Lēmums lietā 2979/2008/VL - Apgalvojums par nespēju atbilstoši apstrādāt sūdzību par pārkāpumu

Lēmums
Lieta 2979/2008/VL - **Uzsākta {0}** 15/12/2008 - **Lēmums par {0}** 06/05/2010

Sūdzības iesniedzējs ir Zviedrijas valstpiederīgais, kurš kopā ar savu sievu, trešās valsts pilsoni, dzīvo Apvienotajā Karalistē. Viņi devās uz Spāniju, kur viņa sievai atteica ieceļošanu, jo viņai nebija derīga Šengenas vīza. Sūdzības iesniedzēja skatījumā Spānija nebija atbilstoši īstenojusi Direktīvas 2004/38/EK 5. panta 2. punktu par Savienības pilsoņu un viņu ģimenes locekļu tiesībām brīvi pārvietoties un uzturēties dalībvalstu teritorijā. Saskaņā ar šo noteikumu vīza nav nepieciešama, ja attiecīgajai personai ir derīga uzturēšanās atļauja. Sūdzības iesniedzēja sievai šāda atļauja bija. Tomēr saskaņā ar Spānijas tiesību aktiem tiek atzītas tikai tādas uzturēšanās atļaujas, ko izsniegušas dalībvalstis, kuras pilnībā līdzdarbojas Šengenas nolīgumā.

Līdz ar to sūdzības iesniedzējs iesniedza Eiropas Komisijai sūdzību par Spānijas izdarītu pārkāpumu.

Komisijas Tiesiskuma, brīvības un drošības ģenerāldirektorāts (JLS ĢD) savā 2008. gada 17. novembra atbildē apgalvoja, ka Spānija bija "pareizi transponējusi" Direktīvu 2004/38 valsts tiesību aktos.

Pēc tam sūdzības iesniedzējs iesniedza sūdzību Eiropas ombudam, kurš sāka izmeklēšanu.

Viņaprāt, Komisija bija paskaidrojusi, ka ir izdarīta kļūda un ka tās 2008. gada 17. novembra vēstules attiecīgajā daļā vajadzēja būt rakstītam „nepareizi transponēta” nevis „pareizi transponēta". Komisija atzīmēja, ka tā jau bija nosūtījusi vēstuli sūdzības iesniedzējam par šo kļūdu un par to atvainojusies. Tika precizēts, ka tās skatījumā Spānija nebija atbilstoši transponējusi attiecīgo Direktīvas 2004/38 noteikumu.

Atbildē uz vienu no ombuda jautājumiem Komisija paskaidroja, ka tā ir konstatējusi aptuveni 1100 problemātisku jautājumu saistībā ar Direktīvas 2004/38 transponēšanu dalībvalstu tiesību aktos. Tāpēc tā nolēma ar visām dalībvalstīm noorganizēt divpusēju tikšanos, pirms sākt pārkāpumu izmeklēšanas procedūras. Komisija apgalvoja, ka ir gatava sākt pārkāpumu izmeklēšanas procedūras saistībā ar visiem jautājumiem, kas palikuši neatrisināti pēc šādas divpusējas tikšanās.

Ombuds izteicās atzinīgi par faktu, ka Komisija atzina savu kļūdu un atvainojās sūdzības iesniedzējam. Viņš uzskatīja, ka Komisijas pieeja šajā gadījumā bija saprātīga, un secināja, ka nebija pamata tālākai izmeklēšanai. Tāpēc šo lietu slēdza.

Tomēr ombuds lūdza Komisiju viņu informēt par sūdzības iesniedzēja norādītās problēmas tālāko attīstību.

THE BACKGROUND TO THE COMPLAINT

1. The complainant is a Swedish national who, together with his Bolivian wife, resides in the United Kingdom. The complainant and his wife travelled to Spain, where his wife was refused entry and held in a cell overnight to be deported the next day. According to the complainant, the Spanish authorities stated that his wife was not holding a valid Schengen visa and that she did not have sufficient financial resources with her to allow her to enter the country. The complainant emphasised that his wife had a valid residence card as a family member, which had been issued by the United Kingdom under Directive 2004/38/EC. [1] ('Directive 2004/38'). He added that they also had with them a certified copy of a valid marriage certificate. They were told that a valid Schengen visa for the wife could only be issued in Bolivia.

2. On 4 September 2008, the complainant lodged an infringement complaint regarding this incident with the Secretariat-General of the European Commission. On 5 September 2008, his complaint was registered and assigned to the Directorate-General for Justice, Freedom and Security ('DG JLS'). In his letter to the Commission, the complainant put forward that the relevant Spanish rules, namely, Article 4(2) of Real Decreto 240/2007 did not properly transpose Article 5(2) of Directive 2004/38 into Spanish national law. The complainant drew the Commission's attention to the fact that Real Decreto 240/2007 referred only to residence permits issued by Member States which apply the Schengen agreement.

3. The complainant's translation of Article 4(2) of Real Decreto reads as follows:

" *2. Family members entering the country, who are not nationals of a European Union Member State or of another state party to the Agreement on the European Economic Area, must have a valid passport and, in addition, the relevant entry visa where required by Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries, whose nationals must be in possession of a visa when crossing the external borders and those whose nationals are exempt from that requirement. These visas shall be issued free of charge and preference shall be given to processing visas for family members who are accompanying or joining an EU citizen.*

Family members of an EU citizen who produce a valid residence permit issued by one of the States implementing in full the Schengen agreement of 14 June 1985 concerning the gradual abolition of controls at common borders and its implementing rules shall be exempt from the requirement to obtain the entry visa and shall not be required to have their passports stamped when entering or leaving the country. [2] "

4. Article 5(2) of Directive 2004/38 provides as follows:

" *Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.*

Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.
"

5. Article 10 of Directive 2004/38 stipulates that Member States shall issue a residence card to a non-EU family member of a Union citizen once the applicant has presented the necessary documents required by the Directive.

6. Despite being an EU Member State, the United Kingdom does not participate in the Schengen agreement [3] .

7. On 17 October 2008, DG JLS sent a reply to the complainant. In that letter, DG JLS referred to the stipulation contained in Article 5(2) of Directive 2004/38 requiring a third-country national ('TCN') family member of an EU citizen to have an entry visa in accordance with Regulation 539/2001 [4] . It added, however, that TCN family members joining or accompanying an EU citizen in a Member State other than that of his nationality could, pursuant to that same article, be exempted from the requirement to present a visa, if they possessed a valid residence card issued by a Member State, as provided for in Article 10 of the Directive. Furthermore, DG JLS confirmed that the residence card issued by the United Kingdom authorities should have exempted the complainant's wife from the obligation to present a visa in other EU Member States. However, DG JLS took the view that the Real Decreto 240/2007 " *correctly transposes Article 5 Directive 2004/38.* " DG JLS also referred to case-law of the Court of Justice of the European Union, according to which a Member State may not send back a third-country national who is married to a national of a Member State and attempts to enter its territory without being in possession of a valid identity card or, where necessary, visa, where this person is able to prove his or her identity and the conjugal ties. The Commission submitted that the Spanish authorities should thus have given the complainant's wife the chance to prove her identity and her family ties before sending her back. In light of the above, DG JLS suggested that the incident described by the complainant was most likely an isolated case of misapplication of Union law and advised him to turn to SOLVIT and to consider making a claim for damages at the national level.

8. On 18 October 2008, the complainant replied to the Commission's letter of 17 October 2008. He explained that he had not intended to make a complaint about his personal circumstances, but rather to inform the Commission of the incorrect implementation of Article 5(2) of Directive 2004/38 into Spanish law. The complainant pointed out that he knew of other couples who had faced a similar situation and that this was not, therefore, an isolated case. He also informed the

Commission that he was in the process of taking legal action at national level against the Spanish border police. However, he repeated that Spain had not properly transposed the Directive and that consequently Real Decreto 240/2007, by restricting the exemption to residence cards issued in the Schengen area, ruled out the possibility of presenting a valid United Kingdom residence card. The complainant reiterated his request to the Commission that it should examine the correctness of the Spanish transposition of Directive 2004/38.

9. Not having received a reply from the Commission, the complainant submitted a complaint to the European Ombudsman on 5 November 2008.

THE SUBJECT MATTER OF THE INQUIRY

10. In his complaint, the complainant put forward the following two allegations and the following claim:

Allegations:
- *The Commission's DG JLS failed properly to handle his complaint in relation to the incorrect transposition of Article 5(2) of Directive 2004/38/EC by the Kingdom of Spain in Real Decreto 270/2004.*
- *The Commission failed to reply to his second e-mail.*

Claim:
- *The Commission should properly handle his complaint.*

11. The Commission's Code of Good Administrative Behaviour provides that a reply to correspondence needs to be sent within 15 working days. The complainant lodged his complaint on 5 November 2008, namely, before the said deadline had expired as regards his letter of 18 October 2008. The Ombudsman therefore took the view that there were insufficient grounds to include the second allegation in the inquiry and the Commission was asked to comment only on the first allegation and the claim.

THE INQUIRY

12. On 15 December 2008, the Ombudsman opened an inquiry and asked the Commission for an opinion.

13. On 1 April 2009, the Commission sent its opinion, which was forwarded to the complainant for his observations. No such observations were submitted.

14. On 7 September 2009, the Ombudsman asked the Commission to reply to two questions regarding its handling of the case.

15. On 15 December 2009, the Commission sent its reply, which was forwarded to the

complainant for his observations. No such observations were received.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. Allegation of failure properly to handle the complainant's infringement complaint and corresponding claim

Arguments presented to the Ombudsman

16. In its opinion, the Commission referred to its letter of 14 November 2008 in which it replied to the complainant's second e-mail. DG JLS apologised for the misunderstanding that had occurred and clarified its position as regards Spain's transposition of Article 5(2) of Directive 2004/38. It confirmed that Spain did *not* appear to have correctly transposed the said provision, since it only accepted residence cards issued by Member States taking part in the Schengen agreement, despite the fact that the Directive refers to residence cards issued by all Member States. In its letter dated 14 November 2008, DG JLS noted that the information provided by the complainant would be taken into account in the overall examination of compliance of national legislation with Directive 2004/38. The final report on this overall examination was to be presented to the European Parliament and the Council in December 2008.

17. In its opinion, the Commission explained that its reply to the complainant's letter of 17 October 2008 was drafted on the assumption that the complainant wished to complain about the specific incident which had occurred concerning his wife, and that he wanted a practical solution to be found for the situation to which it gave rise. The legal analysis in the Commission's letter pointed to the fact that the complainant's wife should have been exempted from visa requirements, since she held a residence card issued by the UK authorities. However, the paragraph following that analysis contained an unintended mistake, given that the word " *correctly* " should have read " *incorrectly* ".

18. The complainant did not comment on the Commission's opinion.

19. The Ombudsman examined the Commission's opinion and asked it to comment on two questions regarding its handling of the case. As regards procedural aspects, the Ombudsman asked whether the Commission considered that it had complied with the Communication on relations with the complainant in respect of infringements of EU law [5] ('the Communication'). Moreover, the Ombudsman noted that the report on the implementation of Directive 2004/38, which the Commission submitted to the European Parliament and the Council in December 2008 [6] , did not indicate the action the Commission intended to undertake in order to remedy the infringement of the provision in question. He, therefore, asked the Commission to specify what course of action it had taken, or intended to take, concerning the issue raised by the complainant or, if necessary, to explain why it considers that no such action is needed.

20. In its reply, the Commission first reiterated that the information provided by the complainant

was taken into account both in an overall examination of the compliance of national legislation with Directive 2004/38, as well as in its report on the application of the Directive which was adopted on 10 December 2008. The report concluded that five Member States, one of which is Spain, were not providing for the visa exemption for family members holding a residence card issued by another Member State [7] . The Commission emphasised that it had reached this conclusion after considering information from various sources, including individual complaints. One of these complaints was submitted by the complainant.

21. The Commission stressed that it had already been aware of Spain's incorrect transposition of the EU law provision in question before the complainant lodged his complaint in September 2008. His complaint was, therefore, treated as confirming the existence of an administrative practice which was contrary to EU law.

22. Consequently, the Commission did not register the complaint in the central registry of complaints. The Commission acknowledged, however, that it had failed to inform the complainant sufficiently of the reasons for not doing so. On 14 October 2009, the Commission, therefore, sent a letter to the complainant, in which it referred to the findings of the report and the steps it intended to take to ensure Spain's compliance with EU law. In this letter, DG JLS also explained why it had not registered the complainant's infringement complaint by referring to the reasons listed in the Communication. The passage [8] which the Commission quoted provides that correspondence shall not be investigable as a complaint by the Commission, and shall thus not be recorded in the central registry of complaints, if it sets out a grievance with regard to which the Commission has adopted a clear, public and consistent position, which shall be communicated to the complainant.

23. With regard to the Ombudsman's second question, the Commission stressed that it would increase its efforts to ensure that the Directive is correctly transposed and implemented. In this context, the Commission would fully use its powers under Article 226 of the EC Treaty (now Article 258 of the Treaty on the Functioning of the EU) and launch infringement proceedings when necessary. In view of the fact that the Commission had identified approximately 1 100 issues concerning national transposition measures which were considered problematic, it decided to meet all Member States bilaterally before initiating infringement proceedings. It specified that the meeting with the Spanish authorities was envisaged for January 2010 and that Article 5(2) of Directive 2004/39 was one of the issues to be discussed. The Commission stated that it was prepared to launch infringement proceedings regarding all issues which remained unresolved after the bilateral meeting.

24. The Commission concluded by stating that it considered that it had dealt with the complainant's complaint in a reasonable manner.

25. The complainant did not submit any observations on the Commission's further comments.

The Ombudsman's assessment

27. As regards questions of procedure, the Ombudsman notes that the Commission

acknowledged that its approach did not entirely conform with its Communication. According to the fifth of the reasons set out at point 3 of the Communication, a complaint shall not be investigable as an infringement complaint and shall thus not be registered as such if "it sets out a grievance with regard to which the Commission has adopted a clear, public and consistent position, which shall be communicated to the complainant".

28. The Ombudsman is not convinced that such a "clear, public and consistent position" existed on 4 September 2008 when the complainant lodged his complaint with the Commission. In its letter dated 14 October 2009 to the complainant, and in its submissions to the Ombudsman, the Commission referred to the report it adopted on 10 December 2008 in order to show that it had already taken a position on the issue. This report did not, therefore, appear until three months after the complainant initially turned to the Commission.

29. Regard should nevertheless be had to the fact that the complainant did not criticise the way in which the Commission applied its Communication in the present case, but rather the substance of the Commission's approach. The Ombudsman, therefore, considers that there is no further need to deal with the procedural aspects of the case.

30. As regards the substance of the case, the Ombudsman welcomes the fact that the Commission acknowledged the mistake contained in its letter of 17 October 2008, and that it apologised to the complainant. He also appreciates the fact that the Commission dealt with the issue raised by the complainant and that it reached the conclusion that Spain had incorrectly implemented Article 5(2) of Directive 2004/38.

31. When such infringements of Community law are discovered, the Commission, in its role as Guardian of the Treaties, can initiate infringement proceedings against the Member State concerned, which may lead to an action before the Court of Justice.

32. In its reply to the Ombudsman's request for further information, the Commission confirmed that it would fully use its powers under the Treaties and launch infringement proceedings when necessary. The Commission explained, however, that it had identified approximately 1 100 issues concerning national measures transposing Directive 2004/38 which were considered to be problematic, and that it had, therefore, decided to meet all Member States bilaterally before initiating infringement proceedings.

33. The Ombudsman considers the Commission's approach to be clearly reasonable. In these circumstances, he takes the view that there is no need for further inquiries in the present case.

C. Conclusion

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:

The Ombudsman finds that there are no grounds for further inquiries in the present case.

The complainant and the European Commission will be informed of this decision.

The Ombudsman would, however, appreciate it if the Commission could inform him by 30 September 2010 of its follow-up to the issue raised by the complainant.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 6 May 2010

[1] Directive 2004/38/EC of the European Parliament and of the Council 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).

[2] The Real Decreto 240/2007 was published in BOE, 28 February 2007, No 51, p. 8558. The original Spanish text of Article 4(2) of Real Decreto 240/2007 reads as follows:

"2. Los miembros de la familia que no posean la nacionalidad de uno de los Estados miembros de la Unión Europea o de otro Estado parte en el Acuerdo sobre el Espacio Económico Europeo efectuarán su entrada con un pasaporte válido y en vigor, necesitando, además, el correspondiente visado de entrada cuando así lo disponga el Reglamento (CE) 539/2001, de 15 de marzo, por el que se establece la lista de terceros países cuyos nacionales están sometidos a la obligación de visado para cruzar las fronteras exteriores y la lista de terceros países cuyos nacionales están exentos de esa obligación. La expedición de dichos visados será gratuita y su tramitación tendrá carácter preferente cuando acompañen al ciudadano de la Unión o se reúnan con él.

La posesión de la tarjeta de residencia de familiar de ciudadano de la Unión, válida y en vigor, expedida por un Estado que aplica plenamente el Acuerdo de Schengen, de 14 de junio de 1985, relativo a la supresión gradual de los controles en las fronteras comunes, y su normativa de desarrollo, eximirá a dichos miembros de la familia de la obligación de obtener el visado de entrada y, a la presentación de dicha tarjeta, no se requerirá la estampación del sello de entrada o de salida en el pasaporte."

[3] The Schengen area encompasses 24 countries: 22 EU Member States – Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain and Sweden, as well as Norway and Iceland.

[4] 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).

[5] Commission Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law (OJ 2002, C 244, p. 5).

[6] Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2008) 840/3. It can be accessed at http://ec.europa.eu/justice_home/news/intro/doc/com_2008_840_en.pdf [Saite].

[7] Idem, section 3.2, p.5.

[8] Point 3, second paragraph, fifth indent of the Communication.