

Case C-63/23

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:

6 February 2023

Referring court:

Juzgado Contencioso-Administrativo n.º 5 de Barcelona (Spain)

Date of the decision to refer:

9 January 2023

Applicants:

Sagrario

Joaquín

Prudencio

Defendant:

Subdelegación del Gobierno en Barcelona

Subject matter of the main proceedings

Family reunification – Refusal to grant or renew a residence permit as a reunited family member – Unlawful residence – Particularly difficult circumstances – Prior assessment of personal circumstances – Child’s best interests – Autonomous residence permit

Subject matter and legal basis for the reference

Request for a preliminary ruling – Article 267 TFEU – Compatibility of a national provision with Directive 2003/86/EC – Article 15(3) – Article 17 – Refusal to grant or renew a residence permit as a reunited family member – Unlawful residence – Particularly difficult circumstances – Prior assessment of personal circumstances – Autonomous residence permit – Articles 7 and 24, Article 33(1) and Article 47 of the Charter of Fundamental Rights of the European Union –

Child's best interests – Article 6(1) and Article 8(1) and (2) of the European Convention on Human Rights

Questions referred for a preliminary ruling

1. Must Article 15(3), *in fine*, and Article 17 of Directive 2003/86, when they refer to 'particularly difficult circumstances', be understood as automatically including all circumstances involving a minor and/or circumstances that are similar to those provided for in Article 15?
2. Is national legislation that does not provide for the grant of an autonomous residence permit, which ensures that reunited family members are no longer unlawful residents in the event of such particularly difficult circumstances, compatible with Article 15(3), *in fine*, and Article 17 of Directive 2003/86?
3. Can Article 15(3), *in fine*, and Article 17 of Directive 2003/86 be interpreted as meaning that that right to an autonomous permit arises when the reunited family is left without a residence permit for reasons beyond their control?
4. Is national legislation that does not provide for the necessary and mandatory assessment of the circumstances set out in Article 17 of Directive 2003/86 before a refusal to renew the residence permit of reunited family members compatible with Article 15(3) and Article 17 of that directive?
5. Is national legislation that does not provide, as a step that must be taken before the refusal to grant or renew a residence permit as a reunited family member, for a specific procedure for hearing minors, where the grant or renewal of the sponsor's residence permit has been refused, compatible with Article 15(3) and Article 17 of Directive 2003/86, Article 6(1) and Article 8(1) and (2) of the European Convention on Human Rights, and Articles 47, 24, 7 and Article 33(1) of the Charter of Fundamental Rights of the European Union?
6. Is national legislation that does not provide, as a step that must be taken before the refusal to grant or renew a residence permit as a reunited spouse, where the grant or renewal of the sponsor's residence permit has been refused, for that spouse to be able to plead the circumstances provided for in Article 17 of Directive 2003/86 in order to request that he or she be granted an option to remain resident without interruption vis-à-vis his or her previous residence status compatible with Article 15(3) and Article 17 of Directive 2003/86, Article 6(1) and Article 8(1) and (2) of the European Convention on Human Rights, and Articles 47, 24, 7 and Article 33(1) of the Charter of Fundamental Rights of the European Union?

Provisions of European Union law relied on

Judgment of the Court of Justice of the European Union of 27 June 2006, *Parliament v Council*, C-540/03, EU:C:2006:429

Judgment of the Court of Justice of the European Union of 14 March 2019, *Y.Z. and Others (Fraud in family reunification)*, C-557/17, EU:C:2019:203

Recitals 2 and 11 of Directive 2003/86/EC

Article 5(5), Article 15(3), Article 16(3) and Articles 17 and 18 of Directive 2003/86/EC

Article 24(1) and (2) of the Charter of Fundamental Rights of the European Union

Article 6 of the European Convention on the Exercise of Children's Rights

Provisions of national law relied on

Article 19 of Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social (Organic Law 4/2000 of 11 January on the rights and freedoms of foreign nationals in Spain and their social integration), as amended by Organic Law 2/2009 ('Organic Law 4/2000'). That article governs the effects of family reunification in special circumstances, including residence and work permits, and separate residence permits for spouses and children.

First additional provision, paragraph 4, of Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social (Royal Decree 557/2011 of 20 April 2011 approving the Regulations made under Organic Law 4/2000 on the rights and freedoms of foreign nationals in Spain and their social integration), as amended by Organic Law 2/2009 ('Royal Decree 557/2011'). That provision makes it possible to issue temporary residence and/or work permits where justified by economic, social or employment circumstances and in cases of particular importance that have not been determined [by legislation], and to grant individual temporary residence permits in the event of exceptional circumstance not provided for in those regulations.

Article 58(3) of Royal Decree 557/2011. That article governs the validity of the residence permit for reunited family members in accordance with the sponsor's residence permit.

Article 59 of Royal Decree 557/2011. That article governs the residence of reunited family members independently of the residence of the sponsor and, *inter alia*, the conditions, circumstances and duration of that residence.

Article 61 of Royal Decree 557/2011. That article governs the renewal of residence permits for the purposes of family reunification and, inter alia, the formalities and conditions for the application [for a residence permit], the duration of the permit, the requirements for obtaining the permit in relation to the sponsor and the reunified family member, the supporting documents required and other information to be assessed by the authorities for the renewal of the residence permit.

Brief summary of the facts and the main proceedings

- 1 The applicant and her two minor children held a residence permit for the purposes of family reunification after having been reunited with her husband and their father, respectively.
- 2 On 22 April 2021, all family members submitted an application for a long-term residence permit. By decision of the Subdelegación del Gobierno en Barcelona (Representation of the Spanish State in Barcelona) of 27 May 2021, the sponsor was refused a residence permit due to the existence of a criminal record. Next, by decision of the Representation of the Spanish State in Barcelona of 22 June 2021, the applicant and her two minor children were refused the long-term residence permit because the sponsor did not have a work and/or residence permit, which was contrary to the requirements of Article 61(3)(b)(1) of Royal Decree 557/2011.

Essential arguments of the parties in the main proceedings

- 3 The parties' arguments are not set out in the order for reference.

Brief summary of the reasoning in the request for a preliminary ruling

- 4 Article 15 of Directive 2003/86/EC ('the Directive') provides for the possibility of granting an autonomous residence permit to reunited family members in certain cases. Article 16(3) of the Directive provides that Member States may withdraw or refuse to renew the residence permit of a family member in certain circumstances and in accordance with Article 15. Those provisions were reproduced in Article 59 of Royal Decree 557/2011, paragraph 3 of which states that residence permits are to be granted without interruption.
- 5 Article 15 of the Directive, to which Article 16(3) refers, adds that the 'Member States shall lay down provisions ensuring the granting of an autonomous residence permit in the event of particularly difficult circumstances'. Those difficult circumstances have not been determined by Spanish legislation.
- 6 The first additional provision of Royal Decree 557/2011, in paragraph 4, provides for the grant of residence permits in exceptional cases not provided for in the Regulations made under Organic Law 4/2000. However, it does not appear that

those provisions are compatible with the Directive, since they introduce a discretionary decision [in which those provisions are capable] of broad interpretation which does not preclude automatic decision-making – prohibited by the CJEU – and which, at the same time, falls outside the jurisdiction of the administrative body belonging to the Administración periférica del Estado (Peripheral State Administration [– the administration of the central State’s regional representation]), since it comes under the jurisdiction of the central State administration.

- 7 By its case-law, the CJEU requires Member States to assess the personal circumstances of the persons concerned and prohibits them from making decisions automatically on measures to withdraw residence permits. Thus, for example, the judgment of 27 June 2006, *Parliament v Council* (C-540/03, EU:C:2006:429), by obliging national authorities to take into account the particular circumstances of each case, pursuant to Article 5(5) and Article 17 of the Directive, ensures the compatibility of the provisions of the Directive with fundamental rights.
- 8 However, Spanish legislation does not establish any procedure whereby the persons concerned may rely on the personal circumstances referred to in Article 17 of the Directive and which, at the same time, gives the minor child a prior hearing, in accordance with Article 6 of the European Convention on the Exercise of Children’s Rights. Therefore, decisions are made without taking into account the personal situation of reunited persons, generally minors and women, who instantly find themselves to be unlawful residents.
- 9 In the referring court’s view, reunited family members who have lost their residence permit for reasons beyond their control could be regarded as being in particularly difficult circumstances. This is particularly so in the case of minors or persons who are in a situation of structural discrimination in the society from which they come, as is the case for women from certain countries where that gender is unprotected.
- 10 Since Article 15(3) uses an imperative formulation – ‘shall lay down’ – the referring court considers that national law should determine ‘particularly difficult circumstances’. In so doing, it would be possible to apply Article 15(3) of the Directive to cases where residence permits are lost due to reasons beyond the control of the reunited family members, as is the case in the main proceedings. Moreover, the loss of the residence permit would, in any event, take place after an assessment of the personal and family situation of the reunited family member, as required by Article 17 of the Directive.
- 11 In the referring court’s view, the Spanish authorities merely refused the residence permit without assessing the nature and solidity of the person’s family relationships, the duration of the residence and the existence of family, cultural and social ties with the country where they reside and the country of origin, which is contrary to EU law.