

JUDGMENT OF THE COURT (Fourth Chamber)

17 November 2011 *

In Case C-430/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Administrativen sad Sofia-grad (Bulgaria), made by decision of 11 August 2010, received at the Court on 2 September 2010, in the proceedings

Hristo Gaydarov

v

Direktor na Glavna direktsia 'Ohranitelna politsia' pri Ministerstvo na vatreshnite raboti,

THE COURT (Fourth Chamber),

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

Advocate General: P. Mengozzi,
Registrar: L. Hewlett, Principal Administrator,

* Language of the case: Bulgarian.

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the European Commission, by D. Maidani and V. Savov, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of, first, Article 27(1) and (2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77; corrigenda at OJ 2004 L 229 p. 35, OJ 2005 L 30 p. 27 and OJ 2005 L 197, p. 34), secondly, 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, 'Regulation No 562/2006') and, thirdly, 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), signed at Schengen (Luxembourg) on 19 June 1990 ('the SIC').

- 2 The reference has been made in proceedings between Mr Gaydarov, a Bulgarian national, and the Direktor na Glavna direktsia 'Ohranitelna politsia' pri Ministerstvo na vatreshnite raboti (Director of the 'Security Police' Directorate at the Bulgarian Ministry for the Interior, 'the Director of Police'), in relation to a measure adopted by the Director of Police whereby Mr Gaydarov was prohibited from leaving the country and the issue to him of a passport or other similar document was prohibited.

Legal context

European Union law

Directive 2004/38

- 3 Article 3(1) of Directive 2004/38 provides that that directive is to apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members.

4 Article 4(1) and (3) of that directive provide:

‘1. Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.

...

3. Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality.’

5 Article 27(1) to (3) of that directive provides:

‘1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.'

Regulation No 562/2006

6 Recital 5 in the preamble to Regulation No 562/2006 states:

'The definition of common rules on the movement of persons across borders neither calls into question nor affects the rights of free movement enjoyed by Union citizens and members of their families and by third-country nationals and members of their families who, under agreements between the Community and its Member States, on the one hand, and those third countries, on the other hand, enjoy rights of free movement equivalent to those of Union citizens.'

7 Recital 20 in the preamble to that regulation states:

‘This Regulation respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. It should be applied in accordance with the Member States’ obligations as regards international protection and non-refoulement.’

8 Article 3 of Regulation No 562/2006 provides:

‘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;

...’

9 Under Article 7(6) of that regulation:

‘Checks on a person enjoying the Community right on free movement shall be carried out in accordance with Directive 2004/38/EC.’

The SIC

¹⁰ Article 71 of the SIC provides:

‘1. The Contracting Parties undertake as regards the direct or indirect sale of narcotic drugs and psychotropic substances of whatever type, including cannabis, and the possession of such products and substances for sale or export, to adopt in accordance with the existing United Nations Conventions ..., all necessary measures to prevent and punish the illicit trafficking in narcotic drugs and psychotropic substances.

2. The Contracting Parties undertake to prevent and punish by administrative and penal measures the illegal export of narcotic drugs and psychotropic substances, including cannabis, as well as the sale, supply and handing over of such products and substances....

...

5. The Contracting Parties shall do their utmost to prevent and combat the negative effects arising from the illicit demand for narcotic drugs and psychotropic substances of whatever type, including cannabis. Each Contracting Party shall be responsible for the measures adopted to this end.’

National legislation

The Constitution of the Republic of Bulgaria

- ¹¹ Under Article 35(1) of the Constitution of the Republic of Bulgaria:

‘Everyone shall be free to choose his place of residence and shall have the right to freedom of movement within national territory and to leave that territory. That right may be restricted only by virtue of law for the protection of national security, public health and the rights and freedoms of other citizens.’

Law on Bulgarian identity documents

- ¹² Article 23(2) and (3) of the Law on Bulgarian identity documents (*Zakon za balgarskite litschni dokumenti*, DV No 93 of 11 August 1998), as amended in 2006 (DV No 105) (‘the ZBLD’), provides:

‘2. Every Bulgarian citizen shall have the right to leave and return to the country with an identity card via the internal borders of the Republic of Bulgaria with the Member States of the European Union and in the situations provided for under international agreements.

3. No restrictions shall be placed on the right under paragraph 2 other than such as are in accordance with law and have as their objective the protection of national security, public policy, public health or the rights and freedoms of other citizens.’

13 Under Article 76 of the ZBLD:

‘Permission to leave the country shall not be granted, and a passport and comparable documents shall not be issued, to:

...

5. persons who, while residing in another State, have committed an offence contrary to the laws of that State, for a period of two years from the date of receipt of the official letter from the Ministry of Foreign Affairs or documents concerning deportation or expulsion, specifying the offence committed, issued by the competent authorities of the State concerned.’

14 The ZBLD was amended by a law, published in the Official Journal No 82/2009 of the Republic of Bulgaria, which entered into force on 1 January 2010. That law repealed Article 76(5) and provided, according to the referring court, that measures which had been adopted previously on the basis of that provision would cease to be valid three months after its entry into force.

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

15 Mr Gaydarov, a Bulgarian national, was convicted in Serbia of the offence of unlawful transport of narcotic drugs and sentenced on 2 October 2008 to a period of nine months imprisonment.

- 16 On 6 November 2008 the Bulgarian authorities were informed, through diplomatic channels, of that conviction.
- 17 On the basis of that information the Director of Police adopted on 13 November 2008, in accordance with Article 76(5) of the ZBLD, a measure prohibiting Mr Gaydarov from leaving the country and the issue to him of a passport or other comparable document.
- 18 Notice of that decision was served on Mr Gaydarov on 16 September 2009, when he had served his sentence of imprisonment in Serbia and had returned to Bulgaria.
- 19 Mr Gaydarov challenged that decision before the referring court and claimed, according to that court, that he had previously been convicted in another country and that the Bulgarian legislation was not applicable to him. The Director of Police stated, for his part, that he had complied with the provisions of Article 76(5) of the ZBLD.
- 20 According to the referring court, exercise of that power falls within the discretion of the competent administrative authority. Judicial review of the decision is confined to verifying that the official letter or documents referred to in Article 76(5) exist. The Supreme Administrative Court has recently confirmed that case-law in relation to an appeal against a similar decision taken in respect of a Bulgarian national convicted in Spain (Judgment No 5013 of 16 April 2010).
- 21 The referring court questions the compatibility of the provision of the ZBLD at issue with European Union law which, in accordance with Article 20 TFEU and Article 21 TFEU, Article 45(1) of the Charter of Fundamental Rights of the European Union and

Directive 2004/38, establishes the right of citizens of the Union – a status enjoyed by Mr Gaydarov – to move and reside freely within the territory of the Member States. The referring court none the less observes that, under Article 27 of that directive, Member States may restrict the freedom of movement of Union citizens on grounds of public policy or public health. Further, the referring court notes that a prohibition on leaving the territory such as the measure at issue in the main proceedings is based on the obligation imposed on States by Article 71 of the SIC to adopt measures of control at their external borders to combat the unlawful transport and use of narcotic drugs. Lastly, the referring court questions whether the criteria to be found in Article 27 of Directive 2004/38 are applicable to a Bulgarian national, where the directive was transposed into Bulgarian law only in so far as it concerns the issue of identity documents but not in so far as it concerns the freedom, for Bulgarian nationals, to travel to another Member State.

- ²² In those circumstances, the Administrativen sad Sofia-grad (Administrative Court, Sofia) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 27(1) and (2) of Directive 2004/38/EC to be interpreted, under the circumstances of the main proceedings, as being applicable where a national of a Member State is prohibited from leaving the territory of his own State because he has committed a criminal offence involving narcotic drugs in a third country, in so far as the following circumstances also exist:

- the abovementioned provisions of the directive were not expressly transposed in respect of the Member State’s own nationals;

- the grounds given by the national legislature for the legitimate objective justifying a restriction on the freedom of movement of Bulgarian nationals are based on 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, and

 - the administrative measures are applied in connection with Article 71 of [the SIC] and having regard to recitals 5 and 20 in the preamble to Regulation (EC) No 562/2006?
- (2) In the circumstances of the main proceedings, does it follow from the limitations and conditions governing the exercise of the freedom of movement of European Union citizens and from the measures adopted to give them effect under European Union law, including Article 71(1), (2) and (5) of [the SIC] in conjunction with recitals 5 and 20 in the preamble to Regulation No 562/2006, that national legislation is lawful under which a Member State imposes on one of its nationals who has committed a criminal offence involving narcotic drugs the coercive administrative measure of a “prohibition on leaving the country”, if that national was convicted of that offence by a court in a third country?
- (3) In the circumstances of the main proceedings, are the limitations and conditions governing the exercise of the freedom of movement of citizens of the European Union and the measures adopted to give them effect under European Union law, including Article 71(1), (2) and (5) of [the SIC] in conjunction with recitals 5 and 20 in the preamble to Regulation No 562/2006, to be interpreted as meaning that the conviction of a national of a Member State by a court in a third country for acts concerned with narcotic drugs which, under the law of that Member State, are classified as a serious intentional criminal offence, is sufficient ground for holding, on grounds of general and specific prevention, including guaranteeing a higher level of protection of the health of others in accordance with the precautionary principle, that the personal conduct of that national represents a

genuine, present and sufficiently serious threat affecting one of the fundamental interests of society for a period of time which is precisely defined by law and is not connected with the duration of the sentence imposed, but falls within the rehabilitation period?’

Consideration of the questions referred

- 23 By its questions, which should be dealt with together, the referring court asks, in essence, whether European Union law precludes an administrative decision by which a Member State prohibits one of its nationals from leaving its territory on the ground that the person concerned has been convicted by a court of another country of a criminal offence of narcotic drug trafficking.
- 24 It must first of all be noted that, as a Bulgarian national, Mr Gaydarov enjoys the status of a citizen of the Union under Article 20 TFEU and may therefore rely on the rights pertaining to that status, including against his Member State of origin, and in particular the right conferred by Article 21 TFEU to move and reside freely within the territory of the Member States (see, to that effect, *inter alia*, Case C-33/07 *Jipa* [2008] ECR I-5157, paragraph 17, and Case C-434/09 *McCarthy* [2011] ECR I-3375, paragraph 48).
- 25 It must be added, secondly, that the right of freedom of movement includes both the right for citizens of the European Union to enter a Member State other than the one of origin and the right to leave the State of origin. As the Court has already had occasion to state, the fundamental freedoms guaranteed by the EC Treaty would be rendered meaningless if the Member State of origin could, without valid justification,

prohibit its own nationals from leaving its territory in order to enter the territory of another Member State (see *Jipa*, paragraph 18).

- 26 Moreover, Article 4(1) of Directive 2004/38 expressly provides that all Union citizens with a valid identity card or passport have the right to leave the territory of a Member State to travel to another Member State.
- 27 It follows that a situation such as that of Mr Gaydarov, as described in paragraphs 15 to 18 of this judgment, is covered by the right of citizens of the Union to move and reside freely in the Member States and therefore falls within the scope of Directive 2004/38.
- 28 In that regard, it must be observed, as submitted by the European Commission, that it cannot be either the purpose or the effect of Regulation No 562/2006, as is clear from recital 5 and Article 3(a) thereof, to restrict the freedom of movement of Union citizens as provided for by the FEU Treaty. Article 7(6) of that regulation provides moreover that checks on a person enjoying the right of free movement established by European Union law are to be carried out in accordance with Directive 2004/38.
- 29 Thirdly, it is important to bear in mind that the right of free movement of Union citizens is not unconditional but may be subject to the limitations and conditions imposed by the Treaty and by the measures adopted to give it effect (see, *inter alia*, *Jipa*, paragraph 21 and case-law cited).

- 30 In relation to the main proceedings, those limitations and conditions stem, in particular, from Article 27(1) of Directive 2004/38. However, that provision does not allow Member States to restrict the freedom of movement of Union citizens or their family members on grounds other than public policy, public security or public health.
- 31 According to the referring court, the national legislation transposing the directive is not applicable to nationals of the Republic of Bulgaria. However, that fact cannot have the effect of preventing a national court from giving full effect to the rules of European Union law, if necessary by refusing to apply any provision of national legislation which is contrary to European Union law and in particular to Article 27 of Directive 2004/38 (see, to that effect, inter alia, Case C-173/09 *Elchinov* [2010] ECR I-8889, paragraph 31 and case-law cited), given that the provisions of that article, which are unconditional and sufficiently precise, may be relied on by an individual vis-à-vis the Member state of which he is a national (see, by analogy, Case 41/74 *van Duyn* [1974] ECR 1337, paragraphs 9 to 15).
- 32 Lastly, it is clear from settled case-law that, while Member States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another, the fact still remains that, in the European Union context and particularly as justification for a derogation from the fundamental principle of free movement of persons, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union (see, inter alia, *Jipa*, paragraph 23).
- 33 The Court has thus stated that the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (see, inter alia, *Jipa*, paragraph 23 and case-law cited).

- 34 In that context, the derogations from the free movement of persons that are capable of being invoked by a Member State imply in particular, as stated in Article 27(2) of Directive 2004/38, that if measures taken on grounds of public policy or public security are to be justified they must be based exclusively on the personal conduct of the individual concerned and that justifications that are isolated from the particulars of the case in question or that rely on considerations of general prevention cannot be accepted (*Jipa*, paragraph 24). Further, according to the same provision, previous criminal convictions cannot in themselves constitute grounds for automatically taking measures which restrict the exercise of the right of freedom of movement.
- 35 In that regard, while Article 71 of the SIC imposes on the contracting States the obligation to combat trafficking in narcotic drugs, it is neither the purpose nor the effect of the SIC to derogate from the rules established by the Treaty and Directive 2004/38 in relation to the freedom of movement of Union citizens. Article 134 of the SIC states moreover that its provisions are applicable only in so far as they are compatible with European Union law. That rule was reproduced in the Schengen Protocol which, in the third paragraph of its preamble, confirms that the provisions of the Schengen *acquis* are applicable only if and as far as they are compatible with European Union law (Case C-503/03 *Commission v Spain* [2006] ECR I-1097, paragraph 34).
- 36 In the present case, it is clear that the situation which gave rise to the main proceedings, as described by the referring court, does not appear to meet the requirements of Article 27(2) of Directive 2004/38.
- 37 In particular, on the basis of the documents sent to the Court by the referring court, it seems that the sole basis for the decision at issue adopted in respect of the applicant in the main proceedings is the fact that he was convicted of a criminal offence in Serbia, without any specific assessment of the personal conduct of the person concerned.

- 38 It must be added, from that point of view, and in order to give a full reply to the third question of the referring court, that, as follows from what has been said above, the previous criminal conviction of the person concerned is not by itself sufficient to permit the view to be taken, automatically, that he represents a genuine, present and sufficiently serious threat to one of the fundamental interests of society, that being the sole possible justification for a restriction on the rights conferred on him by European Union law.
- 39 It is nevertheless for the referring court to make the necessary findings in this respect, on the basis of the matters of fact and of law justifying, in the main proceedings, the measure adopted by the Director of Police.
- 40 When making such an assessment, the referring court will have also to determine whether that restriction on the right to leave is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it. According to Article 27(2) of Directive 2004/38 and the Court's settled case-law, a measure which restricts the right of freedom of movement may be justified only if it respects the principle of proportionality (see, to that effect, inter alia, *Jipa*, paragraph 29, and case-law cited).
- 41 Lastly, since, according to the referring court's presentation of the then applicable national law and in particular the case-law to the effect that the administrative authority has a discretion in respect of adopting that type of measure and there is no judicial review of the exercise of that discretion, it must be emphasised that the person to whom such a measure is applied must have an effective judicial remedy (see, inter alia, Case 222/84 *Johnston* [1986] ECR 1651, paragraphs 18 and 19; Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 14; and Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paragraph 39). That remedy must permit a review of the legality of the decision at issue as regards matters of both fact and law in the light of European Union law (see, to that effect, Case C-69/10 *Samba Diouf* [2011] ECR I-7151, paragraph 57). In order to ensure that such review by the courts is effective, the interested party must be able to obtain the reasons for the decision taken

in relation to him, either by reading the decision itself or by requesting and obtaining notification of those grounds, without prejudice to the power of the court with jurisdiction to require the authority concerned to provide that information (see, to that effect, *inter alia*, *Heylens*, paragraph 15, and Joined Cases C-372/09 and C-373/09 *Peñarroja Fa* [2011] ECR I-1785, paragraph 63).

- ⁴² The answer to the questions referred is therefore that Article 21 TFEU and Article 27 of Directive 2004/38 do not preclude national legislation that permits the restriction of the right of a national of a Member State to travel to another Member State in particular on the ground that he has been convicted of a criminal offence of narcotic drug trafficking in another State, provided that (i) the personal conduct of that national constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, (ii) the restrictive measure envisaged is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it and (iii) that measure is subject to effective judicial review permitting a determination of its legality as regards matters of fact and law in the light of the requirements of European Union law.

Costs

- ⁴³ 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:

Article 21 TFEU and Article 27 of Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, do not preclude national legislation that permits the restriction of the right of a national of a Member State to travel to another Member State in particular on the ground that he has been convicted of a criminal offence of narcotic drug trafficking in another State, provided that (i) the personal conduct of that national constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, (ii) the restrictive measure envisaged is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it and (iii) that measure is subject to effective judicial review permitting a determination of its legality as regards matters of fact and law in the light of the requirements of European Union law.

[Signatures]