Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

10 April 2012*

(Area of freedom, security and justice — Regulation (EC) No 810/2009 — Community Code on Visas — Articles 21 and 34 — National legislation — Third-country nationals brought illegally into the territory of a Member State — Visas obtained by fraud — Criminal penalties imposed on the human smuggler)

In Case C-83/12 PPU,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Germany), made by decision of 8 February 2012, received at the Court on 17 February 2012, in the criminal proceedings against

Minh Khoa Vo

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Chamber, U. Lõhmus, A. Rosas, A. Ó Caoimh and C.G. Fernlund, Judges,

Advocate General: E. Sharpston,

Registrar: K. Malacek, Administrator,

having regard to the request by the national court of 8 February 2012, received at the Court on 17 February 2012, that the reference for a preliminary ruling be dealt with under an urgent procedure, in accordance with Article 104b of the Court's Rules of Procedure,

having regard to the decision of 28 February 2012 of the Second Chamber granting that request,

having regard to the written procedure and further to the hearing on 22 March 2012,

after considering the observations submitted on behalf of:

— Mr Vo, by K. Beulich, Rechtsanwältin,

— the Generalbundesanwalt beim Bundesgerichtshof, by K. Lohse and P. Knauss, acting as Agents,

— the German Government, by T. Henze and N. Graf Vitzthum, acting as Agents,

— the Greek Government, by T. Papadopoulou, acting as Agent,

— the European Commission, by G. Wils and W. Bogensberger, acting as Agents,

* Language of the case: German.

after hearing the Advocate General,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 21 and 34 of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) (OJ 2009 L 243, p. 1).

2 The reference has been made in criminal proceedings brought against Mr Vo, who has been convicted of human smuggling, in that he secured the entry into German territory of third-country nationals holding visas obtained by fraud.

Legal context

European Union law

The Visa Code

3 Recital 3 in the preamble to the Visa Code reads as follows:

‘As regards visa policy, the establishment of a “common corpus” of legislation, particularly via the consolidation and development of the acquis (the relevant provisions of the Convention implementing the Schengen Agreement of 14 June 1985 and the Common Consular Instructions), is one of the fundamental components of “further development of the common visa policy as part of a multi-layer system aimed at facilitating legitimate travel and tackling illegal immigration through further harmonisation of national legislation and handling practices at local consular missions”, as defined in the Hague Programme: strengthening freedom, security and justice in the European Union.’

4 According to Article 1(1) of the Visa Code, the Code establishes the procedures and conditions for issuing visas for transit through or stays in the territory of the Member States not exceeding three months in any six-month period; Article 1(2) states that third-country nationals must be in possession of visas when crossing the external borders of the Member States.

5 Article 2 of the Visa Code provides:

‘For the purpose of this Regulation the following definitions shall apply:

1. “third-country national” means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty;

2. “visa” means an authorisation issued by a Member State with a view to:

   (a) transit through or an intended stay in the territory of the Member States of a duration of no more than three months in any six-month period from the date of first entry in the territory of the Member States; …

…’

6 Under Article 14(1) of the Visa Code:

‘1. When applying for a uniform visa, the applicant shall present:

(a) documents indicating the purpose of the journey;

…

(d) information enabling an assessment of the applicant’s intention to leave the territory of the Member States before the expiry of the visa applied for.’

7 Article 21 of the Visa Code provides:

‘1. In the examination of an application for a uniform visa, it shall be ascertained whether the applicant fulfils the entry conditions set out in Article 5(1)(a), (c), (d) and (e) of [Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1)], and particular consideration shall be given to assessing whether the applicant presents a risk of illegal immigration or a risk to the security of the Member States and whether the applicant intends to leave the territory of the Member States before the expiry of the visa applied for.

2. In respect of each application, the VIS [Visa Information System] shall be consulted in accordance with Articles 8(2) and 15 of [Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) (OJ 2008 L 218, p. 60)]. Member States shall ensure that full use is made of all search criteria pursuant to Article 15 of the VIS Regulation in order to avoid false rejections and identifications.

3. While checking whether the applicant fulfils the entry conditions, the consulate shall verify:

(a) that the travel document presented is not false, counterfeit or forged;

(b) the applicant’s justification for the purpose and conditions of the intended stay, and that he has sufficient means of subsistence, both for the duration of the intended stay and for the return to his country of origin or residence, or for the transit to a third country into which he is certain to be admitted, or is in a position to acquire such means lawfully;

(c) whether the applicant is a person for whom an alert has been issued in the Schengen Information System (SIS) for the purpose of refusing entry;

(d) that the applicant is not considered to be a threat to public policy, internal security or public health as defined in Article 2(19) of the Schengen Borders Code or to the international relations of any of the Member States, in particular where no alert has been issued in Member States’ national databases for the purpose of refusing entry on the same grounds;

(e) that the applicant is in possession of adequate and valid travel medical insurance, where applicable.

4. The consulate shall, where applicable, verify the length of previous and intended stays in order to verify that the applicant has not exceeded the maximum duration of authorised stay in the territory of the Member States, irrespective of possible stays authorised under a national long-stay visa or a residence permit issued by another Member State.

5. The means of subsistence for the intended stay shall be assessed in accordance with the duration and the purpose of the stay and by reference to average prices in the Member State(s) concerned for board and lodging in budget accommodation, multiplied by the number of days stayed, on the basis of

the reference amounts set by the Member States in accordance with Article 34(1)(c) of the Schengen Borders Code. Proof of sponsorship and/or private accommodation may also constitute evidence of sufficient means of subsistence.

6. In the examination of an application for an airport transit visa, the consulate shall in particular verify:

(a) that the travel document presented is not false, counterfeit or forged;

(b) the points of departure and destination of the third-country national concerned and the coherence of the intended itinerary and airport transit;

(c) proof of the onward journey to the final destination.

7. The examination of an application shall be based notably on the authenticity and reliability of the documents submitted and on the veracity and reliability of the statements made by the applicant.

8. During the examination of an application, consulates may in justified cases call the applicant for an interview and request additional documents.

9. A previous visa refusal shall not lead to an automatic refusal of a new application. A new application shall be assessed on the basis of all available information.'

8 Under Article 34 of the Visa Code:

'1. A visa shall be annulled where it becomes evident that the conditions for issuing it were not met at the time when it was issued, in particular if there are serious grounds for believing that the visa was fraudulently obtained. A visa shall in principle be annulled by the competent authorities of the Member State which issued it. A visa may be annulled by the competent authorities of another Member State, in which case the authorities of the Member State that issued the visa shall be informed of such annulment.

2. A visa shall be revoked where it becomes evident that the conditions for issuing it are no longer met. A visa shall in principle be revoked by the competent authorities of the Member State which issued it. A visa may be revoked by the competent authorities of another Member State, in which case the authorities of the Member State that issued the visa shall be informed of such revocation.

3. A visa may be revoked at the request of the visa holder. The competent authorities of the Member States that issued the visa shall be informed of such revocation.

4. Failure of the visa holder to produce, at the border, one or more of the supporting documents referred to in Article 14(3), shall not automatically lead to a decision to annul or revoke the visa.

5. If a visa is annulled or revoked, a stamp stating "ANNULLED" or "REVOKED" shall be affixed to it and the optically variable feature of the visa sticker, the security feature "latent image effect" as well as the term "visa" shall be invalidated by being crossed out.

6. A decision on annulment or revocation of a visa and the reasons on which it is based shall be notified to the applicant by means of the standard form set out in Annex VI.

7. A visa holder whose visa has been annulled or revoked shall have the right to appeal, unless the visa was revoked at his request in accordance with paragraph 3. Appeals shall be conducted against the Member State that has taken the decision on the annulment or revocation 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 the event of an appeal, as specified in Annex VI.

8. Information on an annulled or a revoked visa shall be entered into the VIS in accordance with Article 13 of the VIS Regulation.'

9 It is clear from Article 58(5) of the Visa Code that Article 34(6) and (7) of that regulation have been applicable only since 5 April 2011. Between 5 April 2010, the date on which the Visa Code entered into force, and 5 April 2011, Part V, 2.4 of the Common Consular Instructions on Visas for the Diplomatic Missions and Consular Posts (OJ 2005 C 326, p. 1) referred, in the event of the refusal of a visa, to the legal remedies provided for under the national law of the Contracting Party.

Framework Decision 2002/946/JHA

10 Article 1(1) of Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 1) provides that each Member State is to take the measures necessary to ensure that the infringements defined in Articles 1 and 2 of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 17) are punishable by effective, proportionate and dissuasive criminal penalties which may entail extradition.

11 Under Article 4(1)(a) of that framework decision, each Member State is to take the measures necessary to establish its jurisdiction with regard to the infringements referred to in Article 1(1) thereof and committed in whole or in part within its territory.

12 Article 7(1) of the same framework decision states:

'If a Member State is informed of infringements referred to in Article 1(1) which are in breach of the law on the entry and residence of aliens of another Member State, it shall inform the latter accordingly.'

Directive 2002/90

13 Article 1(1) of Directive 2002/90 provides:

'Each Member State shall adopt appropriate sanctions on:

(a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;

(b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.'

14 It is stated in Article 3 of that directive that each Member State is to take the measures necessary to ensure that the infringements referred to in Articles 1 and 2 thereof are subject to effective, proportionate and dissuasive sanctions.

Directive 2008/115/EC

15 Article 3 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98) provides:

'For the purposes of this Directive the following definitions shall apply:

…

2. “illegal stay” means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State;

…’

National legislation

16 Paragraph 4(1)(1) of the Law on the residence, employment and integration of aliens in Federal Territory (Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet, ‘the Aufenthaltsgesetz’) provides:

‘In order to enter and reside in Federal territory, aliens shall require a residence permit, unless the law of the European Union or a national regulation provides otherwise or a right of residence exists by virtue of the Agreement of 12 September 1963 establishing an Association between the European Economic Community and Turkey (BGBl. 1964 II, p. 509) (EEC-Turkey Association Agreement). A residence permit shall be issued in the form of:

(1) a visa …’

17 With regard to penalties, Paragraph 95 of the Aufenthaltsgesetz provides:

‘1. Any person who

…

(2) resides in Federal territory without a residence permit as required in accordance with the first sentence of Paragraph 4(1), where

(a) he is subject to an enforceable obligation to leave the territory,

(b) he has been given no time-limit for his departure or that time-limit has expired, and

(c) his expulsion has not been stayed,

(3) enters Federal territory in breach of Paragraph 14(1), point 1 or 2,

…

shall be liable to a custodial sentence of up to one year or a fine.

…

6. In the situations defined in points 2 and 3 of subparagraph 1, acting on the basis of a residence permit fraudulently obtained by threats, corruption or collusion or by the provision of incorrect or incomplete information shall be treated in the same way as acting without the necessary residence permit.’

18 Paragraph 96 of the Aufenthaltsgesetz, entitled ‘Facilitation of illegal immigration’, provides:

‘1. Any person who aids or abets another to

(1) commit an act punishable under Paragraph 95(1)(3) or (2)(1)(a), and

(a) derives or secures the promise of an advantage from so doing or

(b) so acts repeatedly or for the benefit of more than one alien or

(2) commits an act punishable under Paragraph 95(1), point 1 or point 2, (1a) or (2), point 1(b) or point 2, and derives a pecuniary advantage or secures the promise of such an advantage from so doing

shall be liable to a custodial sentence of up to five years or a fine.

2. Any person who, in the situations defined in subparagraph 1,

(1) acts for financial gain,

(2) acts as a member of a gang formed for the purpose of repeatedly committing such acts,

…

shall be liable to a custodial sentence of six months to ten years.

…

4. Subparagraph 1, point 1(a), point 2, subparagraph 2, points 1, 2 and 5, and subparagraph 3 shall apply to infringements of the provisions relating to the entry and residence of aliens in the territory of the Member States of the European Union or of a Schengen State, where

(1) those provisions correspond to the acts defined in Paragraph 95(1), point 2 or 3, or 2, point 1, and

(2) the perpetrator of the act supports an alien who does not hold the nationality of a Member State of the European Union or of another State party to the Agreement on the European Economic Area.

…'

19 Paragraph 97(2) of the Aufenthaltsgesetz, entitled 'Causing death by facilitation of illegal immigration; facilitation of illegal immigration for financial gain and as a member of an organised gang', provides:

'Any person who, in the situations defined in Paragraph 96(1), where appropriate in conjunction with Paragraph 96(4), acts for financial gain as a member of a gang formed for the purpose of repeatedly committing such acts shall be liable to a custodial sentence of up to ten years.'

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

20 Mr Vo, a Vietnamese national, was subject to a criminal prosecution in Germany in connection with offences relating to assisting illegal immigration. That prosecution led to his being convicted by the Landgericht Berlin (Regional Court, Berlin) and sentenced to imprisonment for a total of four years and three months on four counts of the offence of assisting illegal immigration for financial gain as a member of an organised gang.

21 The defendant was a member of Vietnamese organised gangs which assisted Vietnamese nationals to enter Germany illegally.

22 The modus operandi of one of those gangs was to persuade the Hungarian Embassy in Vietnam that a number of Vietnamese nationals were members of tourist groups of between 20 and 30 people, although the aim was to secure their entry into the territory of the European Union in return for payment of

between USD 11 000 and USD 15 000. To keep up appearances, the trips followed the tour programme for the first few days, but then the persons concerned were transported, in accordance with the previously agreed plan, to various countries of destination, but mainly to Germany.

23 The other gang exploited the fact that the Kingdom of Sweden allowed Vietnamese nationals to stay within the Schengen area for a few months provided that they held visas to work as berry pickers. When the visas were applied for, the competent authorities were led to believe that the applicants wanted to work. In reality, once they had obtained their work visas, as soon as the Vietnamese nationals arrived in Sweden they moved on to Germany. Mr Vo was accused of being partly responsible for those offences and of having received, in return for his services, a sum of between EUR 500 and EUR 2 000 on each occasion he was involved.

24 Some of those Vietnamese nationals were found attempting to settle and work in German territory.

25 The Landgericht Berlin found the defendant guilty of four counts of the offence of assisting illegal immigration for financial gain as a member of an organised gang within the meaning of Paragraph 97(2) of the Aufenthaltsgesetz, read in conjunction with Paragraph 96(1), point 1(a) and (b), Paragraph 95(1), point 3, Paragraph 96(1), point 2, and Paragraph 95(1), point 2, of that law.

26 In the view of that court, the offence cannot be committed unless the smuggled persons have entered or resided in the territory illegally. It held that the fact that those persons were formally in possession of visas does not preclude the imposition of penalties on the smuggler, since obtaining a residence permit by fraud through the provision of false information is equivalent to acting without the necessary residence permit.

27 The defendant brought an appeal on a point of law before the Bundesgerichtshof (Federal Court of Justice) against his conviction by the Landgericht Berlin, claiming, without further clarification, that there had been an infringement of substantive law.

28 The referring court considers that the conditions laid down in Paragraph 95(6) of the Aufenthaltsgesetz are satisfied, since the persons whose immigration was to be assisted deliberately lied to the officials at the Hungarian and Swedish Embassies by stating that they wished to enter the Schengen area as tourists or to work temporarily there, whereas, in reality, they had planned from the outset to move on to Germany, which would have meant that visas would not have been issued, the visas having been issued only because the officials in charge were misled.

29 In those circumstances, the Bundesgerichtshof decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

‘Are Articles 21 and 34 of the [Visa Code], which regulate the issue and annulment of a uniform visa, to be interpreted as precluding criminal liability, resulting from the application of national legislation, for the smuggling of foreign nationals in cases where, although they hold visas, the persons smuggled obtained those visas by deceiving the competent authorities of another Member State as to the true purpose of their journey?’

The urgent procedure

30 The Bundesgerichtshof requested that this reference for a preliminary ruling be dealt with under the urgent procedure provided for in Article 104b of the Court’s Rules of Procedure.

31 The reason given by that court for its request was that Mr Vo, who was sentenced to a term of imprisonment of four years and three months for assisting illegal immigration for financial gain as a member of an organised gang, has been remanded in custody, without interruption, since 1 January

2011, and that, if the Court were to answer the question referred for a preliminary ruling in the affirmative, Mr Vo could no longer be the subject of criminal prosecution and his detention would therefore have no legal basis.

32 On a proposal from the Judge-Rapporteur and after hearing the Advocate General, the Second Chamber of the Court decided to allow the referring court's request that the reference for a preliminary ruling be dealt with under an urgent procedure.

Consideration of the question referred for a preliminary ruling

33 By its question, the referring court asks, in essence, whether Articles 21 and 34 of the Visa Code are to be interpreted as precluding national provisions under which assisting illegal immigration is an offence subject to criminal penalties in cases where the persons smuggled, who are third-country nationals, hold visas which they obtained fraudulently by deceiving the competent authorities of the Member State of issue as to the true purpose of their journey, though those visas have not first been annulled.

34 The first point to be noted is that the adoption by the Visa Code of the measures on the crossing of external borders and the procedures and conditions for issuing visas by Member States is part and parcel of the objective of gradually establishing an area of freedom, security and justice under Article 67 TFEU.

35 According to recital 3 in the preamble to the Visa Code, the purpose of that Code is to establish a multi-layer system aimed at facilitating legitimate travel and tackling illegal immigration through further harmonisation of national legislation and handling practices at local consular missions.

36 The object of the harmonisation pursued by the Code is the issuing of short-stay visas in accordance with the Schengen acquis.

37 Article 21(1) of the Visa Code provides that, in the examination by the competent consulate of an application for a uniform visa, it must be ascertained whether the applicant fulfils the entry conditions set out in Article 5(1)(a), (c), (d) and (e) of the Schengen Borders Code, and particular consideration must be given to assessing whether the applicant presents a risk of illegal immigration or a risk to the security of the Member States and whether the applicant intends to leave the territory of the Member States before the expiry of the visa applied for.

38 Under Article 34(1) of the Visa Code, a visa is to be annulled where there are serious grounds for believing that that visa was fraudulently obtained. The annulment is in principle to be carried out by the competent authorities of the Member State which issued the visa, but the visa may also be annulled by the competent authorities of another Member State, in which case the authorities of the Member State that issued the visa must be informed of such annulment.

39 The purpose of allowing the competent authorities of a Member State other than the Member State of issue to decide on the annulment of visas is to deal with situations where, after the commencement of travel, the visa proves to be invalid or ineffective because it was fraudulently issued or because the conditions for its issue were not met.

40 However, while annulment is, in principle, mandatory as far as the authorities of the Member State which issued the visa are concerned, it appears to be optional for the authorities of another Member State, as the use of the verb 'may' by the legislature of the European Union indicates.

41 It follows that the Court must determine whether the national legislation under which assisting illegal immigration constitutes an offence subject to criminal penalties may take into account, as constituent elements of that offence, the illegal entry and residence of the smuggled persons, though the visas granted to those persons have not first been annulled.

42 The Visa Code governs the conditions for issuing, annulling and revoking visas, but it does not contain any rules laying down criminal penalties for infringement of those conditions. None the less, the visa application form set out in Annex I to the Visa Code contains a section informing the applicant that any false statements will lead, inter alia, to the annulment of the visa and may render him liable to prosecution.

43 In addition, Articles 1(1) and 4(1)(a) of Framework Decision 2002/946/JHA and Articles 1(1) and 3 of Directive 2002/90 require each Member State to take the measures necessary to ensure that the infringements defined are punishable by effective, proportionate and dissuasive criminal penalties and to establish its jurisdiction with regard to the infringements committed, in whole or in part, within its territory.

44 It follows from the foregoing paragraphs that not only does European Union law not preclude a Member State from bringing a criminal prosecution against any person who has intentionally assisted a third-country national to enter the territory of that Member State in breach of the applicable provisions, it expressly requires the Member State concerned to bring such a prosecution.

45 The Member States are thus faced with two obligations. The first is not to act in such a way as to hinder the movement of visa holders unless the visas have been duly and properly annulled. The second is to prescribe and enforce effective, proportionate and dissuasive penalties against those persons who commit the infringements defined in Framework Decision 2002/946/JHA and Directive 2002/90, in particular human smugglers.

46 Those obligations must be discharged in such a way as to ensure that the provisions of European Union law are fully effective (see, to that effect, Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 24, and Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 43). Where necessary, the national courts have a duty to seek outcomes which achieve a proper balance in relation to provisions which, if applied, might call in question the effectiveness or consistency of European Union legislation.

47 Criminal proceedings which, by their very nature, may involve investigative confidentiality and the adoption of urgent measures, cannot always comply with a requirement that a visa must first have been annulled by the competent authorities.

48 In the light of the foregoing, the answer to the question referred must be that Articles 21 and 34 of Regulation No 810/2009 are to be interpreted as meaning that they do not preclude national provisions under which assisting illegal immigration constitutes an offence subject to criminal penalties in cases where the persons smuggled, third-country nationals, hold visas which they obtained fraudulently by deceiving the competent authorities of the Member State of issue as to the true purpose of their journey, without prior annulment of those visas.

Costs

49 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 (Second Chamber) hereby rules:

Articles 21 and 34 of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) are to be interpreted as meaning that they do not preclude national provisions under which assisting illegal immigration constitutes an offence subject to criminal penalties in cases where the persons smuggled, third-country nationals, hold visas which they obtained fraudulently by deceiving the competent authorities of the Member State of issue as to the true purpose of their journey, without prior annulment of those visas.

[Signatures]