

Case C-35/20**Request for a preliminary ruling****Date lodged:**

24 January 2020

Referring court:

Korkein oikeus (Finland)

Date of the decision to refer:

21 January 2020

Appellant:

Syyttäjä

Respondent:

A

KORKEIN OIKEUS ORDER ... [...]
(SUPREME COURT) ... [...]**Public Date of the order** ... [...]

21 January 2020 ... [...]

APPELLANT Syyttäjä (Public Prosecution Service)
RESPONDENT A**SUBJECT MATTER** Minor border infringement**DECISION OF THE SUPREME COURT**

Subject matter of the proceedings

1. This case concerns the question of whether A. can be accused of having committed a minor border infringement by travelling in a pleasure boat from the Republic of Finland to the Republic of Estonia and back to Finland across the external Finnish border without carrying a passport or other travel document.
2. From the perspective of EU law, the case concerns free movement of persons. It specifically involves the question as to whether a Member State can require an EU citizen, under threat of criminal penalties, to carry a valid passport or other valid travel document when travelling to and back from another Member State. Depending on the answer to the foregoing question, this case also concerns whether the fine normally imposed in Finland [Or. 2] for a minor border infringement such as this constitutes a disproportionate obstacle to the free movement of persons.

Relevant facts and criminal proceedings

Background to the dispute

3. On 25 August 2015, A. travelled by pleasure boat from the Republic of Finland to the Republic of Estonia and back again. He holds a valid Finnish passport. A. was entitled to exit Finland. When stopped at a border check in Helsinki on his return to Finland, A. produced neither a passport nor any other travel document. However, his identity was confirmed from the driving licence which he was carrying. The fact that A. holds a valid passport was also established during the course of the border check. A. was not subjected to any border check on the outward journey from Finland or in Estonia.
4. The Syyttäjä (Public Prosecution Service) brought a charge of minor border infringement against A. before the Helsingin käräjäoikeus (Court of First Instance, Helsinki). A. denied the charge.

Judgment of the Court of First Instance, Helsinki, of 5 December 2016

5. In the opinion of the Court of First Instance, A. committed a minor border infringement. The court held that crossing the border without carrying a travel document is an offence, and that it is immaterial in terms of the criminal nature of the offence that the person crossing the border has a valid passport. However, the Court of First Instance refrained from convicting A. [Or. 3], as the offence of which he stood accused was a minor offence and the fine which ought to be imposed on him in that case under general sentencing guidelines would have been disproportionate.

Judgment of the Helsingin hovioikeus (Court of Appeal, Helsinki) of 15 June 2018

6. The Public Prosecution Service lodged an appeal with the Court of Appeal, by which it contended that A. should be sentenced to a fine for the offence of which the Court of First Instance had found him guilty. A. lodged a cross-appeal seeking acquittal.
7. The Court of Appeal held it to be proven that A. was carrying neither a passport nor a travel document with him. However, it acquitted A. as it found that his conduct did not amount to a minor border infringement.

Appeal proceedings before the Supreme Court

8. The Supreme Court admitted the appeal of the Public Prosecution Service in respect of the question of whether, as a result of his conduct, considered as proven by the Court of Appeal, A. had committed a minor border infringement.

Applicable law

EU law

9. It follows from, *inter alia*, Article 45(1) of the Charter of Fundamental Rights of the European Union, Article 3(2) of the Treaty on European Union (TEU) [Or. 4] and Article 21(1) of the Treaty on the Functioning of the European Union (TFEU) that EU citizens have the right to move and reside freely within the territory of the Member States and that this right is one of the fundamental rights of EU citizens.
10. The key instrument implementing freedom of movement is 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), which was subsequently codified in Regulation (EU) 2016/399 (Schengen Borders Code) (codification). For the purposes of the principle of criminal law of legality, references to the Schengen Borders Code below are references to Regulation (EC) No 562/2006 in the version in force on 25 August 2015, when the conduct to be appraised occurred.
11. According to Article 2.1 of the Schengen Borders Code, the term ‘internal borders’ includes the sea ports of the Member States for regular ferry connections. According to Article 2.2 thereof, the term ‘external borders’ includes the sea borders and sea ports of the Member States, provided that they are not internal borders.
12. According to Article 20 of the Schengen Borders Code, internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out. According to Article 21(c) of the Schengen Borders Code, the abolition of border controls at internal borders is not to affect the

possibility for a Member State to provide by law for an obligation to hold or carry papers and documents. **[Or. 5]**

13. According to Article 4(1) of the Schengen Borders Code, external borders may be crossed only at border crossing points and during the fixed opening hours. Under Article 7(2) of the Code, all persons are to undergo a minimum check in order to establish their identities on the basis of the production or presentation of their travel documents. Such a minimum check is to consist of a rapid and straightforward verification, where appropriate by using technical devices, of the validity of the document authorising the legitimate holder to cross the border and of the presence of signs of falsification or counterfeiting. According to Article 7(6), checks on a person enjoying the EU right of free movement must be carried out in accordance with Directive 2004/38/EC. According to point 3.2.5 in Annex VI, by way of derogation from Articles 4 and 7, persons on board a pleasure boat coming from or departing to a port situated in a Member State are not to be subject to border checks and may enter a port which is not a border crossing point. However, according to the assessment of the risks of illegal immigration, and in particular where the coastline of a third country is located in the immediate vicinity of the territory of the Member State concerned, checks on those persons and/or a physical search of the pleasure boat are to be carried out.
14. According to Article 4(1) 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, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (the Free Movement Directive), without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens who hold a valid identity card or passport have the right to leave the territory of a Member State to travel to another **[Or. 6]** Member State. According to Article 4(2), no exit visa or equivalent formality may be imposed on persons to whom paragraph 1 applies.
15. According to Article 5(1) of Directive 2004/38/EC, without prejudice to the provisions on travel documents applicable to national border controls, Member States must grant Union citizens leave to enter their territory with a valid identity card or passport. According to Article 5(4), where a Union citizen does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned must, before turning such persons back, give them every reasonable opportunity to obtain the necessary documents or to have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence. According to Article 5(5), the Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time.

16. According to Article 27(1) of Directive 2004/38/EC, subject to the provisions of Chapter VI of the Directive, Member States may restrict the freedom of movement and residence of Union citizens on grounds of public policy, public security or public health. **[Or. 7]** According to Article 27(2), measures taken on grounds of public policy or public security must comply with the principle of proportionality and must be based exclusively on the personal conduct of the individual concerned.

National provisions

17. According to Paragraph 7(1).1 in Chapter 17 of the Rikoslaki (19.12.1889/39) (Penal Code 19.12.1889/39), in the version in force at the time of the conduct to be assessed, a person who crosses, or tries to cross, the Finnish border without a travel document, visa, residence permit or document equivalent to a travel document required in order to do so is guilty of, inter alia, a border infringement.
18. According to Paragraph 7a in Chapter 17 of the Penal Code, a person who commits a minor border infringement is to incur a fine if, taking overall account of the brief duration of the unlawful residence or movement, the type of prohibited action or other circumstances of the case, the offence is a minor offence.
19. According to Paragraph 9(2) of the Suomen Perustuslaki (11.6.1999/731) (Finnish Constitution, 11.6.1999/731), every person is entitled to exit the country. Necessary restrictions on this right may be enacted by law in order to guarantee judicial proceedings or the enforcement of a penalty or to ensure completion of compulsory military service. According to Paragraph 9(3), a Finnish citizen may not be denied entry, expelled from the country, or extradited or taken to another country against his/her will. The right of Finnish citizens to exit or enter the country is specified in greater detail in the Passilaki (21.7.2006/671) (Law on Passports, 21.7.2006/671). According to Paragraph 1(1) of the Law on Passports **[Or. 8]**, Finnish citizens are entitled to leave the country in accordance with the provisions of that law. Paragraph 1(2) stipulates that a Finnish citizen is not to be denied entry.
20. According to Paragraph 2(1) of the Law on Passports, Finnish citizens prove their right to exit and enter by means of a passport, unless that law, EU law or treaties by which Finland is bound stipulate otherwise. Finnish citizens can travel without a passport to Iceland, Norway, Sweden and Denmark. Other countries to which Finnish citizens may travel using an identity card within the meaning of Paragraph 1(1) of the Henkilökorttilaki (829/1999) (Law on Identity Cards No 829/1999) as a travel document instead of a passport are determined by government regulation. The Law on Identity Cards No 829/1999 was repealed by the Henkilökorttilaki (663/2016) (Law on Identity Cards No 663/2016), which entered into force on 1 January 2017. Paragraph 2(1) of that law states that an identity card issued to a Finnish citizen may be used as a travel document instead of a passport in accordance with provisions enacted pursuant to Paragraph 2(1) of the Law on Passports.

21. According to Paragraph 1(1) in Chapter 2a of the Penal Code, fines are imposed as daily fines, ranging from a minimum of 1 to a maximum of 120.
22. According to Paragraph 2(1) of that Chapter, as it applied at the time of the conduct to be assessed (in version No 808/2007), the daily fine must be set such that it is reasonable for the convicted person in terms of affordability. According to Paragraph 2(2), a reasonable daily fine is one-sixtieth of the **[Or. 9]** convicted person's average monthly income, net of taxes and charges stipulated by government regulation, plus a fixed amount in costs. The daily fine may be reduced if the convicted person has dependants. According to Paragraph 2(3), the daily fine is set by the court on the basis of the data available at the time of the proceedings. According to Paragraph 5 of the Asetus päiväsakon rahamäärästä (609/1999) (Regulation on Daily Fines No 609/1999), the daily fine cannot be set at a level lower than six euros. There is no upper limit on daily fines.
23. According to Paragraph 3(1) in Chapter 2a, the total fine is obtained from the daily fine, multiplied by the number of daily fines.
24. For a minor border infringement similar to that in this case, a fine of 15 times the daily fine is usually imposed. In 2014, the average daily fine was EUR 16.70, which corresponds to a net monthly income of EUR 1 257. It follows from the documents provided in this case that, on the basis of A.'s income, the daily fine would have been EUR 6 350, giving a total fine of EUR 95 250.

The need for the preliminary ruling

25. The referring court needs to ascertain whether EU law is to be interpreted as meaning that an EU citizen can lawfully be penalised for travelling to another Member State and back without carrying a valid passport or other valid travel document. If the answer to that question is in the affirmative, the court must then decide whether the fine normally imposed for that omission **[Or. 10]** disproportionately restricts the free movement of persons.

Background to Questions 1 and 2

26. The Court of Justice ruled in its judgment [of 21 September 1999] in *Wijzenbeek*, C-378/97, EU:C:1999:439, that, as Community law stood at the time of the events in question in that case, neither Article 7a nor Article 8a of the EC Treaty precluded a Member State from requiring a person, whether or not a citizen of the European Union, under threat of criminal penalties, to establish his nationality upon his entry into the territory of that Member State by an internal frontier of the Community, provided that the penalties applicable were comparable to those which applied to similar national infringements and were not disproportionate, thus creating an obstacle to the free movement of persons (paragraph 45).
27. In its judgment [of 17 February 2005] in *Oulane*, C-215/03, EU:C:2005:95, the Court of Justice found that the requirement to present a valid identity card or

passport is aimed, first, at simplifying the resolution of problems relating to evidence of the right of residence not only for citizens but also for national authorities and, second, at establishing the maximum that Member States may require of the persons concerned with a view to recognising their right of residence (paragraph 22). The presentation of a valid identity card [Or. 11] or passport for the purpose of proving that a person is a Community national is an administrative formality the sole objective of which is to provide the national authorities with proof of a right which the person in question has directly by virtue of his status (paragraph 24). If the person concerned is able to provide unequivocal proof of his nationality by means other than a valid identity card or passport, the host Member State may not refuse to recognise his right of residence on the sole ground that he has not presented one of those documents (paragraph 25).

28. It is not unequivocally clear from the case-law of the Court of Justice whether a national provision requiring an EU citizen, under threat of criminal penalties, to carry a valid passport or other valid travel document upon entry to another Member State and thus, in practice, also while resident in another Member State is compatible with EU law. Nor is it clear, now that the amendments to the EU Treaties and to the Schengen Borders Code and the Free Movement Directive have entered into force, whether the decision given by the Court of Justice on the preliminary question referred in the *Wijzenbeek* case still applies as such under the EU law currently in force.
29. According to Article 21(c) of the Schengen Borders Code, the Member States have the right to provide by law for an obligation to hold or carry papers and documents. However, it is not clear whether that provision is to be interpreted as meaning that criminal penalties can be imposed in the event of failure to comply with that obligation [Or. 12] and, if so, under what circumstances.
30. Nor is it clear whether Article 4(1) and Article 5(1) of Directive 2004/38/EC entitle a Member State to require EU citizens, under threat of criminal penalties, to carry a passport or other travel document when exiting or entering the territory of the Member State concerned. According to the articles in Chapter II of that directive concerning the right of exit and entry, a Member State is entitled to impose a penalty only in the event of a person's failure to comply with the obligation to report his/her presence in accordance with Article 5(5).
31. Nor is it clear from the EU-law provisions referred to in paragraphs 11 to 13 above how the right of a Member State to require persons, under threat of criminal penalties, to carry a valid travel document is affected by the fact that the journey from one Member State to another took place by pleasure boat via international waters, during which the EU citizen did not enter the territory of a third country but did cross the EU external border.

Background to Question 3

32. The Court of Justice has ruled in its case-law that, even where they have competence, the Member States may not lay down a penalty for breaches of certain obligations that is so disproportionate as to create an obstacle to the free movement of persons, [Or. 13] such as a term of imprisonment (paragraph 44 of the abovementioned judgment in *Wijsenbeek* and the case-law cited). In its judgment [of 10 July 2008] in *Jipa*, C-33/07, EU:C:2008:396, the Court of Justice found, with reference to its earlier judgments and to the principle of proportionality that follows from Article 27(2) of Directive 2004/38/EC, that a restriction on the right of exit must be appropriate to ensure the achievement of the objective that it pursues and must not go beyond what is necessary to attain it (paragraph 29). The obligation of the Member States to ensure proportionality also follows from Article 5(5) of Directive 2004/38/EC.
33. It is not clear whether the fine normally imposed for conduct such as that indicated in the main proceedings constitutes a disproportionate obstacle to freedom of movement in a situation in which a person does in fact have a valid passport and his/her identity and the validity of the passport can also be established reliably in some other way.

Questions referred

34. After affording the parties the opportunity to comment on the content of the request for a preliminary ruling, the Korkein oikeus (Supreme Court) has decided to stay the proceedings and to refer the following questions to the Court of Justice of the European Union for a preliminary ruling:

1. Does EU law, in particular Article 4(1) of Directive 2004/38/EC and Article 21 of Regulation (EC) No 562/2006 (Schengen Borders Code), or [Or. 14] the right of EU citizens to move freely within the territory of the European Union, preclude the application of a national provision requiring a person (whether or not an EU citizen), under threat of criminal penalties, to carry a valid passport or other valid travel document when travelling from one Member State to another by pleasure boat via international waters without entering the territory of a third country?

2. Does EU law, in particular Article 5(1) of Directive 2004/38/EC and Article 21 of Regulation (EC) No 562/2006 (Schengen Borders Code), or the right of EU citizens to move freely within the territory of the European Union, preclude the application of a national provision requiring a person (whether or not an EU citizen), under threat of criminal penalties, to carry a valid passport or other valid travel document upon entering the Member State concerned from another Member State by pleasure boat via international waters without having entered the territory of a third country?

3. In so far as no obstacle within the meaning of Questions 1 and 2 arises under EU law: Is the penalty normally imposed in Finland in the form of daily fines for crossing the Finnish border without carrying a valid travel document compatible with the principle of proportionality that follows from Article 27(2) of Directive 2004/38/EC? [Or. 15]

... [...]

WORKING DOCUMENT