Case C-540/22

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:

11 August 2022

Referring court:

Rechtbank Den Haag, zittingsplaats Middelburg (Netherlands)

Date of the decision to refer:

11 August 2022

Applicants:

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Defendant:

Staatssecretaris van Justitie en Veiligheid

Subject matter of the main proceedings

The main proceedings concern a dispute between the applicants, 44 natural persons of Ukrainian nationality ('the applicants'), and the staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security; 'the State Secretary') regarding the latter's dismissal as unfounded of the objections raised by the applicants to the grant of a residence permit of limited duration for the purposes of cross-border provision of services.

Subject matter and legal basis of the request for a preliminary ruling

This request under Article 267 TFEU concerns the scope of the free movement of services guaranteed by Articles 56 and 57 TFEU. More specifically, it concerns the right of residence in a Member State of third-country workers employed there by a service provider established in another Member State and the limits, procedural steps and costs which national law may impose on such a right of residence.

Questions referred for a preliminary ruling

1. Does the free movement of services guaranteed by Articles 56 and 57 TFEU include a right derived therefrom of residence in a Member State for third-country workers who may be employed in that Member State by a service provider established in another Member State?

2. If not, where the duration of the provision of services exceeds three months, does Article 56 TFEU preclude an application having to be made for a residence permit for each individual worker in addition to a simple obligation to declare on the part of the service provider?

3. If not, does Article 56 TFEU preclude

a. a provision of national law that the period of validity of such a residence permit may not exceed two years, irrespective of the duration of the provision of services?

b. the limitation of the period of validity of such a residence permit to the period of validity of the work and residence permit in the Member State in which the service provider is established?

c. charging a fee per (renewal) application which is equal to the fee payable for a regular work permit for a third-country national, but five times higher than the fee payable for proof of lawful residence for a Union citizen?

Provisions of EU law relied on

Articles 56 and 57 TFEU

Provisions of national law relied on

Article 3.58(1)(i) of the Vreemdelingenbesluit 2000 (Decree on Foreign Nationals 2000), Article 8 of the Wet arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie (Law on Employment Conditions for Posted Workers in the European Union), Article 3.34(h) of the Voorschrift Vreemdelingen 2000 (Regulation on Foreign Nationals 2000), and Part B5/3.1 of the Vreemdelingencirculaire 2000 (Guidelines on the Implementation of the Law on Foreign Nationals 2000)

Succinct presentation of the facts and procedure in the main proceedings

1 The applicants have Ukrainian nationality and work for the Slovak company ROBI spol s.r.o. ('ROBI'). That company carries out work in the Netherlands for a Netherlands client. The applicants, who hold a Slovak temporary residence permit for employment, were posted by ROBI to carry out that work. ROBI made an advance declaration to the Netherlands authorities of their work and the period during which it would be carried out. Subsequently, ROBI notified the Netherlands authorities that the duration of the work to be carried out by the applicants would exceed the duration of the Schengen circulation right (90 days out of 180).

2 In that regard, ROBI also lodged an application for a residence permit for the purposes of cross-border provision of services for each of the applicants with the Immigratie- en Naturalisatiedienst (Immigration and Naturalisation Service; 'IND'). Fees were charged for the processing of these applications. The IND granted these applications on behalf of the State Secretary with the annotation that no work permit was required for this specific work. The period of validity of the residence permits granted is limited to the period of validity of the applicants'

Slovak residence permits and is therefore shorter than the duration of the work for which the applicants were posted.

3 The applicants lodged objections to the decisions granting the permits with the IND, which reviewed the decisions on behalf of the State Secretary. The objections raised by the applicants concerned the obligation as such to apply for a residence permit, the period of validity of the permits granted and the fees payable for processing the applications. By the contested decisions, the applicants' objections were declared unfounded.

The essential arguments of the parties in the main proceedings

4 The applicants claim that Articles 56 and 57 TFEU have been breached. They refer to the case-law of the Court of Justice, including the judgments in the *Vander Elst* [1] and *Essent* [2] cases which ruled that a service provider must be restricted as little as possible in the exercise of the freedom to provide services.

5 According to the applicants, this case-law has not yet answered the question whether it is justifiable that, after the expiry of the Schengen circulation right (90 days out of 180), third-country employees of service providers from a Member State of the European Union, in addition to their residence permit in the service provider's country of establishment, must also apply for a residence permit to reside in another Member State in connection with their work there in the context of the cross-border provision of services. However, the applicants deduce from the judgments in *Commission* v *Germany* [3] and *Essent* that only a notification, communication or simple declaration may be requested prior to the cross-border provision of services. Such a procedure was also introduced in the Netherlands. Since, in addition to this procedure, a residence permit must also be applied for in the Netherlands on the basis of the same information, the applicants claim that this is an unnecessary and therefore unjustifiable duplication of procedures.

6 The applicants also consider the fact that the required residence permit is not linked to the duration of the right of residence in the Member State in which the service provider is established, but to the probable duration of the provision of services in the Netherlands, to be an unjustified restriction on the freedom to provide services. This also applies to the fact that the period of validity of the residence permit is limited by law to a maximum of two years. [4] According to the

1 Judgment of 9 August 1994, *Vander Elst*, C-43/93, EU:C:1994:310.

2 Judgment of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206.

3 Judgment of 19 January 2006, *Commission* v *Germany*, C-244/04, EU:C:2006:49.

4 Article 3.58(1)(i) of the Vreemdelingenbesluit 2000.

applicants, this acts as a hindrance to projects with a longer implementation period.

7 Finally, the applicants submit that the fees payable for processing the application for a residence permit for the purpose of providing cross-border services are contrary to the right of freedom to provide services. In that regard, they point to the difference between these fees and those payable for obtaining proof of lawful residence as a Union citizen.

8 The State Secretary argues on appeal that the residence permit requirement is not contrary to Articles 56 and 57 TFEU. As the service provider is free, after a simple notification, to reside in the Netherlands for the free period of 90 out of 180 days, there is no question of a check prior to the commencement of the provision of services. The residence permit is also not a work permit. Furthermore, the procedure to obtain a residence permit is simple. The required documents are already in the possession of the service provider and the only test is whether a declaration has been made and whether a work permit, a residence permit and an employment contract exist in the other Member State.

9 To the extent that this must be regarded as a restriction on the free movement of services, this restriction is justified, according to the State Secretary, by the existence of overriding reasons in the general interest. The State Secretary considers the requirement to obtain a residence permit necessary from the point of view of complying with social legislation. The State Secretary also considers the permit requirement necessary to protect the interests of the Netherlands, in particular the protection of access to the Netherlands labour market. In addition, the State Secretary considers the permit requirement necessary in order to be able to check whether a service provider established in another Member State is availing itself of the freedom to provide services for a purpose other than that for which it was instituted. Finally, the State Secretary argues that the residence permit is in the interests of legal certainty because the worker can use the residence document thus obtained to demonstrate that he is lawfully resident in the Netherlands.

10 The State Secretary also argues that he was right to link the period of validity of the permits granted to the duration of the Slovakian residence permits. He disputes that there is an obligation to grant a residence permit for the duration of the anticipated provision of services and points out that a worker who no longer has a valid work and residence permit in the Member State of his employer no longer fulfils the conditions applicable to the provision of services. The State Secretary is also of the opinion that the maximum period of validity laid down in the Netherlands legislation is not contrary to Articles 56 and 57 TFEU.

Succinct presentation of the reasoning in the request for a preliminary ruling

11 Finally, the State Secretary argues that the amount of the fees charged for processing applications for the granting (or extension) of (the period of validity

of) residence permits is not disproportionately high. As of 1 January 2019, the amount of the fees was adjusted as a result of the case-law of the Afdeling bestuursrechtspraak van de Raad van State (Chamber for Contentious Administrative Proceedings of the Council of State) and is now linked to the fees charged for a national identity card.

12 The Rechtbank Den Haag, zittingsplaats Middelburg (The Hague District Court, sitting in Middelburg; 'the referring court'), observes, first of all, that, following the Court's settled case-law, where an undertaking makes available, for remuneration, workers who remain in the employ of that undertaking, no contract of employment being entered into with the user, its activities constitute an occupation which satisfies the conditions laid down in the first paragraph of Article 57 TFEU and must accordingly be considered to be a service within the meaning of that provision. [5]

13 In addition, it is settled case-law that Article 56 TFEU requires not only the elimination of all discrimination on grounds of nationality against providers of services which are established in another Member State but also the abolition of any restriction – even if it applies without distinction to national providers of services and to those of other Member States – which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where it lawfully provides similar services. [6]

14 The Court has further ruled that, in the light of Articles 56 and 57 TFEU, it is not permissible to require a work permit for the employment of third-country nationals who are made available to an undertaking established in a Member State by an undertaking established in another Member State. In order to check whether there has actually been the provision of a service within the meaning of those articles, the less far-reaching measure of a simple prior declaration in which the service provider supplies the information necessary to check that the situation of the posted workers is lawful and that they are carrying on their main activity in the Member State where the service provider is established would suffice. Compliance with social legislation may also be checked in this way. [7] .

15 In its judgment in *Commission* v *Austria*, the Court held that the area of entry into a Member State and residence there of nationals of non-Member States in

5 Judgment of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraph 37.

6 Judgments of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraph 44; 21 October 2004, *Commission* v *Luxemburg*, C-445/03, EU:C:2004:655, paragraph 20, and 21 September 2006, *Commission* v *Austria*, C-168/04, EU:C:2006:595, paragraph 36.

7 Judgment of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraphs 56 to 59; 21 October 2004, *Commission* v *Luxemburg*, C-445/03, EU:C:2004:655, paragraphs 31 and 46, and 19 January 2006, *Commission* v *Germany*, C-244/04, EU:C:2006:49, paragraphs 41 and 45.

connection with a posting by a service provider established in another Member State is not harmonised at Community level, but that the control exercised by a Member State so far as that legislation is concerned cannot affect the freedom to provide services of the undertaking which employs those nationals. [8] A restriction on the freedom to provide services may nevertheless be justified if, first, it meets an overriding requirement relating to the public interest and that interest is not already adequately safeguarded by existing rules, second, the restrictive measure can also attain the objective pursued and, third, the measure does not go beyond what is necessary for that purpose.

16 The referring court observes that, in the above-mentioned case against Austria, the European Commission submitted that, within the framework of freedom to provide services, each service provider transfers to his employees the 'derived right' to receive a residence permit for the period needed for the provision of services. According to the European Commission, the decision concerning the right of residence is purely formal in character and should be recognised automatically. [9]

17 This raises the question of whether the right of freedom to provide services, as laid down in Articles 56 and 57 TFEU, does not also entail a derived right for workers posted in the context of the cross-border provision of services. It can be inferred from paragraph 59 of the judgment in *Commission* v *Austria* that this is not the case, since the regulation of the entry and residence of third-country nationals has not yet been harmonised. Nevertheless, it could be argued that the obligation arising from Article 56 TFEU to remove all obstacles to the free movement of services means that the deployment, within the framework of that movement of services, of workers from a third country who are employed by a service provider established in another Member State should not be made subject to the possession of an individual residence permit because that obligation would make the provision of services by means of the posting of workers from a third country unnecessarily difficult.

18 In addition, the European Commission submitted in the case against Austria that the existence of a dual procedure itself constitutes a disproportionate restriction of the freedom to provide services. [10] The regulations in the Netherlands are also characterised by the existence of a dual procedure, since third-country workers posted here by an employer established in another Member State must, firstly, be declared, stating a series of particulars, and, secondly, on the basis of those same

8 Judgment of 21 September 2006, *Commission* v *Austria*, C-168/04, EU:C:2006:595, paragraph 60, with reference to: the judgment of 3 February 1982, *Seco and Desquenne & Giral*, 62/81 and 63/81, EU:C:1982:34, paragraph 12.

9 Judgment of 21 September 2006, *Commission* v *Austria*, C-168/04, EU:C:2006:595, paragraphs 31 and 32.

10 Judgment of 21 September 2006, *Commission* v *Austria*, C-168/04, EU:C:2006:595, paragraph 20.

particulars, must separately apply for a residence permit. The fact that the requirement of a residence permit only becomes relevant after the expiry of a period of 90 days does not alter the fact that this requirement in effect constitutes a prior authorisation in so far as the provision of services exceeds 90 days. The fact that the IND only checks whether the declaration has been made in accordance with Article 8 of the Wet arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie and does not impose any additional conditions, does not mean that this double procedure does not lead de facto to a restriction of the freedom to provide services. The fact that, in practice, a decision to grant a residence permit is taken within a short period of time does not alter this. [11]

19 The separate procedure to obtain a residence permit constitutes a restriction because the validity of the permit for the cross-border provision of services is limited by law to the duration of the work, with a maximum of two years. [12] Therefore, if the provision of services lasts longer than initially anticipated, or if the provision of services exceeds the specified maximum duration, a new application (for a residence permit or for an extension of the period of validity) must be made.

20 In that case, the statutory fees are payable for each new application. That amount is equal to the fees payable for obtaining a residence permit for work purposes, which can be granted to third-country nationals, but is five times the amount of the fees payable for the issuance of a certificate of lawful residence to a Union citizen (an EU residence document). [13]

21 The foregoing leads the referring court to request the Court to address the questions referred to it for a preliminary ruling.

[11] Cf.: judgment of 19 January 2006, *Commission* v *Germany*, C-244/04, EU:C:2006:49, paragraph 33.

[12] Article 3.58(1)(i), of the Vreemdelingenbesluit 2000, and Part B5/3.1 of the Vreemdelingencirculaire 2000.

[13] Article 3.34(h) of the Voorschrift Vreemdelingen 2000.