

Case C-193/19**Request for a preliminary ruling****Date lodged:**

27 February 2019

Referring court:

Förvaltningsrätten i Malmö (Sweden)

Date of the decision to refer:

15 February 2019

Applicant:

A

Defendant:

Migrationsverket

[OMISSIS]

Request for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union**[OMISSIS]**

Förvaltningsrätten i Malmö, migrationsdomstolen, (Administrative Court for Immigration Matters, Malmö), Sixth Chamber, has [OMISSIS] decided to [OMISSIS] obtain a preliminary ruling from the Court of Justice of the European Union.

[OMISSIS]**Introduction**

- 1 A basic criterion in Swedish law, when issuing a residence permit on a ground other than the need for protection and humanitarian grounds in connection with a natural person, is that the applicant's identity must be made clear. In those situations, the standard of proof required is clarified as synonymous with proof of identity; in practice that requires presentation of a valid passport, in force for the

period of the requested permit. The Swedish utlänningslagen (Law on Aliens; ‘the UL’) does not contain specific rules on identity, but does contain a requirement to hold a passport.

- 2 Derogations have been granted in cases of family reunification, when the persons in question come from a country where acceptable identity documents cannot be presented; in practice, Somalia.
- 3 The Migrationsöverdomstolen (Court of Appeal for Immigration Matters) has previously held that clearly proven identity when granting a temporary residence permit on grounds of a connection to Sweden, for example through a marriage, work or studies, of which the first mentioned is at issue in the present case before the national court, is a prerequisite for Sweden being able to fulfil its commitments under the Schengen Agreement and for cooperation within Schengen included in what is known as the Schengen Borders Code (MIG 2011: 11).
- 4 In 2016, Sweden introduced a temporary law restricting the possibility of being granted a residence permit in the country (Lagen [2016:752] om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige (Law [2016:752] on temporary restrictions on the possibility of obtaining a residence permit in Sweden; ‘the temporary law’).
- 5 [Or. 2] A provision has now been incorporated into that law (Paragraph 16(f)) which allows persons who intend to study at a Swedish upper secondary school to be granted a temporary residence permit. One requirement among many others is that the person has received a final decision refusing an application for asylum with an expulsion order attached to the relevant refusal. The provision concerned also contains a specific derogation from the abovementioned requirement of proof of identity that otherwise applies; that does indeed concern a permit for studies of a limited duration. In addition, the applications must be submitted in Sweden. Such permits are otherwise to be requested and granted before entry into Sweden.
- 6 The provision is worded as follows: a residence permit may be granted even if the alien’s identity is unclear or he or she is unable to provide prima facie evidence of his or her identity.
- 7 The förvaltningsrätten i Stockholm, migrationsdomstolen (Administrative Court for Immigration Matters, Stockholm) has [OMISSIS] has held that provisions of EU law (the Schengen Borders Code and Regulation (EU) No 265/2010 of the European Parliament and of the Council of 25 March 2010 amending the Convention Implementing the Schengen Agreement and Regulation (EC) No 562/2006 as regards movement of persons with a long-stay visa), which are binding on Sweden, prevent application of the abovementioned lower standard of proof of identity and that instead the normal practice of proven identity is to apply.

- 8 The Kammarrätten i Stockholm, Migrationsöverdomstolen (Administrative Court of Appeal for Immigration Matters, Stockholm) has since [OMISSIS] held that the principles established in the abovementioned case MIG 2011:11 concerns applications submitted from outside Sweden (therefore also obviously from outside the Schengen area) and amended the decision of the migrationsdomstolen (Court for Immigration Matters) in such a way that the lower burden of proof referred to above was admitted.
- 9 It is thus unclear what level of required proof of identity under the EU law provisions set out above (paragraph 3 and paragraph 7) applies to applications made in Sweden on a ground other than the need for protection and humanitarian grounds concerning an individual.

The reasons for the court's query as to how the provisions of EU law are to be interpreted in the present case

Provisions of EU law

- 10 In accordance with recital 6 of the Schengen Borders Code, border control is in the interest not only of the Member State at whose external borders it is carried out, but of all Member States which have abolished internal border control. Border control should help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations.
- 11 Article 5(1) of the Code provides that a third-country national must be in possession of a valid travel document entitling the holder to cross the border and must not be a person for whom an alert has been issued in the Schengen Information System (SIS) for the purposes of refusing entry. The same article further provides that a Member State may authorise a third-country national who does not fulfil the conditions laid down to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations.
- 12 Article 7(3) states that third-country nationals are to be subject to thorough checks on entry and exit and that a thorough check is to be carried out to establish whether the third-country national has a document which is valid for crossing the border and which has not expired, and that the document is accompanied, where applicable, by the requisite visa or residence permit.
- 13 [Or. 3] Article 13(1) provides, inter alia, that a third-country national who does not fulfil all the entry conditions is to be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.
- 14 Under Article 6(4) of the Return Directive (Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common

standards and procedures for returning illegally staying third-country nationals) Member States may, at any time, for compassionate, humanitarian or other reasons, decide to grant an autonomous residence permit or other form of authorisation offering a right to stay in the country to a third-country national staying illegally on their territory. In such cases, no return decision is to be issued. Where a return decision has already been issued, it is to be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay.

- 15 Under Article 25(1) of the Schengen Agreement, where a Member State considers issuing a residence permit, it is systematically to carry out a search in the SIS. Where a Member State is to decide whether to issue a residence permit to an alien for whom an alert has been issued for the purposes of refusing entry, it is first to consult the Member State issuing the alert and is to take account of that Member State's interests, and the residence permit is to be issued in exceptional cases only, notably on humanitarian grounds or by reason of international commitments.

Relevant national provisions applicable in the case before the referring court

- 16 Chapter 5, Paragraph 3, first subparagraph, points 1 and 8 of the utlänningslagen (2005:716) (Law (2005:716) on aliens; 'the UL') and Chapter 5, Paragraph 16, first and second subparagraphs of that law concerning the right to a residence permit. Chapter 2, Paragraph 1, of the [UL] and Chapter 2, Paragraph 1, of the utlänningsförrordningen (2006:97) (Ordinance (2006:97) on aliens; 'the UF') concerning the requirement to hold a valid passport. There are no provisions on the requirement for proven identity in the [UL]. There is, however, a provision on identity in the temporary law referred to above.

The need for clarification from the Court of Justice

- 17 In the present case, a person under the name A, born on 81-11-11 and a Gambian national, was granted a residence permit based on his connection to his wife (a Swedish national).
- 18 That application was lodged and granted before his entry into Sweden. His identity may be deemed to have been proven at the time and he showed a home country passport, which must also have been deemed to meet the requirements which may be laid down in respect of such a passport in that situation.
- 19 The man is now seeking an extension to his permit on the same grounds (the man is in Sweden). When the application for extension was made, the following information of interest emerged. The Police in Norway provided information that the man had been held in detention in Norway. Information was also received that the person in question used a number of aliases in Norway. He was known there, in part, as B, born on 18.08.75, citizen of The Gambia (under a false passport) and

in part as C, born on 12.12.82 (asylum seeker without a passport). In a search in Norway, another passport (passport No PC239064) was found, bearing the identification D, born on 08.08.80, also a citizen of The Gambia. Further, an application for a residence permit in Sweden was previously registered in the name of D, born on 08.08.80, a Gambian national (passport No PC239064). The application was made from Dakar. The application was rejected since it involved a marriage of convenience.

- 20 [Or. 4] Finally, it should be noted that Norway expelled D for life and registered him under that name, with the date of birth of 08.08.80, as a Gambian citizen, in SIS. Lastly, it is noted that the man in Norway under the latter name was convicted of the possession and sale of drugs (cocaine) and sentenced to a prison term of 120 days.
- 21 The Migrationsverket rejected the current application essentially on the ground that his identity has not been made clear.
- 22 The Migrationsdomstolen (Court for Immigration Matters) considers, in the light of the foregoing, that it is necessary to request the Court to give a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union concerning the interpretation of whether EU law requires proof of identity for the grant of applications lodged in Sweden which are not based on grounds of protection or humanitarian grounds.

[Or. 5] Questions to the Court of Justice of the European Union

1. Do the provisions of the Schengen Convention, including, in particular, the provisions on the systematic consultation of the SIS and the Schengen Borders Code and including, in particular, the requirement to hold a valid passport laid down therein, constitute obstacles to the grant of residence permits on the basis of applications which were submitted in Sweden and which are not based on grounds of protection or humanitarian grounds, when the identity is unclear?
2. If that is the case, can the exception on establishment of identity be governed by national law or by case-law?
3. If the situation described in paragraph 2 above is not the case, what, if any, derogation is provided for in EU law?

Malmö, 15 February 2019.

[OMISSIS]

[Or. 6] Parties to the main proceedings [OMISSIS]

Applicant:

A

[OMISSIS]

Defendant

Migrationsverket

Sweden

[OMISSIS]

WORKING DOCUMENT