

## JUDGMENT OF THE COURT (First Chamber)

13 December 2017 (\*)

(Reference for a preliminary ruling — Area of freedom, security and justice — Regulation (EC) No 810/2009 — Article 32(3) — Community Visa Code — Decision to refuse a visa — Right of the applicant to bring an appeal against that decision — Obligation of a Member State to guarantee the right to a judicial appeal)

In Case C-403/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), made by decision of 28 June 2016, received at the Court on 19 July 2016, in the proceedings

**Soufiane El Hassani**

v

**Minister Spraw Zagranicznych,**

THE COURT (First Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, C.G. Fernlund, A. Arabadjiev, S. Rodin and E. Regan, Judges,

Advocate General: M. Bobek,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 17 May 2017,

after considering the observations submitted on behalf of:

- Mr El Hassani, by J. Białas, radca prawny,
- the Minister Spraw Zagranicznych, by K. Pawłowska-Nojszewska and M. Arciszewski, acting as Agents,
- the Polish Government, by B. Majczyna, M. Kamejsza-Kozłowska and K. Straś, acting as Agents,
- the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,
- the Estonian Government, by N. Grünberg, acting as Agent,
- the European Commission, by A. Stobiecka-Kuik and C. Cattabriga, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 September 2017,

gives the following

### Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 32(3) of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (OJ 2009 L 243, 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) ('the Visa Code').
- 2 The reference has been made in a dispute between Mr Soufiane El Hassani and the Minister Spraw Zagranicznych (Minister for Foreign Affairs, Poland) concerning the decision of the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland) by which it rejected Mr El Hassani's appeal against the decision of the Konsul Rzeczypospolitej Polskiej (Consul of the Republic of Poland, Rabat (Morocco)) of 27 January 2015, refusing to issue him a visa.

### **Legal context**

#### *EU law*

- 3 Recital 29 of the Visa Code states:

'This Regulation respects fundamental rights and observes the principles recognised in particular by the Council of Europe's [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ("the ECHR")] and by the Charter of Fundamental Rights of the European Union.'

- 4 Article 1(1) of that regulation is worded as follows:

'This Regulation establishes the procedures and conditions for issuing visas for transit through or intended stays on the territory of the Member States not exceeding 90 days in any 180-day period.'

- 5 Article 32(1) and (3) of the Regulation provides:

'1. Without prejudice to Article 25(1), a visa shall be refused:

...

(b) if there are reasonable doubts as to the authenticity of the supporting documents submitted by the applicant or the veracity of their contents, the reliability of the statements made by the applicant or his intention to leave the territory of the Member States before the expiry of the visa applied for.

...

3. Applicants who have been refused a visa shall have the right to appeal. Appeals shall be introduced against the Member State that has taken the final decision on the application for an extension and in accordance with the national law of that Member State. Member States shall provide applicants with information regarding the procedure to be followed in case of review, as specified in Annex VI.'

#### *Polish law*

- 6 Article 76(1) of the ustawa r. o cudzoziemcach (Law on Foreign Nationals) of 12 December 2013 ('the Law on Foreign Nationals') reads:

'Refusal of a Schengen visa ... by:

- (1) a consul — may be challenged by a request for a review of the case by that authority;
- (2) an appeal before the Komendant Główny Straży Granicznej (Commander-in-Chief of the Border Guard) if it was taken by the Komendant placówki Straży Granicznej (Commander of a Border Guard point).'

7 Article 5 of the ustawa-Prawo o postępowaniu przed sądami administracyjnymi (Law on proceedings before the administrative courts) of 30 August 2002 ('the Law on proceedings before the administrative courts') states:

'The administrative courts shall not have jurisdiction in cases concerning:

...

(4) visas issued by consuls, other than visas issued to a foreign national who is a member of the family of a national of a Member State of the European Union, a Member State of the European Free Trade Association party to the European Economic Area [(EEA)] Agreement, or the Swiss Confederation, within the meaning of Article 2(4) of the ustawa ... o wjeździe na terytorium Rzeczypospolitej Polskiej, pobycie oraz wyjeździe z tego terytorium obywateli państw członkowskich Unii Europejskiej i członków ich rodzin (Law on the entry into, residence in and departure from the Republic of Poland of nationals of the Member States of the European Union and the members of their families) of 14 July 2006 ("the Law on entry").'

8 Article 58(1) of the Law on proceedings before the administrative courts provides:

'The court shall dismiss an action:

(1) where the case does not come within the jurisdiction of an administrative court; ...'

9 Article 2 of the Law on entry provides:

'The definitions used in this Law shall have the following meanings:

...

(3) EU national — a foreign national:

(a) a national of a Member State of the European Union;

(b) a national of a Member State of the European Free Trade Association party to the [EEA] Agreement;

(c) a national of the Swiss Confederation;

(4) a member of the family — a foreign national who is or is not an EU national:

(a) the spouse of an EU national;

(b) a direct relative in the descending line of an EU national or his or her spouse, of up to 21 years of age or dependent for support on an EU national or his or her spouse;

(c) a direct relative in the ascending line of an EU national or his or her spouse dependent for support on an EU national or his or her spouse.'

### **Facts of the main proceedings and the question referred for a preliminary ruling**

10 Mr El Hassani submitted an application for a Schengen visa to the Consul of the Republic of Poland in Rabat in order to visit his wife and son who are Polish nationals. That application was refused by the consul by decision of 5 January 2015.

11 As laid down in the Polish rules of procedure, Mr El Hassani submitted a request for review to the same consul who, on 27 January 2015, again refused to grant that application on the ground of the lack of certainty as to his intention to leave Poland before the visa expired.

- 12 The applicant in the main proceedings therefore appealed against that decision before the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw). He argues essentially that the refusal to issue a visa in those circumstances constitutes an infringement of Article 60 of the Law on foreign nationals, read together with Article 8 of the ECHR. Furthermore, he takes the view that Article 76 of the Law on foreign nationals does not lay down a standard of protection that is consistent with Article 13 of the ECHR.
- 13 Mr El Hassani also argues that although his wife and son are Polish nationals the national legislation does not allow him to bring an appeal before an administrative court if the issue of a visa is refused, unlike the foreign spouses of nationals of other Member States of the European Union.
- 14 In his response of 30 March 2015 to the application, the Minister for Foreign Affairs submitted that the appeal should be dismissed as being inadmissible under Article 5(4) of the Law on proceedings before the administrative courts, and, in the alternative, that the appeal be dismissed as unfounded and the proceedings discontinued.
- 15 Therefore, Mr El Hassani requested the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw) to make a reference to the Court of Justice for a preliminary ruling on the interpretation of Article 32(3) of the Visa Code in order to determine whether that provision also includes within its scope the right to bring a judicial appeal against a decision refusing to issue a visa.
- 16 By decision of 24 November 2015, the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw) dismissed the appeal on the basis of Article 5(4) of the Law on proceedings before the administrative courts, holding that actions brought against a decision to refuse a Schengen visa by the consul does not fall within the jurisdiction of the administrative court. Furthermore, that court refused to refer a question to the Court of Justice for a preliminary ruling.
- 17 On 28 April 2016, Mr El Hassani brought an appeal in cassation before the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) arguing essentially that, as a national of a non-member State who is not a family member of a citizen of a Member State of the European Union within the meaning of the Law on entry, he has been denied the right to an effective judicial remedy before a national court, contrary to Article 13 of the ECHR and Article 32(3) of the Visa Code, read together with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), which guarantees the right to an effective remedy before a tribunal.
- 18 According to the referring court, in Polish law, the possibility to bring an appeal before an administrative court against a decision on a visa application depends both on the authority which adopted the contested decision and the status of the person bringing the appeal.
- 19 Although the decisions of the national authorities refusing to issue a visa which are taken by the Commander-in-Chief of the Border Guard or by the Minister for Foreign Affairs, or the refusal to extend a visa made by the regional administration (Poland) may be the subject of an appeal before the administrative courts, that is not always the case for a decision refusing the issue of a visa, including a Schengen visa, taken by a consul. Such an appeal may be brought before an administrative court against such a decision by the national of a non-member State only if he is a family member of a national of a Member State of the European Union, a Member State of the European Free Trade Association, a State party to the EEA Agreement or the Swiss Confederation within the meaning of Article 2(4) of the Law on entry. Other nationals of a non-member State are only entitled to an administrative remedy, namely a request for a review by the same authority, in accordance with Article 76(1)(1) of the Law on foreign nationals.
- 20 The referring court points out that the lack of jurisdiction of the administrative courts over cases relating to visas issued by consuls, as laid down in Article 5(4) of the Law on proceedings before the administrative courts, may infringe Article 32(3) of the Visa Code, read together with the first paragraph of Article 47 of the Charter which guarantees the right to an effective remedy before a tribunal.
- 21 In those circumstances, the Naczelny Sąd Administracyjny (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Must Article 32(3) of the Visa Code, having regard to recital 29 thereof and the first paragraph of Article 47 of the Charter, be interpreted as requiring the Member States to guarantee an effective remedy (appeal) before a court of law?’

### Consideration of the question referred

- 22 By its question, the referring court asks essentially whether Article 32(3) of the Visa Code, read in the light of Article 47 of the Charter, must be interpreted as meaning that it requires Member States to provide for a judicial appeal.
- 23 It must be recalled that, according to the wording of Article 32(3) of the Visa Code, applicants who have been refused a visa have the right to an ‘appeal’ against that judgment, which must be introduced against the Member State that has taken the final decision on the application ‘in accordance with the national law of that Member State’.
- 24 It follows that, in the case of a final refusal to issue a visa, that provision expressly gives visa applicants the opportunity to bring an action in accordance with the national legislation of the Member State which took that decision.
- 25 Thus, the EU legislature left to the Member States the task of deciding the nature and specific conditions of the remedies available to visa applicants.
- 26 In that connection, it must be recalled that, according to settled case-law, in the absence of EU rules on the matter, it is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights of individuals, in accordance with the principle of procedural autonomy, on condition, however, that those rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness) (judgment of 15 March 2017, *Aquino*, C-3/16, EU:C:2017:209, paragraph 48 and the case-law cited).
- 27 It follows that two cumulative conditions, namely respect for the principles of equivalence and effectiveness, must be satisfied in order for a Member State to be able to assert the principle of procedural autonomy in situations which are governed by EU law (judgment of 15 March 2017, *Aquino*, C-3/16, EU:C:2017:209, paragraph 49).
- 28 Those requirements of equivalence and effectiveness embody the general obligation on the Member States to ensure judicial protection of an individual’s rights under EU law. They apply both as regards the designation of the courts and tribunals having jurisdiction to hear and determine actions based on EU law and as regards the definition of detailed procedural rules (judgment of 18 March 2010, *Alassini and Others*, C-317/08 to C-320/08, EU:C:2010:146, paragraph 49).
- 29 First, in relation to the principle of equivalence, it should be borne in mind that this requires that all the rules applicable to actions apply without distinction to actions alleging infringement of EU law and to similar actions alleging infringement of national law (judgment of 15 March 2017, *Aquino*, C-3/16, EU:C:2017:209, paragraph 50 and the case-law cited).
- 30 Secondly, as regards the principle of effectiveness, a national procedural rule, such as that at issue in the main proceedings, must not be such as to render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order (judgment of 15 March 2017, *Aquino*, C-3/16, EU:C:2017:209, paragraph 52 and the case-law cited).
- 31 It is for the referring court, which alone has jurisdiction to interpret its national law, to determine whether and to what extent the review system at issue in the main proceedings satisfies those requirements.

- 32 In that connection, the national court must take account of the fact that the interpretation of the provisions of the Visa Code, as is clear from recital 29 thereof, must be carried out in accordance with the fundamental rights and principles recognised by the Charter.
- 33 According to settled case-law, the fundamental rights guaranteed within the EU legal order are designed to be applied in all situations regulated by EU law, but may not be applied outside those situations. It is consonant with those limits that the Court has already stated that it has no jurisdiction to appraise, in the light of the Charter, national legislation which falls outside the framework of EU law. On the other hand, if such legislation falls within the scope of EU law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures (see, in particular, judgment of 26 September 2013, *Texdata Software*, C-418/11, EU:C:2013:588, paragraph 72 and the case-law cited).
- 34 In the present case, it is common ground that the refusal of the visa applied for by the applicant in the main proceedings, which was communicated to him by means of a standard form set out in Annex VI of the Visa Code, was based on one of the grounds mentioned in Article 32(1) of that code.
- 35 In that connection, the Court has already held that the Visa Code governs the conditions for issuing, annulling and revoking uniform visas and, therefore, the competent authorities of the Member States cannot refuse to issue a uniform visa by relying on a ground not provided for in that code (judgment of 19 December 2013, *Koushkaki*, C-84/12, EU:C:2013:862, paragraphs 47 and 51).
- 36 Although it is true that in examining a visa application the national authorities have a broad discretion as regards the conditions for applying the grounds of refusal laid down by the Visa Code and the evaluation of the relevant facts, the fact remains that such discretion has no influence on the fact that the authorities directly apply a provision of EU law.
- 37 It is clear that the Charter is applicable where a Member State adopts a decision refusing to issue a visa under Article 32(1) of the Visa Code.
- 38 Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection, requires, in its first paragraph, that any person whose rights and freedoms guaranteed by EU law are violated should have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article (see, to that effect, judgment of 17 December 2015, *Tall*, C-239/14, EU:C:2015:824, paragraph 51 and the case-law cited).
- 39 Furthermore, the second paragraph of Article 47 of the Charter provides that everyone is entitled to a hearing by an independent and impartial tribunal. Compliance with that right assumes that a decision of an administrative authority that does not itself satisfy the conditions of independence and impartiality must be subject to subsequent control by a judicial body that must, in particular, have jurisdiction to consider all the relevant issues (judgment 16 May 2017, *Berlioz Investment Fund*, C-682/15, EU:C:2017:373, paragraph 55).
- 40 The concept of independence, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision (judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 49).
- 41 It follows, as the Advocate General observed, in point 119 of his Opinion, that Article 47 of the Charter requires the Member States to guarantee, at a certain stage of the proceedings, the possibility to bring the case concerning a final decision refusing a visa before a court.
- 42 Having regard to the foregoing considerations the answer to the question referred is that Article 32(3) of the Visa Code, read in the light of Article 47 of the Charter, must be interpreted as meaning that it requires Member States to provide for an appeal procedure against decisions refusing visas, the procedural rules for which are a matter for the legal order of each Member State in accordance with the

principles of equivalence and effectiveness. Those proceedings must, at a certain stage of the proceedings, guarantee a judicial appeal.

### 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 (First Chamber) hereby rules:

**Article 32(3) of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas, as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it requires Member States to provide for an appeal procedure against decisions refusing visas, the procedural rules for which are a matter for the legal order of each Member State in accordance with the principles of equivalence and effectiveness. Those proceedings must, at a certain stage of the proceedings, guarantee a judicial appeal.**

[Signatures]

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\* Language of the case: Polish.