Case C-503/19

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:

2 July 2019

Referring court:

Juzgado de lo Contencioso-Administrativo No 17 de Barcelona (Administrative Court No 17, Barcelona, Spain)

Date of the decision to refer:

7 June 2019

Appellant:

UQ

Respondent:

Subdelegación del Gobierno en Barcelona (Government Office, Barcelona)

Subject matter of the main proceedings

The main proceedings concern the rejection of an application by a third-country national for long-term resident status due to the existence of a criminal record.

Purpose and legal basis of the request for a preliminary ruling

The request for a preliminary ruling is based on Article 267 TFEU.

In essence, the purpose of the request for a preliminary ruling is to determine whether the interpretation by the Tribunal Supremo (Supreme Court) of national legislation on the granting of long-term resident status, under which the existence of a criminal record is sufficient grounds for refusing that status without any requirement to take other factors into account, is compatible with Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents and, in particular, with Article 6(1) and Article 17.

The referring court also asks whether that directive precludes a provision of national law that allows such status to be refused on public policy or public security grounds without establishing any assessment criteria, when the grounds for refusal in question are not laid down clearly and transparently in the national legislation.

Questions referred

‘1. Whether an interpretation by the national courts under which the existence of any form of criminal record is sufficient grounds for refusing long-term resident status is compliant with Article 6(1) and Article 17 of Directive 2003/109.

2. Whether, in addition to the existence of a criminal record, the national courts should take account of other factors, such as the severity and length of the sentence, the danger the applicant represents to society, the duration of the applicant’s prior legal residence and the links he has formed with the country, and make an assessment that takes all these elements into account.

3. Whether Article 6(1) of the directive should be interpreted as precluding a rule of national law that allows long-term resident status under Article 4 to be refused on public policy or public security grounds without establishing the assessment criteria included in Article 6(1) and Article 17.

4. Whether Article 6(1) and Article 17 of Directive 2003/109 should be interpreted as meaning that, under the case-law established by the Court of Justice that directives have vertical direct effect, the national court has authority to apply the content of Article 6(1) and Article 17 directly, and may do so in order to assess a criminal record, having regard to the gravity of the offence, the length of the sentence, and the danger represented by the applicant.

5. Whether EU law, in particular the right to obtain long-term resident status, and the principles of clarity, transparency and intelligibility, should be interpreted as precluding an interpretation by the Spanish courts of Articles 147 to 149 of Royal Decree 557/2011 and Article 32 of Organic Law 4/2000 under which long-term resident status may be refused on public policy and public security grounds, even though those provisions do not set out clearly and transparently that these shall be grounds for refusal.

6. Whether a provision of national law and its interpretation by the courts that hinder access to long-term resident status and encourage temporary residence are compliant with the principle that Directive 2003/19 must have practical effect, and with Article 6(1) in particular.’

Provisions of EU law cited

Provisions of EU law

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents ('Directive 2003/109'): recitals 4, 6, 8, 10, 16 and 21, Articles 4(1), 6(1) and 7(3) and Article 17.

EU case-law

Judgment of 26 April 2012, *Commission* v *Netherlands*, C-508/10, EU:C:2012:243: paragraphs 65 and 75.

Judgment of 18 October 2012, *Staatssecretaris van Justitie* v *Mangat Singh*, C-502/10, EU:C:2012:636: paragraphs 44 and 45.

Judgment of 28 April 2011, *El Dridi*, C-61/11, ECR p. 13015: paragraph 55.

Provisions of national law cited

Provisions of national law

Ley Orgánica 4/2000 de 11 de enero sobre derechos y libertades de los extranjeros en España y su integración social (Organic Law 4/2000 of 11 January 2000 on the rights and freedoms of foreign nationals in Spain and their social integration; 'OL 4/2000'): Article 32(1) and (2).

Royal Decree 557/2011 of 20 April 2011 approving the Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social (Regulations made under Organic Law 4/2000 on the rights and freedoms of foreign nationals in Spain and their social integration) as amended by Organic Law 2/2009 ('RD 557/2011'): Article 149(2)(f).

National case-law

Judgment of the Supreme Court of 5 July 2018 (1150/2018), which held that the mere existence of a criminal record automatically leads to refusal of long-term resident status.

Judgment of the Tribunal Constitucional (Constitutional Court) 201/2016 of 28 November 2016, which analyses the relative weight given to various circumstances in cases involving expulsion for having committed an offence.

Judgments of the Constitutional Court 33/1982, 6/1983, 19/1985, 59/1990 and 46/2001, in which the Constitutional Court applies a restricted view of the notion of public policy.

Judgment of the Tribunal Superior de Justicia del País Vasco (High Court of Justice, Basque Country) of 25 February 2010, which held that the existence of a criminal record cannot be deemed grounds for refusing authorisation for permanent residence if there are no other circumstances concerning the applicant that have public policy or public security implications.

Brief summary of the facts and the main proceedings

1 In a judgment dated 10 November 2014, UQ was found guilty of driving under the influence of alcohol on 2 November 2014.

2 He was sentenced to 40 days' community service, which was completed on 18 April 2018, and banned from driving motor vehicles and motor cycles for 8 months and 2 days, with the latter penalty having been served and completed on 10 November 2015. His criminal conviction remains unspent.

3 On 2 February 2018 UQ applied to the Oficina de Extranjeros de Barcelona (Immigration Office, Barcelona) for long-term resident status. The Immigration Office comes under the auspices of the Subdelegación del Gobierno (Spanish Government Office) Barcelona.

4 When he submitted his application, UQ had already been legally resident for at least 5 years under a temporary residence permit. During that time he worked legally and complied with his Social Security obligations and the requirements of other government bodies. The referring court believes it is highly likely that his period of residence is longer, because in this type of case there has usually been a previous period of illegal residence which varies in duration.

5 In a decision dated 27 March 2018, the authorities rejected the application due to the existence of a criminal record.

6 UQ submitted an application for review of the decision; the review dismissed his appeal on 6 July 2018.

7 He brought an action in administrative proceedings against that dismissal, which gives rise to this reference for a preliminary ruling.

Main arguments of the parties to the main proceedings

8 Lawyers acting for the authorities oppose UQ's appeal and request that it be dismissed.

9 Before giving judgment, the court issued an order in which it raised the possibility of referring the matter to the Court of Justice of the European Union for a preliminary ruling. The appellant agreed that a reference would be appropriate. Counsel for the Spanish Government opposed a reference, arguing that the matter was an 'acte clair'.

Brief summary of the basis for the request for a preliminary ruling

REGULATION UNDER SPANISH LAW

10 The Spanish immigration system comprises a tiered set of residence situations which usually starts with the grant of a temporary residence permit for a maximum period of 5 years, after which long-term resident status may be obtained, which must be renewed every 5 years.

11 Article 32 of OL 4/2000 establishes that persons who have been temporarily resident in Spain for a continuous period of 5 years and who satisfy the conditions laid down in regulations are to be entitled to long-term resident status. Article 149(2)(f) of RD 557/2011 stipulates that applications for long-term resident status must be accompanied by a criminal records certificate, which must not contain any convictions for offences under Spanish law.

DISCREPANCY IN THE CASE-LAW AND THE SUPREME COURT JUDGMENT OF 5 JULY 2018 (1150/2018)

12 The legislation described above has given rise to contradictory interpretations by the Spanish courts. In essence, four different positions have been adopted: under a mechanistic approach, authorisation is automatically refused where the applicant has a criminal record; under an evaluative approach, the applicant's circumstances are examined on a case-by-case basis, with an assessment being made of the relevant facts and the individual's convictions in order to determine whether, at the time of the authorisation, these constitute a genuine, current threat that is sufficiently serious and affects a fundamental interest of society; others have held that there is no need to examine an applicant's criminal record, on the grounds that it is not a requirement for authorisation; lastly, others have looked directly to the provisions of Directive 2003/109/EC in order to decide disputes in this area and have ignored the national legislation.

13 The Supreme Court gave a ruling on this question in judgment 1150/2018 of 5 July 2018, ruling that the mere existence of a criminal record meant that an application for long-term resident status should automatically be rejected.

14 The Supreme Court held that the fact that Article 149(2)(f) of RD 557/2011 requires the submission of a criminal records certificate which records any convictions for offences under Spanish law means that it is a requirement that the individual should not have a criminal record. It held that it was illogical for the absence of a criminal record to be a condition for temporary resident status while there was no such requirement in order to be granted a more advantageous status. It also held that this interpretation was not contrary to Directive 2003/109, concluding that third-country nationals who wished to obtain and retain long-term resident status should not constitute a threat to public policy or public security, and that the existence of a criminal record could constitute such a threat. The Supreme Court noted, basing its opinion on the case-law of the Constitutional

Court and the wording of the provisions on the expulsion of long-term residents, that while in the case of expulsion there is a requirement to evaluate a series of circumstances, there is no express requirement for such an evaluation in the case of an application for long-term resident status, and it held that it was proportionate to impose more stringent conditions and requirements on individuals seeking to obtain long-term resident status than when expelling a foreign national who already had that status.

COMMENTS BY THE REFERRING COURT

15 The referring court considers that there is clearly friction between Directive 2003/109 and the Spanish legislation, which has been highlighted in the Supreme Court's interpretation of the Spanish legislation in the aforementioned judgment 1150/2018.

16 In its view, Directive 2003/109 seeks to establish a system of enhanced protection for third-country nationals who can demonstrate close links as the result of a continuous 5-year period of residence. Article 6 of the directive sets out the circumstances in which long-term resident status may be refused on grounds of two undefined legal concepts, namely public policy and public security, having regard to the severity or nature of the offence that is contrary to those legal concepts. In the view of the referring court, the directive does not allow Member States any leeway to depart from those criteria when implementing it.

17 The first issue raised by the Spanish legislation and the interpretation placed on it by the Supreme Court is whether the concepts of public policy and public security that have been enshrined over time in the case-law of the Spanish courts are sufficiently constrained to enable the assessment required by Article 6 of the directive to be performed.

18 The Supreme Court has repeatedly held that it is not enough simply to cite public policy grounds because, given that this legal concept is undefined, proof of the specific public policy issues involved must be provided. The Constitutional Court too has always adopted a restricted interpretation of the concept of public policy. The referring court is therefore surprised that the Supreme Court considers that the same concept can be treated as being so broad that it prevents authorisation from being granted where the applicant is guilty of any conduct classified as an offence under the Criminal Code.

19 In the view of the referring court, Directive 2003/109 quite clearly establishes that the main criterion for obtaining long-term resident status is temporal, that is, the duration of residence in the State in question; and it also establishes that such status can be refused on public policy or public security grounds — taking into account the severity or nature of the offence that is contrary to public policy or public security and the danger posed to these concepts by the individual concerned; moreover, it is clear from the preamble that the concept of 'public policy' can cover a conviction for a serious offence. All of these considerations

lead to the conclusion that the directive is asking us to carry out an assessment of the applicant's circumstances on a case-by-case basis and to use that assessment as the basis for arriving at a concrete conclusion as to whether or not the applicant constitutes a threat to society. That case-by-case assessment must take account of various elements, namely the severity or type of offence committed, the danger that it represents, the duration of residence and the applicant's links with the country.

20 However, if one applies the automatic criterion advocated by the Supreme Court, long-term resident status must be refused where the applicant has a criminal record; where there is no criminal record, the other factors must be examined.

21 It must be borne in mind that the Spanish Criminal Code categorises offences and sentences according to their severity, classifying them as serious, less serious and minor. Since the reforms introduced by Organic Law 1/2015 of 30 March 2015, which amended Organic Law 10/1995 of 23 November 1995 on the Criminal Code, very minor offences have been classified as crimes that must be recorded in the Registro Central de Penados y Rebeldes (Central Register of Offenders and Defaulters). This means that the offender is recorded as having a criminal record for at least 6 months following completion of the sentence.

22 The referring court considers it odd that, under the administrative procedure, the criminal classification is not taken into account, and that the same treatment is accorded to situations that are essentially different, not only in terms of the classification of offences described above, but also because the personal circumstances and length of residence in our country of the foreign nationals concerned may be completely different and may therefore merit different assessments.

23 While it is true that the concept of 'public policy and security' is not a closed concept and that each State is therefore free to adopt a more or less extensive approach, as it sees fit, the Supreme Court's interpretation of the provisions in Article 149(2)(f) of RD 557/2011, described above, may not be consistent with Article 6(1) and Article 17 of Directive 2003/109, since it does not allow for an assessment of the severity of the offence and of whether the individual in question represents a threat to public policy or public security. In the view of the referring court, an approach that automatically assumes that a single previous conviction inevitably implies the existence of such a threat to public policy or public security is overly formalist and too sweeping.

24 A second issue raised by the Spanish legislation and the way in which it has been interpreted by the Spanish courts is as follows: under Article 13 of Directive 2003/109 Member States may introduce more favourable terms, provided that these do not confer a right of residence in other Member States. But does the directive allow Member States to introduce less favourable conditions, which exist alongside long-term resident status and do not offer the benefits of that status, by

imposing more stringent conditions on applicants for long-term resident status than on applicants for temporary resident status?

25 One of the basic tenets of Supreme Court judgment 1150/2018 was that, for the Supreme Court, more stringent conditions and requirements must be imposed on applications for long-term resident status than on the expulsion of a foreign national who has already acquired long-term resident status.

26 It should be noted that an individual who has temporary authorisation to reside in Spain may renew his temporary residence permit and obtain a new temporary residence authorisation even if he has a criminal record. Under Article 31 of OL 4/2000, the mere existence of a criminal record is not grounds for refusing to renew a temporary residence permit: instead, where someone has a criminal record, the circumstances must be assessed.

27 The effect of the above and of the Supreme Court's interpretation is that a temporary resident who can demonstrate 5 years' continuous residence in Spain and who has some form of criminal record has more chance of obtaining a new temporary residence permit for a further 2 years than of obtaining long-term resident status.

28 From this perspective, the Spanish legislation on applications for long-term resident status, as interpreted by the Supreme Court, poses a genuine obstacle to the exercise of the rights conferred by Directive 2003/109 which may jeopardise the objectives pursued by that directive, thus depriving it of effect, creating pools of non-EU nationals with temporary status and hindering their effective integration, thus making them more likely to become detached from European principles and values and depriving them of the equal rights established by Directive 2003/109.

29 The Supreme Court's interpretation of the Spanish legislation has thus turned long-term resident status into a sort of prize that requires applicants to demonstrate higher standards of good character. It ignores recitals 4 and 6 of Directive 2003/109, which position the directive more as a mechanism for safeguarding and protecting those who have put down roots in the country than as a threshold comprising separate special requirements.

30 The third issue raised concerns the incorrect implementation of Directive 2003/109 in Spanish law, since none of the provisions on obtaining long-term resident status (Article 32 of OL 4/2000 and the implementing regulations in RD 557/2011) set out clearly, transparently and intelligibly the provisions that should apply to applicants for long-term resident status who have criminal records.

31 Article 6(1) of Directive 2003/109 gives Member States the option of rejecting an application for long-term resident status on public policy grounds. The Kingdom of Spain did not exercise that option and did not make provision in its legislation for refusal on grounds of a criminal record. However, the various judgments that have developed this area have sought to identify in Article 149(2)(f) of RD

557/2011 a veiled reference to public policy and public security considerations as grounds for refusing long-term resident status.

32 If the option to refuse long-term resident status on these grounds was not implemented, a Member State that has failed to implement the legislation or implemented it incorrectly cannot give direct effect to the option to the detriment of the individual, particularly in view of the fact that it was an optional power. Nor can that Member State invoke the principle of consistent interpretation without risking an interpretation *contra legem*, because Article 6(1) of the directive does not require an application to be rejected on public policy grounds: it simply allows for that possibility. Under the principles of sincere cooperation and legal certainty, both the EU legislation and the legislation implementing a directive must be clear, understandable and transparent.

33 Under no circumstances can Article 149(2)(f) of RD 557/2011 be interpreted as meaning that the requirement not to have been convicted of any offences under Spanish law applies to applicants who have been resident in Spain for 5 years. The reasons for this are as follows. Firstly, this particular paragraph does not impose any such requirement: rather, it begins with the phrase 'where applicable', and is therefore setting out a catch-all provision that applies in other cases; in other words, it refers to applicants who have not been living in Spain for the last 5 years. Secondly, those who apply under Article 148(1) of RD 557/2011 — who have lived in Spain for the last 5 years — are not required to provide such a certificate because, given that they have been living in Spain for the last 5 years, it is assumed that the body responsible for examining the application will have access to the records of the applicant's criminal offences and will be able to obtain a certificate, include it in the case file and then assess it. And, thirdly, the Member State may impose more burdensome requirements on applicants who have not completed a 5-year residence period in Spain; but this does not mean it can be assumed, in the way the directive has been implemented, that the requirement not to have a criminal record in Spain can also be imposed on applicants who have been living in Spain for 5 years.