Anonymised version

Case C-402/19

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:

24 May 2019

Referring court:

Cour du travail de Liège (Higher Labour Court of Liège, Belgium)

Date of the decision to refer:

17 May2019

Appellant:

LM

Respondent:

Centre public d'action sociale de Seraing

I. Facts of the case and main proceedings

1 LM, appellant in the main proceedings, born in 1956 and of Congolese nationality, is the father of a young girl, R, born in 1999 and who has now come of age. R suffers from severe sickle cell anaemia and has significant kyphosis requiring surgery in order to prevent paralysis.

2 It is common ground between the parties that R's medical condition is very serious and it is apparent from the documents before the Court in the main proceedings that the doctors consider it necessary for her father to be constantly present.

3 LM and R came to Belgium in 2012. On the basis of the health of R, a minor at the time, LM submitted, on 20 August 2012, an application for leave to reside on medical grounds, under Article 9b 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 the entry in Belgian territory, residence, establishment and removal of foreign nationals] (*Moniteur belge* of 31 December 1980, p. 14584) ('the Law of 15 December 1980'). That application was found to be admissible on 6 March 2013 by the l'Office des étrangers [Belgian Immigration Office] ('the Office).

4 As a result of that first decision, the Centre public d'action sociale de Seraing (Public Centre for Social Welfare, Seraing) ('the CPAS'), respondent in the main proceedings, granted LM financial social assistance at the rate assigned to heads of household.

5 Three decisions rejecting the application under Article 9b were subsequently adopted by the Office against R and LM, but were systematically withdrawn following the action brought before the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium) ('the CCE').

6 On 25 February 2016, the interested party was notified of a fourth decision rejecting the application, together with an order to leave Belgian territory within 30 days. An action for the suspension and annulment of that decision was brought before the CCE and is still pending.

7 In so far as that action does not have automatic suspensive effect, LM and R have been staying illegally on Belgian territory since 26 March 2016.

8 The CPAS de Seraing withdrew financial assistance from that date. On 22 March 2016, the CPAS granted emergency medical assistance to R, including hospital expenses.

9 Following interlocutory proceedings before the tribunal du travail de Liège (Labour Court, Liège), financial assistance at the household rate was reinstated.

10 That assistance was again withdrawn by two decisions notified to LM on 22 May 2017, on the ground that R had come of age on 11 April 2017. By those decisions, the CPAS, on the one hand, withdrew the financial assistance at the household rate granted to LM with effect from 11 April 2017 — the date on which he no longer had a dependent minor child — and, on the other, refused his entitlement to any social assistance other than emergency medical assistance because he was considered to be staying illegally.

11 With regard to R, given her medical condition, since coming of age she has received social assistance at the rate assigned to single persons, plus family benefits to which she is entitled on account of her disability.

12 By judgment of 16 April 2018, pursuant to the judgment of the Court of Justice of the European Union of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453) ('the *Abdida* judgment'), the tribunal du travail de Liège acknowledged the suspensive effect of the action brought before the CCE against the decision rejecting the application made under Article 9b. As a result, the tribunal du travail de Liège ordered the CPAS to pay LM financial social assistance at the household rate between 26 March 2016, the date on which the application was submitted, and 10 April 2017, the day before his daughter came of age.

13 With regard to the period beginning 11 April 2017, the tribunal de travail, finding that, from that date, LM was no longer the parent of a minor able to claim the impossibility of return on medical grounds, held that the decisions refusing to grant him social assistance were well founded as of that date.

14 LM brought an appeal against that judgment, in so far as it confirmed the legality of the decisions of the CPAS relating to the withdrawal of and refusal to grant him social assistance from 11 April 2017.

II. Legal context

1. Belgian law

15 Under Article 9b of the Law of 15 December 1980, a foreign national residing in Belgium who suffers from an illness occasioning a real risk to his life or physical integrity or a real risk of inhuman or degrading treatment where there is no appropriate treatment in his country of origin or in the country in which he resides may apply to the Minister or his representative for leave to reside in the Kingdom of Belgium. This is a derogation from the general rule provided for in Article 9 according to which the application for leave to reside for more than three months must be submitted to the Belgian diplomatic or consular post competent for the place of residence or place of stay of the person concerned.

16 Pursuant to Article 57(2) of the loi du 8 juillet 1976 organique des centres publics d'action sociale [Basic Law of 8 July 1976 on public social welfare centres (CPAS)] (*Moniteur belge* of 5 August 1976, p. 9876) ('the Law of 8 July 1976'), the consequence of an illegal stay is the refusal of all social assistance, except the provision of emergency medical assistance.

17 The Cour constitutionnelle belge (Constitutional Court, Belgium) created a judicial exception to that rule, in favour of an illegally staying foreign national demonstrating that it is absolutely impossible on medical grounds for him or her to comply with an order to leave the national territory.

18 By judgment 80/99 of 30 June 1999, the Cour d'arbitrage (Court of Arbitration) — now the Cour constitutionnelle — held that Article 57(2) cited above infringes Article 10 and 11 of the Constitution in cases where the restriction of social

assistance to emergency medical assistance only 'applies to persons for whom, on medical grounds, it is absolutely impossible to comply with an order to leave Belgian territory' because 'it applies equal treatment, without reasonable justification, towards persons in fundamentally different situations: those who may be removed and those who may not be removed on medical grounds. Article 57(2) is, to that extent, discriminatory'.

19 Judgment 194/2005 of 21 December 2005 of the Cour d'arbitrage extended the scope of that judicial exception to cover illegally staying parents of a seriously ill minor child. It held in that judgment that Article 57(2) of the Law of 8 July 1976 infringed the constitutional principles of equality and non-discrimination in that it 'applies, without reasonable justification, towards persons in fundamentally different situations: those who may be removed and those who may not because they are parents — and can provide justification thereof — of a minor child for whom, on medical grounds, it is absolutely impossible to comply with an order to leave Belgian territory because of a serious disability in respect of which he or she cannot receive adequate care in the country of origin or in another State obliged to take him or her back and whose right to respect for family life must be preserved by guaranteeing the presence of his or her parents at his or her side'. The constitutional court reached that conclusion on the basis of, inter alia, Article 8 ECHR.

20 The courts having jurisdiction as to the substance of the matter have subsequently established, in abundant case-law, the three criteria which must all be satisfied by the illegally staying foreign national — or his or her minor child — who claims it is absolutely impossible to return to his or her country of origin on medical grounds such as the severity of the disease, the lack of adequate treatment in the country of origin and the lack of effective access to care in the country of origin.

2. International law and EU law

21 Article 8 ECHR provides:

'Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

22 The Court held in the *Abdida* judgment:

'Articles 5 and 13 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, taken in conjunction with Articles 19(2) and 47 of the Charter of Fundamental Rights of the European Union and Article 14(1)(b) of that directive, are to be interpreted as precluding national legislation which:

– does not endow with suspensive effect an appeal against a decision ordering a third country national suffering from a serious illness to leave the territory of a Member State, where the enforcement of that decision may expose that third country national to a serious risk of grave and irreversible deterioration in his state of health, and

– does not make provision, in so far as possible, for the basic needs of such a third country national to be met, in order to ensure that that person may in fact avail himself of emergency health care and essential treatment of illness during the period in which that Member State is required to postpone removal of the third country national following the lodging of the appeal'.

23 The appellant also relies on Article 19(2), Article 47 and Articles 7 and [21] of the Charter of Fundamental Rights of the European Union ('the Charter') and Articles 5, 13 and 14(1)(b) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 238, p. 98).

III. The dispute in the main proceedings and the positions of the parties

24 The appellant recognises that the tribunal de travail correctly applied the *Abdida* judgment in order to grant financial social assistance to his daughter, having regard to the suspensive effect of the action that he brought, whilst she was still a minor, before the CCE, on the basis of the arguable complaint set out therein relating to her state of health.

25 He considers that, on account of the serious medical conditions suffered by his daughter, it is absolutely impossible on medical grounds for him or her to return, in so far as the medical profession confirms that, in view of the seriousness of R's disability, the presence of her father at her side is imperative, thus preventing him from complying with the order to leave the national territory.

26 He claims that the execution of that order to leave the national territory would adversely affect the right to respect for private and family life enshrined in Article 8 ECHR.

27 In view of the force majeure circumstances preventing him materially and non-materially from leaving the national territory, the appellant takes the view that it is necessary to preclude application of Article 57(2) of the Law of 8 July 1976. In

addition, he observes that the fact that the family unit that he forms with his daughter is in need is not contested by the CPAS which, for that reason, granted her application for financial assistance at the rate assigned to single persons. The expenses for which the father and daughter were liable remained the same (rent, energy, pharmaceutical and medical costs, etc.) whereas their resources fell by 25% in relation to the time when LM received financial assistance at the household rate.

28 Consequently, LM requests that the cour de travail de Liège orders the CPAS to grant him, with effect from 11 April 2017, financial assistance at the household rate or, in the alternative, at the rate assigned to cohabitees.

29 The CPAS disputes, first of all, the suspensive effect of the action brought by LM before the CCE.

30 Next, it considers that the refusal to grant social assistance to the interested party does not constitute a breach of his right to respect for private and family life since, on the one hand, the father and daughter are both staying illegally and, on the other, by granting the daughter the assistance she needs on medical grounds, the decision to withdraw social assistance from LM does not prevent him from living with his daughter who has now come of age.

31 Moreover, LM cannot claim the impossibility of return on medical grounds, in so far as he does not personally have health problems, and his daughter's illness — the seriousness of which is not disputed by the CPAS — does not constitute force majeure circumstances on which he relies in order to preclude application of Article 57(2) of the Law of 8 July 1976.

32 Lastly, the CPAS disputes the fact that they are in need since LM has failed to demonstrate that the financial assistance granted to his daughter, plus family allowances for disability, are insufficient to cover the requirements of both interested parties.

33 The CPAS therefore contends that the judgment should be upheld.

IV. Findings of the cour du travail

34 The cour de travail considers that the subject-matter of the dispute is not whether R, who has now come of age, meets the criteria of absolute impossibility to return, which has already been established. Despite staying illegally on Belgian territory, the CPAS grants her social financial assistance because of the seriousness of her illness which requires, according to the unanimous medical opinion of specialists over the years, adequate care which can only be received in Belgium, given the state of collapse of the healthcare system in the Congo.

35 The subject-matter of the dispute in the main proceedings is therefore whether, due to the presence of LM at his daughter's side, which the medical profession

considers to be imperative, it is permissible to preclude, for his benefit, application of Article 57(2) of the Law of 8 July 1976, with the result that, in so far as they have established that they are in need, he could be granted financial assistance in addition to that received by his daughter.

1. Distinction between absolute impossibility of return on medical grounds and leave to reside on medical grounds

36 The cour du travail notes the fundamental distinction to be made between absolute impossibility of return on medical grounds, on the one hand, and the criteria laid down in the *Abdida* judgment, on which the suspensive effect of an action for annulment and suspension directed against a decision refusing an application under Article 9b depends, on the other.

37 That distinction has already been set out in a judgment of the cour de travail de Bruxelles (Labour Court, Brussels) of 13 May 2015, which held that the impossibility of return on medical grounds is an autonomous concept in relation to that which is relevant for an application under Article 9b. That conclusion is supported by the following considerations:

– In finding, in judgment No 80/99, that there was a breach of Articles 10 and 11 of the Constitution, the Cour consitutionnelle (Constitutional Court) failed to refer to either Article 3 ECHR, or to the judgment of the European Court of Human Rights of 2 May 1997, *D. v. the United Kingdom* (CE:ECHR:1997:0502JUD003024096). The same is true of judgment No 194/2005.

– In the latter judgment, the Cour constitutionnelle considers that the lack of 'adequate care in the country of origin' constitutes an obstacle to return, in respect of which the ECtHR states that 'the fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3 [ECHR]' (judgment of 27 May 2008, *N. v. the United Kingdom*, CE:ECHR:2008:0527JUD002656505, §42) ('the *N. v. the United Kingdom* judgment'), case-law which the ECtHR has since altered (see below).

– Social assistance granted in the case of impossibility of return on medical grounds has the same basis as that granted to a foreign national who, for circumstances beyond his control, but not of a medical nature, is prevented from returning to his country of origin (for example when that country refuses to issue the necessary documents). It is therefore the impossibility of return, as such, which is decisive for granting social assistance and not only the medical circumstances giving rise to that impossibility.

– The particularly strict formalities which characterise the assessment of conditions of residence is not therefore relevant when examining an application for social assistance.

38 The cour de travail takes the view that it is necessary to analyse the appellant's arguments by making a very clear distinction between, on the one hand, the criteria required for the recognition of force majeure circumstances making it impossible to comply with the order to leave the national territory and, on the other, much more restrictive criteria relating to the likelihood of serious or irreversible deterioration in the health of the illegally staying foreign national, necessary for recognising the suspensive effect of an action for the suspension and annulment of a decision rejecting an application under Article 9b.

2. The opinion of the Public Prosecutor

39 In its written opinion, the Public Prosecutor highlighted the seriousness of R's illness and the degree of her dependence. It notes that R, who has lived with her father LM since arriving in Belgium, relies solely on him to provide emotional support in coping with repeated crises and hospital stays, closely monitoring medical treatment, making the right medical decisions, undergoing major surgery which will happen in the near future, and all in the context of a situation where the condition is life threatening. The question is therefore whether the need for LM to remain by his daughter's side — which is undisputed — precludes him from complying with the order to leave the national territory.

40 The Public Prosecutor thus focuses on Article 8 ECHR and the ECtHR's application of Article 8 to private and family relationships between parents and their adult children or between adult siblings. It considers that 'the particular circumstances of dependency of R — an a child who has come of age — on her father, to an extent exceeding normal ties, which is clear given the medical circumstances' has been established in the present case.

41 The Public Prosecutor makes the suggestion that the cour de travail makes a reference to the Court of Justice of the European Union for a preliminary ruling on the interpretation of provisions of Directive 2008/115, taken in conjunction with Articles 7 and [21] of the Charter guaranteeing respect for private and family life and prohibiting discrimination on grounds of age respectively.

42 The cour de travail follows the opinion of the Public Prosecutor and considers that, whatever the basis of the right invoked by the appellant — impossibility of return by reason of force majeure or suspensive effect pursuant to the *Abdida* judgment — it must be examined in the light of the right to respect for private and family life.

3. Examination in the light of the right to respect for private and family life

43 The ECtHR has enshrined the following principles in its case-law.

44 The bond between a child and his parents amounts, *ipso jure*, to 'family life' and is, on that basis, protected by Article 8 (see, inter alia, the judgments of the European Court of Human Rights of 21 December 2001, *Sen v. the Netherlands*, CE:ECHR:2001:1221JUD003146596; of 19 February 1996, *Gül v. Switzerland*, CE:ECHR:1996:0219JUD002321894; and of 28 November 1996, *Ahmut v. the Netherlands*, CE:ECHR:1996:1128JUD002170293).

45 The purpose of that provision is, in essence, to protect the individual against arbitrary action by public authorities. In addition, it may create positive obligations on the part of States Parties to ensure effective respect for family life. Interference with the exercise of that right is subject to a review of proportionality, which balances compliance with national immigration policy against the seriousness of the infringement of the right of the persons concerned to respect for their private family life. The court must assess in the specific case whether, in exercising its discretion, the State has complied with Article 8 by taking into account a fair balance between the competing interests of the individual and society as a whole.

46 The family relationship must be genuine. The ECtHR examines, in those circumstances, the quality and intensity of that relationship. The cour de travails observes, in the present case, that the close family relationship between LM and his daughter R is not disputed and therefore that the first criterion has prima facie been met.

47 The question of maintaining protection of family life between a parent and their child who has come of age is more sensitive. The ECtHR has long recognised that the right to family life is not limited to relationships between parents and children and has extended that concept beyond the nuclear family to include the ties between near relatives, for instance those between grandparents and grandchildren, provided that the ties in question are real, effective and deep (see, in particular, judgments of the European Court of Human Rights of 13 June 1979, *Marckx v. Belgium*, CE:ECHR:1979:0613JUD000683374, and of 9 June 1998, *Bronda v. Italy*, CE:ECHR:1998:0609JUD002243093).

48 The ECtHR has published a 'Guide on Article 8 of the European Convention on Human Rights' (https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf) ('the Guide'). Pursuant to paragraph [329] of the Guide '[i]n immigration cases, there will be no "family life" between parents and adult children unless they can demonstrate additional elements of dependence other than normal emotional ties'; it is stated in paragraph [313] that '[i]n more recent jurisprudence, the [ECtHR] has stated that family ties between adults and their parents or siblings attract lesser protection unless there is evidence of further elements of dependency, involving more than the normal emotional ties'. *

* These references concern the version of the Guide updated on 31 June 2018. In the version updated on 31 December 2018, they relate to paragraphs 311 and 297 respectively.

49 The ECtHR has also accepted in a number of cases concerning young adults who have not yet founded a family of their own that their relationship with their parents and other close family members also constitute family life. Most of those cases concern the expulsion of a foreign national who has committed a criminal offence, but the principles adopted by the ECtHR in that regard are all the more interesting in that they should be applied a fortiori to cases concerning sick foreign nationals who, like in the present case, have never committed a crime. Accordingly, in paragraph 62 of the judgment of 23 June 2008, *Maslov v. Austria* (CE:ECHR:2008:0623JUD000163803), the ECtHR noted that: 'The applicant was a minor when the exclusion order was imposed. He had reached the age of majority, namely 18 years, when the exclusion order became final in November 2002 following the Constitutional Court's decision, but he was still living with his parents. In any case, the Court has accepted in a number of cases concerning young adults who had not yet founded a family of their own that their relationship with their parents and other close family members also constituted "family life"'.

50 The ECtHR has even recognised the existence of a family tie justifying protection under Article 8 ECHR in situations where, either that tie exists only in embryo, or its exercise has been significantly disturbed by the specific living circumstances of the family unit in question, noting that 'where the existence of a family tie has been established, the State must in principle act in a manner calculated to enable that tie to be developed and take measures that will enable parent and child to be reunited' (judgment of 26 February 2002, *Kutzner v. Germany*, CE:ECHR:2002:0226JUD004654499). By contrast, that positive obligation should apply all the more so in the presence of long-established family ties.

51 Paragraph [332]* of the Guide refers to the judgment of 13 December 2016, *Paposhvili v. Belgium*, CE:ECHR:2016:1213JUD 004173810 ('the *Paposhvili* judgment'), in which the ECtHR altered its decision in *N. v. the United Kingdom*. In paragraph 183 of the *Paposhvili* judgment, the ECtHR considers that the 'other very exceptional cases' within the meaning of the judgment in *N. v. the United Kingdom* which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The ECtHR points out that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness.

* In the version of the Guide updated on 31 December 2018, this relates to paragraph 314.

52 The cour du travail de Liège notes that the foreseeable consequences of withdrawing R's treatment corresponds, in all respects, to the threshold of seriousness laid down in the *Paposhvili* judgment.

53 Furthermore, the physical presence of LM alongside his daughter who has come of age is as imperative as when she was a minor, given that she is particularly vulnerable as a result of the seriousness of her illness.

54 Although the CPAS rightly claims in that regard that the refusal to grant social assistance to LM is not in itself a breach of his right to private and family life, in so far as that breach does not result directly from the lack of social assistance, but rather the order to leave the national territory addressed to the interested party if the Office were to enforce it, on the contrary, the position of the CPAS cannot be followed where it writes that 'the decision at issue does not de facto prevent the appellant in the main proceedings from continuing to live with his daughter and helping her on a daily basis'.

55 The question of the financial means necessary to enable the interested party to maintain his support and physical presence alongside his daughter who has now come of age cannot be overlooked. LM, who is still of working age, is excluded from the labour market by reason of the irregularity of his stay and is, consequently, deprived of his own resources.

V. Decisions of the cour du travail de Liège

56 The complexity of the question from a legal standpoint, given the fact that the daughter of the party concerned has now come of age, supports the cour de travail de Liège making a reference to the Court of Justice of the European Union for a preliminary ruling. Furthermore, the cour de travail de Liège makes a reference for a preliminary ruling to the Cour constitutionnelle concerning the alleged infringement of the provisions of the Constitution relating to equality before the law, non-discrimination, respect for private and family life and the right to lead a life in keeping with human dignity. Lastly, the cour de travail de Liège re-opens the oral proceedings so as to give the parties an opportunity to comment on whether the interested parties are in need.

VI. Referral to the Court of Justice of the European Union

57 The cour du travail de Liège (Belgium) asks the Court to give a preliminary ruling on the following question:

'Does the point 1 of the first subparagraph of Article 57(2) of the Organic Law of 8 July 1976 on public social welfare centres infringe Articles 5 and 13 of Directive 2008/115/EC, read in the light of Articles 19(2) and 47 of the Charter of Fundamental Rights of the European Union, and Article 14(1)(b) of that directive and Articles 7 and [21] of the Charter of Fundamental Rights of the European

Union as interpreted by the Court of Justice of the European Union in the *Abdida* judgment of 18 December 2014 (Case C-562/13):

– first, in so far as it results in depriving a third-country national, staying illegally on the territory of a Member State, of provision, in so far as possible, for his basic needs pending resolution of the action for suspension and annulment that he has brought in his own name as the representative of his child, who was at that time a minor, against a decision ordering them to leave the territory of a Member State;

– where, second, on the one hand, that child who has now come of age suffers from a serious illness and the enforcement of that decision may expose that child to a serious risk of grave and irreversible deterioration in her state of health and, on the other, the presence of that parent alongside his daughter who has now come of age is considered to be imperative by the medical professional given that she is particularly vulnerable as a result of her state of health (recurrent sickle cell crises and the need for surgery in order to prevent paralysis)?'