

Case C-206/21

Request for a preliminary ruling

Date lodged:

31 March 2021

Referring court:

Tribunal Administratif de Dijon (France)

Date of the decision to refer:

11 March 2021

Applicant:

Mr X

Defendant:

Préfet de Saône-et-Loire

[...]

Having regard to the following procedure:

[...] Mr X, [...], claims that the Administrative Court should:

1) annul the order of 23 November 2020 by which the préfet de Saône-et-Loire (Prefect of Saône-et-Loire) ordered him to leave France [...]

[...]

He submits that:

– [...] [Or. 2]

– [...];

– [...];

– [...];

- the provisions of Articles L. 121-1 and R. 121-4 of the code de l'entrée et du séjour des étrangers et du droit d'asile (Code on the Entry and Stay of Foreign Nationals and the Right to Asylum) and, therefore, his removal from France, are contrary to [...] Articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ['the ECHR'] and [...] Article 21 of the Charter of Fundamental Rights of the European Union ['the Charter'], since the adult disability allowance is disregarded in the assessment of sufficient own resources;
- [the removal order] infringes [...] Article 8 of the [ECHR] and is vitiated by a manifest error of assessment as regards his personal situation.

[...]

[...] the Prefect of Saône-et-Loire contends that the application should be dismissed.

He submits [...] in particular that:

- the periodical payments made by a French national who provides Mr X's accommodation are simply a reassignment of the rent that he pays to her;
- in that regard, the cour administrative d'appel de Lyon (Administrative Court of Appeal, Lyon) found, by final judgment of 23 June 2020, that, in reality, 'the adult disability allowance is Mr X's only resource';
- the cour administrative d'appel de Paris (Administrative Court of Appeal, Paris) (CAA Paris, 15 May 2018, No. 17PA00903) held that there was no evidence to support the alleged discrimination since 'Article R. 121-4 of the Code on the Entry and Stay of Foreign Nationals and the Right to Asylum takes into account all non-contributory social benefits not only the adult disability allowance'.

[..] **[Or. 3]**

Having regard to:

- the Treaty on the Functioning of the European Union ['TFEU'];
- the [ECHR];
- the [Charter];
- 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] ['Directive 2004/38'];

- the Code on the Entry and Stay of Foreign Nationals and the Right to Asylum;
 - [...].
 - [...]
- [...]

1 Mr X, a Belgian national, born on 13 February 1984, who entered France on 1 July 2016, had his initial application for a residence permit refused and was ordered to leave France by an order of 14 August 2018, with which he failed to comply despite his application for annulment being dismissed by a judgment of 27 August 2019, which was confirmed by judgment of the Administrative Court of Appeal, Lyon of 23 June 2020. On 23 December 2019, the Prefect of Saône-et-Loire again refused to issue a residence permit to him, ordered him to leave France within 30 days and determined the country to which he could be removed, with which the applicant again failed to comply, even though his application for annulment was dismissed by judgment of the court of 12 November 2020. By the present application, Mr X seeks the annulment of the order of 23 November 2020 by which the Prefect of Saône-et-Loire ordered him to leave France within 30 days, determined the country to which he could be removed and banned him from returning to France within one year.

Context of the dispute:

- 2 In the first place, when it is claimed that a directive [...] infringes the provisions of the Treaties, the Charter [...], the general principles of EU law or the [provisions] of a convention to which the European Union is a party, it falls to the administrative court, if there are no serious difficulties, to reject the plea in law put forward or, if serious difficulties do exist, to refer the matter to the Court of Justice of the European Union for a preliminary ruling, in the circumstances set out in Article 267 [TFEU]. The same applies when it is claimed that a directive infringes the [ECHR], since, under Article 6(3) [TEU], the fundamental rights guaranteed by [the ECHR] *'shall constitute general principles of the Union's law'*. **[Or. 4]**
- 3 In the second place, where a plea in law is raised before an administrative court alleging that a law transposing a directive is itself incompatible with a fundamental right guaranteed by the [ECHR] that [...] constitutes a general principle of the Union's law, the administrative court must, first of all, ensure that the law achieves a due transposition of the provisions of the directive. If that is the case, the plea alleging infringement of that fundamental right by the transposing law can only be assessed in accordance with the procedure for the review of the directive itself, described above. The same applies where it is claimed that a law transposing a directive is incompatible with an international convention to which France and the European Union are parties.

The substance of the removal order:

- 4 It is one of the aims of Directive [2004/38] that *'persons exercising their right of residence should not ... become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence'*. Therefore, *'the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions'*. Under Article 7(1) of Directive [2004/38]: *'All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they: (a) are workers or self-employed persons in the host Member State; (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State ...'*
- 5 Under Article L. 121-1 of the Code on the Entry and Stay of Foreign Nationals and the Right to Asylum, which achieves a due transposition of Article 7 of Directive [2004/38]: *'Except where their presence poses a threat to public order, all EU citizens ... shall have the right of residence in France for a period of longer than three months if they meet one of the following criteria: (1) they work in France; (2) they have sufficient resources for themselves and their family members, as defined in paragraph 4, not to become a burden on the social assistance system and have sickness insurance cover ...'*. Lastly, under Article R. 121-4 of the same code, which transposes Article 8(4) of Directive [2004/38]: *'... Where required, an assessment of whether resources are sufficient shall take into account the personal situation of the person concerned. In all cases the required amount shall not be higher than the flat-rate of the earned income supplement referred to in Article L. 262-2 of the code de l'action sociale et des familles (Social Action and Families Code)... . Assessment of the burden on the social assistance system created by the national referred to in Article L. 121-1 shall take into account the amount of non-contributory social benefits he has received, the length of time during which he has suffered difficulties and the period of residence'*.
- 6 In the present case, it is apparent from the documents on file that Mr X, a disabled adult suffering 80% incapacity, has been in France since 1 July 2016, despite having been refused a residence permit twice and being ordered to leave France. Mr X has no documented employment in France and receives the adult disability allowance, a non-contributory social benefit, in the sum of EUR 531.15 per month. By the contested order of 23 November 2020, the Prefect of Saône-et-Loire ordered Mr X to leave France within 30 days, on the grounds that he did not have his own resources and that his continued presence in [Or. 5] France was an abuse of rights in view of the burden posed on the social assistance system. Although, since the end of 2019, the applicant has been receiving financial support from a French national, the Prefect maintains, without it being contested, that that support is in fact the reassignment of rent paid by Mr X by means of the social benefit he receives as a disabled adult. In any event, even if her payments are assumed to be outright gifts, amounting to EUR 405.83 per month after deduction of various bank charges, it is clear from the documents placed on the

file that, at the date of the contested decision, almost 60% of the resources available to Mr X, who has also not shown any evidence of sickness insurance, are derived from the French social system, meaning that he can be regarded as failing to have *'sufficient resources not to become a burden on the social assistance system'* since he arrived in France.

- 7 Furthermore, Article 8 of the [ECHR] [provides]: *'1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference from a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'*. Under Article 14 of [the ECHR]: *'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'*. Lastly, under Article 21(1) of the [Charter]: *'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'*.
- 8 In the present case, Mr X [claims] that both Article 7(1)(b) and Article 8(4) of Directive [2004/38], duly transposed into domestic law by Article L. 121-1(2) and Article R. 121-4 respectively of the Code on the Entry and Stay of Foreign Nationals and the Right to Asylum, cannot be interpreted as allowing the criterion of *'sufficient resources not to become a burden on the social assistance system'* to be used, as it was by the Prefect of Saône-et-Loire, against an EU citizen affected by a disability and, like him, in receipt of the adult disability allowance, which is a non-contributory social benefit in the host Member State, without this constituting discrimination based on his state of health, his disability or his property, which is prohibited both by the combined [provisions] of Articles 8 and 14 of the [ECHR], and by Article 21 of the [Charter].
- 9 In those circumstances, and even though the aforementioned Article R 121-4 of the Code on the Entry and Stay of Foreign Nationals and the Right to Asylum provides that, in the assessment of the burden created by the EU citizen, all non-contributory social benefits and not just the adult disability allowance are to be taken into account, the question [set out in the operative part of this judgment] arises [...] [**Or. 6**] [...].
- 10 This question is decisive for the outcome of the dispute before the administrative court and raises serious difficulties. It is, accordingly, appropriate to refer the matter to the Court of Justice of the European Union pursuant to Article 267 TFEU [...].

HAS DECIDED AS FOLLOWS:

Article 1:

Proceedings are stayed [...] until the Court of Justice of the European Union has given a preliminary ruling on the following question:

‘In requiring sickness insurance cover and sufficient resources not to become a burden on the social assistance system, do Articles 7(1)(b) and 8(4) of Directive 2004/38/EC of 29 April 2004 introduce indirect discrimination, contrary to the provisions referred to in paragraph 7 of this judgment, to the detriment of persons who, due to their disability, are not in a position to work or who can work only in a limited capacity and who can therefore find themselves without sufficient resources to meet their needs without significant or even unreasonable reliance on the social assistance system of the host Member State where they reside?’.

[...] **[Or. 7]** [...]