JUDGMENT OF THE COURT (Grand Chamber)

3 October 2006 *

In Case C-241/05,

REFERENCE for a preliminary ruling under Article 68 EC and Article 234 EC from the Conseil d'État (France), made by decision of 9 May 2005, received at the Court on 2 June 2005, in the proceedings

Nicolae Bot

v

Préfet du Val-de-Marne,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans and A. Rosas, Presidents of Chambers, J.-P. Puissochet, R. Schintgen, N. Colneric, P. Kūris, E. Juhász, U. Lõhmus, E. Levits, A. Ó Caoimh (Rapporteur) and L. Bay Larsen, Judges,

* Language of the case: French.

Advocate General: A. Tizzano,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the French Government, by G. de Bergues and J.-C. Niollet, acting as Agents,

— the Czech Government, by T. Boček, acting as Agent,

— the Slovak Government, by R. Procházka, acting as Agent,

— the Finnish Government, by T. Pynnä, acting as Agent,

— the Commission of the European Communities, by C. O'Reilly and A.-M. Rouchaud-Joët, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 April 2006,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 20(1) of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19) ('the CISA'), signed on 19 June 1990 at Schengen (Luxembourg).

2 This reference was made in the course of proceedings brought by Mr Bot, a Romanian national, for the annulment of the decree by the Préfet du Val-de-Marne (Prefect of Val-de-Marne) (France) ordering his deportation.

Legal context

The Schengen acquis

The Schengen Agreements

3 The Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 14 June 1985 (OJ 2000 L 239, p. 13) ('the Schengen Agreement') was implemented by the signature of the CISA.

4 Article 1 of the CISA defines 'alien' as 'any person other than a national of a Member State of the European Communities'.

5 Article 5(1), which appears under Title II of the CISA, entitled 'Abolition of checks at internal borders and movement of persons', lays down the conditions of entry of aliens into the territories of the Contracting States to the Schengen Agreement ('the Schengen Area') for stays not exceeding three months.

6 Chapter 3 of Title II of the CISA contains the rules concerning visas.

7 Article 11(1) of the CISA, which is in Section 1 of Chapter 3, entitled 'Short-stay visas', is worded as follows:

'1. The visa provided for in Article 10 may be:

(a) a travel visa valid for one or more entries, provided that neither the length of a continuous visit nor the total length of successive visits exceeds three months in any half-year, from the date of first entry;

...'

8 Article 18 of the CISA, which is in Section 2 of Chapter 3, entitled 'Long-stay visas', provides:

'Visas for stays exceeding three months shall be national visas issued by one of the Contracting Parties in accordance with its national law... '

9 Chapter 4 of Title II of the CISA sets out, in Articles 19 to 24 thereof, the conditions governing the movement of aliens. Inter alia, it provides the following:

'*Article 19*

1. Aliens who hold uniform visas and who have legally entered the territory of a Contracting Party may move freely within the territories of all the Contracting Parties during the period of validity of their visas, provided that they fulfil the entry conditions referred to in Article 5(1)(a), (c), (d) and (e).

...

Article 20

1. Aliens not subject to a visa requirement may move freely within the territories of the Contracting Parties for a maximum period of three months during the six

months following the date of first entry, provided that they fulfil the entry conditions referred to in Article 5(1)(a), (c), (d) and (e).

...

Article 23

1. Aliens who do not fulfil or who no longer fulfil the short-stay conditions applicable within the territory of a Contracting Party shall normally be required to leave the territories of the Contracting Parties immediately.

...'

The Schengen Protocol

10 Under Article 1 of the Protocol integrating the Schengen *acquis* into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community by the Treaty of Amsterdam ('the Schengen Protocol'), 13 Member States of the European Union, including the French Republic, were authorised to establish closer cooperation among themselves within the scope of the Schengen *acquis* as defined in the Annex to that protocol. That cooperation is to be conducted within the legal and institutional framework of the Union and of the EU and EC Treaties.

11 As stated in the Annex to the Schengen Protocol, the Schengen Agreement and the CISA are included in the Schengen *acquis* defined thereby.

12 Under the first subparagraph of Article 2(1) of the Schengen Protocol, from the date of entry into force of the Treaty of Amsterdam, that is to say as from 1 May 1999, the Schengen *acquis* is to apply immediately to the 13 Member States referred to in Article 1 of that protocol.

13 Pursuant to the second sentence of the second subparagraph of Article 2(1) of the Schengen Protocol, the Council of the European Union adopted Council Decision 1999/436/EC of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis (OJ 1999 L 176, p. 17). It is apparent from Article 2 of that decision, in conjunction with Annex A thereto, that the Council designated as the legal basis for Article 20 of the CISA Article 62(3) EC, which is part of Title IV of the EC Treaty, entitled 'Visas, asylum, immigration and other policies related to free movement of persons'.

Regulation (EC) No 539/2001

14 Under Article 1(2) of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2001 L 81, p. 1), as amended by Council Regulation (EC) No 2414/2001 of 7 December 2001 (OJ 2001 L 327, p. 1), Romanian nationals are exempt from the requirement of having to be in possession of a visa when crossing Member States' external borders for stays of no more than three months in all.

National legislation

15 Regulation No 45-2658 of 2 November 1945 concerning the entry and residence requirements for aliens in France (*Journal officiel de la République française* (JORF), 4 November 1945, p. 7225), as amended by, inter alia, Law No 2003-1119 of 26 November 2003 concerning immigration management, the residence of aliens in France and nationality (JORF, 27 November 2003, p. 20136) ('Regulation No 45-2658'), provided as follows in Article 22:

'I — The State's representative in the Département and, in Paris, the chief of police may, by reasoned decree, decide that an alien is to be deported in the following instances:

(1) If the alien is unable to prove that he has lawfully entered French territory, unless he holds a valid residence permit;

...

II — The provisions of subparagraph 1 of I apply to an alien who is not a national of a Member State of the European Community:

(a) If he does not meet the entry requirements provided for in Article 5 of the [CISA];

(b) Or if, coming directly from the territory of a State which is a party to that Convention, he is unable to prove that he has entered the territory of metropolitan France in compliance with the provisions of Article 19(1) or (2), Article 20(1) and Article 21(1) or (2) of the [CISA].'

The main proceedings and the question referred for a preliminary ruling

16 It is apparent from the order for reference that Mr Bot, a Romanian national, resided in the Schengen Area, inter alia in France, from 15 August to 2 November 2002 and then from the end of November 2002 until the end of January 2003. Subsequently, passing through Hungary on 23 February 2003 and then, according to what he says, through Austria and Germany, he returned to France where he was stopped and questioned on 25 March 2003.

17 On 26 March 2003, a decree for his deportation was issued by the Préfet du Val-de-Marne on the basis of Article 22(II)(b) of Regulation No 45-2658.

18 The application for annulment of that decree made by Mr Bot was rejected by judgment of the Tribunal administratif de Melun (Administrative Court of Melun) of 1 April 2003 on the ground that, in essence, by returning to France even though the period of six months referred to in Article 20(1) of the CISA had not yet elapsed, Mr Bot had infringed that provision on several occasions and could not therefore be regarded as having proved that he had entered France lawfully for the purposes of that regulation.

19 On 5 May 2003, Mr Bot applied to the Conseil d'État (Council of State) to have that judgment set aside.

20 As it considered that the answer to the question whether, as at the date of the deportation decree, Mr Bot's position was lawful under Article 20(1) of the CISA depends on what is meant by 'date of first entry' for the purposes of that provision, the Conseil d'État decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'[What is] meant by "date of first entry" in terms of Article 20(1) of the [CISA] and, in particular, [should] any entry taking place at the end of a period of six months during which there has been no other entry into the territory, as well as, in the case of an alien who carries out multiple entries for stays of short duration, any entry immediately following the expiry of a period of six months from the date of the last known "first entry", be regarded as a "first entry" into the territory of the States which are party to that Convention[?]'

The question referred for a preliminary ruling

21 By its question, the national court seeks an interpretation of the term 'first entry' in Article 20(1) of the CISA in order to ascertain whether the right of a national of a third country not subject to a visa requirement to move freely within the Schengen Area, in accordance with that provision, for a maximum period of three months during a period of six months has been exhausted in the case of the applicant in the main proceedings.

22 It is apparent from the order for reference that the applicant, after having made successive stays in the Schengen Area amounting to more than three months in all during the six months following the date of his very first entry into that area, entered the area again after that initial six-month period had elapsed and was subject to a check there less than three months after that new entry.

23 In those circumstances, the national court raises the question whether the term 'first entry' refers to any new entry into the Schengen Area or solely, besides the very first entry into that territory, to the next entry made after the expiry of a period of six months from that very first entry.

24 As is apparent from the wording of Article 20(1) of the CISA, the date of first entry into the Schengen Area by a national of a third country not subject to a visa requirement is the point from which a period of six months starts to run during which such a national has the right, in accordance with that provision, to move freely within that area for a maximum period of three months.

25 It follows from this that, as observed by the national court, the very first entry of that national into the Schengen Area constitutes a first entry within the meaning of Article 20(1) of the CISA from which his right to stay for a maximum period of three months during a period of six months must be determined.

26 As all the interested parties who have submitted written observations to the Court have accepted, Article 20(1) of the CISA permits in that respect, in the same way as Article 11(1)(a) of the CISA does expressly as regards nationals of third countries subject to a visa requirement for stays of short duration, both a continuous visit of three months in length and successive visits of shorter length which, taken together, do not exceed three months in all.

27 However, it is apparent from the wording of Article 20(1) of the CISA, read in conjunction with Article 23(1) thereof, that when that right to stay for a maximum period of three months has been exhausted during the six-month period which has elapsed since the date of the very first entry into the Schengen Area, the national concerned must, as a rule, if his stay in that area is not to exceed that maximum period, leave it immediately.

28 Accordingly, whilst nothing in the wording of Article 20(1) of the CISA precludes the same national from moving within the Schengen Area again subsequently, a point which was, moreover, not disputed by any of the interested parties who submitted observations to the Court, it is on condition that he effect a new entry into that area and does so after the expiry of a period of six months following the date of his very first entry into the area.

29 As submitted by the French, Czech and Slovak Governments, such a new entry must therefore also be regarded as a first entry within the meaning of Article 20(1) of the CISA in the same way as the very first entry into the Schengen Area. That provision thus allows nationals of a third country not subject to a visa requirement to stay in that area for a maximum period of three months during successive periods of six months, provided that each of those periods commences with such a first entry.

30 That interpretation is borne out by the provisions of the CISA applicable to short-stay visas. Under Articles 11(1)(a) and 19 of that Convention, nationals of a third country who hold a travel visa and who have legally entered the Schengen Area may move freely within it for a period not exceeding three months in any half-year from the first entry, thus expressly allowing stays of three months during successive periods of six months.

31 It must also be pointed out that, as correctly submitted by the French and Czech Governments and likewise by the Commission of the European Communities, interpreted thus, the term 'first entry' in Article 20(1) of the CISA does not in any way deprive the competent national authorities of the power to penalise, in compliance with Community law, a national of a third country whose stay in the Schengen Area has exceeded the maximum period of three months during an earlier period of six months, even if, on the date of the check to which he was subject, his stay in that area, like that of Mr Bot in the main proceedings, has not exceeded three months since the most recent date of first entry.

32 The Commission, however, submits that this literal interpretation of Article 20(1) of the CISA is capable of resulting in unlawful behaviour intended to circumvent the rules applicable to long stays, although both Articles 62 EC and 63 EC and the provisions of the CISA, in particular Articles 5 and 18 thereof, set out a clear distinction between, firstly, stays exceeding a period of three months, which are covered by the rules relating to immigration policy, and, secondly, stays of under three months, which are covered by the rules relating to the free movement of persons.

33 Thus, the Commission, and likewise the Finnish Government, observe that a national of a third country not subject to a visa requirement who, having taken care to leave the Schengen Area on the very day of his first entry, has effected a stay of three months less a day at the end of an initial period of six months, could, by leaving that area for a single day at the end of that initial period and entering it again the following day, stay in the area for three additional months during a second period of six months, thus allowing him to move freely within that territory for a period of six consecutive months less a day.

34 In those circumstances, the Commission and the Finnish Government submit that Article 20(1) of the CISA should, in accordance with the objectives of that Convention, be interpreted in such a way as to ensure that any national of a third

country contemplating one or more successive stays exceeding in total the maximum period of three months during any six-month period is subject to the rules laid down by the Community legislation relating to long stays.

35 According to the Commission, the term 'first entry' is therefore to be interpreted as relating to any first entry into the Schengen Area and also to any new entry provided that a period of more than three months without a stay in that area has elapsed between the last exit and that new entry. If that is not the case, a distinction must be drawn according to whether the length of the stay during the six-month period preceding that new entry is more or less than three months. In the former case, the right to stay would be exhausted. In the latter case, the right to stay would have to be calculated by reference to the length of the stays aggregated over the six-month period.

36 As for the Finnish Government, it submits that the term 'first entry' is to be interpreted as referring to the first entry into the Schengen Area which took place during the six-month period preceding a new entry into that area, with every stay which has already been made in the area during that period reducing the length of the permitted three-month stay accordingly.

37 It is indeed apparent from the wording of Article 62(3) EC, which, pursuant to Decision 1999/436, constitutes the legal basis for Article 20(1) of the CISA, that the Council can adopt on the basis of that provision of the EC Treaty only measures setting out the conditions under which nationals of third countries may move freely within the Schengen Area during a period of no more than three months.

38 It follows from this that, regardless of compliance with the requirement as to the period of six months following the date of first entry in Article 20(1) of the CISA,

nationals of a third country cannot in any event stay in the Schengen Area pursuant to that provision for more than three consecutive months in all. As regards nationals of a third country not subject to a visa requirement, that absolute maximum limit is clear from Article 5(1) of the CISA and Article 1(2) of Regulation No 539/2001.

39 That being so, contrary to what the Commission and the Finnish Government suggest, the interpretation of the term 'first entry' in Article 20(1) of the CISA, as is apparent from paragraphs 28 and 29 of this judgment, does not in any way have the effect of permitting nationals of a third country not subject to a visa requirement to move freely within the Schengen Area for a period of more than three consecutive months, since, as has been stated in those paragraphs, every 'first entry' within the meaning of that provision necessarily calls for a new entry into that area after a prior period of six months has elapsed.

40 Furthermore, although according to the interpretations advocated by the Commission and the Finnish Government the term 'first entry' is essentially capable of ensuring that a national of a third country not subject to a visa requirement does not stay for more than three months in the Schengen Area during any period of six months, that is clearly not the rule laid down by Article 20(1) of the CISA, which merely prohibits stays of more than three months during the six months beginning on a date corresponding to the first entry into that area. By focusing on the variable dates of first entry depending on the date of last entry, those interpretations effectively overlook the fact that Article 20(1) of the CISA is framed around the very notion of 'first entry', in order to replace it with date of last entry, which is not to be found in that provision.

41 In those circumstances, as they have no basis in the wording of that provision, those interpretations, the relative complexity of which could, moreover, affect the uniform

application of Article 20(1) of the CISA and therefore prejudice legal certainty for individuals, cannot be accepted.

42 As for the risk of circumvention of the rules applicable to long stays, as submitted by the Commission, it is sufficient to point out that while Article 20(1) of the CISA allows, as its wording now stands, a national of a third country not subject to a visa requirement to stay in the Schengen Area for a period of almost six months by aggregating two successive non-consecutive stays, it is for the Community legislature to amend that provision, if necessary, if it takes the view that such an aggregation is capable of undermining the rules applicable to stays of more than three months.

43 Consequently, the answer to the question referred for a preliminary ruling must be that Article 20(1) of the CISA is to be interpreted as meaning that the term 'first entry' in that provision refers, besides the very first entry into the Schengen Area, to the first entry into that area taking place after the expiry of a period of six months from that very first entry and also to any other first entry taking place after the expiry of any new period of six months following an earlier date of first entry.

Costs

44 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 hereby rules:

Article 20(1) of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed on 19 June 1990 at Schengen, is to be interpreted as meaning that the term 'first entry' in that provision refers, besides the very first entry into the territories of the Contracting States to that agreement, to the first entry into those territories taking place after the expiry of a period of six months from that very first entry and also to any other first entry taking place after the expiry of any new period of six months following an earlier date of first entry.

[Signatures]