Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

21 June 2012*

(Accession of new Member States — Republic of Bulgaria — Member State legislation making the grant of a work permit to Bulgarian nationals subject to an examination of the situation of the labour market — Directive 2004/114/EC — Conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service)

In Case C-15/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Austria), made by decision of 9 December 2010, received at the Court on 12 January 2011, in the proceedings

Leopold Sommer

v

Landesgeschäftsstelle des Arbeitsmarktservice Wien,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, A. Prechal, K. Schiemann, L. Bay Larsen (Rapporteur) and C. Toader, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Mr Sommer, by W. Rainer, Rechtsanwalt,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the European Commission, by M. Condou-Durande and W. Bogensberger, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 March 2012,

gives the following

* Language of the case: German.

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 20 of the Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union (OJ 2005 L 157, p. 29) ('the Admission Protocol'), of paragraph 14 of Point 1 of Annex VI to that Protocol, and of Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (OJ 2004 L 375, p. 12).

2 The reference has been made in proceedings between Mr Sommer and the Landesgeschäftsstelle des Arbeitsmarktservice Wien (Regional Agency of the Department of Employment, Vienna) ('the Vienna Arbeitsmarktservice') concerning the latter's refusal to issue Mr Sommer, on behalf of a Bulgarian national studying in Austria, with a permit to work as a part-time driver.

Legal context

European Union law

The Admission Protocol and Annex VI thereto

3 The Treaty between the Member States of the European Union and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union (OJ 2005 L 157, p. 11) ('the Treaty of Accession'), was signed on 25 April 2005 and came into force on 1 January 2007.

4 Article 1(3) of the Treaty of Accession states that '[t]he conditions and arrangements for admission are set out in the Protocol annexed to this Treaty. The provisions of that Protocol shall form an integral part of this Treaty'.

5 According to Article 20 of the Admission Protocol, entitled 'Transitional Measures', which appears in Part Four of that Protocol, concerning temporary provisions, under Title I thereof:

'The measures listed in Annexes VI and VII to this Protocol shall apply in respect of Bulgaria and Romania under the conditions laid down in those Annexes.'

6 Under paragraphs 1, 2 and 14 of Point 1 of Annex VI to the Admission Protocol, entitled 'List referred to in Article 20 of the [Admission] Protocol: transitional measures, Bulgaria':

'1. Article III-133 and the first paragraph of Article III-144 of the Constitution shall fully apply only, in relation to the freedom of movement of workers and the freedom to provide services involving temporary movement of workers as defined in Article 1 of Directive 96/71/EC between Bulgaria on the one hand, and each of the present Member States on the other hand, subject to the transitional provisions laid down in paragraphs 2 to 14.

2. By way of derogation from Articles 1 to 6 of Regulation (EEC) No 1612/68 [of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968(II), p. 475)] and until the end of the two year period following the date of accession, the present Member States will apply national measures, or those resulting from bilateral agreements, regulating access to their labour markets by Bulgarian nationals. The present Member States may continue to apply such measures until the end of the five year period following the date of accession.

…

14. The effect of the application of paragraphs 2 to 5 and 7 to 12 shall not result in conditions for access of Bulgarian nationals to the labour markets of the present Member States which are more restrictive than those prevailing on the date of signature of the Treaty of Accession.

Notwithstanding the application of the provisions laid down in paragraphs 1 to 13, the present Member States shall, during any period when national measures or those resulting from bilateral agreements are applied, give preference to workers who are nationals of the Member States over workers who are nationals of third countries as regards access to their labour market.

Bulgarian migrant workers and their families legally resident and working in another Member State or migrant workers from other Member States and their families legally resident and working in Bulgaria shall not be treated in a more restrictive way than those from third countries resident and working in that Member State or Bulgaria respectively. Furthermore, in application of the principle of Community preference, migrant workers from third countries resident and working in Bulgaria shall not be treated more favourably than nationals of Bulgaria.'

Regulation No 1612/68

7 Articles 1 to 6 of Regulation No 1612/68 appear in Part I of that regulation, entitled 'Employment and Workers' Families', under Title I thereof, concerning eligibility for employment.

8 Article 1 of that regulation provides:

'1. Any national of a Member State shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.

2. He shall, in particular, have the right to take up available employment in the territory of another Member State with the same priority as nationals of that State.'

9 Article 2 of that regulation provides:

'Any national of a Member State and any employer pursuing an activity in the territory of a Member State may exchange their applications for and offers of employment, and may conclude and perform contracts of employment in accordance with the provisions in force laid down by law, regulation or administrative action, without any discrimination resulting therefrom.'

Directive 2004/114

10 Directive 2004/114 came into force on 12 January 2005 and, according to the first paragraph of Article 22 of that directive, the Member States were to bring into force the laws, regulations and administrative provisions necessary in order to comply with that directive by 12 January 2007. The Republic of Austria transposed that directive into Austrian law on 1 January 2006.

11 Recital 6 in the preamble to that directive is worded as follows:

'One of the objectives of Community action in the field of education is to promote Europe as a whole as a world centre of excellence for studies and vocational training. Promoting the mobility of third-country nationals to the Community for the purpose of studies is a key factor in that strategy. The approximation of the Member States' national legislation on conditions of entry and residence is part of this.'

12 Recital 7 in the preamble to that directive states:

‘Migration for the purposes set out in this Directive, which is by definition temporary and does not depend on the labour-market situation in the host country, constitutes a form of mutual enrichment for the migrants concerned, their country of origin and the host Member State and helps to promote better familiarity among cultures.’

13 Concerning student economic activity, Recital 18 in the preamble to Directive 2004/114 states:

‘In order to allow students who are third-country nationals to cover part of the cost of their studies, they should be given access to the labour market under the conditions set out in this Directive. The principle of access for students to the labour market under the conditions set out in this Directive should be a general rule; however, in exceptional circumstances Member States should be able to take into account the situation of their national labour markets.’

14 Under Article 1 of that directive:

‘The purpose of this Directive is to determine:

(a) the conditions for admission of third-country nationals to the territory of the Member States for a period exceeding three months for the purposes of studies, pupil exchange, unremunerated training or voluntary service;

(b) the rules concerning the procedures for admitting third-country nationals to the territory of the Member States for those purposes.’

15 Article 2(a) of that directive defines a ‘third-country national’ as ‘any person who is not a citizen of the European Union within the meaning of Article 17(1) of the [EC] Treaty’.

16 Article 3 of Directive 2004/114 provides:

‘1. This Directive shall apply to third-country nationals who apply to be admitted to the territory of a Member State for the purpose of studies.

…

2. This Directive shall not apply to:

…

(e) third-country nationals considered under the national legislation of the Member State concerned as workers or self-employed persons.’

17 Article 7 of Directive 2004/114, entitled ‘Specific conditions for students’, which appears in Chapter II of that directive, concerning conditions of admission, is worded as follows:

‘1. In addition to the general conditions stipulated in Article 6, a third-country national who applies to be admitted for the purpose of study shall:

(a) have been accepted by an establishment of higher education to follow a course of study;

(b) provide the evidence requested by a Member State that during his/her stay he/she will have sufficient resources to cover his/her subsistence, study and return travel costs. Member States shall make public the minimum monthly resources required for the purpose of this provision, without prejudice to individual examination of each case;

…’

18 Article 17 of Directive 2004/114, entitled 'Economic activities by students', which is the sole article contained in Chapter IV of that directive, entitled 'Treatment of the third-country nationals concerned', provides:

'1. Outside their study time and subject to the rules and conditions applicable to the relevant activity in the host Member State, students shall be entitled to be employed and may be entitled to exercise self-employed economic activity. The situation of the labour market in the host Member State may be taken into account.

Where necessary, Member States shall grant students and/or employers prior authorisation in accordance with national legislation.

2. Each Member State shall determine the maximum number of hours per week or days or months per year allowed for such an activity, which shall not be less than 10 hours per week, or the equivalent in days or months per year.

3. Access to economic activities for the first year of residence may be restricted by the host Member State.

4. Member States may require students to report, in advance or otherwise, to an authority designated by the Member State concerned, that they are engaging in an economic activity. Their employers may also be subject to a reporting obligation, in advance or otherwise.'

Austrian law

19 The national rules which make up the legal framework applicable to the dispute in the main proceedings are the Law on establishment and residence (Niederlassungs- und Aufenthaltsgesetz, BGBl. I 100/2005) (the Niederlassungsverordnung), which transposes Directive 2004/114 into Austrian law, and the Law on the employment of foreign nationals (Ausländerbeschäftigungsgesetz, BGBl. 218/1975), in the version in force on the date of the decision refusing the work permit at issue in the main proceedings, namely 17 March 2008.

The Niederlassungsverordnung

20 Under Paragraph 64(1) and (2) of the Niederlassungsverordnung:

'(1) Third-country nationals may be issued a student residence permit if they:

1. satisfy the conditions under Part 1 and

2. undertake a regular or individual study programme at a university, higher technical college or accredited private university and, in the case of a university course, learning a language is not its sole purpose. A declaration of responsibility shall be admissible.

(2) Economic activity as an employed person shall be in accordance with the Ausländerbeschäftigungsgesetz. Such activity shall be without prejudice to the requirement of studies as the sole purpose of residence.'

The Ausländerbeschäftigungsgesetz

21 The relevant provisions of the Ausländerbeschäftigungsgesetz are worded as follows:

'Conditions applying to foreign nationals concerning employment

Paragraph 3

(1) Unless otherwise provided in this federal law, an employer may hire a foreign national only if he has obtained a work permit on behalf of that foreign national …

Work permit conditions

Paragraph 4

(1) The work permit shall be granted, unless otherwise provided hereinafter, if the situation of and developments in the labour market permit employment and it is not precluded by important public or macroeconomic interests.

…

(6) After the regional maximum numbers fixed under Paragraph 13 have been exceeded, further work permits may be granted only if the conditions under subparagraphs 1 to 3 are satisfied, and:

1. the Regional Advisory Board (Regionalbeirat) recommends the grant of the work permit unanimously or

2. the employment of the foreign national appears necessary in view of his advanced integration or

3. the employment is to be effected under a quota in accordance with Paragraph 5 or

4. the foreign national satisfies the conditions under Paragraph 2(5) or

4a. the foreign national is the spouse or unmarried minor child (including step-child or adoptive child) of a foreign national who is lawfully established and employed on a permanent basis or

5. the employment is to be effected on the basis of an international agreement or

6. the foreign national belongs to a category of persons who may be admitted to employment even after the regional maximum number has been exceeded (Paragraph 12a(2)).

…

Examination of the situation in the labour market

Paragraph 4b

(1) The situation of and developments in the labour market (Paragraph 4(1)) shall permit the grant of a work permit if neither an Austrian national nor a foreign national available on the labour market who is willing and able to carry out the job applied for under lawful conditions is available for the vacant position to be filled by the foreign national in respect of whom the application is made. Among the available foreign nationals preference shall be given to those who are entitled to unemployment benefits, who hold an authorisation to work, an exemption certificate or a permanent residence permit, [European Economic Area] citizens (Paragraph 2(6)) and Turkish workers covered by the Association Agreement. The examination shall be based on the job specification given in the work permit application, which must cover operational requirements. The employer shall supply proof of training or other special qualifications required to carry out the work. …

Quotas for the temporary admission of foreign nationals

Paragraph 5

(1) In the case of a temporary need for additional labour which cannot be met from the human resources available in Austria, the Federal Minister for Economics and Labour shall be authorised to fix, by regulation, quantitative quotas within the relevant limits laid down under[Paragraph 13 of] the Niederlassungsverordnung:

1. for the temporary admission of foreign workers to a specific economic sector, occupational group, or region, or

2. for the immediate admission of seasonal agricultural harvest workers authorised to enter Austria without a visa.

…

(5) For foreign nationals who hold a residence permit for the purposes of studies or school education, work permits may be granted within the scope of quotas under subparagraph 1(1) and (2) only for a maximum total duration of three months per calendar year.

…'

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

22 On 30 January 2008, Mr Sommer, the applicant in the main proceedings, applied for a work permit on behalf of a Bulgarian national, who was a student in Austria and who had been resident there for over a year, in order to employ him as a driver for 10.25 hours per week for a gross monthly salary of EUR 349. The student was to carry out night-time deliveries in Vienna.

23 By decision of 8 February 2008, the Vienna Arbeitsmarktservice rejected that application pursuant to Paragraph 4(6)(1) of the Ausländerbeschäftigungsgesetz. Mr Sommer brought an appeal against that decision, claiming that other job-seekers had repeatedly turned down the job because the work either amounted to too few weekly hours on its own or was not compatible with parallel full-time employment.

24 By decision of 17 March 2008, the Vienna Arbeitsmarktservice rejected that appeal pursuant to the combined provisions of Paragraph 66(4) of the Law on administrative procedure (Allgemeines Verwaltungsverfahrensgesetz) and Paragraph 4(6) of the Ausländerbeschäftigungsgesetz. As grounds for its decision, the Vienna Arbeitsmarktservice pointed out that the maximum number of foreign workers, fixed at 66 000 for the region of Vienna, had already been exceeded by 17 757 additional foreign workers.

25 Mr Sommer brought an appeal against that decision before the referring court, which states, first, that, on the basis of a literal interpretation of the combined provisions of Articles 1(a) and 2(a) of Directive 2004/114, a Bulgarian national is not subject to the provisions of that directive because, in light of the Republic of Bulgaria's accession to the European Union on 1 January 2007, he is no longer a 'third-country national'. Since, prior to that accession, a Bulgarian national would have enjoyed, as a third-country national, the rights laid down in Directive 2004/114, the refusal to grant the work permit after that accession could constitute a deterioration in his legal position or less favourable treatment than that given to students from third countries, which is expressly prohibited by paragraph 14 of Point 1 of Annex VI to the Admission Protocol. The referring court also highlights the principle of preference referred to in the third subparagraph of paragraph 14.

26 Second, the referring court notes that, under national law, namely Paragraph 4(1) of the Ausländerbeschäftigungsgesetz, before issuing a work permit, it must be ascertained that the situation of and developments in the labour market permit employing the worker and that such employment is

not precluded by important public or macroeconomic interests. In addition, pursuant to Paragraph 4(6), where the maximum numbers of foreign workers fixed by legislation have been exceeded, a work permit may be granted only if certain additional conditions are satisfied. The referring court observes that the examination of the situation of and developments in the labour market and any important public or macroeconomic interests must be carried out systematically and not merely in exceptional circumstances, and asks whether that legislation is contrary to Directive 2004/114.

27 In those circumstances the Verwaltungsgerichtshof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Having regard to the first or third subparagraphs of paragraph 14 of Point 1 [entitled] “Freedom of movement for persons” of Annex VI[to the Admission Protocol, entitled] “List referred to in Article 20 of the Protocol: transitional measures — Bulgaria”, does Directive 2004/114 … apply to a Bulgarian student in Austria?

2. If Question 1 is answered in the affirmative: Does Union law, in particular Article 17 of Directive 2004/114, preclude a national rule which, like the provisions of the Ausländerbeschäftigungsgesetz which are relevant in the main proceedings, provides in all cases for an examination of the situation of the labour market prior to the grant of a work permit for an employer to employ a student who has already resided in Austria for more than one year … and additionally makes the grant of a work permit subject to further conditions if the fixed maximum number of foreign nationals employed has been exceeded?’

Consideration of the questions referred

Question 1

28 By its first question, the referring court asks, in essence, whether paragraph 14 of Point 1 of Annex VI to the Admission Protocol is to be interpreted to mean that the conditions of access to the labour market by Bulgarian students, during the transitional period mentioned in the first subparagraph of paragraph 2 of that Point, may not be more restrictive than those set out in Directive 2004/114.

29 In that regard, it should be noted that the persons covered by Directive 2004/114, as defined in Article 3(1) thereof, are third-country nationals who apply to be admitted to the territory of a Member State for the purpose of studies, the concept of third-country nationals being defined in Article 2(a) of that directive as any person who is not a citizen of the European Union within the meaning of Article 17(1) of the Treaty.

30 As highlighted by the referring court, following the Republic of Bulgaria’s accession to the European Union on 1 January 2007, Bulgarian nationals are no longer third-country nationals but are citizens of the European Union and, consequently, from that date and, therefore, on the date of the application for the work permit at issue in the main proceedings, namely 30 January 2008, Bulgarian nationals were no longer covered by that directive.

31 However, on 30 January 2008, Directive 2004/114 had been in force since 12 January 2005 and the period granted to the Member States for transposing that directive had expired on 12 January 2007. Accordingly, on 30 January 2008 access [to the labour market] by students who were third-country nationals was governed by Directive 2004/114.

32 According to the first subparagraph of paragraph 2 of Point 1 of Annex VI to the Admission Protocol, access to the labour markets of the Member States by Bulgarian nationals is to be governed, for a transitional period which may run until the end of a five-year period following the date of accession, by national measures, or measures resulting from bilateral agreements, which will regulate Bulgarian nationals’ access to the Member States’ labour markets.

33 None the less, and irrespective of the standstill clause set out in the first subparagraph of paragraph 14 of that Point, the second subparagraph of that paragraph enshrines the principle of preference for citizens of the European Union, pursuant to which the Member States are required, with the exception of measures taken during the transition period, to give preference, for access to their labour markets, to nationals of the Member States over workers who are nationals of third countries. According to that paragraph, Bulgarian nationals must not merely enjoy the same conditions of access to the labour markets of the Member States as third-country nationals, but must receive preferential treatment.

34 As has been stated in paragraph 31 of this judgment, on 30 January 2008, the date the application for the work permit at issue in the main proceedings was submitted, access by third-country nationals to the labour markets of the Member States was governed by Directive 2004/114.

35 It therefore follows from the preference clause that Bulgarian nationals had the right, at that date, to be granted access to the labour market under conditions which were not more restrictive than those set out in Directive 2004/114 for third-country nationals. Accordingly, if access to the Austrian labour market must be granted to a student who is a third-country national according to the rules laid down in Directive 2004/114, such access must be granted to a Bulgarian student under conditions which are at least as favourable and, in addition, that Bulgarian student must be given preference over a student who is a third-country national.

36 Accordingly, the answer to the first question is that paragraph 14 of Point 1 of Annex VI to the Admission Protocol must be interpreted to mean that the conditions of access to the labour market by Bulgarian students, at the time of the events in the main proceedings, may not be more restrictive than those set out in Directive 2004/114.

Question 2

37 In view of the answer given to the first question, the referring court should be given guidance as to whether or not national legislation such as that at issue in the main proceedings provides for a more restrictive treatment of Bulgarian nationals than that given to third-country nationals under Directive 2004/114.

38 According to the first subparagraph of Article 17(1) of Directive 2004/114, students covered by that directive are to be entitled to be employed and may be entitled to exercise self-employed economic activity outside their study time, subject to the rules and conditions applicable to the relevant activity in the host Member State. However, the second sentence of that subparagraph allows the Member States concerned to take into account the situation of their labour markets, notwithstanding the rule set out in the first sentence.

39 It should be noted that, according to Recitals 6 and 7 in the preamble to Directive 2004/114, that directive is intended to promote the mobility of students who are third-country nationals to the European Union for the purpose of education. That mobility is intended ‘to promote Europe … as a world centre of excellence for studies and vocational training’.

40 According to Article 17(2) of Directive 2004/114, each Member State is to determine the maximum number of hours per week or days or months per year allowed for such an activity, which is not to be less than 10 hours per week, or the equivalent in days or months per year. As is clear from the first subparagraph of Article 17(1), that maximum number allowed is for work outside of study time.

41 Moreover, Article 17(3) of Directive 2004/114 allows the host Member State to restrict access to economic activities for the first year of residence connected with study, without any justification being required in that regard. Thus, until the end of their first year of residence, the students concerned are

only granted access to economic activities under the conditions and within the limits laid down by national legislation, whereas, after that first year of residence, access [to the labour market] by third-country nationals is governed by that directive, more specifically by Article 17(1), (2) and (4) thereof.

42 It therefore follows from the general scheme of Directive 2004/114, in particular Article 17, and from the purposes thereof that the host Member State, after the first year of residence of a student who is a third-country national, may invoke the second sentence of the first subparagraph of Article 17(1) of that directive in order to take into account the situation of the labour market only after having exhausted the possibilities resulting from Article 17(2) to determine the maximum number of hours worked outside of study time, and that that taking into account of the situation of the labour market can only take place in exceptional circumstances and provided that any planned measures to that effect are justified and proportionate with regard to the aim being pursued.

43 Accordingly, national legislation such as that at issue in the main proceedings, which states that a systematic examination of the labour market must be carried out and that the issuing of a work permit is allowed only if neither an Austrian national nor a foreign national available on the labour market who is willing and able to carry out the job is available for the vacant position to be filled by the foreign national in respect of whom the application is made, cannot be compatible with Directive 2004/114, in particular Article 17 thereof, since, during that examination, the situation of the labour market must be taken into account without it being necessary to establish the existence of exceptional circumstances which justify its being taken into account.

44 As regards the national legislation at issue in the main proceedings, according to which, where the fixed regional maximum number of foreign nationals employed has been exceeded, the issuing of a work permit to third-party nationals is subject, not only to the systematic examination of the situation of and developments in the labour market, but also to the application of additional conditions, it is sufficient to state that, given that Directive 2004/114 precludes such systematic examination, it *a fortiori* precludes national measures which go beyond that examination.

45 Accordingly, the answer to the second question is that national legislation such as that at issue in the main proceedings provides for a more restrictive treatment of Bulgarian nationals than that given to third-country nationals under Directive 2004/114.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Paragraph 14 of Point 1 of Annex VI to the Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union must be interpreted to mean that the conditions of access to the labour market by Bulgarian students, at the time of the events in the main proceedings, may not be more restrictive than those set out in Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service.**

2. **National legislation such as that at issue in the main proceedings provides for a more restrictive treatment of Bulgarian nationals than that given to third-country nationals under Directive 2004/114.**

[Signatures]