Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

14 June 2012*

(Regulation (EC) No 562/2006 — Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) — Article 13 — Third-country nationals holding a temporary residence permit — National legislation banning the re-entry of those nationals into the territory of the Member State which issued the temporary residence permit in the absence of a re-entry visa — Meaning of 're-entry visa' — Earlier administrative practice authorising re-entry without re-entry visa — Need for transitional measures — Absence)

In Case C-606/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Conseil d'État (France), made by decision of 15 December 2010, received at the Court on 22 December 2010, in the proceedings

Association nationale d'assistance aux frontières pour les étrangers (ANAFE)

v

Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration,

THE COURT (Second Chamber),

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

Advocate General: V. Trstenjak,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 20 October 2011,

after considering the observations submitted on behalf of:

— Association nationale d'assistance aux frontières pour les étrangers (ANAFE), by J.-É. Malabre, President thereof,

— the French Government, by G. de Bergues, J.-S. Pilczer and B. Beaupère-Manokha, acting as Agents,

— the Belgian Government, by T. Materne and C. Pochet, acting as Agents,

— the European Commission, by D. Maidani and M. Wilderspin, acting as Agents,

* Language of the case: French.

after hearing the Opinion of the Advocate General at the sitting on 29 November 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 5(4)(a) and 13 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1), as amended by Regulation (EC) No 81/2009 of the European Parliament and of the Council of 14 January 2009 (OJ 2009 L 35, p. 56) ('Regulation No 562/2006').

2 The reference was made in proceedings between the Association nationale d'assistance aux frontières pour les étrangers ('ANAFE') and the Ministry for the Interior, Overseas Territories, Local and Regional Authorities and Immigration in relation to a circular issued by the Ministry for Immigration, Integration, National Identity and Development Solidarity of 21 September 2009 setting out the conditions of entry into the Schengen area of third-country nationals holding provisional residence authorisations and acknowledgments of receipt of applications for residence permits issued by the French authorities ('the circular of 21 September 2009').

Law

European Union legislation

3 Recitals 1, 2, 3 and 6 of the preamble to Regulation No 562/2006 state:

'(1) The adoption of measures under Article 62(1) of the [EC] Treaty with a view to ensuring the absence of any controls on persons crossing internal borders forms part of the Union's objective of establishing an area without internal borders in which the free movement of persons is ensured, as set out in Article 14 of the Treaty.

(2) In accordance with Article 61 of the Treaty, the creation of an area in which persons may move freely is to be flanked by other measures. The common policy on the crossing of external borders, as provided for by Article 62(2) of the Treaty, is such a measure.

(3) The adoption of common measures on the crossing of internal borders by persons and border control at external borders should reflect the Schengen *acquis* incorporated in the European Union framework, and in particular the relevant provisions 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 [(OJ 2000 L 239, p. 19, "the Schengen Agreement") signed at Schengen (Luxembourg) on 19 June 1990 ("the Schengen Convention")] and the Common Manual [external borders (OJ 2002 C 313, p. 97)].

...

(6) Border control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control. Border control should help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations.'

4 Article 2 of Regulation No 562/2006 is worded as follows:

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

…

(15) “residence permit” means:

(a) all residence permits issued by the Member States according to the uniform format laid down by Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals [(OJ 2002 L 157, p. 1)];

(b) all other documents issued by a Member State to third-country nationals authorising a stay in, or re-entry into, its territory, with the exception of temporary permits issued pending examination of a first application for a residence permit as referred to in point (a) or an application for asylum;

…’

5 Article 3 of Regulation No 562/2006, headed ‘Scope’, states:

‘This Regulation shall apply to any person crossing the internal or external borders of Member States, without prejudice to:

(a) the rights of persons enjoying the Community right of free movement;

(b) the rights of refugees and persons requesting international protection, in particular as regards non-refoulement.’

6 Under Article 5 of that regulation, relating to entry conditions for third-country nationals:

‘1. For stays not exceeding three months per six-month period, the entry conditions for third-country nationals shall be the following:

(a) they are in possession of a valid travel document or documents authorising them to cross the border;

(b) they are in possession of a valid visa, if required pursuant to 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)], except where they hold a valid residence permit;

(c) they justify the purpose and conditions of the intended stay, and they have sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin or transit to a third country into which they are certain to be admitted, or are in a position to acquire such means lawfully;

(d) they are not persons for whom an alert has been issued in the [Schengen Information System (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.

…

4. By way of derogation from paragraph 1,

(a) third-country nationals who do not fulfil all the conditions laid down in paragraph 1 but hold a residence permit or a re-entry visa issued by one of the Member States or, where required, both documents, shall be authorised to enter the territories of the other Member States for transit purposes so that they may reach the territory of the Member State which issued the residence permit or re-entry visa, unless their names are on the national list of alerts of the Member State whose external borders they are seeking to cross and the alert is accompanied by instructions to refuse entry or transit;

(b) third-country nationals who fulfil the conditions laid down in paragraph 1, except for that laid down in point (b), and who present themselves at the border may be authorised to enter the territories of the Member States, if a visa is issued at the border in accordance with Council Regulation (EC) No 415/2003 of 27 February 2003 on the issue of visas at the border, including the issue of such visas to seamen in transit [(OJ 2003 L 64, p. 1)].

...

(c) third-country nationals who do not fulfil one or more of the conditions laid down in paragraph 1 may be authorised by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations. Where the third-country national concerned is the subject of an alert as referred to in paragraph 1(d), the Member State authorising him or her to enter its territory shall inform the other Member States accordingly.'

7 Article 13(1) of Regulation No 562/2006, headed 'Refusal of entry', provides:

'A third-country national who does not fulfil all the entry conditions laid down in Article 5(1) and does not belong to the categories of persons referred to in Article 5(4) shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.'

8 Under Article 40 of Regulation No 562/2006, that regulation is binding in its entirety and directly applicable in the Member States, and entered into force on 13 October 2006.

9 Article 2 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), headed 'Definitions' provides:

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

...

(2) "visa" means an authorisation issued by a Member State with a view to:

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

(b) transit through the international transit areas of airports of the Member States;

...

(4) "visa with limited territorial validity" means a visa valid for the territory of one or more Member States but not all Member States;

...'

10 Under Article 25(1) to (3) of Regulation (EC) No 810/2009, headed 'Issuing of a visa with limited territorial validity':

'1. A visa with limited territorial validity shall be issued exceptionally, in the following cases:

(a) when the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations:

(i) to derogate from the principle that the entry conditions laid down in Article 5(1)(a), (c), (d) and (e) of [Regulation No 562/2006] must be fulfilled,

(ii) to issue a visa despite an objection by the Member State consulted in accordance with Article 22 to the issuing of a uniform visa; or

(iii) to issue a visa for reasons of urgency, although the prior consultation in accordance with Article 22 has not been carried out;

or

(b) when for reasons deemed justified by the consulate, a new visa is issued for a stay during the same six-month period to an applicant who, over this six-month period, has already used a uniform visa or a visa with limited territorial validity allowing for a stay of three months.

2. A visa with limited territorial validity shall be valid for the territory of the issuing Member State. It may exceptionally be valid for the territory of more than one Member State, subject to the consent of each such Member State.

3. If the applicant holds a travel document that is not [sic] recognised by one or more, but not all Member States, a visa valid for the territory of the Member States recognising the travel document shall be issued. If the issuing Member State does not recognise the applicant's travel document, the visa issued shall only be valid for that Member State.'

The French legislation

11 Article L.311-4 of the Code on the entry and residence of foreign nationals and the right of asylum provides:

'Possession of an acknowledgement of receipt of an application for a residence permit or for renewal of a residence permit, an acknowledgement of receipt of an application for asylum or for provisional residence authorisation shall entitle a foreign national to be present in France, without prejudice to the final decision that will be taken with regard to his right of residence. ...'

12 The circular of 21 September 2009 states, inter alia:

'Under [Regulation No 562/2006] ..., pursuant to Articles [5(1)(b)], 7 and 13 thereof, checks must be made that the conditions of entry into the Schengen area of third-country nationals subject to a visa requirement are satisfied. Those conditions are possession of a visa or holding a "valid residence permit".

The definition of residence permit given in Article 2(15) of [Regulation No 562/2006] shows that that concept covers all documents permitting residence in the national territory of a Member State and re-entry into its territory, with the exception of temporary permits issued pending examination of a first application for a permit or pending examination of an application for asylum.

The Conseil d'État has also held ... that a foreign national holding a document permitting residence in France, even temporarily, may leave France and return to it, provided that that permit has not expired, without having to apply for a visa.

If the provisions of [Regulation No 562/2006] and the case-law of the Conseil d'État are read together, the following conclusion can be drawn:

(1) the holder of the following documents may return freely into the Schengen area:

(a) all temporary residence authorisations (with the single exception of residence authorisations issued in connection with examination of an application for asylum);

(b) acknowledgements of receipt of applications for *renewal* of a residence permit.

That information was, in accordance with Article 34 of [Regulation No 562/2006], notified by France to the European Commission so that the other Member States in the Schengen area could be notified.

(2) the holder of the following documents may not return freely into the Schengen area, under the exception stated in Article 2(15) of [Regulation No 562/2006]:

(a) residence authorisations issued in connection with examination of an application for asylum;

(b) acknowledgements of receipt of a *first application* for a residence permit or of an application for asylum.

Third-country nationals subject to a visa requirement and who have left France in possession of either a temporary residence authorisation issued in connection with examination of an application for asylum, or an acknowledgement of receipt of an application issued in the same context, or an acknowledgement of receipt of a first application for a residence permit, therefore cannot re-enter the Schengen area unless they are in possession of a visa.

The rule in this area is the possession of a consular re-entry visa.

That rule does not however preclude the possibility, in certain exceptional circumstances, that the prefectural authority may exercise its discretion in individual situations to issue, for easiness, a prefectural re-entry visa ... The exceptional cases of issue of such a visa may include, on submission of adequate supporting documents, cases of force majeure, business travellers, *stagiaires*, humanitarian cases, students during school or university vacations.

It must however be borne in mind that with the exception of the prefectural re-entry visa issued to foreign children, which was the subject of notification to the European Commission ([*Official Journal of the European Union*] of 1 March 2008 [alien minors]), the prefectural re-entry visa normally authorises the crossing of Schengen area external borders only at a French point of entry.

...'

13 That circular requested that prefects 'call the attention of third-country nationals, where [their] staff put them in possession of a document covered by the exception laid down in Article 2(15) of [Regulation No 562/2006] (acknowledgment of receipt of an application for asylum or of a first application for a residence permit, [temporary residence authorisation] issued pending examination of an application for asylum), to the fact that those documents do not allow re-admission into the Schengen area and that in the event of a departure from French territory, the re-entry of the persons concerned will be subject to their obtaining, in accordance with the ordinary law, a visa from the consular authorities'.

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

14 On 28 September 2009 ANAFE brought an action before the Conseil d'État for the annulment of the circular of 21 September 2009, in so far as it imposed on prefects the requirement, inter alia, to refuse re-entry without a visa into French territory to third-country nationals holding acknowledgements of receipt of first applications for a residence permit and of applications for asylum.

15 In its action, ANAFE maintains that the circular does not confine itself to measures required by Regulation No 562/2006, but supplements the provisions of that regulation. Further, ANAFE argues that the circular is in breach of the principles of legal certainty and the protection of legitimate expectations in that it is immediately applicable and deprives third-country nationals who have left French territory of the right to return to France without having to apply for a visa, as they could legitimately expect to do on the basis of earlier administrative practice.

16 The Conseil d'État observes, first, that the conditions in Article 5 of Regulation No 562/2006 are expressly laid down in respect of entry into the whole territory of the Member States, and not in respect of entry into only the territory of the Member State which issued the temporary residence authorisation for a stay not exceeding three months but, second, that several provisions of the same regulation, including in particular Article 5(4)(c), allow the issue of authorisations of entry limited to the territory of the Member State granting such authorisation.

17 The Conseil d'État then expresses doubts as to whether the prohibition laid down in Article 13 of that regulation also applies where the re-entry into the territory of the Member State which has issued the temporary residence permit does not need either entry, or transit, or stay in the territory of other Member States. If the answer to that question is that the prohibition does apply, the referring court seeks to ascertain under what conditions a re-entry visa may be issued by a Member State to a third-country national, and in particular whether such a visa can restrict entry solely to points of entry into national territory.

18 Lastly, the Conseil d'État asks whether Regulation No 562/2006 excludes any possibility of entry into the territory of Member States in respect of third-country nationals who are holders of only a temporary residence permit issued pending examination of a first application for a residence permit or an application for asylum, contrary to what would have been allowed by the Schengen Convention, in the version prior to its amendment by that regulation, in which case the question arises whether the principles of legal certainty and the protection of legitimate expectations did not require that transitional measures be provided for the benefit of such nationals who had left French territory when they were holders of only a temporary residence permit and who wished to return to France after the entry into force of that regulation.

19 Since the Conseil d'État had doubts as to the interpretation of Regulation No 562/2006 and in particular Articles 13 and 5(4)(a), it decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does Article 13 of [Regulation No 562/2006] apply to re-entry by a third-country national into the territory of a Member State which has issued that person with a temporary residence permit, where re-entry into its territory does not require entry, transit or stay in the territory of the other Member States?

(2) In what circumstances may a Member State issue to third-country nationals a "re-entry visa" within the meaning of Article 5(4)(a) of that regulation? In particular, may such a visa limit entry only to points of entry into the territory of that State?

(3) Since Regulation No 562/2006 excludes all possibility of entry into the territory of the Member States for third-party nationals who hold only a temporary residence permit issued pending examination of a first application for a residence permit or an application for asylum, contrary to what was allowed

under [the Schengen Convention], in the version prior to its amendment by [Regulation No 562/2006], did the principles of legal certainty and protection of legitimate expectations require that transitional measures should be laid down in respect of third-country nationals who left the territory of those States when they were holders of only a temporary residence permit issued pending examination of a first application for a residence permit or an application for asylum, and wished to return there after the entry into force of Regulation No 562/2006?'

Consideration of the questions referred for a preliminary ruling

The first question

20 By its first question, the referring court seeks, in essence, to ascertain whether the rules relating to refusal of entry to third-country nationals laid down in Article 13 of Regulation No 562/2006 are also applicable to third-country nationals subject to a visa requirement who wish to return to the territory of the Member State which issued to them a temporary residence permit where re-entry into the territory of that Member State can be made without entering the territory of other Member States.

21 According to ANAFE, the combined provisions of Articles 5 and 13 of Regulation No 562/2006 should be interpreted as meaning that entry into the territory of a Member State based on a temporary residence permit can be refused only if the third-country national applies for entry for a short stay and if the application is made at the border of a Member State other than that which issued the residence document held by the person concerned.

22 According to the French and Belgian Governments and the Commission, on the other hand, Article 13 of Regulation No 562/2006 also applies to third-country nationals whose re-entry into the territory of the Member State which has issued them with a temporary residence permit does not need either entry, or transit, or residence in the territory of other Member States.

23 Article 1 of Regulation No 562/2006 states that its 'subject-matter and principles' are to develop the European Union as a common area of free movement without internal borders and to establish rules governing border control of persons crossing the external borders of the Member States of the European Union.

24 Recital 6 of the preamble to Regulation No 562/2006 reads: '[b]order control [at Member States' external borders] is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control.'

25 That regulation is part of the more general context of an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime (Article 3(2) TEU). The first sentence of Article 67(2) TFEU states that the Union is to 'ensure the absence of internal border controls for persons and ... frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals'.

26 The system established by the Schengen Agreement is consequently based on compliance with harmonised rules for external border controls and, in the present case, on strict compliance with the conditions of entry of third-country nationals into the territory of the States which are party to that agreement, as established by Regulation No 562/2006. Each Member State whose territory is part of the Schengen area must have confidence that the controls carried out by every other State in the Schengen area are effective and stringent. Those controls are facilitated by a body of rules which authorise, inter alia, the recognition of visas and other short-stay residence permits.

27 Article 5 of Regulation No 562/2006 governs the conditions of entry of third-country nationals. It is clear from the provisions of Article 5(1)(b) and (4)(a) that the possession of a residence permit issued by a Member State to a third-country national enables that person to enter and move freely in the Schengen area, to leave that area and to return to it without being required to obtain a visa.

28 It must be observed that the concept of residence permit is defined in Article 2(15) of Regulation No 562/2006 and that the temporary residence permit, issued pending examination of a first application for a residence permit or pending examination of an application for asylum, is expressly excluded, under Article 2(15)(b), from the concept of residence permit.

29 Controls at the external borders of the Schengen area and refusal of entry at those external borders are governed by Articles 6 to 13 of Regulation No 562/2006.

30 As regards refusal of entry, the first sentence of Article 13(1) of Regulation No 562/2006 contains the general rule that entry into the Schengen area is to be refused to third-country nationals who do not fulfil all the entry conditions laid down in Article 5(1) of that regulation and who do not belong to one of the categories of persons referred to in Article 5(4) thereof. The second sentence of Article 13(1) states that that provision is to be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.

31 Article 13(2) to (6) of Regulation No 562/2006 set out other rules relating to refusal of entry.

32 Contrary to what is claimed by ANAFE, Article 13 of Regulation No 562/2006 cannot be interpreted as meaning that the entry into the Schengen area of a third-country national presenting a residence document which is not equivalent to a residence permit within the meaning of Article 2(15) of that regulation can be refused only if that entry is sought at the border of a Member State other than that which issued the residence document and is sought for a short stay.

33 In accordance with Article 3 of Regulation No 562/2006, that regulation applies to any person crossing the internal or external borders of a Member State of the Schengen area.

34 It follows that the rules governing refusal of entry laid down in Article 13 of Regulation No 562/2006 apply to any third-country national who wishes to enter a Member State by crossing an external border of the Schengen area.

35 Accordingly, since that regulation dispensed with checks on persons at internal borders and moved border controls to the external borders of the Schengen area, its provisions on refusal of entry at external borders are in principle applicable to all cross-border movements by persons, even if the entry via the Schengen area external borders of one Member State is made only for the purposes of a stay in that Member State.

36 The fact that a third-country national attempts, on the basis of a temporary residence permit issued by one Member State, to return into that Member State by an external border of the Schengen area, but does not intend to seek access to the entire Schengen area, therefore does not preclude the application of Article 13 of Regulation No 562/2006.

37 That interpretation is reinforced by the fact that the second sentence of Article 13(1) of Regulation No 562/2006, which refers to the possibility of entering a Member State under the provisions concerning the right of asylum or the issue of national long-stay visas, mentions, in doing so, types of entry via the Schengen area external borders of one Member State when the intention is that the principal, long-term stay will be solely in that Member State.

38 As regards the length of the stay, that also has no effect on the application of Article 13 of Regulation No 562/2006. That interpretation is confirmed by the reference in the first sentence of Article 13(1) of Regulation No 562/2006 to Article 5 of that regulation. While Article 13 refers to the entry conditions laid

down in Article 5(1), which relate to a stay not exceeding three months per six-month period, Article 13 also refers to the categories of persons referred to in Article 5(4), namely persons who hold a residence permit or a re-entry visa. Holders of a residence permit or a re-entry visa who wish to return to a Member State for a period of more than three months are therefore within the scope of Article 13.

39 It follows from the foregoing that a third-country national who is in possession of a residence document covering temporarily his stay in the territory of a Member State pending a decision on his (or her) application for residence or application for asylum and who leaves the territory of the State where he has made his application for residence or for asylum cannot return there on the strength of his temporary residence document alone. Consequently, where such a national arrives at the Schengen area external borders, the authorities responsible for border controls must, pursuant to Article 13 of Regulation No 562/2006, refuse him entry into that territory unless he is covered by one of the exceptions laid down in Article 5(4) of that regulation.

40 It must in that regard be recalled that, under Article 3(b), Regulation No 562/2006 applies without prejudice to the rights of refugees and persons requesting international protection, in particular as regards non-refoulement. Consequently, as stated by the Commission at the hearing, those controls must be carried out without prejudice to the application of provisions which protect applicants for asylum, in relation to, inter alia, the principle of non-refoulement.

41 Consequently, the answer to the first question is that the rules relating to refusal of entry to third-country nationals laid down in Article 13 of Regulation No 562/2006 are also applicable to third-country nationals subject to the requirement to obtain a visa who wish to return via the Schengen area external borders to the Member State which issued them with a temporary residence permit but not to enter for that purpose the territory of another Member State.

The second question

42 By its second question, the referring court asks under what conditions a Member State may issue a re-entry visa within the meaning of Article 5(4)(a) of Regulation No 562/2006 and, in particular, whether such a re-entry visa may restrict entry into the Schengen area solely to points of entry into the national territory of the Member State which issued it.

43 By that question, the referring court refers to the provision in the circular of 21 September 2009 to the effect that a prefectural re-entry visa as a general rule authorises re-entry only via the French external borders of the Schengen area.

44 According to the Commission, the form of a re-entry visa is governed by rules defined by the Member States. However, since, in accordance with Article 5(4)(a) of Regulation No 562/2006, a re-entry visa must allow re-entry into the Member State which issued it, either directly, or by transit through the territory of other Member States, that visa cannot restrict re-entry into the Schengen area solely to points of entry into the national territory. ANAFE's argument is essentially the same.

45 The French Government, at the hearing, supported the position maintained by the Commission. In the absence of any definition of a re-entry visa in Regulation No 562/2006, the Visa Code or in chapter 3 of the Schengen Convention on visas, the conditions for the issue of a re-entry visa are subject to the national legislation of Member States. Such a visa cannot restrict entry solely to points of entry into the national territory of the Member State which issued the re-entry visa.

46 It must be observed that Article 5(4)(a) of Regulation No 562/2006 guarantees, to third-country nationals who do not fulfil all the conditions for re-entry into the Schengen area but who are holders of a residence permit issued by a Member State or a re-entry visa, a right of entry into the other Member States for transit purposes so that they may reach the territory of the Member State which issued the residence permit or the re-entry visa.

47 The concept of ‘re-entry visa’ is not defined in that regulation.

48 That concept designates a document issued, in a Member State, to a person who is not yet the holder of a residence permit, but who is temporarily authorised to reside in the territory of that State and who, for some reason, has to leave that State. That document authorises the holder to return to the territory of the State which issued it.

49 It can be inferred from the definitions contained in Article 2 of the Visa Code that a re-entry visa within the meaning of Article 5(4)(a) of Regulation No 562/2006 is not a ‘visa’ within the meaning of that Code.

50 Under Article 2(2) of the Visa Code, a visa is an authorisation issued by a Member State with a view to transit through or intended stay in the territory of the Member States, for a duration which does not exceed three months in any six-month period from the date of the first entry in the territory of the Member States, or transit through the international transit areas of airports of the Member States. However, Article 5(4)(a) of Regulation No 562/2006 concerns precisely those cases where a third-country national is not in possession of a visa within the meaning of Article 2(2) of the Visa Code.

51 A ‘re-entry visa’ within the meaning of Article 5(4)(a) of Regulation No 562/2006 is also not a ‘visa with limited territorial validity’ as defined in Article 2(4) of the Visa Code. If the European legislature had intended the re-entry visa to have such scope, it would have used the concept of a visa with limited territorial validity in Article 5(4)(a), since that category of visa was already governed by Article 16 of the Schengen Convention and was explicitly referred to in point 2, headed ‘Definition and types of visa’, in the Common Consular Instructions on visas for the diplomatic missions and consular posts of the Contracting Parties to the Schengen Convention (OJ 2002 C 313, p. 1), adopted as part of the Schengen cooperation.

52 It follows that a re-entry visa within the meaning of Article 5(4)(a) of Regulation No 562/2006 is an authorisation which can be issued by a Member State to a third-country national who does not hold either a residence permit or a visa or a visa with limited territorial validity within the meaning of the Visa Code and which allows him to leave that Member State for a specific purpose before then returning to the same State.

53 While the conditions for the issue of such a national re-entry authorisation are not defined by Regulation No 562/2006, it is however apparent, as maintained by both the French Government and the Commission, from the very wording of Article 5(4)(a) of that regulation, that a re-entry visa must authorise a third-country national to enter for transit purposes the territory of other Member States, so that he may reach the territory of the Member State which issued such a re-entry visa.

54 Accordingly, for the holders of a re-entry visa within the meaning of Article 5(4)(a) of Regulation No 562/2006, entry via the external borders of the Schengen area cannot be limited solely to points of entry to the national territory of the Member State which issued such a visa.

55 The provision of Regulation No 562/2006 which concerns entry limited solely to points of entry to the national territory of a Member State is Article 5(4)(c), under which third-country nationals who do not fulfil one or more of the conditions laid down in Article 5(1) may be authorised by a Member State to enter its territory on humanitarian grounds or grounds of national interest or because of international obligations.

56 Consequently, the answer to the second question is that Article 5(4)(a) of Regulation No 562/2006 must be interpreted as meaning that a Member State which issues to a third-country national a re-entry visa within the meaning of that provision cannot restrict entry into the Schengen area solely to points of entry to its national territory.

The third question

57 By its third question, the referring court seeks, in essence, to ascertain whether the principles of legal certainty and the protection of legitimate expectations required the provision of transitional measures for the benefit of third-country nationals who had left the territory of a Member State when they were holders only of a temporary residence permit issued pending examination of a first application for a residence permit or an application for asylum and who wanted to return to that territory after the entry into force of Regulation No 562/2006.

58 That question arises because, as is clear from the answer to the first question, Regulation No 562/2006 prohibits the re-entry into the territory of the Member States of third-country nationals who are subject to a visa requirement and who hold only a temporary residence permit issued pending examination of a first application for a residence permit or an application for asylum.

59 The order for reference states that, before the adoption of the circular of 21 September 2009, an administrative practice had developed in France whereby third-country nationals subject to a visa requirement who held only a temporary residence permit issued pending examination of a first application for a residence permit or an application for asylum could leave the national territory and thereafter return to it via the Schengen area external borders provided that that document had not expired. The aim of that circular was to put an end to that practice, but it did not provide for any transition period, so that third-country nationals subject to a visa requirement who had left French territory with such a temporary residence permit before the adoption of the circular could no longer return into the Schengen area unless they obtained a visa or other document giving them the right to enter that territory.

60 The French Government considers that the principles of legal certainty and the protection of legitimate expectations did not require the provision of transitional measures for the benefit of third-country nationals who left the territory of a Member State when they were holders only of a temporary residence permit and who wished to return to that territory after the entry into force of Regulation No 562/2006.

61 The Belgian Government and the Commission maintain that Regulation No 562/2006 did not essentially alter the provisions of European Union law relating to the entry of third-country nationals who hold only a temporary residence permit issued pending examination of a first application for a residence permit or an application for asylum. The Schengen Convention never permitted the crossing of the Schengen area external borders or free movement within the Schengen area by means of a temporary residence permit issued pending examination of a first application for a residence permit or an application for asylum. The entry into force of that regulation therefore changed nothing in that regard. According to the Commission, it is clear that the problems associated with the interpretation of European Union law before the adoption of the circular of 21 September 2009 and/or the application of that circular must be resolved in the light of the rules of national law.

62 In order to answer the third question, it must first be stated that the prohibition on re-entry established in that circular is in accordance with the obligations imposed on Member States by Regulation No 562/2006.

63 As is already clear from paragraphs 27 and 28 of this judgment, it follows from the combined provisions of Article 5(1), Article 2(15)(b) and Article 5(4) of Regulation No 562/2006 that a temporary residence permit issued pending examination of a first application for a residence permit or an application for asylum cannot be used to enter the Schengen area.

64 The circular of 21 September 2009, consequently, serves to make clear that third-country nationals subject to a visa requirement who have left French territory while being holders of such a temporary residence permit cannot expect to be guaranteed free re-entry into France via the Schengen area

external borders. Since, in accordance with the first paragraph of Article 40 of Regulation No 562/2006, that regulation entered into force on 13 October 2006, that circular clarifies the state of the law in France as from that date.

65 Next, having regard to the wording of the third question, it must be observed, as regards the provisions applicable to the main proceedings, that Regulation No 562/2006 made no change as compared with the provisions of the Schengen Convention.

66 In particular, as stated by the French and Belgian Governments and by the Commission, temporary residence permits were previously excluded from the concept of 'residence permit' under Article 1 of the Schengen Convention.

67 Lastly, in the same way, Article 1(2)(a)(ii) of Regulation No 1030/2002 excludes from the concept of residence permits permits issued pending examination of an application for a residence permit or for asylum.

68 As stated by the Commission in its written pleadings, the reason for that exclusion is because the issue of a temporary residence permit or temporary residence authorisation is an indication that it has not yet been determined whether the conditions for entry into the territory of the Schengen area or for the grant of refugee status have been met and, accordingly, the holders of such documents are not authorised to move freely in that area and are not exempt from a visa requirement in the event of re-entry into the Schengen area.

69 It must also be stated that Regulation No 562/2006 does not mean that it is wholly impossible for the holder of a temporary residence permit issued in connection with an application for asylum or a first application for a residence permit to return directly into the territory of the Member State which issued that document to him. Such a possibility exists provided that the conditions laid down in Article 5(4)(a) of that regulation are satisfied.

70 As stated by the Advocate General in point 55 of her Opinion, the fact that third-country nationals subject to a visa requirement have left French territory by an external border of the Schengen area shortly before the adoption of the circular of 21 September 2009 while believing that they might return to France without a visa, in accordance with an earlier administrative practice which was contrary to European Union law, cannot validly justify calling into question the relevant provisions of Regulation No 562/2006 in the light of the principles of legal certainty and the protection of legitimate expectations.

71 In that regard, it must be borne in mind, first, that, in accordance with the second paragraph of Article 288 TFEU, a regulation is binding in its entirety and is directly applicable in all Member States.

72 The direct application of a regulation means that its entry into force and its application in favour of or against those subject to it are independent of any measure of reception into national law (see, inter alia, Case 34/73 *Variola* [1973] ECR 981, paragraph 10, and Joined Cases C-4/10 and C-27/10 *Bureau national interprofessionnel du Cognac* [2011] ECR I-6131, paragraph 66), unless the regulation in question leaves it to the Member States themselves to adopt the necessary legislative, regulatory, administrative and financial measures to ensure the effective application of the provisions of that regulation (see, to that effect, Case 31/78 *Bussone* [1978] ECR 2429, paragraph 32).

73 Further, in accordance with the principle of the precedence of European Union law, provisions of the FEU Treaty and directly applicable measures of the institutions have the effect, in their relations with the internal law of the Member States, merely by entering into force, of rendering automatically inapplicable any conflicting provision of national law (Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 17; Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 18, and Case C-409/06 *Winner Wetten* [2010] ECR I-8015, paragraph 53).

74 In accordance with settled case-law, a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation (see, inter alia, *Simmenthal*, paragraphs 21 to 24, and Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 61).

75 The Court has also stated that, first, all administrative bodies, including decentralised authorities, are subject to that obligation as to primacy, and individuals may therefore rely on such provisions of European Union law against them and, secondly, provisions of national law which conflict with such provisions of European Union law may be legislative or administrative (see Case C-224/97 *Ciola* [1999] ECR I-2517, paragraphs 30 and 31 and case-law cited).

76 It must next be recalled that the principle of legal certainty, which constitutes a general principle of European Union law, requires that European Union legislation be clear and precise, and that its application be foreseeable for all interested parties (order of 8 November 2007 in Case C-421/06 *Fratelli Martini and Cargill*, paragraph 56; to the same effect, see Case C-194/09 P *Alcoa Trasformazioni* v *Commission* [2011] ECR I-6311, paragraph 71 and case-law cited).

77 The provisions of Regulation No 562/2006 relating to the conditions of re-entry into a Member State of the Schengen area on the basis of a temporary residence permit issued pending examination of a first application for a residence permit or an application for asylum satisfy the requirements of clarity and foreseeability. As stated in paragraph 28 of this judgment, it is clear from the combined provisions of Article 5(1), Article 2(15)(b) and Article 5(4) of Regulation No 562/2006 that such a temporary residence permit does not bestow a right of re-entry into the Schengen area. Further, it should be stated that Regulation No 562/2006 was published in the *Official Journal of the European Union* on 13 April 2006, in other words six months before the date of its entry into force, and accordingly the foreseeability of the rules to become applicable from that date was ensured.

78 As regards the principle of the protection of legitimate expectations, it should be observed that that principle may be invoked as against European Union legislation only to the extent that the Union itself, that is an institution of the Union, has previously created a situation which can give rise to a legitimate expectation (see, to that effect, Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20, and Case C-14/01 *Niemann* [2003] ECR I-2279, paragraph 56).

79 In the main proceedings, it is clear that no such prior conduct of the European Union institutions allowed the creation of a legitimate expectation on the part of third-country nationals that they would be able to return into the Schengen area without having obtained a re-entry visa. At the very least, if it were accepted that such an expectation was legitimately held by those nationals subject to a visa requirement and holding temporary residence permits which did not allow such re-entry, the cause would be the existence of a French administrative practice contrary to European Union law.

80 A national administrative practice of that kind which is contrary to European Union law cannot be the basis of a legitimate expectation of third-country nationals that it will be possible to continue to take advantage of that practice.

81 In accordance with the Court's settled case-law, a practice of a Member State which is contrary to European Union rules cannot give rise to a legitimate expectation on the part of an individual who benefits from that situation (see, to that effect Case 5/82 *Maizena* [1982] ECR 4601, paragraph 22, and Joined Cases C-31/91 to C-44/91 *Lageder and Others* [1993] ECR I-1761, paragraph 34). It follows that the conduct of a national authority responsible for applying European Union law, which acts in breach of that law, cannot give rise to a legitimate expectation on the part of an individual of beneficial treatment contrary to European Union law (see Case C-153/10 *Sony Supply Chain Solutions (Europe)* [2011] ECR I-2775, paragraph 47 and case-law cited).

82 It follows from the foregoing that consideration of the third question has not disclosed any factors to justify a finding of breach of the principles of legal certainty and protection of legitimate expectations in the context of the entry into force of Regulation No 562/2006.

83 The answer to the third question is that the principles of legal certainty and protection of legitimate expectations did not require the provision of transitional measures for the benefit of third-country nationals who had left the territory of a Member State when they were holders of temporary residence permits issued pending examination of a first application for a residence permit or an application for asylum and wanted to return to that territory after the entry into force of Regulation No 562/2006.

Costs

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

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

1. **The rules relating to the refusal of entry to third-country nationals laid down in Article 13 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), as amended by Regulation (EC) No 81/2009 of the European Parliament and of the Council of 14 January 2009, are also applicable to third-country nationals subject to the requirement to obtain a visa who wish to return via the Schengen area external borders to the Member State which issued them with a temporary residence permit but not to enter for that purpose the territory of another Member State.**

2. **Article 5(4)(a) of Regulation No 562/2006, as amended by Regulation No 81/2009, must be interpreted as meaning that a Member State which issues to a third-country national a re-entry visa within the meaning of that provision cannot limit entry into the Schengen area solely to points of entry to its national territory.**

3. **The principles of legal certainty and protection of legitimate expectations did not require the provision of transitional measures for the benefit of third-country nationals who had left the territory of a Member State when they were holders of temporary residence permits issued pending examination of a first application for a residence permit or an application for asylum and wanted to return to that territory after the entry into force of Regulation No 562/2006, as amended by Regulation No 81/2009.**

[Signatures]