Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 16 July 2020[1]

Case C-193/19

A
v
Migrationsverket

(Request for a preliminary ruling
from the Förvaltningsrätten i Malmö, migrationsdomstolen (Administrative Court for Immigration Matters, Malmö, Sweden))

(Reference for a preliminary ruling — Border control, asylum and immigration — Immigration policy — Convention implementing the Schengen Agreement — Article 25(1) — Directive 2003/86/EC — Right to family reunification — Conditions for the issue of a residence permit — Article 5(2) — Obligation to present a travel document — National legislation requiring the applicant's identity to be established with certainty — National practice requiring, to that end, the presentation of a passport valid for the duration of the residence authorisation — Application for renewal of a residence permit made by a family member already in the national territory — Family member for whom an alert has been issued for the purposes of refusing entry in the Schengen Information System — Refusal to renew the residence permit on the ground that identity is not established with certainty — Admissibility)

I. Introduction

1. May a Member State make the renewal of a residence permit issued to a third-country national for the purpose of family reunification subject to the condition that that national establish his or her identity with certainty by presenting a passport valid for the duration of the residence authorisation?

2. That is, in essence, the object of the questions referred to the Court for a preliminary ruling by the Förvaltningsrätten i Malmö, migrationsdomstolen (Administrative Court for Immigration Matters, Malmö, Sweden).

3. Those questions arise in the context of a dispute between A, a Gambian national, and the Migrationsverket (Migration Board, Sweden), following the latter's refusal to renew A's residence permit because it had not been possible to establish his identity with certainty. That decision was taken in a specific context, since an alert was issued for the purposes of refusing entry in the Schengen Information System (SIS) for the person concerned by the Norwegian authorities on account, inter alia, of the multiple aliases used by him on the basis of falsified passports.

1 Original language: French.

4. This case presents the Court with the opportunity to rule on the nature and the scope of the requirements laid down by EU law as regards proof of the identity of a third-country national seeking, in the territory of the Member State in which he or she is present, the renewal of a residence permit for the purpose of family reunification, even though an alert has been issued for him or her in the SIS for the purposes of refusing entry into the Schengen area.

5. In the first part of my Opinion, I will propose that the Court rule that Article 25(1) of the Convention implementing the Schengen Agreement,[2] interpretation of which is sought by the referring court, does not preclude a decision by which a Contracting State[3] agrees to renew the residence permit of a third-country national for whom an alert has been issued for the purposes of refusing entry in the SIS, even where the identity of that national cannot be established with certainty. I will, however, set out the reasons why such a decision must follow consultation with the Contracting State that issued the alert for that person and must be based on a substantive reason.

6. In the second part of my Opinion, in order to provide the referring court with an answer that will be of use to it, I will propose that the Court give a ruling on the provisions laid down in Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.[4]

7. First, I will explain that the conditions set out in Article 5(2) of that directive do not preclude national legislation such as that at issue which requires, for the purposes of examining an application for a residence permit, that the third-country national establish his or her identity with certainty by attaching a certified copy of a passport valid for the duration of the residence authorisation sought. Next, I will focus my examination on compliance with the two principles governing the examination of an application for family reunification within the meaning of Directive 2003/86, namely that of examining the application on an individual basis and that of guaranteeing the right to respect for family life of the family member concerned. Lastly, I will conclude that, where that family member is unable to attach the travel document required to his or her application, the competent national authority cannot reject that application on that ground alone. I will explain that that authority is primarily required to examine the application on an individual basis, taking into account, in particular, the reasons for which that document cannot be presented and the cooperation demonstrated by the family member in question with a view to establishing his or her identity unequivocally by any other appropriate means.

II. Legal context

A. EU law

1. Directive 2003/86

8. Directive 2003/86 lays down the conditions governing the exercise of the right to family reunification enjoyed by third-country nationals residing lawfully in the territory of the Member States.

2 Convention 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 in Schengen on 19 June 1990 and entered into force on 26 March 1995 (OJ 2000 L 239, p. 19; 'the CISA').

3 I am using here the term used by the Court in the judgment of 16 January 2018, *E* (C-240/17, EU:C:2018:8).

4 OJ 2003 L 251, p. 12.

9. In Chapter III of that directive on the submission and examination of applications for residence permits, Article 5(1) to (3) states:

'1. Member States shall determine whether, in order to exercise the right to family reunification, an application for entry and residence shall be submitted to the competent authorities of the Member State concerned either by the sponsor [5] or by the family member or members.

2. The application shall be accompanied by documentary evidence of the family relationship and of compliance with the conditions laid down in Articles 4 and 6 and, where applicable, Articles 7 and 8, as well as certified copies of family member(s)' travel documents.

If appropriate, in order to obtain evidence that a family relationship exists, Member States may carry out interviews with the sponsor and his/her family members and conduct other investigations that are found to be necessary.

…

3. The application shall be submitted and examined when the family members are residing outside the territory of the Member State in which the sponsor resides.

By way of derogation, a Member State may, in appropriate circumstances, accept an application submitted when the family members are already in its territory.'

10. In Chapter VII of Directive 2003/86, concerning penalties and redress, Article 16(2) and (4) provides:

'2. Member States may also reject an application for entry and residence for the purpose of family reunification, or withdraw or refuse to renew the family member's residence permits, where it is shown that:

(a) false or misleading information, false or falsified documents were used, fraud was otherwise committed or other unlawful means were used;

…

4. Member States may conduct specific checks and inspections where there is reason to suspect that there is fraud or a marriage, partnership or adoption of convenience as defined by paragraph 2. Specific checks may also be undertaken on the occasion of the renewal of family members' residence permit.'

11. Lastly, Article 17 of Directive 2003/86 reads as follows:

'Member States shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family.'

5 Under Article 2(c) of that directive, the 'sponsor' is a third-country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her.

2. The Schengen acquis

(a) The CISA

12. Article 25 of the CISA, as amended by Regulation (EU) No 265/2010,[6] provides:

'1. Where a Member State considers issuing a residence permit, it shall systematically carry out a search in the [SIS]. Where a Member State considers issuing a residence permit to an alien for whom an alert has been issued for the purposes of refusing entry, it shall first consult the Member State issuing the alert and shall take account of its interests; the residence permit shall be issued for substantive reasons only, notably on humanitarian grounds or by reason of international commitments.

Where a residence permit is issued, the Member State issuing the alert shall withdraw the alert but may put the alien concerned on its national list of alerts.

…

2. Where it emerges that an alert for the purposes of refusing entry has been issued for an alien who holds a valid residence permit issued by one of the Contracting Parties, the Contracting Party issuing the alert shall consult the Party which issued the residence permit in order to determine whether there are sufficient reasons for withdrawing the residence permit.

If the residence permit is not withdrawn, the Contracting Party issuing the alert shall withdraw the alert but may nevertheless put the alien in question on its national list of alerts.

…'

13. Article 96 of the CISA reads as follows:

'1. Data on aliens for whom an alert has been issued for the purposes of refusing entry shall be entered on the basis of a national alert resulting from decisions taken by the competent administrative authorities or courts in accordance with the rules of procedure laid down by national law.

2. Decisions may be based on a threat to public policy or public security or to national security which the presence of an alien in national territory may pose.

This situation may arise in particular in the case of:

(a) an alien who has been convicted of an offence carrying a penalty involving deprivation of liberty of at least one year;

…

6 Regulation of the European Parliament and of the Council of 25 March 2010 amending the Convention Implementing the Schengen Agreement and Regulation (EC) No 562/2006 as regards movement of persons with a long-stay visa (OJ 2010 L 85, p. 1). Article 25 of the CISA was subsequently repealed and replaced by Articles 27 to 30 of Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006 (OJ 2018 L 312, p. 14).

3. Decisions may also be based on the fact that the alien has been subject to measures involving deportation, refusal of entry or removal which have not been rescinded or suspended, including or accompanied by a prohibition on entry or, where applicable, a prohibition on residence, based on a failure to comply with national regulations on the entry or residence of aliens.'

14. Article 134 of the CISA provides:

'The provisions of this convention shall apply only in so far as they are compatible with [EU] law.'

(b) Regulation (EC) No 562/2006

15. Article 5(1) 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),[7] as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013,[8] provides:

'For intended stays on the territory of the Member States of a duration of no more than 90 days in any 180-day period, which entails considering the 180-day period preceding each day of stay, the entry conditions for third-country nationals shall be the following:

(a) they are in possession of a valid travel document entitling the holder to cross the border …;

…

(d) they are not persons for whom an alert has been issued in the SIS for the purposes of refusing entry;

(e) they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States' national data bases for the purposes of refusing entry on the same grounds.'

B. Swedish law

16. Chapter 2, Paragraph 1, of the utlänningslagen (Law on aliens; 'the UL') of 29 September 2005[9] provides:

'An alien entering or residing in Sweden must hold a passport.'

17. Chapter 5, Paragraph 3, of the UL states:

'A residence permit shall be issued, subject to the provisions of Paragraphs 17 to 17b, to:

1. any foreign national whose spouse or cohabiting partner is resident or has been issued a residence permit in Sweden;

7 OJ 2006 L 105, p. 1.

8 OJ 2013 L 182, p. 1; 'the SBC'. That regulation was repealed with effect from 12 April 2016 by Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1). The order for reference does not specify the date on which the person concerned made his application for renewal of a residence permit, such that there is some doubt as to the regulation applicable *ratione temporis*. In this Opinion, I will examine the provisions laid down in the SBC in the version thereof resulting from Regulation No 562/2006, as amended, in so far as the referring court expressly refers to that regulation in its order for reference. I would, however, point out that Article 5(1)(a) of that regulation, the interpretation of which is sought here, appears in identical terms in Article 6(1)(a) of Regulation 2016/399.

9 SFS 2005, No 716.

…’

18. Under the first subparagraph of Chapter 5, Paragraph 16, of the UL:

‘An alien who, pursuant to Paragraph 8, has been granted a temporary residence permit on account of a family relationship can obtain a new temporary or permanent residence permit on that ground only if the relationship in question continues to exist.’

19. The first and second subparagraphs of Chapter 5, Paragraph 17a, of the UL provide:

‘In the situations referred to in Paragraph 3, the issue of a residence permit may be refused if:

1. incorrect information has deliberately been given or facts deliberately withheld where that information and those facts are relevant to obtaining a residence permit,

2. an alien has been adopted or a marriage or co-habiting relationship entered into exclusively with the aim of giving the alien the right to a residence permit, or

3. the alien poses a threat to public order or public security.

A residence permit may also be refused in the situations referred to in point 1 and point 2(b) of the first subparagraph of Paragraph 3 if

1. the spouses or partners do not live together or have no intention of doing so,

2. the person with whom a relationship is claimed or the alien who has applied for a residence permit is married to or in a co-habiting relationship with another person, or

3. one of the spouses or partners is under 18 years of age.’

III. The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

20. A is a Gambian national [10] living in Sweden. He was granted a temporary residence permit in order to join his spouse, a Swedish national, on a date not specified in the order for reference. That application was granted before the person concerned entered Sweden. The referring court states that it is reasonable to believe that, at that time, the competent national authorities were of the view that the identity of the person concerned was established and that his passport met the requirements laid down in Swedish law.

A. Examination of the application for renewal of a residence permit by the Migration Board

21. A submitted an application for renewal of his residence permit to the Migration Board on a date not specified in the order for reference. According to the referring court, the Migration Board rejected that application (‘the decision at issue’) on the ground, inter alia, that his identity had not been established. [11]

10 Gambian nationals must be in possession of a visa when crossing the external borders of the Member States, in accordance with Article 1(1) 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).

11 The order for reference does not state on which date the decision at issue was taken.

22. When considering that application, the Migration Board was informed by the Norwegian police that the person concerned had used several aliases in Norway: first, the identity of B, a Gambian national, born on 18 August 1975 (according to a false passport); next, the identity of C, an undocumented asylum seeker, born on 12 December 1982; and, finally, the identity of D, a Gambian national, born on 8 August 1980 (according to another passport discovered during a search). Under the latter identity, the person concerned was sentenced to a term of imprisonment of 120 days in Norway for commission of an offence relating to the possession and sale of drugs (cocaine). It is likewise under that identity that the person concerned was removed from Norwegian territory; he was also permanently banned from entering that territory and an alert was issued for him in the SIS. That system identifies the person concerned under the name of D, born on 8 August 1980 and of Gambian nationality.

23. It is apparent from the order for reference that it is under the latter identity and whilst he was in Dakar (Senegal) that the person concerned submitted an application for a residence permit which was considered by the Swedish authorities. That application was rejected because it was made on the basis of a marriage of convenience.

B. The proceedings brought before the referring court

24. In its order for reference, the Förvaltningsrätten i Malmö, migrationsdomstolen (Administrative Court for Immigration Matters, Malmö) asks about the requirements laid down in EU law regarding the establishment of the identity of a third-country national who, whilst already in the national territory, applies for a residence permit which is based on neither grounds of protection nor humanitarian grounds.

25. In the first place, the referring court explains that Swedish law requires, when such a residence permit is issued, the identity of the third-country national to be established with certainty, which entails, in practice, the presentation of a passport valid for the duration of the residence authorisation. The UL does not contain any obligations other than that of holding a passport. The referring court points out, however, that there is an exception to that rule in cases of applications made by third-country nationals whose country of origin does not issue acceptable documents attesting to civil status.

26. In the second place, the referring court makes reference to national case-law with a view to illustrating the doubts related to the interpretation of EU law.

27. First, the Migrationsöverdomstolen (Court of Appeal for Immigration Matters, Sweden), in judgment No MIG 2011:11 of 12 May 2011, held that, when issuing a temporary residence permit on grounds of a connection to the Kingdom of Sweden (for example, for the purpose of family reunification or in order to carry on a professional activity), it is necessary to require that the identity of the third-country national be established with certainty in order to comply with the commitments provided for in the CISA and the SBC.

28. Second, the Förvaltningsrätten i Stockholm, migrationsdomstolen (Administrative Court for Immigration Matters, Stockholm, Sweden) has found the provisions of Paragraph 16f of the lagen (2016:752) om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige (Law on temporary restrictions on the possibility of obtaining a residence permit in Sweden) [12] of 22 June 2016 to be contrary to the provisions of the CISA and the SBC, in so far as they allow a residence permit to be issued even if the identity of the third-country national is unclear or he or she is unable to provide prima facie evidence of his or her stated identity.

12 SFS 2016, No 752; 'the Law on temporary restrictions'.

29. Third and finally, the Migrationsöverdomstolen (Court of Appeal for Immigration Matters) has held that the principles established in its judgment No MIG 2011:11 of 12 May 2011 concerned only applications for residence permits made by third-country nationals when they are outside the Schengen area. In addition, it overturned the judgment given by the Förvaltningsrätten i Stockholm, migrationsdomstolen (Administrative Court for Immigration Matters, Stockholm) cited in the previous point of this Opinion and allowed the lower burden of proof provided for in Paragraph 16f of the Law on temporary restrictions. Thus, a residence permit may be issued for the purpose of studies at an upper secondary school to a third-country national who is already in the national territory, even where his or her identity is unclear and he or she cannot provide prima facie evidence of his or her stated identity.

30. It is in that context that the referring court asks whether EU law and, in particular, the provisions of the CISA and the SBC require that a third-country national establish his or her identity with certainty when, whilst already in the national territory, he or she submits an application for a residence permit based on neither grounds of protection nor humanitarian grounds.

C. The questions referred for a preliminary ruling

31. In the light of the considerations set out above, the Förvaltningsrätten i Malmö, migrationsdomstolen (Administrative Court for Immigration Matters, Malmö) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Do the provisions of the [CISA], including, in particular, the provisions on the systematic consultation of the SIS and the [SBC] and including, in particular, the requirement to hold a valid passport laid down therein, constitute obstacles to the grant of residence permits on the basis of applications which were submitted in Sweden and which are not based on grounds of protection or humanitarian grounds, when the identity is unclear?

(2) If that is the case, can the exception on establishment of identity be governed by national law or by case-law?

(3) If the situation described in [the second question] is not the case, what, if any, derogation is provided for in EU law?’

32. Written observations were submitted by A, the Migration Board, the Netherlands, Polish and Swedish Governments and the European Commission.

33. Following the cancellation of the hearing scheduled for 18 March 2020, it was decided, with the agreement of the Judge-Rapporteur, to put questions, in accordance with Article 62(1) of the Rules of Procedure of the Court, to which A, the Migration Board, the Swedish Government and the Commission replied in writing within the time limit prescribed.

IV. Analysis

34. Before considering the questions referred for a preliminary ruling, it appears to me to be appropriate to make some preliminary observations.

A. Preliminary observations

35. My first observation concerns the object of the questions referred for a preliminary ruling by the national court.

36. By its first question, in essence, the referring court asks the Court whether the provisions of the CISA or the SBC preclude a Member State from issuing a residence permit based on neither grounds of protection nor humanitarian grounds to a third-country national, who applies for that permit in the territory of the Member State in which he or she is present and where he or she fails to establish his or her identity with certainty. Where appropriate, the referring court seeks to ascertain to what extent a Member State may derogate from the principle that the individual's identity must be established (second question) and whether EU law can allow exceptions to that principle (third question).

37. As is apparent from the order for reference, those questions lie at the heart of a debate in Swedish case-law. It is interesting to note that this request for a preliminary ruling is very similar to that made on 10 August 2018 by the Förvaltningsrätten i Göteborg, migrationsdomstolen (Administrative Court for Immigration Matters, Gothenburg, Sweden) and withdrawn several weeks later.[13] That request concerned, in essence, the compliance — in the light of the CISA and the SBC — of the provisions of Paragraph 16 of the Law on temporary restrictions, which relax the requirements relating to the proof of the identity of a third-country national wishing to study at an upper secondary school as set out in points 28 and 29 of this Opinion.[14]

38. It is true that the present reference for a preliminary ruling differs from the earlier reference because it concerns the permissibility of the rule of ordinary law requiring, by contrast, that the identity of the applicant for a residence permit be established with certainty by the presentation, in practice, of a passport valid for the duration of the residence authorisation. However, both these cases relate to the interpretation of the relevant provisions of EU law regarding the standard of proof required for the purposes of establishing the identity of a third-country national who, in the territory of the Member State in which he or she resides, applies for a residence permit (Case C-526/18) or for the renewal of a residence permit (Case C-193/19).

39. Moving beyond the context of the present case, I recall that, in accordance with settled case-law, the task of the Court is not to deliver an advisory opinion on general or hypothetical questions, but rather to interpret an EU rule that is necessary for the effective resolution of a dispute.[15] I will therefore focus my analysis on the situation of a third-country national for whom, like A, an alert has been issued in the SIS for the purposes of refusing entry into the Schengen area and who is seeking the renewal of his or her residence permit for the purpose of family reunification.

40. My second observation relates to the scope of the clarifications provided by the referring court and the replies given by the parties to the questions put by the Court.

41. It is apparent from those clarifications and replies that A's personal situation and, in particular, his family ties in Sweden have developed significantly since the decision at issue was adopted. In view of the allocation of tasks between the Court and the referring court, I assume, for the purposes of this Opinion, that A, on the day on which that decision was adopted, was applying for the renewal of his residence permit for the purpose of family reunification with a Swedish national, as is expressly stated in the order for reference, without that fact being called into question by any of the parties. I likewise assume that, in considering that application, the Migration Board also took account of the fact that A was the father of two Norwegian children and had a relationship with those children's mother, a Norwegian national, all of whom resided in Sweden.

13 Order for removal from the register of the President of the Court of 23 October 2018, *AA* (C-526/18, not published, EU:C:2018:894).

14 The questions were as follows: '1. Do the provisions of the [CISA] or the [SBC] preclude provisions of national law such as those set out in Paragraph 16[f] of the [Law on temporary restrictions] and which mean that a residence permit for study at secondary school level may be granted to a third-country national who is in a Member State, even if his or her identity is unclear or he or she is unable to provide prima facie evidence of his or her stated identity? 2. If, in such a situation, the Schengen acquis is deemed to include a requirement that identity has been made clear or for which prima facie evidence has been provided, can the provisions 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)] or any other EU legislation be interpreted as permitting an exception from that identity requirement?'

15 Judgment of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 28 and the case-law cited).

42. It is further apparent from those clarifications and replies that, in the context of the decision at issue, the first family relationship, arising from the marriage to a Swedish national, was not deemed to be genuine. As for the second relationship between A, his children and those children's mother, it appears that it was found not to be real, such that there was no obstacle to the removal of the person concerned from Swedish territory.[16] It is also clear from those documents that, since the adoption of the decision at issue, A has divorced the Swedish national and that his children, Norwegian nationals, have left Swedish territory with their mother to go to Norway.

B. The questions referred for a preliminary ruling

43. By its first question referred for a preliminary ruling, the referring court asks the Court, in essence, whether EU law and, in particular, Article 25(1) of the CISA and Article 5(1)(a) of the SBC preclude a Member State issuing to a third-country national a residence permit based on neither grounds of protection nor humanitarian grounds where that national applies for that permit in the territory of the Member State in which he or she is present and fails to establish his or her identity with certainty.

44. In other words, and in the light of the facts of the dispute in the main proceedings, the question is whether and, as the case may be, to what extent EU law requires that the identity of a third-country national applying for the renewal of his or her residence permit, granted for the purpose of family reunification, be established.

45. In order to provide an answer that is helpful to the referring court, it is necessary, in the first place, to examine in addition the question of whether a Member State may make the issue of such a residence permit subject to the presentation of a passport valid for the duration of the residence authorisation. It is apparent from the order for reference that Swedish law requires the presentation of such a document, on the basis of which the identity of the applicant may be established with certainty.

46. In the second place, in the case of an application for a residence permit on the basis of family reunification, it appears to me that the question must also be considered in the light of Directive 2003/86 and, in particular, the rules and principles set out in that directive regarding the proof of the identity of the family member concerned.

47. The situation at issue falls, quite clearly, within the scope of the provisions of Article 25 of the CISA, to which reference is expressly made by the referring court in its request for a preliminary ruling, since A applied for the renewal of a residence permit which he was granted in Sweden for the purpose of family reunification, although an alert had been issued for him by the Norwegian authorities in the SIS for the purposes of refusing entry.

48. However, it is likewise essential to ensure the harmonious application of all relevant provisions of EU law. To that end, the conditions of residence of third-country nationals laid down in the CISA must take into account the requirements of EU law. As the case-law of the Court shows, those rules must be interlinked.[17] The Protocol integrating the Schengen acquis into the framework of the

16 The matter brought before the Court is unconcerned with the removal of the person concerned from Swedish territory. In the absence of any real family ties and in the event of fraud, the provisions laid down in Directive 2008/115 should be applied, since the person concerned would then be 'staying illegally' in the territory of the European Union within the meaning of Article 3(2) of that directive. Under that provision, an 'illegal stay' on the territory of a Member State occurs where a third-country national does not fulfil, or no longer fulfils, the conditions of entry as set out in Article 5 of the SBC, or other conditions for entry, stay or residence in that Member State.

17 See, by way of illustration, judgments of 31 January 2006, *Commission* v *Spain* (C-503/03, EU:C:2006:74), and of 12 December 2019, *E.P. (Threat to public policy)* (C-380/18, EU:C:2019:1071). This interlinkage is also illustrated by implementing legislation such as the Declaration of the Executive Committee set up by the CIAS of 18 April 1996 defining the concept of alien (OJ 2000 L 239, p. 458) or even Commission Implementing Decision 2011/406/EU of 1 July 2011 amending the SIRENE Manual (OJ 2011 L 186, p. 1) (Section 4.7 of the Annex).

European Union, annexed to the Treaty of Amsterdam,[18] thus states, in the third paragraph of the preamble thereto, that 'the provisions of the Schengen acquis are applicable only if and as far as they are compatible with the European Union … law'.[19] Article 1 of the Protocol specifies that closer cooperation in the field of Schengen acquis must be conducted within the institutional and legal framework of the European Union and with respect for the Treaties. Regulation No 265/2010 is similarly unambiguous since it states, in recital 8 thereof, that its application does 'not affect the obligation of Member States to issue residence permits for certain categories of third-country nationals as provided for by other Union instruments, in particular … Directive [2003/86]'.

49. The case at hand concerns the conditions subject to which a Member State may make the issue and, in particular, the renewal of a residence permit where that permit is sought by a third-country national for the purpose of family reunification. Although the grounds for that application for a residence permit were, originally, A's family relationship with a Swedish national, that application was subsequently based on A's family relationship with a Norwegian national and the couple's Norwegian children.

50. I would recall that, in accordance with settled case-law, the Court has jurisdiction to give the national court full guidance on the interpretation of EU law in order to enable it to determine the issue of compatibility of provisions of national law or a national practice with the legal rules of the European Union for the purposes of the case before it.[20]

51. The Migration Board and the Swedish Government explain, in their replies to the questions put by the Court, that the interpretation of Directive 2004/38/EC[21] has no bearing on the answer to the question whether A is entitled to a residence permit under the national law at issue. They state that that directive was transposed, into Swedish law, in a different chapter of the UL, namely not in Chapter 5 in which the national legislation at issue appears but in Chapter 3 of that law and, in addition, concerns the conditions for the grant not of a residence permit, as is the case here, but of a right of residence. According to the Migration Board, the provisions on the residence permit at issue in the present case are therefore wholly unrelated to Directive 2004/38, which is confirmed by national case-law.

52. However, all the parties, with the exception of A, point out that, when transposing Directive 2003/86 into the national legal order, the Kingdom of Sweden chose to apply the provisions contained in the national legislation at issue to any individual residing in Sweden, regardless of his or her nationality. In line with the observations lodged by the Swedish Government, the referring court thus accepted that, in a situation in which the person concerned claims a relationship with both a Swedish national and Norwegian nationals residing in Swedish territory, the provisions of Directive 2003/86 were rendered applicable by national law directly and unconditionally, within the meaning of the case-law of the Court.[22]

53. In the light of those factors, it appears to me that the questions referred for a preliminary ruling should be examined in the light not only of the relevant provisions of the CISA and the SBC but also those laid down in Directive 2003/86.

18 OJ 1997 C 340, p. 93.

19 The Protocol reproduces here the wording of Article 134 of the CISA.

20 See order of 8 April 2020, *Commission* v *Poland* (C-791/19 R, EU:C:2020:277, paragraph 74 and the case-law cited).

21 Directive 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 (OJ 2004 L 158, p. 77).

22 Judgment of 13 March 2019, *E.* (C-635/17, EU:C:2019:192, paragraphs 35 to 37 and the case-law cited).

1. Conditions laid down in Article 5 of the SBC applicable to a third-country national for entry into the Schengen area

54. In accordance with the second subparagraph of Article 1 of the SBC, the purpose of the SBC is to establish rules governing border control of persons crossing the external borders of the Schengen area. [23]

55. Although Article 5(1)(a) of the SBC, to which the referring court makes reference, provides that third-country nationals must be 'in possession of a valid travel document entitling the holder to cross the border', that condition applies to entry into and residence in the Schengen area 'of a duration of no more than 90 days'. That provision does not therefore govern the situation of a third-country national who, like A, is already in the territory of a Member State (here: Sweden) and already holds a residence permit for the purpose of family reunification. [24] It follows from the case-law of the Court that Article 5 of the SBC applies to third-country nationals a priori with no ties to the territory of the European Union and in relation to whom the Court has held that they had no fundamental right to enter or to reside in the territory of a particular State. [25]

56. It follows from those factors that Article 5(1)(a) of the SBC is not the relevant provision applicable to A and cannot provide an answer to the referring court's questions.

2. Conditions for the issue of a residence permit to a third-country national for whom an alert has been issued in the SIS for the purposes of refusing entry, as laid down in Article 25(1) of the CISA

57. The referring court also asks about the interpretation of the provisions of Article 25(1) of the CISA.

58. I note that that provision applies to the situation in which a Contracting State *considers issuing* a residence permit to a third-country national. [26] As there is no indication to the contrary, that provision appears to me also to apply in the case of an application for renewal of a residence permit, with that application therefore being made whilst the third-country national is already in the territory of the Contracting State. Furthermore, Article 27 of Regulation 2018/1861, which replaced Article 25(1) of the CISA, uses the words 'where a Member State considers *granting or extending* a residence permit'. [27]

59. Moreover, the purpose of Article 25(1) of the CISA is not to define the legal conditions for entry into a Member State which a third-country national, for whom an alert has been issued in the SIS for the purposes of refusing entry, must satisfy in order to be granted the residence permit sought.

60. The sole purpose of that provision is to establish a mechanism based on concerted and consistent action on the part of the Contracting States in order to prevent situations in which, in relation to the same third-country national, both an alert has been issued in the SIS for the purposes of refusing entry by a Contracting State ('the State issuing the alert') and a residence permit granted by another Contracting State ('the State of application' or 'the granting State'). The provision is akin to the combined provisions of Article 6 and Article 11 of Directive 2008/115, which seek to prevent, under the same detailed rules, situations in which an entry ban has been issued by one Member State and a residence permit granted by another Member State in relation to the same third-country national.

23 See, by analogy, with regard to Article 1 of Regulation 2016/399, judgment of 5 February 2020, *J. and Others (Signing-on of seamen in the Port of Rotterdam)* (C-341/18, EU:C:2020:76, paragraph 30 and the case-law cited).

24 See judgment of 22 October 2009, *Zurita García and Choque Cabrera* (C-261/08 and C-348/08, EU:C:2009:648, paragraph 45).

25 See judgment of 27 June 2006, *Parliament* v *Council* (C-540/03, EU:C:2006:429, paragraph 53).

26 By contrast, Article 25(2) of the CISA concerns the situation in which a Contracting State *considers withdrawing the residence permit*. For an interpretation of that provision, see judgment of 16 January 2018, *E* (C-240/17, EU:C:2018:8).

27 Emphasis added.

61. In the first place, the first subparagraph of Article 25(1) of the CISA requires the SIS to be consulted systematically before any residence permit is issued. That requirement, to which the referring court makes express reference in its question, was introduced by Regulation No 265/2010. It is to enable all Contracting States to which an application for a residence permit is made to learn of any alert issued in the SIS for the purposes of refusing entry to the third country national concerned by another Contracting State. [28]

62. Within the meaning of Article 96 of the CISA, such an alert may be based on a threat to public policy where the individual has been convicted of an offence carrying a penalty involving deprivation of liberty of at least one year (point (a) of the second subparagraph of paragraph 2) or where he or she has been subject to a measure based on a failure to comply with national regulations on the entry or residence of aliens (paragraph 3). The issuing of such an alert entails a ban on entry to the whole of the Schengen area and renders the grant of a visa impossible. [29] It follows that, under the arrangements laid down in the CISA, a person such as A could not, in principle, be granted a residence permit within the Schengen area. However, the arrangements under Article 25(1) of the CISA do not have the effect of triggering an automatic rejection of the application for a residence permit.

63. In the second place, the first subparagraph of Article 25(1) of the CISA provides for the situation in which an alert has been issued in the SIS for the third-country national for the purposes of refusing entry.

64. That provision establishes a system of prior consultation of the State issuing the alert where the State of application nevertheless, despite the alert, considers issuing a residence permit to that person. [30] That system must enable the State of application to learn the grounds on the basis of which the alert was issued and to adopt any measures for the purposes of protecting its public policy and public security. [31] In a situation such as that at issue, which falls within the scope of Directive 2003/86, that system likewise enables the State of application to obtain information relevant for the purposes of the individual assessment of the application for a residence permit. In return, the State of application is required to take account of the interests of the State issuing the alert.

65. In addition, the first subparagraph of Article 25(1) of the CISA provides that the reasons forming the basis of the grant of a residence permit to a third-country national who is the subject of an alert must be 'substantive', with the EU legislature referring 'notably' to 'humanitarian grounds or by reason of international commitments'. [32] By using the adverb 'notably', the EU legislature intends to afford some discretion to the State of application as to the nature of the reasons upon which it may rely. The decisive factor is that the reason must be substantive. [33] In its recommendation of 6 November

28 The conditions relating to alerts issued in respect of third-country nationals for the purposes of refusing entry and stay are set out in Articles 20 to 30 of Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) (OJ 2006 L 381, p. 4).

29 Pursuant to Article 5(1) of the CISA, 'for stays not exceeding three months, aliens fulfilling the following conditions may be granted entry into the territories of the Contracting parties: … (d) that the aliens shall not be persons for whom an alert has been issued for the purposes of refusing entry' and, under Article 15 of the CISA, short-stay visas 'may be issued only if an alien fulfils the entry conditions laid down in Article 5(1) … (d)'. See, also, Article 6(1)(d) and Article 14(1) of Regulation 2016/399.

30 In the judgment of 31 January 2006, *Commission* v *Spain* (C-503/03, EU:C:2006:74), the Court held that the principle of cooperation between the Contracting States underpins the Schengen acquis and is essential to the operation of an integrated management system intended to ensure a high and uniform level of checks and surveillance along external borders which is the corollary of the freedom to cross internal borders within the Schengen area (paragraph 37).

31 See, in that regard, Articles 93 and 96 of the CISA.

32 That condition no longer appears in Article 27 of Regulation 2018/1861, which replaced Article 25(1) of the CISA, as I stated in footnote 6 of this Opinion.

33 As the Commission rightly observed in its answers to the written questions, the Swedish language version of the first subparagraph of Article 25(1) of the CISA differs because it contains the words 'i särskilda fall', which are translated into English as 'specific cases' or 'justified cases'. However, I note that most language versions of that provision have used the same wording as that used in the English language version of that provision. They include, inter alia, the Spanish language version ('motivos serios'), the German language version ('gewichtiger Gründe'), the French language version ('motifs sérieux'), the Italian language version ('motivi seri'), the Dutch language version ('ernstige redenen') and even the Finnish language version ('painavista syistä').

2006,[34] the Commission stated that the 'humanitarian' ground covers, for example, the situation in which the third-country national is faced with the sudden, serious illness or death of a close relative, and the ground arising 'because of international obligations' as covering the situation of an applicant for international protection.[35]

66. In my opinion, however, the concept of 'substantive grounds' must be interpreted restrictively in order to take into account both the interests of the State issuing the alert and the objectives pursued by the Member States within the area of freedom, security and justice. Indeed, a State that adopts an expulsion decision and issues a ban on entry into the Schengen area is acting not only in its own interests and those of its citizens but also for the security of those living in the area of freedom, security and justice. In accordance with Article 25(1) of the CISA, the grant of a residence permit in circumstances such as those at issue would lead to the withdrawal of the alert for A in the SIS. I recall that that person has already moved within the Schengen area using multiple aliases on the basis of falsified documents with a view to enjoying an undue right of residence and could engage in the same conduct in another Member State, taking advantage of the removal of checks at the internal borders. Accordingly, in order to take account of the interests at stake, it appears to me essential that the concept of 'substantive grounds' is interpreted restrictively. In that context, I take the view that the reasons which enable the third-country national concerned to exercise the rights that he derives from the Charter of Fundamental Rights of the European Union ('the Charter'), in particular respect for family life (Article 7 of the Charter) and those which allow respect for the rights of the child to be guaranteed (Article 24 of the Charter), are 'substantive' reasons. However, that requires that the State of application examine the authenticity, reality and genuineness of the family relationship claimed and, as the Commission points out in its answers to the written questions, strike a balance between the interests of the third-country national concerned and those of the Member States.

67. In the third place, the second subparagraph of Article 25(1) of the CISA provides that the issuing of a residence permit by the granting State to a third-country national obliges the State issuing the alert to withdraw that alert. However, the latter State retains the option of putting that national on its national list of alerts.

68. It is apparent from that literal interpretation of Article 25(1) of the CISA that that provision does not specify the legal conditions which a third-country national must satisfy in order to enter and reside in the territory of a Member State, which include the establishment of his or her identity, unlike Articles 5 and 15 of that convention. Article 25(1) of the CISA is based on the premiss that that national is not in compliance with the conditions of entry and residence in the Schengen area, which is the reason for which an alert has been issued for him or her. By that provision, the EU legislature intended solely to establish a concerted procedure between the Contracting States in the event that one of them were to intend to derogate from the entry ban to which the third-country national is subject further to the alert issued.

69. It does not follow from any of the provisions of Article 25(1) of the CISA that a Member State is denied the possibility of renewing a residence permit granted to a third-country national for the purpose of family reunification solely on the ground that his or her identity is not established with certainty.

70. The systematic and teleological interpretation of that provision supports that interpretation.

34 Recommendation establishing a common 'Practical Handbook for Border Guards (Schengen Handbook)' to be used by Member States' competent authorities when carrying out the border control of persons (C(2006) 5186 final).

35 See points 6.2 and 7.5 of that recommendation.

71. Article 25(1) of the CISA seeks to ensure a fair balance between, on the one hand, the security requirements imposed by an area without internal borders, such as the area of freedom, security and justice, and, on the other, the leeway enjoyed by the Member States as regards their migration policy. Member States enjoy some latitude as regards the grant of a residence permit to an individual in an irregular situation, thus retaining controls over the entry to, and residence in, their territory by third-country nationals. As the Court has held, the issue of residence permits for a period of more than 90 days is covered, for the most part, by the national legislation of the Member States.[36] Accordingly, the primary objective of Article 25(1) of the CISA is to balance the interests of each of the Contracting States, the State issuing the alert and the granting State, by means of a consultation procedure and, where appropriate, to restrict the issue of residence permits to those based on a substantive reason.

72. That provision is not unique, as equivalent provisions are found not only within the framework of the SBC but also in Directive 2008/115.

73. Thus, Article 5(4)(c) of the SBC allows the Contracting States to authorise, for the purposes of a stay of a duration of no more than 90 days, a third-country national who does not fulfil the entry conditions laid down in paragraph 1 of that provision to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations. Where an alert has been issued in the SIS for that national for the purposes of refusing entry, the Contracting State is required not to consult with but rather to inform all Member States.

74. In the same way, Article 6(4) of Directive 2008/115, read in conjunction with Article 11(4) of that directive, allows a Member State, at any moment, to grant a right to stay or an autonomous residence permit for compassionate, humanitarian or other reasons to a third-country national staying illegally on its territory, even where another Member State has adopted, against that individual, a decision prohibiting entry to the territory. In those circumstances, the EU legislature establishes, in Article 11(4) of Directive 2008/115, a prior consultation procedure mirroring that introduced in Article 25(1) of the CISA.

75. In the light of those considerations, I take the view that Article 25(1) of the CISA is to be interpreted as not precluding a Contracting State from issuing a residence permit to a third-country national applying for that permit in the territory of that State, even though that national cannot establish his or her identity with certainty and an alert has been issued for him or her in the SIS for the purposes of refusing entry, provided that the issuing of that permit is preceded by the consultation of the Contracting State which issued the alert and is based on a substantive ground.

76. That conclusion must however be qualified.

77. The conditions laid down in Article 25(1) of the CISA do not draw a distinction, on the one hand, on the basis of whether the residence permit is sought on humanitarian grounds, for the purpose of family reunification or for another reason, or, on the other, according to whether the application is made to the authorities of a Member State or the authorities of a Contracting State. In consequence, that article does not incorporate the conditions expressly listed by the EU legislature in Article 5(2) of Directive 2003/86 where an application for a residence permit is made in a Member State for the purpose of family reunification. For the reasons previously set out in my preliminary observations, it is therefore necessary to examine the provisions laid down in the light of the latter directive.

36 Judgment of 16 January 2018, *E* (C-240/17, EU:C:2018:8, paragraph 41).

3. The requirements relating to proof of identity under Directive 2003/86

78. I will begin my examination with a textual analysis of Article 5(2) of Directive 2003/86. Since that provision requires merely that certified copies of the sponsor's family members' travel documents be provided but does not, however, specify the consequences associated with a failure to provide them, I will consider the context and the objectives pursued by the legislation of which that provision forms part. I will also take account of the strict limits laid down in the case-law of the Court as regards the exercise by Member States of their discretion. It is clear from the case-law of the Court that the legislation of a Member State implementing the provisions of that directive must observe both the objectives and effectiveness of that directive, the fundamental rights guaranteed by the Charter and the principle of proportionality and must not prevent an application for family reunification from being examined on a case-by-case basis. [37]

(a) Textual analysis of Article 5(2) of Directive 2003/86

79. In the first place, and as I have observed in the preceding point of this Opinion, the first subparagraph of Article 5(2) of Directive 2003/86 states that an application for a residence permit in order to exercise the right to family reunification is to be accompanied by certified copies of the sponsor's family members' travel documents. [38]

80. The travel documents, to which a visa may be affixed, are intended not only to establish the identity and the nationality of the third-country national but also to certify, as the case may be, that he or she has lawfully crossed the Member State's borders or the external borders of the Schengen area. It is, therefore, not a mere administrative formality such as that laid down in Article 4(1) of Directive 2004/38. The sole purpose of that provision, under which a valid identity card or passport is to be presented, is to enable the person concerned to provide proof of his or her status as a citizen of the Union with a view to exercising his or her right of free movement and to allow the competent national authority to find that a right exists which arises directly from that status.

81. The obligation to present a travel document laid down in the first subparagraph of Article 5(2) of Directive 2003/86 pursues several objectives.

82. First of all, that obligation allows the identity and nationality of the third-country national to be established.

83. The proof of identity, to which the referring court's question relates, is inherent in the proof of the existence of a family relationship that forms the basis of the right to reunification. In the judgment of 25 July 2002, *MRAX*, [39] the Court held that, 'in the absence of a valid identity card or passport, documents which are intended to enable their holder to provide proof of his identity and nationality …, the person concerned cannot as a rule properly prove his identity or, consequently, his family ties'. [40]

37 See, by analogy, judgment of 12 December 2019, *Bevándorlási és Menekültügyi Hivatal (Family reunification — Sister of a refugee)* (C-519/18, EU:C:2019:1070, paragraphs 62 to 67), the grounds of which are clear from that analytical framework.

38 The obligation to present a travel document is also a requirement under the combined provisions of Article 5(1)(a) and (b) of the CISA on checks on persons at external borders, Article 5(1) of the SBC, for a stay of a maximum of three months, and Article 12 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).

39 C-459/99, EU:C:2002:461.

40 Paragraph 58 of that judgment and the case-law cited.

84. Next, the obligation to present a travel document allows proof of, as the case may be, the lawful crossing of the Member State's borders or the external borders of the Schengen area to be provided. In the specific context of the Schengen area, it is an essential tool in controlling entry and migratory flows within a territory without internal borders which must guarantee the free movement of persons whilst limiting the risks of illegal immigration. That obligation thus allows for the rejection of applications from third-country nationals who attempt to use the family reunification procedure for the purposes of improperly legalising their entry and their residence in a Member State.

85. Lastly, the obligation is a means of corroborating the documentary evidence issued for the purposes of proving not only the family relationship but also compliance with the other conditions required in order to exercise the right to family reunification. Those conditions are laid down in, inter alia, Article 7 of Directive 2003/86. Under that provision, the Member State concerned may require the person applying for family reunification to provide evidence that the sponsor has accommodation, sickness insurance or even resources sufficient to maintain him or herself. In order to satisfy that requirement, that person must provide specified documents, such as a rental agreement, a certificate of sickness insurance, a contract of employment or even salary slips and any document that may be corroborated using a passport. [41]

86. The requirement laid down in the first paragraph of Article 5(2) of Directive 2003/86 assumes that the travel documents are valid, reliable and authentic in order to prevent abusive or fraudulent applications. In addition, it requires that those documents be recognised as being valid by the Member State to which the application is made. Recognition of the validity of the travel documents is a matter falling solely within the competence of the Member States. The Commission draws up the list of those documents recognised by the Member States and Contracting States on the basis of information gathered as part of the cooperation established in the Schengen area. [42] At present, it is clear from that list that, in the case of travel documents issued by The Gambia, Sweden recognises as valid (ordinary, diplomatic and service) passports as well as travel documents granted on the basis of the Convention on the Status of Refugees, signed in Geneva on 28 July 1951. [43]

87. In the second place, it appears to me that the presentation of a valid travel document may be required both when an initial application for a residence permit is made and when an application for renewal of that permit is submitted. The EU legislature draws no distinction in relation to proof of identity according to whether the application is made when the family member is residing outside the territory of the Member State in which the sponsor resides (situation covered by the first subparagraph of Article 5(3) of Directive 2003/86) or whether he or she is already in that territory (situation covered by the second subparagraph of Article 5(3) of that directive). In addition, Article 16(4) of that directive provides that Member States are permitted to conduct specific checks where there is reason to suspect that there is fraud, even when an application for renewal of a residence permit is made.

88. In the third place, I note that the EU legislature does not provide for any relaxations of or exceptions to the rule that the application for a residence permit must be accompanied by certified copies of travel documents. Nor does it stipulate the conclusions that the Member State must draw from the failure to provide those documents. Directive 2003/86 does not specify whether that failure can constitute a sufficient ground for rejecting the application.

41 See, in that regard, Sections 4.2. to 4.4. of the Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification (COM(2014) 210 final) ('the Guidance for application of Directive 2003/86').

42 See 'Travel documents issued by third countries and territorial entities (Part I)', list drawn up on 30 April 2020, available at the following website: https://www.consilium.europa.eu/prado/en/prado-recognised-documents.html. Such cooperation is established in accordance with Decision No 1105/2011/EU of the European Parliament and of the Council of 25 October 2011 on the list of travel documents which entitle the holder to cross the external borders and which may be endorsed with a visa and on setting up a mechanism for establishing this list (OJ 2011 L 287, p. 9). See, also, Decision of the Executive Committee of 16 December 1998 concerning the compilation of a manual of documents to which a visa may be affixed (SCH/Com-ex (98) 56) (OJ 2000 L 239 p. 207).

43 *United Nations Treaties Series*, vol. 189, p. 150, No 2545 (1954).

89. The detailed rules on proof of identity are markedly different from the specific provisions concerning evidence of a family relationship. Such evidence is prescribed in the second and third subparagraphs of Article 5(2) of Directive 2003/86. That provision states that, if documentary evidence proving a family relationship is not provided, Member States have the option of making use of additional investigatory measures by carrying out, for example, interviews with the sponsor and his or her family members. However, provision is made for the option of making use of additional investigatory measures only for the purposes of 'obtain[ing] evidence that a family relationship exists'. The EU legislature does not lay down similar provisions where the family member fails to present the travel documents required.

90. The detailed rules on the proof of identity of third-country nationals laid down in Article 5(2) of Directive 2003/86 also differ from the specific scheme introduced in Article 11(2) of that directive in favour of those who have refugee status. The latter provision states, unequivocally, that 'a decision rejecting an application [made by a refugee] may not be based solely on the fact that [official] documentary evidence [of a family relationship] is lacking' and that 'the Member State shall take into account other evidence … of the existence of such relationship'. However, I note that, in the general scheme laid down in Article 5(2) of the directive, the EU legislature does not lay down comparable provisions, thereby refraining from specifying whether a decision rejecting an application relating to a third-country national, such as A, may be based solely on the fact that the travel documents required are not provided.

91. It therefore appears to me that, in the light of that literal interpretation of Article 5(2) of Directive 2003/86, a Member State may require, for the purposes of issuing a residence permit, the family member concerned to attach to his or her application the travel documents that allow his or her identity and nationality to be established and, as the case may be, on the basis of which he or she was allowed to cross the external borders of the Schengen area.

92. However, since Article 5(2) of Directive 2003/86 does not contain any indication of the consequences which a Member State may draw from the failure to provide travel documents establishing the identity and nationality of the family member concerned, it appears to me necessary to conduct a systematic and teleological analysis of Directive 2003/86 in order to assess whether, and to what extent, that question is a matter for the discretion of the Member States.

(b) Systematic analysis of Directive 2003/86

93. Where the family member is unable to establish his or her identity by presenting the travel document required by the Member State, it appears to me, having regard to the scheme of Directive 2003/86, that that Member State cannot, on that ground alone, reject an application for a residence permit for the purpose of family reunification, in particular in the case of an application for renewal, without having examined that application individually beforehand.

94. That requirement is laid down in Article 17 of Directive 2003/86, which covers cases in which a Member State considers rejecting an application, withdrawing or refusing to renew a residence permit, or even removing the sponsor or members of his or her family. In the view of the Court, the obligation to conduct an individual examination is a procedural requirement applicable when assessing the probative nature of the evidence of the existence of a family relationship.[44]

95. The same line of reasoning must be followed when examining the documents provided for the purposes of proving the identity of the applicant for reunification.

44 Judgment of 13 March 2019, *E.* (C-635/17, EU:C:2019:192, paragraph 63). See, also, Section 3.2. of the Guidance for application of Directive 2003/86.

96. First of all, Article 17 of Directive 2003/86 is worded in general terms, such that it does not identify the grounds on which the decision to reject an application or to withdraw or refuse to renew a residence permit is based.

97. Next, I would observe that Article 16(2)(a) and (4) of that directive provides that Member States are authorised to reject an application for entry and residence for the purpose of family reunification, or to withdraw or refuse to renew the family member's residence permits, where it is shown, following the specific checks and inspections which they are allowed to conduct where there are grounds for suspicion, that false or falsified documents were used for the purpose of the residence permit being granted. In my view, that covers both the travel documents and the documents proving a family relationship such as marriage certificates or even birth certificates. The establishment of such proof by the competent national authority presupposes the determination of a series of facts and circumstances relating to, for example, the alteration of the document provided, the identity of the individual or even his or her background and the information received, which manifestly falls within the scope of an individual assessment of the application. [45]

98. Lastly, an interpretation to that effect can also be derived from Section 5.1. of the Guidance for application of Directive 2003/86. That guidance states that, 'if access to travel documents … is particularly difficult or dangerous and may thus constitute a disproportionate risk or a practical obstacle to the effective exercise of the right to family reunification, [Member States] are encouraged to consider the specificities of the case and the circumstances in the country of origin. In exceptional circumstances, for instance, in the context of a failed state or a country with high internal security risks, [Member States] are encouraged to accept emergency travel documents issued by the International Committee of the Red Cross (ICRC), to issue a national one-way laissez-passer, or offer family members the possibility of being issued a visa upon arrival in the [Member State]'.

99. All those provisions point to the cooperation that must be established between the family member concerned and the competent national authority when examining an application for family reunification, in particular where that application is made without the documents required. [46]

100. In accordance with settled case-law, an individual examination involves the competent national authority actually examining the situation of the family member concerned, comprehensively assessing all relevant factors of his or her application and taking into account, in a balanced and reasonable manner, all the interests in play before reaching a decision on that application. [47] In the judgment of 4 March 2010, *Chakroun*, [48] the Court thus held that Article 17 of Directive 2003/86 precludes national legislation providing for a minimum income level below which all family reunifications are refused, where the application for family reunification is rejected irrespective 'of an actual examination of the situation of each applicant'. [49]

45 See, by analogy, judgment of 18 December 2014, *McCarthy and Others* (C-202/13, EU:C:2014:2450), on the interpretation of Article 35 of Directive 2004/38, under which Member States may refuse, terminate or withdraw any right conferred by that directive in the case of abuse of rights or fraud. In paragraph 52 of that judgment, the Court held that the measures adopted on that basis must be 'based on an individual examination of the particular case'.

46 In its answers to the questions put by the Court, the Swedish Government stated that, pursuant to Paragraph 23(1) and (3) of the förvaltningslagen (Law on administrative management) of 28 September 2017 (SFS 2017, No 900), the competent national authority is required to exercise due diligence by allowing the applicant to elaborate on and supplement his or her application so that it may take a fair decision in material terms, on the basis of all the relevant factors.

47 See, in that regard, judgment of 13 March 2019, *E.* (C-635/17, EU:C:2019:192, paragraph 59 and the case-law cited). See, also, Sections 6.1.2. and 7.4. of the Guidance for application of Directive 2003/86.

48 C-578/08, EU:C:2010:117.

49 Paragraph 48 of that judgment. In the same vein, see Section 6.1. of the Guidance for application of Directive 2003/86, in which the Commission states that no factor taken separately may automatically lead to a decision.

101. It is my view that, in the case of an application for renewal of a residence permit the rejection of which would entail the break-up of family life, it is necessary for the Member State to take account of the specific reasons for the third-country national's inability to provide the travel document required and of the cooperation and good faith demonstrated by that national. It cannot be ruled out, for example, that that national is unable to provide proof of a valid travel document because that document expired during the period covered by the initial residence authorisation.

102. In the light of those factors, and with the exception of situations in which it is absolutely clear that the third-country national flagrantly fails to comply with his or her duty of cooperation or makes an application fraudulently, I am of the view that, in order to guarantee compliance with the objectives pursued by Directive 2003/86, a Member State cannot reject an application for family reunification solely on the ground that the family member fails to present the travel document required without having carried out an individual examination of the situation beforehand.

(c) Teleological analysis of Directive 2003/86

103. The objective of Directive 2003/86 is to encourage family reunification by allowing the status arising from that directive to be granted to persons who actually meet the conditions for obtaining it. [50]

104. The obligation on the third-country national to present a travel document quite clearly contributes to that objective. I recall that that obligation allows the identity and nationality of that person to be established and the documentary evidence issued to be corroborated for the purpose not only of evidence that a family relationship exists but also to prove that the other conditions required for exercise of the right to family reunification are satisfied. I would point out that it may also serve, if necessary, as proof of the lawful crossing of the external borders of the Schengen area.

105. However, it is apparent from settled case-law that authorisation of family reunification is the general rule. [51] In order to guarantee that objective and to avoid the risk of unduly denying a family member that benefit, a Member State cannot reject an application for family reunification solely on the ground that it is not accompanied by the travel document required, without first having carried out an individual examination of the situation.

106. That interpretation of the provisions of Article 5(2) of Directive 2003/86 thus ensures that respect for both the fundamental rights guaranteed by the Charter and the principle of proportionality, by which Member States are bound, is guaranteed.

50 See judgment of 12 December 2019, *Bevándorlási és Menekültügyi Hivatal (Family reunification — Sister of a refugee)* (C-519/18, EU:C:2019:1070, paragraph 42 and the case-law cited).

51 See, to that effect, judgment of 6 December 2012, *O and Others* (C-356/11 and C-357/11, EU:C:2012:776, paragraph 74 and the case-law cited).

(d) Respect for fundamental rights and the principle of proportionality

107. It is clear from settled case-law that, when implementing the provisions laid down in Directive 2003/86, Member States are required to exercise their discretion in compliance with the fundamental rights enshrined in the Charter.[52] Under recital 2 of that directive, the provisions of the directive must be interpreted and applied in the light of, inter alia, Article 7 of the Charter, which recognises the right to respect for private or family life, and Article 24(2) and (3) of the Charter, which requires that regard be had to the child's best interests and the need for a child to maintain on a regular basis a personal relationship with both parents.[53]

108. In addition, the Court asks the Member States to exercise the discretion they enjoy to transpose Directive 2003/86 in accordance with the principle of proportionality, which is a general principle of EU law.[54] The conditions laid down for the purposes of submitting and examining applications for family reunification, but also the control measures adopted by the Member States must be proportionate. Although combating fraud constitutes a legitimate objective justifying the control measures, those measures must be appropriate to achieving that objective and must not go beyond what is necessary to achieve it or have the consequence of rendering the right to family reunification ineffective.

109. It appears to me that compliance with those principles requires, as does compliance with the obligations set out in Article 17 of Directive 2003/86, a distinction to be drawn between the following situations.

110. The first situation is that in which the third-country national flagrantly fails to comply with his or her duty of cooperation by failing to provide any of the travel documents required or any other document capable of establishing his or her identity and nationality. The burden of proof rests with the sponsor or the family member concerned. That person alone initiates the procedure in order to be granted a right and he or she alone has documents capable of proving his or her identity. In a situation in which the third-country national makes no effort to submit his or her application in the proper form and where that application is manifestly incomplete, nothing, in my view, prevents the competent national authority from being able to reject it outright on the basis of Article 5(2) of Directive 2003/86.

111. The second situation is that in which it is clear, having regard to the objective evidence at the disposal of the competent national authority, that the application is fraudulent or abusive in nature. In that situation and following the individual examination of the application required by Article 17 of Directive 2003/86, that authority is justified in rejecting that application pursuant to Article 16(2)(a) of that directive.

112. Finally, the third situation is that in which the third-country national fails to present the travel document required by the Member State for the purpose of establishing his or her identity, such as a valid passport, but complies with the duty of cooperation incumbent on him or her by establishing his or her identity and nationality unequivocally by any other appropriate means.

52 I note that, in accordance with Article 51 of the Charter, Member States are obliged to respect the rights and observe the principles enshrined in the Charter when they are implementing EU law, which includes the measures adopted as part of the discretion they enjoy to transpose a directive. See, with regard to the discretion enjoyed by the Member States when implementing Article 10(2) of Directive 2003/86, judgment of 12 December 2019, *Bevándorlási és Menekültügyi Hivatal (Family reunification — Sister of a refugee)* (C-519/18, EU:C:2019:1070, paragraphs 64 and 65 and the case-law cited).

53 See, in that regard, judgment of 13 March 2019, *E.* (C-635/17, EU:C:2019:192, paragraph 56 and the case-law cited).

54 See judgment of 12 December 2019, *E.P. (Threat to public policy)* (C-380/18, EU:C:2019:1071, paragraph 47 and the case-law cited).

113. It is true that, in such circumstances, presentation of the travel documents is not a mere administrative formality. I recall that the scope of that obligation cannot be compared with the obligation laid down within the framework of Directive 2004/38 on the holding of a valid identity card or passport for Union citizens who wish to reside in a Member State other than that of which they are a national. Whereas the first obligation is concerned with the grant of a residence permit to a third-country national, who is seeking to benefit indirectly from the provisions of EU law, the second relates to the grant of a right of residence in a Member State flowing directly from the status of citizen of the Union. This is why the principles identified by the Court in the judgment of 17 February 2005, *Oulane*,[55] with regard to the right of residence of nationals of Member States within the European Union as regards establishment and the provision of services do not appear to me to be applicable to a family member of a third-country national. I recall that, in that judgment, delivered with regard to the interpretation of Directive 73/148/EEC,[56] repealed and replaced by Directive 2004/38, the Court found that the host Member State could not refuse to recognise the right of residence of a national of another Member State on the sole ground that he or she did not present a valid identity card or passport if he or she were, however, able to prove his or her nationality unequivocally by other means, without infringing the principle of proportionality.[57]

114. Situations covered by Directive 2004/38 and those falling within the scope of Directive 2003/86 are not comparable. However, certain situations involving third-country nationals could also necessitate a relaxation of the burden of proof. It would thus be for the competent national authority to identify such a situation in the light of an individual examination.

115. Unlike the first two situations mentioned (flagrant failure to comply with the duty of cooperation and fraudulent or abusive application), a refusal issued by a competent national authority that disregards both the reasons justifying the failure to provide the travel documents required and the cooperation demonstrated by the person concerned with a view to establishing his or her identity risks infringing the fundamental rights referred to in paragraph 107 of this Opinion and the principle of proportionality. In addition, in the case of an application for renewal of a residence permit, at which time the third-country national could not present his or her travel documents, such a refusal would have the consequence of bringing the continuation of that national's family life to an end and could thus disproportionately affect the right enshrined in Article 7 of the Charter.

116. I note that the Court adopted that approach in the judgment of 25 July 2002, *MRAX*,[58] on the right of residence of a third-country national, the spouse of a national of a Member State. It recognised that, in view of the importance attached by the EU legislature to the protection of family life,[59] a Member State cannot, without infringing the principle of proportionality, send back at the border a third-country national who is married to a national of a Member State and attempts to enter its territory without being in possession of a valid identity card or passport or, if necessary, a visa, where

55 C-215/03, EU:C:2005:95. See, also, judgment of 9 January 2007, *Jia* (C-1/05, EU:C:2007:1, paragraph 41 and the case-law cited).

56 Council Directive of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14).

57 In the judgment of 17 February 2005, *Oulane* (C-215/03, EU:C:2005:95), the Court found it to be disproportionate in the light of the objectives pursued by that directive for it be possible to provide such evidence, in all cases, only by presentation of a valid identity card or passport. The Court takes the view that the presentation of a valid identity card or passport for the purpose of proving that a person is a Union citizen is an administrative formality, the sole object of which is to provide the national authorities with proof of a right which the person in question has directly by virtue of their status (paragraph 24). However, in the Court's view, evidence of identity and nationality may be provided by other means and, where it is not specified which means of evidence are admissible, it must be concluded that such evidence may be adduced by any appropriate means (paragraph 53).

58 C-459/99, EU:C:2002:461.

59 Paragraph 53 of that judgment.

that national is able to prove his or her identity and the conjugal ties and there is no evidence to establish that he or she represents a risk to the requirements of public policy, public security or public health within the meaning of Article 10 of Directive 68/360/EEC[60] and Article 8 of Directive 73/148.[61]

117. I would recall, finally, that, in the judgment of 18 December 2014, *McCarthy and Others*,[62] the Court held that the fact that a Member State is faced with a high number of cases of abuse of rights or fraud committed by third-country nationals cannot justify the adoption of measures founded on considerations of general prevention, to the exclusion of any specific assessment of the conduct of the actual person concerned.[63]

118. In the light of all those considerations, I therefore take the view that Article 5(2) of Directive 2003/86 must be interpreted as not precluding national legislation requiring, for the purpose of examining an application for a residence permit for family reunification, that the family member concerned establish his or her identify with certainty by attaching a certified copy of a passport valid for the duration of the residence authorisation.

119. However, where the family member concerned is unable to provide that document, the competent national authority cannot reject the application on that ground alone, without first conducting an individual examination, which requires, in particular, that it take into account the reasons for the family member's inability to present those documents and the cooperation demonstrated by that person with a view to establishing his or her identity unequivocally by any other appropriate means.

120. That conclusion answers the second and third questions submitted by the referring court.

V. Conclusion

121. In the light of the foregoing considerations, I propose that the Court answer the questions submitted by the Förvaltningsrätten i Malmö, migrationsdomstolen (Administrative Court for Immigration Matters, Malmö, Sweden) as follows:

(1) Article 25(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, as amended by Regulation (EU) No 265/2010 of the European Parliament and of the Council of 25 March 2010, is to be interpreted as not precluding a Contracting State from issuing a residence permit to a third-country national applying for that permit in the territory of that State, even though that national cannot establish his or her identity with certainty and an alert has been issued for him or her in the Schengen Information System for the purposes of refusing entry, provided that the issuing of that permit is preceded by the consultation of the Contracting State which issued the alert and is based on a substantive ground.

60 Council Directive of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485).

61 Paragraph 62 of the judgment.

62 C-202/13, EU:C:2014:2450.

63 Paragraph 55 of that judgment regarding the interpretation of Article 35 of Directive 2004/38 on the abuse of rights.

(2) Article 5(2) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification is to be interpreted as not precluding national legislation requiring, for the purpose of examining an application for a residence permit, that the family member concerned establish his or her identify with certainty by attaching a certified copy of a passport valid for the duration of the residence authorisation.

However, where the family member concerned is unable to enclose the travel document required with his or her application, the competent national authority cannot reject that application on that ground alone without first conducting an individual examination, which requires, in particular, that it take into account the reasons for the family member's inability to present that document and the cooperation demonstrated by that person with a view to establishing his or her identity unequivocally by any other appropriate means.