STUDIA PRAWNICZE KUL
4 (88) 2021

The role of the CJEU in the strengthening of the participation of third-country nationals in academic life in the EU. Analysis of the ruling of the CJEU in case M.A. versus Consul of the Republic of Poland in N[1]

Rola TSUE we wzmacnianiu udziału obywateli państw trzecich w życiu akademickim w UE. Analiza orzeczenia TSUE w sprawie M.A. przeciwko Konsulowi Rzeczypospolitej Polskiej w N.

Роль Суда Европейского Союза в укреплении участия граждан третьих стран в академической жизни в ЕС. Анализ решения Суда Европейского Союза по делу M.A. против консула Республики Польша в N.

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Summary: The analyzed ruling is the first judgement which the Court of Justice passed in order to provide interpretation for the new Student Directive (2016/801 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). Due to its judiciary activism, the Court was able to find a connection between the case pending before a national court and EU law in the case of M.A. In the end, the Court finally decided that in the case at issue, regarding the rights of a foreign national to apply for a residence permit for the purpose of enrolling in second-cycle studies programme in Poland, the procedure of applying for a long-stay visa on the grounds of national law must be safeguarded by the guarantees under Article 47 of the Charter of Fundamental Rights. The guarantees apply to the actual states in which EU law is applicable – in this case the "Student Directive." It seems that the ruling in the case of M.A. will play a crucial role in facilitating students' – TCNs' – entry into the territory of the Republic of Poland, while the Polish legislator, in all probability, will be obliged to change the provisions of the national law in such a way as to make it possible for future students to access a full array of legal remedies against the negative decisions of consuls.

Key words: Long-stay visa, foreign students, Student Directive, Directive 2016/801, the right of defence and the right to an effective legal remedy

Streszczenie: Analizowane orzeczenie jest pierwszym wyrokiem, który Trybunał Sprawiedliwości Unii Europejskiej (TSUE) wydał w celu wykładni nowej „dyrektywy studenckiej" (Dyrektywa Parlamentu Europejskiego i Rady

[1] Judgement of the Court of 10 March 2021, M.A. v. Konsul Rzeczypospolitej Polskiej w N., C 949/19, ECLI:EU:C:2021:186. The current article is based on the findings of the research project entitled "Zarządzanie bezpieczeństwem w prawie i polityce azylowej i powrotowej Unii Europejskiej w obliczu kryzysu migracyjnego" (Security management in European asylum and return law and policy with regard to the migration crisis) registered at No. 2016/23/D/HS5/00404 and funded by the National Science Centre, Poland.

ISSN: 1897-7146; eISSN: 2719-4264;
https://doi.org/10.31743/sp.12894

(UE) 2016/801 z dnia 11 maja 2016 r. w sprawie warunków wjazdu i pobytu obywateli państw trzecich w celu prowadzenia badań naukowych, odbycia studiów, szkoleń, udziału w wolontariacie, programach wymiany młodzieży szkolnej lub projektach edukacyjnych oraz podjęcia pracy w charakterze au pair). Aktywizm orzeczniczy TSUE pozwolił w sprawie M.A. na znalezienie związku między sprawą zawisłą przed sądem krajowym a prawem Unii Europejskiej. Trybunał uznał ostatecznie, że w przypadku, w którym sprawa dotyczy prawa cudzoziemca do ubiegania się o zezwolenie pobytowe w celu odbycia studiów II stopnia w Polsce, do procedury ubiegania się o uzyskanie wizy długoterminowej na podstawie prawa krajowego zastosowanie znaleźć muszą gwarancje z art. 47 Karty Praw Podstawowych. Gwarancje te obejmują stany faktyczne, w których stosowane jest prawo UE – w tym przypadku „dyrektywa studencka". Wydaje się, że orzeczenie w sprawie M.A. będzie miało kluczowe znaczenie dla facylitacji wjazdu studentów – obywateli państw trzecich na terytorium RP, zaś polski ustawodawca z dużym prawdopodobieństwem będzie zobligowany do zmiany przepisów ustawy krajowej w taki sposób, aby umożliwić przyszłym studentom pełny wachlarz środków odwoławczych od negatywnych decyzji konsulów.

Słowa kluczowe: wiza długoterminowa, studenci – obcokrajowcy, dyrektywa studencka, Dyrektywa 2016/801, prawo do obrony i środka odwoławczego

Резюме: Анализируемое решение является первым решением, которое Суд Европейского Союза вынес с целью интерпретации новой «студенческой директивы» (Директива Европейского Парламента и Совета Европейского Союза 2016/801 от 11 мая 2016 года об условиях въезда и проживания граждан третьих стран в целях научных исследований, стажировок, волонтерской деятельности, обмена студентами или образовательных проектов, а также работы по программе «au pair»). Практика Европейского Суда позволила в производстве по делу M.A. найти связь между делом, находящимся на рассмотрении национального суда, и правом Европейского Союза. В итоге суд постановил, что если дело касается права иностранца на подачу заявления на получение вида на жительство с целью продолжения обучения на втором уровне в Польше, то гарантии статьи 47 Хартии основных прав Европейского Союза должны применяться к процедуре получения долгосрочной визы в соответствии с национальным законодательством. Эти гарантии охватывают фактические ситуации, в которых применяется законодательство ЕС – в данном случае «студенческая директива». Представляется, что решение по делу M.A. будет иметь решающее значение для облегчения въезда студентов – граждан третьих стран – на территорию Польши, и польский законодатель, по всей вероятности, будет обязан изменить положения внутреннего законодательства таким образом, чтобы предоставить будущим студентам полный спектр средств обжалования отрицательных решений послов.

Ключевые слова: долгосрочная виза, студенты-иностранцы, «студенческая директива», Директива 2016/801, право на защиту и средства обжалования

Preliminary remarks

Studying in the European Union is becoming increasingly popular among foreign nationals year by year. In 2018, in accordance with the Eurostat data, the number of foreign nationals enrolled in tertiary level education within the EU Member States was over 1,3 million (including both migrating EU citizens, as well as third-country nationals – further as TCNs).[2]

[2] *Learning mobility statistics*, Eurostat Statistics Explained, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Learning_mobility_statistics [access: 12.05.2021]. See also: Internationale Studierende, Migrationsdatenportal, https://www.migrationdataportal.org/ [access: 12.05.2021].

In EU law, the rules of entry and residence of TCNs in the Member States with a view to undertaking studies are regulated by the provisions of the so-called Student Directive 2016/801, which repealed the provisions of Directive 2004/114.[3] The case analyzed in the present article resulted in the first judgement of the CJEU pronounced on the grounds of the new Directive.[4]

1. The Analyzed EU Law and National Proceedings

In the case under discussion, the request for a preliminary ruling was submitted to the Court by the Polish Supreme Administrative Court, examining a cassation complaint submitted by a foreign national against the refusal to issue a national visa.[5] The reason behind the visa application was to enrol in a second-cycle programme of studies in Poland.

In accordance with EU law, migration policy is a competence which is shared between the EU and the Member States.[6] Consequently, the area of visa law functions under both the Convention Implementing the Schengen Agreement (CISA)[7] and the Visa Code,[8] as well as the provisions of national law, allowing for the issuing of so-called national visas. Long-stay visas are issued on the basis of EU law or national law and they are defined under Article 18 CISA, in accordance with which

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3 Council Directive 2004/114/EC of 13 December 2004 on the conditions for the admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, OJ L 375, 23.12.2004, pp. 12–18. See also: M. Chavrier, P. Bury, *Students and Researchers Directive: Negotiations within the Council*, in: *The Students & Researchers Directive. Central Themes, Problem Issues and Implementation in Selected Member States*, eds. T. de Lange, P. Minderhoud, Nijmegen 2020, pp. 5–18; H. Calers, *The Students and Researchers Directive: Analysis and Implementation Challenges*, in: *The Students & Researchers Directive*…, pp. 19–42.

4 As of now, the President of the Court made only two rulings in Cases C 671/19 and C 672/19 (of 24 October 2019 X v. État belge, request for a preliminary ruling from the Conseil du Contentieux des Étrangers; ECLI: EU:C:2019:913 and ECLI: EU:C:2019:914).

5 Request for a preliminary ruling submitted by the Supreme National Court (Poland) on 31 December 2019 – M.A. v. Konsul Rzeczypospolitej Polskiej w N. (Case C 949/19), OJ C 191, 8.06.2020, pp. 2–3.

6 Article 6 of the Treaty on the Functioning of the European Union, consolidated version, OJ C 202, 7.06.2016, p. 47.

7 The Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.9.2000, pp. 19–62.

8 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), OJ L 243, 15.09.2009, pp. 1–58.

they are granted in a uniform format for a maximum of one year. The long-term visa allows the possibility to exercise the right to free movement of persons within the Schengen area (Article 21 (2) (a) CISA).

In accordance with Article 32 (3) of the Visa Code, in a situation when a foreign national is refused a visa, he or she is entitled to the right of appeal against the unfavourable judgement. This right is guaranteed as a fundamental right under the Charter of Fundamental Rights of the European Union (CFR) in its Article 47 as the "Right to an effective remedy and to a fair trial."[9]

An act of EU secondary law which regulates the legal situation of persons applying for admission to higher education studies in the EU Member States is the so-called Student Directive, that is, Directive (EU) 2016/801 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.[10] In accordance with Article 2 (1) of the Directive "[…] the Directive shall apply to third-country nationals who apply to be admitted or who have been admitted to the territory of a Member State for the purpose of research, studies, training or voluntary service in the European Voluntary Service. […]" The Directive also uses the term 'authorisation', which is defined as a residence permit or, if provided for in national law, a long-stay visa.[11] In accordance with Article 34 (5) of the Directive, any decisions declaring an application as inadmissible or rejecting it will be open to legal challenge in accordance with national law.[12]

In Polish law, the issuing of visas is regulated by the Act on Foreigners.[13] In accordance with Article 59 (1) of the Act "A national visa authorises the foreigner to enter the territory of the Republic of Poland and stay in this territory uninterruptedly or within several consecutive stays lasting in total no longer than 90 days within the period of visa validity. National visas are issued for the period not exceeding a year (Aricle 59 (3)), among others for attending first- or second-degree studies, or third-degree studies (Article 60 (1) (9)). In accordance with Article 75 of the Act, the refusal to issue a national visa is made by way of a decision. If the refusal decision is issued by the consul, it may be appealed against to the same authority

9 Charter of Fundamental Rights of the European Union, OJ C 202/389, 7.06.2016, pp. 389–405.

10 Directive (EU) 2016/801 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, OJ L 132, 21.05.2016, pp. 21–57.

11 Article 3 (21) of Directive 2016/801.

12 Article 34 (5) of the Directive 2016/801.

13 The Act on Foreigners of 12 December 2013, Journal of Laws [Dziennik Ustaw] 2020 item 35.

(Article 76 (1)). However, Polish law does not provide for the possibility of challenging the refusal decision rendered by the consul before administrative courts, as they are not competent to rule in the cases of visas issued by consuls.[14] Consequently, under Article 58 (1) (1), an administrative court rejects such an appeal as it does not fall within its area of competence.

The foreign national complainant in the case under discussion applied for a national long-stay visa in order to enrol in second-cycle studies programme in Poland. Next, having been refused a visa, he applied for reconsideration of his situation, thus exhausting the legal procedure provided for under Polish law. The second decision of the consul in the case at hand was also a refusal. As a result, the applicant challenged the refusal from the consul before the Provincial Administrative Court in Warsaw, citing a reference to Case El Hassani.[15] The Supreme Administrative Court denied the appellant any direct legal remedy on the grounds of Article 5 (4) of the Law of the Administrative Courts Procedure. Therefore, the foreign national filed a cassation appeal to the Supreme National Court. The Court observed that the case of El Hassani, to which the appellant referred, did not apply in the present dispute, as it concerned the lack of any means of redress for the issuing of a Schengen short--term visa. What is more, the Polish legislator changed the introductory sentence to Article 5(4) of the Law of the Administrative Courts Procedure in such a way as to make the Polish law compliant with the interpretation of the law presented by the CJEU in the case of El Hassani.[16] However, the Supreme Administrative Court had doubts whether, in accordance with EU law, national law should not provide the same guarantees of protection as those functioning with regard to the Schengen visas after the El Hassani judgement.[17] The Supreme Administrative Court observed that holders of national long-stay visa, under the provisions of Article 21 (2) (a) of the CISA have the right to free movement and therefore holding a national visa is a prerequisite to be able to exercise the entitlements given to TCNs by European law. The holders of long-stay Schengen visas are entitled to the same rights. In the opinion of the Supreme Administrative Court, there exists a risk that a lack of legal remedy regarding the refusal to grant a national visa may be in breach of EU law,

14 The Act of 30 August 2002 – The Law of the Administrative Courts Procedure, Journal of Laws 2019 item 2325.

15 Judgement of the Court (First Chamber) of 13 December 2017, Soufiane El Hassani v. Minister Spraw Zagranicznych, C 403/16, ECLI:EU:C:2017:960.

16 Article 5 (4) introductory sentence changed by Article 5 (1) of the Act of 21 January 2021 (Journal of Laws 2021 item 159) changing the Law of the Administrative Courts Procedure as of 9 February 2021.

17 § 19 of the judgement in Case M.A. v. Konsul Rzeczypospolitej Polskiej w N.

especially of Article 47 of the CFR.[18] Given the circumstances, the national court suspended the proceedings and referred a question for a preliminary ruling to the Court of Justice of the European Union.[19]

2. Questions for a Preliminary Ruling and Answers from the Court of Justice

The Court of Justice decided to reformulate the question referred for a preliminary ruling and examine whether: "EU law, in particular Article 21 (2a) of the CISA read in the light of Article 47 of the Charter, must be interpreted as meaning that it requires the Member States to provide for an appeal procedure against decisions refusing a long-stay visa for the purpose of studies." The Court ruled that Article 21 (2a) of the CISA merely entitles TCNs to the right of freedom of movement and it does not allow for any entitlement that would be guaranteed under Article 47 of the CFR, guaranteeing the right to effective legal remedy. Consequently, in the opinion of the Court, a decision to refuse the issuing of a long-stay visa to a foreign national does not fall within the scope of applying Article 21 (2a) of the CISA.

However, the Court decided to examine the case thoroughly and refer to the existing case law, especially to the ruling in Case C 225/15,[20] in order to determine whether the obligation of the Member State to establish a legal remedy against a decision of the consul refusing to issue a long-stay visa for the purpose of study follows from other provisions of EU law.

The Court observed that the Union legislator did not decide to impose any provision of EU law which would regulate or harmonize the issuing of long-stay

18 § 20 of the judgement in Case M.A. v. Konsul Rzeczypospolitej Polskiej w N.

19 Ruling of the Supreme Administrative Court of 4 November 2019, II OSK 2470/19, https://orzeczenia.nsa.gov.pl/doc/980E3DBEAC [access: 1.06.2021].

20 Judgement of the Court of 9 April 2014, Ville d'Ottignies-Louvain-la-Neuve and others v. Région wallonne, C 225/13, ECLI:EU:C:2014:245, § 30. "Nevertheless, it is clear from the settled case-law of the Court that the fact that the referring court's question refers to certain provisions of EU law does not mean that the Court may not provide the national court with all the guidance on points of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to those points in its question. It is, in this regard, for the Court to extract from all the information provided by the referring court, in particular from the grounds of the decision to make the reference, the points of EU law which require interpretation in view of the subject-matter of the dispute (see, inter alia, Case C 418/11 Texdata Software EU:C:2013:588, para. 35 and the case-law cited)".

national visas.[21] Accordingly, in a similar vein to Case X and X[22] (at that time the Court ruled that the issuing of long-stay visas for humanitarian reasons does not fall within the scope of the Union's guarantees) applications for issuing visas, such as the one the foreign national complainant M.A. was requesting, do not fall within the guarantees of the Union. Therefore, the guarantees under Article 47 of the CFR[23] are not applicable in the procedure of issuing such visas. The lack of possibility to apply the guarantees of fundamental rights transpires directly from the horizontal clauses in the charter. In accordance with its Article 51: "The provisions of this Charter 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."[24]

In order to find a foothold for the present case in EU law, the Court emphasized that that the complainant applied for a visa with a view to enrolling in second-cycle higher education in Poland. EU law guarantees the conditions of entry and stay of students who are foreign nationals in the provisions of Directive 2016/801, whereas in accordance with Article 3 (21)[25] and 3 (23)[26], the permission to enter and, consequently, enrol in a study programme is granted in the form of a residence permit or a long-stay visa, as long as it is provided for by the law of the Member State. The Court ruled that it is for the national court to assess whether the application for issuing a visa, contested within national proceedings, falls within the application of the Student Directive.

In the case of an affirmative answer from the national court, according to the Court, Article 34 (5) of Directive 2016/801 is binding for the case. According to said article: "Any decision declaring inadmissible or rejecting an application, refusing

21 § 34 of the judgement in Case M.A. v. Konsul Rzeczypospolitej Polskiej w N. The basis for adopting such legal solutions may lie in Article 79 (2) of the TFEU.

22 Judgement of the Court of 21 April 2017, X and X v. État belge, C 638/16 PPU, ECLI:EU:C:2017:173.

23 § 35 of the judgement in Case M.A. v. Konsul Rzeczypospolitej Polskiej w N.

24 § 36 of the judgement in Case M.A. v. Konsul Rzeczypospolitej Polskiej w N. See also: judgment of the Court (Grant Chamber) of 19 November 2019, A.K. and Others v. Sąd Najwyższy, CP v. Sąd Najwyższy and DO v. Sąd Najwyższy, Case 585/18, ECLI:EU:C:2019:982. In accordance with § 78 of the judgement: The scope of the Charter, in so far as the action of the Member States is concerned, is defined in Article 51 (1) thereof, according to which the provisions of the Charter are addressed to the Member States when they are implementing EU law. That provision confirms the Court's settled case-law, which states that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations."

25 In accordance with Article 3 (21) of Directive 2016/801: "'authorisation' means a residence permit or, if provided for in national law, a long-stay visa issued for the purposes of this Directive."

26 In accordance with Article 3 (23) of Directive 2016/801: "'long-stay visa' means an authorisation issued by a Member State as provided for in Article 18 of the Schengen Convention or issued in accordance with the national law of Member States not applying the Schengen acquis in full."

renewal, or withdrawing an authorisation shall be open to legal challenge in the Member State concerned, in accordance with national law. The written notification shall specify the court or administrative authority with which an appeal may be lodged and the time limit for lodging the appeal."

The Court emphasized that, in accordance with the procedural autonomy, the Member States are free to decide on the scope of the implemented appeal measures against the decisions anchored in EU law. Nevertheless, the national legislator must guarantee the realization of the principles of equivalence and effectiveness, that is, ensure that the newly implemented measures were not less effective than those arising from the applicable national law and that they would not constitute an obstacle to the realization of rights provided for by EU law. Simultaneously, the legal remedy measures guaranteed in the national law must be compliant with Art. 47 of the Charter and therefore ensure "the right to an effective remedy before a tribunal."[27]

In providing a final answer to the question referred to for a preliminary ruling, the Court ruled that Article 21 (2a) cannot be applied in the case of a TCN whose application for a long-stay visa was rejected. However, in the opinion of the Court, the Member States are obliged to guarantee effective legal remedy measures, resulting from Article 47 of the CFR in a situation when the refusal concerned the visa for the purpose of study on the grounds of Article 34 (5) of the Student Directive. The Court left it to the national court – the Supreme Administrative Court – to assess whether the provision of Article 34 (5) is applicable in the main proceedings.[28]

3. Assessment of the judgement in the present commentary

The national court decided to refer a question for a preliminary ruling on the grounds of Article 267 TFEU. In accordance with the provisions of the treaty: "Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court." Significantly, the national court decided to refer a question for a preliminary ruling despite the existence of the so-called "CILFIT" criteria, established by the CJEU:

In the judgment in CILFIT, the Court of Justice, on the basis of the judgment in Da Costa, exempted courts of last instance within the meaning of the third

27 The introductory sentence of Article 47 of the Charter of Fundamental Rights.

28 § 48 of the judgement M.A. v. Konsul Rzeczypospolitej Polskiej w N., see also the operative part of the judgement.

paragraph of Article 234 EC from their obligation to make a reference for a preliminary ruling not only where the question of Community law raised in a case is irrelevant but also where the Community provision in question has already been interpreted by the Court in any type of proceedings ('acte éclairé') or where the correct application of Community law is so obvious as to leave no scope for any reasonable doubt ('acte clair').[29]

3.1. The CJEU Case Law as an Instrument for Facilitating Foreign Student Admission in the European Union

As a result of the judgment passed within the framework of a preliminary ruling procedure, the Supreme Administrative Court resumed the suspended proceedings and overturned the contested decision of the Provincial Administrative Court concerning the foreign national's complaint regarding the decision refusing the issue of a long-stay visa for the purpose of undertaking studies.[30] As a result, the case was returned to the Provincial Administrative Court. In the reasoning of the ruling, the Supreme Administrative Court emphasized that the application for a visa may well fall within the scope of application of the Student Directive and the court of first instance is obliged to examine such factors and, in the case of an affirmative conclusion, to substantially examine the complaint. Poland was obliged to implement the Student Directive by 23 May 2018. At that time, the process of implementation included eleven legal acts such as laws and regulations.[31]

In my opinion, based on the facts of the case under discussion and the reasoning of the CJEU, there is no doubt that applications lodged for the issue of residence visas for the purpose of undertaking studies fall within the scope of application of the Student Directive. Consequently, the provisions of the Polish Act on Foreigners are not compliant with the provisions of the Student Directive. In such a situation, in accordance with the principle of supremacy of EU law, the provisions of the Directive are fully applicable.[32] Therefore, in cases such as M.A.'s, the national courts

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29 Opinion of Advocate General Christine Stix-Hackl of 12 April 2005, Intermodal Transports BV v. Staatssecretaris van Financiën, C 495/03, ECLI:EU:C:2005:215, § 74.

30 The Decision of of the Supreme Administrative Court of 13 April 2021, II OSK 2470/19, LEX no. 3176020.

31 https://eur-lex.europa.eu/legal-content/PL/NIM/?uri=CELEX:32016L0801 [access: 12.05.2021]. On the subject. I. Florczak, *Executing Provisions of Directive 2016/801 – The Polish Perspective*, in: *The Students & Researchers Directive*…, pp. 105–116.

32 The principle of supremacy was established in the case law of the CJEU, whereas the key significance for understanding this term is to be found in Case Costa v. ENEL – judgement of the Court of 15 July

will be obliged to apply the principles resulting from the provisions of the Directive and provide for the legal remedy against the negative decision of the consul.

A situation when the national court passed a judgement or ruling in obvious violation of the judgement of the Court might incur liability on the part of the Polish State under Article 258 of the TFEU.[33] Indeed, a Member State is to be held responsible in the case of not fully implementing a directive and this is precisely what happened in the light of the ruling of the Court regarding the Student Directive. As transpires from Article 288 of the TFEU, directives are binding for the Member States with regard to the results that are to be achieved, whereas the Member States are obliged to implement the guarantees resulting from the provisions of the directives into the system of national law. This is not what happened concerning the provisions of the Student Directive, whose provisions provide for judicial control over refusal decisions in the law pertaining to residence permits issued for the purpose of undertaking studies, in accordance with the guarantees resulting from Article 47 of the Charter. The Court had already ruled in Polish cases regarding an incorrect transposition of a directive, among others in Case C492/07, ruling that Poland had made an incorrect transposition of the definition of "subscriber" in the national law.[34] What is also significant, in a situation such as in the judgement under discussion, it does not suffice for a Member State to establish or change the administrative procedure, but to ensure effective guarantees resulting from the provisions of the Directive in national law.[35] Thus, in all likelihood, the provisions of the Polish Act

1964, Flaminio Costa v. E.N.E.L., C 6/64 (Ente nazionale energia elettrica, impresa già della Edison Volta). In accordance with declaration no. 17 attached to the Treaty of Lisbon (Declaration on primacy, OJ C115, 9.05.2008, p. 344): "In accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law."

33 Article 258 of the TFEU. See: judgement of the Court of 30 September 2003, Gerhard Köbler v. Republik Österreich, C 224/01, ECLI:EU:C:2003:513, § 56 of the judgement: "an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter."

34 Judgement of the Court (Fifth Chamber) of 22 January 2009, Commission of the European Communities v. Republic of Poland, C 492/07, ECLI:EU:C:2009:31. See also: judgement of the Court of 19 March 2009, Commission of the European Communities v. Republic of Poland, C 143/08, ECLI:EU:C:2009:174 and judgement of the Court of 5 June 2008, Commission of the European Communities v. Republic of Poland, C 170/07, ECLI:EU:C:2008:322.

35 Judgement of the Court of 15 October 1986, Commission of the European Communities v. Italian Republic, C 168, ECLI:EU:C:1986:381. In the operative part of the judgement the Court stated the following: "since the incompatibility of national legislation with provisions of the treaty can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended, mere administrative practices, which by their nature are alterable at

on Foreigners will have to be changed in accordance with the interpretation conducted by the Court in Case M.A.

If the national provisions are declared incompatible with EU law, it will most probably result in a change of practice in the area of student admission, and so it may effectively open the door for educational migrations. The statistical data referred to in the preliminary remarks confirm an increasing interest among young people in undertaking studies abroad. However, as can be seen in the statistical data by the Polish Ministry of Foreign Affairs, in the years 2016–2020 Polish consuls issued a total of 16 109 refusal decisions with regard to applications for long-stay visas for the purpose of studies, including 11 733 refusal decisions for undertaking MA studies.[36]

As pointed out in the preliminary remarks, the ruling under discussion constitutes the first ruling of the CJEU issued on the grounds of the new Student Directive. So far, the Court has ruled in student cases only in a few cases on the grounds of Directive 2004/114. Indeed, in cases Leopold Sommer v. Landesgeschäftsstelle des Arbeitsmarktservice Wien and The Queen, on the application of Ezgi Payir, Burhan Akyuz and Birol Ozturk v. Secretary of State for the Home Department,[37] the CJEU expressed its opinion on students' access to the job market, emphasizing in the judgement in Case C 15/11 that "the conditions of access to the labour market by Bulgarian students, at the time of the events in the main proceedings, may not be more restrictive than those set out in Council Directive 2004/114/EC."[38]

The conditions of entry of TCNs interested in obtaining education in the Member States were the focus of the case of Ali Ben Alaya. The case concerned the fact that the national bodies of a Member State refused to issue a student visa, claiming that he had poor grades, indicating the low level of education he had received outside the EU, which were not satisfactory enough to facilitate effective higher education in his chosen field at a medical university. The Court observed that since

will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations under the treaty capable of remedying the infringement."

36 In the year 2020 alone there were 2041 such decisions.

37 Judgement of the Court (Third Chamber) of 24 January 2008, The Queen, on the application of Ezgi Payir, Burhan Akyuz and Birol Ozturk v. Secretary of State for the Home Department, C 294/06, ECLI:EU:C:2008:36. The case concerned the nationals of Turkey. The Court stated that: "The fact that a Turkish national was granted leave to enter the territory of a Member State as an au pair or as a student cannot deprive him of the status of 'worker' and prevent him from being regarded as 'duly registered as belonging to the labour force' of that Member State."

38 Judgement of the Court of 21 June 2012, Leopold Sommer v. Landesgeschäftsstelle des Arbeitsmarktservice Wien, C 15/11, ECLI:EU:C:2012:371. The complainant in this case was a national of Bulgaria seeking employment in Austria.

the foreign national met all the conditions for entry for the purpose of studies, there were no grounds for refusing him permission to enter. The CJEU also emphasized that the Member States cannot establish any additional conditions obstructing entry which would be contrary to the objectives of the Student Directive.[39]

From the case cited above there transpires a uniform line of case law laid down by the Court, in which the CJEU provides the interpretation of the EU law for the benefit of TCNs.[40] The analyzed judgement constitutes a confirmation of the Court's efforts for the cause of facilitating stay and admission to universities for TCNs interested in studying in the Member States, in as far as they do not pose a threat to the security and public order.[41] In the case of Sommer, the Court justly confirmed that the provisions of the Student Directive are aimed at promoting "the mobility of students who are third-country nationals to the European Union for the purpose of education. That mobility is intended 'to promote Europe […] as a world centre of excellence for studies and vocational training."[42]

What is also worth emphasizing is that the Court ruled in the cases regarding access to education for the sake of the beneficiaries of the educational system also before the creation of the Area of Freedom, Security and Justice – just to mention the case of R. Grzelczyk.[43] Therefore, the case law of the CJEU constitutes a coherent instrument promoting educational mobility in the EU.

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39 Judgement of the Court of 10 September 2014, Mohamed Ali Ben Alaya v. Bundesrepublik Deutschland, C 491/13, ECLI:EU:C:2014:2187.

40 See also: judgement of the ECHR in Case B.A.C. regarding a lack of possibility to undertake studies by a TCN due to the prolonged proceedings concerning his application for refugee status in Greece. The ECHR declared in this case that the excessive length of asylum proceedings negatively influenced the possibility of undertaking studies by the foreign national. Judgement of the ECHR of 13 October 2016 in Case B.A.C. v. Greece, complaint no. 11981/15.

41 This is what the Court ruled in the case of Fahimian, stating that it is not contrary to EU law to refuse the issuing of a residence permit to a TCN who wants to enrol in studies in the territory of the EU, but that there is a risk that such a person might use his knowledge for purposes contrary to public health. See also: judgement of the Court of 12 December 2019, Staatssecretaris van Justitie en Veiligheid v. E.P., C 380/18, ECLI:EU:C:2019:1071, § 32.

42 Judgement of the Court of 21 June 2012, Leopold Sommer v. Landesgeschäftsstelle…, § 39. The cited fragment comes from recitals 6 and 7 to Directive 2004/114. The Directive presently in force also in the Preamble contains a claim that "This Directive […] should allow for a better contribution to the Global Approach to Migration and Mobility and its Mobility Partnerships which offer a concrete framework for dialogue and cooperation between the Member States and third countries, including in facilitating and organising legal migration" (recital 6 of the Preamble to Directive 2016/801).

43 Judgment of the Court of Justice of 20 September 2001, Rudy Grzelczyk and Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, C 184/99, ECLI:EU:C:2001:458; See rulings in the following cases: judgement of the Court of 13 February 1985, Françoise Gravier v. Ville de Liège, C 293/83, ECLI:EU:C:1985:69; judgement of the Court of 13 July 1983, Sandro Forcheri and his wife Marisa Forcheri, née Marino v. Belgian State and asbl Institut Supérieur de Sciences Humaines

3.2. Special Protection Resulting from Article 47 of the Charter of Fundamental Rights Regarding Third-Country Nationals

Despite the fact that the Court did not find any grounds for applying Article 21 of the CISA in the case under discussion, it was possible to combine the situation of the complainant in the main proceedings with the provisions of the Student Directive and in this way extend the standard for protection for persons such as M.A. with the guarantees under Article 47 of the Charter, due to the fact that the case came within the scope of the application of EU law. The answer to the question referred to for a preliminary ruling constitutes an example of judiciary activism on the part of the CJEU.[44] In § 31 of the judgement, the Court declared that "it is clear from the settled case-law of the Court that the fact that the referring court's question refers only to certain provisions of EU law does not mean that the Court may not provide the national court with all the guidance on points of interpretation of EU law which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to those points in its question."[45]

The judiciary activism of the Court is rooted in its systemic attitude to EU law which comes under its scrutiny and interpretation. In Case Merck v. Hauptzollamt Hamburg-Jonas, the Court stated that "[…] in interpreting a provision of [Union] law it is necessary to consider not only its wording, but also the context in which it occurs and the objects of the rules of which it is part."[46] In the doctrine of EU law, there appear arguments in favour of the existence of the "Doctrine of De Facto Precedent Based on the Supremacy of EU Law."[47] Because the CJEU applies

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Appliquées – Ecole Ouvrière Supérieure, C 152/82, ECLI:EU:C:1983:205; judgement of the Court of 21 June 1988, Sylvie Lair v. Universität Hannover, C 39/86, ECLI:EU:C:1988:322; judgement of the Court of 21 June 1988, Steven Malcolm Brown and The Secretary of State for Scotland, C 197/86, ECLI:EU:C:1988:323.

44 On the subject of judiciary activism, see: P. Marcisz, *Koncepcja tworzenia prawa przez Trybunał Sprawiedliwości Unii Europejskiej*, Warszawa 2015; P. Kuczma, *O aktywizmie sędziowskim*, Zeszyty Naukowe Uczelni Jana Wyżykowskiego. Studia z Nauk Społecznych, 2016, no. 9, pp. 187–197; K.D. Kmiec, *The Origin and Current Meanings of 'Judicial Activism'*, California Law Review 2004, vol. 92, no. 5, pp. 1441–1477; V. Dhooghe, R. Franken, T. Opgenhaffen, *Judicial Activism at the European Court of Justice: A Natural Feature in a Dialogical Context*, Tilburg Law Review 2015, vol. 20, pp. 122–141; H.-W. Micklitz, *Judicial Activism of the European Court of Justice and the Development of the European Social Mode in Anti-Discrimination and Consumer Law*, EUI Working Papers LAW 2009/19.

45 See also: judgement of the Court (Second Chamber) of 9 April 2014, Ville d'Ottignies-Louvain-la-Neuve and others, C 225/13, ECLI:EU:C:2014:245, § 30.

46 G. Beck, *Judicial Activism in the Court of Justice of the EU*, University of Queensland Law Journal 2017, vol. 36, no. 2, p. 339.

47 G. Beck, *Judicial Activism*…, p. 335.

meta-teleological interpretation in the processed cases, it is possible to use an extensive interpretation of EU law (pro-Union interpretation).[48]

The possibility of applying the guarantees under Article 47 of the CFR in a case such as M.A. is significant. As a rule, foreign nationals find themselves in a more vulnerable position as a party to court and administrative proceedings in a Member State, due to the lack of knowledge of the language, provisions of law and procedures. The possibility of applying the provisions of the Charter with regard to foreign nationals results directly from Article 51 of the CFR – both the Member States, as well as the institutions of the Union are obliged to observe the guarantees of the Charter within the scope with which they implement EU law. The horizontal clause therefore extends the range of applications of the Charter regarding TCNs, including those residing illegally in the territory of the Member States, in so far as they come within the scope of the application of the provisions of EU law.

On numerous occasions did the Court interpret the application of the guarantees under Article 47 of the Charter regarding foreign nationals. In the case of Moussa Sacko[49] the CJEU emphasized that "The principle of effective judicial protection of the rights which individuals derive from EU law comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented." The cited case concerned an appeal against a decision refusing the granting of international protection. By providing an interpretation of the application of Article 47 of the Charter, the CJEU also referred to the appeal procedures against decisions obliging a foreign national to return to his country of origin – in the judgement in the case of Sadikou Gnandi,[50] the Court underscored the significance of the suspension of the enforcement of the return decision in the case when it gets contested as a means of guaranteeing the observance of fundamental rights of a foreign national, including the principle of non-refoulement. On the other hand, in the case of X v. Belastingdienst/Toeslagen, the Court stated that the ensuring of a two-instance appeal procedure against unfavourable decisions regarding foreign nationals is not obligatory but must be implemented in a situation when such procedural guarantees are provided in other procedures resulting from national law (the so-called principle of equivalence).[51] It is worth adding that in the light of the case law of the Court, the application of the

48 Judgment of the Court (Second Chamber) of 26 July 2017, Moussa Sacko v. Commissione Territoriale per il riconoscimento della protezione internazionale di Milano, C 348/16, ECLI:EU:C:2017:591, § 32.

49 Ibidem.

50 Judgement of the Court of 19 June 2018, Sadikou Gnandi v. État belge, C 181/16, ECLI:EU:C:2018:465, § 54.

51 See: judgment of the Court (Third Chamber) of 20 October 2016, Evelyn Danqua v. Minister for Justice and Equality and others, C 429/15, ECLI:EU:C:2016:789, § 30: "As regards the principle of

mechanism of redress before the judicial bodies of the Member State results from EU law and is guaranteed by the so-called principle of effectiveness, which means that national provisions must not in practice make it impossible or excessively difficult to obtain judicial redress.[52] The ruling under discussion fits well within this line of judiciary approach of the CJEU – in the light of the judgment of the Court in the case of M.A., the ensuring of full implementation of the principle of effectiveness with regard to the provisions of the Student Directive in the light of Article 47 of the Charter finds itself among the responsibilities of the Polish state.

Conclusion

To sum up, it should be observed that the analyzed ruling implements new standards for the administrative procedure concerning foreign nationals who wish to undertake studies in EU Member States. The European Union appears to be an especially attractive destination for foreign nationals due to the high level of education. As E.S. Brezis and A. Soueri Bar-Ilan emphasize, "[…] students' emigration is motivated by quality of education and not by wages. Human capital doesn't flow from poor to rich countries, but rather from countries of low-quality education to those of high-quality education."[53] The case law of the Court constitutes in this situation a live instrument of the interpretation of the provisions of law *pro peregrinorum*.

Translated by Adam Kunysz

equivalence, it should be recalled that observance of that principle requires that a national rule be applied without distinction to procedures based on EU law and those based on national law."

52 See: § 41 and 42 of the judgement of the Court (Fourth Chamber) of 8 May 2014, H.N. v. Minister for Justice, Equality and Law Reform and others, C 604/12, ECLI:EU:C:2014:302, § 63 of the judgement of the Court (Grand Chamber) of 7 December 2010, Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW, C 439/08, ECLI:EU:C:2010:739.

53 E.S. Brezis, A. Soueri, *Why do Students Migrate? Where do they Migrate to?*, AlmaLaurea Working Papers 2011, September, no. 25, p. 16.

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