Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

21 March 2013*

(Area of freedom, security and justice — 'Local border traffic' at the external land borders of the Member States — Regulation (EC) No 1931/2006 — Regulation (EC) No 562/2006 — Maximum duration of stay — Rules for calculation)

In Case C-254/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Magyar Köztársaság Legfelsőbb Bírósága (Hungary), made by decision of 3 May 2011, received at the Court on 25 May 2011, in the proceedings

Szabolcs-Szatmár-Bereg Megyei Rendőrkapitányság Záhony Határrendészeti Kirendeltsége

v

Oskar Shomodi,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot (Rapporteur), acting as President of the Fourth Chamber, C. Toader, M. Berger, A. Prechal and E. Jarašiūnas, Judges,

Advocate General: P. Cruz Villalón,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 14 June 2012,

after considering the observations submitted on behalf of:

— the Szabolcs-Szatmár-Bereg Megyei Rendőrkapitányság Záhony Határrendészeti Kirendeltsége, by É. Tasnádi, jogtanácsos,

— Mr Shomodi, by L. Isaák, ügyvéd,

— the Hungarian Government, by M. Fehér, K. Szíjjártó and Z. Tóth, acting as Agents,

— the Polish Government, by M. Szpunar, acting as Agent,

— the Romanian Government, by H.R. Radu, F. Abrudan and A. Crișan, acting as Agents,

— the Slovak Government, by B. Ricziová, acting as Agent,

* Language of the case: Hungarian.

— the European Commission, by V. Bottka and G. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 December 2012,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2(a), 3(3) and 5 of Regulation (EC) No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention (OJ 2006 L 405, p. 1, and corrigendum OJ 2007 L 29, p. 3).

2 The request has been made in proceedings between the Szabolcs-Szatmár-Bereg Megyei Rendőrkapitányság Záhony Határrendészeti Kirendeltsége (Szabolcs-Szatmár-Bereg County Police Headquarters – Záhony Border Police Office ('the Záhony border police authority')) and Mr Shomodi, a Ukrainian national, concerning the authority's refusal to allow Mr Shomodi to enter Hungarian territory on the ground that he had exceeded the maximum duration of stay permitted in Hungarian territory for local border traffic.

Legal context

European Union ('EU') law

General provisions relating to third-country nationals not subject to a visa requirement

3 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 at Schengen on 19 June 1990 (OJ 2000 L 239, p. 19; 'the Convention implementing the Schengen Agreement'), provides:

'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 …'

4 Recital 3 in the preamble to 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) states:

'The adoption of common measures on the crossing of internal borders by persons and border control at external borders should reflect the Schengen *acquis* incorporated in the [EU] framework, and in particular the relevant provisions of the Convention implementing the Schengen Agreement … and the Common Manual [(OJ 2002 C 313, p. 97)].'

5 Article 5(1) of Regulation No 562/2006 lays down the entry conditions imposed on third-country nationals for stays 'not exceeding three months per six-month period'.

6 Article 35 of that regulation provides that the regulation 'shall be without prejudice to Community rules on local border traffic and to existing bilateral agreements on local border traffic'.

Special provisions relating to local border traffic

7 Recitals 2 and 3 to Regulation No 1931/2006 state:

‘(2) It is in the interest of the enlarged Community to ensure that the borders with its neighbours are not a barrier to trade, social and cultural interchange or regional cooperation. An efficient system for local border traffic should consequently be developed.

(3) The local border traffic regime constitutes a derogation from the general rules governing the border control of persons crossing the external borders of the Member States of the European Union which are set out in Regulation … No 562/2006 …’.

8 Recital 4 to Regulation No 1931/2006 sets out, inter alia, the principle of ‘the easing of border crossing for bona fide border residents having legitimate reasons frequently to cross an external land border’.

9 Article 3 of that regulation provides the following definitions:

‘…

(2) “border area” means an area that extends no more than 30 kilometres from the border. The local administrative districts that are to be considered as the border area shall be specified by the States concerned in their bilateral Agreements as referred to in Article 13. If part of any such district lies between 30 and 50 kilometres from the border line, it shall nevertheless be considered as part of the border area;

(3) “local border traffic” means the regular crossing of an external land border by border residents in order to stay in a border area, for example for social, cultural or substantiated economic reasons, or for family reasons, for a period not exceeding the time limit laid down in this Regulation;

…’

10 Under Article 13 of Regulation No 1931/2006, the Member States are entrusted with the task of implementing the local border traffic regime, under the supervision of the European Commission, by means of bilateral agreements concluded with neighbouring third countries. In accordance with Article 5 of that regulation, those agreements are to specify ‘the maximum permissible duration of each uninterrupted stay under the local border traffic regime, which shall not exceed three months’.

11 Article 7 of Regulation No 1931/2006 introduces a local border traffic permit and sets out the characteristics of such a permit and the information which it is to contain, including, in particular, the statement that ‘its holder is not authorised to move outside the border area’ and that ‘any abuse shall be subject to penalties as provided for in Article 17’. Article 17 lays down the rule that penalties are to be ‘effective, proportionate and dissuasive’ and to include ‘the possibility of cancelling and revoking local border traffic permits’.

12 In addition, recital 5 to that regulation states:

‘As a general rule, in order to prevent abuses, local border traffic permits should be issued only to those who have been lawfully resident in a border area for at least one year. Bilateral Agreements concluded between Member States and neighbouring third countries may provide for a longer period of residence …’

13 Lastly, under Article 9 of Regulation No 1931/2006, local border traffic permits may be issued only to border residents who produce documents proving, inter alia, the existence of legitimate reasons frequently to cross an external land border.

Hungarian law

14 As regards the general rules on the entry and stay of third country nationals, Paragraph 40(1) of Law No II of 2007 on the Entry and Stay of third country nationals (2007. évi II. törvény a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról) provides:

'On the basis of the provisions of [Regulation No 562/2006], the border control authority shall refuse entry to third-country nationals seeking admission for stays of three months' duration or less and, with due regard for their interests, shall return such persons ...'

15 As regards local border traffic, Article 1(5) of the agreement concluded between the Hungarian Government and the Ukrainian Cabinet of Ministers with a view to regulating local border traffic states that the local border traffic permit 'shall entitle the holder to multiple entry and to a continuous stay of a maximum of three months within a six-month period in the border area of the State of the other Contracting Party, in particular for social, cultural or family reasons, or for substantiated economic reasons which do not fall to be treated as gainful activity for the purposes of national legislation'. Article 3(2) of that agreement provides that 'any misuse of the permit shall give rise to penalties as determined by the national legislation of the Contracting Parties'.

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

16 Mr Shomodi is a Ukrainian national in possession of a local border traffic permit which authorises him to enter the border area of Hungary. On 2 February 2010 he requested entry at the Záhony border crossing. The Hungarian border police established that, during the period from 3 September 2009 to 2 February 2010, Mr Shomodi had stayed in Hungarian territory for 105 days, entering that territory almost daily for several hours. Since Mr Shomodi had thus stayed in the Schengen area for more than three months during a six-month period, the Záhony border police authority, by decision of 2 February 2010, refused him entry into Hungarian territory pursuant to Paragraph 40(1) of Law II of 2007.

17 Mr Shomodi contested that decision before the Szabolcs-Szatmár-Bereg megyei bíróság (Szabolcs-Szatmár-Bereg County Court), which annulled it by judgment of 26 May 2010. First, the Szabolcs-Szatmár-Bereg County Court ruled that Regulation No 562/2006 and Paragraph 40(1) of Law II of 2007, implementing the latter, were not applicable. Next, it applied the special rules on local border traffic, finding that there is no limit on the number of entries to which the holder of a local border traffic permit is entitled and that the three-month limit laid down in the agreement referred to in paragraph 15 above applies only to uninterrupted stays. The Szabolcs Szatmár-Bereg County Court concluded that the grounds relied on by the Záhony border police authority did not justify the refusal to allow Mr Shomodi to enter Hungarian territory.

18 Hearing the appeal on a point of law brought against that judgment by the Záhony border police authority, the Magyar Köztársaság Legfelsőbb Bírósága (Supreme Court of the Republic of Hungary) decided, on the view that the outcome of the dispute depends on the interpretation to be given to the provisions of Regulation No 1931/2006, to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. With particular regard to Article 2(a) and Article 3(3) of Regulation … No 1931/2006 …, is Article 5 of that regulation, which permits an uninterrupted stay not exceeding three months, to be interpreted as meaning that Regulation No 1931/2006 allows, on the basis of bilateral agreements between Member States and third countries as referred to in Article 13 of that regulation, multiple exits and entries and an uninterrupted stay not exceeding three months, with the result that a border resident in possession of a local border traffic permit may, prior to the expiry of the three-month period allowed for the stay, interrupt the uninterrupted stay and, once he has crossed the border again, be entitled anew to an uninterrupted stay of three months?

2. In the event that the answer to Question 1 is yes, can an exit and entry occurring on the same day or on consecutive days be regarded as an interruption of an uninterrupted stay under Article 5 of Regulation No 1931/2006?

3. In the event that the answer to Question 1 is yes, but the answer to Question 2 is no, what time interval or other examination criterion needs to be taken into consideration to establish an interruption of an uninterrupted stay, for the purposes of applying Article 5 of Regulation No 1931/2006?

4. In the event that the answer to Question 1 is no, can Article 5 of Regulation No 1931/2006, which permits an uninterrupted stay not exceeding three months, be interpreted as meaning that the periods of time covered by multiple exits and entries must be counted together and that, in view of Article 20(1) of the Convention implementing the Schengen Agreement …, or any other rules relating to Schengen law, if the total number of days thus calculated exceeds 93 days (three months), the local border traffic permit does not provide entitlement to any further stay within six months of the date of first entry?

5. In the event that the answer to Question 4 is yes, must multiple entries and exits occurring on the same day, or a single entry and exit on the same day, also be taken into account for the purposes of calculating the total number of days and, if so, using what counting method?'

Consideration of the questions referred

Questions 1 and 4

19 The national court seeks, in essence, clarification as to the precise scope of the three-month limitation placed on each 'uninterrupted stay' to which the holder of a local border traffic permit is entitled under Regulation No 1931/2006, in the light of the limitation of stays – to three months over a six-month period – laid down in the Convention implementing the Schengen Agreement and in Regulation No 562/2006 for third-country nationals who are not subject to visa requirements.

20 By that question, the national court is effectively asking whether Regulation No 1931/2006 is to be interpreted in the light of the Schengen *acquis* or whether, on the contrary, it must be given an autonomous interpretation.

21 The first of those alternatives, which is favoured by the Hungarian and Polish Governments, consists in viewing Regulation No 1931/2006 as an integral part of the Schengen *acquis*. On that view, the rule – specific to that legislation – under which the duration of short stays of third-country nationals exempt from visa requirements is limited to a total of three months over a six-month period, has to take precedence over any other provision. Accordingly, holders of a local border traffic permit who are exempt from visa requirements under Regulation No 1931/2006 are not excepted from that rule. Advocates of that approach argue that, if no such limit had been placed on the total number of authorised successive stays, holders of such a permit would *de facto* have a potentially unlimited right to stay, as all they would have to do in order to benefit from a new three-month period would be to leave the territory of the Member State concerned at the end of the three months and then return the following day.

22 However, such an approach is not consistent with either the letter or the spirit of Regulation No 1931/2006.

23 Article 5 of Regulation No 1931/2006 leaves to bilateral agreements the task of determining the maximum permissible duration 'of each uninterrupted stay', subject to the three-month limit. That specification clearly distinguishes, as does the wording in which it is framed, between the limitation in time of local border traffic, on the one hand, and the 'Schengen limitation', which is wholly unrelated to uninterrupted stays, on the other. That interpretation is confirmed by the *travaux préparatoires* for Regulation No 1931/2006, from which it is apparent that, although the Commission initially proposed an alignment with the maximum stay, laid down in the Schengen *acquis*, of three months within each six-month period, the EU legislature opted for a limitation specific to uninterrupted stays. In that regard, the fact that that specific limitation is set at three months, just as it is under the Schengen *acquis*, cannot cast doubt on its special nature in relation to the ordinary rules in place for third-country nationals who are not subject to visa requirements, since there is nothing in Regulation No 1931/2006 to suggest that those three months must fall within one and the same six-month period.

24 Moreover, the spirit of Regulation No 1931/2006 demands that its provisions be given an autonomous interpretation where the need arises. Both the objectives of that regulation and its provisions indicate that the EU legislature intended to put rules in place for local border traffic which derogate from Regulation No 562/2006. As the Advocate General pointed out in point 52 of his Opinion, the purpose of those rules is to enable the residents of the border areas concerned – while, at the same time, taking account of local, current and historical realities – to cross the external land borders of the European Union for legitimate economic, social, cultural or family reasons, and to do so easily – that is to say, without excessive administrative constraints – and frequently, even regularly.

25 The concerns expressed by the Hungarian and Polish Governments in connection with the alleged negative consequences of such an interpretation on public order in connection with borders cannot be regarded as persuasive, since the right thereby granted to holders of local border traffic permits is neither unconditional nor absolute. In order to obtain such a permit, a person must have resided for at least one year in the border area of the neighbouring country and that minimum residence requirement can be extended by a bilateral agreement. Moreover, there is nothing to prevent a bilateral agreement from specifying, as the maximum duration of uninterrupted stay, a period shorter than the three-month period laid down in Regulation No 1931/2006, which simply marks the maximum permissible overall. Furthermore, the easing of border crossing is intended – as is apparent from the very wording of recital 4 to Regulation No 1931/2006 and Article 9(b) thereof – for bona fide border residents with legitimate and duly substantiated reasons for frequently crossing an external land border. In that regard, the competent authorities remain free to impose penalties, as referred to in Article 7 of Regulation No 1931/2006, on border residents who abuse or fraudulently use their local border traffic permit.

26 Consequently, the answer to Questions 1 and 4 is that Regulation No 1931/2006 must be interpreted as meaning that the holder of a local border traffic permit granted under the special local border traffic regime established by that regulation must be able, within the limits laid down in that regulation and in the bilateral agreement concluded for its implementation between the third country of which he is a national and the neighbouring Member State, to move freely within the border area for a period of three months if his stay is uninterrupted and to have a new right to a three-month stay each time that his stay is interrupted.

Question 2

27 By its second question, the national court asks in essence how frequently is it acceptable for there to be interruptions of stay on the part of the holder of a local border traffic permit for the purposes of Article 5 of Regulation No 1931/2006.

28 In that regard, it can be inferred from the statements made above that the stay of the holder of a permit to cross a local border, granted for the purposes of local border traffic, must be regarded as interrupted as soon as the person concerned crosses back into his State of residence in accordance with the authorisation granted to him, and there is no need to take account of the number of border crossings made each day.

29 Accordingly, the answer to Question 2 is that Article 5 of Regulation No 1931/2006 must be interpreted as meaning that there is an interruption of stay, as referred to in that provision, upon the crossing of the border between the neighbouring Member State and the third country in which the holder of the local border traffic permit resides, in accordance with the conditions laid down in that permit, irrespective of the frequency of such crossings, even if they occur several times daily.

The other questions

30 In view of the answers given to Questions 1, 2 and 4, there is no need to answer Questions 3 and 5.

Costs

31 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 (Fourth Chamber) hereby rules:

1. **Regulation (EC) No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention must be interpreted as meaning that the holder of a local border traffic permit granted under the special local border traffic regime established by that regulation must be able, within the limits laid down in that regulation and in the bilateral agreement concluded for its implementation between the third country of which he is a national and the neighbouring Member State, to move freely within the border area for a period of three months if his stay is uninterrupted and to have a new right to a three-month stay each time that his stay is interrupted.**

2. **Article 5 of Regulation No 1931/2006 must be interpreted as meaning that there is an interruption of stay, as referred to in that provision, upon the crossing of the border between the neighbouring Member State and the third country in which the holder of the local border traffic permit resides, in accordance with the conditions laid down in that permit, irrespective of the frequency of such crossings, even if they occur several times daily.**

[Signatures]