Case C-568/21

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:

16 September 2021

Referring court:

Raad van State (Netherlands)

Date of the decision to refer:

25 August 2021

Appellants:

Staatssecretaris van Justitie en Veiligheid

Respondents:

E. and S., also on behalf of their minor children

Subject matter of the main proceedings

The main proceedings concern the appeal lodged by the staatssecretaris (State Secretary) with the Raad van State (Council of State) against the judgment of 20 March 2020 of the rechtbank Den Haag (The Hague District Court), sitting in Amsterdam. In that judgment, the District Court annulled the decisions of the State Secretary of 29 January 2020 not to examine the applications of the foreign nationals for international protection.

Subject matter and legal basis of the request

The referring court asks the Court of Justice, pursuant to Article 267 TFEU, whether a diplomatic card issued by a Member State under the Vienna Convention on Diplomatic Relations constitutes a residence document within the meaning of Article 2(l) of the Dublin Regulation.

Question referred for a preliminary ruling

Must Article 2(1) of the Dublin Regulation be interpreted as meaning that a diplomatic card issued by a Member State under the Vienna Convention on Diplomatic Relations is a residence document within the meaning of that provision?

Provisions of European Union law relied on

Vienna Convention on Diplomatic Relations of 18 April 1961, Articles 2, 4, 7, 9, 10 and 39.

Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, recitals 4 and 5, Articles 2, 12 and 14.

Succinct presentation of the facts and procedure in the main proceedings

1 The foreign nationals are third-country nationals who are a family. The father worked at his country's embassy in Member State X and lived there with his family. They received diplomatic cards from the Ministry for Foreign Affairs of Member State X. After some years, the family left that Member State and lodged applications for international protection in the Netherlands.

Course of the take charge procedure

2 On 31 July 2019, the State Secretary held Member State X responsible for examining these applications pursuant to Article 12(1) or 12(3) of the Dublin Regulation.

3 On 30 August 2019, Member State X rejected the take charge requests. That Member State is of the view that no visa or residence document had been issued to the foreign nationals and that they resided in Member State X solely on the basis of their diplomatic status. The foreign nationals travelled to Member State X and to the Netherlands by means of their diplomatic passports, as a result of which they did not require a visa. According to that Member State, the responsibility lies with the Netherlands pursuant to Article 14(2) of the Dublin Regulation.

4 On 11 September 2019, the State Secretary asked Member State X to consider the take charge requests. The State Secretary – relying on a handbook of the Ministry for Foreign Affairs of Member State X for this purpose – is of the opinion that the diplomatic cards issued by Member State X constitute a residence document. According to the State Secretary, under Article 12(1) of the Dublin Regulation, responsibility lies with Member State X.

5 On 25 September 2019, Member State X accepted the take charge requests pursuant to Article 12(1) of the Dublin Regulation.

The decisions and the judgment of the District Court

6 By decisions of 29 January 2020, the State Secretary refused to examine the foreign nationals' applications for international protection as Member State X was responsible for doing so.

7 The foreign nationals lodged an appeal against those decisions and argued before the District Court that Member State X was not responsible for their applications. Indeed, the authorities of Member State X had never granted them a residence document. In fact, they derived their right of residence directly from the Vienna Convention or from their diplomatic status (as the case may be). Their diplomatic cards are merely a confirmation thereof.

8 The District Court declared that appeal well founded and annulled the decisions concerned. In particular, the District Court held that the diplomatic cards issued by Member State X could not be regarded as an authorisation or permission to stay, since the foreign nationals already had a right of residence in Member State X on the basis of the Vienna Convention. The diplomatic cards were therefore merely declaratory (and not constitutive) of that right of residence. According to the District Court, the State Secretary, who had wrongly held Member State X responsible for examining the applications for international protection, should carry out a substantive examination of those applications.

9 The State Secretary lodged an appeal against that judgment with the referring court.

Essential arguments of the parties to the main proceedings

10 The State Secretary argued, primarily, that the diplomatic cards issued to the foreign nationals by Member State X do fall under the definition of a residence document within the meaning of Article 2(l) of the Dublin Regulation. By actually issuing these cards, Member State X confirmed that the foreign nationals have a right of residence under the Vienna Convention. The fact that this right of residence is derived directly from this Convention does not undermine this. The Dublin Regulation, which does not require a residence document under the law pertaining to foreign nationals, does not exclude the possibility that a diplomatic card may constitute a residence document within the meaning of the aforementioned provisions.

11 In the alternative, the State Secretary argued that, in view of the general scheme and objectives of the Dublin Regulation, diplomatic cards should be regarded as a residence document. Member State X played the greatest role in the entry and stay of the foreign nationals on the territory of the Member States. The judgment of the

Court of Justice of 26 July 2017, *Jafari*, C-646/16, ECLI:EU:C:2017:586, is applicable by analogy.

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

12 Some Member States regard a diplomatic card as a residence document, others do not.

Interpretation of Article 2(l) of the Dublin Regulation

13 In order to answer the question referred for a preliminary ruling, Article 2(l) of the Dublin Regulation must be interpreted in the light of the wording of this provision, the general scheme, context and objectives of the Dublin Regulation, and also of the Vienna Convention:

– The definition of the term ‘residence document’ does not provide a clear answer to this question.

  The Dublin Regulation requires a residence document only in general terms, without expressly stating that it must be a document issued under national law. Furthermore, it must be an authorisation issued by the authorities of a Member State to reside on its territory, without specifying what that authorisation must entail.

– The general scheme, context, objectives and history of the adoption of the Dublin Regulation are not conclusive either.

  The Dublin Regulation aims to establish a clear and workable method for determining the Member State responsible for an application for international protection (recitals 4 and 5). The case-law of the Court of Justice indicates, inter alia, that the Dublin Regulation seeks to avoid ‘forum shopping’ and that the responsibility for examining such an application lies with the Member State which a foreign national first entered or stayed in upon entering in the territory of the Member States. In the same vein, the Court of Justice has held that, in an area where there is freedom of movement, each Member State is answerable to all the other Member States for its actions concerning the entry and residence of third-country nationals. Each Member State must therefore bear the consequences thereof in accordance with the principles of solidarity and fair cooperation (see, inter alia, the judgments of 26 July 2017, Jafari, C-646/16, EU:C:2017:586, paragraphs 87-88; of 7 June 2016, *Ghezelbash*, C-63/15, EU:C:2016:409, paragraph 54; and of 21 December 2011, *N.S. and Others*, Joined Cases C-411/10 and C-493/10, EU:C:2011:865, paragraph 79).

– The Vienna Convention lays down the rules governing diplomatic relations.

Unlike the case of the head of the diplomatic mission, in the case of other members of the diplomatic staff and their families, the Ministry for Foreign Affairs has only to be notified of their appointment, arrival, final departure or termination of their functions. Prior notification of arrival and departure is not required. The sending State may freely appoint diplomatic staff (Articles 4, 7 and 10). The consequence of such appointment, which confers diplomatic status, is that the diplomat and his or her family members are entitled to the privileges and immunities provided for in this Convention, including the right to reside in the receiving State (Article 39). This Convention obliges the States Parties to the Convention to permit the residence of diplomatic staff and their families. The establishment of their right of residence does not depend on the issuing or refusal of a residence document by the receiving State.

14 In the light of the foregoing, the referring court arrives at two possible interpretations:

– A diplomatic card is a residence document, as a result of which Member State X is responsible for examining applications for international protection.

– A diplomatic card is not a residence document, as a result of which the Netherlands is responsible for examining the aforementioned applications.

Possibility 1: a diplomatic card is a residence document

15 This interpretation is in line with the principle that the responsibility for examining an application for international protection lies with the Member State which a foreign national first entered or stayed in upon entering in the territory of the Member States (judgment of 26 July 2017, *Jafari*, C-646/16, EU:C:2017:586, paragraph 87, and the Explanatory Memorandum to the Proposal for Dublin III (COM(2008) 820 final, bullet point 3).

16 In the present case, the foreign nationals have the strongest connection with Member State X. They entered in the territory of the Member States by virtue of the diplomatic relations between the sending State and Member State X, where they also worked and lived for several years. A different interpretation would mean that foreign nationals who work as diplomatic staff in a Member State and then wish to lodge an application for international protection, have a choice as to the Member State in which to do so. The establishment of uniform mechanisms and criteria for determining the Member State responsible seeks to prevent precisely this (judgment of 2 April 2019, *H. and R.*, Joined Cases C-582/17 and C-583/17, EU:C:2019:280, paragraph 77).

Possibility 2: a diplomatic card is not a residence document

17 It appears to follow from the Vienna Convention that, in the international movement of diplomats, it is not within the powers of the receiving State to grant or to refuse permission for diplomats to stay on its territory.

18 In the present case, the father was appointed by the sending State as a staff member of the diplomatic mission in Member State X, by which he and his family acquired diplomatic status. Their right of residence in Member State X was a privilege based on that diplomatic status. They derived this privilege directly – without the intervention of the authorities of Member State X – from the Vienna Convention. The diplomatic card merely confirms the foreign nationals' pre-existing right of lawful residence in Member State X. According to the referring court, that strongly supports the interpretation that a diplomatic card does not constitute a residence document within the meaning of the Dublin Regulation.

Conclusion

19 According to the referring court, it is not possible to give an unambiguous answer to this question. That answer cannot be deduced directly from the applicable provision of the Dublin Regulation, the system established by that regulation and the relevant rules of international law. Nor is there any case-law of the Court of Justice on the Dublin Regulation that provides clarity on this point. Furthermore, it appears that Member States have different practices.

20 Although the referring court takes the view that, in the present case, there is no question of authorisation by the authorities of Member State X, and therefore also not of a residence document, the referring court considers that, in view of the objectives and principles of the Dublin Regulation, a different interpretation cannot be ruled out.