Case C-949/19

Request for a preliminary ruling

Date lodged:

31 December 2019

Referring court:

Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland)

Date of the decision to refer:

4 November 2019

Applicant:

M. A.

Defendant:

Konsul Rzeczypospolitej Polskiej in N.

[…]

ORDER

4 November 2019

Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) […]

[…]

having examined on 4 November 2019

[…]

the appeal in cassation brought by M. A.

against the decision of the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland)

of 12 March 2019 […] to dismiss the appeal

lodged by M. A.

against the decision of the Konsul Rzeczypospolitej Polskiej (Consul of the Republic of Poland) in N.

of […] July 2018, No […]

regarding refusal to issue a visa

makes the following order:

1. to refer the following question to the Court of Justice of the European Union for a preliminary ruling: Must Article 21(2a) of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders […] in conjunction with the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union […] be interpreted as meaning that a third-country national who has been refused a long-stay visa and who cannot exercise the right to move freely within the territories of the other Member States under Article 21(1) of the Convention implementing the Schengen Agreement must have the right to an effective remedy before a tribunal?

2. […] stay the proceedings until such time as the above question referred for a preliminary ruling has been answered. **[Or. 1]**

STATEMENT OF REASONS

1. Legal framework

The legal framework encompasses the provisions of EU and national law on the right to bring an appeal against the decision of a consul refusing to issue a national visa.

1.1. Provisions of EU law

Article 47(1) of the Charter of Fundamental Rights of the European Union (‘the Charter’):

‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.’

Article 18 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19; ‘the Convention implementing the Schengen Agreement’):

‘1. Visas for stays exceeding three months (long-stay visas) shall be national visas issued by one of the Member States in accordance with its national law or Union law. Such visas shall be issued in the uniform format for visas as set out in Council Regulation (EC) No 1683/95 with the heading specifying the type of visa with the letter “D”. They shall be filled out in accordance with the relevant provisions of Annex VII to Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code).

2. Long-stay visas shall have a period of validity of no more than one year. If a Member State allows an alien to stay for more than one year, the long-stay visa shall be replaced before the expiry of its period of validity by a residence permit.’

Article 21(1) of the Convention implementing the Schengen Agreement: **[Or. 2]**

‘Aliens who hold valid residence permits issued by one of the Member States may, on the basis of that permit and a valid travel document, move freely for up to three months in any six-month period within the territories of the other Member States, provided that they fulfil the entry conditions referred to in Article 5(1)(a), (c) and (e) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) and are not on the national list of alerts of the Member State concerned.’

Article 21(2a) of the Convention implementing the Schengen Agreement:

‘The right of free movement laid down in paragraph 1 shall also apply to aliens who hold a valid long-stay visa issued by one of the Member States as provided for in Article 18.’

1.2. Provisions of national (Polish) law

Article 75 of the ustawa z dnia 12 grudnia 2013 r. o cudzoziemcach (Law of 12 December 2013 on foreigners) (Dz.U. of 2018, item 2094, as amended; ‘the Law on Foreigners’):

‘1. A refusal to issue a national visa shall be made by way of a decision.

2. A decision on refusal to issue a national visa shall be delivered using a form.’

Article 76 of the Law on Foreigners:

‘1. A decision on refusal to issue a Schengen visa or a national visa by: 1) a consul — may be challenged by a request for a review of the case by that authority; …’

Article 5 of the ustawa z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi (Law of 30 August 2002 on proceedings before the

administrative courts) (Dz.U. of 2018, item 1302, as amended; 'the Law on Proceedings before the Administrative Courts'):

'The administrative courts shall not have jurisdiction in cases concerning: …

4) visas issued by consuls, other than visas: **[Or. 3]**

a) referred to in Article 2(2) to (5) of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) (OJ 2009 L 243, p. 1, as amended),

b) issued to a foreign national who is a member of the family of a national of a Member State of the European Union, a Member State of the European Free Trade Association (EFTA) — party to the European Economic Area Agreement, or the Swiss Confederation, within the meaning of Article 2(4) of the ustawa z dnia 14 lipca 2006 r. o wjeździe na terytorium Rzeczypospolitej Polskiej, pobycie oraz wyjeździe z tego terytorium obywateli państw członkowskich Unii Europejskiej i członków ich rodzin (Law of 14 July 2006 on the entry into, residence in and departure from the Republic of Poland of nationals of the Member States of the European Union and the members of their families) (Dz.U. of 2017, item 900, and of 2018, item 650).

…'

Article 58(1) of the Law on Proceedings before the Administrative Courts: 'The court shall dismiss an action: where the case does not come within the jurisdiction of an administrative court …'

2. Facts of the case

2.1. Procedure before the consul

On … July 2018, M. A. ('the applicant') applied to the Consul of the Republic of Poland ('the Consul') for a national visa, citing a desire to undertake two-year second-cycle studies in Poland. By his decision of … July 2018, the Consul refused to issue a national visa. After examining the applicant's request for the case to be reviewed, on … July 2018 the Consul once again refused to issue a visa on the ground that the applicant had failed to justify the purpose or conditions of his planned stay.

2.2. Proceedings before the administrative courts

2.2.1. The applicant appealed against the Consul's decision refusing to issue a national visa before the Wojewódzki Sąd Administracyjny (Regional Administrative Court) in Warsaw, Poland (the court of first instance). In justifying the admissibility of appealing against such a decision before an administrative court, the applicant referred, inter alia, to the judgment of the Court of Justice of

the European Union of 13 December 2017, *El Hassani*, C-403/16 (EU:C:2017:960). The applicant submitted that the operative part of the judgment could **[Or. 4]** also be applied to the case at issue, since there is similarity in fact and in law.

In response to the appeal, the Consul submitted that it should be dismissed on the ground that the administrative court lacked jurisdiction.

2.2.2. By its decision of 12 March 2019 […], the court of first instance dismissed the appeal.

The court of first instance found that the case did not fall within the jurisdiction of an administrative court. Citing Article 5(4) of the Law on Proceedings before the Administrative Courts, in the version in force on the date on which the contested decision was issued, the court held that the decision refusing a national visa was not covered by the exceptions set out in that provision and therefore could not be reviewed by an administrative court. So far as concerns the judgment of the Court of Justice of 13 December 2017, *El Hassani*, C-403/16, referred to in the application, the court held that that judgment concerned a Schengen visa, whereas in the present case the applicant had applied for a national visa, which is issued in accordance with national law.

2.2.3. In the appeal in cassation against the above decision, it was alleged that procedural rules that could have a significant impact on the outcome of the case, namely Article 58(1)(1) of the Law on Proceedings before the Administrative Courts, had been infringed due to the erroneous assumption that the Consul's decision refusing a national visa was not subject to judicial review and, consequently, due to the unjustified dismissal of the appeal against the Consul's decision. At the same time, the applicant indicated that the doubts raised in this regard needed to be considered by the Court of Justice of the European Union.

2.2.4. In his reply to the appeal in cassation, the Consul submitted that the appeal should be dismissed given the wording of Article 5(4) of the Law on Proceedings before the Administrative Courts, which, following an amendment taking into account the judgment of the Court of Justice in *El Hassani*, C-403/16, provides for the possibility to lodge an appeal before an administrative court against the refusal to issue a Schengen visa, and not a national visa. The Consul emphasised that the provisions of the Visa Code do not apply to national visas, the procedure for the granting of which is determined by national law. Citing the judgment of the Naczelny Sąd Administracyjny (Supreme Administrative Court) of 22 January 2014 […], the Consul indicated that the two legal orders should not be confused. The decision to refuse a visa referred to in Article 32(3) of the Visa Code should therefore be understood solely as a decision to refuse a visa within the meaning of the Visa Code. This interpretation is in line with the case-law of the Court of Justice. In its judgment of 7 March 2017, *X and X*, C-638/16 **[Or. 5]** PPU (EU:C:2017:173, paragraphs 40 to 47), the Court ruled that since no measure had been adopted, to date, by the EU legislature on the basis of Article 79(2)(a) of the

Treaty on the Functioning of the European Union ('TFEU'), with regard to the conditions governing the issue by Member States of long-term visas and residence permits to third-country nationals on humanitarian grounds, the applications at issue in the main proceedings fell solely within the scope of national law. The situation at issue in the main proceedings was not, therefore, governed by EU law.

3. Grounds for the reference

3.1. Admissibility of the question referred

The Naczelny Sąd Administracyjny (Supreme Administrative Court) is a national court whose rulings are not subject to appeal under Polish law for the purpose of the third sentence of Article 267 TFEU. Referral of the question is justified by doubts concerning the correct interpretation of the provisions of EU law which must be dispelled in order to properly resolve the dispute pending before the national court.

3.2. Grounds for the reference

3.2.1. Pursuant to Article 3(2)(4) of the ustawa z 14 czerwca 1960 r. Kodeks postępowania administracyjnego (Law of 14 June 1960 — Code of Administrative Procedure) (Dz. U. of 2018, item 2096, as amended; 'the Code of Administrative Procedure'), the provisions of that code do not apply to proceedings in matters falling within the competence of Polish diplomatic missions and consular posts, unless specifically provided otherwise. The proceedings before the Consul with regard to the issuing of a national visa were conducted in accordance with the provisions of the ustawa z dnia 25 czerwca 2015 r. Prawo konsularne (Law of 25 June 2015 — Consular Law) (Dz. U. of 2017, item 1545, as amended; 'the Consular Law'). Article 88 of the Consular Law provides that a party may appeal against a consul's decision to a higher authority, whereas according to Article 94 of that Law, in the cases provided for in specific provisions, the party may request a review of the case by the consul, which must be submitted within 14 days of the date of service on that party of the decision. One such specific provision is Article 76(1)(1) of the Law on Foreigners, which states that a decision on refusal to issue a Schengen visa or a national visa rendered by a consul may be challenged by a request for a review of the case by that authority. After reviewing the case, the consul issues a decision which is final and cannot **[Or. 6]** be appealed to another administrative authority, and in the case of a national visa, cannot be appealed to a court.

3.2.2. In the case under consideration, judicial review was excluded on the basis of Article 5(4) of the Law on Proceedings before the Administrative Courts, according to which administrative courts lack jurisdiction over cases relating to visas issued by consuls. The Law provides for exceptions in this regard.

It follows from Article 5(4b) of the Law on Proceedings before the Administrative Courts that a foreign national who is a member of the family of a national of a

Member State of the European Union, a Member State of the European Free Trade Association (EFTA) — party to the European Economic Area Agreement, or the Swiss Confederation, within the meaning of Article 2(4) of the Law on entry into the Republic of Poland, may bring an appeal before an administrative court against a consul's decision refusing to issue a visa.

As a result of taking the judgment of the Court of Justice of 13 December 2018, *El Hassani*, into account, Article 5(4a) of the Law on Proceedings before the Administrative Courts entered into force on 4 March 2019. This grants the right to bring an action before a court also when the consul's decision concerns a visa as defined in Article 2(2) to (5) of the Visa Code, that is, a Schengen visa.

However, that amendment does not apply to the refusal at issue in the main proceedings. Under national legislation, a consul's decision refusing to issue a national (long-stay) visa to a foreign national cannot be subject to judicial review.

3.2.3. In the view of the referring court, the question of the admissibility of excluding the possibility to challenge such a refusal in proceedings before a court, as provided for in national administrative court procedure, must be assessed in the light of the guidelines arising from EU law.

However, the national court is not certain whether EU law requires the same level of protection for national (long-stay) visas as that provided for in relation to Schengen visas under the aforementioned *El Hassani* judgment.

That uncertainty arises, first and foremost, from the different regulation under EU law of the rights of foreign nationals to challenge refusal decisions as regards various types of visas. As is clear from the *El Hassani* judgment, the obligation to provide under national law for the possibility to challenge before a court a final decision **[Or. 7]** refusing to issue a visa results from the principle of effective judicial protection laid down in Article 47 of the Charter. The Court has expressly stated that the provisions of the Charter are applicable where a Member State adopts a decision refusing to issue a visa under Article 32(1) of the Visa Code.

The procedure for issuing long-stay visas, unlike Schengen visas, is not regulated by any act of EU law. As the Court has clearly indicated, since no binding measure has been adopted by the EU legislature on the basis of Article 79(2)(a) T[F]EU, national law is to apply to the processing of applications for the issue of long-term visas and residence permits to [third-country nationals] on humanitarian grounds (see the judgment in *X and X*, paragraph 44).

However, in the view of the referring court, the position expressed by the Court does not unequivocally dispel the uncertainty as to whether, in relation to national visas, it is permissible to exclude observance of the scope of judicial protection arising from Article 47 of the Charter.

3. 3. Reasons for the referring court's uncertainty

3.3.1. The referring court's uncertainty concerns the interpretation of Article 21(2a) of the Convention implementing the Schengen Agreement, in conjunction with the first paragraph of Article 47 of the Charter, as regards whether it establishes a right to an effective remedy before a tribunal in the event that a consul refuses to issue a national visa. Under Article 45(2) of the Charter, the right of free movement may be granted to a third-country national residing legally in the territory of a Member State. That right is conferred by Article 21(2a) of the Convention implementing the Schengen Agreement on persons holding a valid long-stay visa. The Convention implementing the Schengen Agreement forms part of the Schengen acquis and is a source of individual rights. The exercise of freedom of movement is conditional upon obtaining a long-stay visa. A decision refusing to issue a long-stay visa renders it impossible to exercise the right to free movement within the Schengen Area under EU law. According to the first paragraph of Article 47 of the Charter, everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. **[Or. 8]**

3.3.2. Member States are obliged, as part of the principle of effective judicial protection, to ensure the protection of individual rights derived from EU law, including effective access to court, but acting under the principle of the procedural (institutional) autonomy of Member States. The procedural autonomy of Member States is understood as the competence of a Member State to regulate the jurisdiction of the courts and (judicial) procedures for examining claims based on EU law, subject to observance of the principles of equivalence and effectiveness (see judgments of the Court of 16 December 1976, *Rewe*, 33/76, EU:C:1976:188; and *Comet*, 45/76, EU:C:1976:191). The margin of discretion available to Member States in a particular case to define the principles and procedure for protecting rights derived from EU law is further affected by the obligation to observe the first paragraph of Article 47 of the Charter. In laying down a standard of protection, it is not possible to ignore the position of the Court of Justice which highlights the principle of effective judicial protection as a general principle of EU law stemming from the constitutional traditions common to the Member States and which has been enshrined in Articles 6 (Right to a fair trial) and 13 (Right to an effective remedy) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (see judgment of the Court of 13 March 2007, C-432/05, *Unibet*, EU:C:2007:163, paragraph 37). As is clear from the *El Hassani* judgment, C-403/16, the obligation to observe the principle of effective judicial protection laid down in Article 47 of the Charter also applies to the procedural rules relating to the possibility of challenging before a national court a decision refusing to grant a Schengen visa.

The obligation to observe Article 47 of the Charter in the case under consideration may be justified by the content of Article 21(2a) of the Convention implementing the Schengen Agreement, which grants freedom of movement to foreign nationals holding a long-stay (national) visa. A national visa is one of the possible means

that a foreign national can exercise the right to free movement, and understood in this way, is not significantly different from the exercise of that right on the basis of a Schengen visa granted to a third-country national. In the view of the referring court, the existing differences between the detailed aspects of the principles, conditions and procedures for granting national visas and Schengen visas do not alter the fact that both those types of visas concern the exercise of the same right that a foreign national derives from EU law. The fact that it is not possible **[Or. 9]** to challenge before a court a final decision refusing to grant a national visa may therefore infringe EU law, in particular the right to an effective remedy before a tribunal as set out in the first paragraph of Article 47 of the Charter. This situation means that the level of legal protection depends on the type of visa the foreign national applies for, even though each type of visa entitles its holder to move freely within the territory of the Member States. The referring court therefore has doubts as to whether this might lead to discrimination against third-country nationals applying for national visas.

In the opinion of the referring court, in view of the aforementioned need to ensure adequate judicial protection of rights derived from EU law, it could be argued that an analogous level of protection should be ensured in the case of a decision refusing a national visa.

However, the national court is uncertain as to whether this position is correct given the significant differences in the definition of the procedural rules for issuing Schengen visas and national visas.

4. Position of the national court

In the opinion of the national court, the wording of Article 21(2a) of the Convention implementing the Schengen Agreement, in conjunction with the first paragraph of Article 47 of the Charter, seems to indicate the need to ensure that a foreign national applying for a national visa has the right to appeal against a decision refusing the visa to a competent court.

However, given that this issue has not been unequivocally resolved in the case-law of the Court of Justice, an answer to the question referred for a preliminary ruling is required for the purposes of assessing whether the indicated position of the referring court is correct.

5. Conclusion

The doubts raised in relation to the interpretation of Article 21(2a) of the Convention implementing the Schengen Agreement, in conjunction with Article 47 of the Charter, justify referring a question to the Court of Justice for a preliminary ruling under the third sentence of Article 267 TFEU. A ruling on the correct interpretation of the above provisions will determine the possibility of assessing the alleged infringement of Article 58(1)(1) of the Law on Proceedings

before the Administrative Courts set out in the appeal in cassation. A preliminary ruling by the Court of Justice is thus **[Or. 10]** indispensable for the resolution of the proceedings pending before the national court.

6. Stay of administrative court proceedings

[…]