ECLI:EU:C:2019:993

Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

20 November 2019 (*)

(Reference for a preliminary ruling — Area of freedom, security and justice — Immigration policy — Right to family reunification — Directive 2003/86/EC — Article 5(4) — Decision concerning the application for family reunification — Consequences of failure to comply with the time limit for taking a decision — Automatic issue of a residence permit)

In Case C-706/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings, Belgium), made by decision of 8 November 2018, received at the Court on 14 November 2018, in the proceedings

X

v

Belgische Staat,

THE COURT (Sixth Chamber),

composed of R. Silva de Lapuerta (Rapporteur), Vice-President of the Court, acting as President of the Sixth Chamber, L. Bay Larsen and C. Toader, Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Belgian government, by C. Pochet, M. Jacobs and P. Cottin, acting as Agents, and by C. Decordier and T. Bricout, advocaten,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by C. Cattabriga, M. Condou-Durande and G. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).

2 The application was made in the context of a dispute between X, an Afghan national, and the Belgische Staat (Belgian State) concerning the latter's rejection of her application for the issue of a visa for family reunification.

Legal context

European Union law

3 Recital 6 of Directive 2003/86 states that 'to protect the family and establish or preserve family life, the material conditions for exercising the right to family reunification should be determined on the basis of common criteria'.

4 Article 1 of Directive 2003/86 provides:

'The purpose of this Directive is to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.'

5 Article 2 of the directive reads as follows:

'For the purpose of this Directive:

…

(c) "sponsor" means a third country national residing lawfully in a Member State and applying, or whose family members apply, for family reunification to be joined with him/her;

(d) "family reunification" means the entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident's entry;

(e) "residence permit" means any authorisation issued by the authorities of a Member State allowing a third country national to stay legally in its territory, in accordance with the provisions of Article 1(2)(a) of Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third country nationals [(OJ 2002 L 157, p. 1)];

…’

6 Article 3(5) of Directive 2003/86 provides:

‘This directive shall not affect the possibility for the Member States to adopt or maintain more favourable provisions.’

7 In accordance with Article 4 of the directive:

‘1. The Member States shall authorise the entry and residence, pursuant to this directive and subject to compliance with the conditions laid down in Chapter IV, as well as in Article 16, of the following family members:

(a) the sponsor’s spouse;

…’

8 Article 5 of that directive provides:

‘…

2. The application shall be accompanied by documentary evidence of the family relationship and of compliance with the conditions laid down in Articles 4 and 6 and, where applicable, Articles 7 and 8, as well as certified copies of family member(s)’ travel documents.

If appropriate, in order to obtain evidence that a family relationship exists, Member States may carry out interviews with the sponsor and his/her family members and conduct other investigations that are found to be necessary.

When examining an application concerning the unmarried partner of the sponsor, Member States shall consider, as evidence of the family relationship, factors such as a common child, previous cohabitation, registration of the partnership and any other reliable means of proof.

…

4. The competent authorities of the Member State shall give the person, who has submitted the application, written notification of the decision as soon as possible and in any event no later than nine months from the date on which the application was lodged.

In exceptional circumstances linked to the complexity of the examination of the application, the time limit referred to in the first subparagraph may be extended.

Reasons shall be given for the decision rejecting the application. Any consequences of no decision being taken by the end of the period provided for in the first subparagraph shall be determined by the national legislation of the relevant Member State.’

9 Article 11(2) of Directive 2003/86 is worded as follows:

‘Where a refugee cannot provide official documentary evidence of the family relationship, the Member States shall take into account other evidence, to be assessed in accordance with national

law, of the existence of such relationship. A decision rejecting an application may not be based solely on the fact that documentary evidence is lacking.'

10 Article 13 of that directive provides:

'1. As soon as the application for family reunification has been accepted, the Member State concerned shall authorise the entry of the family member or members. In that regard, the Member State concerned shall grant such persons every facility for obtaining the requisite visas.

2. The Member State concerned shall grant the family members a first residence permit of at least one year's duration. This residence permit shall be renewable.

3. The duration of the residence permits granted to the family member(s) shall in principle not go beyond the date of expiry of the residence permit held by the sponsor.'

Belgian law

11 Article 10 of the Wet betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen (Law on entry to the territory, residence, establishment and removal of foreign nationals) of 15 December 1980 (*Belgisch Staatsblad*, 31 December 1980, p. 14584), in the version applicable to the main proceedings, ('the Law of 15 December 1980') provides:

'1. Subject to Articles 9 and 12, the following persons shall be granted leave to reside in the Kingdom for more than three months as of right:

…

(4) the following family members of a foreign national who, for at least 12 months, has been admitted or granted leave to reside in the Kingdom for an unlimited period, or who, for at least 12 months, has been granted leave to become established there. That 12-month period shall be waived if the conjugal bond or registered partnership existed before the arrival of the foreigner joined in the Kingdom or if they have a common minor child. Those conditions with regard to the nature of the stay and the duration of the stay do not apply if it concerns the family members of a foreign national who, in accordance with the second or third paragraph of Article 49(1) or the second or third subparagraph of Article 49/2(1), was granted permission to reside in Belgium as a beneficiary of international protection status:

– his foreign spouse or the foreign national with whom he is in a registered partnership considered to be equivalent to marriage in Belgium, who is coming to live with him, provided that both parties concerned are over the age of 21 years. This minimum age shall be reduced to 18 years, however, where the marital relationship or the registered partnership, as the case may be, pre-exists the arrival in the Kingdom of the foreign national who is being joined;

…'

12 Article 12a(2) of the Law of 15 December 1980 states:

'If the foreign national referred to in paragraph 1 submits his application to the Belgian diplomatic or consular representative who has jurisdiction for his place of domicile or his place of residence abroad, documents must be submitted together with the application that show that he meets the

conditions set out in Article 10(1) to (3), in particular a medical certificate showing that he is not suffering from one of the diseases listed in the Annex to the present Law, and, if he is older than 18 years, an extract from the criminal records or an equivalent document.

The date of submission of the application is that on which all evidence is submitted, in accordance with Article 30 of the wet van 16 juli 2004 houdende het Wetboek van internationaal privaatrecht (Law of 16 July 2004 laying down the Code of Private International Law) or international agreements on the same subject matter.

The decision regarding the residence permit shall be taken and notified as soon as possible and no later than six months following the date of submission of the application, as stipulated in the second paragraph. The decision shall be taken with due consideration of all the elements of the file.

If the condition relating to the adequacy of the means of subsistence referred to in Article 10(5), is not met, the Minister or his authorised representative should determine, on the basis of the personal needs of the foreign national who is seeking admission and of his family members, what means of subsistence they require to meet their needs without being a burden on the public authorities. The minister or his authorised representative may require the foreign national to submit any documents and information which may be useful for determining that amount.

In exceptional cases related to the complexity of the examination of the application as well as in the context of an investigation concerning a marriage referred to in Article 146a of the Civil Code or the conditions of the partnership referred to in Article 10(1)(1), point 5, the Minister or his delegate may, on two occasions, extend this period by a period of three months, by a reasoned decision, notified to the applicant.

If no decision has been taken after the expiry of the six-month period following the date on which the application was submitted, which may have been extended in accordance with paragraph 5, the residence permit must be issued.'

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

13 On 24 October 2013, X, an Afghan national, submitted an application for a family reunification visa to the Belgian Embassy in Islamabad (Pakistan) in order to join her alleged spouse, F.S.M., an Afghan national with refugee status in Belgium.

14 By decision of 16 June 2014, the gemachtigde van de staatssecretaris voor Asiel en Migratie, Maatschappelijke Integratie en Armoedebestrijding (Delegated Official of the Secretary of State for Asylum and Migration, Social Integration and the Fight against Poverty, Belgium) rejected that request on the grounds that the matrimonial link between X and F.S.M. had not been established.

15 On 24 July 2014, the appellant in the main proceedings brought an appeal against that decision before the referring court, the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings, Belgium). By a judgment of 15 July 2016, that court dismissed the action.

16 On 22 August 2016 the appellant in the main proceedings appealed in cassation against that judgment to the Raad van State (Council of State, Belgium).

17 By judgment of 13 March 2018, the Raad van State (Council of State) set aside the judgment of the referring court of 15 July 2016. In its judgment, the Raad van State (Council of State) held, in

essence, that if the time limit provided for in Article 12a(2) of the Law of 15 December 1980 is exceeded, it entails, without exception, the granting of an entry and residence permit to the applicant, so that the appellant in the main proceedings should have been granted such a permit, even if there were doubts as to the existence of her matrimonial link with F.S.M. The Raad van State (Council of State) also remitted the case to the referring court for a new examination.

18 The case having been remitted to it by the Raad van State (Council of State), the referring court explains that it is bound by the solution adopted by the latter in its judgment of 13 March 2018 concerning the application of Article 12a(2) of the Law of 15 December 1980. However, in so far as that provision constitutes a transposition of Article 5(4) of Directive 2003/86, that court is doubtful as to whether such a solution is in conformity with that directive.

19 In that regard, the referring court notes that, in its judgment of 27 June 2018, *Diallo* (C-246/17, EU:C:2018:499), the Court ruled, concerning the interpretation 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, corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34), that the competent national authorities may not automatically issue a residence permit to the family members of an EU citizen when the six-month period provided for in that directive for the issue of such a permit has expired.

20 In that context, that court points out, in essence, that the automatic grant of a residence permit to family members of a third-country national under the conditions provided for in Article 12a(2) of the Law of 15 December 1980 would, on the one hand, lead to more favourable treatment of the family members of that national than of those of an EU citizen and, on the other, could undermine the objective of Directive 2003/86, which is to lay down the conditions under which the right to family reunification of third-country nationals legally residing in the territory of the Member States is exercised.

21 In those circumstances, the Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings) decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

‘Does Directive 2003/86 — having regard to Article 3(5), as well as the objective thereof, in particular, the determination of the conditions for the exercise of the right to family reunification — preclude national legislation which requires that Article 5(4) of Directive 2003/86 be interpreted as meaning that the consequence of no decision having been taken by the expiry of the prescribed period is that national authorities are under an obligation to grant, of their own motion, a residence permit to the person concerned, without first establishing that that person in fact satisfies the conditions for residence in Belgium in conformity with EU law?’

Consideration of the question referred

22 By its question, the referring court asks, in essence, whether Directive 2003/86 must be interpreted as precluding national legislation under which, in the absence of a decision within six months of the date on which the application for family reunification is lodged, the competent national authorities must automatically issue a residence permit to the applicant, without necessarily having to establish in advance that he or she actually meets the requirements for residence in the host Member State in accordance with EU law.

23 In that regard, it is clear from the first subparagraph of Article 5(4) of Directive 2003/86 that the decision on the application for family reunification must be taken as soon as possible, and in any event no later than nine months from the date on which the application was lodged with the competent national authorities of the Member State concerned.

24 In accordance with the second sentence of the third subparagraph of Article 5(4) of Directive 2003/86, any consequences of no decision being taken by the end of that period must be determined by the national legislation of the relevant Member State.

25 In the present case, it appears from the order for reference that the national legislation at issue in the main proceedings provides for an implicit acceptance system, under which the absence of a decision on the application for family reunification on the expiry of a period of six months from the date on which that application is lodged entails, without exception, the automatic issue of a residence permit to the applicant.

26 However, while EU law in no way precludes Member States from establishing implicit acceptance or authorisation schemes, such schemes must nevertheless not impair the effectiveness of EU law (judgment of 27 June 2018, *Diallo*, C-246/17, EU:C:2018:499, paragraph 46).

27 In that regard, it must be noted that, although, on the one hand, the objective pursued by Directive 2003/86 is to promote family reunification (judgment of 13 March 2019, *E.*, C-635/17, EU:C:2019:192, paragraph 45), on the other, under Article 1 of Directive 2003/86, read in conjunction with recital 6 thereof, that directive is intended to lay down, in accordance with common criteria, the substantive conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.

28 In Article 2(d) of Directive 2003/86, the concept of ‘family reunification’ is defined as the entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident’s entry.

29 Under Article 4(1) of Directive 2003/86, Member States are to authorise the entry and residence, in accordance with that directive, of certain members of the sponsor’s family for the purpose of family reunification, including, in particular, the sponsor’s spouse. The Court has previously held that that provision imposes specific positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by that directive, to authorise family reunification of certain members of the sponsor’s family, without being left a margin of appreciation (judgment of 27 June 2006, *Parliament* v *Council*, C-540/03, EU:C:2006:429, paragraph 60).

30 However, as regards the procedural rules governing the lodging and examination of the application for family reunification, the first subparagraph of Article 5(2) of Directive 2003/86 provides that that application must be accompanied by ‘documentary evidence of the family relationship’. Similarly, the second subparagraph of Article 5(2) of that directive, provides that ‘if appropriate, in order to obtain evidence that a family relationship exists, Member States may carry out interviews with the sponsor and his/her family members and conduct other investigations that are found to be necessary’.

31 Moreover, with regard to family reunification of refugees, Article 11(2) of Directive 2003/86 provides that, where a refugee cannot provide official documentary evidence of the family

relationship, the Member State concerned is to take into account other evidence of the existence of such relationship.

32 It follows that the competent national authorities must examine the existence of the family relationship claimed by the sponsor or by the member of his or her family concerned by the application for family reunification.

33 Thus, when the application for family reunification is accepted, the Member State concerned is to authorise the entry of the sponsor's family member and issue him or her with a first residence permit, in accordance with Article 13(2) of Directive 2003/86.

34 It follows from those considerations that the competent national authorities are required, before authorising family reunification under Directive 2003/86, to establish the existence of the relevant family links between the sponsor and the third-country national in respect of whom the application for family reunification is made.

35 In those circumstances, those authorities may not issue a residence permit on the basis of Directive 2003/86 to a third-country national who does not meet the requirements laid down in that directive for its allocation (see, by analogy, judgment of 27 June 2018, *Diallo*, C-246/17, EU:C:2018:499, paragraph 50).

36 In the present case, as is clear from paragraphs 17 and 25 of this judgment, under the national legislation at issue in the main proceedings, the competent national authorities are required to issue, without exception, a residence permit on the basis of Directive 2003/86 to the applicant for family reunification on expiry of a period of six months from the date on which that person's application was lodged, even though it had not been established in advance that the applicant actually met the requirements laid down in Directive 2003/86 for entitlement to that permit.

37 Such legislation, in so far as it allows the issue of a residence permit on the basis of Directive 2003/86 to a person who does not meet the requirements for obtaining it, impairs the effectiveness of that directive and is contrary to its objectives.

38 In the light of all the foregoing considerations, the answer to the question referred is that Directive 2003/86 must be interpreted as precluding national legislation under which, in the absence of a decision being adopted within six months of the date on which the application for family reunification was lodged, the competent national authorities must automatically issue a residence permit to the applicant, without necessarily having to establish in advance that the latter actually meets the requirements for residence in the host Member State in accordance with EU law.

Costs

39 Since these proceedings are, for the parties in 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 (Sixth Chamber) hereby rules:

Council Directive 2003/86/EC of 22 September 2003 on family reunification must be interpreted as precluding national legislation under which, in the absence of a decision being adopted within six months of the date on which the application for family reunification was lodged, the competent national authorities must automatically issue a residence permit to the

applicant, without necessarily having to establish in advance that the latter actually meets the requirements for residence in the host Member State in accordance with EU law.

[Signatures]

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* Language of the case: Dutch.