

## JUDGMENT OF THE COURT (Fifth Chamber)

17 January 2013 (\*)

(Regulation (EC) No 562/2006 – Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) – Alleged violation of the right to respect for human dignity – Effective judicial protection – Right of access to a court)

In Case C-23/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Augstākās tiesas Senāts (Latvia), made by decision of 11 January 2012, received at the Court on 17 January 2012, in the proceedings brought by

**Mohamad Zakaria**

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, A. Rosas (Rapporteur), E. Juhász, D. Šváby and C. Vajda, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Latvian Government, by I. Kalniņš and I. Ņesterova, acting as Agents,
- the European Commission, by G. Wils and A. Sauka, acting as Agents,

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

gives the following

### Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), and Article 6(1) and Article 13(3) 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).
- 2 The request has been made in the course of the consideration of an action brought by the claimant, Mr Zakaria, against the refusal to grant his application for damages based on the conduct of an administrative body upon his crossing of the Latvian border.

### Legal context

*European Union law*

3 Recital 20 in the preamble to Regulation No 562/2006 is formulated as follows:

'This Regulation respects fundamental rights and observes the principles recognised in particular by the [Charter]. It should be applied in accordance with the Member States' obligations as regards international protection and non-refoulement.'

4 Article 6 of Regulation No 562/2006, entitled 'Conduct of border checks', is worded as follows:

'1. Border guards shall, in the performance of their duties, fully respect human dignity.

Any measures taken in the performance of their duties shall be proportionate to the objectives pursued by such measures.

2. While carrying out border checks, border guards shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

5 Article 13(3) of Regulation No 562/2006 provides:

'Persons refused entry shall have the right to appeal. Appeals shall be conducted in accordance with national law. A written indication of contact points able to provide information on representatives competent to act on behalf of the third-country national in accordance with national law shall also be given to the third-country national.

Lodging such an appeal shall not have suspensive effect on a decision to refuse entry.

Without prejudice to any compensation granted in accordance with national law, the third-country national concerned shall, where the appeal concludes that the decision to refuse entry was ill-founded, be entitled to correction of the cancelled entry stamp, and any other cancellations or additions which have been made, by the Member State which refused entry.'

*Latvian law*

6 Article 20 of the Law on Immigration (Imigrācijas likums, *Latvijas Vēstnesis*, 2002, No 169, p. 2744) states:

'(1) Foreign nationals shall be granted the right to lodge an appeal against a decision refusing entry into the Republic of Latvia at their diplomatic representation within 30 days of the adoption of that decision.

(2) Appeals within the meaning of paragraph 1 shall be examined by the Head of the State border control or by the official authorised by it, and the ensuing decision shall not be subject to appeal.'

7 Article 76(2) of the Administrative Code of Procedure (*Administratīvā procesa likums, Latvijas Vēstnesis*, 2001, No 164, p. 2551), in the version applicable at the material time, states:

'Administrative acts may form the subject-matter of a complaint to a higher body. Legislation or rules of the Council of Ministers may appoint another body before which the complaint against the administrative act may be taken. Failing such appointment, or if that body is the Council of Ministers, the administrative act may form the subject-matter of proceedings before the courts.'

8 Article 89 of the Administrative Code of Procedure, entitled 'Meaning of factual act of an authority', states:

'(1) A factual act is an act of an authority in the field of public law which does not manifest itself in the form of a legal act and which is intended to produce factual effects, if a natural person has the right to that act or if that act adversely affected or is liable to adversely affect his rights or legal interests. A factual act also includes the acts of authorities which, regardless of their intention, produce factual effects which adversely affect or are likely to adversely affect

the rights of an individual. Procedural acts of authorities (acts which are not definitive) do not constitute factual acts.

(2) A certificate issued by the authority and failure of the authority to act, if it was or is required by law to carry out an act, also constitute a factual act.'

9 Article 92 of the Administrative Code of Procedure, entitled 'Right to compensation', states:

'Everyone has the right to compensation for material or personal damage, including non-material damage, suffered as a result of an administrative act or factual act of an authority.'

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

10 According to the order for reference, on 28 November 2010, Mr Zakaria flew from Beirut (Lebanon) to Copenhagen (Denmark) via Riga (Latvia). Mr Zakaria's identification document was a Palestinian refugee travel document issued to him by the Republic of Lebanon. On 27 November 2008 the claimant had obtained permanent residence rights in Sweden where, he claims, he had been living for the past 10 years and had initiated the process of acquiring Swedish nationality. He was travelling to Copenhagen because his domicile, which is in Lund (Sweden), was reached more easily and quickly from Copenhagen.

11 At Riga airport, the border guards inspected Mr Zakaria's documents and finally allowed him to enter Latvia and the territory of the Member States forming part 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 (OJ 2000 L 239, p. 19), signed at Schengen on 19 June 1990. However, in Mr Zakaria's submission, his documents were inspected in an offensive and provocative manner, which violated his human dignity. On account of the time taken by that inspection he missed his flight to Copenhagen.

12 Objecting to the conduct of the border guards when they inspected his documents at the border, and taking the view that it had caused him non-material harm, Mr Zakaria lodged a complaint with the Head of the State border control and sought compensation in the amount of LVL 7 000.

13 Decision No 25 of the Head of the State border control of 28 February 2011 upheld the legality of the conduct of the border guards and the ensuing administrative act, namely the authorisation of Mr Zakaria to cross the border and enter the territory of the Republic of Latvia, a Member State party to the Convention implementing the Schengen Agreement. On the other hand, the application was dismissed in so far as it concerned the compensation claim.

14 Mr Zakaria brought an action before the administratīvā rajona tiesa (Local Administrative Court) (Latvia) seeking a declaration that the conduct of the border guards was unlawful and compensation in the amount of LVL 7 000 for the material and non-material harm which he suffered.

15 By decision of the administratīvā rajona tiesa of 29 March 2011, Mr Zakaria's application was dismissed as inadmissible under the administrative procedure. The decision was based on the following arguments.

16 According to that court, Article 20 of the Law on Immigration establishes that foreign nationals who have been denied entry into Latvia have the right to challenge the decision within a period of 30 days of its adoption by lodging a complaint at their diplomatic representation. Such a complaint is examined by the Head of the State border control or an official authorised by him and the decision adopted is not subject to appeal.

17 Nor, due to the lack of a right of appeal before a court against a decision refusing entry into Latvia, could a court examine an application for a declaration that a procedural defect was committed in a decision authorising entry into that Member State.

- 18 The action for damages could not be viewed as a separate claim since it was inextricably linked to the main action. Consequently, if there was no main action, the action for damages for material and non-material harm suffered was inadmissible and had also to be dismissed.
- 19 Mr Zakaria appealed against the decision of the administratīvā rajona tiesa. The Administratīvā apgabaltiesa (Regional Administrative Court of Appeal) endorsed the reasoning of that decision. However, the Administratīvā apgabaltiesa accepted that, if Mr Zakaria considered that the border guards hurt his honour and dignity, which gave him a right to seek compensation, he was entitled to pursue such a claim before the ordinary courts.
- 20 Mr Zakaria appealed against the decision of the Administratīvā apgabaltiesa to the Augstākās tiesas Senāts (Senate of the Supreme Court). In that action, he was not seeking a review of the decision authorising him to enter Latvia, but, specifically, to challenge before a court the factual act of the border officials at the time of adoption of that decision, but unrelated to its adoption. He also claims that the factual act of the border guards falls within the definition laid down in Paragraph 89 of the Administrative Code of Procedure.
- 21 The Augstākās tiesas Senāts, referring court, states that, in the absence of a means of obtaining redress against the Head of the State border control's decision before an administrative court, and in view of the fact that Mr Zakaria's action is directed against acts which took place during an administrative procedure, the claim for compensation cannot be brought before the civil courts. However, it harbours doubts as to whether it is possible to reconcile with Article 13(3) of Regulation No 562/2006 a national law pursuant to which a person has no right to appeal a decision before a court or administrative body in which, from an institutional and functional perspective, an independent and objective review of the appeal is guaranteed.
- 22 Similarly, the Augstākās tiesas Senāts harbours doubts as regards the fact that Article 13(3) of Regulation No 562/2006 guarantees the right to appeal only in cases in which a person is denied entry into the Member State concerned, and takes the view that a person is entitled to complain of procedural infringements, particularly attacks on human dignity, even where the outcome of the administrative decision is favourable.
- 23 Having regard to the foregoing, the Augstākās tiesas Senāts decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- (1) Does Article 13(3) of Regulation ... No 562/2006 ... provide persons with a right of appeal not only against a decision refusing entry into a country, but also against infringements committed in the procedure leading to the adoption of a decision authorising entry?
- (2) If question 1 is answered in the affirmative, in the light of recital 20 in the preamble to, and Article 6(1) of, Regulation No 562/2006, and Article 47 of the Charter ... , does Article 13(3) of Regulation No 562/2006 require the Member States to guarantee an effective remedy before a court of law?
- (3) If question 1 is answered in the affirmative and question 2 in the negative, in the light of recital 20 in the preamble to, and Article 6(1) of, Regulation No 562/2006, and Article 47 of the Charter ... , does Article 13(3) of Regulation No 562/2006 require the Member States to guarantee an effective remedy before an administrative body which, from an institutional and functional perspective, provides the same guarantees as a court of law?

#### **Procedure before the Court**

- 24 Observations were submitted to the Court by the Latvian Government and by the Commission. Mr Zakaria, who did not put forward written observations himself and on behalf of whom no observation was submitted, sought to be allowed to present his observations during the oral part of the procedure, stating that he wished to set out the facts relating to the incident at issue in the main proceedings and that his interests were represented by the Latvijas Cilvektiesību centrs (Latvian Centre for Human Rights).

- 25 In accordance with Article 76(2) of the Rules of Procedure of the Court of Justice, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, the Court may decide not to hold a hearing if it considers, on reading the written pleadings or observations lodged during the written part of the procedure, that it has sufficient information to give a ruling. In accordance with Article 76(3) that provision does not apply where a request for a hearing, stating reasons, has been submitted by an interested person referred to in Article 23 of the Statute of the Court of Justice of the European Union who did not participate in the written part of the procedure.
- 26 Neither the decision to refer nor the documents submitted to the Court shows that Mr Zakaria was represented before the referring court by the Latvijas Cilvektiesību centrs. Accordingly, it is not established that that body is entitled to represent individuals under the applicable Latvian rules of procedure, as provided for by Article 47(2) of the Rules of Procedure of the Court of Justice.
- 27 The Court therefore invited Mr Zakaria to confirm that he had instructed the Latvijas Cilvektiesību centrs to represent him before the Court and to explain, first, whether that body is authorised, under Latvian law, to represent individuals before the national courts and, second, whether it was the representative of that centre who would address the Court during the hearing of oral arguments. Since Mr Zakaria did not reply within the time-limit laid down by the Court and since no other interested party referred to in Article 23 of the Statute of the Court had sought the opening of the oral part of the procedure, the Court refrained from holding a hearing, taking the view that it had sufficient information to give a ruling.

#### **Preliminary observations**

- 28 It is apparent from the decision to refer, examination of the documents submitted to the Court and the Commission's observations that the relevant provisions of Latvian law are subject to differing interpretations as regards the possibility of challenging the factual acts of border guards before the courts and of obtaining damages for material and non-material harm which those acts may have caused an individual in a case where a positive administrative decision has been made, namely authorisation to enter Latvian territory.
- 29 In that respect, as is apparent from settled case-law, when the Court replies to a question submitted for a preliminary ruling by a Court of a Member State in accordance with Article 267 TFEU, it does not have jurisdiction to interpret the national law of that Member State (see, inter alia, Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, paragraph 7; Case C-511/03 *Ten Kate Holding Musselkanaal and Others* [2005] ECR I-8979, paragraph 25, and Case C-506/04 *Wilson* [2006] ECR I-8613, paragraph 34).
- 30 The Court will take that element and the uncertainty as regards the exact content of Latvian procedural law into account in attempting to provide the Augstākās tiesas Senāts with criteria for the interpretation of European Union law with which it may assess the compatibility of the provisions of its national law with European Union legislation.

#### **Consideration of the questions referred**

- 31 By its first question, the referring court asks whether Article 13(3) of Regulation No 562/2006 provides persons with a right of appeal not only against a decision refusing entry into a Member State, but also against infringements committed in the procedure leading to the adoption of a decision authorising entry. By its second and third questions, the referring court asks whether, if the answer to the first question is in the affirmative, the abovementioned provision requires the Member State to guarantee an effective remedy before a court or before an administrative body which, from an institutional and functional perspective, provides the same guarantees as a court.
- 32 It is appropriate to consider those questions together.

- 33 Article 13(3) of Regulation No 562/2006 provides that persons refused entry shall have the right to appeal. According to that provision, appeals are to be conducted in accordance with national law.
- 34 It must be added that Article 13 of Regulation No 562/2006 relates entirely to refusal of entry.
- 35 As the Latvian Government and the Commission stated, Article 13(3) of Regulation No 562/2006 obliges Member States to establish a means of obtaining redress only against decisions to refuse entry.
- 36 Furthermore, it is apparent that neither the applicant in the main proceedings nor the referring court has questioned the validity of that provision.
- 37 By its second and third questions, the referring court asks whether in the light of recital 20 in the preamble to, and Article 6(1) of, Regulation No 562/2006, and Article 47 of the Charter, Article 13(3) of Regulation No 562/2006 imposes an obligation on Member States to guarantee a right of appeal against infringements alleged to have been committed during the adoption of a decision authorising entry either before a court or before an administrative body which, from an institutional and functional perspective, provides the same guarantees as a court of law.
- 38 Since those two questions were raised solely in the event that the response to the first question was in the affirmative, namely that Article 13(3) of Regulation No 562/2006 provides that a person has a right of appeal not only against a decision refusing entry into a Member State, but also against the infringements alleged by the claimant and described at paragraph 11 of this judgment, they do not require an answer.
- 39 In any event, the decision to refer does not provide sufficient information regarding the main proceedings, in particular regarding the relevant facts, for the Court to determine the relevance of Article 6 of Regulation No 562/2006 for the purposes of examination of that action. Consequently, the Court is not in a position to determine whether the situation of the claimant in the main proceedings is governed by European Union law within the meaning of Article 51(1) of the Charter, whose provisions are addressed to the Member States only when they are implementing European Union law (see, to that effect, Case C-400/10 PPU *McB*. [2010] ECR I-8965, paragraph 51, and Case C-40/11 *Ida* [2012] ECR, paragraphs 79 to 81).
- 40 It is for the referring court to ascertain, in the light of the facts in the main proceedings, whether the situation of the claimant in the main proceedings is governed by European Union law and, if that is the case, whether a refusal to grant him the right to bring his claims before a court infringes the rights recognised in Article 47 of the Charter. In that respect, it must be noted that border guards performing their duties, within the meaning of Article 6 of Regulation No 562/2006, are required, inter alia, to fully respect human dignity. It is for Member States to provide in their domestic legal system for the appropriate legal remedies to ensure, in compliance with Article 47 of the Charter, the protection of persons claiming the rights derived from Article 6 of Regulation No 562/2006.
- 41 On the other hand, if that court takes the view, in the light of the response given by the Court of Justice to the first question, that that situation is not governed by European Union law, it must examine it in the light of national law, taking into account also the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, and to which all the Member States are party (see, to that effect, Case C-256/11 *Dereci and Others* [2011] ECR, paragraphs 72 and 73).
- 42 In the light of the foregoing considerations, the answer to the questions referred is that Article 13(3) of Regulation No 562/2006 obliges Member States to establish a means of obtaining redress only against decisions to refuse entry.

### **Costs**

- 43 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:

**Article 13(3) 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) obliges Member States to establish a means of obtaining redress only against decisions to refuse entry.**