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Abstract of the Federal Constitutional Court's Order of 7 April 2021 - 2 BvR 572/21 [CODICES]

Abstract

Second Chamber of the Second Senate

Order of 7 April 2021

2 BvR 572/21

Headnotes (non-official):

1. Whether the legal basis for a refusal of entry to holders of a Schengen visa satisfies constitutional requirements is for the administrative courts to clarify by way of an action for a declaratory judgment.

2. It is true that the mere possession of a uniform visa or a visa with limited territorial validity does not automatically entitle the holder to entry. However, since Article 14.2 of the Schengen Borders Code sets out grounds for refusal of entry and Article 14.3 of the Schengen Borders Code provides for legal protection against the refusal of entry, it cannot be ruled out from the outset that a right to entry might exist if grounds for refusal were not expressly set out.

Summary:

I.

The applicants are two children born in 2018 and their mother, who are living in Germany, as well as their grandmother living in Iran. The grandmother is in possession of a Schengen visa valid until 14 December 2021. The family had arranged for the grandmother to visit in March 2021 being aware that under the current entry restrictions due to the Covid-19 pandemic visiting grandchildren is not considered a valid reason for entry. In preparation of the visit, the father of the young children turned to the Federal Ministry of the Interior, for Building and Home Affairs (hereinafter, the Ministry) claiming that the current entry restrictions were disproportionate. When the Ministry noted that the restrictions continued to apply, the family filed an application for a preliminary injunction obliging the German state to grant approval to the grandmother's entry and to declare the approval vis-à-vis the airline. The administrative courts rejected the application for a preliminary injunction stating that the applicants had not sufficiently demonstrated and substantiated that they would suffer a particularly severe or unreasonable disadvantage. In the courts' view, denying the opportunity to foster the close personal relationship between the children and their grandmother did not amount to such unreasonable treatment that it had to be decided in preliminary proceedings. The administrative courts stated that the applicants had not mentioned any family event that, in view of Article 6.1 of the Basic Law and Article 8.1 ECHR, might make it absolutely necessary for the grandmother to visit Germany at the present time because entry at a later date would be pointless. The courts held that it was currently not unreasonable for the applicants to await the further developments of the pandemic since the refusal of entry was based on Council Recommendation (EU) 2020/912 of 30 June 2020 on temporary restrictions on non-essential travel to the European Union, implemented by the Federal Government, and last updated by Council Recommendation (EU) 2021/132 of 2 February 2021, and was not manifestly unlawful.

By lodging a constitutional complaint and an application for a preliminary injunction before the Federal Constitutional Court, the applicants challenged the entry restrictions imposed by the German state and the decisions of the administrative courts. They claimed a violation of Article 2.1, Article 6.1 and 6.3, and Article 12.1 of the Basic Law.

II.

Based on the considerations below, the Federal Constitutional Court refused to admit the constitutional complaint for decision.

Pursuant to the second sentence of § 23.1 and § 92 of the Federal Constitutional Court Act, a constitutional complaint must address the underlying ordinary (non-constitutional) law and the relevant standards arising from constitutional law, and must set out in a sufficiently substantiated manner that the applicants' fundamental rights are presently and directly affected. If a constitutional complaint is directed against a judicial decision, it requires a detailed examination of the decision and its reasoning. In doing so, the complaint must also address to what extent a fundamental right may be violated in the specific case and which constitutional requirements are allegedly not met by the challenged measure. Insofar as the Federal Constitutional Court has already developed constitutional standards regarding certain issues, a constitutional complaint must address these standards in a sufficiently substantiated manner. The present complaint does not meet these requirements. First, the applicants did not state any legal basis on which the approval of entry by the Ministry might be granted. Insofar as the applicants claim, *mutatis mutandis*, a violation of the guarantee of effective legal protection under Article 19.4 of the Basic Law, they do not take into account the requirements that apply when the main issues are already decided in the preliminary proceedings and not left to the principal proceedings. With regard to the alleged violations of Article 2.1, Article 6.1 and 6.3 and Article 12.1 of the Basic Law, the constitutional complaint does not differentiate between the different applicants and the different ways in which their fundamental rights may be affected. Neither does the complaint address the relevant constitutional standards nor does it deal with the challenged decisions in a sufficiently substantiated manner.

To the extent that the constitutional complaint directly challenges the entry restrictions laid down in delegated legislation, it does not satisfy the principle of subsidiarity. Subsidiarity of the constitutional complaint requires that an applicant, before filing a constitutional complaint, take all available and reasonable procedural possibilities to obtain remedy for the asserted violation of the Constitution or to prevent a violation of fundamental rights. This also applies if it is unclear whether a certain legal remedy is admissible in the specific case. The applicants assumed that holders of Schengen visas are entitled to entry if there are no grounds for refusing entry pursuant to Article 14.1 in conjunction with Article 6.1 of the Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (hereinafter, Schengen Borders Code) or § 15 of the German Residence Act. The applicants further claimed that entry under Article 6.1 letter e of the Schengen Borders Code may only be refused if the individual person "carries" a risk of infection that is sufficiently high and/or cannot be ruled out otherwise. They argued that Article 6.1 letter e of the Schengen Borders Code does not cover the general objective of reducing travel to the Schengen area due to the pandemic by allowing travel only for sufficiently important reasons. If this legal opinion were correct, Council Recommendation (EU) 2020/912, as last amended by Council Recommendations (EU) 2020/1052 and 2021/132, might not be in line with the requirements of the Schengen Borders Code. Finally, the applicants claim that the implementation of these Council recommendations must be laid down in an act adopted by Parliament and may not merely be set out in internal administrative instructions. Though all these issues raise constitutional concerns, they must first be clarified in administrative court proceedings, if necessary also by referral to the Court of Justice of the European Union. It is not objectionable under constitutional law that the administrative courts rejected the applications concerning the (refusal of) entry itself, but referred the applicants to the possibility of filing an action for declaratory judgment to challenge the underlying legal basis.