

Case C-525/23 [Accra]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:

14 August 2023

Referring court:

Fővárosi Törvényszék (Hungary)

Date of the decision to refer:

26 June 2023

Applicant:

OS

Defendant:

Országos Idegenrendészeti Főigazgatóság

Subject matter of the main proceedings

Administrative action challenging a decision relating to immigration matters.

Subject matter and legal basis of the request

Right of residence of a national of a third State – Evidence of financial provision for subsistence costs – Additional requirements relating to evidence beyond those established in EU law and not provided for in legal rules, but rather developed by the case-law of the highest court of the Member State in question – Right of the national of a third State, arising from the right to an effective remedy, to be warned, expressly and in advance, of such additional requirements

Article 267 TFEU

ⁱ The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

Questions referred for a preliminary ruling

1. Is the practice of a Member State which establishes as additional requirements for accepting that an applicant for residency, who is a national of a third State and intends to carry out voluntary work, has means of subsistence – after he has proved that his relative who is not regarded as a family member can and does provide, from his lawfully acquired income and by means of regular transfer of the amount required for subsistence, sufficient income for the applicant's subsistence and for his return travel – that the applicant must state precisely whether the amount received is income or capital and, moreover, must provide documentary evidence of the legal basis on which he acquired that income or capital and must have the amount or the capital at his disposal, as his own, on a permanent and unrestricted basis, consistent with the discretion afforded to Member States by Article 7(1)(e) of [Directive (EU) 2016/801], having regard to the objectives set out in recitals 2 and 41 and Article 1(a) and Article 4(1) of that directive?
2. Having regard to the principle of the primacy of EU law, fair treatment in accordance with Article 79 TFEU, freedom of residence as enshrined in Article 45 of the Charter [of Fundamental Rights of the European Union] and the rights to an effective remedy and to a fair trial enshrined in Article 47 of the Charter, as well as recitals 54 and 61 of [Directive 2016/801], in particular the principle of legal certainty, does the fact that, as a whole, the national legislation relating to residence permits does not contain the requirements set out in the first question referred, such that those requirements have not been established by the legislature, but rather by the highest court of the Member State in its application of the law, which has to serve as precedent, have a bearing on the answer to the first question referred?
3. To the extent that, in applying national law for the purpose of accepting that the applicant for residency has means of subsistence, the declaration and documentary evidence relating to the abovementioned requirements are also necessary, in the present case, must Article 7(1)(e) [of Directive 2016/801] be interpreted, having regard to the requirement for fair treatment laid down by Article 79 TFEU, the rights to an effective remedy and to a fair trial conferred by Article 47 of the Charter, the requirement for legal certainty referred to in recital 2 [of Directive 2016/801] and the content of recitals 41 and 42 [of that directive] with regard to procedural safeguards, as meaning that the practice of a Member State whereby that applicant is required, after being warned of the legal consequences, to state and prove coherently and consistently that he meets the additional requirements considered necessary, and whereby the application for a residence permit is refused solely on the ground that he has failed to provide evidence relating to the requirements established in the case-law, is consistent with the provisions of the

legislation only if the rights of the person concerned and the procedural safeguards have thereby been observed?

Provisions of European Union law relied on

- Article 79 TFEU
- Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (OJ 2004 L 375, p. 12) (no longer in force): Articles 6 and 7.
- Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing: recitals 2, 20, 21, 41, 42, 54 and 61 and Article 1(a), Article 2(1) and Article 7(1).
- Charter of Fundamental Rights of the European Union: Articles 45 and 47.

Provisions of national law relied on

- A harmadik országbeli állampolgárok beutazásáról és tartózkodásáról szóló 2007. évi II. törvény (Law II of 2007 on entry and residence by third-country nationals): Paragraph 2(d), Paragraph 13(1)(f) and Paragraph 87(1).

Paragraph 2(d) of the provisions relied on establishes which relatives are, for the purposes of that law, considered to be family members of the national of a third State. Paragraph 13 regulates stays of more than ninety days within a period of one hundred and eighty days. Under Paragraph 13(1)(f), nationals of a third country may remain in Hungary's territory for that period, if, during the whole of their stay, they have sufficient resources to cover their subsistence costs and accommodation, including the cost of return travel.

- A harmadik országbeli állampolgárok beutazásáról és tartózkodásáról szóló 2007. évi II. törvény végrehajtásáról szóló 114/2007. (V. 24.) Korm. Rendelet (Government Decree 114/2007, of 24 May, approving the implementing regulations for Law II of 2007 on entry and residence by third-country nationals): Paragraph 29(5) and (6).

According to these provisions, a national of a third country has the financial resources necessary for his or her stay in Hungary if that person or a member of his or her family is able to defray that person's subsistence costs, accommodation, return travel and, where necessary, medical care, with income or capital which the relevant person has acquired lawfully and has at

his or her disposal. The decree referred to also enumerates how the existence of means of subsistence can be proved.

- A személyi jövedelemadóról szóló 1995. évi CXVII. törvény (Law CXVII of 1995 on personal income tax): Paragraph 4(1) and (2).

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant in the main proceedings is a national of a third State and the holder of a residence permit valid in Hungary until 30 June 2020 for undertaking studies. On 5 June 2020, the applicant submitted an application to renew that residence permit with a view to carrying out voluntary work at the Mahatma Gandhi Emberi Jogi Egyesület (Mahatma Gandhi Human Rights Organisation; ‘the Organisation’).
- 2 During the period of volunteering, the applicant intended to finance his subsistence in Hungary with the help of his uncle, a British national. The applicant enclosed his contract with the Organisation, a statement for the bank account in his name showing six months’ transactions, the declaration of responsibility made by his uncle and documents providing evidence of his uncle’s income with the application to renew the residence permit.
- 3 The immigration policing authority at first instance refused the application to renew the residence permit and expelled the applicant from EU territory. In the reasoning for its decision, that authority explained that, given that the uncle of the applicant was not considered to be a family member within the meaning of the abovementioned Hungarian legal provisions, he could not cover the subsistence costs of the applicant in Hungary and, therefore, the evidence enclosed with the application could not be taken into account.
- 4 The applicant brought a challenge to that first-instance decision refusing the application before the defendant, which confirmed the decision on the basis that the person who had taken responsibility for the applicant is not considered to be a member of his family and, therefore, cannot cover the subsistence costs of the applicant in Hungary.
- 5 The applicant brought an administrative action challenging the second-instance decision before the Fővárosi Törvényszék (Budapest High Court, Hungary), the referring court. In its judgment, the Budapest High Court annulled the defendant’s decision, including the first-instance decision, and ordered the administrative authority at first instance to initiate a new procedure.
- 6 That judgment was set aside by the Kúria (Supreme Court, Hungary), which has ordered the Budapest High Court to initiate new proceedings and make a new decision. In those new proceedings, the Budapest High Court has referred three questions to the Court of Justice for a preliminary ruling.

The essential arguments of the parties in the main proceedings

- 7 In his administrative appeal against the first-instance immigration decision, the applicant argued that, although his uncle was not actually considered to be a family member, he would provide the applicant with the financial assistance under a loan agreement and the applicant would stay in Hungary at a student residence. He enclosed with that appeal a declaration in which his uncle undertook to provide the applicant, for the duration of the volunteering, with HUF 200 000 a month (approximately EUR 520), by means of bank transfers or [through] other entities.
- 8 Once the administrative appeal had been rejected by the defendant, in his administrative action, the applicant criticised the fact that the evidence provided by him had only been assessed from the standpoint that his uncle was not considered to be a family member and, therefore, could not take responsibility for maintaining the applicant and that, in short, the applicant's means of subsistence in Hungary were not guaranteed. The applicant maintained that his uncle would not provide him with the assistance in the form of maintenance, but rather as a gift, such that the applicant's own means of subsistence would then be guaranteed.
- 9 In its response to the administrative action, the defendant argued that the declaration made by the applicant's uncle did not state the legal basis of the assistance and, therefore, it could not regard it as a gift. However, the defendant added that, under the abovementioned Hungarian legislation, subsistence costs must be defrayed with income or capital that is lawfully acquired. In that regard, the legal basis on which the income or capital is acquired lacks relevance and, therefore, that was not the reason why it rejected the applicant's appeal.

Conclusions of the courts that have heard the main proceedings previously

- 10 As far as lawfully acquired income or capital is concerned, the Budapest High Court takes as its starting point the definition of 'income' contained in Law CXVII of 1995 on personal income tax. That definition does not establish a distinction according to the source of the income. The concept of income not only includes income obtained in the form of wages in the context of an employment relationship, but also that received on any other basis in the context of any other legal relationship. Thus, the concept of income also includes the payments that the applicant obtains from his uncle as a natural person. In that regard, the legal basis on which the applicant's uncle provides the assistance lacks relevance. Therefore, according to the Budapest High Court, the defendant acted unlawfully in examining the income obtained by the applicant solely from the perspective of whether it was provided by a member of his family. Instead, it should have considered whether the applicant's income was of a regular nature, urging him to provide the evidence necessary for that purpose.
- 11 Contrary to the position of the Budapest High Court, the Supreme Court held that the concept of income should not be interpreted on the basis of the provisions of

the Law on personal income tax. It is necessary to examine whether the applicant's statements are coherent and consistent and, moreover, whether they are unquestionably supported by the enclosed documents. In the present case, however, the applicant's uncle has not stated the legal basis on which he intends to provide the applicant with HUF 200 000 a month. The applicant contradicted himself in his statements in that regard: while, in his administrative appeal, he stated that he receives that sum in the form of a loan, in his administrative action he maintained that he receives it in the form of a gift. That undermined the applicant's credibility and the reliability of his statements.

- 12 According to the Supreme Court, the Budapest High Court also erred in not considering the legal basis of the income to be relevant. On the contrary, that basis is of particular relevance, since it makes it possible to determine whether the applicant has the resources in question as his own on a permanent basis. The applicant should, therefore, have stated precisely whether he regarded the amount provided by his uncle as income or as capital. He should have provided documentary evidence for the legal basis on which he received that sum of money and also for the fact that he had it at his disposal, as his own, on a permanent basis and without restriction. The Budapest High Court should clarify those points in the new proceedings.

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

- 13 The Budapest High Court has doubts as to whether the requirements established by the Supreme Court, compliance with which must be proved by the applicant, are consistent with the provisions of Directive 2016/801 and whether the requirements of a fair trial are fully observed in the present case.
- 14 As regards the need to request a preliminary ruling from the Court of Justice, the Budapest High Court first of all considers that the questions which it is referring are relevant in relation to EU law. The Hungarian legislation transposing Directive 2016/801 must be consistent with that directive, as must the case-law developed in applying that legislation. The question of whether the case-law of the Supreme Court is consistent with Article 7(1)(e) of Directive 2016/801 necessarily has a bearing on the decision reached in the proceedings as regards the substance. Second, the Court of Justice has not yet interpreted the relevant provisions of Directive 2016/801 in the light of the approach set out in the questions referred for a preliminary ruling by the Budapest High Court. Third, given that the Budapest High Court and the Supreme Court differ significantly in their interpretation of the law, the answer to the questions referred cannot be considered obvious.
- 15 With regard to the first question referred, the Budapest High Court starts from the premiss that, as far as means of subsistence are concerned, the Supreme Court required the assessment of additional requirements that are not provided for either in Directive 2016/801 or in the Hungarian legislation transposing it. There can be no doubt that, when they authorise the entry and residence of nationals of a third

State, the Member States may assess the financial provision required for subsistence on the basis of their own national rules. Nevertheless, according to the Budapest High Court, that does not mean that the Member States can supplement the content of Article 7(1)(e) of Directive 2016/801 with additional assessment criteria.

- 16 According to the Budapest High Court, it is doubtful that the additional requirements established by the Supreme Court are genuinely relevant in relation to the provision of Directive 2016/801 relied on. The relevance of whether the applicant receives the amount from his uncle in the form of a loan or a gift and whether he will have to return it or it will remain at his disposal on a permanent basis is debatable. It has been proven in the present case that the applicant's uncle is a solvent individual and obtains his income lawfully. Moreover, the applicant's uncle made a declaration in which he expressly stated the purpose of the assistance, that is, that the amount in question is intended to be used for the applicant's subsistence during the period of volunteering. On the basis of the above, the Budapest High Court considers that, in order to prove the existence of means of subsistence, it is sufficient to show that the amount was paid into a bank account used exclusively by the applicant and that the applicant withdrew that amount from that account.
- 17 The purpose of Directive 2016/801 is to establish, in a single legal instrument, the conditions to be met by nationals of a third State in order to be able to enter the territory of the Member States for a period of more than three months for the purpose of carrying out a voluntary activity, simplifying and unifying the provisions previously in force. The Directive also aims to encourage the mobility of the individuals concerned. It is questionable whether the fact that the Supreme Court, in relation to entry and residence, establishes additional requirements that supplement the general conditions provided for in Article 7(1)(e) of Directive 2016/801 is compatible with those objectives.
- 18 The Budapest High Court refers to the judgment of 10 September 2014, *Ben Alaya*, C-491/13, EU:C:2014:2187, paragraphs 33 and 34, which referred to the then-in-force Directive 2004/114. Articles 6 and 7 of that former directive regulated the conditions of admission for nationals of a third country to undertake studies. Regarding those conditions, the Court of Justice has declared that the discretion available to the national authorities relates only to the conditions laid down in Articles 6 and 7 of that directive and, within that context, to the assessment of the relevant facts in order to determine whether the conditions established in that directive are met. The Court of Justice has also declared that, were Member States to add other conditions for admission, it would equate to making them stricter, which would be contrary to the objective pursued by Directive 2004/114.
- 19 Given that the subsistence requirements applicable to students and contained in Directive 2004/114 match those of Article 7(1)(e) of Directive 2016/801, in particular as regards undertaking voluntary work, the Budapest High Court also

considers the abovementioned judgment of the Court of Justice to be relevant to the present case.

- 20 The question therefore arises of whether, when national authorities assess the means of subsistence, the discretion available to them extends solely to the conditions provided for in Article 7(1)(e) of Directive 2016/801 or whether they are also authorised to establish additional criteria in order to determine whether those conditions are met. It is thus a matter of whether the applicant may be required to make a declaration consistent with the declaration made by the person providing him with the assistance regarding the legal basis on which he is acquiring the means of subsistence and, moreover, be required to provide documentary evidence of his right to have those resources at his disposal on a permanent and unrestricted basis.
- 21 The second question referred by the Budapest High Court relates to the situation in which the Court of Justice considers that the discretion afforded to the Member States includes the establishment of the abovementioned additional requirements. In that regard, the Budapest High Court wonders whether it is relevant that those additional requirements are not established in legislation, but rather have only been determined by the case-law of the highest court of a Member State, whose decisions are binding on lower authorities.
- 22 The third question referred by the Budapest High Court refers to the requirement for a fair trial and to procedural safeguards. The Supreme Court established the additional requirements in question by assessing only the evidence available in the light of the criteria which it determined itself, without requesting more information from the applicant or giving him the opportunity to provide evidence in relation to the latter. In that regard, the Budapest High Court seeks clarification as to whether the establishment by the Supreme Court of the assessment of those additional requirements complies with the requirements of a fair trial, even though, in the administrative procedure, the applicant was not warned of such requirements, or required to provide declarations or documents in relation to them.