directive 2004/38/EC, Article 29 of Directive 2011/95/EU and Article 12 of Directive 2011/98/EU. ASGI accordingly requested that the law instituting the 'family card' be disapplied in so far as it precluded the card from being issued to third-country nationals in the legal positions protected by the said directives.

ASGI also requests that Article 90a of Legislative Decree No 18/2020 be interpreted as removing all requirements other than that of having at least one dependent child.

That letter remained unanswered. Therefore, the applicant associations issued before this court special proceedings relating to discrimination disputes.

2 – The claims of the applicant associations

The applicant associations allege that the national rules governing the 'family card' are inconsistent with the following provisions of EU law in that they

preclude the card from being issued to certain categories of third-country nationals:

- I. Article 11(1)(d) of Directive 2003/109/EC, in that, in the applicants' opinion, the 'family card' comes within the scope of the concepts of 'social security, social assistance and social protection' contemplated by that provision. In addition, the Italian State has not expressly exercised its right to derogate under Article 11(4) of the directive. It therefore follows that the exclusion from entitlement to the 'family card' of third-country nationals who are long-term residents is unlawful.
- II. Article 12(1)(e) of Directive 2011/98/EU, in conjunction with Article 1(z) and Article 3[(1)](j) of Regulation (EC) No 883/2004, in that, in the applicants' opinion, the 'family card' is a 'family benefit' within the meaning of Regulation (EC) No 883/2004. As regards family benefits, there is a right of equal treatment as between nationals of the Member State and third-country nationals, as referred to in Article 3(1)(b) and (c) of Directive 2011/98/EU. The manner in which the benefit is funded is irrelevant in this regard: according to the applicants, it falls within the scope of the independent EU law concept of 'social security'. It therefore follows that the exclusion from entitlement to the 'family card' of third-country nationals who are holders of a single permit as provided for by Directive 2011/98/EU is unlawful.

[OR. 3]

- III. Article 14(1)(e) of Directive 2009/50/EC, in conjunction with Article 1(z) and Article 3[(1)](j) of Regulation (EC) No 883/2004, to be understood as being referred to by virtue of Article 90 thereof, which replaced the previous references to Regulation (EEC) No 1408/71. This is for the same reasons, and has the same consequences as outlined in point II above, in so far as concerns third-country nationals holding an 'EU Blue Card'. The reference, in the application, to Directive 2000/50/EC must be taken to be a typographical error, immediately identifiable as such because of the mention of 'highly qualified foreigners'.
- IV. Article 24(1) of Directive 2004/38/EC, in that, in the applicants' opinion, the benefit in question falls within the scope of 'social security', which in turn falls within the sphere of application of the Treaties. It follows that the exclusion of third-country nationals who are family members falling within the scope of Directive 2004/38/EC is unlawful.
- V. Article 29 of Directive 2011/95/EU, in that, in the applicants' opinion, the 'family card' falls within the scope of the concept of 'social assistance' referred to therein. The applicants state that Italy has not exercised its option to limit equal treatment to core benefits, as provided for in Article 29(2) of Directive 2011/95/EU. Indeed, Article 27(1) of Legislative Decree No 251/2007 provides that: *'Holders of refugee status and those granted subsidiary protection status shall be entitled to the same treatment as Italian nationals in so far as concerns social assistance and health assistance.'* The wording of that provision was not amended by Legislative

Decree No 18/2014, which transposed Directive 2011/95/EU. It follows that the exclusion from entitlement to the ‘family card’ of third-country nationals benefiting from international protection is unlawful.

At the hearing, the legal representative of the applicant associations submitted that the inconsistencies with EU law described in points I, II and III above would also occur if the issue of a ‘family card’ were to be regarded as a ‘service’ within the meaning of Article 11(1)(f) of Directive 2003/109/EC, Article 12(g) of Directive 2011/98/EU and Article 14(1)(g) of Directive 2009/50/EC.

The applicants submit that all the directives mentioned, in so far as is relevant to the present case, contain rules that are *clear, precise and unequivocal* and that those rules are therefore directly applicable in national law.

The applicants therefore request this court to disapply the national legislation in question to the extent that it excludes from the benefit referred to as a ‘family card’ the abovementioned categories of third-country nationals. They accordingly ask the court to order the defendant authorities to amend the government regulation issued by Decree of 27 June 2019 and to permit such individuals to obtain a ‘family card’.

3. The defence of the State Legal Service

The State legal Service [...] [procedural matters] has expressed its view on the merits of the applicants’ claims.

In so far as concerns the amendment made by Legislative Decree No 18/2020, the defendant authorities submit that it relates only to the number of family members and of dependent children required in order to qualify for a ‘family card’. No change was made with regard to the nationality requirements.

As regards the inconsistencies with EU law alleged by the applicants, the State Legal Service makes the arguments that are summarised as follows:

- I. Regarding the inconsistency with Directive 2003/109/EC, the State Legal Service argues that the ‘family card’ does not fall within the concept of ‘social assistance and social protection’. In its view, it is a ‘measure to provide support to families’, ‘a measure to reduce the cost of services to families’. Nonetheless, it does not take into account the recipients’ income. Nor are they benefits paid for **[OR. 4]** by the State, since the discounts are offered by the suppliers of goods and services which have joined the scheme.
- II For similar reasons, the State Legal Service disputes any inconsistency with Directive 2011/98/EU. It is not a ‘family benefit’ because no contribution from public funds is used to help with the cost of bringing up children. That view is confirmed by the fact that the European Commission has already initiated infringement proceedings (No 2100/2019) for Italy’s failure to transpose Directive

2011/[9]8/EU with regard to the entitlement to social security benefits of third-country workers who are long-term residents. The Commission did not include the ‘family card’ among the social security benefits from which third-country workers were unlawfully excluded.

- III. The State Legal Service argues that the national legislation is not inconsistent with Directive 2009/50/EC for the same reasons as are set out in point II above.
- IV. According to the State Legal Service, the reference to Article 24 of Directive 2004/38/EC is irrelevant, since, if one of the parents is a national of an EU Member State, that parent will be able to obtain a ‘family card’ for the benefit of all other family members, regardless of their nationality.
- V. The State Legal Service also argues that there is no inconsistency with Article 29 of Directive 2011/95/EU. For the reasons given in points I and II above, the ‘family card’ is not a ‘social assistance’ benefit. Moreover, according to the State Legal Service, Article 29 of Directive 2011/95/EU does not contain directly applicable provisions, since it is not sufficiently precise.

[...]

[other purely internal matters] For those reasons, the State Legal Service requests that the applicants’ claims be dismissed.

4. The need to make a reference for a preliminary ruling

There is a dispute between the parties regarding the interpretation of EU law and this court therefore considers it appropriate to refer to the Court of Justice a number of questions regarding the issues of interpretation raised by the applicants. Indeed, the resolution of the dispute is directly dependent on the answers to these questions.

As a preliminary point, this court endorses the interpretation suggested by the State Legal Service regarding the temporary legislative amendment made by Article 90a of Legislative Decree No 18/2020. The legislature clearly intended to extend, for 2020, the range of recipients of the ‘family card’ to include families with at least one dependent child, without altering the remainder of the rules in Article 1(391) of Law No 208/2015, to which express reference is made. The different interpretation suggested by the applicants is at odds with the literal wording and the purpose of the provisions in question. Moreover, if the latter interpretation were to be upheld, the action would become inadmissible because there would be no *locus standi* to challenge discrimination that is not current but future and merely potential.

The issues of interpretation between the parties substantially concern the question of whether or not the ‘family card’ falls within the scope of the concepts of ‘social security’, ‘social assistance’, ‘social protection’, ‘access to goods and services’ or

‘family benefits’ contemplated by the abovementioned directives and by Regulation (EC) No 883/2004.

The present case is special in that the reduction in earnings resulting from the discounts offered to families holding a ‘family card’ is borne by the suppliers of the goods and services, whether public or private, which have decided to enter into the agreement with the Department for Family Policies of the Office of the President of the Council of Ministers. The latter authority, however, is under a duty, the cost of which is for State budget, to process applications, issue ‘family cards’ and publish the names of the public and private entities that have entered into the agreement. All this takes place via a website that is managed by an in-house company controlled by the Ministry of the Economy. [...]

The argument raised by the State Legal Service regarding the issue (see 2.IV above) raised by the applicants in relation to Article 24(1) of Directive (EC) 2004/38 is well founded. A national of an EU Member State lawfully residing in Italy will be able to obtain a ‘family card’ for the benefit of all family members. In such a case, the third-country national would not be excluded from the issue of a ‘family card’ as a family member of an EU national with a right of residence. No question should therefore be referred regarding this point.

[...] [internal procedural matters]

The legal issues raised by the applicants and disputed by the State Legal Service should be resolved by the application of independent interpretation of EU law. For that reason, there being a significant interpretative disagreement between the parties, it appears appropriate to refer to the Court of Justice of the European Union the questions of interpretation set out in the operative part.

FOR THOSE REASONS

A) Refers to the Court of Justice of the European Union the following questions of interpretation for a preliminary ruling:

1. Does Article 11(1)(d) or (f) of Directive 2003/109/EC preclude national legislation such as that under consideration here, which provides for the issue by the government of a Member State to nationals of that Member State or of other Member States of the European Union, but not to third-country nationals who are long-term residents, of a document which confers entitlement to discounts on supplies of goods and services by public and private entities that have entered into an agreement with the government of the Member State in question?
2. Does Article 12(1)(e) of Directive 2011/98/EU, in conjunction with Article 1(z) and Article 3[(1)](j) of Regulation (EC) No 883/2004, or Article 12(1)(g) of Directive 2011/98/EU preclude national legislation such as that under consideration here, which provides for the issue by

the government of a Member State to nationals of that Member State or of other Member States of the European Union, but not to third-country nationals as referred to in Article 3(1)(b) and (c) of Directive 2011/98/EU, of a document which confers entitlement to discounts on supplies of goods and services by public and private entities that have entered into an agreement with the government of the Member State in question?

3. Does Article 14(1)(e) of Directive 2009/50/EC, in conjunction with Article 1(z) and Article 3[(1)](j) of Regulation (EC) No 883/2004, or Article 14(1)(g) of Directive 2009/50/EC, preclude national legislation such as that under consideration here, which provides for the issue by the government of a Member State to nationals of that Member State or of other Member States of the European Union, but not to third-country nationals holding an ‘EU Blue Card’ within the meaning of Directive 2009/50/EC, of a document which confers entitlement to discounts on supplies of goods and services by public and private entities that have entered into an agreement with the government of the Member State in question?
4. Does Article 29 of Directive 2011/95/EU preclude national legislation such as that under consideration here, which provides for the issue by the government of a Member State to nationals of that **[OR. 6]** Member State or of other Member States of the European Union, but not to third-country nationals benefiting from international protection, of a document which confers entitlement to discounts on supplies of goods and services by public and private entities that have entered into an agreement with the government of the Member State in question?

[...] [standard wording]

Milan, 14 September 2020

[...]