Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 6 March 2012 [1]

Case C-364/10

Hungary
v

Slovak Republic

(Failure of a Member State to fulfil obligations — Article 259 TFEU — Article 21(1) TFEU — Directive 2004/38/EC — Right of EU citizens to move within the territory of the Member States — Refusal to allow the President of Hungary to enter the territory of the Slovak Republic — Application of European Union law to Heads of State — Wrongful application of European Union law)

I – Factual and legal background to the action

1. This infringement action was brought by Hungary on 8 July 2010 under Article 259 TFEU. That Member State claims that the Court should:

— find that the Slovak Republic failed to fulfil its obligations under 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,[2] and Article 21(1) TFEU in that, on 21 August 2009, relying on Directive 2004/38, but failing to respect its provisions, it did not allow the President of Hungary, Mr Sólyom, to enter its territory;

— declare that the position of the Slovak Republic, which it still maintained at the time of bringing the action, namely, that it is entitled under Directive 2004/38 to prohibit the entry to the territory of the Slovak Republic of a representative of Hungary, such as the President of that Member State, thereby confirming that such an unlawful attitude may recur, conflicts with the law of the European Union, in particular Article 3(2) TEU and Article 21(1) TFEU;

— declare that the Slovak Republic applied European Union ('EU') law wrongfully in that its authorities did not allow President Sólyom access to its territory; and

— in the event that a specific provision of international law may limit the personal scope of Directive 2004/38, define the extent and scope of such derogations.

2. The facts underlying the dispute between Hungary and the Slovak Republic can be summarised as follows.

1 — Original language: French.

2 — OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34.

3. On the invitation of an association based in Slovakia, the President of Hungary, Mr Sólyom, had planned to go to the town of Komárno (Slovakia) on 21 August 2009 to take part in the ceremony inaugurating a statute of Saint Stephen of Hungary.

4. To understand the circumstances of this visit, it should be noted, in particular, that, first, 20 August is a national holiday in Hungary, commemorating Saint Stephen, the founder and first king of the Hungarian State. Secondly, 21 August is a sensitive date in Slovakia, since 21 August 1968 was the date on which the Warsaw Pact troops, which included Hungarian troops, invaded Czechoslovakia.

5. After several diplomatic exchanges between the embassies of the two Member States regarding President Sólyom's planned visit, the three highest representatives of the Slovak Republic, namely, the President of the Republic, Mr Gašparovič, the Prime Minister, Mr Fico, and the President of the Parliament, Mr Paška, adopted a joint declaration in which they indicated that President Sólyom's visit was considered inappropriate, having regard in particular to the fact that he had not expressed any desire to meet Slovak dignitaries and that the date of 21 August was particularly sensitive.

6. Following further diplomatic contact, President Sólyom stated that he wished the visit to go ahead.

7. By *note verbale* of 21 August 2009, the Ministry of Foreign Affairs of the Slovak Republic informed the Ambassador of Hungary in Bratislava (Slovakia) that the Slovak authorities had decided to refuse President Sólyom entry into the territory of the Slovak Republic on that date for security reasons, on the basis of Directive 2004/38 and of provisions of domestic law on the stay of foreign nationals and on the national police.

8. President Sólyom was informed of the terms of that note while en route to Slovakia; he acknowledged receipt at the border and refrained from entering Slovak territory.

9. By note of 24 August 2009, the Hungarian authorities argued, in particular, that Directive 2004/38 could not form a valid legal basis justifying the refusal of the Slovak Republic to allow President Sólyom to enter its territory. They also found that insufficient reasons were given for the decision to refuse access. For those reasons, they considered that the Slovak Republic had adopted that measure in breach of EU law.

10. At a meeting held on 10 September 2009 in Szécsény (Hungary) the Hungarian and Slovak Prime Ministers adopted a joint declaration maintaining their respective positions regarding the legal aspects of the contested decision, while regretting the circumstances of President Sólyom's trip. On that same occasion a memorandum was adopted to clarify certain practical arrangements for future official and unofficial visits to the two countries.

11. By a note of 17 September 2009, the Slovak authorities answered the note of 24 August 2009, stating that, in view of the circumstances of the incident, the application of Directive 2004/38 was the 'last chance' to stop President Sólyom entering the territory of the Slovak Republic, and that they had not acted in any way contrary to EU law.

12. Meanwhile, on 3 September 2009 the Hungarian Minister for Foreign Affairs sent a letter to Mr Barrot, Vice-President of the European Commission, seeking the Commission's opinion on the possible breach of EU law by the Slovak Republic.

13. In his reply dated 10 September 2009, Mr Barrot acknowledged that, in accordance with Directive 2004/38, any restriction of freedom of movement must observe the principle of proportionality, that, under Article 27(2) of that directive, it must be based on the personal conduct of the individual concerned, and that the person concerned must be notified, in the manner prescribed in Article 30 of that directive, of that restriction and given a full, precise explanation of the reasons. He also considered

that it was for the national courts in the first place to consider whether the rules of Directive 2004/38 had been properly applied. He emphasised that everything possible must be put in hand in order to avoid any repetition of such situations and stated that he was confident that a constructive bilateral dialogue between the two Member States could resolve the dispute.

14. On 12 October 2009, the Hungarian Minister for Foreign Affairs, acting on behalf of Hungary, sent a complaint to the President of the Commission, requesting that the Commission examine whether it was appropriate to initiate infringement proceedings against the Slovak Republic under Article 258 TFEU for violation of Article 21 TFEU and Directive 2004/38.

15. In a letter of 11 December 2009, the Commission confirmed that 'Union citizens are entitled to move and reside freely within the territory of the Member States pursuant to Article 21 TFEU and Directive 2004/38'. However, the Commission pointed out that 'under international law, the Member States reserve the right to control the access of a foreign Head of State to their territory, regardless of whether that Head of State is a Union citizen'. In its opinion, the Member States of the European Union continue to arrange official visits through bilateral political channels, so that this is not a sphere in which EU law applies. In the Commission's opinion, while a Head of State may indeed decide to visit another Member State as a private individual under Article 21 TFEU and Directive 2004/38, it is evident from the documents attached to the complaint of the Hungarian Minister for Foreign Affairs that Hungary and the Slovak Republic disagree regarding the private or official nature of the proposed visit. The Commission considered, therefore, that it was not in a position to find that the Slovak Republic had failed to observe the provisions of EU law on the free movement of Union citizens, even if the Slovak Republic had been wrong, in its *note verbale* of 21 August 2009, to rely on Directive 2004/38 and the legislation adopted for its implementation in national law.

16. On 16 December 2009, the Slovak Minister for Foreign Affairs commented on the position adopted by the Commission, stating that 'from the point of view of the [Slovak Republic], that means that we are right, that when we do something we are acting after proper consideration and we do not complain to the entire world that someone is infringing European rules without knowing what we are talking about'. He stressed that 'it would be a good thing if Hungary, like us and the Commission … were to consider this matter closed'. He then added that Bratislava had the letter from the Commission as confirmation that his position was correct.

17. On 15 March 2010, the Slovak Prime Minister, Mr Fico, responding to an opinion expressed by President Sólyom on the teaching of languages in primary school, made a public statement in which he said that 'in these circumstances, refusing to allow Mr … Sólyom to enter the country on 21 August 2009 was completely justified in our view. In our opinion, it is even more so now than it was then'.

18. On 30 March 2010, Hungary brought the matter before the Commission in accordance with Article 259 TFEU. On 30 April 2010, the Slovak Republic submitted its observations. Finally, on 12 May 2010, the two Member States presented their oral observations at a hearing arranged by the Commission.

19. In its reasoned opinion dated 24 June 2010, the Commission considered that Article 21(1) TFEU and Directive 2004/38 do not apply to visits made by the head of one Member State to the territory of another Member State and that, in those circumstances, the alleged infringement is unfounded.

20. On 8 July 2010 Hungary brought this action. The Slovak Republic contends that the Court should dismiss the action and order Hungary to pay the costs.

21. By order of the President of the Court of 28 January 2011, the Commission was given leave to intervene in support of the form of order sought by the Slovak Republic.

22. The Court heard the oral arguments of Hungary, the Slovak Republic and the Commission at the hearing held on 1 February 2012.

II – The main arguments of the parties

23. The Slovak Republic states, first of all, that it questions the Court's jurisdiction to hear and determine the present dispute, EU law not applying to a situation such as this.

24. By contrast, Hungary, supported by the Commission on this point, considers that, the Member States having undertaken, in accordance with Article 344 TFEU, not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein, the Court has sole jurisdiction to hear and determine a dispute between two Member States concerning the interpretation of EU law. In particular, a Member State that considers that another Member State is in breach of EU law could either request the Commission to initiate infringement proceedings in accordance with Article 258 TFEU, or bring such an action directly before the Court pursuant to Article 259 TFEU.

25. As to the substance, Hungary makes four complaints against the Slovak Republic.

26. By its first complaint, Hungary maintains that the Slovak Republic infringed Article 21(1) TFEU and Directive 2004/38 when it refused President Sólyom entry into its territory.

27. In order to establish the applicability of EU law in this case, Hungary claims, in particular, that Directive 2004/38 applies to all citizens of the Union, including Heads of State, and all types of visits, that is to say, both official and private.

28. It adds that, if the European Parliament and the Council of the European Union had wished to make the exercise of freedom of movement conditional on rules of international law, they would have made provision to that end, as they did, for example, in Article 3(2)(f) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.[3] Moreover, there are no such rules of international law governing the entry of a Head of State into the territory of another State. In view of the case-law of the Court according to which the EU legislature must respect international law,[4] if such rules existed, Directive 2004/38 would have taken them into account. In any case, even assuming that such rules exist, Hungary considers that their application must not compromise the effectiveness of EU legislation, such as Directive 2004/38, by introducing a derogation regarding its personal scope.[5]

29. Hungary notes that during their term of office the Heads of Member States are also citizens of the Union, so that it considers that the mere fact that international law grants privileges and immunity to persons performing the duties of Head of State in order to facilitate the performance of those duties implies neither the cessation nor the suspension of the rights and duties attached to citizenship of the Union under the Treaty on the Functioning of the European Union. On the contrary, Hungary considers that those privileges and immunities constitute supplementary rights for Heads of State which, rather than limiting the rights and duties associated with citizenship of the Union, are additional thereto.

3 — OJ 2004 L 16, p. 44.

4 — In this connection Hungary cites Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraph 9, and Case C-162/96 *Racke* [1998] ECR I-3655, paragraph 45.

5 — Hungary relies on Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 84, and Case C-301/08 *Bogiatzi* [2009] ECR I-10185, paragraph 19, in which the Court ruled that 'the provisions of an agreement concluded prior to entry into force of the Treaty or prior to a Member State's accession cannot be relied on in intra-Community relations'. That Member State contends that that opinion is equally valid in regard to the rules of customary international law.

30. Hungary also maintains that the scope of the right of every citizen of the Union to move freely within the Union cannot be given a restrictive interpretation, with the result that that right may be made subject only to the limitations specified, by way of exception, by Directive 2004/38. However, those limitations may be applied only when the substantive and procedural conditions laid down in that directive have been satisfied.

31. With regard to substantive conditions, Article 27(2) of Directive 2004/38 allows Member States to adopt restrictive public policy or public security measures if they are based exclusively on the personal conduct of the individual concerned, while observing the principle of proportionality. Moreover, such restrictions may be applied only if the conduct of the person concerned represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. As regards procedural conditions, Article 30 of the same directive mentions the safeguards enjoyed by all citizens of the Union whose right to freedom of movement is limited, concerning in particular the notification of the grounds for any restrictive measure and the remedies available to them.

32. According to Hungary, the Slovak Republic failed to satisfy either the substantive or the procedural conditions laid down in Directive 2004/38 when refusing Mr Sólyom entry into Slovak territory. First, Mr Sólyom did not represent any threat to any fundamental interest of society and, in any case, it was disproportionate to refuse access. Secondly, no notification was sent to Mr Sólyom to inform him of the grounds for the decision in question and the remedies available to him.

33. Like the Commission, the Slovak Republic first of all states that Mr Sólyom's planned visit was public, not private, and that, consequently, the key question in this dispute is whether EU law, and in particular Article 21 TFEU and Directive 2004/38, are applicable to Heads of State of the Member States.

34. In this connection, the Slovak Republic considers that, in view of the role of Heads of State, their movements within the Union fall within the sphere of diplomatic relations between Member States, as governed by customary international law and by conventions.[6] The principle of the conferral of competences under Article 4(1) TEU and Article 5 TEU excludes bilateral diplomatic relations between Member States from the ambit of EU law. That is confirmed, first of all, by *Commission* v *Belgium*,[7] according to which the Member States retain the right to regulate their diplomatic relations even after acceding to the European Union. Moreover, there is no provision in the Treaties expressly conferring on the European Union competence to regulate diplomatic relations between Member States. Next, the Head of State holding the sovereignty of the State he leads, he may enter another sovereign State only with the latter's knowledge and consent. In that regard, the Slovak Republic points out that Article 4(2) TEU provides that 'the Union shall respect the equality of Member States before the Treaties as well as their national identities' and that the principle of free movement may not, in any circumstances, lead to a change in the ambit of the FEU Treaty or of the provisions of secondary legislation.

35. With regard to the arguments put forward by Hungary on the applicability of EU law in the present case, the Slovak Republic counters that, first, the fact that Directive 2004/38 does not provide for any derogation concerning the movement of Heads of State does not mean that that directive applies to them, the application of EU law to Heads of State being excluded by the Treaties themselves. Second, the Slovak Republic, like the Commission, challenges the comparison between Directive 2004/38 and Directive 2003/109, for these two texts deal with different subjects. Third, the

6 — The Slovak Republic refers in particular to the Vienna Convention of 18 April 1961 on Diplomatic Relations ('the Vienna Convention'), the Vienna Convention of 24 April 1963 on Consular Relations, the Vienna Convention of 14 March 1975 on the Representation of States in their Relations with International Organisations of a Universal Character, the Convention on Special Missions adopted by the United Nations General Assembly on 8 December 1969 ('the Convention on Special Missions') and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, attached to General Assembly Resolution 3166 (XXVIII) of 14 December 1973.

7 — Case C-437/04 [2007] ECR I-2513.

judgments in *Poulsen and Diva Navigation* and *Racke* do not create any obligation requiring the EU legislature to indicate, for any act of secondary legislation, the material and personal scope of the Treaties in the context of international law. Fourth, and lastly, the judgments cited in *RTE and ITP* v *Commission* and *Bogiatzi* are relevant only if the competence of the Union is not contested, and that is precisely not the case here.

36. Moreover, if it were to be accepted that EU law applied in circumstances such as those of the present case, the Head of State of one Member State would enjoy privileges based on that law in another Member State, while at the same time being protected by the immunity provided for by international law against the applicability of administrative decisions taken by that State under EU law. The consequence would be that a Member State could neither deny such a person entry into its territory nor, taking account of his immunities, subsequently expel him.

37. In any case, even assuming that EU law is applicable in the circumstances of this case, the Slovak Republic denies having applied that law, and in particular Directive 2004/38. In this connection, it considers that the *note verbale* of 21 August 2009 containing the reference to Directive 2004/38 formed part of the diplomatic exchanges concerning the arranging of Mr Sólyom's planned visit, and did not therefore constitute a 'decision' within the meaning of that directive. All the more so because that note was written, not by a police officer in the border control service but by the Ministry of Foreign Affairs, that is to say, a body which clearly does not have power to adopt such a decision under Directive 2004/38 and the relevant national rules. Moreover, far from being addressed to Mr Sólyom, that note was sent by diplomatic channels to Hungary.

38. The Slovak Republic also maintains that the unfortunate wording and the legally irrelevant reference to Directive 2004/38 in the *note verbale* of 21 August 2009 do not determine the material application of that directive to the present case. According to that Member State, the reference to the directive in that note, intended to draw to the attention of the Hungarian authorities a potential threat to public security, was inappropriate.

39. By its second complaint, Hungary claims that there is a risk that the Slovak Republic may, in the future, repeat the infringement of Article 3 TEU, Article 21 TFEU and Directive 2004/38. In its view, that there is such a risk is confirmed by several statements made by the Slovak authorities – including, in particular, those of the Slovak Minister for Foreign Affairs of 16 December 2009 and of the Slovak Prime Minister of 15 March 2010 – to the effect that their conduct in regard to the President of Hungary did not infringe EU law.

40. Since it denies any infringement of EU law, essentially on the grounds that the latter is not applicable to the present case, the Slovak Republic considers that the logical consequence is that there is no risk of any repetition. In any case, the second complaint is based purely on the possible future conduct of the Slovak authorities. Moreover, the evidence invoked by Hungary in support of that complaint consists of statements made after the note of 21 August 2009, and to take them into account in the present proceedings would infringe the Slovak Republic's rights of defence. Finally, referring to a marked improvement in relations between the two Member States in the period after the events in question, the Slovak Republic dismisses the possibility of any similar misunderstanding recurring in the future.

41. By its third complaint, Hungary claims not only that the practice adopted by the Slovak authorities was contrary to Directive 2004/38, but that the very fact of basing the *note verbale* of 21 August 2009 on that directive is covered by the concept of the abuse of rights as defined by the case-law of the Court (in particular the judgment in *Emsland-Stärke*).[8] In reality, those authorities made use of the directive to pursue political aims.

8 — Case C-110/99 [2000] ECR I-11569.

42. According to Hungary, resorting to EU law in order to express political hostility by means of measures restricting the free movement of citizens is contrary to the most fundamental values of the European Union. Similarly, it is not possible to invoke the public policy or public security mentioned in Directive 2004/38 in order to pursue political aims. Hungary adds that, if such conduct were to be considered compatible with EU law, there would be nothing to prevent the other Member States from settling their bilateral disputes in the future by invoking EU law, which is clearly contrary to the objectives of that law.

43. The Slovak Republic replies that there has been no wrongful application of EU law, for that law does not apply to the present case.

44. In any event, according to the case-law of the Court (in particular, *Emsland-Stärke*), the finding of an abuse of rights would require the existence of two elements, namely, an objective element consisting in the use of EU legislation for purposes other than those intended, and a subjective element relating to the desire to obtain an advantage resulting from EU law by artificially creating the necessary conditions to achieve it. The Slovak Republic denies that these two elements are present in this case, for EU law does not apply and it had no intention of obtaining any advantage.

45. By its fourth and final complaint, Hungary maintains that, if the Court were to decide that the rules of international law apply in the present case, and not EU law, it should then specify the personal scope of those rules in order to clarify the limits to the application of Article 21 TFEU and Directive 2004/38 so far as bilateral relations between Member States are concerned. In particular, the Court should specify whether those limits concern only Heads of State, or whether they also apply to other categories of Union citizens.

46. The Slovak Republic considers that the question of the persons, other than Heads of State, who may avoid the application of Article 21 TFEU and Directive 2004/38 has no influence on the resolution of the dispute.

III – Assessment

47. First, I would point out that, in my opinion, the Court certainly has jurisdiction to hear and determine this action for infringement, inasmuch as the dispute between Hungary and the Slovak Republic is indeed based on an alleged infringement of EU law. The Court is requested, in this action, to determine the full significance of the rules on citizenship of the Union and, in particular, to decide whether the Head of State of a Member State may be regarded as a citizen of the Union in his public movements in other Member States. It is in accordance with Article 344 TFEU that the dispute on the interpretation and application of the Treaty on the Functioning of the European Union concerning citizenship of the Union should be settled by the Court by means of one of the procedures provided for in that Treaty, in this case Article 259 TFEU.

48. With regard to the substance, I would at the start point out that, having regard to the objective circumstances of Mr Sólyom's proposed visit, as indicated by the observations submitted to the Commission, that visit must be classed as being public in nature. It is common ground that Mr Sólyom intended to go to the town of Komárno in order to attend the inauguration of a symbolic monument linked to the history of the Hungarian State, and that he was to give a speech on that occasion. There is, therefore, no question here of a purely private visit, or even of a visit made incognito, since the Slovak authorities had been notified several times of this visit through diplomatic channels.

49. Consequently, it was indeed in the performance of his duties as the President of Hungary, and not simply as a citizen of the Union, that Mr Sólyom wished to visit the town of Komárno.

50. While the movement of citizens of the Union between Member States is governed by EU law, and in particular by Article 21 TFEU and Directive 2004/38, the same does not apply to visits to Member States by Heads of State.

51. As stated in Article 5(2) TEU, '[u]nder the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States'. [9] The Treaties being silent on the question of access for Heads of State to the territory of Member States, I conclude that this is a competence reserved for the Member States.

52. Moreover, I note that, in its judgment in *Commission* v *Belgium* the Court pointed out, in connection with the 1961 Vienna Convention, that it 'is a public international law convention concluded by the Member States and non-Member States *acting in the exercise of their powers as regards diplomatic relations* [10]' [11] and that 'in principle it concerns bilateral relations between States'. [12] Consequently, the sphere of diplomatic relations remains within the purview of the Member States, in accordance with international law. In my opinion, the same applies in regard to travel by the heads of State of Member States, including their entry into the territory of other Member States, in circumstances such as those in question here.

53. I do not agree with the idea put forward by Hungary that the status of citizen of the Union and the resulting rights and obligations should prevail over the status enjoyed by Heads of State of the Member States, so that the latter must always enjoy freedom of movement within the Union. Such an extensive interpretation of what is meant by citizenship of the Union would ultimately extend the competences of the Union in a manner incompatible with the principle of the conferral of competences.

54. Moreover, that is a view that ignores the specific character of the position of Heads of State, which lies essentially in their capacity as the supreme organ of the State, representing, personifying and committing the State at international level. [13] In other words, that special position implies that, when a Head of State travels on a public visit, he can never do so on an entirely personal basis in so far as it is primarily the community he represents that is welcomed by the State receiving him.

55. While there is at present no international convention intended to give a general definition of the status of Heads of State in international law, and in particular the question of their entry into State territory, the fact nevertheless remains that, under international law, Heads of State undeniably enjoy a position that cannot be compared to any other, and certainly not to that of a citizen wishing to make a purely private visit to another State.

56. The special treatment afforded by international law to Heads of State is derived largely from international custom and, to a lesser extent, concerning certain particular aspects, from international conventions. [14] That special treatment concerns the protection, facilities, privileges and immunity accorded them. [15]

9 — See, to the same effect, Article 4(1) TEU.

10 — Emphasis added.

11 — Paragraph 33.

12 — Ibid.

13 — See Salmon J., 'Représentativité internationale et chef d'État', *Le chef d'État et le droit international* – Clermont-Ferrand symposium / French international law society, Pedone, Paris, 2002, p. 155.

14 — See in particular the Convention on Special Missions and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, cited in point 34 of this Opinion.

15 — See, on this subject, Sir Arthur Watts, 'Heads of State', *Max Planck Encyclopedia of Public International Law*, paragraphs 12 to 20, *Oppenheim's International Law*, 9th edition, Vol. I, Peace, § 451 et seq., and Cosnard, M., 'Les immunités du chef d'État', *Le chef d'État et le droit international*, op. cit., p. 189.

57. In my view, the status of the highest representative of the State, which is that of Head of State, and the principle of the sovereign equality of States militate in favour of the opposite proposition to that supported by Hungary, namely, that visits by Heads of State within the Member States of the Union depend on the consent of the host State [16] and the detailed conditions defined by the latter within the framework of its competence, and cannot be understood in terms of freedom of movement.

58. That said, as in the case of any competence reserved for them, the Member States should not exercise their diplomatic competence in a manner that might lead to a lasting break in diplomatic relations between two Member States. Such a break would, in fact, be incompatible with the integration process aimed at creating, in the words of the preamble to the EU Treaty, 'an ever closer union among the peoples of Europe' and would constitute a barrier to the attainment of the essential objectives of the Union, including the aim of promoting peace.

59. Only a situation of persistent paralysis in diplomatic relations between two Member States, contrary to their commitment to maintain good-neighbourly relations consubstantial with their decision to join the Union, would be covered by EU law, if only because, in accordance with the last paragraph of Article 4(3) TEU, Member States must refrain from any measure that could jeopardise the attainment of the Union's objectives.

60. We are obviously not dealing with such a situation here, as is evident, for instance, from the meeting between the Hungarian and Slovak Prime Ministers [17] on 10 September 2009, that is to say, a few days after the incident giving rise to the present proceedings. On that occasion, they also reiterated their commitment to respecting and applying all the articles of the Treaty on Good-neighbourly Relations and Friendly Cooperation between Hungary and the Slovak Republic, signed in Paris on 19 March 1995. [18]

61. EU law not, therefore, being intended to govern the incident occurring on 21 August 2009, I consider that there can be no finding of an infringement of Article 259 TFEU.

62. Examination of the complaint that the Slovak Republic committed an abuse of rights by relying, in particular, on Directive 2004/38 in its *note verbale* of 21 August 2009 in order to refuse to allow President Sólyom access to its territory cannot, in my view, alter that conclusion.

63. The position of the Slovak Republic is consistent on that point. It acknowledges that the reference to Directive 2004/38 in that *note verbale* was inappropriate, with which I can only agree, in view of the foregoing considerations. Nevertheless, I cannot deduce that this constitutes an abuse of rights within the meaning of the case-law of the Court, which requires the presence of both an objective and a subjective element. [19]

64. It is evident from the observations submitted to the Court that, for the Slovak Republic, after a number of attempts through diplomatic channels to express its disapproval of Mr Sólyom's proposed visit on a date that Member State regarded as sensitive, this *note verbale* was the last resort. It seems that considerations concerning public security gave rise to the reference to Directive 2004/38 in that note. [20] In so far as such considerations are mentioned in that directive, in particular in the first

16 — This reference to 'consent' is found in a number of international conventions, in particular in Article 2 of the 1961 Vienna Convention, Article 2(1) and (2) of the Vienna Convention of 24 April 1963 on Consular Relations and Articles 1(a), 2 to 6 and 18 of the Convention on Special Missions.

17 — See point 10 of this Opinion.

18 — The text of this convention may be consulted in, inter alia, the *Revue générale de droit international public*, Pedone, Paris, 1995, p. 525.

19 — See *Emsland-Stärke*, paragraphs 52 and 53.

20 — See paragraph 57 of the defence by the Slovak Republic and the actual text of the verbal note of 21 August 2009, which mentions that security risks are taken into account.

subparagraph of Article 27(2), and as Mr Sólyom's proposed visit could reasonably, having regard to the political context of that visit, prompt an assessment of public security risks, it does not seem to me to be proved that, in referring to Directive 2004/38 in the *note verbale* of 21 August 2009, the Slovak Republic committed an abuse of rights.

65. Finally, in response to the last complaint made by Hungary, I would say that, inasmuch as the present dispute concerns only the visit of a Head of State, there is no need, in the present proceedings, to examine further what the position of citizens of the Union performing other official duties would be.

IV – Conclusion

66. In the light of the foregoing considerations I propose that the Court should:

— dismiss the application;

— order Hungary to pay the costs.