Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 29 November 2016[1]

Case C-544/15

Sahar Fahimian
v
Federal Republic of Germany

(Request for a preliminary ruling from the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany))

(Area of freedom, security and justice — Directive 2004/114/EC — Article 6(1)(d) — Conditions of admission of third-country nationals for the purposes of studies — Refusal to admit a person — Concept of 'threat to public security' — Member State discretion — Judicial review)

1. Ms Fahimian is an Iranian student who wishes to obtain a visa in Germany in order to study for a doctorate. The German authorities refuse to grant such a visa on the basis that she studied at a university which is listed by the Council of the European Union as an entity close to the Iranian Government and as carrying out research for military purposes. They regard her as a threat to public security.

2. While there is a robust body of case-law on the public security exception in the domain of the internal market freedoms and EU citizenship, the same cannot be said of public security conditions in the area of EU immigration policy.

3. The questions raised by this case, which is the second one on the interpretation of a provision of Council Directive 2004/114/EC,[2] go to the heart of EU immigration policy. It will be for the Court to determine the margin of discretion available to the authorities of a Member State in this context, as well as the degree of judicial review. In doing so, the Court should take into account the different objectives of the internal market and immigration policy.

1 — Original language: English.

2 — Directive of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (OJ 2004 L 375, p. 12).

I – **Legal framework**

A –*EU law*

1. Directive 2004/114

4. Article 1 of Directive 2004/114 ('the Directive'), headed 'Subject matter', reads as follows:

'The purpose of this Directive is to determine:

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

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

5. Pursuant to its Article 3(1) ('Scope'), the Directive is to apply to 'third-country nationals who apply to be admitted to the territory of a Member State for the purpose of studies'.

6. Chapter II of Directive 2004/114 consists of Articles 5 to 11 and deals with 'Conditions of admission'.

7. The 'Principle', as contained in Article 5, is that 'the admission of a third-country national under this Directive shall be subject to the verification of documentary evidence showing that he/she meets the conditions laid down in Article 6 and in whichever of Articles 7 to 11 applies to the relevant category'.

8. Article 6 of Directive 2004/114, headed 'General conditions' reads as follows:

'1. A third-country national who applies to be admitted for the purposes set out in Articles 7 to 11 shall:

(a) present a valid travel document as determined by national legislation. Member States may require the period of validity of the travel document to cover at least the duration of the planned stay;

(b) if he/she is a minor under the national legislation of the host Member State, present a parental authorisation for the planned stay;

(c) have sickness insurance in respect of all risks normally covered for its own nationals in the Member State concerned;

(d) not be regarded as a threat to public policy, public security or public health;

(e) provide proof, if the Member State so requests, that he/she has paid the fee for processing the application on the basis of Article 20.

2. Member States shall facilitate the admission procedure for the third-country nationals covered by Articles 7 to 11 who participate in Community programmes enhancing mobility towards or within the Community.'

9. Article 18 on 'Procedural guarantees and transparency', located in Chapter V of Directive 2004/114 ('Procedure and Transparency') states in its fourth paragraph that 'where an application is rejected or a residence permit issued in accordance with this Directive is withdrawn, the person concerned shall have the right to mount a legal challenge before the authorities of the Member State concerned'.

2. Regulation (EU) No 267/2012 and Implementing Regulation (EU) No 1202/2014

10. According to Article 23(2)(d) of Regulation (EU) No 267/2012,[3] 'all funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex IX shall be frozen. Annex IX shall include the natural and legal persons, entities and bodies who, in accordance with Article 20(1)(b) and (c) of Council Decision 2010/413/CFSP, have been identified as … being other persons, entities or bodies that provide support, such as material, logistical or financial support, to the Government of Iran and entities owned or controlled by them, or persons and entities associated with them'.

11. Council Implementing Regulation (EU) No 1202/2014[4] lists in its Annex under I.I. persons and entities 'involved in nuclear or ballistic missile activities and persons and entities providing support to the Government of Iran'.[5] In point 161 of the Annex it is stipulated as follows:

'Sharif University of Technology (SUT) has a number of cooperation agreements with Iranian Government organisations which are designated by the UN and/or the EU and which operate in military or military-related fields, particularly in the field of ballistic missile production and procurement. This includes: an agreement with the EU-designated Aerospace Industries Organisation for inter alia the production of satellites; cooperating with the Iranian Ministry of Defence and the Iranian Revolutionary Guards Corps (IRGC) on smart boat competitions; a broader agreement with the IRGC Air Force which covers developing and strengthening the University's relations, organisational and strategic cooperation;

SUT is part of a 6-university agreement which supports the Government of Iran through defence-related research; and SUT teaches graduate courses in unmanned aerial vehicle (UAV) engineering which were designed by the Ministry of Science among others. Taken together, these show a significant record of engagement with the Government of Iran in military or military-related fields that constitutes support to the Government of Iran.'

B –*German law*

12. The Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Law on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory),[6] in the version notified on 25 February 2008 (BGBl. 2008 I, p. 162), as most recently amended by Article 1 of the Law of 27 July 2015 (BGBl. 2015 I, p. 1386) deals, inter alia, with a right of entry of third-country nationals into Germany.

3 — Council Regulation of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010 (OJ 2012 L 88, p. 1), as amended by Council Regulation (EU) 2015/1328 of 31 July 2015 (OJ 2015 L 206, p. 20).

4 — Implementing Regulation of 7 November 2014 implementing Regulation No 267/2012 (OJ 2012 L 325, p. 3).

5 — Technically, the persons and entities listed in that Annex are to be inserted in the list set out in Part I of Annex IX to Regulation No 267/2012.

6 — An English version of that law is available at https://www.gesetze-im-internet.de/englisch_aufenthg/englisch_aufenthg.html#p0046.

13. Pursuant to Article 4(1) of that law:

'In order to enter and stay in the federal territory, foreigners shall require a residence permit, in the absence of any provisions to the contrary in the law of the European Union or a statutory instrument and except where a right of residence exists as a result of the agreement of 12 September 1963 establishing an association between the European Economic Community and Turkey (Federal Law Gazette 1964 II, p. 509) (EEC/Turkey Association Agreement). The residence permits shall be granted in the form of

1. a visa pursuant to Section 6(1), No. 1 and (3),

…'

14. Article 6(3) of the same law stipulates:

'A visa for the federal territory (national visa) shall be required for stays of longer duration; this visa shall be issued before the foreigner enters the federal territory. Issuance shall be based on the regulations applying to the residence permit, the EU Blue Card, the settlement permit and the EU long-term residence permit. The duration of lawful stay with a national visa shall be offset against the periods of possession of a residence permit, EU Blue Card, settlement permit or EU long-term residence permit.'

15. Article 16(1) of the said law reads as follows:

'A foreigner may be granted a residence permit for the purpose of studying at a State or State-recognised university or a comparable educational establishment. … The residence permit for study purposes may only be issued where the foreigner has been admitted by the educational establishment concerned; conditional admission is sufficient. Proof of a knowledge of the language in which the course of studies is to be conducted shall not be required where the foreigner's knowledge of the language has already been taken into account in the decision on admission or is to be acquired by means of preparatory measures for the course of study. The period of validity when the residence permit for study purposes is issued for the first time and for each subsequent extension shall be at least one year and should not exceed two years during courses of study and preparatory measures for courses of study; it may be extended where the purpose of residence has not yet been achieved and is achievable within a reasonable period of time.'

II – **Facts, procedure and questions referred**

16. Ms Fahimian, an Iranian national born in 1985, holds a Master of Science degree in the field of information technology from the Sharif University of Technology (SUT) in Tehran. This university specialises in technology, engineering and physics.

17. On 21 November 2012, she applied to the German Embassy in Tehran for a visa to study for a doctorate at the Technical University Darmstadt, Center for Advanced Security Research Darmstadt (CASED), within the framework of the 'Trusted embedded and mobile systems project'. The application was accompanied by a certificate of admission from the university and also by a letter from the managing director of CASED of 14 November 2012. According to that letter, Ms Fahimian 'will do her research in the research area secure things, esp. in the project "Trustworthy Embedded and Mobile Systems" … Her research questions range from security of mobile systems, esp. intrusion detection on SmartPhones to security protocols. Her task will be to find new efficient and effective protections (sic) mechanisms for SmartPhones under the well-known restrictions of restricted power, restricted computing resources, and restricted bandwidth.'

18. Furthermore, CASED offered a doctoral grant for Ms Fahimian amounting to EUR 1 468 per month.

19. By order of 27 May 2013, the German embassy rejected Ms Fahimian's visa application. Her informal appeal ('Remonstrationsverfahren') against this order was without success.

20. On 22 November 2013, Ms Fahimian brought an action against the German Government before the referring court in which she pursues further her request to be issued with a visa for the purpose of studies. She relies on Article 6(1) of Directive 2004/114 for her right of entry. The German Government, for its part, takes the view that she represents a threat to public security within the meaning of Article 6(1)(d) of Directive 2004/114.

21. It is in the context of these proceedings that, by order of 14 October 2015, received at the Court on 19 October 2015, the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) referred the following questions for a preliminary ruling:

'(1) (a) Is Article 6(1)(d) of [Directive 2004/114] to be interpreted as meaning that the competent authorities of the Member States are able to exercise a degree of discretion in examining whether a third-country national who applies to be admitted for the purposes set out in Articles 7 to 11 of that directive is regarded as a threat to public policy, public security or public health, as a result of which discretion the assessment by the authorities may be subject to only limited judicial review?

(1) (b) If Question (1)(a) is answered in the affirmative: What are the legal limits placed on the competent authorities of the Member States when making the assessment that a third-country national who applies to be admitted for the purposes set out in Articles 7 to 11 of [Directive 2004/114] is to be regarded as a threat to public policy, public security or public health, particularly in view of the facts underlying that assessment and their evaluation?

(2) Independently of the answers to Questions (1)(a) and (1)(b): Is Article 6(1)(d) of [Directive 2004/114] to be interpreted as meaning that the Member States are thereby empowered, in a case such as the present, in which a third-country national from Iran, who obtained her university degree from the Sharif University of Technology (Tehran) in Iran, which specialises in technology, engineering and physics, seeks entry for the purpose of taking up doctoral studies in the area of IT-security research within the framework of the "Trusted Embedded and Mobile Systems" project, in particular the development of effective security mechanisms for smartphones, to deny entry to their territory, stating as grounds for this refusal that it could not be ruled out that the skills acquired in connection with the research project might be misused in Iran, for instance for the acquisition of sensitive information in Western countries for the purpose of internal repression or more generally in connection with human rights violations?'

22. Ms Fahimian and the Governments of Germany, Belgium, Greece, France, Italy and Poland submitted written observations, as did the European Commission. Ms Fahimian and the Governments of Germany, Greece and France as well as the European Commission also presented oral argument at the hearing on 20 September 2016.

III – **Analysis**

23. I propose to reformulate the three questions of the referring court, against the background that, in the context of the procedure established by Article 267 TFEU, it is for Court to provide the national court with an answer which will be of use to it and enable it to determine the case before it and that to that end, the Court may extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the legislation and the principles of

EU law that require interpretation in view of the subject matter of the dispute in the main proceedings.[7]

24. By its questions, which should be examined together, the referring court in essence seeks to ascertain whether Article 6(1)(d) of Directive 2004/114 is to be interpreted as precluding a Member State from refusing to issue a visa to a third-country national in circumstances such as those of the case at issue where a third-country national from Iran, who obtained a university degree from an institution listed in Implementing Regulation No 1202/2014 as an entity 'involved in nuclear or ballistic missile activities and persons and entities providing support to the Government of Iran', intends to undertake a research project in a Member State in the field of IT security.

25. In this connection, the referring court seeks guidance on the concept of 'public security' within the meaning of Article 6(1)(d) of Directive 2004/114 as well as on the extent of discretion enjoyed by the competent national authorities and the extent of subsequent judicial review in this regard.

A –*On the interpretation of Directive 2004/114*

26. Since this is but the second case which has reached the Court on the interpretation of a provision of Directive 2004/114, I deem it helpful to establish and recall some basic features of this directive.

1. Public international law and right of entry

27. Under public international law as it currently stands, first entry for the purpose of legal migration is an area of largely unfettered State discretion.[8] Traditionally States have no obligation under international law regarding the admission of foreigners and the conditions for such admission.[9] As Advocate General Mengozzi put it in his Opinion in *Koushkaki*,[10] 'if there is a principle of international law deemed to be one of the characteristic manifestations of State sovereignty, it is that States have the right to control the entry of non-nationals to their territory'.

28. Such sovereignty is not, incidentally, called into question by international human rights treaties, which have always and traditionally been conceived as guarantees within existing States and not for transnational movement.[11] In a similar vein, the European Court of Human Rights (ECtHR) holds that, in principle, contracting States enjoy as a matter of well-established international law and subject to their treaty obligations the right to control the entry, residence and expulsion of aliens.[12] It is true that that same court has slightly attenuated this principle with respect to the two distinct situations of

7 — See, to that effect, judgments of 4 September 2014, *eco cosmetics and Raiffeisenbank St Georgen* (C-119/13 and C-120/13, EU:C:2014:2144, paragraph 33) and of 23 April 2015, *Aykul* (C-260/13, EU:C:2015:257, paragraph 43 and the case-law cited).

8 — See Thym, D., 'Legal framework for entry and border controls', in Hailbronner, K., and Thym, D. (eds.), *EU immigration and asylum law – a commentary*, 2nd edition, C.H. Beck, Hart, Nomos, Munich, Oxford, Baden-Baden 2016, at point 32.

9 — See Hailbronner, K. and Gogolin, J., 'Aliens', in Wolfrum, R. (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, online edition (http://opil.ouplaw.com/home/EPIL), at point 14.

10 — C-84/12, EU:C:2013:232, point 47.

11 — See Hailbronner, K., and Gogolin, J., loc. cit., at points 14 to 22.

12 — This constitutes consistent case-law. See judgment of ECtHR of 18 February 1991, No 12313/86, *Moustaquim v. Belgium*, CE:ECHR:1991:0218JUD001231386, § 43 and judgment of ECtHR of 26 July 2005, No 38885/02, *N. v. Finland*, CE:ECHR:2003:0923DEC003888502, § 158.

non-refoulement under Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[13] signed in Rome on 4 November 1950, and issues of family reunification under Article 8 of the ECHR,[14] but that does not change the general principle under public international law described above.

2. The Charter

29. The same is true of the Charter of Fundamental Rights of the European Union ('the Charter'), which grants rights in two specific circumstances to third-country nationals in the context of free movement. Thus, Article 15(3) of the Charter provides that third-country nationals who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union, while Article 45(2) of the Charter stipulates that 'freedom of movement and residence may be granted, *in accordance with the Treaties*, to nationals of third countries *legally resident* in the territory of a Member State'.[15] The Charter, therefore, presupposes legal entry into the Union and does not create such a right.

3. EU immigration law

30. EU immigration law in general is inextricably linked to the functioning of the internal market, as defined in Article 26(2) TFEU[16] in that an abolition of internal borders, including border controls, necessarily entails the need to provide for a common regime on external borders.[17] This is why Article 61, point a), inserted into the EC Treaty by the Treaty of Amsterdam[18] and applicable at the time of adoption of Directive 2004/114, refers to external border controls, asylum and immigration as 'flanking measures' which were 'directly related' to the free movement of persons.[19]

4. Objective of Directive 2004/114

31. Directive 2004/114 should be seen in this context.

32. Based on what is now, after the entry into force of the Treaty of Lisbon, Article 79(2) TFEU,[20] Directive 2004/114 has as its purpose to determine 'the *conditions* for admission of third-country nationals to the territory of the Member States for a period exceeding three months for the purposes of studies …'[21] as well as 'the rules concerning the *procedures* for admitting third-country nationals to

13 — This constitutes consistent case-law since judgment of ECtHR of 7 July 1989, No 14038/88, *Soering v. the United Kingdom*, CE:ECHR:1989:0707JUD001403888, § 91. See also judgment of ECtHR of 15 November 1996, No 22414/93, *Chahal v. the United Kingdom*, CE:ECHR:1996:1115JUD002241493, § 73-74.

14 — See judgments of ECtHR of 21 December 2001, No 31465/96, *Sen v. the Netherlands*, CE:ECHR:2001:1221JUD003146596, § 40; of 1 December 2005, No 60665/00, *Tuquabo-Tekle and Others v. the Netherlands*, CE:ECHR:2005:1201JUD006066500, § 50; and of 14 June 2011, No 38058/09, *Osman v. Denmark*, CE:ECHR:2011:0614JUD003805809, § 53 et seq.

15 — My emphasis.

16 — According to which, the internal market comprises an area *without internal frontiers* in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

17 — This does not, however, imply that once a third-country national is admitted to a Member State he has an automatic right of mobility. Indeed, the directives adopted on the basis of Article 79 TFEU contain substantive restrictions to mobility within the EU. See, by way of example, Article 8 of Directive 2004/114 which subjects mobility (yet again) to the fulfilment of the general and specific conditions enshrined in Articles 6 and 7 of this directive.

18 — Which, incidentally, created the area of freedom, security and justice. This was further to a transfer of those matters closely related to the free movement of persons from the third pillar (TEU) to the first pillar (TEC). Henceforth, until the entry into force of the Treaty of Lisbon, this area was a cross-pillar area, part of its provisions being in the EC Treaty, and the other part being in the EU Treaty.

19 — This wording has only vanished with the entry into force of the Treaty of Lisbon on 1 December 2009.

20 — Common immigration policy. Formerly Article 63(3) and (4) EC.

21 — See Article 1(a) of Directive 2004/114. My emphasis.

the territory of the Member States for those purposes'.[22] On a more general level, the recitals[23] of the Directive reveal that promoting the mobility of third-country nationals to the Union is a key factor in promoting Europe as a whole as a world centre of excellence for studies and vocational training[24] and that migration for the purposes set out in the Directive constitutes a form of mutual enrichment for the migrants concerned, their country of origin and the host Member State and helps to promote better familiarity among cultures.[25]

33. Its main objective is the interest of the Union in attracting to the Union qualified third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service. Creating rights for third-country nationals wishing to enter the Union is but a means to fulfil this objective. Put crudely, therefore, Directive 2004/114 is not a 'human rights directive', as compared with, for instance, secondary law on asylum.

5. Objective of Directive 2016/801

34. To complete the picture, it should be mentioned that, in the meantime, the Union legislature has adopted Directive (EU) 2016/801,[26] which merges the subjects-matters of Directive 2004/114 and of Directive 2005/71/EC,[27] while repealing those two legal instruments, with effect from 24 May 2018.[28] Though Directive 2016/801 is not applicable to the case at issue *ratione temporis*, it nevertheless indicates the legislature's intentions as they stand in 2016.

35. Adopted by the Council and the Parliament 12 years after Directive 2004/114, Directive 2016/801 is a good deal more elaborate on its purpose, as its preamble indicates. Thus, the recitals of Directive 2016/801 speak of attracting *highly skilled people*, forming the Union's key asset of *human capital*, and ensuring *growth*,[29] fostering people-to-people contacts and mobility,[30] mutual enrichment for the migrants concerned, their country of origin and the Member State concerned, while strengthening cultural links and enhancing cultural diversity,[31] promoting the Union as an attractive location for research which should lead to an increase in the Union's overall competitiveness and growth rates while creating jobs that make a greater contribution to GDP growth[32] and making the Union more attractive to third-country nationals wishing to carry out a research activity.[33] And yet, the Union legislature does not seek to encourage a brain drain from emerging or developing countries, which is why measures to support researchers' reintegration into their countries of origin should be taken in partnership with the countries of origin with a view to establishing a comprehensive migration policy.[34] At the same time Europe as a whole should be promoted as a world centre of excellence for studies in training and, to this aim, the conditions for entry and residence should be improved and simplified.[35]

22 — See Article 1(b) of Directive 2004/114. My emphasis.

23 — The preamble to a Union measure may explain the measure's content: see judgment of 22 December 2008, *Wallentin-Hermann* (C-549/07, EU:C:2008:771, paragraph 17 and the case-law cited).

24 — See recital 6 of Directive 2004/114.

25 — See recital 7 of Directive 2004/114.

26 — Directive of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast) (OJ 2016 L 132, p. 21).

27 — Directive of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research (OJ 2005 L 289, p. 15).

28 — See Article 41 of Directive 2016/801.

29 — See recital 3 of Directive 2016/801.

30 — See recital 6 of Directive 2016/801.

31 — See recital 7 of Directive 2016/801.

32 — See recital 8 of Directive 2016/801.

33 — See recital 11 of Directive 2016/801.

34 — See recital 12 of Directive 2016/801.

35 — See recital 14 of Directive 2016/801.

36. This is hardly ‘human rights terminology’, but rather ‘internal market speak’.

6. Right of entry on the basis of *Ben Alaya*

37. Obviously, the principle of public international law described above is widely curtailed as regards intra-EU situations within the internal market, including citizenship, where the Union resembles something close to a federal entity with extensive free movement of persons. But also as regards the external border of the Union, secondary law has begun to attenuate the general principle of public international law mentioned above, as can be seen in the case of Directive 2004/114.

38. The *Ben Alaya* [36] case is a good illustration of this.

39. Mr Ben Alaya, a Tunisian national born in Germany who had left Germany at the age of six to live in Tunisia, intended to come back to Germany after his baccalaureate in order to take up university studies. Although he had been accepted by the university to study mathematics, the German authorities refused to issue a student visa, as they had doubts as to his motivation for wishing to study in Germany, particularly in the light of the inadequacy of grades previously obtained, his weak knowledge of German and the fact that there was no connection between his proposed course of study and his intended career. [37] Crucially, Mr Ben Alaya had met the general and specific conditions laid down in Articles 6 and 7 of Directive 2004/114. The German authorities, in reality, had tried to establish further conditions not provided for in the Directive.

40. It was in that particular context that the Court interpreted the Directive as meaning that where students from third countries meet the general and specific conditions exhaustively listed in Articles 6 and 7 of that directive, they must, pursuant to Article 12 of the Directive, be issued with a residence permit. [38] The Court added that ‘Directive 2004/114 allows Member States to exercise a measure of discretion when considering applications for admission’ [39] which, however relates ‘only to the conditions laid down in Articles 6 and 7 of that directive and, within that context, to the assessment of the relevant facts in order to determine whether those conditions are met and, in particular, whether there are grounds relating to the existence of a threat to public policy, public security or public health which preclude the admission of a third-country national’. [40]

41. As a result, a residence permit ought to have been issued to Mr Ben Alaya. [41] The German Government could not introduce any conditions in addition to those listed in Articles 6 and 7 of Directive 2004/114.

42. Subject to the general and specific conditions under Articles 6 and 7 of Directive 2004/114, a third-country national therefore has a right to enter the Union. And yet, given the discretion a Member State has in determining whether the general and specific conditions are fulfilled, the scope of such a right differs substantially from the rights stemming from free movement in the internal market.

36 — Judgment of 10 September 2014 (C-491/13, EU:C:2014:2187).

37 — See judgment of 10 September 2014, *Ben Alaya* (C-491/13, EU:C:2014:2187, paragraph 16).

38 — Ibid., paragraph 27.

39 — Ibid., paragraph 33.

40 — Ibid.

41 — Ibid., paragraph 35.

7. *Koushkaki* and *Air Baltic Corporation*

43. Two further judgments should be mentioned at this stage: *Koushkaki*[42] on 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)[43] and *Air Baltic Corporation*[44] 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 (Schengen Borders Code).[45]

44. The application of Mr Koushkaki, an Iranian national, for a uniform visa had been rejected by the German authorities on the ground that he had not proved that he had sufficient means of subsistence either for the duration of the stay envisaged or to return to his country of origin. Such a condition is not foreseen by the Visa Code. None of the grounds for refusal of a visa listed in Article 32(1) of the Visa Code applied. Accordingly, the Court held that the competent authorities of a Member State could not refuse, following the application for a uniform visa, to issue such a visa to an applicant unless one of the grounds for refusal of a visa listed in the Visa Code applied to that applicant.[46]

45. In *Air Baltic Corporation*, the Court was faced with the question whether national legislation making the entry of third-country nationals to the territory of a Member State subject to the condition that, at the border check, the valid visa presented must necessarily be affixed to a valid travel document, a condition not provided for in Article 5 of the Schengen Borders Code, was in conformity with the Schengen Borders Code. Applying *Koushkaki* by analogy, the Court held that the list of entry conditions laid down in Article 5 of the Schengen Borders Code was exhaustive.[47]

B –*On Article 6(1)(d) of Directive 2004/114*

46. Although the referring court refers in its actual questions to public policy, public security and public health, for me these questions are clearly geared towards 'public security', as is apparent from the fact that in the order for a preliminary reference the referring court consistently refers to 'public security' alone when it comes to the case of Ms Fahimian.

47. The German Government regards Ms Fahimian as a threat to public security within the meaning of Article 6(1)(d) of Directive 2004/114. It bases this opinion on the consideration that the situation in Iran poses a sufficiently serious risk that the skills acquired during the course of the applicant's research project could be misused in her home country. The intended doctorate in a sensitive and security-related research area could involve the acquisition of knowledge capable of being misused for military purposes and/or for acts of internal repression or more generally in connection with human-rights abuses in Iran. Also, the knowledge acquired of systems and equipment for telecommunications and internet services, and of encryption and cryptography technology could be misused by police or intelligence agencies to monitor the population.

48. The question which arises is, therefore, whether such considerations are covered by the terms 'public security' within the meaning of Article 6(1)(d) of Directive 2004/114.

42 — Judgment of 19 December 2013 (C-84/12, EU:C:2013:862).

43 — OJ 2009 L 243, p. 1.

44 — Judgment of 4 September 2014 (C-575/12, EU:C:2014:2155).

45 — OJ 2006 L 105, p. 1.

46 — Judgment of 19 December 2013, *Koushkaki* (C-84/12, EU:C:2013:862, paragraph 63).

47 — See judgment of 4 September 2014, *Air Baltic Corporation* (C-575/12, EU:C:2014:2155, paragraph 62).

1. On ‘public security’

49. There is no general definition of the terms ‘public security’ at the level of the EU. In principle it is for a Member State to define the content of ‘public security’. EU law then comes in at two stages: first, in framing this content and, secondly, in the relationship between the individual concerned and ‘public security’.

50. The Court does not tend to be too strict at the first stage when it comes to framing ‘public security.’ The Court holds consistently, in the context of the internal market,[48] that ‘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’.[49] What is important is that the scope of the requirements cannot be determined unilaterally by each Member State without any control by the institutions of the Union.[50] The Court has, moreover, with respect to ‘public policy’ under Article 7(4)[51] of Directive 2008/115/EC,[52] employed the same formula.[53]

51. The term ‘public security’ is referred to in the context of all internal market freedoms, including in Directive 2004/38/EC,[54] which specifies the rules on free movement and on citizenship in the context of free movement,[55] as a ground of justification for a derogation from free movement.[56] Moreover, the Court has recently allowed for a public security exception in the context of the Treaty rules on EU citizenship, by holding in *CS* ‘that Article 20 TFEU does not affect the possibility of Member States relying on an exception linked, in particular, to upholding the requirements of public policy and safeguarding public security’.[57]

48 — See, by way of example, judgment of 17 November 2011, *Gaydarov* (C-430/10, EU:C:2011:749, paragraph 32 and the case-law cited).

49 — See judgment of 22 May 2012, *I* (C-348/09, EU:C:2012:300, paragraph 23 and the case-law cited).

50 — Ibid.

51 — ‘If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.’

52 — Directive of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

53 — See judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraph 48).

54 — Directive 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): see Articles 1(c), 15(1), 27, 28, 30(2), 31, 32(1) and 33(2).

55 — Accordingly, the legal bases of this directive are to be found in the chapters on citizenship (Articles 18 and 21 TFEU), freedom of movement for workers (Article 46 TFEU), freedom of establishment (Article 50 TFEU) and freedom to provide services (Article 59 TFEU).

56 — Free movement of goods (Articles 36 TFEU), freedom of movement for workers (Article 45(3) TFEU), right of establishment (Article 52(1) TFEU), freedom to provide services (Articles 56, 61 and 52(2) TFEU), free movement of capital (Article 65(1)(b) TFEU). There is also a reference to those terms in Article 202 TFEU, the legal basis for the Union acts in the domain of freedom of movement for workers from overseas countries and territories.

57 — See judgment of 13 September 2016, *CS* (C-304/14, EU:C:2016:674, paragraph 36), thereby following my Opinion in Joined Cases *Rendón Marín and CS* (C-165/14 and C-304/14, EU:C:2016:75), see point 140 et seq. of my Opinion.

52. In this context, the Court has repeatedly held that public security 'covers both a Member State's internal and its external security'[58] which may entail 'a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests'.[59] Moreover, the Court has also held that the concept of 'public security' comprises the fight against crime in connection with drug trafficking as part of an organised group,[60] combating the sexual exploitation of children[61] and the fight against terrorism.[62]

53. Given such a wide interpretation, I would not be opposed to subsuming the German preoccupations under the terms of 'public security'. The main worry of the German authorities appears to be that Ms Fahimian will disseminate her knowledge for military purposes once she is back in Iran. Security aspects of a Member State's international and external relations should therefore be covered by 'public security'. It should be remembered that the Visa Code specifically refers to a 'threat … to the international relations of any of the Member States'[63] as a ground for refusing a visa. A lack of such wording in Article 6(1)(d) of Directive 2004/114 does not, in my view, imply that, when determining public security, a Member State cannot resort to considerations of international relations.

2. On the German Government's margin of discretion[64] in establishing a 'threat' to public security

54. But can the German authorities, at the second stage, validly claim that they 'regard' Ms Fahimian 'as a threat' to public policy in the sense of Article 6(1)(d) of the Directive? In other words, how wide is the margin of discretion available to the German authorities?

55. Under the internal-market freedoms, where Member States may restrict internal movement on grounds of public security, such grounds are conceived as an *exception* of the general rule of free movement. Under free movement rules, 'public security' is to be based exclusively on the personal conduct of the individual concerned, which means that previous criminal convictions are not in themselves to constitute grounds for taking such measures, and which implies moreover that the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.[65] Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention are not accepted.[66] There has to be 'a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'.[67]

56. Such considerations are fully appropriate in an internal-market context. It is understandable that exceptions to free movement rules are interpreted in a narrow manner. Free movement rules are and continue to be the cornerstone of the whole integration project and are of constitutional importance.

58 — See, by way of example, judgment of 13 September 2016, *CS* (C-304/14, EU:C:2016:674, paragraph 39 and the case-law cited). See also my Opinion in Joined Cases *Rendón Marín and CS* (C-165/14 and C-304/14, EU:C:2016:75, at point 170). *CS* was about citizenship, but the formula has its origins in the internal market freedoms and is resorted to in all of them.

59 — See judgment of 13 September 2016, *CS* (C-304/14, EU:C:2016:674, paragraph 39).

60 — See judgment of 23 November 2010, *Tsakouridis* (C-145/09, EU:C:2010:708, paragraphs 45 and 46).

61 — See judgment of 22 May 2012, *I* (C-348/09, EU:C:2012:300, paragraph 28).

62 — See judgment of 26 November 2002, *Oteiza Olazabal* (C-100/01, EU:C:2002:712, paragraphs 12 and 35).

63 — See Article 32(1)(a)(vi) of the Visa Code.

64 — In contrast to EU law, German administrative law differentiates between what is called a *Beurteilungsspielraum* and what is called *Ermessen*. While the former concerns the material requirements of a norm, the latter comes into play only at the level of legal consequences, once a norm is fulfilled ('Rechtsfolgenseite'). This distinction is, however, of no relevance to the case at issue, given that EU law does not operate such a distinction, which is why the terms 'margin of discretion' in the Court's case-law are sometimes referred to as 'Beurteilungsspielraum' and sometimes as 'Ermessen'.

65 — See Article 27(2) and (3) of Directive 2004/38 which is taken to codify previous Court case-law with respect to the Treaty freedoms.

66 — See Article 27(2) of Directive 2004/38.

67 — Ibid.

57. But a different approach should be taken with respect to Article 6(1)(d) of Directive 2004/114. The case-law mentioned above should not be transposed, as such, to the Union's external border regime, as I shall now outline.

58. First of all, the wording of the internal market exceptions differs from that of Article 6(1)(d) of Directive 2004/114. Article 6(1)(d) of the Directive states that a third country national who applies to be admitted for the purposes set out in Articles 7 to 11 shall 'not be regarded' as a threat to, inter alia, public security. The use of the terms 'be regarded' implies for me that the Member State concerned has greater leeway when it makes its assessment. The term 'threat' is not qualified as it is in the context of free movement. There is no use of the terms 'genuine, precise and sufficiently serious' in relation to a threat. As a consequence, the threshold of a threat to public security is, in my view, considerably lower than it is in the context of free movement.

59. Secondly, not to be regarded as a threat to public security is not an exception to a widely construed right of entry, but merely a negative *condition* governing a right of entry. The context is therefore simply other than that of the internal market, and context matters. The specific context of EU immigration law implies that a third-country national does not benefit from the same rights as a national of a Member State, i.e. an EU citizen. [68]

60. Thirdly, the legislative process in particular of Article 6(1)(d) of Directive 2004/114 offers valuable insight in support of my argument. Directive 2004/114 was adopted very shortly after Directive 2004/38. [69] The clear difference in wording described above can only have been intentional. Indeed, the original proposal had sought to align the wording in both these directives. In two instances, it contained the phrase 'public policy or public security grounds shall be based exclusively on the conduct of the third-country national concerned'. [70] The Council decided not to take up this terminology. [71]

61. Finally, it should be borne in mind that Directive 2004/114 is based on Article 79 TFEU (formerly Article 63 EC) in Part 3, Title V of the FEU Treaty. That Title includes Article 72 TFEU according to which 'this Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'. Even though the exact meaning of this provision is not fully clear at first sight, it does point to a difference between public policy and security in free movement law and in immigration law. [72]

68 — A similar argument is made in legal writing by Hailbronner, K., and Thym, D., 'Constitutional framework and principles for interpretation', in Hailbronner, K., and Thym, D. (eds), *EU immigration and asylum law – a commentary*, 2nd edition, C.H. Beck, Hart, Nomos, Munich, Oxford, Baden-Baden 2016, at point 20.

69 — Directive 2004/38 dates from 29 April 2004, whereas Directive 2004/114 was adopted on 13 December 2004.

70 — Under 'general conditions' concerning conditions of entry and residence in draft Article 5(1)(c) and under 'withdrawal of permits' in draft Article 15(2). See Commission Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of studies, vocational training or voluntary service, COM(2002) 548 final, at pp. 26 and 30 respectively.

71 — That occurred further to a proposal of the relevant Council Working Party. See 'Outcome of proceedings, Working Party on Migration and Expulsion – Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of studies, vocational training or voluntary service', Brussels, 28.11.2003, 1513/03 MIGR 103, p. 9.

72 — This view is also held by Hailbronner, K., and Gies, S., 'Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service', in Hailbronner, K., and Thym, D. (eds.), *EU immigration and asylum law – a commentary*, 2nd edition, C.H. Beck, Hart, Nomos, Munich, Oxford, Baden-Baden 2016, Article 6, point 7. The opposing view in legal writing thinks that there is no reference in the text or preamble of Directive 2004/114 to Article 72 TFEU which implies, in that view, that 'a narrow interpretation of the public policy exception would bolster the objective of the legislation to attract students to the EU', see Peers, S., in Peers, S, Guild, E., Acosta Arcarazo, D. Groenendijk, K., Moreno-Lax, V. (eds), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition, Volume 2: EU Immigration Law*, Martinus Nijhoff Publishers, Leiden, Boston 2012, Chapter 7, p. 202.

62. This leads me to the question of how wide the margin of discretion of the German authorities is and what can be expected of them in a case such as the one at issue. What the referring court seeks to ascertain is whether this 'wide discretion' implies that it is enough for the German authorities to have established that (1) Ms Fahimian is an Iranian national, (2) she obtained her degree at the SUT, (3) the SUT is classified as an establishment that supports the Iranian Government in Annex IX to Regulation No 267/2012[73] and (4) her proposed area of research is in the field of IT-security.

63. In *Ben Alaya*, the Court held that, regarding the conditions laid down in Articles 6 and 7 of Directive 2004/114, Member States could 'exercise a measure of discretion when considering applications for admission'.[74] Such discretion relates to the assessment of the relevant facts in order to determine whether the conditions of Articles 6 and 7 of Directive 2004/114 are met.[75]

64. Nine months earlier, sitting as the Grand Chamber, the Court had afforded Member States examining visa applications a '*wide* discretion'[76] when it comes to the application of Articles 21(1), 32(1) and 35(6) of the Visa Code. This relates, according to the Court, 'to the assessment of the relevant facts in order to determine whether the grounds set out in [Articles 32(1) and 35(6) of the Visa Code] preclude the issue of the visa applied for'.[77]

65. On the basis of this, what can be expected of the German authorities?

66. First and foremost, a Member State must carefully and comprehensively ascertain, determine and investigate all relevant facts so as to be able to take an informed decision. I would, in this context, also like to point to recital 14 of Directive 2004/114, according to which there must be 'an assessment of the facts'.

67. In this context, it must be remembered, however, that a number of the factual elements which a Member State relies on in a case such as the one at issue are outside its jurisdiction and even outside the territory of the Union. This obviously makes matters more difficult for a Member State and should duly be taken into account. For the German Government, it is more difficult to establish facts pertaining to Iran than to Germany or another Member State. Moreover, any evaluation about a future development is of inherent complexity.[78] Such a decision-making process necessarily implies relying to some extent on a risk-assessment of future events. There is thus a considerable '"fact-finding" discretion'[79] for a Member State when it comes to assessing Articles 6 and 7 of Directive 2004/114.

68. Secondly, while the relatively high threshold of personal behaviour under free movement[80] does not apply, there has to be a link between the individual person and the measure taken. Anything else would amount to a form of blanket ban which would rarely lead to a right of entry for a third-country national on the basis of Directive 2004/114. Ergo, a national authority has to convincingly furnish concrete elements as to why the individual concerned is regarded as a threat to public security.

73 — And is, moreover, listed as such an entity in section I, point 161, of the Annex to Implementing Regulation No 1202/2014.

74 — See judgment of 10 September 2014, *Ben Alaya* (C-491/13, EU:C:2014:2187, paragraph 33).

75 — Ibid.

76 — See judgment of 19 December 2013, *Koushkaki* (C-84/12, EU:C:2013:862, paragraphs 60, 61, 63 and operative part). My emphasis.

77 — Ibid., paragraph 60.

78 — Even though it has to be admitted that the same obstacle exists under the free movement rules where a Member State cannot restrict free movement as a sanction for what someone has done, but only what it is suspected he or she will do in future.

79 — In the catchy formulation of Hailbronner, K., and Gies, S., 'Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service', in Hailbronner, K., and Thym, D. (eds.), *EU immigration and asylum law – a commentary*, 2nd edition, C.H. Beck, Hart, Nomos, Munich, Oxford, Baden-Baden 2016, Article 5, point 15.

80 — Pursuant to Article 27(2) of Directive 2004/38, measures taken by Member States are to be based exclusively on the personal conduct of the individual concerned. Such personal conduct 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.

69. Moreover, the more sensitive the matter, the less individual circumstances need to be furnished to justify a threat to public security.

70. Finally, a Member State should undertake a comprehensive weighing of its interest and the Union's interest in entry, i.e. attracting highly-qualified students to undertake research in the Union against security issues.

71. Though it is obviously for the referring court to determine whether the German authorities have complied with these requirements, I am under the impression that they have acted within the margin of discretion they dispose of.

C –*On judicial review*

72. A wide margin of discretion implies limited judicial review. Otherwise the margin of discretion would be frustrated and the judiciary would be doing the job of the executive. As is apparent from the way Question 1(a) is phrased,[81] the referring court is fully aware of this.

73. And yet, judicial review has to be available.

74. Pursuant to Article 18(4) of Directive 2004/114, where an application is rejected or a residence permit issued in accordance with this directive is withdrawn, the person concerned is to have the right to mount a legal challenge before the authorities of the Member State concerned.

75. Contrary to the initial Commission proposal,[82] the right of appeal no longer refers to 'courts' of the Member State concerned. One may therefore wonder whether the Directive requires a judicial remedy or not and whether the exclusion of a judicial remedy at the national level is in line with the Directive, or indeed Article 47 of the Charter and the general principles of EU law.[83] I would have my doubts that such an exclusion were possible, against the background of the clear wording of Article 47 of the Charter to provide an effective remedy to everyone whose rights and freedoms guaranteed by EU law are violated.

76. But that is not the question for the case at issue, given that such a remedy exists in Germany. As the preliminary reference demonstrates, there is a judicial procedure provided for at the national level. Moreover, judicial review of decisions taken by the administrative authorities tends to be very comprehensive in Germany in the sense that courts have full jurisdiction to review such decisions.[84] Such jurisdiction is, however, limited in cases where the administrative authorities enjoy a margin of discretion.[85]

77. Judicial review which is, in principle, governed by national procedural law, in the context of procedural autonomy, must be effective.

81 — '…as a result of which discretion the assessment by the authorities may be subject to only limited judicial review'.

82 — See draft Article 20(3) of the Commission Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of studies, vocational training or voluntary service, COM(2002)548 final, at p. 40.

83 — See Hailbronner, K., and Gies, S., 'Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service', in Hailbronner, K., and Thym, D. (eds), *EU immigration and asylum law – a commentary*, 2nd edition, C.H. Beck, Hart, Nomos, Munich, Oxford, Baden-Baden 2016, Articles 18 to 21, at point 8.

84 — In particular in comparison to other national legal orders, see von Danwitz, Th., *Europäisches Verwaltungsrecht*, Springer, Berlin, Heidelberg, 2008, p. 589 et seq.

85 — Be it in the form of a 'Beurteilungsspielraum' or of 'Ermessen'. See also von Danwitz, Th., loc. cit.

78. While the national judge can naturally only determine whether the boundaries of the discretion which the Member State has exercised have been overstepped, it must nevertheless be in a position to review all procedural aspects as well as the material elements of the decision. An effective remedy requires that the national judge is in a position to assess whether the authorities complied with the requirements established above, i.e. whether they determined and investigated all relevant facts and why this individual is regarded as a threat to public security.

79. In this respect, it may be, as the German Government also points out, that predictions of a Member State in a matter such as the one at issue are based on information that can only be made public in a restricted manner so as not to endanger sources of information or the external policy interests of Member States. In this connection I should like to refer the Court to *Kadi and Al Barakaat International Foundation* v *Council and Commission*,[86] where the Court itself points to the relevant case-law of the ECtHR[87] that 'it is … the task of the Community judicature to apply, in the course of the judicial review it carries out, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice'.[88]

IV – **Conclusion**

80. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) as follows:

(1) When an authority of a Member State establishes whether a third-country national is regarded as a threat to public security under Article 6(1)(d) of Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service it shall, within the wide margin of discretion at its disposal,

— comprehensively ascertain, determine and investigate all the relevant facts;

— furnish concrete information as to why an individual is regarded as a threat to public security and

— undertake a comprehensive weighing of all relevant interests.

In such a situation, judicial review is limited to checking whether the boundaries of such discretion have been respected.

(2) A Member State is not precluded by Article 6(1)(d) of Directive 2004/114 from refusing to issue a visa to a third-country national, who obtained a university degree from an institution listed in a Council regulation as an entity involved in nuclear or ballistic missile activities and listed among persons and entities providing support to a third-country Government and who intends to undertake a research project in that Member State, when the authorities of that Member State have established that there is a risk that that third-country national will misuse knowledge acquired in that Member State for purposes which constitute a threat to the Member State's external or internal security.

86 — Judgment of 3 September 2008 (C-402/05 P and C-415/05 P, EU:C:2008:461).

87 — See judgment of ECtHR of 15 November 1996, No 22414/93, *Chahal v. the United Kingdom*, CE:ECHR:1996:1115JUD002241493, § 131.

88 — See judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 344).