JUDGMENT OF THE COURT (Second Chamber)

14 April 2005 *

In Case C-157/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 7 April 2003,

Commission of the European Communities, represented by C. O'Reilly and L. Escobar Guerrero, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, C. Gulmann, J. Makarczyk (Rapporteur), P. Küris and J. Klučka, Judges,

Advocate General: C. Stix-Hackl,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 9 November 2004,

gives the following

Judgment

1 By its application the Commission of the European Communities asks the Court to declare that, by requiring, in breach of the provisions of Council Directive 68/360/EEC 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), Council Directive 73/148/EEC 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) and Council Directive 90/365/EEC of 28 June 1990

on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ 1990 L 180, p. 28), third-country nationals who are members of the family of a Community national who has exercised his right to freedom of movement to obtain a residence visa for the issue of a residence permit and, by failing, in breach of the provisions of Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964 p. 117), to issue a residence permit as soon as possible and in any event not later than six months from the date of application for that permit, the Kingdom of Spain has failed to fulfil its obligations under those directives.

Legal background

Community law

The provisions relating to entry and residence

2 Article 1 of Directive 68/360 provides for the abolition of restrictions on the movement and residence of nationals of the Member States and of members of their families to whom 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) applies.

3 Article 1 of Directive 73/148 provides inter alia for the abolition of restrictions on the movement and residence of nationals of a Member State who are established or who wish to establish themselves in another Member State in order to pursue activities as self-employed persons, or who wish to provide services in that State, and of their spouse, irrespective of their nationality.

4 Under Article 1 of Directive 90/365, nationals of Member States who have pursued within the Community an activity as an employee or self-employed person and members of their families are to be granted a right of residence, provided that they are recipients of an invalidity or early retirement pension, or old age benefits, or of a pension in respect of an industrial accident or disease of an amount sufficient to avoid becoming a burden on the social security system of the host Member State during their period of residence and provided they are covered by sickness insurance in respect of all risks in that Member State.

5 Articles 3 and 4 of Directive 68/360 provide:

'Article 3

1. Member States shall allow the persons referred to in Article 1 to enter their territory simply on production of a valid identity card or passport.

2. No entry visa or equivalent document may be demanded save from members of the family who are not nationals of a Member State. Member States shall accord to such persons every facility for obtaining any necessary visas.

Article 4

1. Member States shall grant the right of residence in their territory to the persons referred to in Article 1 who are able to produce the documents listed in paragraph 3.

2. As proof of the right of residence, a document entitled "Residence Permit for a National of a Member State of the EEC" shall be issued. This document must include a statement that it has been issued pursuant to Regulation (EEC) No 1612/68 and to the measures taken by the Member States for the implementation of the present Directive. The text of such statement is given in the Annex to this Directive.

3. For the issue of a Residence Permit for a national of a Member State of the EEC, Member States may require only the production of the following documents:

...

— by the members of the worker's family:

(c) the document with which they entered the territory;

(d) a document issued by the competent authority of the State of origin or the State whence they came, proving their relationship;

(e) in the cases referred to in Article 10(1) and (2) of Regulation (EEC) No 1612/68, a document issued by the competent authority of the State of origin or the State whence they came, testifying that they are dependent on the worker or that they live under his roof in such country.

4. A member of the family who is not a national of a Member State shall be issued with a residence document which shall have the same validity as that issued to the worker on whom he is dependent.'

6 Articles 3 and 6 of Directive 73/148 provide:

'Article 3

1. Member States shall grant to the persons referred to in Article 1 right to enter their territory merely on production of a valid identity card or passport.

2. No entry visa or equivalent requirement may be demanded save in respect of members of the family who do [not] have the nationality of a Member State. Member States shall afford to such persons every facility for obtaining any necessary visas.

...

Article 6

An applicant for a residence permit or right of abode shall not be required by a Member State to produce anything other than the following, namely:

(a) the identity card or passport with which he or she entered its territory;

(b) proof that he or she comes within one of the classes of person referred to in Articles 1 and 4.'

7 Article 2(1) and (2) of Directive 90/365 is worded as follows:

'1. Exercise of the right of residence shall be evidenced by means of the issue of a document known as a "Residence permit for a national of a Member State of the EEC", whose validity may be limited to five years on a renewable basis. However, the Member States may, when they deem it to be necessary, require revalidation of the permit at the end of the first two years of residence. Where a member of the family does not hold the nationality of a Member State, he or she shall be issued with a residence document of the same validity as that issued to the national on whom he or she depends.

For the purposes of issuing the residence permit or document, the Member State may require only that the applicant present a valid identity card or passport and provide proof that he or she meets the conditions laid down in Article 1.

2. Articles 2, 3, 6(1)(a) and (2) and Article 9 of Directive 68/360/EEC shall apply mutatis mutandis to the beneficiaries of this Directive.

...'

8 Under Article 5(1) of Directive 64/221:

'A decision to grant or to refuse a first residence permit shall be taken as soon as possible and in any event not later than six months from the date of application for the permit.

The person concerned shall be allowed to remain temporarily in the territory pending a decision either to grant or to refuse a residence permit.'

Visa provisions

9 Article 2 of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2001 L 81, p. 1), provides:

'For the purposes of this Regulation, "visa" shall mean an authorisation issued by a Member State or a decision taken by such State which is required with a view to:

— entry for an intended stay in that Member State or in several Member States of no more than three months in total,

— entry for transit through the territory of that Member State or several Member States, except for transit at an airport.'

National legislation

10 Under Article 10(3) of Royal Decree No 766/1992 of 26 June 1992 concerning the entry and residence in Spain of nationals of Member States of the European Communities (Real Decreto 766/1992, de 26 de junio 1992, sobre entrada y permanencia en España de nacionales de Estados miembros de las Comunidades Europeas, BOE No 156 of 30 June 1992, p. 22275), as amended by Royal Decrees No 737/95 of 5 May 1995 (BOE No 133, of 5 June 1995, p. 16547) and No 1710/1997 of 14 November 1997 (BOE No 274, of 15 November 1997, p. 33549):

'Where the persons concerned are members of the family of the persons referred to in the preceding paragraphs, in the context envisaged in Article 2, they must submit documents issued by the competent authorities to prove:

(a) the family relationship;

(b) that they are supported by or dependent on the national to whom they are related, in cases where that condition is applicable;

(c) with regard to members of the family of the residents referred to in paragraphs 1 (e), (f) and (g), that the resources and sickness insurance mentioned in those provisions are sufficient to cover the person entitled to residence and the members of his family in accordance with the rules laid down therein;

(d) family members who are not nationals of a Member State of the European Communities must produce, in addition to the documents mentioned above, a residence visa stamp in their passport, which may be waived in exceptional cases.'

11 According to Articles 23 and 28 of Royal Decree No 155/1996 of 2 February 1996, approving the implementing regulation for Basic Law 7/1985 (Real Decreto 155/1996, de 2 de febrero 1996, por el que se aprueba el Reglamento de ejecución de la Ley Orgánica 7/1985, BOE No 47, of 23 February 1996, p. 6949):

'Article 23: Residence visas: Types

...

2. Residence visas for family reunification may be granted following a favourable report from the competent administrative authority, to foreign nationals in one of the cases listed in Article 54 of this regulation who request a residence visa in order

to join a family member residing in Spain. That report shall be binding as regards the conditions to be fulfilled by the applicant, in accordance with Article 28(1) of this regulation.

...

6. Non-working residence visas may be granted to retired foreign nationals, if they are entitled to a retirement pension or benefits, or to foreign nationals of working age who will not pursue in Spain an activity requiring a work permit or in respect of which the requirement to obtain such a permit is waived.

...

Article 28: Specific documents required for residence visas

1. When applying for a residence visa for family reunification, the sponsor residing in Spain shall ask, before lodging his application, for a report from the administrative authority of the province in which he resides, certifying that he satisfies the conditions laid down in Article 56(5) and (7) of the present regulation, and that he has a residence permit which has already been renewed. A family member falling within one of the categories referred to in Article 54(2) of this regulation shall submit, with the visa application, a copy of the request for the report, registered by that administrative authority, together with the documents certifying the family relationship and, where necessary, legal and financial dependency.

...

6. In the case of an application for a non-working residence visa, a foreign national shall provide documents certifying that he has adequate resources or that he will receive regular income that is sufficient and adequate for him and the members of his family for whom he is responsible. Such resources or regular income must be sufficient to cover accommodation, maintenance and health care for the applicant and the members of his family for whom he is responsible.'

Facts and pre-litigation procedure

12 The present proceedings for failure to fulfil obligations originated from two complaints submitted to the Commission by Community nationals exercising the right of freedom of movement conferred on them by the EC Treaty, whose spouses were refused a residence permit in Spain; the reason given was that they should first have applied for a residence visa at the Spanish consulate in their last country of domicile. The facts giving rise to those complaints took place in 1998 in the case of Ms Weber and in 1999 in the case of Ms Rotte Ventura.

13 On 26 April 1999 the Commission sent a letter in that connection to the Spanish authorities, which replied on 5 July 1999 confirming that a residence visa was a prerequisite of the subsequent procedure for the issue of a residence permit.

14 In accordance with the procedure laid down in the first paragraph of Article 226 EC the Commission, having given the Kingdom of Spain the opportunity to submit its observations, issued a reasoned opinion, by letter of 3 April 2002, calling on that Member State to take the measures necessary to comply with its obligations under Directives 68/360, 73/148, 90/365 and 64/221 within a period of two months from the date of notification of that opinion. Since the Commission was not satisfied by the reply given by the Spanish authorities, it decided to bring the present action.

The action

The first complaint: incompatibility of the Spanish legislation with Directives 68/360, 73/148 and 90/365 as regards the conditions governing the issue of a residence permit in Spain to third country nationals who are members of the family of a Community national who has exercised his right to freedom of movement

Arguments of the parties

15 By its first complaint, the Commission claims that the Kingdom of Spain has infringed the provisions of Directives 68/360, 73/148 and 90/365 by requiring third country nationals who are members of the family of a Community national to obtain a residence visa for the issue of a residence permit.

16 Recalling that the Treaty and secondary Community law guarantee Community nationals the right to freedom of movement, the Commission submits that certain members of the family of those nationals, regardless of their nationality, also enjoy rights derived from Community law.

17 The requirement that those family members obtain a residence visa in order to be issued with a residence permit is not only a limitation on their rights arising from Community rules, but also an indirect restriction on the right to freedom of movement of the Community national himself.

18 The Commission accepts that Member States may demand that third country nationals have an entry visa, but, obtaining that visa must be facilitated where family members of Community citizens are involved and its issue must not entail subjecting those persons to an immigration procedure before they enter the territory of a Member State.

19 According to the Commission, the only precondition that Member States may impose in relation to the right of entry into their territory on beneficiaries of Community law is the production of the documents listed in Article 3 of Directives 68/360 and 73/148. The Commission states that the 'entry visa' that those States may require on entry into their territory is a term which must be construed as being solely a short stay visa of three months.

20 Therefore, it is only when a residence permit is issued, in accordance with Article 2 of Directive 90/365 and Article 6 of Directive 73/148, that third country nationals who are members of the family of a Community national must prove that they satisfy the conditions laid down by Community legislation.

21 It follows, in the Commission's view, that it is contrary to Community legislation and case-law (Case C-459/99 *MRAX* [2002] ECR I-6591) to introduce a system which requires third country nationals to submit to an immigration procedure in order to obtain a residence permit, which is granted principally on the basis of evidence that they are a member of the family of a Community national.

22 The Spanish Government maintains that, in accordance with Article 3(2) of Directives 68/360 and 73/148, where a Community national moves within the

Community and enjoys rights which are conferred on him by the Treaty and directives, the Member States may demand an entry visa or any other equivalent document from members of his family who are not nationals of one of those States.

23 It argues that, in accordance with Articles 4(3) of Directive 68/360 and 6(a) of Directive 73/148, the Member States may require the production of the document on the basis of which the person concerned entered into the national territory.

24 Highlighting the difference between entry visas and residence visas, the Spanish Government contends that Regulation No 539/2001 concerns only short-term visas. Therefore, the Member States have competence as regards the rules governing long-term or residence visas.

25 Lastly, the Spanish Government states that there is no harmonisation at Community level regarding the issue of residence visas to third-country nationals. Since the Council has not adopted measures on immigration policy within the areas covered by Article 63, first paragraph, subparagraph (3)(a) and (b) EC, the Member States remain competent in that respect.

Findings of the Court

26 As a preliminary point, it must be recalled that the Community legislature has recognised the importance of ensuring protection for the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty (Case C-60/00 *Carpenter* [2002] I-6279, paragraph 38, and *MRAX*, paragraph 53).

27 With that in view, Article 1 of Directives 68/360, 73/148 and 90/365 extend the application of Community law concerning entry and residence on the territory of Member States to the spouses of the nationals of those States falling within those provisions, irrespective of their nationality.

28 In that regard, the right of entry into the territory of a Member State granted to a third-country national who is the spouse of a national of a Member State derives from the family relationship alone. Therefore, issue of a residence permit to a third country national who is the spouse of a Member State national is to be regarded not as a measure giving rise to rights but as a measure by a Member State serving to prove the individual position of a national of a third country with regard to provisions of Community law (see *MRAX*, paragraph 74).

29 As regards the procedure for obtaining a residence permit, it must be pointed out that the conditions which may be required by a Member State for the issue of that permit are laid down in Article 4(3)(c), (d) and (e) of Directive 68/360, Article 6 of Directive 73/148 and Article 2 of Directive 90/365.

30 Those conditions are exhaustive in nature (see, to that effect, Case 48/75 *Royer* [1976] ECR 497, paragraph 37; Case C-363/89 *Roux* [1991] ECR I-273, paragraphs 14 and 15; and Case C-376/89 *Giagounidis* [1991] ECR I-1069, paragraph 21).

31 In accordance with Article 3(1) of Directives 68/360 and 73/148, Member States are to allow nationals of those States and members of their family who are covered by those directives to enter their territory merely on production of a valid identity card or passport.

32 Nevertheless, in accordance with Article 3(2) of those directives, when a national of a Member State moves within the Community with a view to exercising the rights conferred on him by the Treaty and those directives, the Member States may demand an entry visa or an equivalent document from members of his family who are not nationals of one of those States. The list of third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States was determined by Council Regulation (EC) No 2317/95 of 25 September 1995 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States (OJ 1995 L 234, p. 1), replaced by Council Regulation (EC) No 574/1999 of 12 March 1999 (OJ 1999 L 72, p. 2), itself replaced by Regulation No 539/2001 (*MRAX*, paragraph 56).

33 However, those States must grant family members who are not nationals of one of the Member States every facility for obtaining any necessary visas. In that regard, the Court has held that if the provisions of Directives 68/360 and 73/148 are not to be denied their full effect, a visa must be issued without delay and, as far as possible, at the place of entry into national territory (*MRAX*, paragraph 60).

34 Article 2 of Regulation No 539/2001 defines a visa as an authorisation issued by a Member State which is required with a view to entry for a stay of no more than three months in total.

35 According to the Spanish rules on the conditions for obtaining a residence permit, members of the family of Community nationals who do not have the nationality of a Member State must submit, among other documents, a residence visa for family reunification stamped on their passport.

36 Therefore, those family members are required to carry out the formalities governing residence before entering Spanish territory, failing which the issue of the residence permit will be refused.

37 Moreover, no mention is made among the conditions governing the issue of a residence permit to family members of Community nationals laid down by Directives 68/360, 73/148 and 90/365 of the type of visa demanded by Spanish legislation (see, to that effect, *MRAX*, paragraph 56).

38 Consequently, the residence visa requirement laid down by the Spanish rules in order to obtain a residence permit and, consequently, the refusal to issue such a permit to a third-country national who is a member of the family of a Community national, on the ground that he or she should first have applied for a residence visa at the Spanish consulate in their last place of domicile thus constitutes a measure contrary to the provisions of Directives 68/360, 73/148 and 90/365.

39 It follows from the foregoing that the Commission's first complaint is well founded.

Second complaint: infringement of Directive 64/221

Arguments of the parties

40 By its second complaint, the Commission claims that, in accordance with the general scheme of the Community system for the issue of residence permits and, in

particular, in the light of Article 5 of Directive 64/221, a Member State must take a decision on the residence permit as soon as possible and in any event not later than six months from the date on which the application was submitted.

41 While it acknowledges that the Spanish legal provisions comply with Directive 64/221 as regards the time-limits laid down for the issue of residence permits, the Commission complains that the Kingdom of Spain did not comply with the time-limit fixed in Article 5 of that directive in the specific case of Ms Rotte Ventura, who received her residence permit only after a procedure lasting 10 months.

42 The Spanish authorities take the view that the Commission cannot complain, on the basis of an isolated case, that the Kingdom of Spain has failed to comply generally with the Community rules, particularly when the person concerned was able to reside in its territory while waiting for the residence permit to be issued.

Findings of the Court

43 As a preliminary point it must be recalled that the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 10 EC to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States (Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 12).

44 The Court has already held that the Commission may ask the Court to find that, in not having achieved, in a specific case, the result intended by a directive, a Member State has failed to fulfil its obligations (Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I-3609, paragraph 30).

45 It must be pointed out that under Article 5(1) of Directive 64/221 the Member State must take a decision on whether to grant a residence permit as soon as possible and in any event not later than six months from the date on which the application was submitted.

46 In this case it is common ground that Ms Rotte Ventura, a third-country national and the wife of a Community national who has exercised his right to freedom of movement, obtained her residence permit only after a 10-month procedure contrary to the requirements of that directive.

47 It is of little importance in that regard that the applicant may provisionally reside in the national territory while awaiting the decision concerning the grant or refusal of the residence permit. As the Advocate General stated, in point 63 of her Opinion, the question whether the fact that the time-limit is exceeded constitutes an obstacle to taking up residence or exercising an activity is irrelevant.

48 Accordingly, the Commission's second complaint is well founded.

49 In the light of all the above considerations it must be held that:

— by failing to transpose correctly into its national law Directives 68/360, 73/148 and 90/365, in particular, by requiring third-country nationals who are members

of the family of a Community national who has exercised his right to freedom of movement to obtain a residence visa for the issue of a residence permit and,

— by failing, in breach of the provisions of Directive 64/221, to issue a residence permit as soon as possible and in any event not later than six months from the date on which the application for that permit was submitted,

the Kingdom of Spain has failed to fulfil its obligations under those directives.

Costs

50 Article 69(2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Spain has been unsuccessful, the Kingdom of Spain must be ordered to pay the costs.

On those grounds the Court (Second Chamber) hereby:

(1) — Declares that, by failing to transpose correctly into its national law Council Directive 68/360/EEC of 15 October 1968 on the abolition of

restrictions on movement and residence within the Community for workers of Member States and their families, Council Directive 73/148/EEC 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 and Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, in particular, by requiring third-country nationals who are members of the family of a Community national who has exercised his right to freedom of movement to obtain a residence visa for the issue of a residence permit, and

— **by failing, in breach of the provisions of Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, to issue a residence permit as soon as possible and in any event not later than six months from the date on which the application for that permit was submitted,**

the Kingdom of Spain has failed to fulfil its obligations under those directives;

(2) **Orders the Kingdom of Spain to pay the costs.**

[Signatures]