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Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

6 October 2021 ([1](#))

(Reference for a preliminary ruling – Citizenship of the Union – Right of Union citizens to move freely within the territories of the Member States – Article 21 TFEU – Directive 2004/38/EC – Articles 4 and 5 – Obligation to carry an identity card or a passport – Regulation (EC) No 562/2006 (Schengen Borders Code) – Annex VI – Crossing the maritime border of a Member State on board a pleasure boat – Rules on sanctions applicable when moving between Member States without an identity card or passport – Rules on daily fines in criminal cases – Calculation of the fine based on the offender’s average monthly income – Proportionality – Severity of the sanction in relation to the offence)

In Case C-35/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Korkein oikeus (Supreme Court, Finland), made by decision of 21 January 2020, received at the Court on 24 January 2020, in the criminal proceedings against

A

intervening parties:

Syyttäjä,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, M. Ilešič, E. Juhász, C. Lycourgos (Rapporteur) and I. Jarukaitis, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- A, by U. Väänänen, asianajaja,
- the Finnish Government, by H. Leppo, acting as Agent,
- the German Government, by J. Möller and R. Kanitz, acting as Agents,
- the European Commission, by E. Montaguti, G. Wils, J. Tomkin and I. Koskinen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 June 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 21(1) TFEU, Article 4(1), Article 5(1) and Article 27(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77), and Article 21 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1), as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 182, p. 1).

2 The request has been made in criminal proceedings against A regarding his crossing the national border of Finland on board a pleasure boat without being in possession of an identity card or passport.

Legal context

European Union law

Directive 2004/38

3 Under recitals 1, 7 and 31 of Directive 2004/38:

‘(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

...

(7) The formalities connected with the free movement of Union citizens within the territory of Member States should be clearly defined, without prejudice to the provisions applicable to national border controls.

...

(31) This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. ...'

4 Article 1 of that directive, headed 'Subject', states:

'This Directive lays down:

- (a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;
- (b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;
- (c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.'

5 Article 3 of the directive, entitled 'Beneficiaries', provides in paragraph 1:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.'

6 Article 4 of that directive, entitled 'Right of exit', provides:

'1. Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.

...

3. Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality.

...'

7 Article 5 of Directive 2004/38, entitled 'Right of entry', reads as follows:

'1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

...

4. Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to

corroborate or prove by other means that they are covered by the right of free movement and residence.

5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.'

8 Article 27 of that directive, entitled 'General principles', provides, in paragraphs 1 and 2 thereof:

'1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. ...

...'

9 Article 36 of that directive, headed 'Sanctions', provides:

'Member States shall lay down provisions on the sanctions applicable to breaches of national rules adopted for the implementation of this Directive and shall take the measures required for their application. The sanctions laid down shall be effective and proportionate. ...'

Regulation No 562/2006

10 Article 1 of Regulation No 562/2006, entitled 'Subject matter and objectives', provided:

'This Regulation provides for the absence of border control of persons crossing the internal borders between the Member States of the European Union.

It establishes rules governing border control of persons crossing the external borders of the Member States of the European Union.'

11 Article 2 of that regulation, entitled 'Definitions', provided:

'For the purposes of this Regulation the following definitions apply:

1. "internal borders" means:

- (a) the common land borders, including river and lake borders, of the Member States;
- (b) the airports of the Member States for internal flights;
- (c) sea, river and lake ports of the Member States for regular internal ferry connections;

2. “external borders” means the Member States’ land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders;

...’

12 Article 4 of that regulation, headed ‘Crossing of external borders’, provided:

‘1. External borders may be crossed only at border crossing points and during the fixed opening hours. The opening hours shall be clearly indicated at border crossing points which are not open 24 hours a day.

...

2. By way of derogation from paragraph 1, exceptions to the obligation to cross external borders only at border crossing points and during the fixed opening hours may be allowed:

...

(c) in accordance with the specific rules set out in Articles 18 and 19 in conjunction with Annexes VI and VII.

...’

13 Article 7 of Regulation No 562/2006, headed ‘Border checks on persons’, stated:

‘1. Cross-border movement at external borders shall be subject to checks by border guards. ...

...

2. All persons shall undergo a minimum check in order to establish their identities on the basis of the production or presentation of their travel documents. Such a minimum check shall consist of a rapid and straightforward verification, where appropriate by using technical devices and by consulting, in the relevant databases, information exclusively on stolen, misappropriated, lost and invalidated documents, of the validity of the document authorising the legitimate holder to cross the border and of the presence of signs of falsification or counterfeiting.

...

6. Checks on a person enjoying the right on free movement under Union law shall be carried out in accordance with Directive [2004/38].

...’

14 Article 18 of that regulation, headed ‘Specific rules for the various types of borders and the various means of transport used for crossing the external borders’, provided:

‘The specific rules set out in Annex VI shall apply to the checks carried out at the various types of border and on the various means of transport used for crossing border crossing points.

Those specific rules may contain derogations from Articles 4 and 5 and Articles 7 to 13.’

15 Article 20 of Regulation No 562/2006, headed 'Crossing internal borders', provided:

'Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.'

16 Article 21 of that regulation, entitled 'Checks within the territory', stated:

'The abolition of border control at internal borders shall not affect:

(a) the exercise of police powers by the competent authorities of the Member States under national law, in so far as the exercise of those powers does not have an effect equivalent to border checks; that shall also apply in border areas. Within the meaning of the first sentence, the exercise of police powers may not, in particular, be considered equivalent to the exercise of border checks when the police measures:

(i) do not have border control as an objective,

(ii) are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime,

(iii) are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders,

(iv) are carried out on the basis of spot-checks;

(b) security checks on persons carried out at ports and airports by the competent authorities under the law of each Member State, by port or airport officials or carriers, provided that such checks are also carried out on persons travelling within a Member State;

(c) the possibility for a Member State to provide by law for an obligation to hold or carry papers and documents;

...'

17 Annex VI to Regulation No 562/2006, entitled 'Specific rules for the various types of border and the various means of transport used for crossing the Member States' external borders', contained a section entitled 'Pleasure boating', which provides as follows:

'3.2.5. By way of derogation from Articles 4 and 7, persons on board a pleasure boat coming from or departing to a port situated in a Member State shall not be subject to border checks and may enter a port which is not a border crossing point.

However, according to the assessment of the risks of illegal immigration, and in particular where the coastline of a third country is located in the immediate vicinity of the territory of the Member State concerned, checks on those persons and/or a physical search of the pleasure boat are to be carried out.

...

3.2.7. During those checks, a document containing all the technical characteristics of the vessel and the names of the persons on board shall be handed in. A copy of that document shall be

given to the authorities in the ports of entry and departure. As long as the vessel remains in the territorial waters of one of the Member States, a copy of that document shall be included amongst the ship's papers.'

18 That regulation, applicable at the material time, was repealed and replaced by Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1).

Finnish law

Rules on travel documents

19 Paragraph 1 of the Passilaki (671/2006) (Law on Passports (671/2006)) provides:

'Finnish nationals have the right to leave the country in accordance with the provisions of this law.

A Finnish citizen cannot be denied entry to the territory.'

20 Paragraph 2 of the Law on Passports provides:

'Finnish nationals shall have the right to leave and enter Finland with a passport, subject to the exceptions set out in this Law, in EU law or in an international agreement binding on Finland. Without a passport, Finnish nationals can travel to Iceland, Norway, Sweden and Denmark. A regulation adopted by the Council of Ministers shall determine the other countries to which Finnish nationals may travel using, as a travel document, not a passport but an identity card ...'

21 Under the first subparagraph of Paragraph 28 of the Law on Passports:

'If a Finnish national is required to carry a passport or identity card when travelling, he or she must, when leaving the country and when arriving in the country, show that document to the border control authority if requested.'

22 Paragraph 1 of the Valtioneuvoston asetus matkustusosoikeuden osoittamisesta eräissä tapauksissa (660/2013) (Regulation adopted by the Council of Ministers on proof of the right to travel in specific cases (660/2013)) provides:

'Finnish nationals may travel from Finland to the following countries using an identity card as a travel document instead of a passport ...: The Netherlands, Belgium, Bulgaria, Spain, Ireland, the United Kingdom, Italy, Austria, Greece, Croatia, Cyprus, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Portugal, Poland, France, Romania, Germany, San Marino, Slovakia, Slovenia, Switzerland, the Czech Republic, Hungary and Estonia.'

The Penal Code

23 Paragraph 7, entitled 'Border offences', in Chapter 17, entitled 'Public order offences', of the Rikoslaki (39/1889) (Penal Code (39/1889)) provides:

'Whosoever

(1) crosses or attempts to cross the Finnish border without a valid travel document, visa, residence permit or any other document equivalent to a travel document, or elsewhere than at an authorised place of entry or exit, or in violation of any legal prohibition other than the prohibition on entry,

...

shall be guilty of an infringement of border control punishable by a fine or by imprisonment for a term not exceeding one year.'

24 Paragraph 7a of Chapter 17 of the code, entitled 'Minor border offences', states:

'A person who commits a minor border offence shall incur a fine if, taking account of the brief duration of the unlawful residence or movement, the type of prohibited action or other circumstances of the case, the offence considered as whole is judged to be a minor offence.'

25 As set out in the first subparagraph of Paragraph 1 of Chapter 2a of the Penal Code:

'Fines are imposed as daily fines, ranging from a minimum of 1 to a maximum of 120 days.'

26 Paragraph 2 of Chapter 2a of the Penal Code provides as follows

'The amount of the daily fine shall be set in a reasonable manner, taking into account the offender's ability to pay.

The amount of the daily fine shall be considered reasonable if it corresponds to one sixtieth of the offender's average monthly income, after deduction of taxes and duties which are determined by regulation adopted by the Council of Ministers and a fixed amount corresponding to current consumption expenses. The maintenance obligation of the offender may reduce the amount of the daily fine.

The income indicated in the last tax form provided by the offender shall be the main basis for calculating that monthly income. If the offender's income cannot be determined sufficiently reliably from the tax data or has changed significantly since the last tax form was provided, it may be determined on the basis of another accessible document.

...

A regulation adopted by the Council of Ministers regulates more specifically the calculation of the average monthly income, the manner of rounding up the amount of the daily fine, the fixed amount corresponding to current consumption expenses, the taking into account of maintenance obligations as well as the minimum amount of the daily fine.'

27 Paragraph 5 of the Valtioneuvoston asetus päiväsakon rahamäärästä (609/1999) (Regulation adopted by the Council of Ministers on the amount of the daily fine (609/1999)) states:

'The amount of the daily fine may not be less than EUR 6.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

28 On 25 August 2015, A, a Finnish national, made a round trip between Finland and Estonia on board a pleasure boat. Both the place of departure and the place of return of that trip were in Finland. In the course of that trip, A crossed international waters between the two Member States.

29 Although he held a valid Finnish passport, A did not carry it on the trip. Consequently, during a border check in Helsinki upon his return, A was unable to present his passport or any other travel document. However, A's identity could be established on the basis of his driving licence.

30 The Syyttäjä (Public Prosecutor, Finland) brought a charge relating to a minor border offence against A before the Helsingin käräjäoikeus (District Court, Helsinki, Finland).

31 By decision of 5 December 2016, the Helsingin käräjäoikeus (District Court, Helsinki) found that A had committed an offence by crossing the Finnish border without being in possession of a travel document, and stated that the fact that he held a valid passport was irrelevant in that regard.

32 However, the court did not impose a sanction on the grounds that the offence was minor and that, if a fine were imposed, the amount of the fine, calculated according to the rules on daily fines in criminal cases, based on A's average monthly income, would be excessive.

33 The Public Prosecutor appealed against that judgment to the Helsingin hovioikeus (Court of Appeal, Helsinki, Finland). A lodged a cross-appeal against the same decision.

34 By judgment of 15 June 2018, the Helsingin hovioikeus (Court of Appeal, Helsinki), while finding that it had been duly established that A did not have a travel document when crossing the Finnish border, dismissed the proceedings. The court found that the minor border offence was not sufficiently serious in this case.

35 A brought an appeal against that judgment before the Korkein oikeus (Supreme Court, Finland).

36 That court considers that the case must be examined from the point of view of EU law.

37 It recalls that the Court held, in paragraph 45 of the judgment of 21 September 1999, *Wijsenbeek* (C-378/97, EU:C:1999:439), that that right does not preclude a Member State from requiring a person to establish his or her nationality on entering the territory of that Member State, on pain of criminal sanctions, provided that the sanctions are comparable to those applicable to similar national offences and are not disproportionate.

38 However, the referring court wonders whether that case-law is still applicable, taking into account the changes in EU law made after that judgment.

39 While it is indeed clear from the Schengen Borders Code that any Member State may lay down an obligation for Union citizens to be in possession of a valid travel document, the national court wonders whether and, if so, under what conditions non-compliance with that obligation may be subject to a sanction, since it cannot be ruled out that the imposition of a sanction would infringe the right to freedom of movement laid down in Article 21(1) TFEU.

40 In order to determine whether that right is infringed, Articles 4 and 5 of Directive 2004/38 and Article 21 of Regulation No 562/2006 must be taken into account, the latter being the Schengen Borders Code applicable to the main proceedings.

41 It is also necessary to clarify, in the light of Articles 2, 4, 7, 20 and 21 of Regulation No 562/2006 and point 3.2.5 of Annex VI thereto, the relevance of the fact that the Union citizen concerned travelled between two Member States on board a pleasure boat and through international waters.

42 Assuming that EU law does not preclude the obligation to carry a valid travel document, on pain of sanctions, the referring court is still uncertain whether rules on daily fines, such as those provided for in the Penal Code, are compatible with the principle of proportionality.

43 In 2014, the average daily fine was EUR 16.70, which corresponds to a net monthly income of EUR 1 257. It also states that an offence contrary to the rules on border crossing, such as that at issue in the main proceedings, is normally punishable by a 15-day daily fine.

44 Taking into account A's average monthly income, the amount of a daily fine in his case would be EUR 6 350, so that the total amount of the fine which could be imposed on him would be EUR 95 250. Such an amount is explained by the fact that, while the legislation applicable in the main proceedings sets a minimum level of EUR 6 for the amount of the daily fine, it does not provide for any ceiling on that amount.

45 In those circumstances, the Korkein oikeus (Supreme Court) stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does EU law, in particular Article 4(1) of Directive [2004/38], Article 21 of Regulation [No 562/2006], or the right of EU citizens to move freely within the territory of the European Union, preclude the application of a national provision requiring a person (whether or not an EU citizen), on pain of criminal penalties, to carry a valid passport or other valid travel document when travelling from one Member State to another by pleasure boat via international waters without entering the territory of a third country?’

(2) Does EU law, in particular Article 5(1) of Directive [2004/38], Article 21 of Regulation [No 562/2006], or the right of EU citizens to move freely within the territory of the European Union, preclude the application of a national provision requiring a person (whether or not an EU citizen), on pain of criminal penalties, to carry a valid passport or other valid travel document upon entering the Member State concerned from another Member State by pleasure boat via international waters without having entered the territory of a third country?’

(3) In so far as no obstacle within the meaning of Questions 1 and 2 arises under EU law: Is the penalty normally imposed in Finland in the form of daily fines for crossing the Finnish border without carrying a valid travel document compatible with the principle of proportionality that follows from Article 27(2) of Directive [2004/38]?’

Consideration of the questions referred

The first question

46 Under the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. It is for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation, having regard to the subject matter of the dispute

(see, to that effect, judgment of 29 April 2021, *Granarolo*, C-617/19, EU:C:2021:338, paragraph 32 and 33 and the case-law cited).

47 In the present case, it is apparent from the order for reference that the main proceedings concern a voyage between Finland and Estonia by a Finnish national on board a pleasure boat, with places of departure and return in Finland and crossing international waters. It also follows from that decision that the person concerned is subject to criminal proceedings for failure to comply with Finnish regulations requiring Finnish nationals to carry an identity card or passport when travelling between Finland and other Member States, including the Republic of Estonia.

48 In those circumstances, by its first question the national court is essentially asking, first, whether the right of Union citizens to freedom of movement laid down in Article 21(1) TFEU and set out in Directive 2004/38 must, in the light of the provisions on border crossing laid down in Regulation No 562/2006, be interpreted as precluding national legislation by which a Member State requires its nationals to carry a valid identity card or passport when travelling to another Member State, on pain of criminal penalties, and, secondly, whether the fact that such a trip is made on board a pleasure boat and through international waters has any bearing in that regard.

49 According to Article 21(1) TFEU, every Union citizen has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

50 As stated in Article 1 of Directive 2004/38, one of the purposes of the directive is to lay down the conditions for the exercise of that right and the limitations to it.

51 Article 4(1) of Directive 2004/38 provides that, without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport have the right to leave the territory of a Member State to travel to another Member State.

52 As the Advocate General pointed out in points 54 to 57 of his Opinion, it follows from the phrase ‘with a valid identity card or passport’ in that provision that the exercise by nationals of a Member State of their right to travel to another Member State is subject to the condition that they carry a valid identity card or passport.

53 Thus, while it is for the Member States, under Article 4(3) of Directive 2004/38, to issue to their citizens, or to renew, an identity card or passport, the EU legislature, by making the right of a Union citizen to travel to another Member State subject to the condition that he or she must be in possession of such a document, in accordance with Article 4(1) thereof, intended to define a formality connected with freedom of movement within the meaning of recital 7 thereof. As the Advocate General observed, in point 58 of his Opinion, that formality aims to facilitate the exercise of the right to free movement by ensuring that any person benefiting from that right is easily identified as such in the context of a possible verification (see, to that effect, judgments of 21 September 1999, *Wijzenbeek*, C-378/97, EU:C:1999:439, paragraph 43, and of 17 February 2005, *Oulane*, C-215/03, EU:C:2005:95, paragraphs 21 and 22).

54 That condition for the exercise of the right to free movement applies, in accordance with Article 3(1) of Directive 2004/38, to any Union citizen who travels to a Member State other than that of his or her nationality.

55 It follows that a Member State which requires its nationals to carry their identity card or passport when they cross a national border to travel to another Member State contributes, in so

doing, to compliance with a formality which, under Directive 2004/38, is required for the exercise of the right to free movement. Such a rule of national law therefore falls within the scope of the implementation of that directive.

56 In accordance with Article 36 of that directive, each Member State has the power to lay down the sanctions applicable to infringements of the national provisions adopted pursuant to that directive.

57 In the absence of harmonisation at EU level in the field of the sanctions applicable, the Member States retain the power to choose the sanctions which seem to them to be appropriate, provided that they exercise that power in accordance with EU law and its general principles (see, by analogy, judgment of 11 February 2021, *K. M. (Penalties imposed on the master of a vessel)*, C-77/20, EU:C:2021:112, paragraph 36 and the case-law cited).

58 Consequently, and notwithstanding the developments that have taken place since the judgment of 21 September 1999, *Wijsenbeek* (C-378/97, EU:C:1999:439), EU law still preserves, as it stands, the autonomy of the Member States with regard to the penalties that may be imposed on a Union citizen who fails to comply with a formality connected with the exercise of the right to free movement. As the Court observed in paragraph 45 of that judgment, the Member States may, in such a case, provide for criminal penalties, provided that those penalties comply, in particular, with the principle of proportionality. That principle is now enshrined in Article 49(3) of the Charter of Fundamental Rights of the European Union ('the Charter'), according to which the severity of penalties must not be disproportionate to the offence.

59 Furthermore, it must be recalled that a provision of national criminal law may not discriminate against persons to whom EU law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by EU law (see judgment of 19 November 2020, *ZW*, C-454/19, EU:C:2020:947, paragraph 27 and the case-law cited).

60 The legitimacy, subject to compliance with the general principles of EU law, of the obligation imposed by a Member State on its nationals to carry, on pain of criminal sanction, a valid identity card or passport when crossing the national border with a view to travelling to another Member State is not invalidated by the stipulation in Article 4(1) of Directive 2004/38 that that provision is 'without prejudice to the provisions on travel documents applicable to national border controls'.

61 It is true that it follows from that clarification that any rule on national border controls, such as that contained in Article 20 of Regulation No 562/2006, which provides for the abolition of such controls at the internal borders of the Schengen area, must be fully applied. Therefore, a check cannot, in principle, be carried out when crossing those borders.

62 However, the abolition of internal border checks does not affect the possibility, set out in Article 21 of Regulation No 562/2006, for Member States to carry out identity checks within the territory and to provide for the obligation to hold and carry papers and documents for that purpose (see, to that effect, judgment of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 63 and the case-law cited).

63 Furthermore, while point 3.2.5 of Annex VI to Regulation No 562/2006 lays down, in its first paragraph, the rule that persons on board a pleasure boat coming from or going to a port situated in a Member State and crossing an external border of the Schengen area are not to be subject to identity checks, the same point lays down, in its second paragraph, an exception to that rule,

according to which such persons may nevertheless be subject to checks ‘according to the assessment of the risks of illegal immigration’.

64 In the light of the power thus reserved to Member States to verify, in various situations specified in Regulation No 562/2006, the identity of persons, a Member State must be regarded as not infringing the right to free movement when it obliges its nationals, on pain of sanctions, where appropriate, of a criminal nature, which are both dissuasive and in accordance with the general principles of EU law, to carry their identity card or passport when they leave the national territory in order to travel, by whatever means of transport and by whatever route, to another Member State. Such an obligation ensures that such nationals are able to demonstrate their identity, nationality and, consequently, their status as Union citizens when one of the situations provided for by Regulation No 562/2006 arises and leads to a check.

65 Therefore, the answer to the first question is that the right of Union citizens to freedom of movement laid down in Article 21 TFEU and defined by Directive 2004/38 must, in the light of the provisions relating to border crossing set out in Regulation No 562/2006, be interpreted as not precluding national legislation by which a Member State obliges its nationals, on pain of criminal sanctions, to carry a valid identity card or passport when travelling to another Member State, by whatever means of transport and by whatever route, provided that the detailed rules for those sanctions comply with the general principles of EU law, including those of proportionality and non-discrimination.

The second question

66 In the light of the considerations set out in paragraph 47 of the present judgment, the second question seeks, in essence, to determine, first, whether the right of Union citizens to freedom of movement, laid down by Article 21(1) TFEU and defined by Directive 2004/38 must, in the light of the provisions on border crossing set out in Regulation No 562/2006, be interpreted as precluding national legislation by which a Member State requires its nationals, on pain of criminal sanctions, to carry a valid identity card or passport when they enter its territory from another Member State and, secondly, whether the fact that the journey is made on board a pleasure boat and through international waters is relevant in that regard.

67 It should be observed from the outset that, a situation in which a Union citizen crosses the border of the Member State of which he or she is a national on arriving from another Member State is not governed by Directive 2004/38.

68 In accordance with Article 3(1) thereof, that directive governs only the conditions of entry and residence of a Union citizen in Member States other than that of which he or she is a national (judgment of 14 November 2017, *Lounes*, C-165/16, EU:C:2017:862, paragraphs 33 and 34).

69 In view of the delimitation of the scope of Directive 2004/38 and since it follows from a principle of international law, reaffirmed in Article 3 of Protocol No 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, that a Member State is precluded from refusing its nationals the right of entry or residence (see, to that effect, judgments of 4 December 1974, *van Duyn*, 41/74, EU:C:1974:133, paragraph 22, and of 5 May 2011, *McCarthy*, C-434/09, EU:C:2011:277, paragraph 29), the entry of a Union citizen into the territory of the Member State of which he or she is a national does not fall under the conditions relating to the right of entry set out in Article 5 thereof.

70 The fact remains that the return of a Union citizen to the territory of the Member State of which he or she is a national falls within the scope of Article 21(1) TFEU if that citizen has previously exercised, in a Member State other than his or her Member State of origin, his or her right to freedom of movement under that provision (see, to that effect, judgment of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385, paragraph 31 and the case-law cited).

71 Therefore, it is necessary to examine whether the requirement imposed by a Member State on its nationals to carry a valid identity card or passport when they enter its territory from another Member State is such as to impede the exercise of the right to freedom of movement provided for in Article 21 TFEU.

72 Subject to verification by the referring court, it is clear from the case file before the Court that Finnish nationals who are not in possession of their identity card or passport when they return to Finland are authorised to enter the territory of that Member State as soon as they are able to prove their identity by other means.

73 It thus appears that the obligation to carry an identity card or passport does not condition the right of entry, but is a formality aimed at standardising and thus facilitating the identity checks which may be carried out in the cases defined by Regulation No 562/2006.

74 Since every Union citizen holds an identity card or passport and must carry that document when travelling to a Member State other than that of which he or she is a national, the obligation imposed by national legislation to carry that document when returning to the Member State of origin is neither onerous nor inconvenient and cannot therefore be regarded as having the effect of discouraging the exercise of the right to free movement, it being further specified that that obligation does not condition the right of entry into the territory of the Member State of origin, provided, however, that the penalties provided for in the event of failure to comply with that obligation are compatible with the principle of proportionality, enshrined in Article 49(3) of the Charter, and with the other general principles of EU law, including the principle of non-discrimination, all of which are applicable in the context of the assessment of national legislation in the light of Article 21(1) TFEU (see, in the latter regard, judgment of 8 June 2017, *Freitag*, C-541/15, EU:C:2017:432, paragraphs 31 and 42 and the case-law cited).

75 Furthermore, the fact that the journey in question is made on board a pleasure boat and that it passes through international waters does not prevent the identity of the occupants of that vessel from being verified.

76 As recalled in paragraph 63 of the present judgment, the second subparagraph of point 3.2.5 of Annex VI to Regulation No 562/2006 authorises, ‘according to the assessment of the risks of illegal immigration’, checks on persons on board a pleasure boat coming from or going to a port situated in a Member State and crossing an external border of the Schengen area. The effectiveness of that provision would be compromised if it were to be interpreted as meaning that the competent authorities must, when carrying out those checks, confine themselves to checking the document containing all the technical characteristics of the vessel and the names of the persons on board, referred to in point 3.2.7 of that annex, without being able to check, by means of verification of the identity documents, the accuracy of the list of names contained in that document.

77 In the present case, it is apparent from the material before the Court that the vessel at issue in the main proceedings crossed the international waters between the territorial waters of Finland and Estonia on its journey, so that it must be regarded as having crossed an external border within the meaning of Article 2(2) of Regulation No 562/2006. Furthermore, the journey was made in August

2015, a period recognised by the parties to the main proceedings as having presented an increased risk of illegal immigration. Thus, subject to the checks which it is for the national court to carry out, it appears that the competent Finnish authorities were in a position where they could legitimately verify the identity of the persons on board the vessel on its return to Finnish territorial waters.

78 As noted in paragraphs 73 and 74 of the present judgment, the right to freedom of movement does not preclude a Member State from requiring its nationals to carry an identity card or passport when they return to its territory from another Member State, in order to standardise and thus facilitate the identity checks which may be carried out in the cases defined by Regulation No 562/2006, provided that the penalties for failure to comply with that obligation are compatible with the general principles of EU law. It follows that the authorities of that Member State may, in the context of a control legitimately carried out pursuant to the second paragraph of point 3.2.5 of Annex VI to Regulation No 562/2006, require the person concerned to produce his or her identity card or passport and, in the event of failure to produce such a document, impose a penalty.

79 In the light of the foregoing considerations, the answer to the second question is that the right of Union citizens to freedom of movement laid down in Article 21(1) TFEU must, in the light of the provisions on border crossing set out in Regulation No 562/2006, be interpreted as not precluding national legislation by which a Member State requires its nationals to carry a valid identity card or passport, on pain of criminal penalties, when they enter its territory from another Member State, provided that that obligation does not make the right of entry conditional and that the detailed rules on penalties for failure to comply with that obligation comply with the general principles of EU law, including those of proportionality and non-discrimination. A journey to the Member State concerned from another Member State on board a recreational craft and crossing international waters is, under the conditions laid down in the second paragraph of point 3.2.5 of Annex VI to that regulation, among the cases in which the presentation of such a document may be requested.

The third question

80 Thus, as is clear from the provisions of the Penal Code cited in the order for reference, any person who crosses or attempts to cross the Finnish border without a travel document or other document which may be treated as such commits an offence punishable by a fine or imprisonment of up to one year, it being specified that where the offence is deemed to be minor, the sanction is a fine imposed in the form of a daily fine, the amount of a daily fine being equal to one sixtieth of the offender's average monthly income less certain taxes and expenses.

81 Moreover, it follows from the decision to refer that the fine imposed in the case of minor offences of the national border is normally a 15-day daily fine and that the total amount of the fine imposed is, typically, about 20% of the offender's net monthly income.

82 In the present case, the Public Prosecutor initiated proceedings against A because he did not have a valid passport or any other travel document when crossing the Finnish border, even though his identity could be established on the basis of the driving licence he was carrying.

83 Therefore, the third question referred for a preliminary ruling must therefore be considered as asking whether Article 21(1) TFEU and Articles 4 and 36 of Directive 2004/38, read in the light of Article 49(3) of the Charter, preclude rules on criminal sanctions by which a Member State makes the crossing of its national border without a valid identity card or passport punishable by a fine which, by way of indication, may amount to 20% of the offender's net monthly income.

84 Pursuant to the rule laid down in Article 49(3) of the Charter, the severity of sanctions must be commensurate with the seriousness of the infringements they address, in particular by ensuring that they have a genuinely dissuasive effect, while at the same time not exceeding the limits of what is necessary to achieve the objectives legitimately pursued by the legislation in question (see, to that effect, judgment of 11 February 2021, *K. M. (Sanctions imposed on the master of a vessel)*, C-77/20, EU:C:2021:112, paragraphs 37 and 38 and the case-law cited).

85 While it is for the national court to assess whether the rules on sanctions at issue in the main proceedings are proportionate to the achievement of the legitimate objective pursued by the requirement to carry a valid identity card or passport, the Court may nevertheless provide it with all the elements of interpretation under EU law which may enable it to determine whether that is the case (see, by analogy, judgments of 28 January 2016, *Laezza*, C-375/14, EU:C:2016:60, paragraph 37, and of 11 February 2021, *K. M. (Sanctions imposed on the master of a vessel)*, C-77/20, EU:C:2021:112, paragraph 39).

86 Thus, as noted in paragraph 53 of the present judgment, the obligation to carry an identity card or passport when moving from one Member State to another is a formality intended to facilitate the exercise of the right to freedom of movement by ensuring that any person benefiting from that right is easily identified as such in the context of a possible check.

87 With regard to the criminal fine which, according to the information provided by the referring court, is imposed in cases where the crossing of the national border without an identity card or passport is treated as a minor offence, it must be held that that sanction, which typically amounts to about 20% of the offender's net monthly income, is not commensurate with the seriousness of the offence, as is particularly apparent from the circumstances of the main proceedings, in which, as noted in paragraph 44 of the present judgment, the total amount of the fine that could be imposed for that minor offence is EUR 95 250, without any ceiling being provided for.

88 While it is open to Member States to impose a fine in order to penalise a breach of a formal requirement relating to the exercise of a right conferred by EU law, it is important to note that such a sanction must be proportionate to the seriousness of that breach (see, to that effect, judgment of 18 March 2021, *A. (Exercise of the right of deduction)*, C-895/19, EU:C:2021:216, paragraph 53 and the case-law cited).

89 Where, as in the present case, the obligation to carry a valid identity card or passport is disregarded by a person entitled to freedom of movement who holds such a document but has merely failed to carry it when travelling, the offence is, as the Finnish Government acknowledged, of minor importance. Therefore, subject to cases of recidivism, such an offence should not lead to the imposition of a heavy financial penalty, such as a fine amounting to 20% of the offender's average net monthly income.

90 The severity of such a sanction exceeds the limits of what is appropriate and necessary to achieve the objective set out in paragraph 86 of the present judgment.

91 It is true, as the Advocate General pointed out in point 121 of his Opinion, that EU law does not preclude rules on financial penalties from taking account of the offender's ability to pay by providing that the fine is to be calculated according to the offender's level of income. However, compliance by Union citizens with the formalities connected with the exercise of the right to freedom of movement may be ensured in a sufficiently dissuasive manner by measures which are less restrictive than those provided for by legislation such as that at issue in the main proceedings;

such measures may include, in particular, the fixing of fines corresponding to a lower percentage of monthly income and the introduction of a ceiling on the amount of fines.

92 In the light of the foregoing, the answer to the third question must be that Article 21(1) TFEU and Articles 4 and 36 of Directive 2004/38, read in the light of Article 49(3) of the Charter, must be interpreted as precluding rules on criminal sanctions by which a Member State makes the crossing of its national border without a valid identity card or passport punishable by a fine which may, by way of illustration, amount to 20% of the offender's net monthly income, where such a fine is not proportionate to the seriousness of the offence, which is of a minor nature.

Costs

93 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

- 1. The right of Union citizens to free movement provided for in Article 21 TFEU and defined by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, must, having regard to the provisions on border crossing laid down by Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013, be interpreted as not precluding national legislation by which a Member State obliges its nationals, on pain of criminal penalties, to carry a valid identity card or passport when travelling to another Member State, by whatever means of transport and by whatever route, provided that the detailed rules for those penalties comply with the general principles of EU law, including those of proportionality and non-discrimination.**
- 2. The right of Union citizens to freedom of movement laid down in Article 21(1) TFEU, in the light of the provisions on the crossing of borders set out in Regulation No 562/2006, as amended by Regulation No 610/2013, must be interpreted as not precluding national legislation by which a Member State requires its nationals to carry a valid identity card or passport, on pain of criminal sanctions, when they enter its territory from another Member State, provided that that obligation does not make the right of entry conditional and that the detailed rules on penalties for failure to comply with that obligation comply with the general principles of EU law, including those of proportionality and non-discrimination. A journey to the Member State concerned from another Member State made on board a pleasure boat and through international waters is listed, under the conditions laid down in the second paragraph of point 3.2.5 of Annex VI to that regulation, among the cases in which the submission of such a document may be requested.**
- 3. Article 21(1) TFEU and Articles 4 and 36 of Directive 2004/38, read in the light of Article 49(3) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding rules on criminal sanctions by which a Member State makes the crossing of its national border without a valid identity card or passport punishable by a fine**

which may, by way of example, amount to 20% of the offender's net monthly income, where such a fine is not proportionate to the seriousness of the offence, which is of a minor nature.

[Signatures]

1 Language of the case: Finnish.
