Anonymised version

Case C-905/19

Request for a preliminary ruling

Date lodged:

11 December 2019

Referring court:

Verwaltungsgericht Darmstadt (Germany)

Date of the decision to refer:

27 November 2019

Applicant:

EP

Defendant:

Kreis Groß-Gerau

VERWALTUNGSGERICHT DARMSTADT

ORDER

In the administrative proceedings

of Mr EP,

[…] Riedstadt,

[…]

– Applicant –

[…]

v

Kreis Groß-Gerau (the administrative district of Groß-Gerau), […]

– Defendant –

concerning residence permits

the Verwaltungsgericht Darmstadt (Administrative Court of Darmstadt) […]

ordered as follows on 27 November 2019: **[Or. 2]**

The proceedings are stayed.

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

Can it be inferred from the prohibition of discrimination in Article 64 of the Euro-Mediterranean Agreement with Tunisia that a curtailment of the period of validity of a residence permit because the conditions for the grant of that residence permit are no longer satisfied is prohibited if

- **the Tunisian national was in employment at the time when the retroactive curtailment of the period of validity of the residence permit was notified,**
- **the decision to curtail the period of validity is not based on grounds relating to the protection of a legitimate national interest, such as public policy, public security or public health, and**
- **the Tunisian national did not possess authorisation to take up employment (work permit) that was independent of the residence permit, but was entitled by law to take up employment during the period of validity of the residence permit?**

Does the legal status of a foreign national arising from the prohibition of discrimination in Article 64 of the Euro-Mediterranean Agreement with Tunisia require, in addition to the residence permit, the grant of an administrative authorisation to take up employment?

What is the relevant point in time for the assessment of legal status under the law on residence and work permits? Is the relevant point in time the date of adoption of the administrative decision withdrawing the right of residence or the date of the judicial decision? [Or. 3]

GROUNDS

I. Facts of the case

The applicant, a Tunisian national, married the German national S in the Republic of Tunisia on 11 May 2016. He entered Federal territory on 21 September 2016 with a family reunification visa issued by the German Embassy in Tunis on 21 September 2016 with the consent of the defendant, which was valid until 19 December 2016. On 3 November 2016, the defendant administrative district issued a residence permit to him for the first time, valid until 23 February 2019, which, by law, confers on the applicant the right to take up paid employment. On 9 January 2019, that residence permit was extended until 8 January 2022.

The applicant's son, who is a German national, was born in Federal territory on 13 June 2018.

The applicant has been in paid employment since 9 January 2019.

On 15 April 2019, the applicant and his wife both declared to the defendant that they had separated in January 2019 and that they intended to get divorced.

By decision of 24 July 2019, the defendant retroactively curtailed the period of validity of the applicant's residence permit, which was still valid until 8 January 2022, to the date on which the order was notified. A decision on the grant of a residence permit with regard to the applicant's German son was not taken, as the applicant had not filed a corresponding application for a residence permit. The applicant was ordered to leave the Federal territory by 14 August 2019 at the latest. The applicant was threatened with deportation to Tunisia if he did not depart voluntarily within the time limit set. The grounds cited were that the residence permit could be retroactively curtailed pursuant to the second sentence of Paragraph 7(2) of the Aufenthaltsgesetz (Law on residence, 'AufenthG'), because the marital cohabitation of the applicant with his German wife had not existed since the end of January 2019. The residence permit had been granted exclusively for the purpose of establishing and maintaining marital **[Or. 4]** cohabitation with his wife. Although the applicant had submitted the son's birth certificate, he had not applied for a residence permit to establish and maintain cohabitation with a family member, his son, meaning that it was not possible for a decision to be taken in that regard. As evidenced by the record of service by registered post, the applicant was notified of the order on 26 July 2019.

The applicant brought an action by fax of 13 August 2019. As grounds, he submits that, as the father of a German child, he is entitled to a residence permit.

The applicant requests that

> the order of 24 July 2019 be annulled and the defendant also be obliged to issue a residence permit to him.

The defendant requests that

the action be dismissed.

As grounds, it states that no application for a residence permit had been filed in respect of the German child. Since such a request had been made by way of the action, the matter was now being examined.

II. Legal context

The Euro-Mediterranean Agreement

Article 64 of the Euro-Mediterranean Agreement is to be found in Chapter I ('Workers') of Title VI ('Cooperation in Social and Cultural Matters') and is worded as follows:

'(1) The treatment accorded by each Member State to workers of Tunisian nationality employed in its territory shall be free from any discrimination based on nationality, as regards working conditions, remuneration and dismissal, relative to its own nationals.

(2) All Tunisian workers allowed to undertake paid employment in the territory of a Member State on a temporary basis shall be covered by the provisions of paragraph 1 with regard to working conditions and remuneration. **[Or. 5]**

(3) Tunisia shall accord the same treatment to workers who are nationals of a Member State and employed in its territory.'

Article 66 of the Euro-Mediterranean Agreement provides:

'The provisions of this Chapter shall not apply to nationals of the Parties residing or working illegally in the territory of their host countries.'

In addition, the Joint Declaration of the contracting parties relating to Article 64(1) in the Final Act of the Euro-Mediterranean Agreement reads:

'With regard to the absence of discrimination as regards redundancy, Article 64(1) may not be invoked to obtain renewal of a residence permit. The granting, renewal or refusal of a residence permit shall be governed by the legislation of each Member State and the bilateral agreements and conventions …'

Pursuant to Article 91 of the Euro-Mediterranean Agreement, the Joint Declaration forms an integral part of that agreement.

The relevant provisions of German law arise from the following provisions of the Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet [Law on residence, employment and integration of foreign nationals in the Federal territory] ('Aufenthaltsgesetz' [Law on residence] — 'AufenthG' — in the version published on 25 February 2008 [BGBl. I, page 162], as last amended by Article 49 of the Zweites Gesetzes zur Anpassung des Datenschutzrechts an die Verordnung (EU) 2016/679 und zur Umsetzung der Richtlinie (EU) 2016/680 vom 20. November 2019 [Second Law adapting data protection law to Regulation (EU) 2016/679 and implementing Directive (EU) 2016/680 of 20 November 2019] [BGBl. I, page 1626]):

Paragraph 4 — Requirement to hold a residence entitlement

…

'(2) A residence entitlement authorises the taking-up of paid employment where that is provided by that law or where the residence entitlement expressly allows the taking-up of such employment. Each residence entitlement must state whether the taking-up of paid employment has been authorised. A foreign national who is not in possession of a residence permit for the purposes of taking up employment cannot be authorised to take up employment unless the Federal Labour Agency has indicated its agreement or a regulation provides that taking up such employment without that agency's authorisation is permissible. The restrictions imposed on the issue of the authorisation by the Federal Labour Agency must be mentioned in the residence entitlement. **[Or. 6]**

(3) Foreign nationals may take up paid employment only if the residence entitlement authorises them to do so. Foreign nationals may be employed or commissioned with other services or work in return for remuneration only if they possess such a residence entitlement. This does not apply to seasonal employment if the foreign national possesses a work permit for the purpose of seasonal employment, or to other paid employment if the foreign national is permitted to take up paid employment on the basis of an inter-State agreement, a law or a regulation without having to be authorised to do so by virtue of a residence entitlement. …'

Paragraph 7 Residence permits

'(1) Residence permits are fixed-period residence entitlements. They shall be issued for the purposes of residence specified in the following sections. …

(2) The period of validity of residence permits shall be fixed taking account of the intended purpose of residence. Where one of the essential conditions for granting or for extending permission, or for fixing its period of validity, is no longer satisfied, its duration may also be retroactively curtailed.'

Section 6. Residence for family reasons

Paragraph 27 — Principle of family reunification

‘(1) For the purposes of protecting marriage and the family, as enshrined in Article 6 of the German Constitution (Grundgesetz), fixed-term residence permits may be issued and extended in order to establish or maintain, for the benefit of foreign family members, consortium vitae in a family within Federal territory (family reunification).

…

(5) A residence entitlement pursuant to this section authorises the taking-up of paid employment.’

Paragraph 28 Family reunification to join German nationals

‘(1) A residence permit is to be issued to the foreign

1. spouse of a German national, **[Or. 7]**

2. unmarried minor child of a German national,

3. parent of an unmarried minor German national for the purpose of care of the child,

where the German national in question is habitually resident in Federal territory.

…’

Paragraph 84 Effects of objections and actions

‘(2) Without prejudice to their suspensive effect, objections and actions shall not affect the validity of the expulsion or any other administrative act which terminates the legality of the residence. For the purpose of taking up or pursuing paid employment, the residence entitlement shall be deemed to remain in effect as long as the time limit for raising an objection or bringing an action has not yet expired, during judicial proceedings concerning an admissible application requesting that suspensive effect be given or restored, or as long as the appeal lodged has suspensive effect. There shall be no interruption of the legality of the residence if the administrative act is annulled by a decision of the authorities or final judicial decision.’

III. Grounds for the order for reference

The request for a preliminary ruling concerns the interpretation of Article 64(1) of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, done at Brussels on 17 July 1995 and approved on behalf of the European Community and the European Coal and Steel Community

by Decision 98/238/EC, ECSC of the Council and the Commission of 26 January 1998 (OJ 1998 L 97, p. 1, 'the Euro-Mediterranean Agreement').

The court has referred the questions concerning the interpretation of Article 64 of the Euro-Mediterranean Agreement with Tunisia, as formulated in the operative part of the decision, to the Court of Justice of the European Union pursuant to Article 267(1)(a) and (2) TFEU and has therefore stayed the proceedings pending the ruling of the Court of Justice of the European Union, Paragraph 94 of the Verwaltungsgerichtsordnung (Law on administrative court proceedings, 'VwGO') being applied correspondingly. **[Or. 8]**

The questions raised are relevant to the court's decision. If it were possible to infer a prohibition on the retroactive curtailment of the period of validity of residence permits from Article 64 of the Euro-Mediterranean Agreement with Tunisia, the defendant's order under the law relating to foreign nationals would be unlawful and would not be capable of justifying the removal of the applicant.

Even if the defendant were to grant the applicant a new residence permit with regard to his German son, a decision on the question referred would still be relevant to the decision to be given in the main proceedings. The reason for this is that the applicant would no longer have continuous legal residence based on a residence permit, meaning that the periods of legal residence based on the marriage with the German national could not count towards the previous periods of residence required for a permanent right of residence in the form of a settlement permit.

The basis for the reference is the decision of the Court of Justice of the European Union in the *Gattoussi* case (CJEU, judgment of 14 December 2006 — C-97/05 — [ECLI:EU:C:2006:780]) concerning Article 64(1) of the Euro-Mediterranean Agreement. That decision also concerns a situation in which the immigration authority retroactively curtailed the period of validity of a residence permit due to the fact that the marital cohabitation with a German wife had ceased. The difference between that decision and the case referred here is based on the fact that Mr Gattoussi was in possession of an authorisation to take up employment of indefinite duration, which had been issued in addition to his residence permit in a separate administrative procedure.

In that decision, the Court of Justice held that Article 64(1) of the Euro-Mediterranean Agreement has direct effect (CJEU, judgment of 14 December 2006 — C-97/05 — *Gattoussi*, paragraph 28). Furthermore, the Court of Justice stated the following in the decisive passage regarding the scope of Article 64(1) of the Euro-Mediterranean Agreement:

> '40. In particular, as the Court has already held, if the host Member State has previously granted the migrant worker specific rights in relation to employment which are more extensive than the rights of residence conferred on him by that State, it cannot then reopen the question of that worker's

situation on grounds unrelated to the protection of a legitimate national interest such as public policy, public security or public health (*El-Yassini*, paragraphs 64, 65 and 67). **[Or. 9]**

[…]

42. In the light of the principles of the protection of legitimate expectations and of legal certainty, the rule referred to in paragraph 40 applies a fortiori in cases, such as that before the national court, in which permission to remain has been limited by the host Member State retroactively.'

Based on the *a fortiori* reasoning in *Gattoussi* (paragraph 40), the Court of Justice indicated that, for a retroactive curtailment of the period of validity of a residence permit which simultaneously withdraws the right to take up employment, it is not necessary that the migrant worker must have been granted rights in relation to employment which are more extensive than the rights of residence.

However, as with the decision in the *El-Yassini* case (CJEU, judgment of 2 March 1999 — C-416/96 — [ECLI:EU:C:1999:107]), the cited decision of the Court of Justice of the European Union is characterised by the distinction made between residence entitlements and authorisations to take up employment. Proceeding from the purpose of the Euro-Mediterranean Agreement, which is to improve the situation of Tunisian nationals employed as workers in the Member States and to safeguard their rights when taking up employment legally, the case-law of the Court of Justice could therefore be based on an explicit provision of access to the labour market by means of an independent authorisation (work permit).

Were the prohibition of discrimination to require such a work permit, which exists in addition to the residence permit, Article 64(1) of the Euro-Mediterranean Association Agreement would not preclude the duration of the residence permit from being curtailed. This is because the right to take up paid employment that is linked to the residence entitlement is based solely on a direct statutory authorisation pursuant to Paragraph 27(5) AufenthG: 'A residence entitlement pursuant to this section authorises the taking-up of paid employment.' Since the Law on residence entered into force in 2005, the independent work permit or entitlement to take up employment issued by the employment authority — which was the basis for the decision in the *Gattoussi* case — has been abolished without replacement. The right to take up employment is linked to the existence of the specific residence entitlement and does not confer a right that is detached from it and is more extensive than it. It is inextricably linked to the existence of the residence entitlement and to the **[Or. 10]** specific purpose of residence. If the latter ceases to exist, and that circumstance is taken into account by a decision of the immigration authority that produces effects for the future in such a way that the period of validity of the residence permit is curtailed on the basis of national law (in this case the second sentence of Paragraph 7(2) AufenthG), the legal basis for employment also ceases to exist when the decision of the authority becomes final.

At the point at which the order under the law relating to foreign nationals was notified, the applicant was in possession of a residence permit, valid until 8 January 2022, and was therefore entitled, by operation of law, to pursue employment until the expiry of that residence permit.

The case-law of the German higher administrative courts and the Bundesverwaltungsgericht (Federal Administrative Court) puts forward the view that the prohibition of discrimination arising from Article 64(1) of the Euro-Mediterranean Agreement does not preclude a retroactive curtailment of the period of validity of the residence permit and the associated withdrawal of the statutory authorisation to pursue employment […] [case-law references].

The Federal Administrative Court […] stated the following in this respect:

> 'The Verwaltungsgericht (Administrative Court) and the Verwaltungsgerichtshof (Higher Administrative Court) correctly stated that since the Law on residence entered into force in 2005, the independent work permit or work entitlement issued by the employment authority has been abolished without replacement and is now governed by Paragraph 4(2) and (3) AufenthG. According to the legal situation, which is clear in this respect, the applicant's right to take up paid employment is based solely on a direct statutory authorisation pursuant to Paragraph 27(5) AufenthG ('A residence entitlement pursuant to this section authorises the taking-up of paid employment') or the predecessor provision, Paragraph 28(5) AufenthG (old version), which was repealed with effect from 6 September 2013 […]. This right is clearly linked to the existence of the specific residence entitlement and does not confer a right that is detached from it and is more extensive than it; the **[Or. 11]** link to the residence entitlement also extends to the specific purpose of residence.'

However, the referring court is unable to infer from the case-law of the Court of Justice of the European Union to date what specific requirements are to be imposed on the legal status under the law on permission to carry out paid employment. The fact that, in its decisions in the *Gattoussi* and *El-Yassini* cases, the Court of Justice took the existence of authorisations to take up employment as a basis may reside solely in the fact that such authorisations existed in those specific cases. In this respect, the question arises as to whether the legal status arising from the prohibition of discrimination in Article 64 of the Euro-Mediterranean Agreement with Tunisia requires, in addition to the residence permit, a separate authorisation to take up employment?

Since the relevant point in time for assessing the factual and legal situation in court proceedings is the date of the judicial decision, the question arises as to what point in time is to be taken as the basis for the assessment of the legal status under the law on residence and work permits. Is the relevant point in time the date of adoption of the administrative decision withdrawing the right of residence or the date of the judicial decision? If the date of the judicial decision is to be taken as

the basis, the foreign national would no longer be in possession of the original statutory authorisation to take up employment due to the termination of the residence permit, and would instead only be entitled, on the basis of the second sentence of Paragraph 84(2) AufenthG, to take up employment until the proceedings of the action have been concluded with the force of res judicata.

In view of the legal questions requiring clarification, the Chamber considers that it is necessary, for the purpose of developing the law and establishing legal unity (cf. the second paragraph of Article 267 TFEU), to refer the questions of interpretation to the Court of Justice of the European Union for clarification.

[…] [Finality of the order]