Case C-710/19

Request for a preliminary ruling

Date lodged:

25 September 2019

Referring court:

Conseil d'État (Belgium)

Date of the decision to refer:

12 September 2019

Applicant:

G.M.A.

Defendant:

Belgian State (Ministre de l'Asile et de la Migration [(Minister for Asylum and Migration])

CONSEIL D'ÉTAT (COUNCIL OF STATE, BELGIUM), ADMINISTRATIVE LITIGATION SECTION

[…]

JUDGMENT

[…]

I. Subject matter of the application

By an application lodged on 1 August 2018, G.M.A. seeks an order in cassation setting aside a judgment of the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium), No. 206.186 of 28 June 2018 […].

II. Procedure before the Conseil d'État (Council of State)

[…] **[Or. 2]** […]

III. Facts relevant to the examination of the matter

It is apparent from the findings made in the judgment under appeal that:

> ‘[On] 27 October 2015, the appellant applied for a certificate of registration as a jobseeker. The application was supplemented on 12 November 2015. On 18 March 2016, the Belgian State took a decision refusing permission to stay for more than three months, which was combined with an order to leave the territory. The reasons given in that decision (‘the contested act’) were as follows:
>
> > “[The application] is refused on the ground that:
> >
> > [The appellant] does not meet the necessary conditions to benefit from the right to stay for more than three months as an EU citizen: The person concerned has applied for a certificate of registration as a jobseeker. In support of his application, he has produced a certificate showing that he has enrolled with Actiris [the regional jobcentre] with a view to finding employment, together with his curriculum vitae and some application letters, but those documents do not show that he has a real chance of obtaining employment, having regard to his personal situation. Although he has enrolled with Actiris in the hope of improving his chances of finding employment, none of the responses to his application letters give reason to believe **[Or. 3]** that he has a real chance of doing so. […]”.’

An action was brought before the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium), which, by the judgment under appeal, refused the application to suspend and annul the decision of 18 March 2016.

Following a fresh application of 25 April 2016, a certificate of registration was issued to the appellant on 6 May 2016.

IV. Admissibility of the action

[…] the appellant argued […] that he continued to have an interest in having the decision annulled, submitting that he would then be regarded as having been lawfully resident since 27 October 2015 (the date on which the first application was made), which would affect the acquisition of the right of permanent residence which arises after an uninterrupted period of residence of five years”, […] ***[Or. 4]*** *[…].*

Decision of the Conseil d’État (Council of State)

[…]

The action is therefore admissible.

V. Single ground of appeal

Submissions of the parties

The appellant raises a single ground of appeal, alleging infringement of Article 149 of the Constitution, Article 40(4), first paragraph, point 1, and Article 39/65 of the loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement des étrangers et l'éloignement des étrangers (Law of 15 December 1980 on access to the territory, residence, establishment of aliens and expulsion of aliens), Article 50(2), point 3, of the arrêté royal du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Royal Decree of 8 October 1981 on access to the territory, residence, establishment and expulsion of aliens), Article 45 [TFEU], Articles 41 and 47 of the Charter of Fundamental Rights of the European Union, Articles 15, 31 and 34 of 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, and the general principles of primacy of European Union law **[Or. 5]** and effectiveness of directives.

Under the first part of his ground of appeal, the appellant contends that the judgment under appeal was wrong in holding that Article 45 [TFEU], as interpreted in the case-law of the Court of Justice of the European Union, does not require a jobseeker to be allowed a minimum period in which to acquaint himself with job offers in the host Member State, during which he is not obliged to prove that he has a real chance of obtaining employment, when the case-law of the Court of Justice of the European Union, in particular the judgment [of 26 February 1991,] *Antonissen* [C-292/89, EU:C:1991:80] is not authority for that proposition.

According to the appellant, the judgment under appeal should have held that, in order to ensure the effectiveness of the principle of free movement referred to in Article 45 [TFEU], Member States are required (1) to allow jobseekers a reasonable period of time to acquaint themselves with potentially suitable employment opportunities and take the necessary steps to obtain employment, (2) to accept that the time allowed for seeking employment cannot in any circumstances be less than six months, and (3) to permit a jobseeker to stay within its territory for the whole of that period, without requiring him to prove that he has a real chance of obtaining employment.

The appellant submits that it is apparent from Articles 7(3), 11 and 16 of Directive 2004/38/EC of 29 April 2004, which govern analogous situations, that a period of less than six months cannot be considered sufficiently reasonable, and that if there is still doubt as to whether such an obligation is necessary to ensure the effectiveness of the principle of free movement referred to in Article 45 [TFEU], and as to the scope of that obligation, then the Court of Justice of the European

Union should be asked whether domestic law complies with Article 45 in the following terms:

> 'Is Article 45 [TFEU] to be interpreted and applied as meaning that the host Member State is required (1) to allow jobseekers a reasonable period of time to acquaint themselves with potentially suitable employment opportunities and take the necessary steps to obtain employment, (2) to accept that the time allowed for seeking employment cannot in any circumstances be less than six months, and (3) to permit a jobseeker to stay within its territory for the whole of that period, without requiring him to prove that he has a real chance of obtaining employment?'

In response, the Belgian State submits that, contrary to the appellant's intimations, the judgment under appeal did not hold that EU law **[Or. 6]** does not require a national of another Member State to be allowed a minimum period of time to find employment, but that it provides for a 'reasonable time' — which could be six months, depending on the national legislation — such that a period of six months is not 'the *de facto* minimum required by EU law'. The Belgian State maintains that that conclusion does not involve any error of law.

The Belgian State argues that the case-law of the Court of Justice which is cited by the appellant is based on the 'lack of any provision in EU law' and on the reasonableness of the time allowed under the relevant national legislation, and consequently that it has not been established that Article 45 [TFEU] must be interpreted as requiring a minimum of six months. Moreover, the Belgian State submits that the reasonableness of the time allowed to the jobseeker is necessarily a matter for a definitive finding of fact and thus cannot be challenged on appeal in cassation, which otherwise would amount to the Conseil d'État (Council of State) being requested to rule in the place of the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings), which it has no power to do. The Belgian State argues that a finding was made in the judgment under appeal that the appellant had not submitted any evidence, in relation to his application, to show that he had a real chance of obtaining employment, and that it follows by necessary implication that he has not shown how, in concrete terms, the time allowed to him in the present case, for the purposes of establishing that he meets the conditions for the right of residence, was unreasonable; the Belgian State goes on to argue that that reasoning is not challenged — indeed, cannot be challenged — on appeal in cassation and accordingly that the first part of the ground of appeal is unfounded.

The Belgian State also deduces therefrom that the question which the appellant seeks to have referred for a preliminary ruling has no bearing on the outcome of the dispute and ought not therefore to be submitted to the Court of Justice of the European Union.

In reply, the appellant submits that the assessment of the reasonableness of the time allowed to a jobseeker under Belgian law gives rise to a question of

interpretation of EU law which has a direct bearing on the conformity of Article 40(4) of the Law of 15 December 1980 and Article 50(2), point 3, of the Royal Decree of 8 October 1981 with Article 45 [TFEU]. According to the appellant, that question of interpretation is not exclusively a matter for a definitive finding of fact, but must be open to examination on appeal in cassation, so that it can be determined whether the judgment under appeal is vitiated by an error of law, and more particularly an error of classification.

Under the second part of his ground of appeal […] **[Or. 7]** […] **[Or. 8]** […]. [the Conseil d'État (Council of State) went on to reject that part]

Under the third part of his ground of appeal, the appellant challenges the judgment under appeal in so far as it was held that the judicial review instituted by Article 39/2 of the Law of 15 December 1980 prevents regard being had to the fact that, on 6 April 2016 (after the Belgian State had taken its decision), the appellant obtained employment with the European Parliament, when that fact shows that the appellant had a real chance of obtaining employment and thus refutes the grounds of the Belgian State's decision. According to the appellant, Articles 15 and 31 of Directive 2004/38/EC, Articles 41 and 47 of the Charter of Fundamental Rights of the European Union and the general principles of primacy of EU law and effectiveness of directives require the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) to have regard to new facts and matters in the context of an action for annulment, and to disapply any contrary national provisions or rules.

The appellant argues that it is apparent from the case-law of the Court of Justice of the European Union that Articles 15 and 31 of Directive 2004/38/EC and Article 47 of the Charter of Fundamental Rights are to be understood as requiring an exhaustive examination of all the facts and circumstances, including the appropriateness of the proposed measure, and that the national courts which review the legality of decisions taken under EU rules on free movement of persons must have regard to **[Or. 9]** new facts and matters which are brought to their attention after those decisions have been made. The appellant maintains that, where a provision or rule of national law is contrary to a rule of EU law, national courts are required to disapply the contrary provision or rule of national law and that, in the judgment under appeal, regard should have been had to the fact that the appellant had obtained employment with the European Parliament on 6 April 2016, which demonstrates that he had a real chance of obtaining employment and thus refutes the grounds of the Belgian State's decision.

The appellant submits that if there is any doubt as to whether the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) is obliged to have regard to new facts and matters in an action for annulment, pursuant to Articles 15 and 31 of Directive 2004/38/EC and Articles 41 and 47 of the Charter of Fundamental Rights of the European Union, and to the general principles of primacy of EU law and effectiveness of directives, or as to the obligation, where applicable, to disapply any contrary national provisions or rules,

the following question should be referred to the Court of Justice of the European Union for a preliminary ruling:

> 'Are Articles 15 and 31 of Directive 2004/38, Articles 41 and 47 of the Charter of Fundamental Rights, and the general principles of primacy of EU law and effectiveness of directives to be interpreted and applied as meaning that the national courts of the host Member State are required, in the context of an action for annulment brought against a decision refusing to recognise a right of residence of more than three months on the part of an EU citizen, to have regard to new facts and matters arising after the decision of the national authorities, where such facts and matters are capable of altering the situation of the person concerned in such a way that it is no longer permissible to restrict his right of residence in the host Member State?'

[…] [plea of illegality dismissed by the Conseil d'État (Council of State)] […]

The Belgian State submits that the administrative court [Conseil du contentieux des étrangers (Council for asylum and immigration proceedings)] was correct in refusing to have regard to a matter of fact which, undisputedly, had not been made known to the administration in advance and that Article 39/2(2) of the Law of 15 December 1980 prevents it from conducting a full **[Or. 10]** review, limiting its jurisdiction to a review of the strict legality of the decision […].

[…]

In reply, the appellant argues […] that 'Articles 15 and 31 of Directive 2004/38, Article 47 of the Charter of Fundamental Rights, the general principles of primacy of EU law, effectiveness of directives, and respect for the rights of defence, preclude a national practice under which national courts are not ***[Or. 11]*** *supposed to have regard, when examining the legality of an expulsion order made in respect of a national of another Member State, to matters of fact arising after the decision of the competent authorities, where those matters of fact would indicate that the person concerned has a right of residence'; […] that 'the case-law cited by the Belgian State makes no reference to that contained in the judgments of the Court of Justice of 29 April 2004,* Orfanopoulos and Oliveri *(C-482/01 and C-493/01, EU:C:2004:262) and of 11 November 2004,* Cetinkaya *(C-467/02, EU:C:2004:708) which recognises an obligation to have regard, in the context of an action for annulment, to new matters of fact arising after the national authorities have taken a decision' […].****[Or. 12]***

Decision of the Conseil d'État (Council of State)

First part

The appellant maintains that, in order to ensure the effectiveness of the freedom of movement of workers enshrined in Article 45 [TFEU], the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) ought to have

decided that that provision required the Belgian State '(1) to allow jobseekers a reasonable period of time to acquaint themselves with potentially suitable employment opportunities and take the necessary steps to obtain employment, (2) to accept that the time allowed for seeking employment cannot in any circumstances be less than six months, and (3) to permit a jobseeker to stay within its territory for the whole of that period, without requiring him to prove that he has a real chance of obtaining employment'.

Contrary to the Belgian State's submission, that challenge does not require an assessment of fact to be made. What it requires is a determination of the scope of Article 45 [TFEU].

It is therefore appropriate to refer the question proposed by the appellant to the Court of Justice of the European Union for a preliminary ruling. The question is necessary for the purposes of resolving the dispute. If the Court of Justice rules that Article 45 of the Treaty on the Functioning of the European Union is to be interpreted as imposing the obligations for which the appellant contends, it will follow that the first part is well founded.

Second part

[…]

The [second] limb […] **[Or. 13**] […] is unfounded.

Third part

The judicial review instituted by Article 39/2(2) of the Law of 15 December 1980 prevents the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) from having regard to matters which postdate the adoption of the decision to which the action for annulment relates and of which the authority was not aware at the time of its decision.

The appellant submits, essentially, that Articles 15 and 31 of Directive 2004/38/EC require a review of a kind such as to enable the court to have regard to matters which have arisen after the taking of the decision refusing a right of residence of more than three months and which may serve to establish that such a right exists.

He contends that Article 39/2(2) of the Law of 15 December 1980 did not correctly transpose Articles 15 and 31 of Directive 2004/38/EC, in that it does not permit the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) to have regard to such matters.

[…]

The appellant has the necessary interest to advance that line of argument. If it is well founded, the appropriate step will not be to recognise a judicial power which

is not granted by law, as the Belgian State submits, but to disapply the prohibition that prevents judicial consideration being given to facts and matters arising after the decision refusing a right of residence of over three months has been taken which potential serve to establish such a right.

In order to determine whether the appellant is correct in his submissions as to the scope of EU Law, it is appropriate […] to make a reference to the […] [Court of Justice] as regards the interpretation of that law. **[Or. 14]**

[…]

ON THOSE GROUNDS,

THE CONSEIL D'ÉTAT (COUNCIL OF STATE, BELGIUM) DECIDES:

[…]

Pursuant to the third paragraph of Article 267 [TFEU], the following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

1. 'Is Article 45 of the Treaty on the Functioning of the European Union to be interpreted and applied as meaning that the host Member State is required (1) to allow jobseekers a reasonable period of time to acquaint themselves with potentially suitable employment opportunities and take the necessary steps to obtain employment, (2) to accept that the time allowed for seeking employment cannot in any circumstances be less than six months, and (3) to permit a jobseeker to stay within its territory for the whole of that period, without requiring him to prove that he has a real chance of obtaining employment?'

2. 'Are Articles 15 and 31 of 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, Articles 41 and 47 of the Charter of Fundamental Rights of the European Union, and the general principles of primacy of EU law and effectiveness of directives, to be interpreted and applied as meaning that the national courts of the host Member State are required, in the context of an action for annulment brought against a decision refusing to **[Or. 15]** recognise a right of residence of more than three months of an EU citizen, to have regard to new facts and matters arising after the decision of the national authorities, where such facts and matters are capable of altering the situation of the person concerned in such a way that it is no longer permissible to restrict his right of residence in the host Member State?'

[…]

[Signatures]