Case C-560/20

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:

26 October 2020

Referring court or tribunal:

Verwaltungsgericht Wien (Austria)

Date of the decision to refer:

25 September 2020

Appellants:

CR

GF

TY

Respondent authority:

Landeshauptmann von Wien (head of government of the province of Vienna)

Subject matter of the main proceedings

Issue of a residence permit

Subject matter and legal basis of the reference

Interpretation of EU law, in particular Directive 2003/86/EC, Article 267 TFEU

Questions referred for a preliminary ruling

I. Can the third-country national parents of a refugee who has applied for asylum as an unaccompanied minor and has been granted asylum as a minor continue to rely on Article 2(f) in conjunction with Article 10(3)(a) of Council

Directive 2003/86/EC of 22 September 2003 on the right to family reunification if the refugee reached the age of majority after being granted asylum but during the procedure for granting a residence permit to his parents?

II. If Question I is to be answered in the affirmative: In such a case, is it necessary that the parents of the third-country national comply with the period for submitting an application for family reunification referred to in the judgment of the Court of Justice of 12 April 2018, C-550/16, *A and S*, paragraph 61, namely 'in principle, […] within a period of three months of the date on which the "minor" concerned was declared to have refugee status'?

III. If Question I is to be answered in the affirmative: Must the adult third-country national sister of a recognised refugee be granted a residence permit directly on the basis of EU law if, in the event that the adult sister of the refugee were to be refused a residence permit, the parents of the refugee would be *de facto* compelled to waive their right to family reunification under Article 10(3)(a) of Directive 2003/86/EC because that adult sister of the refugee is in urgent need of the permanent care of her parents on account of her state of health and therefore cannot remain in the country of origin alone?

IV. If Question II is to be answered in the affirmative: What criteria are to be applied when assessing whether such an application for family reunification was submitted 'in principle' within a period of three months within the meaning of the statements made in the judgment of the Court of Justice of 12 April 2018, C-550/16, *A and S*, paragraph 61?

V. If Question II is to be answered in the affirmative: Can the refugee's parents continue to rely on their right to family reunification under Article 10(3)(a) of Directive 2003/86/EC if three months and one day have elapsed between the date on which the minor was declared to have refugee status and the date on which they applied for family reunification?

VI. Can a Member State require the refugee's parents, in principle, to meet the conditions of Article 7(1) of Directive 2003/86/EC in a family reunification procedure under Article 10(3)(a) of Directive 2003/86/EC?

VII. Is the requirement to meet the conditions referred to in Article 7(1) of Directive 2003/86/EC in the context of family reunification under Article 10(3)(a) of Directive 2003/86/EC dependent on whether the application for family reunification was submitted within a period of three months after the granting of the refugee status within the meaning of the third subparagraph of Article 12(1) of Directive 2003/86/EC?

Provisions of Community law cited

TFEU, in particular Article 20

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, in particular Articles 2, 4, 7 and 9

Provisions of international law cited

European Convention on Human Rights – ECHR, Article 8

Provisions of national law cited

Niederlassungs- und Aufenthaltsgesetz (Law on establishment and residence) – 'the NAG', in particular Paragraphs 2, 11 and 46

Asylgesetz (Law on asylum) – 'the AsylG', in particular Paragraphs 34 and 35

Brief summary of the facts and procedure

1 Three cases concerning the issuing of residence permits under Article 46(1)(2) NAG are pending before the Verwaltungsgericht (Administrative Court). These three cases concern the parents (CR and GF) and the adult sister (TY) of RI, a refugee recognised in Austria. In the forms of order sought by the applicants, they request family reunification with RI. All the aforementioned people are Syrian citizens.

2 RI came to Austria as an unaccompanied minor on 31 December 2015 and submitted an application for international protection on 8 January 2016. RI was granted refugee status by decision of the Bundesamts für Fremdenwesen und Asyl (Federal Office for Immigration and Asylum, Austria), which was served on 5 January 2017 – and which, in accordance with Austrian law, became final on 2 February 2017.

3 On 6 April 2017, CR, GF and TY filed applications for family reunification with RI pursuant to Paragraph 35 of the AsylG. These applications were rejected by decision of the Austrian Embassy in Damascus, which was served on 29 May 2018, because RI had since reached the age of majority. That decision became final on 26 June 2018.

4 By email of 11 July 2018, CR, GF and TY submitted the applications for family reunification under Paragraph 46(1)(2) NAG that are at issue in the present case, invoking their rights deriving from Directive 2003/86/EC and invoking, with regard to TY, Article 8 ECHR. Those applications were rejected by decisions of the Landeshauptmann von Wien of 20 April 2020, because the applications had not been submitted 'within three months of the granting of the refugee status'. An admissible appeal was lodged against those decisions in due time and referred to the Verwaltungsgericht Wien (Administrative Court of Vienna) for a decision. The latter held a public hearing in the related appeal cases on 3 September 2020.

5 Based on the results of the investigation, it is clear that the appellants CR, GF and TY are unable to provide evidence of a right to accommodation regarded as usual for the area concerned in Austria, of sickness insurance compulsory in Austria or of stable and regular income. Furthermore, it is clear that TY suffers from cerebral palsy and is permanently dependent on a wheelchair and on support with regard to food intake and daily personal hygiene. She is essentially cared for by her mother CR and otherwise has no access to a social network in her current place of residence. She could not be left alone in Syria by her parents.

Principal arguments of the parties to the main proceedings

6 The appellants before the Administrative Court of Vienna deduce from paragraph 34 of the *A and S* judgment that, in the case of an application for family reunification under Article 10(3)(a) of Directive 2003/86/EC, the evidence referred to in Article 7(1) of Directive 2003/86/EC, for which provision has been made under Austrian law, cannot be required of the applicants.

Brief summary of the basis for the reference

7 The question that arises, in essence, for the Administrative Court of Vienna in the present case is whether the applicants can derive rights from Directive 2003/86/EC, even though the refugee RI has since reached the age of majority. In the *A and S* judgment, the Court of Justice stated that a third-country national or stateless person who is below the age of 18 at the moment of his or her entry into the territory of a Member State and of the introduction of his or her asylum application in that State, but who, in the course of the asylum procedure, attains the age of majority and is thereafter granted refugee status must continue to be regarded as a 'minor' for the purposes of Article 2(f) in conjunction with Article 10(3)(a) of Directive 2003/86/EC.

8 In the present cases, however, the third-country national did not attain the age of majority in the course of the asylum procedure – as was the case in the situation underlying the *A and S* judgment – but only during the family reunification procedure within the meaning of Article 10(3)(a) of Directive 2003/86/EC. In view of the reasons put forward by the Court of Justice for its decision in the *A and S* judgment, it is clear to the Administrative Court of Vienna that the reasoning given in that judgment is transferable to cases such as the present one (the considerations in the judgment of the Court of Justice of 16 July 2020, C-133/19, *B.M.M. and Others*, also indicate that, in the context of Directive 2003/86/EC, the circumstance of the age of majority being attained during a pending procedure is not, in principle, significant, but rather account should be taken of the minority on the date the application is submitted). However, since – as far as the Administrative Court of Vienna is aware – there is not yet any case-law from the Court of Justice on this point, Question I is asked.

9 If that question is answered in the affirmative, the question that then arises for the Administrative Court of Vienna is whether the reasoning given in paragraph 61 of the *A and S* judgment, according to which the application for family reunification made on the basis of Article 10(3)(a) of Directive 2003/86/EC must, in principle, be submitted within a period of three months of the date on which the 'minor' concerned was declared to have refugee status, is to be transferred to the present situation (Question II). Since, in the present cases, the age of majority was attained after refugee status had been granted, it would also be conceivable that such a period does not begin to run until the date on which the refugee attains the age of majority and that, therefore, an application for family reunification under Article 10(3)(a) of Directive 2003/86/EC submitted at a time when the refugee was still a minor has in any event been submitted in good time, irrespective of the temporal link between the submission of the application and the date on which asylum is granted.

10 If Question II is also to be answered in the affirmative, the Administrative Court of Vienna is unable to ascertain, from the case-law of the Court of Justice, the criteria against which adherence to a period of, 'in principle', three months is to be assessed (Question IV.)

11 In the present appeal cases, three months and one day elapsed between the date on which the minor was granted asylum and the applications for family reunification pursuant to Article 10(3)(a) of Directive 2003/86/EC. For the Administrative Court of Vienna, the question arises as to whether this means that the period of, 'in principle', three months referred to in paragraph 61 of the *A and S* judgment has been observed (Question V).

12 In that context, the Administrative Court of Vienna considers that the applicants cannot be accused of having pursued the legal remedy of submitting an application under Paragraph 35 of the Law on asylum, which, in accordance with Austria law, was the correct legal remedy on the date on which they submitted their applications for family reunification, and their applications were subsequently dismissed on the ground that the refugee had in the meantime reached the age of majority, because the applicants naturally had no influence on the point in time at which their applications were processed. The follow-up applications for family reunification under point 2 of Paragraph 46(1) NAG that are at issue in the present proceedings were eventually submitted immediately after the applications under Paragraph 35 AsylG had been dismissed, such that the Administrative Court of Vienna is not aware of any failure to comply with the time limit in this respect, and the question of whether the applications for family reunification were in principle submitted within three months of asylum having being granted can therefore relate only to the first applications for family reunification under Paragraph 35 AsylG three months and one day after the minor was granted asylum.

13 It is not apparent to the Administrative Court of Vienna, from paragraph 34 or any other passage of the *A and S* judgment, that, in the case of an application for

family reunification under Article 10(3)(a) of Directive 2003/86/EC, the applicants cannot be required to provide the evidence referred to in Article 7(1) of Directive 2003/86/EC (see paragraph 6 above). Article 10(3)(a) of Directive 2003/86/EC guarantees the family reunification of the first-degree relatives in the direct ascending line without applying the conditions laid down in Article 4(2)(a). This means that it is not necessary that the relatives are dependent on the family reunification sponsor and do not enjoy proper family support in the country of origin. However, the Administrative Court of Vienna is unable to see, either from the wording of that provision or from the general scheme of the Family Reunification Directive, for what reasons the requirements laid down in Article 7 of Directive 2003/86/EC should not, in principle, apply to family reunification under Article 10(3)(a) of Directive 2003/86/EC (see, by contrast, family reunification under Article 4(1) of Directive 2003/86/EC, for which the application of Article 7 of Directive 2003/86/EC is expressly excluded pursuant to the first subparagraph of Article 12(1) of Directive 2003/86/EC). Question VI therefore arises.

14 Furthermore, it is unclear to the Administrative Court of Vienna whether the request for such evidence depends on whether the application for family reunification was submitted within a period of three months after the granting of the refugee status, as laid down in the third subparagraph of Article 12(1) of Directive 2003/86/EC. In its schematic context, the period referred to in that subparagraph could, by virtue of the reference in the first subparagraph, relate only to the family members referred to in Article 4(1) of Directive 2003/86/EC. However, the provision could also be construed as meaning that it applies in principle to every application for family reunification (the judgment of the Court of Justice, C-380/17, *K and B*, paragraphs 46 and 47 could be understood in that sense), which is why Question VII seeks clarification regarding the interpretation of the third subparagraph of Article 12(1) of Directive 2003/86/EC.

15 Austrian law does not cover the sponsor's sister as a family member. In this respect, Austria has not made use of the possibility provided for in Article 10(2) of Directive 2003/86/EC. The appellants before the Administrative Court of Vienna argue that the care situation of the adult sister in the country of origin is not stable, no other relatives live in the country of origin and the sister is therefore entirely dependent on the continued care of her parents.

16 For the Administrative Court of Vienna, it can be inferred from that situation that, if the sponsor's sister were not also granted a residence permit at the same time, the applicant parents of the sponsor would be compelled in practice to waive any rights to family reunification they may be able to derive from Article 10(3)(a) of Directive 2003/86/EC.

17 In its existing case-law on Article 20 TFEU (Case C-34/09, *Zambrano*, Case C-256/11, *Dereci*, Case C-133/15, *Chavez-Vilchez and Others*), the Court of Justice has held that a refusal of residence may be impermissible in relation to a third-country national where such a refusal would lead to a situation where

citizens of the Union would have to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union. In the view of the Administrative Court of Vienna, however, the Court of Justice's case-law to date relates, first, only to citizenship of the Union and, second, only to situations in which a third-country national is required to leave the territory of the European Union, but not to situations in which entry is refused.

18 No Union citizens are involved in the present appeal cases, so a violation of the core element of Article 20 TFEU is out of the question. Nevertheless, it can be argued that, in so far as they are entitled to family reunification under Directive 2003/86/EC, the applicants CR and GF are effectively deprived of the possibility of exercising the right to family reunification conferred on them by EU law if another person is denied the right of residence. In the view of the Administrative Court of Vienna, the considerations relating to Article 20 TFEU set out in the judgments of the Court of Justice cited above can be transferred to the exercise of the right to family reunification under Article 10(3)(a) of Directive 2003/86/EC, which is why Question III seeks to ascertain whether such *de facto* compulsion may extend the scope of Directive 2003/86/EC to other persons.

19 It should be considered in this context that, in accordance with Austrian law, it is conceivable that, for overriding reasons relating to private and family life within the meaning of Article 8 ECHR, the sponsor's adult sister may be granted the right of residence despite the failure to meet the legal requirements. However, an entitlement to a right of residence deriving directly from EU law could go beyond the protective content of Article 8 ECHR, which is why the question referred proves to be necessary to resolve the present appeal case concerning the applicant's sister.