

Anonymised version

Translation

C-394/19 — 1

Case C-394/19

Request for a preliminary ruling

Date lodged:

21 May 2019

Referring court:

Tribunal du travail francophone de Bruxelles (Brussels Labour Court (French-speaking), Belgium)

Date of the decision to refer:

14 May 2019

Applicants:

PN

QO

RP

SQ

TR

Defendant:

Centre public d'action sociale d'Anderlecht (Anderlecht Public Welfare Centre, CPAS)

[...] [Or. 2] [...]

I PROCEDURE

The proceedings were brought by an application lodged at the Court Registry on 13 February 2019. [conduct of the proceedings]

[...] [Or. 3]

II THE CONTESTED DECISIONS AND THE SUBJECT-MATTER OF THE REQUEST

By decision of 12 November 2018, the Centre public d'action sociale (CPAS) d'Anderlecht (the Anderlecht Public Welfare Centre, Belgium) ('the Anderlecht CPAS') refused to grant PN welfare assistance equivalent to the social integration income [...], on the following grounds:

'You are residing in Belgium illegally.

Persons residing illegally can only be granted urgent medical assistance, by virtue of Article 57(2) of the loi du 8 juillet 1976 organique des CPAS [(CPAS Basic Law of 8 July 1976)].

The Comité Special du Service Social [(Special Welfare Services Committee, Belgium)] therefore considers that you do not meet the statutory conditions for the grant of welfare assistance equivalent to the integration income.'

By decision of the same date, and on the same grounds, the Anderlecht CPAS also refused to grant QO welfare assistance equivalent to the social integration income with effect from 18 October 2018, and permitted him a medical card for the purposes of emergency medical assistance.

PN and QO seek [...] an order requiring the Anderlecht CPAS to grant them welfare assistance equivalent to the social integration income at the rate fixed for those with dependent relatives as from 18 October 2018.

III FACTS

[...]

PN, a Moroccan national who was born on 1 January 1975, states that she arrived in Belgium in 2003.

On 6 December 2003 she married US, a Belgian national. [...]

On 12 January 2008, PN and US divorced.

On 19 March 2008, in Morocco, PN married QO, a Moroccan national who was born on 27 September 1976.

On 28 November 2008, QO arrived in Belgium on a short-stay visa. Following the expiry of that visa, an order to leave the territory was issued against him on 23 April 2009 [...]. [Or. 4]

On 15 October 2009, QO submitted a residence application under Article 9a 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, settlement and removal of foreign nationals) (application for regularisation of residence on the basis of exceptional circumstances).

On 2 August 2010, PN and QO's first child, RP, was born.

On 27 January 2011, QO was given permission to reside for a period in excess of 3 months.

By judgment of 12 June 2012, the Tribunal de première instance de Bruxelles (Brussels Court of First Instance, Belgium) annulled the marriage between PN and US.

On 29 January 2013, the Office for Foreign Nationals withdrew the rights of residence of PN and her son RP and ordered them to leave the territory and not re-enter within 5 years, on the following grounds (which have been loosely translated):

'The Tribunal de première instance de Bruxelles [(Brussels Court of First Instance)] found that the person concerned had not had a long-term intention of living as husband and wife with the Belgian national whom she had married. She had deliberately, and with fraudulent intent, abused Belgian procedures for family reunification. It has been established that PN acted fraudulently with a view to obtaining a right of residence. Her right to settle is withdrawn on the ground of fraud with effect from 29 January 2013.'

On 21 March 2013, as a result of the decision withdrawing PN's right of residence, QO's permission to reside was also withdrawn, and on 25 April 2013 he brought an action before the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium).

By judgment of 27 May 2014, the cour d'appel de Bruxelles (Brussels Court of Appeal, Belgium) upheld the judgment of the Tribunal de première instance de Bruxelles (Brussels Court of First Instance) of 12 June 2012.

On 30 July 2014, PN and QO had a second child, SQ.

On 27 July 2015, PN and QO applied for residence under Article 9a of the Law of 15 December 1980 on entry to the territory, residence, settlement and removal of foreign nationals (application for regularisation of residence on the basis of exceptional circumstances). On 16 November 2015, their applications were declared inadmissible and dismissed, and they were ordered to leave the territory.

On 15 September 2016, the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) dismissed QO's action of 25 April 2013.

On 26 September 2016, PN and QO had a third child, TR. **[Or. 5]**

By letter of 13 June 2017, addressed to the Belgian State, the lawyer acting on behalf of PN and QO asserted that the withdrawal of their rights of residence constituted a breach of European law, and sought, by way of reparation in kind of that breach, the return to PN of her F + card (a permanent residence card issued to family members of EU citizens), F + cards for her children, and a B card (certifying entry in the register of foreign nationals — indefinite leave to remain) for QO.

By email of 16 June 2017, the Belgian State refused to grant that request, on the following grounds:

[...]

The actual date of the decision was 29 January 2013. Your client PN was notified of it on 20 March 2013.

Your clients were entitled to bring an action within 30 days of that notification.

No action was brought by your clients. The prohibition of entry remains applicable.'

On 24 January 2018, PN and QO accordingly brought proceedings before the Tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-Speaking), Belgium), with a view to obtaining a residence permit, [...].

By judgment of 10 July 2018, that court held that it did not have jurisdiction [...].

PN and QO lodged an appeal against that decision, which is still pending before the cour d'appel de Bruxelles (Brussels Court of Appeal).

[...]

IV DISCUSSION

Article 1 of the CPAS Basic Law of 8 July 1976 states that 'everyone is entitled to welfare assistance. The purpose of such assistance is to enable every person to lead a life in keeping with human dignity'.

[...] Article 57(2) of that law provides:

'By derogation from the other provisions of this law, the functions of the public welfare centre shall be limited to:

1. the grant of urgent medical assistance, in respect of an alien residing illegally in the Kingdom; [Or. 6]

The purpose of that provision is to encourage foreign nationals residing illegally to comply with orders to leave the territory.

PN and QO submit [...] that the fact that they do not currently have permission to reside is due to a breach of European law on the part of the Belgian State, and that the instant court has power to remedy that breach to the extent, at the very least, of safeguarding their right to welfare assistance, so as to enable them to lead a life in keeping with human dignity.

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [...] which had a transposition deadline of 30 April 2006, provides in Article 35 thereof:

'Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.'

At the time of the decisions withdrawing PN and QO's rights of residence, their legal basis for such decisions in domestic law was Article 42f of the Law of 15 December 1980 on entry to the territory, residence, settlement and removal of foreign nationals, which then read as follows:

'The Minister or his representative may refuse to permit the entry or terminate the right of residence of an EU citizen or members of his family where he or they have used false or misleading information or false or fabricated documents, or have resorted to fraud or other illegal means, but for which that right would not have been granted.'

Contrary to Article 35 of Directive 2004/38/EC, that provision did not require prior consideration to be given to proportionality.

That requirement was only introduced when Article 42f of the Law of 15 December 1980 was amended, by the loi du 4 mai 2016 (Law of 4 May 2016) [...], so as to read as follows:

'The Minister or his representative may terminate the residence of an EU citizen or a member of his family and expel them from the territory of the Kingdom where there has been use of false or misleading information or false or fabricated documents, or recourse to fraud or other illegal means, which has contributed to residence being granted. [Or. 7]

Where the Minister or his representative envisages making such a decision, he shall take account of how long the individual concerned has resided in the Kingdom, his age, his state of health, his family and economic situation, his social and cultural integration into the Kingdom, and the extent of his links with his country of origin.'

The statement of reasons [...] indicates in this regard that:

'The amendments which have been made ... are intended to clarify the provisions of the Law of 15 December 1980 concerning refusal of entry and residence, and withdrawal of residence of EU citizens and their family members, by ensuring that Directive 2004/38/EC is transposed fairly.

Article 35 of Directive 2004/38/EC does not by any means require that residence would not have been granted but for the use of fraud. Nonetheless, regard must be had to the principle of proportionality and the safeguards for which Articles 30 and 31 of that directive provide.

That is why the Minister or his representative must henceforth take account of how long the individual concerned has resided, his age, his state of health, his family and economic situation, his social and cultural integration into the Kingdom, and the extent of his links with his country of origin.'

In those circumstances it cannot reasonably be disputed that the decisions withdrawing PN and QO's rights of residence — which are the foundation for the contested decision — were made on the basis of an erroneous transposition of Directive 2004/38/EC, and without the prior consideration of proportionality that is required by that directive.

The Court of Justice of the European Union ('the Court of Justice') [...] has identified the principles that govern the liability of a Member State for national legislation which is contrary to EU law. **[Or. 8]**

In its judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428), the Court of Justice stated:

'31. It should be borne in mind at the outset that the EEC Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions (see the judgments in Case 26/62 Van Gend en Loos [1963] ECR I and Case 6/64 Costa v ENEL [1964] ECR 585).

32. Furthermore, it has been consistently held that the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see in particular the judgments in Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal [1978] ECR 629, paragraph 16, and Case C-213/89 Factortame [1990] ECR I-2433, paragraph 19).

33. The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.

34. The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.

35. It follows that the principle whereby a State must be liable for loss and damage caused to individuals by breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.

36. A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 of the Treaty, under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law. Among these is the obligation to nullify the unlawful consequences of a breach of Community law (see, in relation to the analogous provision of Article 86 of the ECSC Treaty, the judgment in Case 6/60 Humblet v Belgium [1960] ECR 559). **[Or. 9]**

37. It follows from all the foregoing that it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.'

Those principles were confirmed in the judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79). In that judgment, the Court of Justice answered the question referred for a preliminary ruling as follows:

'1. The principle that Member States are obliged to make good damage caused to individuals by breaches of Community law attributable to the State is applicable where the national legislature was responsible for the breach in question.

2. *Where a breach of Community law by a Member State is attributable to the national legislature acting in a field in which it has a wide discretion to make legislative choices, individuals suffering loss or injury thereby are entitled to reparation where the rule of Community law breached is intended to confer rights upon them, the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals. Subject to that reservation, the State must make good the consequences of the loss or damage caused by the breach of Community law attributable to it, in accordance with its national law on liability. However, the conditions laid down by the applicable national laws must not be less favourable than those relating to similar domestic claims or framed in such a way as in practice to make it impossible or excessively difficult to obtain reparation.*

3. *Pursuant to the national legislation which it applies, reparation of loss or damage cannot be made conditional upon fault (intentional or negligent) on the part of the organ of the State responsible for the breach, going beyond that of a sufficiently serious breach of Community law*

4. *Reparation by Member States of loss or damage which they have caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained. In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims or actions based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation. National legislation which generally limits the damage for which reparation may be granted to damage done to certain, specifically protected individual interests not including loss of profit by individuals is not compatible with Community law. [Or. 10] Moreover, it must be possible to award specific damages, such as the exemplary damages provided for by English law, pursuant to claims or actions founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law.*

5. *The obligation for Member States to make good loss or damage caused to individuals by breaches of Community law attributable to the State cannot be limited to damage sustained after the delivery of a judgment of the Court finding the infringement in question.*

In the light of the matters set out above, it is appropriate to refer to the Court of Justice for a preliminary ruling the question set out in the operative part of this judgment.

[...] [Or. 11] [...]

[Or. 12] [...]

[interim measure granting welfare assistance pending the substantive judgment].

ON THOSE GROUNDS,

THE COURT,

[...]

Pursuant to Article 267 TFEU, submits the following question to the Court of Justice for a preliminary ruling:

- Is the principle of full effectiveness of the rules of European Law and the protection of those rules, as defined in the *Francovich* and *Brasserie du pêcheur* judgments, in conjunction with Directive 2004/38/EC, to be interpreted as imposing an obligation on a Member State, in circumstances where the right of residence of a foreign national has been withdrawn without prior consideration of proportionality, as a result of an error in transposition into domestic law, to cover, within the framework of its welfare system, the basic needs of the applicant other than medical needs, until the applicant's position as regards the right of residence has been determined in conformity with EU law?

[...] [Or. 13] [...]

[...] [signatures]

WORKING DOCUMENT