

Case C-528/21**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:**

26 August 2021

Referring court:

Fővárosi Törvényszék (Budapest High Court, Hungary)

Date of the decision to refer:

19 July 2021

Applicant:

M.D.

Defendant:

Országos Idegenrendészeti Főigazgatóság Budapesti és Pest Megyei Regionális Igazgatósága (Budapest and Pest Regional Directorate of the National Directorate of the Immigration Police, Hungary)

Subject matter of the main proceedings

Judicial review of the lawfulness of an entry and residence ban ordered on grounds of national security against a third-country national who has been legally resident in Hungary for a long time and who is a family member of an EU citizen (specifically, an ascendant relative of a Hungarian citizen who is a minor).

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

Interpretation of Articles 5, 11 and 13 of Directive 2008/115/EC and of Article 20 TFEU, in conjunction with Articles 7, 21, 24 and 47 of the Charter.

Legal basis: Article 267 TFEU

Questions referred for a preliminary ruling

1) Are Articles 5 and 11 of Directive 2008/115/EC and Article 20 TFEU, in conjunction with Articles 7, 20, 24 and 47 of the Charter, to be interpreted as precluding a practice of a Member State which extends the application of a legislative amendment to fresh proceedings initiated by virtue of a court order made in previous proceedings, where, as a result of that legislative amendment, a third-country national who is a family member of an EU citizen is made subject to much less favourable procedural rules, such that that person loses the status of a person who may not be returned even on grounds of public policy, public safety or national security, which that person had attained on account of the duration of his residence up to that point; that person's application for a permanent residence card is then refused on the basis of that factual situation and on grounds of national security; and that person has the residence card issued in his favour withdrawn and is subsequently made subject to an entry and residence ban without consideration of his personal and family circumstances in any of the proceedings (particularly, in this context, the fact that the person concerned also has a dependent minor child who is a Hungarian citizen), as a result of which either the family unit is broken up or the EU citizens who are family members of the third-country national, including his minor child, are required to leave the territory of the Member State?

2) Are Articles 5 and 11 of Directive 2008/115 and Article 20 TFEU, in conjunction with Articles 7 and 24 of the Charter, to be interpreted as precluding a practice of a Member State pursuant to which the personal and family circumstances of a third-country national are not examined before the imposition on that third-country national of an entry and residence ban, on the grounds that residence by that person, who is a family member of an EU citizen, presents a real, immediate and serious threat to the country's national security?

In the event of an affirmative answer to questions 1 or 2:

3) Are Article 20 TFEU and Articles 5 and 13 of Directive 2008/115, in conjunction with Articles 20 and 47 of the Charter, and recital 22 of Directive 2008/115, which states that the obligation to take into account the best interests of the child should be a primary consideration, and recital 24 of that directive, which requires that the fundamental rights and principles enshrined in the Charter must be guaranteed, to be interpreted as meaning that, where, in the event that the national court declares, on the basis of a ruling of the Court of Justice of the European Union, that the law of the Member State or the practices of the immigration authorities based on that law are contrary to EU law, that court may, when examining the legal basis of the entry and residence ban, take into account, as an acquired right of the applicant in the present case, the fact that, under the rules of the a szabad mozgás és tartózkodás jogával rendelkező személyek beutazásáról és tartózkodásáról szóló 2007. évi I. törvény (Law I of 2007 on the entry and residence of persons having the right of free movement and residence; 'Law I of 2007'), the applicant had achieved what was necessary for the purposes

of application of Article 42 of that Law, namely more than 10 years' legal residence in Hungary, or, when reviewing the grounds for the issue of the entry and residence ban, must that court base the consideration taken of family and personal circumstances directly on Article 5 of Directive 2008/115 in the absence of provisions in that respect in the a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról szóló 2007. évi II. törvény (Law II of 2007 on the entry and residence of third-country nationals; 'Law II of 2007')?

4) Is a practice of a Member State whereby, in proceedings brought by a third-country national who is a family member of an EU citizen, exercising his right of appeal, the immigration authorities do not comply with a final judgment which orders immediate judicial protection against the enforcement of the decision [of those authorities] who claim that they have already entered in the Schengen Information System (SIS II) a description relating to the entry and residence ban, as a consequence of which the third-country national who is a family member of an EU citizen is not entitled to exercise in person the right of appeal or to enter Hungary while the proceedings are in progress before a final judgment has been given in his case, compatible with EU law, in particular with the right to an effective remedy guaranteed in Article 13 of Directive 2008/115 and with the right to a fair trial enshrined in Article 47 of the Charter?

Provisions of European Union law relied on

Article 20 of the Treaty on the Functioning of the European Union (TFEU)

Articles 7, 20, 21, 24 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter')

Directive 2008/115/EC 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, in particular recitals 22 and 24 and Articles 5, 11 and 13

Provisions of national law relied on

A szabad mozgás és tartózkodás jogával rendelkező személyek beutazásáról és tartózkodásáról szóló 2007. évi I. törvény (Law I of 2007 on the entry and residence of persons having the right of free movement and residence; 'Law I of 2007'), Articles 33, 42 and 94

A harmadik országbeli állampolgárok beutazásáról és tartózkodásáról szóló 2007. évi II. törvény (Law II of 2007 on the entry and residence of third-country nationals; 'Law II of 2007'), Articles 43, 44 and 45

Succinct presentation of the facts and procedure in the main proceedings

- 1 In 2002, the applicant, a Kosovo Serb national, arrived in Hungary, where he lives with his mother, his partner who is a Hungarian national, and his son, a minor of Hungarian nationality who was born in 2016. The applicant speaks good Hungarian. His lifestyle, family relationships and friendships connect him to the country. He is the head of the family. He owns a business, a property and several vehicles. He has also set up a business in Slovakia.
- 2 From 31 May 2003, the applicant held a residence permit which was renewed a number of times; he was subsequently issued with a residence card, valid until 20 May 2021, because he has a minor child of Hungarian nationality.
- 3 On 12 June 2018, the applicant applied for a permanent residence card which the defendant refused to grant, stating that the applicant's right of residence had expired. The defendant based its decision on an opinion of the Alkotmányvédelmi Hivatal (Constitutional Protection Office, Hungary), according to which the applicant's conduct – a previous (suspended) prison sentence for committing the offence of encouraging illegal immigration by offering assistance to cross the border without permission – presented a real, immediate and serious threat to national security and he should therefore leave the country.
- 4 The court before which the appeal was brought annulled the decision, including the first-tier decision, and ordered the immigration authorities to conduct a new procedure, stating that those authorities could not base their decision on the decision of the Constitutional Protection Office which had not acted in the matter as a specialist authority. The court ordered that, in the context of the new procedure, the immigration authorities should weigh up all the circumstances of the case, taking account primarily of the fact that the applicant and his partner live in Hungary in a home with their son, who is a minor of Hungarian nationality.
- 5 By the decision it gave in the new procedure, the defendant withdrew the applicant's residence card. The defendant stressed that, in the light of the legislative changes that had taken place on 1 January 2019, the new procedure had been conducted under Article 94(4)(b) of Law I of 2007, which is a mandatory provision. The defendant also pointed out that it could not diverge from the content of the opinions of the specialist authority and that it had no margin of discretion.
- 6 The Fővárosi Törvényszék (Budapest High Court, Hungary), which heard the applicant's appeal, dismissed that appeal by a judgment which was confirmed by the Kúria (Supreme Court, Hungary), stating that, given that, in the applicant's case, there were grounds of national security, the immigration authorities had no margin of discretion when they acted.
- 7 On 24 September 2020, the applicant left Hungarian territory. The defendant imposed an entry and residence ban on him for a period of three years and ordered that a description of that ban be entered in the Schengen Information System (SIS

II). The defendant stated that, in accordance with Law II of 2007, residence by the applicant, a third-country national, presented a threat to Hungary's national security, as a result of which it considered his return a proportionate restriction, even though he also had a valid Slovakian residence permit.

The essential arguments of the parties in the main proceedings

- 8 The applicant submits that the defendant did not comply with its obligation to clarify the facts, to conduct an assessment and to provide reasons when it relied solely on the proposal of the Constitutional Protection Office without taking account of Article 11 of Directive 2008/115 and Article 45(1) of Law II of 2007, which require consideration of personal and family circumstances.
- 9 The defendant claims that the appeal should be dismissed, arguing that it adopted its decision on the basis of the mandatory provisions of Article 43 of Law II of 2007, which provides that an autonomous entry and residence ban must be imposed on any third-country national who is resident abroad and whose entry and residence threaten national security, and which also stipulates that the proposals of bodies responsible for national security are mandatory. Furthermore, given that the applicant's residence permit, which had been issued to him in the light of his family relationship, had already been withdrawn, the defendant also had no statutory obligation to weigh up the applicant's family circumstances.

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

- 10 Under Law I of 2007, in force prior to 1 January 2019, third-country nationals who were family members of Hungarian citizens who had not exercised their right of free movement were entitled to reside in Hungary under the same conditions as third-country nationals who were family members of citizens of the European Economic Area (EEA) who had exercised their right of free movement.
- 11 However, the legislative amendment of 1 January 2019 provided that the provisions of Law II of 2007, instead of those of Law I of 2007, were to apply to procedures commenced and repeated after the entry into force of the amending Law where those procedures relate to the entry and residence of third-country nationals who are family members of Hungarian citizens. Accordingly, since that time, those family members have been subject to less favourable rules and are treated in the same way as third-country nationals who do not have family members of Hungarian nationality or the nationality of an EEA Member State.
- 12 The legislative amendment also made it possible to order the return, on grounds of national security, public safety or public order, of third-country nationals who are family members of Hungarian citizens and who have resided in Hungary for a long time, without weighing up their family and personal circumstances and thus without taking into account the case-law of the Court of Justice of the European

Union, inter alia the judgment of 11 March 2021, *Etat belge* (Return of the father of a minor) (C-112/20, EU:C:2021:197).

- 13 The referring court harbours doubts regarding whether, in the case of third-country nationals who are family members of Hungarian citizens and who have resided for long time in Hungary, the legislative amendment or the way in which it is applied are compatible with the guarantee of EU citizens' right of freedom of movement and freedom of residence enshrined in Article 20 TFEU, and of the derived right of family members, and with Articles 7, 21, 24 and 47 of the Charter, in conjunction with the judgment of the Court of Justice of 8 May 2018, *K.A. and Others* (Family reunification in Belgium) (C-82/16, EU:C:2018:308).
- 14 According to the referring court, the application of the amending Law to repeated procedures is contrary to EU law but, in the present case, as a result of the case-law of the Kúria (Supreme Court), it is not possible to disapply national law.
- 15 The referring court also asks whether account may be taken of the fact that the applicant had been residing legally in the country for more than 10 years in accordance with Article 42(1) of Law I of 2007, applicable until 1 January 2019, and whether Directive 2008/115 must be interpreted as meaning that, if an entry and residence ban has been issued autonomously, that court, for the purposes of examining family and personal circumstances, may, in the absence of national provisions, base its decision directly on Article 5 of the directive, in addition to disapplying national law.
- 16 Regard being had to the fact that there are considerable differences in the domestic case-law of the national courts in relation to these matters, that is to say that, owing to the Member State's legal practice, the correct application of EU law is not so obvious as to leave no room for reasonable doubt; the referring court thus considers that an interpretation of EU law is necessary for the purposes of adjudicating on the case, in line with the *acte clair* doctrine.
- 17 In view of the fact that the applicant, who is currently in Austria, is unable to travel to Hungary due to the entry and residence ban, and regard being had to the best interests of his son who is a minor, the referring court requests that the questions referred be dealt with under the urgent procedure.