THE POSITION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN THE ZAKARIA CASE (C-23/12): GENERAL OBSERVATIONS

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1. Introduction

The Community Code on the rules governing the movement of persons across borders, also known as “Schengen Borders Code”, established by Regulation No. 562/20061, has a double function: to contribute to the creation of a space of free movement of people without internal border controls and to establish a common corpus of legislation governing border control of persons crossing the external borders of the Member States of the European Union. Rules regarding external border controls oblige Member States to assure specific procedural guarantees to third-country nationals refused entry in their territories. In particular, Article 13§3 states “persons refused entry have the right to appeal”. Anyway, this provision does not establish any common standards applicable to Member States; on the contrary, it specifies that “appeals should be conducted in accordance with national law”4.

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2 Article 1 (“Subject matter and principles”) of Regulation No. 562/2006 states “This Regulation provides for the absence of border control of persons crossing the internal borders between Member States of the European Union. It establishes rules governing border control of persons crossing the external borders Member States of the European Union”.


4 Article 13§3 (“Refusal of entry”) of Regulation No. 562/2006 states “Persons refused entry shall have the right to appeal. Appeals shall be conducted in accordance with national law. A written indication of
In the case C-23/12, Mr Zakaria brings an action against the refusal to grant his application for damages based on the conduct of an administrative body upon his crossing of the Latvian border. The request for a preliminary ruling\(^5\) submitted by the Latvian Senate of the Supreme Court to the Court of Justice of the European Union (hereinafter CJEU) concerns the interpretation of Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’), regulating the right to an effective remedy and to a fair trial\(^6\), as well as Article 6§1\(^7\) and Article 13§3 of Regulation No. 562/2006. The main question of the Supreme Court regards the extent to which Article 13§3 is applicable: does this provision foresee the possibility to enjoy the right of appeal only against decisions refusing entry into a Member State or also against infringements committed in the procedure leading to the adoption of a decision authorising entry, e.g. the alleged misconduct of Latvian border guards in the performance of their duties? Which is the role of the Charter in such a situation? In its Judgement issued on 17\(^{th}\) January 2013, the CJEU shows great caution about the alleged violations of the provisions of the Charter, resulting not from the content of an administrative decision, but from a procedural defect committed during its adoption\(^8\).

2. Relevant facts and questions referred for a preliminary ruling

Mr Mohamad Zakaria has lived 10 years in Sweden, where in 2008 he obtains permanent residence rights. Moreover, he is in possession of a Palestinian refugee travel document issued by the Republic of Lebanon. On 28 November 2010 he flies from Beirut (Lebanon) to Copenhagen (Denmark) via Riga (Latvia). He travels to Denmark since his domicile (i.e. Lund, Sweden) is easier to reach from Copenhagen. At Riga airport, border guards inspect Mr Zakaria’s documents. According to the claimant, inspections are conducted in an offensive and provocative manner violating his human contact points able to provide information on representatives competent to act on behalf of the third-country national in accordance with national law shall also be given to the third-country national. Lodging such an appeal shall not have suspensive effect on a decision to refuse entry. Without prejudice to any compensation granted in accordance with national law, the third-country national concerned shall, where the appeal concludes that the decision to refuse entry was ill-founded, be entitled to correction of the cancelled entry stamp, and any other cancellations or additions which have been made, by the Member State which refused entry”.

\(^5\) Regulated by Article 267 TFEU.

\(^6\) Article 47 of the Charter states “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”.

\(^7\) Article 6§1 (“Conduct of border checks”) of Regulation No. 562/2006 states “Border guards shall, in the performance of their duties, fully respect human dignity. Any measures taken in the performance of their duties shall be proportionate to the objectives pursued by such measures”.

dignity. Border guards finally allow him to enter Latvia but, on account of the time taken by inspections, Mr Zakaria misses his flight to Copenhagen.

Considering the conduct of the border guards unlawful, Mr Zakaria lodges a complaint with the Latvian administrative bodies and jurisdictions asking for pecuniary compensation for the material and non-material harm incurred.

His first complaint is lodged with the Head of State border control, whose decision is not subject to appeal according to the Latvian Law. The Head of State border control dismisses Mr Zakaria’s application and upholds the legality of the conduct of the border guards and the ensuing administrative act authorizing his entry. Mr Zakaria brings action against the Latvian administrative jurisdictions. Both the Local Administrative Court and the Regional Administrative Court of Appeal dismiss his applications as inadmissible under the national administrative procedure. Although the Senate of the Supreme Court also states that the claim for compensation cannot be brought before the civil courts because Mr Zakaria’s action is directed against acts taking place during an administrative procedure, it harbours doubts about the compatibility of the national law with Article 13, §3 of Regulation No. 562/2006. Moreover, the Supreme Court hesitates vis-à-vis the applicability of Article 13, §3, which guarantees the right of appeal only in case of decisions refusing entry into the Member State concerned. Actually, in the opinion of the Supreme Court “a person is entitled to complain of procedural infringements, particularly attacks on human dignity, even where the outcome of the administrative decision is favourable.”

Consequently, the Supreme Court decides to refer three questions to the Court of Justice for a preliminary ruling. By its first question, the Courts asks if Article 13§3 of Regulation No. 562/2006 provides persons with the right of appeal not only against a decision refusing entry but also against infringements committed in the procedure leading to the adoption of a decision authorising entry. By its second and third questions, the Court asks whether, if the answer to the first question is affirmative, in the light of Recital 20 in the Preamble to, and Article 6§1 of, the above-mentioned Regulation as well as of Article 47 of the Charter, Article 13§3 imposes an obligation

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9 Article 20§2 of the Latvian Law on Immigration (Imigracijas Iikums, Latvijas Vestnesis, 2002, No. 169, p. 2744) states “Appeals (...) shall be examined by the Head of the State border control or by the official authorised by it, and the ensuing decision shall not be subject to appeal”.

10 Indeed, the Latvian legislation recognizes the right of appeal before a court only in cases in which a person is denied entry into the territory of the Country. Consequently, no right of appeal is foreseen against a procedural defect committed in a decision authorising entry. However, the Regional Court takes the view that if Mr Zakaria considers that border guards hurt his honour and dignity, which gives him a right to seek compensation under Article 92 of the Latvian Administrative Code of Procedure ("Right to compensation": Everyone has the right to compensation for material or personal damage, suffered as a result of an administrative act or factual act of an authority), he is entitled to pursue such a claim before the ordinary court.

11 Paragraph 22 of the Judgment of the CJEU.

12 Recital 20 in the Preamble to the Regulation No. 562/2006 affirms “This Regulation respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. It should be applied in accordance with the Member States' obligations as regards international protection and non-refoulement.”
on Member States to guarantee an effective remedy either before a court of law or before an administrative body providing the same guarantees as a court.

3. Judgement of the CJEU

The CJEU answers only to the first question, being the second and the third raised solely in the event that the response to the first was in the affirmative. Concerning the interpretation of Article 13§3 of Regulation No. 562/2006, the Court rules that this article obliges Member States to establish a means of obtaining redress only against decisions to refuse entry. Consequently, being Mr Zakaria’s entry authorized by border guards, the right of appeal recognised by Article 13§3 cannot be applied to the particular case.

Furthermore, the CJEU affirms that the lack of information concerning the relevant facts in the main proceedings determines the impossibility for the Court to establish the extent to which the conduct of border guards in the performance of their duties is in line with the provision contained in paragraph 1 of Article 6, focussed on the respect of human dignity and the proportionality of the measures taken during border checks. Consequently, the Court is not in the position to define if the situation of the claimant is governed by EU Law within the meaning of Article 51§1 of the Charter of Fundamental Rights, whose provisions “are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”.

For these reasons, in the light of the facts in the main proceedings, the referring court has to ascertain whether the situation of Mr Zakaria is governed by EU Law and, if that is the case, whether a refusal to grant him the right to brings his claims before a court infringes Article 47 of the Charter.

Moreover, the Court underlines that border guards performing their duties are obliged to fully respect human dignity – as required by Article 6 of the Regulation 562/2006 and that, should the referring court consider the situation not governed by EU Law, the relevant facts shall be examined in the light of the national law, taking into account the European Convention for the Protection of Human Rights and Fundamental Freedom (ECHR)\(^\text{13}\).

4. Main observations about the position of the CJEU

Although the CJEU has usually assisted the attainment of the general objectives of the EU Treaties by its creative jurisprudence and willingness to interpret measures in a

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\(^{13}\) “Convention for the Protection of Human Rights and Fundamental Freedoms” of the Council of Europe (to which all the Member States are party), signed in Rome on 4 November 1950 and entered into force on 3 September 1953.
way to make them effective, this particular judgment seems to be based on a neutral and cautious approach which does not leave any room for important future developments. Such a low level of “creativity” makes the position of the Court in the Zakaria Case particularly interesting.

The CJEU justifies its approach by advancing two main arguments: first of all, it affirms not to be in the position to determine if Mr Zakaria’s situation is governed by European Union law due to the lack of information on the main proceedings; secondly, it asserts not to have jurisdiction to interpret the national law of the concerned Member State while replying to a question submitted for a preliminary ruling in accordance with Article 267 TFEU. In order to better understand these statements and proceed with the analysis, it is necessary to briefly focus on the competences conferred to the CJEU by the Treaties.

As mentioned in the previous paragraph, Member States are addressed by the Charter only while implementing EU Law (Article 51§1 Charter). Under Article 51§2, it is also specified that “the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties”. Accordingly, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it. Moreover, Article 19§1 of the Treaty on the European Union (TEU) clearly indicates that the role of the CJEU is to “ensure that in the interpretation and application of the Treaties the law is observed” and that “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”. Referring to this latter provision, CJEU specifies in point 40 of this judgement that “it is for Member States to provide in their domestic legal system for the appropriate legal remedies to ensure, in compliance with Article 47 of the Charter, the protection of persons claiming the rights derived from Article 6 of Regulation No. 562/2006”.

As mentioned above, the CJEU does not have jurisdiction regarding the interpretation of the national law of the concerned Member State while replying to a question submitted for a preliminary ruling in accordance with Article 267 TFEU, as indicated in its previous case-law as well as in point 29 of this judgement.

Finally, the powers of the CJEU are limited also in relation to the protection and safeguarding of Fundamental Rights, which the right to an effective remedy and to a fair trial belongs to. Although these rights are recognized as general principles of EU law by

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15 Moreover, Article 6§1 TEU states that “the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties”.
both the Treaties\textsuperscript{18} and the jurisprudence of the CJEU\textsuperscript{19}, it must, however, be emphasized that the Court of Justice can only rule on compatibility between the ECHR and Union law in those areas of national law affected by Union law\textsuperscript{20}.

The competences of the CJEU being clarified, the next step is to understand which results could have been achieved if the approach of the Court to the particular case was less cautious.

As specified above, by adducing the lack of information concerning the relevant facts in the main proceedings, the CJEU designates to the referring Court the responsibility to ascertain whether the situation of Mr. Zakaria is governed by EU Law and focusses its judgment entirely on the fact that, under Regulation No. 562/2006, no right to appeal is foreseen against a decision authorizing entry.

By avoiding to interpret Article 13§3 in the light of Recital 20 and Article 6§1 of Regulation No 562/2006 as well as of Article 47 of the Charter, according to which the right to an effective remedy is assured to “everyone whose rights and freedoms guaranteed by the law of the Union are violated”, the Court does not foster the development of a further obligation for Member States foreseeing the possibility to appeal against alleged violations committed not only during the adoption of a decision refusing but also authorizing entry. The lack of an interpretation based on the combination of these provisions makes obviously inapplicable the activation of any procedural guarantees under Article 47 of the Charter.

Although the inadequacy of the information provided did not put the Court in the position to ascertain the alleged violation of Mr. Zakaria’s dignity due to the misconduct of the Latvian border guards, a more extensive interpretation could have been provided in order to assure the respect of effective rights of individuals by national courts, facilitating, in that way, the achievement of an \textit{effet utile}.

In the Zakaria Case, the CJEU focuses its attention more on the clarification of the meaning of Article 13§3 of Regulation No. 562/2006 than on the provision of a “creative” interpretation underlying the predominance of fundamental rights. Even though the CJEU \textit{has attributed special importance to the principle guaranteed by Article 47 of the Charter from an early stage, in demanding that individuals should enjoy the opportunity to assert their rights through the courts as indeed required by the notion of judicial control of the executive that underlies the constitutional traditions...}

\textsuperscript{18} Article 6§3 TEU states that “fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”.

\textsuperscript{19} See Case C-222/84 Johnston (1986) ECR 1651, paragraph 18: “The requirement of judicial control (...) reflects a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. As the European Parliament, Council and Commission recognized in their Joint Declaration of 5 April 1977 (Official Journal C 103, p. 1) and as the Court has recognized in its decisions, the principles on which that Convention is based must be taken into consideration in Community law”.

\textsuperscript{20} Fairhurst, John, \textit{op. cit.}, p.72.
common to the Member States\textsuperscript{21}, in this particular case the application of this principle seems to be hampered by the lack of information on the relevant facts and, consequently, designated to the discretion of the concerned national court.

5. Conclusions

The jurisprudence of the CJEU, as a major source of law, comprises not only all the formal decisions of the Court, but also the principles enunciated in its judgments and opinions\textsuperscript{22}. For this reason, a sharper interpretation of the Zakaria Case could have set an interesting precedent for extending the applicability of Article 13§3 of Regulation No. 562/2006 as well as represented a good occasion to reconfirm the principle of “Effective Legal Protection” developed by the Court\textsuperscript{23} as a general principle of law.

On the contrary, the cautious position adopted by the Court seems to call to mind the indisputable role of national law within the framework of the procedural guarantees contained in the “Community Code on the rules governing the movement of persons across borders” (i.e. “Schengen Borders Code”), where no common standard on the right to appeal is foreseen, neither against decisions refusing entry into the territory of Member States.


\textsuperscript{22} Fairhurst, John, \textit{op. cit.}, p.68.