ECLI:EU:C:2019:1071

Provisional text

JUDGMENT OF THE COURT (First Chamber)

12 December 2019 (*)

(Reference for a preliminary ruling — Border controls, asylum and immigration — Regulation (EU) 2016/399 — Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) — Article 6 — Entry conditions for third-country nationals — Concept of 'threat to public policy' — Return decision issued to an illegally staying third-country national)

In Case C-380/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Council of State, Netherlands), made by decision of 6 June 2018, received at the Court on 11 June 2018, in the proceedings

Staatssecretaris van Justitie en Veiligheid

v

E.P.

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, R. Silva de Lapuerta, Vice-President of the Court, M. Safjan, L. Bay Larsen (Rapporteur) and C. Toader, Judges,

Advocate General: G. Pitruzzella,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 2 May 2019,

after considering the observations submitted on behalf of:

– E.P., by Š. Petković, advocaat,

– the Netherlands Government, by J.M. Hoogveld, M.A.M. de Ree, M.L. Noort and M.K. Bulterman, acting as Agents,

– the Belgian Government, by C. Van Lul, C. Pochet and P. Cottin, acting as Agents, C. Decordier, avocate, and T. Bricout, advocaat,

– the German Government, initially by T. Henze and R. Kanitz, and subsequently by R. Kanitz, acting as Agents,

– the Swiss Government, by S. Lauper, acting as Agent,

– the European Commission, by G. Wils, J. Tomkin and C. Cattabriga, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 July 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 6(1)(e) of Regulation (EU) 2016/399 of the European Parliament and 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; 'the Schengen Borders Code').

2 The request has been made in proceedings between the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands; the State Secretary') and E.P. concerning the legality of a decision ordering E.P. to leave the territory of the European Union.

Legal context

The Convention implementing the Schengen Agreement

3 Article 5(1) of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed in Schengen on 19 June 1990 (OJ 2000 L 239, p. 19; 'the Convention implementing the Schengen Agreement'), provided:

'For stays not exceeding three months, aliens fulfilling the following conditions may be granted entry into the territories of the Contracting Parties:

(a) that the aliens possess a valid document or documents, as defined by the Executive Committee, authorising them to cross the border;

…

(c) that the aliens produce, if necessary, documents justifying the purpose and conditions of the intended stay and that they have sufficient means of subsistence … or are in a position to acquire such means lawfully;

(d) that the aliens shall not be persons for whom an alert has been issued for the purposes of refusing entry;

(e) that the aliens shall not be considered to be a threat to public policy, national security or the international relations of any of the Contracting Parties.'

4 Article 20(1) of the Convention implementing the Schengen Agreement, 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), provides:

'Aliens not subject to a visa requirement may move freely within the territories of the Contracting Parties for a maximum period of 90 days in any 180-day period, provided that they fulfil the entry conditions referred to in Article 5(1)(a), (c), (d) and (e).'

Directive 2004/38/EC

5 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 corrigenda OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34) states:

'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. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.'

Regulation (EC) No 1987/2006

6 Article 24(1) and (2) of Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) (OJ 2006 L 381, p. 4) states:

'1. Data on third-country nationals in respect of whom an alert has been issued for the purposes of refusing entry or stay shall be entered on the basis of a national alert resulting from a decision taken by the competent administrative authorities or courts in accordance with the rules of procedure laid down by national law taken on the basis of an individual assessment. Appeals against these decisions shall lie in accordance with national legislation.

2. An alert shall be entered where the decision referred to in paragraph 1 is based on a threat to public policy or public security or to national security which the presence of the third-country national in question in the territory of a Member State may pose. This situation shall arise in particular in the case of:

(a) a third-country national who has been convicted in a Member State of an offence carrying a penalty involving deprivation of liberty of at least one year;

(b) a third-country national in respect of whom there are serious grounds for believing that he has committed a serious criminal offence or in respect of whom there are clear indications of an intention to commit such an offence in the territory of a Member State.'

Directive 2008/115/EC

7 Article 3 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98) is worded as follows:

'For the purpose of this Directive the following definitions shall apply:

…

2. "illegal stay" means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 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)] or other conditions for entry, stay or residence in that Member State;

…'

8 Article 6(1) of Directive 2008/115 provides:

'Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5.'

The Visa Code

9 Article 21(1) of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) (OJ 2009 L 243, p. 1; 'the Visa Code') states:

'In the examination of an application for a uniform visa, it shall be ascertained whether the applicant fulfils the entry conditions set out in Article 5(1)(a), (c), (d) and (e) of [Regulation No 562/2006], and particular consideration shall be given to assessing whether the applicant presents a risk of illegal immigration or a risk to the security of the Member States and whether the applicant intends to leave the territory of the Member States before the expiry of the visa applied for.'

The Schengen Borders Code

10 Recitals 6 and 27 of the Schengen Borders Code are worded as follows:

'(6) Border control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control. Border control should help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations.

…

(27) In accordance with the case-law of the Court of Justice of the European Union, a derogation from the fundamental principle of free movement of persons must be interpreted strictly and the concept of public policy presupposes the existence of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.'

11 Article 2 of the Schengen Borders Code provides:

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

…

5. "persons enjoying the right of free movement under Union law" means:

(a) Union citizens within the meaning of Article 20(1) TFEU, and third-country nationals who are members of the family of a Union citizen exercising his or her right to free movement to whom Directive [2004/38] applies;

(b) third-country nationals and their family members, whatever their nationality, who, under agreements between the Union and its Member States, on the one hand, and those third countries, on the other hand, enjoy rights of free movement equivalent to those of Union citizens;

…'

12 Article 6(1) of the Schengen Borders Code provides:

'For intended stays on the territory of the Member States of a duration of no more than 90 days in any 180-day period, which entails considering the 180-day period preceding each day of stay, the entry conditions for third-country nationals shall be the following:

…

(d) they are not persons for whom an alert has been issued in the [Schengen Information System (SIS)] for the purposes of refusing entry;

(e) they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States' national data bases for the purposes of refusing entry on the same grounds.'

13 The third subparagraph of Article 8(2) of the Schengen Borders Code provides:

'However, on a non-systematic basis, when carrying out minimum checks on persons enjoying the right of free movement under Union law, border guards may consult national and European databases in order to ensure that such persons do not represent a genuine, present and sufficiently serious threat to the internal security, public policy, international relations of the Member States or a threat to the public health.'

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

14 When E.P., a third-country national, was in the Netherlands on a short stay for which he was exempt from a visa requirement, he was suspected of having committed an infringement of the Netherlands criminal legislation relating to drugs.

15 By decision of 19 May 2016, the State Secretary ordered E.P. to leave the territory of the European Union, on the ground that he no longer fulfilled the condition set out in Article 6(1)(e) of the Schengen Borders Code inasmuch as he posed a threat to public policy.

16 E.P. brought an action against that decision before the rechtbank Den Haag, zittingsplaats Amsterdam (District Court, The Hague, sitting in Amsterdam, Netherlands).

17 By judgment of 13 September 2016, that court upheld the action and annulled the State Secretary's decision.

18 The State Secretary appealed against that judgment.

19 In the light in particular of the nature of the decision issued to E.P., the complexity of the assessments that the State Secretary was called upon to make in order to adopt that decision and the fact that E.P. was on the territory of a Member State on the day when the decision was adopted, the referring court is uncertain whether, in order to find a threat to public policy, within the meaning of Article 6(1)(e) of the Schengen Borders Code, it had to be established that E.P.'s personal conduct represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

20 It takes the view that, as matters stand, the Court's case-law, resulting from the judgments of 19 December 2013, *Koushkaki* (C-84/12, EU:C:2013:862), of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377), of 24 June 2015, *T.* (C-373/13, EU:C:2015:413), of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84), and of 4 April 2017, *Fahimian* (C-544/15, EU:C:2017:255), does not provide an unequivocal answer to that question.

21 In those circumstances, the Raad van State (Council of State, Netherlands) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 6(1)(e) of [the Schengen Borders Code] be interpreted as meaning that, when establishing that a legal stay of no more than 90 days within a period of 180 days has been terminated because a foreign national is considered to be a threat to public policy, reasons must be given as to why the personal conduct of the foreign national concerned poses a genuine, present and sufficiently serious threat to one of the fundamental interests of society?

(2) If question 1 is to be answered in the negative, what are the requirements which, pursuant to Article 6(1)(e) of [the Schengen Borders Code], apply to the reasons as to why the foreign national is considered to be a threat to public policy?

Must Article 6(1)(e) of [the Schengen Borders Code] be interpreted as precluding a national practice according to which a foreign national is considered to be a threat to public policy on the sole ground that it has been established that the foreign national concerned is suspected of having committed a criminal offence?'

Consideration of the questions referred

22 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 6(1)(e) of the Schengen Borders Code must be interpreted as precluding a national practice under which the competent authorities may issue a return decision to a third-country national not subject to a visa requirement, who is present on the territory of the Member

States for a short stay, on the basis of the fact that that national is considered to be a threat to public policy because he or she is suspected of having committed a criminal offence.

23 It is clear from Article 6(1)(e) of the Schengen Borders Code that one of the entry conditions for a short stay on the territory of the Member States is the requirement not to be considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States.

24 Although that provision presents that requirement as a condition for entry into the territory of the Member States, it must be held that, following such entry, the stay on that territory is likewise legal only if that requirement continues to be complied with.

25 First, Article 20(1) of the Convention implementing the Schengen Agreement provides that third-country nationals not subject to a visa requirement may move freely within the territory of the Member States for the period defined in that provision, provided that they fulfil the entry conditions referred to in Article 5(1)(a), and (c) to (e) of that convention.

26 In that regard, it should be noted that Article 6(1) of the Schengen Borders Code replaced Article 5(1) of Regulation No 562/2006, which itself replaced Article 5(1) of the Convention implementing the Schengen Agreement. Thus, Article 20(1) of that convention must be understood as now referring to Article 6(1) of the Schengen Borders Code.

27 Second, it is apparent from Article 3(2) of Directive 2008/115 that a third-country national who is present on the territory of a Member State without fulfilling the conditions of entry as set out in Article 5 of Regulation No 562/2006, now replaced by Article 6 of the Schengen Borders Code, or other conditions for entry, stay or residence is, therefore, staying on that territory illegally (see, to that effect, judgment of 7 June 2016, *Affum*, C-47/15, EU:C:2016:408, paragraph 59).

28 Accordingly, given that Article 6(1) of Directive 2008/115 provides that Member States are, in principle, to issue a return decision to any third-country national staying illegally on their territory, a Member State may issue such a decision to a third-country national not subject to a visa requirement who is present on the territory of the Member States for a short stay if he or she is a threat to public policy within the meaning of Article 6(1)(e) of the Schengen Borders Code.

29 In that context, with a view to determining the scope of the concept of 'threat to public policy' in Article 6(1)(e) of the Schengen Borders Code, it should be noted that it is apparent from the Court's settled case-law that a Union citizen who has exercised his or her right to free movement and certain members of that citizen's family can be regarded as posing a threat to public policy only if their individual conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society of the Member State concerned (see, to that effect, judgments of 29 April 2004, *Orfanopoulos and Oliveri*, C-482/01 and C-493/01, EU:C:2004:262, paragraphs 66 and 67, and of 10 July 2008, *Jipa*, C-33/07, EU:C:2008:396, paragraphs 23 and 24).

30 The concept of 'threat to public policy [*ordre public*]' has subsequently been interpreted in the same way in the context of a number of directives governing the situation of third-country nationals who are not part of a Union citizen's family (see judgments of 11 June 2015, *Zh. and O.*, C-554/13, EU:C:2015:377, paragraph 60; of 24 June 2015, *T.*, C-373/13, EU:C:2015:413, paragraph 79; and of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 67).

31 Nonetheless, any reference by the EU legislature to the concept of 'threat to public policy' does not necessarily have to be understood as referring exclusively to individual conduct representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society of the Member State concerned.

32 Thus, the Court has held, in the context of 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), that the kindred concept of 'threat to public security' must be interpreted more broadly than it is in the case-law relating to persons enjoying the right of free movement and that it may cover inter alia potential threats to public security (see, to that effect, judgment of 4 April 2017, *Fahimian*, C-544/15, EU:C:2017:255, paragraph 40).

33 It is thus necessary, in order to define the scope of the concept of 'threat to public policy', within the meaning of Article 6(1)(e) of the Schengen Borders Code, to take into account the wording of that provision, its context and the objectives pursued by the legislation of which it forms part (see, to that effect, judgments of 24 June 2015, *T.*, C-373/13, EU:C:2015:413, paragraph 58, and of 4 April 2017, *Fahimian*, C-544/15, EU:C:2017:255, paragraph 30).

34 As regards, in the first place, the wording of Article 6(1)(e) of the Schengen Borders Code, it is to be noted that, unlike inter alia Article 27(2) of Directive 2004/38, it does not expressly require the personal conduct of the individual concerned to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society in order for that individual to be capable of being regarded as a threat to public policy.

35 That assessment is supported, in the second place, by the context of Article 6(1)(e) of the Schengen Borders Code.

36 In that regard, it must be pointed out, first of all, that that provision is also closely connected with the Visa Code, since, under Article 21(1) of the Visa Code, it must be ascertained before a uniform visa is issued whether the entry condition which it lays down is fulfilled.

37 Therefore, the wide discretion accorded by the Court to the competent authorities of the Member States when they ascertain whether the conditions to which issue of a uniform visa is subject are complied with must logically, in the light of the complexity of such an examination (see, to that effect, judgment of 19 December 2013, *Koushkaki*, C-84/12, EU:C:2013:862, paragraphs 56 to 60), be accorded to those authorities also when they determine whether a third-country national is a threat to public policy, within the meaning of Article 6(1)(e) of the Schengen Borders Code.

38 Next, whilst it is true that recital 27 and the third subparagraph of Article 8(2) of the Schengen Borders Code expressly refer to the situation in which a person represents 'a genuine, present and sufficiently serious threat' to public policy, those references relate only to the situation of persons enjoying the right of free movement under EU law, within the meaning of Article 2(5) of that code.

39 Accordingly, if the EU legislature had also intended Article 6(1)(e) of the Schengen Borders Code to apply only if such a situation obtained, it would logically have worded that provision in the same way as the third subparagraph of Article 8(2) of that code.

40 Finally, Article 6(1)(d) of the Schengen Borders Code provides that the requirement not to be a person for whom an alert has been issued in the SIS for the purposes of refusing entry is also an entry condition for a short stay on the territory of the Member States.

41 It is clear from Article 24(2) of Regulation No 1987/2006 that a third-country national who has been convicted of an offence carrying a penalty involving deprivation of liberty of at least 1 year or in respect of whom there are serious grounds for believing that he or she has committed a serious criminal offence may be a person for whom an alert is issued in the SIS for the purposes of refusing entry in that he or she is a threat to public policy or public security.

42 It follows that the concept of 'threat to public policy or public security', within the meaning of that provision, is therefore appreciably different from the concept referred to in paragraph 29 of the present judgment (see, by analogy, judgment of 31 January 2006, *Commission* v *Spain*, C-503/03, EU:C:2006:74, paragraph 48).

43 In that context, to hold the concept of threat to public policy, within the meaning of Article 6(1)(e) of the Schengen Borders Code, to be narrower than the concept on which application of Article 6(1)(d) of that code depends would introduce incoherence into that code.

44 So far as concerns, in the third place, the objectives of the Schengen Borders Code, it is clear from recital 6 of the code that border control should help to prevent 'any threat' to public policy.

45 Therefore, it is evident, first, that the safeguarding of public policy is, as such, one of the objectives pursued by the Schengen Borders Code and, second, that the EU legislature intended to combat all threats to public policy.

46 In the light of all those considerations, Article 6(1)(e) of the Schengen Borders Code cannot be interpreted as precluding, as a matter of principle, a national practice under which a return decision is issued to a third-country national not subject to a visa requirement, who is present on the territory of the Member States for a short stay, if that national is suspected of having committed a criminal offence, without it having been established that his or her conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society of the Member State concerned.

47 That said, such a national practice must comply with the principle of proportionality, which is a general principle of EU law, and must therefore, in particular, not go beyond what is necessary to safeguard public policy (see, to that effect, judgments of 2 May 2019, *Lavorgna*, C-309/18, EU:C:2019:350, paragraph 24; of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 68; and of 9 July 2015, *K and A*, C-153/14, EU:C:2015:453, paragraph 51).

48 It follows, first, that the infringement which the third-country national at issue is suspected of having committed must be sufficiently serious, in the light of its nature and of the punishment which may be imposed, to justify that national's stay on the territory of the Member States being brought to an immediate end.

49 Second, in the absence of a conviction, the competent authorities can invoke a threat to public policy only if there is consistent, objective and specific evidence that provides grounds for suspecting that that third-country national has committed such an offence.

50 It is for the referring court to establish whether the national practice at issue in the main proceedings meets those requirements.

51 It follows from all the foregoing that the answer to the questions referred is that Article 6(1)(e) of the Schengen Borders Code must be interpreted as not precluding a national practice under which the competent authorities may issue a return decision to a third-country national not subject to a visa requirement, who is present on the territory of the Member States for a short stay, on the basis of the fact that that national is considered to be a threat to public policy because he or she is suspected of having committed a criminal offence, provided that that practice is applicable only if, first, the offence is sufficiently serious, in the light of its nature and of the punishment which may be imposed, to justify that national's stay on the territory of the Member States being brought to an immediate end and, second, those authorities have consistent, objective and specific evidence to support their suspicions, matters which are for the referring court to establish.

Costs

52 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 (First Chamber) hereby rules:

Article 6(1)(e) of Regulation (EU) 2016/399 of the European Parliament and the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) must be interpreted as not precluding a national practice under which the competent authorities may issue a return decision to a third-country national not subject to a visa requirement, who is present on the territory of the Member States for a short stay, on the basis of the fact that that national is considered to be a threat to public policy because he or she is suspected of having committed a criminal offence, provided that that practice is applicable only if, first, the offence is sufficiently serious, in the light of its nature and of the punishment which may be imposed, to justify that national's stay on the territory of the Member States being brought to an immediate end and, second, those authorities have consistent, objective and specific evidence to support their suspicions, matters which are for the referring court to establish.

[Signatures]

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* Language of the case: Dutch.