Case C-137/19

Request for a preliminary ruling

Date lodged:

20 February 2019

Referring court:

Conseil d'État (Belgium)

Date of the decision to refer:

31 January 2019

Applicant:

B.M.O.

Defendant:

État belge

CONSEIL D'ÉTAT, SECTION DU CONTENTIEUX ADMINISTRATIF
(Council of State, Administrative Litigation Section, Belgium)

[…]

[…] **[…]**
[…] [administrative references]

I. Subject matter of the action

1. By application lodged on 8 March 2018, B.M.O. requests the Conseil d'État (Council of State, Belgium) to quash the judgment […] of 31 January 2018 delivered by the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium) in Case 154.068/III.

[…]

2. […] **[Or. 2]**

[…]

3. […] [Procedural information]

IV Facts relevant to the examination of the matter

4. It is apparent from the findings of the judgment under appeal that, in response to a second application for a family reunification visa submitted by the applicant on 9 December 2013 to the Embassy of Belgium in Dakar, the defendant rejected that application on 25 March 2014, on the basis of Article 10*ter*(3) 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 **[Or. 3]** of foreign nationals), as then in force, on the ground that the foreign national used false or misleading information or false or falsified documents or resorted to fraud or other illegal means which have been decisive in order to obtain the requested leave to reside for more than three months, since the application was supported by a birth certificate stating that the applicant was born on 20 January 1996, whereas his father stated in his application for asylum in Belgium that the applicant was born on 20 January 1994.

The judgment under appeal dismisses the action for suspension and annulment brought against that decision on the ground of absence of interest, deciding that, even if it were considered that the applicant was born on 20 January 1996, as he asserts in the application, the defendant, if the decision were annulled and it were required to reconsider its decision, could only conclude that the visa application is inadmissible, since, having exceeded the age of 18 years, the applicant 'no longer fulfils the conditions laid down in the provisions which he claims should be applied'.

V. The plea in law

Argument of the applicant

5. The applicant puts forward a single plea 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 the principle of legal certainty.

6. In the first part, the applicant criticises the judgment under appeal for failure to state reasons, in that the court below substituted itself for the assessment of the defendant, by prejudging what the defendant might decide if it were to redress the act. He claims that in order to determine whether he retains 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, and he attempts to show that, contrary to what was decided in the judgment, those conditions must be met at the time when the application is submitted. **[Or. 4]**

He claims that the defendant undeniably considered that it was required to reach its decision, on the substance, according to the situation existing on the date on which he submitted his application for leave to reside, since he was already an adult on the date of the act initially contested although the rejection decision did not state that factor as a reason, and that the defendant did not argue absence of interest before the administrative court. He recalls that if the decision is annulled a new period is opened for the authority, which is required to decide afresh, equal to the period which it initially had, that in a way 'the retroactive annulment also entails annulment of the time that has lapsed', and he 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 the right to reside follows specifically from that age', which is the position in the present case, since he was under the age of 18 years when he submitted his application for leave to reside.

He refers to the judgment of the Council for asylum and immigration proceedings […] of 25 February 2010, and emphasises that 'as the categories referred to in Article 10 of the law enjoy a right to reside in Belgium and as that right is recognised to them in the context of the procedure provided for in Article 12*bis* of the Law of 15 December 1980, it may be considered that the recognition of that right is declaratory in nature and that, owing to that declaratory nature, the prescribed conditions must be fulfilled at the time when the application for recognition of the right to reside is submitted and not up to the time when the decision recognising that right is adopted, 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 [...] failing which recognition of the right to reside will be subject to an uncertain element, depending on the goodwill of the administration and on how quickly it processes an application'.

7. The applicant is admittedly aware of the judgment of the Conseil d'État (Council of State) […] of 18 October 2016, where it was 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. Article 5(4) of Directive 2003/86 gives Member States a period within which to determine an application, which is known to foreign nationals seeking family reunification. It is therefore for applicants to seek leave to reside in good time so that until the expiry of the period they are minors and therefore entitled to family reunification', but he criticises that position, which has regard only to the period prescribed for making a determination on the substance of the application for leave to reside on the basis of Article 10 of the law, whereas examination of the admissibility of the application is not subject to any binding time limit, with the consequence that there is indeed an uncertain element, 'as the right to family reunification may

[Or. 5] then depend solely on how quickly the administration acts'. The applicant adds that the position adopted by the Council of State is difficult to reconcile 'with the principles which the European legislature intended to protect', since, on a reading of Article 4(1)(c) in conjunction with Article 4(6) of Directive 2003/86/EC, it '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'.

8. The applicant refers, next, to 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 must be assessed, for the purpose of claiming family reunification, of 'a third country national or a stateless person who was over the age of 18 years at the time of entering the territory of a Member State and of applying for asylum in that Member State, but who, during the asylum procedure, attained his majority and is subsequently granted refugee status', in order to emphasise that Court's desire to ensure 'the effectiveness of European Union law', to comply with the principles of equal treatment and legal certainty, to 'take into consideration 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'.

9. He concludes that 'to require the minority condition to be satisfied both at the time of submitting the application for leave to reside and at the time when the administration makes its ruling would amount, contrary to the two judgments of the Court and to the Opinion of the Advocate General [...], to making the success of the application depend not on circumstances attributable to the applicant but indeed on the administrative authority, in breach of the three principles identified above, but also of the protection of the child's best interests', that 'to follow the abovementioned judgment [of the Council of State], the child would have to submit his application for family reunification not nine months before attaining his majority, but 15 months (as the nine-month deadline can be extended twice, in application of the fifth subparagraph of Article 12*bis*(2) of the law), or indeed [...] 18 months or more (since the nine-month period begins to run only when the application is admissible and receipt of all the documents has been acknowledged, in application of the second subparagraph of Article 12*bis*(2) of the law), that 'likewise, if as in the present case the decision rejecting an application for family reunification should be the subject of an appeal before the Council for asylum and immigration proceedings, the child would run the serious risk of losing his interest even before a court ruled on the legality of the decision adopted', **[Or. 6]** that 'in the event of annulment, the defendant could again procrastinate, so that the child's right to family reunification would never be recognised' and that 'in the light of the foregoing, the judgment [of the Council of State] of 18.10.2016 cannot be read as generally requiring that the condition of minority laid down in Article 10(1)(4) of the law be satisfied both at the time of the application for leave to reside and at

the time when the administration ultimately rules on the substance of that application'.

10. […] [Questions for a preliminary ruling suggested by the applicant]

11. In the second part of the plea, the applicant also criticises a failure to state reasons in the judgment under appeal in that the applicant's interest could also be found in the fact of having his relationship with his parent, who has leave to reside in Belgium, recognised, as 'that indirect interest was not examined by the court below'.

In essence, he claims that the administrative act initially contested 'calls in question only the child-parent relationship with his father and the date of birth shown in the documents produced', that the action for suspension and annulment sought to show that both the child-parent relationship and the age stated are in reality established by the file, and that the court below ought to have considered the question of the indirect actual relationship, that is to say, the advantage that the applicant might derive from the annulment for the purposes of recognition of his child-parent relationship, that might be properly relied on in the context of a fresh application for leave to reside, even if it were submitted on a different legal basis. He also emphasises his moral interest in the annulment of the act adversely affecting him. **[Or. 7]**

Argument of the defendant

12. The defendant contends that the plea is inadmissible in that it relies on an infringement of Articles 10(1)(4), 12*bis*, 39/2, 39/56 and 39/65 of the abovementioned Law of 15 December 1980, Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 47 of the Charter of Fundamental Rights of the European Union and Articles 10 and 11 of the Constitution, as it fails to show how those provisions were infringed by the court below, that it is also inadmissible in that it relies on 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 in that it relies on a breach of the principle of legal certainty, which is applicable only to acts of the active administration.

13. As regards the first part, the defendant claims that according to the wording of the judgment under appeal, the applicant merely 'referred to the discretion of the court below', that he has thus never maintained, in order to claim that he retains his 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, and that the grounds of cassation relied on, which are not a matter of public policy, are therefore new grounds, so 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 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, when the contested administrative act expressly states that the facts establish an intention to circumvent the legal provisions 'which do not permit family reunification for children over the age of 18 years'.

14. 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 right applied for is not 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*, and that 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' **[Or. 8]** with him before reaching the age of 18 years and 'not that that child initiates the procedure before reaching 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 concludes, on 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.

15. As regards the second part, the defendant contends that, as it found that there was no interest in bringing an action, the court below was not required to adjudicate on the substance of the applicant's arguments and to establish a purely hypothetical interest on his part, that the ordinary courts alone have jurisdiction to hear disputes concerning a refusal by a competent authority to give effect to a foreign act and that, once again, the applicant is putting forward a new argument.

Decision of the Council of State

Applicable legislation

16. The action which the applicant brought before the Council for asylum and immigration proceedings was directed against a decision refusing a family reunification visa, sought 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:

– 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; **[Or. 9]**

– 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’.

17. The decision refusing the visa at issue is based on Article 10*ter*(3) of that law, which provides, in the version applicable in the present case, that ‘the minister or his representative may decide to reject the application for leave to reside for more than three months, … either where the foreign national … has used false or misleading information or false or falsified documents or has resorted to fraud or other illegal means which have been decisive in order to obtain that leave to reside …’.

18. As regards the interest in bringing an action 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’.

Second part

19. 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.

The rules on the admissibility of an action, including the interest in bringing an action, are a matter of public policy. However, even when it is based on a public policy provision, a plea in cassation can be properly raised 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 evident from the documents to which the Council of State may have regard.

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 applicant at the hearing and that he 'confined' himself, as regards the maintenance of his interest in the action, to 'referring to the Council's discretion'. None of the elements, such as the moral interest or the interest in recognition of the applicant's child-parent relationship, put forward in the second part of the plea in cassation as a ground for claiming that the applicant maintained 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.

The second part of the single plea is inadmissible. **[Or. 10]**

First part

20. As regards the admissibility of the first part, the applicant states to the requisite legal standard how the judgment under appeal in his view failed to have regard to point 4 of the first subparagraph of Article 10(1) and Article 39/56 of the Law of 15 December 1980, explaining that, contrary to the findings in the judgment under appeal, he did indeed have an interest in bringing an action for annulment, since, in particular, 'the age conditions laid down in Article 10 of the Law of 15 December 1980 on entry to the territory, residence, establishment and removal of foreign nationals must be satisfied at the time of submission of the application for leave to reside', a point which is developed by references to judgments of the Council for asylum and immigration proceedings, by a criticism of the judgment of the Council of State of 18 October 2016 which decided the contrary, and by considerations concerning Article 4(1)(c) of Directive 2003/86/EC, transposed by point 4 of the first subparagraph of Article 10(1) of the Law of 15 December 1980, and two judgments of the Court of Justice of the European Union relating to the problem of family reunification.

21. Furthermore, the fact that, when invited by the court with jurisdiction to determine whether an administrative authority has exceeded its powers to explain how he retained an interest in bringing an action, the applicant merely 'referred to the Council's discretion' does not mean that he 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.

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

22. 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 Article 12*bis*(1) of that law, 'a foreign national who declares that he is in one of the situations referred to in Article 10 shall submit his application to the competent Belgian diplomatic or consular representative for the place of his residence or temporary residence abroad' and the third subparagraph of Article 12*bis*(2), as applicable when the administrative act initially contested was adopted, provides that the administration is to take **[Or. 11]** its decision within a specific period, in principle, 'within six months of the date of submission of the application'.

23. 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.

In order to adjudicate on the first part of the appeal, it is necessary to determine which are the requirements of EU law, in particular Council Directive 2003/86/EC of 22 September 2003.

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.

…'.

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 reunification 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. 12]** 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'.

24. 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). […]

ON THOSE GROUNDS,

THE COUNCIL OF STATE HEREBY ORDERS:

Article 1.

The proceedings are stayed. **[Or. 13]**

Article 2.

In application of the third paragraph of Article 267 of the Treaty on the Functioning of the European Union, the following question for a preliminary ruling is referred to the Court of Justice of the European Union:

> ‘Must Article 4(1)(c) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, read where appropriate with Article 16(1) of that directive, be interpreted as requiring that third country nationals, in order to be classified as “minor children” within the meaning of that provision, must be “minors” not only at the time of submitting the application for leave to reside but also at the time when the administration eventually determines that application?’

[…]

[…]