Case C-69/21

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:

4 February 2021

Referring court:

Rechtbank Den Haag, zittingsplaats ’s-Hertogenbosch (Netherlands)

Date of the decision to refer:

4 February 2021

Applicant:

X

Defendant:

Staatssecretaris van Justitie en Veiligheid

Subject matter of the main proceedings

The dispute in the main proceedings concerns the question whether X must be granted a residence permit or must be permitted to postpone departure because of serious medical problems and what the medical consequences will be if the treatment which X is undergoing (pain relief with medicinal cannabis) cannot be continued because he must comply with his departure obligation under the Vreemdelingenwet 2000 (Law on foreign nationals of 2000).

Subject matter and legal basis of the request

Interpretation of Articles 1, 4, 7, and 19 of the Charter of Fundamental Rights of the European Union

Having regard to Directive 2008/115/EC, the Rechtbank (District Court) requests the interpretation of Article 19(2) of the Charter, read in conjunction with Articles 1 and 4 of the Charter, in order to assess whether a foreign national must be granted a postponement of departure because of his serious medical problems. In addition, the Rechtbank requests the interpretation of Article 7 of the Charter in

order to be able to assess whether medical treatment in a Member State is an aspect of private life which must be taken into account when assessing an application for a residence permit.

Questions referred for a preliminary ruling

I Can a significant increase in pain intensity due to a lack of medical treatment, while the clinical picture remains unchanged, constitute a situation which is contrary to Article 19(2) of the Charter of Fundamental Rights of the European Union ('the Charter'), read in conjunction with Article 1 of the Charter and Article 4 of the Charter, if no postponement of the departure obligation resulting from Directive 2008/115/EC ('the Return Directive') is permitted?

II Is the setting of a fixed period within which the consequences of the lack of medical treatment must materialise in order to constitute a medical obstacle to an obligation to return resulting from the Return Directive compatible with Article 4 of the Charter, read in conjunction with Article 1 of the Charter? If the setting of a fixed period is not contrary to EU law, is a Member State then permitted to set a general period that is the same for all possible medical conditions and all possible medical consequences?

III Is a determination that the consequences of expulsion should be assessed solely in terms of whether, and under what conditions, the foreign national can travel, compatible with Article 19(2) of the Charter, read in conjunction with Article 1 of the Charter and Article 4 of the Charter, and with the Return Directive?

IV Does Article 7 of the Charter, read in conjunction with Article 1 of the Charter and Article 4 of the Charter, and in the light of the Return Directive, require that the medical condition of the foreign national and the treatment he is undergoing in the Member State be assessed when determining whether private life considerations should result in permission to stay being granted? Does Article 19(2) of the Charter, read in conjunction with Article 1 of the Charter and Article 4 of the Charter, and in the light of the Return Directive, require that private life and family life, as referred to in Article 7 of the Charter, be taken into account when assessing whether medical problems may constitute an obstacle to expulsion?

Provisions of European Union law relied on

Directive 2008/115/EG of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive): Articles 5, 6, and 9

Charter of Fundamental rights of the European Union: Articles 1, 4, 7, 19, 51, and 52

Provisions of national law relied on

Vreemdelingenwet 2000 (Law on foreign nationals of 2000; 'Vw'): Article 64

Vreemdelingencirculaire 2000 (Circular on foreign nationals; 'Vc'): paragraph A3/7

Succinct presentation of the facts and procedure in the main proceedings

1 X was born in 1988 and has Russian nationality. His country of origin is Russia. At the age of 16 years, he developed polycythaemia vera, a rare form of blood cancer. X is being treated in the Netherlands with medicinal cannabis for pain relief. Medicinal cannabis is not legally available in Russia.

2 On 19 May 2016, X lodged an application for asylum in the Netherlands for the second time. X based his asylum application on the fact that he suffers from polycythaemia vera, for which he was treated with regular medicines in his country of origin. X claims that he suffered from the side effects of those medicines and that cannabis provides better pain relief. He grew cannabis plants for medicinal use and as a result experienced such problems that he requires protection.

3 By decision of 29 March 2018, the staatssecretaris ('State Secretary') refused X's asylum application. According to the State Secretary, the problems which X claims to have experienced because of the cultivation of cannabis for personal use are not credible. In addition, the State Secretary decided that X was not eligible for a residence permit on ordinary grounds and that no postponement of departure would be granted on the grounds of Article 64 Vw 2000 (state of health).

4 On 20 December 2018, the Rechtbank partially upheld X's appeal against that decision and partially annulled the decision. This ruling was upheld on appeal. This established in law that X had no claim to refugee status or to subsidiary protection. The State Secretary did, however, have to make a fresh ruling on the claim invoking Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') and on the request for the application of Article 64 Vw.

5 By decision of 19 February 2020, the State Secretary made a fresh ruling on X's second asylum application. According to this decision, X is not eligible for an ordinary residence permit of limited duration on the basis of Article 8 ECHR and he was not granted a postponement of departure on the grounds of Article 64 Vw.

Essential arguments of the parties in the main proceedings

6 X claims that he should be granted a residence permit on the basis of Article 8 ECHR or that he should have been granted a postponement of departure on the basis of Article 64 Vw. He substantiates these claims on the basis of his medical situation, the treatment he is undergoing in the Netherlands and the consequences if he cannot continue this treatment due to his return to Russia.

7 According to X, treatment with medicinal cannabis can relieve the pain by about 70%. This treatment is so essential to him that, if it were to be discontinued, he would not be able to live in a dignified manner, so that residence must be granted on the basis of Article 8 ECHR. Without cannabis he would not be able to sleep or eat because of the pain, which would have considerable physical and psychological consequences. X states that in that case he would become depressed and suicidal. The failure to provide pain relief would therefore result in a short-term medical emergency.

8 The State Secretary took the position that X's treatment in the Netherlands was insufficient to constitute private life within the meaning of Article 8 ECHR, so that he did not have to be granted residence on that ground. If X is no longer able to take medicinal cannabis for pain relief, this does not give rise to any medical emergency, according to the State Secretary. Under certain conditions, it is possible for X to travel. X therefore does not qualify for a postponement of departure on medical grounds pursuant to Article 64 Vw.

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

9 The dispute in the main proceedings concerns the question whether the applicant should be granted residence or postponement of departure because of his state of health and the medical consequences of discontinuing his treatment because of the necessity to comply with his departure obligation.

10 Article 64 Vw and paragraph A3/7 Vc lay down the framework for the assessment of whether a foreign national can obtain a postponement of his departure obligation on the grounds of serious medical problems and thereby acquire a right to stay legally. The State Secretary may grant a postponement of departure under Article 64 Vw if the foreign national is unable to travel on medical grounds or if there is a real risk of an infringement of Article 3 ECHR on medical grounds. According to that assessment framework, there is only a real risk of an infringement of Article 3 ECHR if BMA [1] advice shows that failure to provide medical treatment will in all probability result in a medical emergency and

[1] The Bureau Medische Advisering (Medical Advisors Office; 'BMA') forms part of the Ministerie van Veiligheid en Justitie (Ministry of Security and Justice) and advises its principal, the Immigratie- en Naturalisatiedienst (Immigration and Naturalisation Service; 'IND'), at the latter's request, on medical issues concerning foreign nationals in relation to decisions pursuant to the Vreemdelingenwet 2000.

treatment is not available or not accessible to the foreign national in the country of origin.

11 A medical emergency is understood to mean a situation of which it is certain, on the basis of current medical-scientific insights, that a failure to provide treatment will result, within a period of three months, in death, invalidity or some other form of serious mental or physical damage. On the basis of judgements of the European Court of Human Rights ('ECtHR'), national case-law assumes that there may be an infringement of Article 3 of the ECHR if a seriously ill foreign national, on being removed, runs a real risk of a serious, rapid and irreversible deterioration in his health, resulting in intense suffering or a significant reduction in his life expectancy, as a result of the absence of adequate treatment in the country of origin or a lack of access to such treatment.

12 X substantiated his claim that his medical problems should lead to a postponement of departure with letters from his doctors. These letters show that he suffers intense pain that is just bearable when treated with cannabis and that alternative painkilling medication is contraindicated.

13 In response, the State Secretary asked the BMA for advice. Among other things, BMA advised that the efficacy of cannabis as a medicine has not been demonstrated, that cannabis thus is not a cure and that therefore it is not possible to judge what would happen if the medicine could no longer be used because it was not available in Russia as a painkiller. Because the efficacy of cannabis as a medicine has not been demonstrated, it cannot be said that the use of cannabis prevents a short-term medical emergency. Furthermore, according to the BMA, there are enough alternatives to cannabis to enable a medically sound choice to be made.

14 It has been established that treatment with medicinal cannabis or adequate alternative treatments to combat the pain are not available to X in his country of origin. That means that X's treatment, as far as pain relief is concerned, will be discontinued if he is not granted a postponement of departure. The next question is what the medical consequences are of discontinuing the treatment with medicinal cannabis. From the information provided by the doctors treating him, the Rechtbank provisionally concludes that the clinical picture will remain unchanged if no pain relief is provided.

15 Before the Rechtbank appoints a medical expert to assess what medical consequences are to be expected, and over what period, if the cannabis treatment is discontinued, it is necessary to ask the Court of Justice to interpret the scope of the protection afforded to seriously ill foreign nationals by Articles 1, 4, and 19 of the Charter. While it remains unclear to the Rechtbank whether increased suffering per se can preclude expulsion, over what period the increase in suffering must materialise in order to preclude expulsion, and whether possible psychological consequences due to an increase in pain must be included in the

assessment of whether a medical emergency exists if X fulfils his departure obligation, it is not useful to ask an expert for advice in this regard.

16 Article 52(3) of the Charter provides that, in so far as that Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights will be the same as those laid down by the said Convention. It appears from the Explanations relating to the Charter that Article 1 of the Charter constitutes the real basis of fundamental rights, that Article 4 of the Charter corresponds to Article 3 of the ECHR, that Article 7 of the Charter corresponds to Article 8 of the ECHR and that Article 19(2) of the Charter incorporates the case-law of the ECtHR regarding Article 3 of the ECHR.

First question

17 The Rechtbank is not aware of any case-law of the Court of Justice which interprets Article 19(2) of the Charter, read in conjunction with Articles 1 and 4 of the Charter, with a view to assessing whether there can be considered to be medical obstacles to expulsion if the clinical picture does not worsen if the medical treatment is not available in the country of origin, but there is a significant increase in pain. It would like further elucidation of the protection that a seriously ill foreign national can derive from these provisions.

18 The Rechtbank is of the view that a significant increase in the intensity of suffering resulting from the cessation of pain relief without this being the result of 'a serious, rapid and irreversible decline in his or her state of health' (ECtHR judgment of 13 December 2016, *Paposhvili* v *Belgium*, CE:ECHR:2016:1213JUD00417381, paragraph 183), in X's case, therefore, of a worsening of the clinical picture of polycythaemia vera, should fall within the scope of the protection offered by the Charter to a seriously ill foreign national.

Second question

19 According to the settled case-law of the Afdeling Bestuursrechtspraak of the Raad van State (Administrative Jurisdiction Division of the Council of State; 'ABRvS'), only the medical consequences that occur within a period of three months after discontinuation of the medical treatment are to be taken into account when assessing whether a medical emergency will arise if the treatment is discontinued. According to the ABRvS, this criterion is in line with the requirement of a rapid decline of the person's state of health as laid down in paragraph 183 of the *Paposhvili* judgment. However, the ABRvS has never substantiated why a maximum period has been set and why this period has been set at three months. In the *Paposhvili* judgment, the ECtHR did not explicitly set a deadline, but ruled that 'the impact of removal on the person concerned must be assessed by comparing his or her state of health prior to removal and how it would evolve after transfer to the receiving State' (paragraph 188), which only refers to a the health situation evolving if medical treatment is discontinued.

20 The Rechtbank therefore wishes to ascertain whether a fixed period within which the consequences of the discontinuation of medical treatment must materialise is compatible with EU law, and whether the Member States, without differentiating on the basis of the nature of the medical condition and the medical treatment, may determine a period within which the medical consequences must materialise in order for the foreign national to be granted a postponement of departure and, consequently, the right to stay.

Third question

21 In national legal practice, the medical consequences of expulsion are only assessed by examining the conditions under which the journey can take place. The question of whether transfer or expulsion as such will have medical consequences is not considered in relation to national law, policy and the settled case-law of the ABRvS when assessing whether expulsion is contrary to the Charter or the ECHR.

22 In paragraph 188 of the *Paposhvili* judgment, however, the ECtHR considered that the consequences of the removal of a person must be assessed by comparing his state of health prior to removal with how it would evolve after removal. That seems to indicate that all the medical consequences of the transfer must be taken into account when assessing whether a medical emergency could arise from the removal and not only whether the medical consequences can be mitigated by imposing conditions on the journey.

23 In the judgment of 16 February 2017, *C. K. and Others*, C-578/16 PPU, EU:C:2017:127, the Court of Justice held, in the context of a Dublin transfer, that it is not sufficient for the authorities to consider only the consequences of physically transporting the person concerned from one Member State to another, but all the significant and permanent consequences that might arise from the transfer must be taken into consideration (paragraph 76). The present case concerns return to the country of origin rather than transfer to another Member State, but the Rechtbank does not see why the medical consequences of the mere transfer in this case should be disregarded when assessing whether a foreign national with very serious medical problems can be refused the right to stay.

24 However, according to the interpretation of the judgment in *C. K. and Others* by the ABRvS, this point is not taken into account in the assessment. The Rechtbank would like to ascertain from the Court of Justice whether this national assessment framework is compatible with Article 4 of the Charter.

Fourth question

25 Also at issue in the present proceedings is whether the medical condition of a foreign national and the medical treatment undergone in a Member State can constitute private life deserving of protection within the meaning of Article 7 of the Charter and Article 8 of the ECHR, as claimed by X.

26 In the judgment of 6 May 2001, *Bensaid* v. *United Kingdom*, CE:ECHR:2001:0206JUD004459998, the ECtHR considered that it cannot be ruled out that a situation that does not reach the threshold of Article 3 of the ECHR may nevertheless qualify as a violation of Article 8 of the ECHR if the right to stay is not (any longer) granted. In that context, the ECtHR held that 'private life' is a term not susceptible to exhaustive definition and that mental health must also be regarded as a crucial part of private life within the meaning of Article 8 of the ECHR.

27 Unlike the ABRvS, the Rechtbank is of the opinion that it follows from the *Paposhvili* judgment that Article 8 ECHR also plays a role in the assessment of whether medical reasons preclude expulsion. In addition, in the asylum procedure, an automatic check must be made as to whether the foreign national is entitled to an ordinary residence permit on the grounds of Article 8 ECHR if he or she is not eligible for refugee status or subsidiary protection. The Rechtbank therefore seeks further clarification as to whether, if the foreign national wishes to acquire the right to stay on the basis of his serious medical problems and the medical treatment he is undergoing in the Member State for that reason, the authorities have to take medical circumstances into account as an aspect of private life when assessing whether the foreign national is entitled to stay on the grounds of Article 8 ECHR, and whether they must take these medical circumstances into account as an aspect of private life in any proceedings in which the foreign national applies for the postponement of departure.

28 The answer to the fourth question referred for a preliminary ruling is important because the granting of a permit or authorisation on the basis of private life gives rise to a legally more robust right of residence than the postponement of departure on the basis of Article 64 Vw.

Proposed answers

29 The referring court suggests that the Court of Justice consider answering the questions referred for a preliminary ruling follows:

'I Having regard to Article 19(2) of the Charter, read in conjunction with Article 1 of the Charter, Article 4 of the Charter, and the Return Directive, Member States are obliged to consider all the medical consequences of the termination of the medical treatment being undergone by a seriously ill foreign national in the Member State, even if the clinical picture itself remains unchanged, when assessing whether there are medical obstacles of such a nature that a seriously ill foreign national is not subject to the departure obligation. In appropriate cases, the departure obligation must be suspended or permission must be granted to (temporarily) not comply with a departure obligation so that the right to stay legally is thus acquired.

II Having regard to Article 19(2) of the Charter, read in conjunction with Article 1 of the Charter, Article 4 of the Charter, and the Return Directive,

Member States, when assessing the existence of medical obstacles to expulsion, are obliged to assess the specific circumstances of each case, and determining that medical consequences which become apparent after a general maximum period may be disregarded, is not compatible with the absolute nature of Article 4 of the Charter.

III Having regard to Article 19(2) of the Charter, read in conjunction with Article 1 of the Charter, Article 4 of the Charter, and the Return Directive, Member States are obliged to take into account all the medical consequences resulting from the expulsion in the assessment of whether a medical emergency could arise and a very seriously ill foreign national must, because of medical obstacles, be allowed to (temporarily) not comply with a departure obligation and so that the right to stay legally is thus acquired.

IV Having regard to Article 19(2) of the Charter, read in conjunction with Article 1 of the Charter, Article 4 of the Charter, Article 7 of the Charter, and the Return Directive, the Member States are not permitted to determine that private life and family life, as referred to in Article 7 of the Charter, may never be taken into account in the assessment of whether there are medical obstacles to expulsion. If a seriously ill foreign national applies for permission to stay, and not just for a postponement of departure on the grounds of private life, and bases this on his medical problems and medical treatment, the authorities should assess whether such permission must be granted on the basis of Article 7 of the Charter and Article 8 ECHR.'