Case C-225/19

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:

R.N.N.S.

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 due to 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 option, 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 of 19 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 Egyptian nationality. On 9 June 2017 he lodged an application for a visa to visit his parents-in-law in the Netherlands. After prior consultation with other Member States as referred to in Article 22 of the Visa Code, the Netherlands representation in Amman, Jordan, refused the application. The reasons provided merely 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'.

2 It appears from an internal document of the visa service that Hungary raised an objection. In 2015 the applicant applied for a short-stay visa in that country. That application was refused. The applicant made enquiries as to the reasons or background to the present objection at the Hungarian representations in the Netherlands, Cairo (Egypt) and Sofia (Bulgaria), but did not obtain any clarity. He was not even told which authority in Hungary had raised the objection.

3 The applicant raised an objection to the refusal and subsequently brought proceedings 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 him access.

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

6 The defendant argues that the fact that a Member State wishes to be consulted is confidential. Therefore, when deciding on a visa, he does not have to state that a Member State wished to be consulted. The consultation takes place via the VIS, but nothing is recorded in the VIS about the results of that consultation. Therefore, consulting the VIS does not make it possible to find out whether an objection was raised or what the content of that objection might have been. Furthermore, the defendant points out that the objection in the present case need not have been raised by the Hungarian visa authorities. The objection could also have been raised by a different Hungarian service. The defendant therefore does not know which Hungarian institution objected and for what reason. The defendant therefore did not have the option of changing the decision on the refusal during the objection procedure and that also applies to the Netherlands court in the present action. The defendant maintains that the applicant should look to the Hungarian authorities if he takes the view that they have registered his data inaccurately or unlawfully. The defendant is of the opinion that that state of affairs is not contrary to Article 47 of the Charter.

7 The applicant argues that there is no question of effective legal protection here. Since the motives of the Hungarian authorities are unknown, he is confronted with a decision by the Netherlands against which he cannot marshal any substantive arguments. Moreover, his arguments against the ground for refusal are not being substantively evaluated in the appeal.

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 adequate access to legal redress 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 Hungarian authority, the objection to the issuing of a visa could be challenged.

Nor is any information supplied anywhere as to the court or tribunal before which the applicant can lodge an appeal in Hungary.

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 exists, an action at law, 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 wanting. According to the referring court, the judgment of the Court of Justice of the European Union ('the Court of Justice') that the visa authorities have a wide discretion in the examination of a visa application to ascertain whether a ground for refusal can be applied (judgment of 19 December 2013, *Koushkaki*, C-84/12, EU:C:2013:862), does not provide any justification, in the light of Article 47 of the Charter, for excluding the evaluation of a ground for refusal entirely from an assessment on appeal.

13 In the present case, it is unclear whether the Hungarian authorities, by reason 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 operates to the disadvantage of the applicant.

14 The referring court acknowledges that the applicant himself 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 Hungary, 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 Hungary has previously refused the applicant a visa that he 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 Hungary's objection in Hungary, the question arises whether the present action should await the outcome of that Hungarian appeal (if it is still available), because the final decision depends on it. This 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 Hungary or the Netherlands as to whether the objection was properly raised.

16 There is the question, however, of whether the reference to a proceedings in another country is in accordance with the one-stop principle (set out in, inter alia, 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 Hungary's objection in the present proceedings. However, the defendant and the Hungarian authority that raised the objection would then indeed 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 stand in the way of 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 in a position 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 Hungary’s objection entails and on what facts it is based. Therefore, even if Hungary'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.