Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 12 June 2014[1]

Case C-491/13

Mohamed Ali Ben Alaya
v
Bundesrepublik Deutschland
(Request for a preliminary ruling

from the Verwaltungsgericht Berlin (Germany))

(Area of freedom, security and justice — Directive 2004/114/EC — Conditions of admission of third-country nationals for the purposes of studies — Refusal to admit a person who meets the conditions laid down in Directive 2004/114/EC — Legislation of a Member State leaving a measure of discretion to the administrative authorities)

1. As part of its strategy of promoting itself as a world centre of excellence for research, studies and training, the European Union has adopted a number of legislative instruments which, although falling within the scope of its immigration policy, seek to promote the admission to and mobility within the European Union of third-country nationals for the purpose of studies and research.[2]

2. That strategy has arisen in a globalised context now characterised by competition at global level between developed countries to attract foreign researchers and students into their education systems.[3] The ability to attract such people involves a number of political and economic challenges. First, researchers and students make up a pool of qualified (or potentially qualified) human capital, which is perceived as important for economic growth, development and innovation. Secondly, attracting foreign researchers and students — and the resulting flow of knowledge — may substantially contribute towards the development of educational and research systems, with significant economic repercussions.[4]

3. In the question referred for a preliminary ruling by the Verwaltungsgericht Berlin (Administrative Court of Berlin or 'the referring court') in the present case, the Court is called upon to determine the scope of one of the legislative instruments adopted by the European Union in order to achieve those objectives, namely, Council Directive 2004/114/EC of 13 December 2004 on the conditions of

1 — Original language: French.

2 — See, inter alia, Council Directive 2005/71/EC 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). With similar objectives, the Council of the European Union adopted Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (OJ 2009 L 155, p. 17).

3 — See, in that regard, the Communication from the Commission to the European Parliament and the Council — 4th Annual Report on Immigration and Asylum (2012) (COM(2013) 422 final) and, in particular, Chapter III.2.

4 — Thus, for example, it has been estimated that the value of the revenue linked to 'education exports' in 2011 in the United Kingdom alone was some GBP 17.5 billion (see the report of the UK Government (Department for Business, Innovation and Skills) of July 2013 entitled 'International Education: Global Growth and Prosperity', https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229844/bis-13-1081-international-education-global-growth-and-prosperity.pdf).

admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service.[5] In the present case, however, the Court will have to balance the pursuit of the legitimate objectives referred to above against the risks associated with abuse of that legislative instrument in order to achieve aims which are unrelated to it.

I – **Legal context**

A – *EU law*

4. Recitals 6, 8, 14, 15 and 17 to Directive 2004/114 state:

‘(6) One of the objectives of [EU] action in the field of education is to promote Europe as a whole as a world centre of excellence for studies and vocational training. Promoting the mobility of third-country nationals to [the European Union] for the purpose of studies is a key factor in that strategy. The approximation of the Member States’ national legislation on conditions of entry and residence is part of this.

…

(8) The term “admission” covers the entry and residence of third-country nationals for the purposes set out in this Directive.

…

(14) Admission for the purposes set out in this Directive may be refused on duly justified grounds. In particular, admission could be refused if a Member State considers, based on an assessment of the facts, that the third-country national concerned is a potential threat to public policy or public security. The notion of public order may cover a conviction for committing a serious crime. In this context it has to be noted that the notions of public policy and public security also cover cases in which a third-country national belongs or has belonged to an association which supports terrorism, supports or has supported such an association, or has or has had extremist aspirations.

(15) In case of doubts concerning the grounds of the application of admission, Member States should be able to require all the evidence necessary to assess its coherence, in particular on the basis of the applicant’s proposed studies, in order to fight against abuse and misuse of the procedure set out in this Directive.

…

(17) In order to allow initial entry into their territory, Member States should be able to issue in a timely manner a residence permit or, if they issue residence permits exclusively on their territory, a visa. …’

5. Article 1 of Directive 2004/114, entitled ‘Subject matter’, states:

‘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;

5 — OJ 2010 L 375, p. 12.

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

6. Points (a), (b) and (g) of Article 2 of Directive 2004/114 state, for the purposes of that directive, the following definitions:

'(a) "third-country national" means any person who is not a citizen of the European Union within the meaning of Article 17(1) of the Treaty;

(b) "student" means a third-country national accepted by an establishment of higher education and admitted to the territory of a Member State to pursue as his/her main activity a full-time course of study leading to a higher education qualification recognised by the Member State, including diplomas, certificates or doctoral degrees in an establishment of higher education, which may cover a preparatory course prior to such education according to its national legislation;

…

(g) "residence permit" means any authorisation issued by the authorities of a Member State allowing a third-country national to stay legally in its territory, in accordance with Article 1(2)(a) of Regulation (EC) No 1030/2002 [6].'

7. Article 3 of Directive 2004/114 is entitled 'Scope' and paragraph 1 thereof states that the directive applies to 'third-country nationals who apply to be admitted to the territory of a Member State for the purpose of studies,' going on to provide that 'Member States may also decide to apply this Directive to third-country nationals who apply to be admitted for the purposes of pupil exchange, unremunerated training or voluntary service'.

8. Chapter II of Directive 2004/114 is entitled 'Conditions of admission' and comprises Articles 5 to 11. Under Article 5 of Directive 2004/114, entitled 'Principle', '[t]he 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'.

9. Article 6(1) of Directive 2004/114 lays down the general conditions for admission and provides:

'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.'

6 — Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals (OJ 2002 L 157, p. 1).

10. Articles 7 to 11 of Directive 2004/114 relate to the specific conditions of admission for students, school pupils, unremunerated trainees and those engaging in voluntary service. Article 7 of the directive lays down the specific conditions for students. Article 7(1) provides:

'In addition to the general conditions stipulated in Article 6, a third-country national who applies to be admitted for the purpose of study shall:

(a) have been accepted by an establishment of higher education to follow a course of study;

(b) provide the evidence requested by a Member State that during his/her stay he/she will have sufficient resources to cover his/her subsistence, study and return travel costs. Member States shall make public the minimum monthly resources required for the purpose of this provision, without prejudice to individual examination of each case;

(c) provide evidence, if the Member State so requires, of sufficient knowledge of the language of the course to be followed by him/her;

(d) provide evidence, if the Member State so requires, that he/she has paid the fees charged by the establishment.'

11. Chapter III of Directive 2004/114, entitled 'Residence permits', lays down provisions relating to the residence permit to be issued to each of the categories of persons covered by that directive. Under Article 12 of the directive, entitled 'Residence permit issued to students':

'1. A residence permit shall be issued to the student for a period of at least one year and renewable if the holder continues to meet the conditions of Articles 6 and 7. Where the duration of the course of study is less than one year, the permit shall be valid for the duration of the course.

2. Without prejudice to Article 16, renewal of a residence permit may be refused or the permit may be withdrawn if the holder:

(a) does not respect the limits imposed on access to economic activities under Article 17;

(b) does not make acceptable progress in his/her studies in accordance with national legislation or administrative practice.'

12. Under Article 16 of Directive 2004/114, entitled 'Withdrawal or non-renewal of residence permits':

'1. Member States may withdraw or refuse to renew a residence permit issued on the basis of this Directive when it has been fraudulently acquired or wherever it appears that the holder did not meet or no longer meets the conditions for entry and residence laid down in Article 6 and in whichever of Articles 7 to 11 applies to the relevant category.

2. Member States may withdraw or refuse to renew a residence permit for reasons of public policy, public security or public health.'

B – *National law*

13. Subparagraph 3 of Paragraph 6 of the Law on the residence, employment and integration of foreign nationals in the Federal Territory (Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet; 'the AufenthG'),[7] which is entitled 'Visa', provides:

'Long-term stays shall require a visa for the federal territory (national visa), which must have been issued before entry into that territory. The visa shall be issued in accordance with the requirements in force concerning residence permits, EU Blue Cards, establishment permits and EU permanent residence permits. ...'

14. Subparagraph 1 of Paragraph 16 of the AufenthG, which is entitled 'Studies, language courses, schooling', provides:

'A residence permit may be granted to a foreign national for the purposes of study at a State or State-approved establishment of higher education or at a comparable training establishment. The purpose of a study stay shall include the pursuit of pre-study language courses and attendance at a school where foreign students prepare for university studies (preparatory measures for university studies). The residence permit for study purposes may be granted only if the foreign national has been accepted by the educational establishment; conditional admission shall be sufficient. No evidence of knowledge of the language of instruction shall be required if language skills have already been taken into account for the purposes of the admission decision or if it is provided that language knowledge must be acquired within the framework of the preparatory measures for study. The residence permit for study purposes shall, when first issued and when extended, remain valid for at least one year, but the period of validity must not exceed two years for the studies and the study preparatory measures; it may be extended if the objective of the training has not yet been achieved and may yet be achieved within an appropriate period.'

II – **The facts, the main proceedings and the question referred**

15. Mr Ben Alaya is a Tunisian national born in 1989 in Germany, where his parents reside. He left Germany in 1995 to live in Tunisia, where he studied until obtaining his baccalaureate in 2010.

16. After the baccalaureate, Mr Ben Alaya enrolled at the University of Tunis to study information technology. At the same time, he took steps to enable him to begin studies in Germany. On several occasions, he was accepted by the Technische Universität Dortmund to follow a course of study in mathematics.

17. Mr Ben Alaya made numerous applications to the competent German authorities for a student visa. However, his applications were always refused. The most recent decision refusing to grant him a visa was adopted on 22 July 2011 by the Embassy of the Republic of Germany in Tunis and was confirmed on 23 September 2011. By that decision, the German authorities refused the visa on the basis, in essence, of doubts as to Mr Ben Alaya's motivation for wishing to study in Germany. They pointed out, in particular, that, in the important subjects for his chosen course, Mr Ben Alaya had achieved only inadequate grades. In the light of that fact, those authorities expressed doubts as to Mr Ben Alaya's ability to begin a course of study taught in a foreign language or to learn German within an appropriate period before commencing his studies. It was also their view that he showed no signs of any real desire to address the difficulties involved in higher education studies abroad and that it was difficult to see how higher education studies in Germany would enable him to achieve his ambition of working as a mathematics teacher in Tunisia.

7 — As amended and published on 25 February 2008 (BGBl, I, p. 162); most recently amended by Paragraph 2(59) of the Law of 7 August 2013 (BGBl. I, p. 3154).

18. Mr Ben Alaya, who disputes the description of his academic performance given by the German consular authorities, brought an action contesting those refusal decisions before the Verwaltungsgericht Berlin.

19. That court notes that, in order to enter German territory for study purposes, Mr Ben Alaya requires a national visa, the conditions for obtaining which are governed by Paragraph 16(1) of the AufenthG. However, according to the way in which the wording of that provision has been construed by the German courts, the administrative authorities have discretion in that regard and are able — but not obliged — to grant a student visa in accordance with the conditions laid down in that paragraph.

20. The referring court is uncertain whether that interpretation is compatible with Directive 2004/114. In particular, it is uncertain whether, in cases where the conditions for admission laid down in Articles 6 and 7 of Directive 2004/114 are met — as is the case with Mr Ben Alaya — entitlement to a student visa is conferred under Article 12 of that directive, without any discretion being left to the national administrative authorities.

21. Accordingly, the Verwaltungsgericht Berlin decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does Directive [2004/114] establish a non-discretionary right to a visa for the purposes of studies and the subsequent residence permit under Article 12 of [that directive], if the conditions of admission, namely those listed in Articles 6 and 7 of the directive, are met and there are no grounds for refusing the visa under Article 6(1)(d) of the directive?'

III – **The procedure before the Court**

22. The order for reference was received at the Court Registry on 13 September 2013. Written observations have been submitted by the German, Belgian, Estonian, Greek, Polish and United Kingdom Governments and by the European Commission.

IV – **Legal analysis**

23. By its question, the referring court asks, in essence, whether the competent authorities of a Member State may refuse to issue a third-country national a visa for study purposes and, in accordance with Article 12 of Directive 2004/114, the corresponding residence permit, where that person meets the conditions for admission laid down in Articles 6 and 7 of that directive and where there is no ground for refusing admission under Article 6(1)(d) of the directive. The referring court also seeks to ascertain whether those national authorities enjoy a measure of discretion in considering the application for admission.

24. It emerges from the order for reference that the referring court inclines towards an interpretation of Directive 2004/114 which acknowledges that third-country nationals are entitled to enter if they meet the conditions for admission laid down in that directive, and that the authorities of the Member States cannot exercise any discretion in relation to that decision. In the referring court's view, that interpretation is borne out by the wording of some of the provisions of Directive 2004/114, by the objectives pursued by that directive and by the fact that Directive 2004/114 brought about partial harmonisation of the system for the admission of third-country nationals for study purposes.

25. The participants in the proceedings before the Court are divided in their positions. Although the Commission supports, in essence, the position adopted by the referring court, all the governments that have submitted written observations before the Court contend, by contrast, that the authorities of the Member States must have broad discretion to decide on the admission of third-country nationals for study purposes.

26. In the present case, the Court is therefore faced with a question relating to the interpretation of Directive 2004/114 which requires it to determine whether that directive laid down an exhaustive list of the conditions for the admission to the European Union of third-country nationals for study purposes or whether it merely established minimum conditions and that, accordingly, Member States are free to add, unilaterally, conditions for admission for study purposes other than those laid down in Directive 2004/114. The question referred also raises the issue of the scope of the discretion, if any, left to the authorities of the Member States in the appraisal that they make when deciding on the admission of third-country nationals for study purposes.

27. In order to answer the questions raised in this request for a preliminary ruling, it is necessary, in my view, to undertake an analysis of Directive 2004/114 as a whole, entailing both a literal examination of the wording of its relevant provisions and a systemic, contextual and teleological evaluation.

A – *Literal analysis*

28. The referring court takes the view that the interpretation adopted by certain German courts and supported by the Member States which have submitted observations to the Court, according to which Directive 2004/114 standardises only the minimum conditions to be met by a third-country national to allow him to be admitted to study in a Member State, does not take sufficient account of the wording of a number of provisions of that directive. The national court refers specifically to Articles 5 and 12 of Directive 2004/114.

29. As a preliminary, it is possible to point out that — as the Commission notes — the wording of Article 1 of Directive 2004/114, without being conclusive, tends to support the position taken by the referring court. Under that provision, the purpose of Directive 2004/114 is to determine *the* conditions for the admission of third-country nationals to the territory of Member States for the purposes, inter alia, of studies.[8] From a literal standpoint, I share the Commission's view that wording of that kind arguably supports the view that Directive 2004/114 determines all the conditions for the admission of students and not only some of those conditions (to which others may be freely added by Member States). However, it is probably less than satisfactory merely to make such a finding.

30. The first provision of Directive 2004/114 to which the national court refers is Article 5, entitled 'Principle', which is the first provision in Chapter II of Directive 2004/114, which relates to the conditions for admission for the purposes of that directive. The referring court infers from the wording of that provision that admission for study purposes is not merely a possibility, but a right for a third-country national who meets the conditions laid down in Articles 6 and 7 of Directive 2004/114.

8 — See, also, recital 24 to Directive 2004/114.

31. Nevertheless, although the wording of the German version of that provision may be relied upon to substantiate the view of the referring court, the wording of that provision in other language versions leaves, to my mind, room for ambiguity.[9] In my view, the only certainty that may be inferred from a literal analysis of the provision at issue is that fulfilment of the conditions laid down in Articles 6 and 7 of Directive 2004/114 is compulsory and necessary for the purposes of a third-country national being admitted as a student. It is not possible, however, from the wording of that provision to adopt a definitive position as to whether those requirements constitute minimum conditions to which other conditions may be added or whether they are the only conditions that must be met by third-country nationals requesting admission for study purposes.

32. The national court then refers to Article 12 of Directive 2004/114. It is clear from that provision that a residence permit *is to be* issued to a student who meets the conditions laid down in Article 6 and 7 of Directive 2004/114 for at least one year. Now, as the Commission points out, the use of the prescriptive mode of the verb 'to be' suggests that argues for an interpretation of that provision to the effect that, if those conditions are met, the residence permit must be issued. The wording of Article 12 of Directive 2004/114 therefore appears to support the view that the directive determines all the conditions for admission for study purposes. If the EU legislature had wanted to leave a margin of discretion for the issue of that permit, it would have used the formulation 'may be issued' (as, moreover, the German legislature does).

33. Nor, however, is that provision free of ambiguity. As the German Government points out, it could also be construed as merely governing the length of time for which any residence permit is issued, without addressing the issue of whether such a permit should be issued. Furthermore, under the second part of the first sentence of that provision, the residence permit is *renewable* if the holder continues to meet the conditions laid down in Articles 6 and 7. The use of the term 'renewable' might suggest that the residence permit *may possibly* be renewed if those conditions continue to be met, which could mean that, even in such a case, renewal would not be automatic, and might not occur even if those conditions were met.

34. In that regard, reference should also be made to the Belgian Government's argument that Article 12 of Directive 2004/114 is not even applicable to a third-country national who has applied for residence for study purposes and whose application is still pending, as such a person cannot be treated as a 'student' within the meaning of the definition in Article 2(b) of Directive 2004/114.[10] Therefore, according to the Belgian Government, if it were accepted that that provision places an obligation on the Member States, that obligation would consist solely in issuing a residence permit to third-country nationals who have already been admitted for study purposes.

9 — The referring court's literal interpretation of Article 5 of Directive 2004/114 starts from the finding that the German-language version of that directive uses the present passive tense of the verb 'to admit' ('Ein Drittstaatsangehöriger wird … zugelassen': literally, 'a third-country national shall be ... admitted'). The referring court notes that, because the EU legislature has not used the phrase 'may be admitted', that provision leaves no discretion as regards admission. However, the German version is worded slightly differently from the other language versions such as the Spanish, English, French and Italian versions. Unlike those versions, the German version does not refer to the concept of making admission 'dependent' on the verification of the conditions laid down in Articles 6 and 7 of that directive. Furthermore, all those other language versions use the substantive 'admission' and not the verb 'to admit' in the present tense. Accordingly, in my view, the explanation is that there are nuances in the translation of the provision which may lead it to be construed in different ways.

10 — The concept of 'student', as so defined, presupposes that the Member State concerned has already authorised the third-country national to enter and reside in its territory and has therefore already given a decision on the application for residence for study purposes. However, in the Belgian Government's view, in so far as Article 12 of Directive 2004/114 refers expressly to 'students', it is not applicable in the absence of a prior admission decision and the residence permit referred to in that provision is the residence permit which attests to the decision granting residence, and not that decision itself.

35. In conclusion, I take the view that the wording of the provisions laid down in Directive 2004/114 is characterised by a certain ambiguity, as a result of which it is not possible, on the strength of a literal analysis of the directive, to determine conclusively whether the directive merely establishes the minimum conditions to be met by a third-country national to enable him to be admitted to study in the European Union, or whether the conditions that it lays down are exhaustive. In order to answer the question referred by the national court, it is therefore necessary to carry out a systemic, contextual, and teleological analysis of that directive.

B – *Systemic and contextual analysis*

36. Directive 2004/114 was the third legislative instrument adopted by the European Union in the field of lawful migration following the Treaty of Amsterdam and the conclusions of the Tampere European Council.[11] However, as it was adopted on the basis of points (3)(a) and (4) of the first subparagraph of Article 63 EC, that directive now comes within the ambit of the role entrusted to the European Union under Article 79 TFEU to develop a common immigration policy aimed at ensuring the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of illegal immigration.

37. In accordance with Article 21 of that directive, the application of Directive 2004/114 was the subject of an assessment carried out by the Commission.[12] That assessment exposed a number of weaknesses, which led the Commission to ask whether third-country nationals were being treated fairly in the context of that legislative instrument.[13] Now that those weaknesses have been identified, a draft recast of Directive 2004/114 is currently being carried out in order to clarify that instrument and to extend its scope.[14]

38. The conceptual structure of Directive 2004/114 should therefore be analysed in that context.

39. In that regard, it is necessary first to point out that, as can be seen from Article 3 of Directive 2004/114, that legislative instrument lays down mandatory provisions for Member States only as regards students, allowing the Member States discretion when it comes to applying the provisions of that directive to the other categories of persons covered by it.[15] However, as was noted by the referring court, that distinction — between, on the one hand, the provisions relating to students, which are mandatory for the Member States, and, on the other, the provisions relating to the other categories, the transposition of which is left to the discretion of the Member States — reflects the desire to achieve a certain level of binding harmonisation as regards the system for the admission of students, which is consistent with the objective of Directive 2004/114 of promoting their admission.[16]

11 — Two directives had already been adopted in this field, namely, Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12) and Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44).

12 — See the Report from the Commission to the European Parliament and the Council on the application of Directive 2004/114/EC of 28 September 2011 (COM(2011) 587 final).

13 — See p. 2 of the proposal for a directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing (recast), presented by the Commission on 25 March 2013 (COM(2013) 151 final). That proposal, which is currently being debated in the Council, is also intended to replace Directive 2005/71, referred to in footnote 2.

14 — See the proposal for a directive referred to in footnote 13 above.

15 — The proposal for a directive referred to in footnote 13 above no longer draws that distinction in terms of the scope of Directive 2004/114. Article 2 of the proposal makes the optional provisions of Directive 2004/114 relating to school pupils, unremunerated trainees and volunteers mandatory and extends the general scope of the directive to cover remunerated trainees and au pairs.

16 — See recital 6 to Directive 2004/114 and points 56 and 57 below.

40. Next, Article 4(2) of Directive 2004/114 allows Member States to adopt or to maintain provisions that are more favourable to the persons to whom that directive applies — and therefore certainly to students. In my view, that provision is not compatible with the possibility for Member States to impose stricter conditions of admission for those categories of persons. In other words, it is arguable that, although, under Directive 2004/114, the Member States maintain the freedom to lay down more favourable provisions for the categories covered, *a contrario*, the intention is not to allow them to lay down less favourable provisions, in particular as regards admission, by adding conditions that are not among those listed in Directive 2004/114. Articles 3 and 4 of that directive are, moreover, indicative of 'favour' towards the student category, an impression borne out by the teleological analysis of that directive. [17]

41. Specifically as regards the system of admission put in place by Directive 2004/114, it is necessary to point out that it lays down a basic provision, namely Article 5; and then, in Article 6, general conditions applicable to all the categories covered by that directive; and, lastly, in Articles 7 to 11, a series of specific conditions for each of the categories covered. However, unlike other legislative instruments concerning immigration, [18] none of the enacting terms of Directive 2004/114 lists the grounds on which it is possible to refuse an application for entry and residence in the territory of a Member State for the purposes of that directive. [19]

42. However, must that absence be construed as indicating a desire to allow the authorities of the Member States to refuse, on the basis of an unfettered discretion, to admit a third-country national who has applied for admission for study purposes, even where that person meets all the conditions laid down in Directive 2004/114?

43. I am not convinced of this.

44. In that regard, it is clear from the *travaux préparatoires* for Directive 2004/114 that the main concern which, at the time when the draft directive was presented, was perceived as a possible counterbalance to the express desire to promote, through the adoption of that directive, the admission of third-country nationals for study purposes was the need to safeguard public policy and public security. [20] That concern, to which must be added the preservation of public health, was given legislative expression through the provision, among the general conditions for admission, of the (negative) condition for admission, laid down in Article 6(1)(d) of Directive 2004/114. That concern is also referred to in recital 14 to that directive, which gives specific details of the cases in which a third-country national is a threat to public policy or public security.

45. That concern was accompanied, in the context of the legislative procedure, [21] by the express wish to prevent the procedure set out in Directive 2004/114 from being abused or misused. That additional concern, which is clearly linked to the objective of preventing the misuse of legislative instruments in the field of lawful migration for the purposes of unlawful migration, has nevertheless not found expression in the wording of Directive 2004/114. It has, however, been expressed in recital 15 to that

17 — See point 55 et seq. below.

18 — Such as, in particular, Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (code on visas) (OJ 2009 L 243, p. 1), which was the subject-matter of the case that gave rise to the judgment in *Koushkaki*, C-84/12, EU:C:2013:862; Article 32 of that regulation lists the grounds for refusal of an application for a uniform visa. Article 8 of Directive 2009/50 also provides a list of grounds for refusal.

19 — Such a provision is, however, laid down in the proposal for a directive referred to in footnote 13 above (see Article 18 of that proposal).

20 — See paragraph 1.5 of the 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, presented by the Commission on 7 October 2002 (COM(2002) 548 final).

21 — The Commission's proposal for a directive referred to in footnote 20 above initially made no reference to the concept of misuse or abuse of the procedure.

directive, according to which Member States should be able, where they have doubts concerning the grounds of the application of admission, to require 'all the evidence necessary to assess its coherence, in particular on the basis of the applicant's proposed studies, in order to fight against abuse and misuse of the procedure set out in [that] directive'.

46. In my view, it is from that dual perspective that it is necessary to understand the first sentence of recital 14 to Directive 2004/114, according to which admission for the purposes set out in that directive 'may be refused on duly justified grounds'. That sentence, which seeks in some way to remedy the absence of precise indications in the wording of the provisions of that directive concerning the possibility of refusing admission, must, in my view, be understood by reference to the two areas of concern subsequently expressed in recital 14 itself, as well as in recital 15. It is those two areas of concern — first, that given legislative expression in Article 6(1)(d) of Directive 2004/114 and, second, that linked to the risk that the procedure established in the directive might be misused as a means of gaining access to the territory of the European Union for purposes other than that of studying — that were regarded as being sufficiently serious to counterbalance the objective of Directive 2004/114 of promoting the admission of third-country nationals for study purposes, because of the ensuing beneficial effects for the European Union as a whole.

47. In that regard, it should again be noted that it can be seen from the Commission's draft directive that the fact that the residence permit issued for study purposes may be valid for a period of one year and may be withdrawn, or not renewed, in the cases specified in Article 16 of Directive 2004/114 was regarded as ensuring the exercise of strict *a posteriori* control by the authorities of the Member States.[22]

48. It is clear from the foregoing considerations that, in my view, the authorities of the Member States are justified in refusing to admit third-country nationals either where the conditions laid down in Directive 2004/114 for the admission of students have not been met, or where it is clear from an analysis of the file and any relevant facts that there is precise and specific evidence of the abuse or misuse of the procedure set out in Directive 2004/114. They are not justified, however, in refusing admission for other reasons.

49. In that connection, as regards, first, the analysis of the conditions laid down in Directive 2004/114 for the admission of students, I consider that Member States must, when examining applications for admission, be able to exercise discretion in their assessment. However, that discretion relates to the conditions laid down in Articles 6 and 7 of the directive and to the assessment of the relevant facts in order to determine whether the conditions listed in those provisions have been met for the purposes of the admission of third-country nationals as students.[23] That discretion does not entail, however, authority to add conditions for admission which are not laid down in Directive 2004/114.

50. As regards, secondly, the possible abuse or misuse of the procedure set out in Directive 2004/114, it should be pointed out that, in any event, according to the case-law of the Court, the scope of EU law cannot be extended to cover abusive practices and that proof of such abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the objective of those rules is not achieved and, secondly, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining that advantage.[24]

22 — See, in that regard, the last sentence of paragraph 1.5 of the proposal for a directive presented by the Commission in 2002 and referred to in footnote 20 above.

23 — See, by analogy, *Koushkaki* (EU:C:2013:862, paragraph 60).

24 — See *O. and B.* (C-456/12, EU:C:2014:135, paragraph 58 and the case-law cited), as well as my Opinion in *Fonnship and Svenska Transportarbetareförbundet* (C-83/13, EU:C:2014:201, point 81).

51. The need to carry out an analysis for the purpose of establishing whether there has been any abuse or misuse of the procedure set out in Directive 2004/114 precludes any automatic admission (which covers the entry and residence of third-country nationals for the purposes set out in that directive) [25] even in cases where all the conditions for admission laid down therein have been met — an aspect which addresses the concerns expressed by the Member States in the observations submitted before the Court. However, that analysis must be carried out on the basis of clear principles, with no room for arbitrary considerations.

52. As regards, in particular, the assessment of academic performance which, as is clear from the order for reference, was the decisive element justifying refusal of the applicant's application in the case before the referring court, although it may be only one of the elements taken into account in assessing the coherence of the application for admission, it cannot, in my view, constitute in itself a ground for refusing admission.

53. It should be pointed out, first, that, under Article 7(1)(a) of Directive 2004/114, the first specific condition for admission for students is the fact that they have been accepted by an establishment of higher education to follow a course of study. Even though Member States retain a margin of discretion, both when determining the concept of 'establishment' — as is clear from the definition of that concept in Article 2(e) of Directive 2004/114 — and when determining the conditions for admission to such an establishment, it is usually for establishments of higher education, not diplomatic staff, to assess the capacity of a future student to succeed in his studies, which in no way prevents Member States from introducing into their national legislation rules requiring those establishments to make the admission of third-country nationals subject to an assessment and to a demonstration of educational requirements of a particular level. [26]

54. Furthermore, Article 12(2)(b) of Directive 2004/114 expressly provides for the possibility of not renewing, or even of withdrawing, the residence permit if the holder does not make acceptable progress in his studies. Such provision makes it possible to penalise, *a posteriori*, any abuse of the procedure set out in that directive, in cases where the person admitted has sought admission to the territory of the European Union with no genuine intention of studying there.

C – *Teleological analysis*

55. The interpretation of Directive 2004/114 that I have proposed is confirmed, in my view, by a teleological analysis of that legislative instrument.

56. In that regard, the Court has already pointed out that, as emerges also from recital 6 to Directive 2004/114, the basis for the adoption of that directive is the desire to promote the mobility of third-country nationals to the European Union for study purposes, in the context of a strategy designed to promote Europe as a whole as a world centre of excellence for studies and vocational training, [27] which, furthermore, also has an external dimension in so far as it helps to disseminate the values of human rights, democracy and the rule of law to which the European Union is committed. [28]

25 — See recital 8 to Directive 2004/114.

26 — Legislation of that kind exists in the Netherlands where it is provided that establishments which wish to enrol third-country nationals must sign a code of conduct (Gedragscode Internationale Student in het Hoger Onderwijs) which, inter alia, requires establishments to determine in advance the educational requirements that make up the conditions for admission to the establishment and to ensure prior to admission that future students meet those conditions (see Article 4 of that code in the version of 1 March 2013). The signing of the code of conduct by an establishment is expressly regarded by the Netherlands Government as a condition for issuing a residence permit for study purposes (recital 8 to that code).

27 — *Sommer* (C-15/11, EU:C:2012:371, paragraph 39). In that regard, see also paragraphs 1.2, 1.3 and 1.5 of the proposal for a directive presented by the Commission in 2002 and referred to in footnote 20 above.

28 — See paragraph 1.3 of the proposal for a directive presented by the Commission in 2002 and referred to in footnote 20 above.

57. Directive 2004/114 has been designed to ensure that the approximation of the national legislation in the Member States governing the conditions of entry and residence of third-country nationals for study purposes contributes to the attainment of those objectives by promoting their admission. [29]

58. An interpretation of Directive 2004/114 which would make it possible for the authorities of the Member States to refuse, on the basis of an unfettered discretion, to admit a third-country national who has applied for admission for study purposes, even where that person meets all the conditions laid down in the directive itself, without misusing the procedure set out in that directive, would undermine its effectiveness and would constitute an obstacle to the pursuit of its specific objectives.

V – **Conclusion**

59. In the light of the foregoing considerations, I propose that the Court should give the following answer to the question referred by the Verwaltungsgericht Berlin:

Articles 6, 7 and 12 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 must be interpreted as meaning that the competent authorities of a Member State may, on completion of an examination of the related application, refuse to admit a third-country national for study purposes only if that person fails to meet the conditions laid down in that directive or where there is precise and specific evidence that the procedure set out in the directive has been abused or misused.

29 — Ibid.