Case C-767/23 [Remling] [i]

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:

13 December 2023

Referring court:

Raad van State (Netherlands)

Date of the decision to refer:

13 December 2023

Appellant:

A. M.

Respondent:

Staatssecretaris van Justitie en Veiligheid

Subject matter of the main proceedings

Appeal against a judgment of the rechtbank (District Court), by which an application of a foreign national based on Article 20 of the Treaty on the Functioning of the European Union for a derived right of residence was rejected and the rechtbank did not accede to the foreign national's request to refer questions for a preliminary ruling.

Subject matter and legal basis of the request

Interpretation of the third paragraph of Article 267 of the Treaty on the Functioning of the European Union, in particular the scope of the obligation to state reasons where there is an exception, recognised by the case-law of the Court of Justice, to the obligation of a national court or tribunal whose decisions are not amenable to appeal to refer questions for a preliminary ruling.

[i] This is a fictitious name which does not correspond to the real name of any party to the proceedings.

Questions referred for a preliminary ruling

Must the third paragraph of Article 267 of the Treaty on the Functioning of the European Union, read in the light of the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, be interpreted as precluding national legislation such as Article 91(2) of the Vreemdelingenwet 2000 (Law on foreign nationals of 2000), under which the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State), as a national court whose decisions are not amenable to appeal, can rule summarily, without substantiating which of the three exceptions to its obligation to refer occurs, on a question raised about the interpretation of EU law, whether or not in conjunction with an explicit request for a preliminary ruling?

Provisions of European Union law and international law relied on

Treaty on European Union: Article 6

Treaty on the Functioning of the European Union ('TFEU'): Article 267

Charter of Fundamental Rights of the European Union ('the Charter'): Articles 47 and 52

Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'): Article 6

Case-law of the Court of Justice relied on

Judgment of 6 October 1982, *CILFIT* v *Ministero della Sanità*, 283/81, EU:C:1982:335

Judgment of 6 September 2012, *Trade Agency*, C-619/10, EU:C:2012:531

Judgment of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565

Judgment of 9 September 2015, *X* and *van Dijk*, C-72/14 and C-197/14, EU:C:2015:564

Judgment of 15 March 2017, *Aquino*, C-3/16, EU:C:2017:209 ('the judgment in *Aquino*')

Judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354 ('the judgment in *Chavez-Vilchez*')

Judgment of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, EU:C:2019:982

Judgment of the Court of Justice of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C-561/19, EU:C:2021:799 ('the judgment in *Consorzio*')

Judgment of 29 June 2023, *International Protection Appeals Tribunal and Others (Attack in Pakistan)*, C-756/21, EU:C:2023:523

Opinion of Advocate General Richard de la Tour in Joined Cases *Staatssecretaris van Justitie en Veiligheid (Ex officio review of detention)*, C-704/20 and C-39/21, EU:C:2022:489

Case-law of the European Court of Human Rights relied on

Judgment of 2 October 2014, *Hansen v. Norway*, CE:ECHR:2014:1002JUD001531909 ('the judgment in *Hansen*')

Judgment of 24 April 2018, *Baydar v. the Netherlands*, CE:ECHR:2018:0424JUD005538514 ('the judgment in *Baydar*')

Judgment of 11 April 2019, *Harisch v. Germany*, CE:ECHR:2019:0411JUD005005316 ('the judgment in *Harisch*')

Judgment of 24 March 2022, *Zayidov v. Azerbaijan (No. 2)*, CE:ECHR:2022:0324JUD000538610 ('the judgment in *Zayidov*')

Judgment of 30 June 2022, *Rusishvili v. Georgia*, CE:ECHR:2022:0630JUD001526913 ('the judgment in *Rusishvili*')

Provisions of national law relied on

Vreemdelingenwet 2000 (Law on foreign nationals of 2000; 'the Vw 2000'): Articles 9(1), 83c(1), 84 and 91(2)

Algemene wet bestuursrecht (General Administrative Law Act; 'the Awb'): Articles 8:10, 8:104 and 8:105

Succinct presentation of the facts and procedure in the main proceedings

1 By a decision of 8 October 2019, the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands) rejected A.M.'s application for the issue of a document within the meaning of Article 9(1) of the Vw 2000 certifying lawful residence as a Union citizen. By a judgment of 5 March 2021, the rechtbank declared A.M.'s appeal against that decision unfounded. A.M. has lodged an appeal against that judgment.

2 A.M. relies on a derived right of residence based on Article 20 TFEU, as the Court of Justice recognised in, inter alia, the judgment in *Chavez-Vilchez*. According to A.M., the rechtbank erred in not addressing his argument that it should have made a request for a preliminary ruling to the Court of Justice due to divergence in the national case-law on the burden of proof in relation to that right of residence. He requests the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State; 'the Division') still to refer questions to the Court of Justice for a preliminary ruling. The Division considers that an exception to its obligation to refer questions for a preliminary ruling is applicable (*acte éclairé*), since the answer to A.M.'s question on the interpretation of the applicable EU law is apparent from the case-law of the Court of Justice, even though other national courts seem to favour a different interpretation. It wishes to rule on this case with a summarily reasoned ruling pursuant to Article 91(2) of the Vw, without substantiating why it is not referring questions to the Court of Justice for a preliminary ruling.

The essential arguments of the parties in the main proceedings

3 According to A.M., the Division's intention to rule with a summarily reasoned ruling is contrary to EU law. The Division must, on the basis of paragraph 51 of the judgment in *Consorzio*, state the reasons why it is not obliged to make a reference and which of the three exceptions recognised by the case-law of the Court of Justice (*acte clair*, *acte éclairé*, question irrelevant for the resolution of the dispute) applies. A.M. emphasises in that regard the importance of transparency in relation to the legal argumentation for a refusal to refer questions for a preliminary ruling and the risk of an incorrect interpretation of EU law, which is aggravated by an inadequate statement of reasons for that refusal.

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

4 A national court whose decisions are not amenable to appeal must, as a general rule, state the reasons why it is not obliged to refer to the Court of Justice a question about the interpretation of EU law. This follows from paragraph 51 of the judgment in *Consorzio*. The Netherlands legislature has granted the Division the power, in certain cases, to rule on appeals in immigration cases with a summary statement of reasons. In such a summarily reasoned ruling, the Division confines its statement of reasons to the finding that the appeal is unsuccessful, without substantiating that finding further. It therefore also lacks an answer to a question raised by the parties about the interpretation of EU law and, by extension, the reason why the Division refuses to accede to a possible request to refer questions to the Court of Justice for a preliminary ruling.

5 The Division considers that its practice of summary statements of reasons in immigration law satisfies the requirements to state reasons under EU law and the requirements of a fair hearing as laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'). However,

it considers that paragraph 51 of the judgment in *Consorzio* leaves room for doubt. That consideration by the Court of Justice may be interpreted in several ways. The Division is therefore uncertain whether it, even with a summary statement of reasons, is obliged, under the third paragraph of Article 267 TFEU, read in the light of the second paragraph of Article 47 of the Charter, to state the reasons why it is not referring questions to the Court of Justice for a preliminary ruling.

The legal power to provide a summary statement of reasons; background and context

6 Article 91(2) of the Vw 2000 confers on the Division the power to confine its decision to the finding that a complaint raised is not capable of leading to the setting aside of the judgment of the rechtbank, without giving any further reasons. With a summarily reasoned ruling, the Division does not necessarily endorse the reasoning of the judgment of the rechtbank, but does endorse the outcome of that judgment. The Division can reach the same outcome on other grounds. The first condition for providing a summary statement of reasons is therefore that the appeal is unfounded and the judgment of the rechtbank is not set aside. Moreover, the Division uses this power only if there are no questions requiring a general answer in order to ensure the uniformity and development of the law or in the interests of judicial protection. That is the second condition.

7 The Division states, first, that each Member State makes its own choices in order to safeguard judicial protection, the development of the law, legal certainty and the proper administration of justice. EU law does not require that appeals be made possible, nor does it require that such appeals take a particular form. When the Vw 2000 entered into force, the legislature in the Netherlands opted to enable appeals in matters relating to the law on foreign nationals with a low admissibility threshold, combined with the possibility of ruling on such appeals with a summary statement of reasons. Since then, appeals have in principle been possible in all matters relating to the law on foreign nationals (Article 8:105 in conjunction with Article 8:104 of the Awb).

8 By introducing the possibility of appeals in immigration cases before the Division, the legislature was attempting to ensure the uniformity of the law. Although the Division rules on the substance of any admissible appeal, it was entrusted with the task of concentrating on questions requiring a general answer in order to ensure the uniformity and development of the law or in the interests of judicial protection. The power to provide a summary statement of reasons in cases where such questions are not raised ensures the quality and workability of this system.

9 The *travaux préparatoires* relating to the Vw 2000 emphasised that this new procedure constituted an extension of the judicial protection of foreign nationals due to the introduction for the first time of immigration appeals. At the same time, the Division was put in a position to deal quickly and efficiently with the large number of cases that were expected by being entitled to confine itself to a summary statement of reasons in the absence of questions requiring a general

answer in order to ensure the uniformity and development of the law or in the interests of judicial protection. The system therefore complies with the requirements of Article 6 of the ECHR while allowing the Division to fulfil its statutory function and to adequately ensure the uniformity of the law. The possibility of ruling on an appeal with a summary statement of reasons must therefore be considered in conjunction with appeals in which it provides a full statement of reasons.

10 Over the last three years, from 2020 to 2023, the Vreemdelingenkamer (Foreign Nationals Division) delivered on average over 3 800 decisions in cases in main proceedings per year. The Division currently uses summary reasoning in approximately 85% of immigration rulings. In view of the importance of EU law for immigration law, many requests to refer questions for a preliminary ruling are made on appeal. It may take a relatively long time for the Division to justify why it is not required to refer questions on the substance of the case for a preliminary ruling. Such a justification requires a statement of reasons which is adapted to the substance of the case by reference to the grounds of the dispute and the facts of the case. If the Division considers that the judgment of the rechtbank must be upheld and that there are also no questions requiring a general answer in order to ensure the uniformity and development of the law or in the interests of judicial protection, the power to reason summarily in that context enables it to deal quickly and efficiently with a considerable number of appeals.

11 The Division makes use of the power to reason summarily in the following two situations. First, the Division confines itself to a summary statement of reasons in cases where the parties are challenging a ruling by which the rechtbank applies settled case-law of the Division, without explaining why such an application by the rechtbankis erroneous or defective or is no longer viable in the light of recent developments. Second, the Division confines itself to a summary statement of reasons in cases where the parties' complaints are legitimately raised, but the Division nevertheless considers that the grounds of complaint cannot lead to the setting aside of the contested judgment because the outcome would not be different if the judgment of the rechtbank were not vitiated by the defects identified in the notice of appeal. These include, for example, complaints regarding failure by the rechtbank accurately to reproduce or expressly to discuss a ground of appeal, reasoning of the rechtbank that is not straightforwardly comprehensible, or failure to reproduce a foreign national's personal details or reasons for making an asylum claim in full or accurately.

12 In all these cases, there is no ground for the setting aside of the judgment of the rechtbank, nor are there any questions concerning the uniformity and development of the law or judicial protection in a general sense; that is, there are no questions of law requiring a preliminary reference. Once questions of EU law which are relevant to the resolution of the dispute and are not covered by the other exceptions of *acte clair* or *acte éclairé* are raised, the Division cannot reason summarily.

13 The summary statement of reasons provided by the Division does not affect the judicial protection of the foreign national concerned. Indeed, the substance of each immigration case is examined in detail by the rechtbank. In addition, the rechtbank always rules with a full statement of reasons; summary reasoning is not possible at first instance. The judicial protection of the foreign national is also guaranteed on appeal to the Division. In any event, the assessment of the Division that a judgment of the rechtbank is upheld is still based on a comprehensive assessment of the substance of the appeal, even if that assessment does not appear in the summary reasoning for the ruling. In their assessment, the judges responsible for ruling on the case are to take into account the notice of appeal, where appropriate the reaction of the opposing party, the judgment of the rechtbank and the procedural file containing the documents from the hearing of the appeal before the rechtbank and the administrative stage. They have access to the complete file containing all the relevant documents in that case. If the Division concludes that application of the summary statement of reasons is not possible, a fully reasoned judgment will follow.

Article 47 of the Charter and Article 6 ECHR

14 The first and second paragraphs of Article 47 of the Charter recognise the right of everyone to a fair trial and to an effective remedy before a tribunal. It is apparent from Article 52(3) of the Charter that the meaning and scope of Article 47 of the Charter are at least the same as those laid down by Article 6(1) of the ECHR. The right to a fair trial provided for in that provision includes, in particular, the right to an adequately reasoned judgment from which it is apparent that the court has truly heard the requests and observations of the parties (judgment in *Zayidov*, paragraph 91). That does not mean, however, that the court is required to give a detailed answer to every argument. The European Court of Human Rights (ECtHR) also examines the role of the relevant judicial body, for example the appellate court or a leave system in which the supreme national court must grant leave to appeal (judgments in *Rusishvili*, paragraphs 74 and 75, and *Hansen*, paragraphs 73 and 74).

15 In the context of the general obligation to state reasons, the ECtHR has ruled on the statement of reasons for a decision to refuse a request that a reference be made to the Court of Justice for a preliminary ruling. It follows from this that (a) the court of last instance must specify on which of the three exceptions it is basing its refusal of the request (b) if that court has a legally granted power to rule on the case without a further statement of reasons, it shares the decision on the request to refer questions for a preliminary ruling in the overall assessment of the case and is not required to state separately the reasons why it does not make a reference. That is what the Division draws from the judgments in *Baydar* and *Harisch*. In the judgment in *Baydar*, the ECtHR accepted that summary reasoning implies recognition that a preliminary reference cannot lead to a different outcome. According to the ECtHR, ruling in this way on a request for a preliminary ruling in the circumstances described in that case is not contrary to Article 6(1) of the ECHR.

16 The method described in paragraph 13 ensures that the Division carefully examines questions raised concerning EU law as well as any request to refer questions for a preliminary ruling and, where appropriate, makes an order for reference. This constitutes a fair trial. The Division proceeds on the basis that its legal power to reason summarily complies with the general obligation to state reasons under the first paragraph of Article 47 of the Charter and Article 6 of the ECHR. It submits, provisionally, that its power to reason summarily if requested to refer questions for a preliminary ruling is also consistent with the case-law on Article 47 of the Charter.

Article 267 TFEU

17 The Division still faces the question of whether its current practice of reasoning summarily is also compatible with the third paragraph of Article 267 TFEU, read in the light of Article 47 of the Charter, when a request for a preliminary ruling has been made. It asks whether it is then required to give a more detailed statement of the reasons why it is not required to make a reference, in particular whether it must explain which exception to the obligation to make a reference applies and for what reason. In paragraph 51 of the judgment in *Consorzio*, the Court held that 'the statement of reasons for its decision must show either that the question of EU law raised is irrelevant for the resolution of the dispute, or that the interpretation of the EU law provision concerned is based on the Court's case-law or, in the absence of such case-law, that the interpretation of EU law was so obvious to the national court or tribunal of last instance as to leave no scope for any reasonable doubt'.

18 The Division understands that consideration as meaning that a summary statement of reasons is sufficient, since such a statement of reasons implies that, for one of the reasons mentioned in that paragraph, there is no obligation to refer. However, it may be inferred from several other language versions of the judgment that the statement of reasons must indicate which exception applies to the case. For example, the Italian version reads '*deve far emergere o che*' and the French version '*doivent faire apparaître soit que*'. The English version states that the statement of reasons 'must show either […], or'. The expression 'either/or' can be interpreted in an inclusive sense, in the manner of 'and/or', in which case it is not necessary to indicate which exception applies. However, it can also be interpreted in an exclusive sense as meaning that it is necessary to indicate which of the three exceptions applies.

19 It is not apparent from a summarily reasoned ruling on the merits which of the three exceptions to the obligation to refer applies. The situation is different in the case of a declaration of inadmissibility, as in the judgment in *Aquino*. In that judgment, the Court of Justice held that a court adjudicating at last instance may decline to refer a question to the Court for a preliminary ruling where an appeal on a point of law is dismissed on grounds of inadmissibility specific to the procedure before that court, subject to compliance with the principles of equivalence and effectiveness. The reason for this is that the questions referred for a preliminary

ruling are not relevant to the outcome of the dispute in cases which are declared inadmissible and the substance of which is therefore not examined. A declaration of inadmissibility therefore implies which of the three exceptions to the obligation to refer applies.

Provisional assessment by the Division

20 The Division considers that the specific obligation to state reasons referred to in paragraph 51 of the judgment in *Consorzio* likewise does not apply if a substantive judgment with a summary statement of reasons implies the existence of an exception to its obligation to refer. In that regard, it considers it important that the courts of the Member States that have a system of granting leave to appeal or that apply stricter procedural rules on admissibility choose in advance which cases will be dealt with on the substance. If national legislatures have opted for such an advance selection, a decision not to hear an appeal brought does not result in a separate judicial statement of the reasons for not making a reference for a preliminary ruling despite a request to do so [see also, in that regard, question 2 of the request for a preliminary ruling in Case C-144/23, made by the Vrhovno sodišče (Supreme Court, Slovenia)]. The purpose and effect of summary reasoning by the Division are similar to a declaration of inadmissibility or a refusal in systems for granting leave to appeal.

21 The Division proceeds on the basis that the scope of the obligation to state reasons in paragraph 51 of the judgment in *Consorzio* is not a priori more extensive for *the sole reason* that a request has been made to refer questions for a preliminary ruling. It seems absurd that an appeal in which a request has been made to refer questions for a preliminary ruling should, by definition, be provided with a more extensive statement of reasons than an appeal in which no such request has been made. In addition, the procedural power to reason summarily does not make it in practice impossible or excessively difficult to exercise the rights conferred by EU law. A summary statement of reasons implies that those rights are not at issue.