EFTA SURVEILLANCE AUTHORITY

Bifröst University

Reykjavik University

University of Akureyri

University of Iceland

EEA Law Moot Court Competition

Iceland, 5-6 November 2016

CASE BUNDLE

JOINED CASES E-1/16 (*STEFAN* V *REPUBLIC OF HIBERNIA*)
AND E-2/16 (*MURAT* V *KINGDOM OF THRACIA*)

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Although competitors will not be given credit for citing any authorities other than those in this bundle, should competitors seek further background information in order to prepare the case, the following websites may be useful:

http://curia.europa.eu
http://www.amicuria.org
http://www.eftacourt.int
http://eur-lex.europa.eu
http://www.eftasurv.int

Equally, competitors may find it helpful to look at the following documents concerning the EFTA Court's rules and procedures:

EFTA Court Rules of procedure:
http://www.eftacourt.int/fileadmin/user_upload/Files/RulesofProcedure/RoP_amendments_2010_draft_EN.pdf

EFTA Court Statute:
http://www.eftacourt.int/fileadmin/user_upload/Files/Statute/Statute_with_amendments_2010.pdf

Notes for the guidance of Counsel in written and oral proceedings before the EFTA Court:
http://www.eftacourt.int/fileadmin/user_upload/Files/GuidanceForCounsel/Guidance_for_Counsel_English_2012_FINAL.pdf

A. LEGISLATIVE MATERIALS

EXTRACT FROM THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

Article 8 - Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 12 – Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

EXTRACTED ARTICLES FROM THE AGREEMENT ON THE EUROPEAN ECONOMIC AREA (EEA)

Article 1

1. The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area, hereinafter referred to as the EEA.

2. In order to attain the objectives set out in paragraph 1, the association shall entail, in accordance with the provisions of this Agreement:

(a) the free movement of goods;

(b) the free movement of persons;

(c) the free movement of services;

(d) the free movement of capital;

(e) the setting up of a system ensuring that competition is not distorted and that the rules thereon are equally respected; as well as

(f) closer cooperation in other fields, such as research and development, the environment, education and social policy.

Article 2

For the purposes of this Agreement:

(a) the term ‘Agreement` means the main Agreement, its Protocols and Annexes as well as the acts referred to therein;

(b) the term ‘EFTA States` means the Contracting Parties, which are members of the European Free Trade Association;

(c) the term ‘Contracting Parties` means, concerning the Community and the EC Member States, the Community and the EC Member States, or the Community, or the EC Member States. The meaning to be attributed to this expression in each case is to be deduced from the relevant provisions of this Agreement and from the respective competences of the Community and the EC Member States as they follow from the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community.

Article 3

The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.

Moreover, they shall facilitate cooperation within the framework of this Agreement.

Article 4

Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

Article 5

A Contracting Party may at any time raise a matter of concern at the level of the EEA Joint Committee or the EEA Council according to the modalities laid down in Articles 92(2) and 89(2), respectively.

Article 6

Without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.

Article 7

Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:

(a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;

(b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.

Article 28

1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of EC Member States and EFTA States for this purpose;

(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.

4. The provisions of this Article shall not apply to employment in the public service.

5. Annex V contains specific provisions on the free movement of workers.

EXTRACTED ARTICLES FROM THE SURVEILLANCE AND COURT AGREEMENT (SCA)

PART IV

THE EFTA COURT

Article 27

A court of justice of the EFTA States, hereinafter referred to as the EFTA Court, is hereby established. It shall function in accordance with the provisions of this Agreement and of the EEA Agreement.

Article 34

The EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.

Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.

An EFTA State may in its internal legislation limit the right to request such an advisory opinion to courts and tribunals against whose decisions there is no judicial remedy under national law.

PART V

GENERAL AND FINAL PROVISIONS

Article 42

The Protocols and Annexes to this Agreement shall form an integral part thereof.

Article 43

1. The Statute of the EFTA Court is laid down in Protocol 5 to this Agreement.

2. The EFTA Court shall adopt its rules of procedure to be approved by the Governments of the EFTA States by common accord.

EXTRACTED ARTICLES FROM THE CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION (TEU)

NB. This extract is taken from the post-Lisbon consolidated version of the TEU, which is currently in force.

TITLE I: COMMON PROVISIONS

Article 1 (ex Article 1 TEU)

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common.

This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community.

Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3 (ex Article 2 TEU)

1. The Union's aim is to promote peace, its values and the well-being of its peoples.

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. The Union shall establish an economic and monetary union whose currency is the euro.

5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

Article 4

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall

respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Article 5 (ex Article 5 TEC)

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

Article 6

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. 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. [...]

TITLE II : PROVISIONS ON DEMOCRATIC PRINCIPLES

Article 9

In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

Article 19

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General.

The General Court shall include at least one judge per Member State.

The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed.

3. The Court of Justice of the European Union shall, in accordance with the Treaties:

(a) rule on actions brought by a Member State, an institution or a natural or legal person;

(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;

(c) rule in other cases provided for in the Treaties.

EXTRACTED ARTICLES FROM THE CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU)

PREAMBLE

HIS MAJESTY THE KING OF THE BELGIANS, THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY, THE PRESIDENT OF THE FRENCH REPUBLIC, THE PRESIDENT OF THE ITALIAN REPUBLIC, HER ROYAL HIGHNESS THE GRAND DUCHESS OF LUXEMBOURG, HER MAJESTY THE QUEEN OF THE NETHERLANDS (1),

DETERMINED to lay the foundations of an ever closer union among the peoples of Europe,

RESOLVED to ensure the economic and social progress of their States by common action to eliminate the barriers which divide Europe,

AFFIRMING as the essential objective of their efforts the constant improvements of the living and working conditions of their peoples,

RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,

ANXIOUS to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions,

DESIRING to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade,

INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,

RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts,

DETERMINED to promote the development of the highest possible level of knowledge for their peoples through a wide access to education and through its continuous updating,

and to this end HAVE DESIGNATED as their Plenipotentiaries:

WHO, having exchanged their full powers, found in good and due form, have agreed as follows.

TITLE I : CATEGORIES AND AREAS OF UNION COMPETENCE

Article 2

1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

3. The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.

4. The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.

5. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas. Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations.

6. The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area.

Article 3

1. The Union shall have exclusive competence in the following areas:

(a) customs union;

(b) the establishing of the competition rules necessary for the functioning of the internal market;

(c) monetary policy for the Member States whose currency is the euro;

(d) the conservation of marine biological resources under the common fisheries policy;

(e) common commercial policy.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

Article 4

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

2. Shared competence between the Union and the Member States applies in the following principal areas:

(a) internal market;

(b) social policy, for the aspects defined in this Treaty;

(c) economic, social and territorial cohesion;

(d) agriculture and fisheries, excluding the conservation of marine biological resources;

(e) environment;

(f) consumer protection;

(g) transport;

(h) trans-European networks;

(i) energy;

(j) area of freedom, security and justice;

(k) common safety concerns in public health matters, for the aspects defined in this Treaty.

3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

Article 5

1. The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.

Specific provisions shall apply to those Member States whose currency is the euro.

2. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.

3. The Union may take initiatives to ensure coordination of Member States' social policies.

Article 6

The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:

(a) protection and improvement of human health;
(b) industry;
(c) culture;
(d) tourism;
(e) education, vocational training, youth and sport;
(f) civil protection;
(g) administrative cooperation.

TITLE II: PROVISIONS HAVING GENERAL APPLICATION

Article 7

The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.

Article 8

In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

Article 9

In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

Article 10

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

PART TWO
NON-DISCRIMINATION AND CITIZENSHIP OF THE UNION

Article 18

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

Article 19

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

Article 20

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a

citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States;

(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

Article 21
1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

Article 22
1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

2. Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

PART THREE
UNION POLICIES AND INTERNAL ACTIONS

TITLE I: THE INTERNAL MARKET

Article 26

1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.

2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

3. The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.

TITLE IV: FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL

CHAPTER 1: WORKERS

Article 45
1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.

CHAPTER 3: SERVICES

Article 56
Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

PART SIX: INSTITUTIONAL AND FINANCIAL PROVISIONS

TITLE I: INSTITUTIONAL PROVISIONS

CHAPTER 1: THE INSTITUTIONS

SECTION 5: THE COURT OF JUSTICE OF THE EUROPEAN UNION

Article 251 (ex Article 221 TEC)

The Court of Justice shall sit in chambers or in a Grand Chamber, in accordance with the rules laid down for that purpose in the Statute of the Court of Justice of the European Union. When provided for in the Statute, the Court of Justice may also sit as a full Court.

Article 252 (ex Article 222 TEC)

The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.

Article 253 (ex Article 223 TEC)

The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence; they shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255.

Every three years there shall be a partial replacement of the Judges and Advocates-General, in accordance with the conditions laid down in the Statute of the Court of Justice of the European Union.

The Judges shall elect the President of the Court of Justice from among their number for a term of three years. He may be re-elected.

Retiring Judges and Advocates-General may be reappointed.

The Court of Justice shall appoint its Registrar and lay down the rules governing his service.

The Court of Justice shall establish its Rules of Procedure. Those Rules shall require the approval of the Council.

Article 258 (ex Article 226 TEC)

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

Article 259 (ex Article 227 TEC)

A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

Article 260 (ex Article 228 TEC)

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 259.

3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

Article 263 **(ex Article 230 TEC)**

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

Article 264 **(ex Article 231 TEC)**

If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void. However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.

Article 265 **(ex Article 232 TEC)**

Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act.

The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.

Article 266 **(ex Article 233 TEC)**

The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.

This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 340.

Article 267 **(ex Article 234 TEC)**

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

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.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community

REGULATION (EEC) No 1408/71 OF THE COUNCIL of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 2, 7 and 51 thereof;

Having regard to the proposals from the Commission drawn up after consultation with the Administrative Commission on Social Security for Migrant Workers [1];

Having regard to the Opinions of the European Parliament [2];

Having regard to the Opinions of the Economic and Social Committee [3];

Whereas the need for a general revision of Council Regulation No 3 [4] on social security for migrant workers has become progressively more apparent, both in the light of the practical experience of its implementation since 1959 and as a result of amendments made to national legislations;

Whereas the existing provisions for co-ordination can, as a whole, be developed, improved and to some extent simplified at the same time, taking into account the considerable differences existing between national social security legislations;

Whereas it is appropriate at this time to bring together in a single legislative instrument all the basic provisions for implementing Article 51 of the Treaty for the benefit of workers, including frontier workers, seasonal workers and seamen;

Whereas the considerable differences existing between national legislations as regards the persons to whom they apply make it preferable to establish the principle that the Regulation applies to all nationals of Member States insured under social security schemes for employed persons;

Whereas the provisions for co-ordination of national social security legislations fall within the framework of freedom of movement for workers who are nationals of Member States and should, to this end, contribute towards the improvement of their standard of living and conditions of employment, by guaranteeing within the Community firstly equality of treatment for all nationals of Member States under the various national legislations and secondly social security benefits for workers and their dependents regardless of their place of employment or of residence;

Whereas these objectives must be attained in particular by aggregation of all the periods taken into account under the various national legislations for the purpose of acquiring and retaining the right to benefits and of calculating the amount of benefits, and by the provision of benefits for the various categories of persons covered by the Regulation regardless of their place of residence within the Community;

Whereas the provisions for co-ordination adopted for the implementation of Article 51 of the Treaty must guarantee to workers who move within the Community their accrued rights and advantages whilst not giving rise to unjustified overlapping of benefits;

Whereas to this end, persons entitled to benefits for invalidity, old age and death (pensions) must be able to enjoy all the benefits which have accrued to them in the various Member States; whereas, however, in order to avoid unjustified overlapping of benefits, which could result in particular from the duplication of insurance periods and other periods

treated as such, it is necessary to limit the benefits to the greatest amount which would have been due to a worker from one of these States if he had spent all his working life there;

Whereas, in order to secure mobility of labour under improved conditions,it is necessary henceforth to ensure closer co-ordination between the unemployment insurance schemes and the unemployment assistance schemes of all the Member States; whereas it is therefore particularly appropriate, in order to facilitate search for employment in the various Member States, to grant to an unemployed worker, for a limited period, the unemployment benefits provided for by the legislation of the Member State to which he was last subject;

Whereas it seems desirable to improve the system under Regulation No 3 governing family benefits in cases of separated families, both as regards the categories of persons to be entitled to such benefits and as regards the machinery for awarding them;

Whereas, taking into account the problems relating to unemployment, it is appropriate to extend entitlement to family benefits to members of the families of unemployed workers residing in a Member State other than the one which is responsible for payment of the unemployment benefit;

Whereas, moreover, the current restrictions on the granting of family benefits should be abolished, and whereas in order to ensure payment of benefits for the maintenance of the members of separated families, leaving aside those benefits aimed largely at encouraging an increase in population, it would be preferable to lay down rules common to all the Member States and efforts should continue to this end; but in the face of great variations between national legislations a solution should be adopted to take this situation into account: payment of family benefits of the country of employment in respect of five countries, and payment of family allowances of the country of residence of members of the family where the country of employment is France;

Whereas by analogy with the solutions contained in Council Regulation (EEC) 1612/68[5] of 15 October 1968 on freedom of movement for workers within the Community, it is desirable to bring together in an Advisory Committee representatives of workers and employers to examine the problems dealt with by the Administrative Commission;

Whereas the present Regulation may replace the arrangements provided for in Article 69 (4) of the Treaty establishing the European Coal and Steel Community;

HAS ADOPTED THIS REGULATION:

TITLE I: GENERAL PROVISIONS

Article 1: Definitions

For the purpose of this Regulation:

(a) 'worker' means:

(i) subject to the restrictions set out in Annex V, any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed persons;

(ii) any person who is compulsorily insured for one or more of the contingencies covered by the branches of social security dealt with in this Regulation, under a social security scheme for all residents or for the whole working population if such person:

- can be identified as an employed person by virtue of the manner in which such scheme is administered or financed, or

- failing such criteria, is insured for some other contingency specified in Annex V under a scheme for employed persons, either compulsorily or on an optional continued basis;

(iii) any person who is voluntarily insured for one or more of the contingencies covered by the branches dealt with in this Regulation, under a social security scheme of a Member State for employed persons or for all residents or for certain categories of residents if such person has previously been compulsorily insured for the same contingency under a scheme for employed persons of the same Member State;

(b) 'frontier worker' means any worker employed in the territory of a Member State and residing in the territory of another Member State to which he returns as a rule daily or at least once a week; however, a frontier worker who is posted elsewhere in the territory of the same or another Member State by the undertaking to which he is normally attached and is prevented on account of such posting from returning daily or at least once a week to the place where he resides shall nevertheless retain the status of frontier worker for a period not exceeding four months;

(c) 'seasonal worker' means any worker who goes to the territory of a Member State other than the one in which he is resident to do work there of a seasonal nature for an undertaking or an employer of that State for a period which may on no account exceed eight months, and who stays in the territory of the said State for the duration of his work; work of a seasonal nature shall be taken to mean work which, being dependent on the succession of the seasons, automatically recurs each year;

(d) 'refugee' shall have the meaning assigned to it in Article 1 of the Convention on the Status of Refugees, signed at Geneva on 28 July 1951;

(e) 'stateless person' shall have the meaning assigned to it in Article 1 of the Convention on the Status of Stateless Persons, signed in New York on 28 September 1954;

(f) 'member of the family' means any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided or, in the cases referred to in Article 22 (1) (a) and Article 39, by the legislation of the Member State in whose territory such person resides; where, however, the said legislations regard as a member of the family or a member of the household only a person living under the same roof as the worker, this condition shall be considered satisfied if the person in question is mainly dependent on that worker;

(g) 'survivor' means any person defined or recognised as such by the legislation under which the benefits are granted; where, however, the said legislation regards as a survivor only a person who was living under the same roof as the deceased worker, this condition shall be considered satisfied if such person was mainly dependent on the deceased worker;

(h) 'residence' means habitual residence;

(i) 'stay' means temporary residence;

(j) 'legislation' means all the laws, regulations, and other provisions and all other present or future implementing measures of each Member State relating to the branches and schemes of social security covered by Article 4 (1) and (2);

This term excludes provisions of existing or future industrial agreements, whether or not they have been the subject of a decision by the authorities rendering them compulsory or extending their scope. However, where such industrial agreements serve to implement an insurance requirement under the laws or regulations referred to in the preceding subparagraph, this restriction may at any time be lifted by a declaration by the Member State concerned, specifying the schemes of such a kind to which this Regulation applies. Notification shall be given of such declaration, which shall be published in accordance with the provisions of Article 96. The provisions of the preceding subparagraph shall

not have the effect of exempting from application of this Regulation the schemes to which Regulation No 3 has been applied;

(k) 'social security convention' means any bilateral or multilateral instrument which binds or will bind two or more Member States exclusively, and any other multilateral instrument which binds or will bind at least two Member States and one or more other States in the field of social security, for all or part of the branches and schemes set out in Article 4 (1) and (2), together with agreements, of whatever kind, concluded pursuant to the said instruments;

(l) 'competent authority' means, in respect of each Member State, the Minister, Ministers or other equivalent authority responsible for social security schemes throughout or in any part of the territory of the State in question;

(m) 'Administrative Commission' means the Commission referred to in Article 80;

(n) 'institution' means, in respect of each Member State, the body or authority responsible for administering all or part of the legislation;

(o) 'competent institution' means:

(i) the institution with which the person concerned is insured at the time of the application for benefit, or

(ii) the institution from which the person concerned is entitled or would be entitled to benefits if he or a member or members of his family were resident in the territory of the Member State in which the institution is situated, or

(iii) the institution designated by the competent authority of the Member State concerned, or

(iv) in the case of a scheme relating to an employer's liability in respect of the benefits set out in Article 4 (1), either the employer or the insurer involved or, in default thereof, a body or authority designated by the competent authority of the Member State concerned;

(p) 'institution of the place of residence' and 'institution of the place of stay' mean respectively the institution which is competent to provide benefits in the place where the person concerned resides and the institution which is competent to provide benefits in the place where the person concerned is staying, under the legislation administered by that institution or, where no such institution exists, the institution designated by the competent authority of the Member State in question;

(q) 'competent State' means the Member State in whose territory the competent institution is situated;

(r) 'insurance periods' means contribution periods or periods of employment as defined or recognised as insurance periods by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to insurance periods;

(s) 'periods of employment' means periods defined or recognised as such by the legislation under which they were completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of employment;

(t) 'benefits' and 'pensions' mean all benefits and pensions, including all elements thereof payable out of public funds, revalorisation increases and supplementary allowances, subject to the provisions of Title III, as also lump-sum benefits which may be paid in lieu of pensions, and payments made by way of reimbursement of contributions;

(u) (i) 'family benefits' means all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4 (1) (h), excluding the special childbirth allowances mentioned in Annex I;

(ii) 'family allowances' means periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family;

(v) 'death grants' means any once-for-all payment in, the event of death, exclusive of the lump-sum benefits referred to in subparagraph (t).

Article 2: Persons covered

1. This Regulation shall apply to workers who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as also to the members of their families and their survivors.

2. In addition, this Regulation shall apply to the survivors of workers who have been subject to the legislation of one or more Member States, irrespective of the nationality of such workers, where their survivors are nationals of one of the Member States, or stateless persons or refugees residing within the territory of one of the Member States.

3. This Regulation shall apply to civil servants and to persons who, in accordance with the legislation applicable, are treated as such, where they are or have been subject to the legislation of a Member State to which this Regulation applies.

Article 3: Equality of treatment

1. Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.

2. The provisions of paragraph 1 shall apply to the right to elect members of the organs of social security institutions or to participate in their nomination, but shall not affect the legislative provisions of any Member State relating to eligibility or methods of nomination.

3. Save as provided in Annex II, social security conventions which remain in force pursuant to Article 7 (2) (c) and conventions concluded pursuant to Article 8 (1), shall apply to all persons to whom this Regulation applies.

Article 4: Matters covered

1. This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness and maternity benefits;

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

(c) old-age benefits;

(d) survivors' benefits;

(e) benefits in respect of accidents at work and occupational diseases;

(f) death grants;

(g) unemployment benefits;

(h) family benefits.

2. This Regulation shall apply to all general and special social security schemes, whether contributory or non-contributory, and to schemes concerning the liability of an employer or ship owner in respect of the benefits referred to in paragraph 1.

3. The provisions of Title III of this Regulation shall not, however, affect the legislative provisions of any Member State concerning a ship owner's liability.

4. This Regulation shall not apply to social and medical assistance, to benefit schemes for victims of war or its consequences, or to special schemes for civil servants and persons treated as such.

Article 5: Declarations of Member States on the scope of this Regulation

The Member States shall specify the legislation and schemes referred to in Article 4 (1) and (2), the minimum benefits referred to in Article 50 and the benefits referred to in Articles 77 and 78 in declarations to be notified and published in accordance with Article 96.

Article 6: Social security conventions replaced by this Regulation

Subject to the provisions of Articles 7, 8 and 46 (4) this Regulation shall, as regards persons and matters which it covers, replace the provisions of any social security convention binding either;

(a) two or more Member States exclusively, or

(b) at least two Member States and one or more other States, where settlement of the cases concerned does not involve any institution of one of the latter States.

Article 7: International provisions not affected by this Regulation

1. This Regulation shall not affect obligations arising from:

(a) any convention adopted by the International Labour Conference which, after ratification by one or more Member States, has entered into force;

(b) the European Interim Agreements on Social Security of 11 December 1953 concluded between the Member States of the Council of Europe.

2. The provisions of Article 6 notwithstanding, the following shall continue to apply:

(a) the Agreement of 27 July 1950 concerning social security for Rhine boatmen, revised on 13 February 1961;

(b) the European Convention of 9 July 1956 concerning social security for workers in international transport;

(c) the social security conventions listed in Annex II.

Article 8: Conclusion of conventions between Member States

1. Two or more Member States may, as need arises, conclude conventions with each other based on the principles and in the spirit of this Regulation.

2. Each Member State shall notify, in accordance with Article 96 (1), any convention concluded with another Member State pursuant to paragraph 1.

Article 9: Admission to voluntary or optional continued insurance

1. The legislative provisions of any Member State which make admission to voluntary or optional continued insurance conditional upon residence in the territory of that State shall not apply to workers to whom this Regulation applies and who are resident in the territory of another Member State, provided that at some time in their past working life they were subject to the legislation of the first State.

2. Where, under the legislation of a Member State, admission to voluntary or optional continued insurance is conditional upon completion of insurance periods, any such periods completed under the Legislation of another Member State shall be taken into account, to the extent required, as if they were completed under the legislation of the first State.

Article 10: Waiving of residence clauses - Effect of compulsory insurance on reimbursement of contributions

1. Save as otherwise provided in this Regulation, invalidity, old-age or survivors' cash benefits, pensions for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.

The preceding subparagraph shall also apply to lump-sum benefits granted in cases of remarriage of a surviving spouse who was entitled to a survivor's pension.

2. Where under the legislation of a Member State reimbursement of contributions is conditional upon the person concerned having ceased to be subject to compulsory insurance, this condition shall not be considered satisfied as long as the person concerned is subject to compulsory insurance as a worker under the legislation of another Member State.

Article 11: Revalorisation of benefits

Rules for revalorisation provided by the legislation of a Member State shall apply to benefits due under that legislation by virtue of the provisions of this Regulation.

Article 12: Prevention of overlapping of benefits

1. This Regulation can neither confer nor maintain the right to several benefits of the same kind for one and the same period of compulsory insurance. However, this provision shall not apply to benefits in respect of invalidity, old age, death (pensions) or occupational disease which are awarded by the institutions of two or more Member States, in accordance with Article 41, Article 43 (2) and (3), Articles 46, 50 and 51 or Article 60 (1) (b).

2. The legislative provisions of a Member State for reduction, suspension or withdrawal of benefit in cases of overlapping with other social security benefits or other income may be invoked even though the right to such benefits was acquired under the legislation of another Member State or such income arises in the territory of another Member State. However, this provision shall not apply when the person concerned receives benefits of the same kind in respect of invalidity, old age, death (pensions) or occupational disease which are awarded by the institutions of two or more Member States in accordance with Articles 46, 50, 51 or Article 60 (1) (b).

3. The legislative provisions of a Member State for reduction, suspension or withdrawal of benefit in the case of a person in receipt of invalidity benefits or anticipatory old-age benefits pursuing a professional or trade activity may be invoked against such person even though he is pursuing his activity in the territory of another Member State.

4. An invalidity pension payable under Netherlands legislation shall, in a case where the Netherlands institution is bound under Article 57 (3) (c) or Article 60 (2) (a) to contribute also to the cost of benefits for occupational disease granted under the legislation of another Member State, be reduced by the amount payable to the institution of the other Member State which is responsible for granting the benefits for occupational disease.

TITLE II: DETERMINATION OF THE LEGISLATION APPLICABLE

Article 13: General rules

1. A worker to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to the provisions of Articles 14 to 17:

(a) a worker employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

(b) a worker employed on board a vessel flying the flag of a Member State shall be subject to the legislation of that State;

(c) civil servants and persons treated as such shall be subject to the legislation of the Member State to which the administration employing them is subject;

(d) a worker called up or recalled for service in the armed forces of a Member State shall retain the status of worker, and shall be subject to the legislation of that State; if entitlement under that legislation is subject to the completion of insurance period before entry into or release from such service, insurance periods completed under the legislation of any other Member State shall be taken into account, to the extent necessary, as if they were insurance periods completed under the legislation of the first State.

Article 14: Special rules

1. Article 13 (2) (a) shall apply subject to the following exceptions or circumstances:

(a) (i) A worker employed in the territory of a Member State by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed twelve months and that he is not sent to replace another worker who has completed his term of posting;

(ii) if the duration of the work to be done extends beyond the duration originally anticipated, owing to unforesecable circumstances, and exceeds twelve months, the legislation of the first State shall continue to apply until the completion of such work, provided that the competent authority of the State in whose territory the worker is posted or the body designated by that authority gives its consent; such consent must be requested before the end of the initial twelve month period. Such consent cannot, however, be given for a period exceeding twelve months;

(b) a worker employed in international transport in the territory of two or more Member States as a member of travelling or flying personnel and who is working for an undertaking which, for hire or reward or on own account, operates transport services for passengers or goods by rail, road, air or inland waterway and has its registered office or place of business in the territory of a Member State, shall be subject to the legislation of the latter State, with the following restrictions:

(i) where the said undertaking has a branch or permanent representation in the territory of a Member State other than that in which it has its registered office or place of business, a worker employed by such branch or agency shall be subject to the legislation of the Member State in whose territory such branch or permanent representation is situated;

(ii) where a worker is employed principally in the territory of the Member State in which he resides, he shall be subject to the legislation of that State, even if the undertaking which employs him has no registered office or place of business or branch or permanent representation in that territory;

(c) a worker, other than one employed in international transport, who normally pursues his activity in the territory of two or more Member States shall be subject:

(i) to the legislation of the Member State in whose territory he resides, if he pursues his activity partly in that territory or if he is attached to several undertakings or several employers who have their registered offices or places of business in the territory of different Member States;

(ii) to the legislation of the Member State in whose territory is situated the registered office or place of business of the undertaking or individual employing him, if he does not reside in the territory of any of the Member States where he is pursuing his activity;

(d) a worker who is employed in the territory of one Member State by an undertaking which has its registered office or place of business in the territory of another Member State and which straddles the common frontier of these States shall be subject to the legislation of the Member State in whose territory the undertaking has its registered office or place of business.

2. Article 13 (2) (b) shall apply subject to the following exceptions and circumstances:

(a) a worker employed by an undertaking to which he is normally attached, either in the territory of a Member State or on board a vessel flying the flag of a Member State, who is posted by that undertaking on board a vessel flying the flag of another Member State to perform work there for that undertaking shall, subject to the conditions provided in paragraph 1 (a), continue to be subject to the legislation of the first Member State;

(b) a worker who, while not being habitually employed at sea, is employed in the territorial waters or in a port of a Member State on a vessel flying the flag of another Member State, but is not a member of the crew, shall be subject to the legislation of the first State;

(c) a worker employed on board a vessel flying the flag of a Member State and remunerated for such employment by an undertaking or a person whose registered office or place of business is in the territory of another Member State shall be subject to the legislation of the latter State if he is resident in the territory of that State; the undertaking or person paying the remuneration shall be considered as the employer for the purposes of the said legislation.

3. The legistative provisions of a Member State under which a pensioner who is pursuing a professional or trade activity is not subject to compulsory insurance in respect of such activity shall also apply to a pensioner whose pension was acquired under the legislation of another Member State.

Article 15: Rules concerning voluntary insurance or optional continued insurance

1. The provisions of Articles 13 and 14 shall not apply to voluntary insurance or optional continued insurance.

2. Where application of the legislations of two or more Member States entails overlapping of insurance:

- under a compulsory insurance scheme and one or more voluntary or optional continued insurance schemes, the person concerned shall be subject exclusively to the compulsory insurance schemes;

- under two or more voluntary or optional continued insurance schemes, the person concerned may join only the voluntary or optional continued insurance scheme for which he has opted.

3. However, in respect of invalidity, old age and death (pensions), the person concerned may join the voluntary or optional continued insurance scheme of a Member State, even if he is compulsorily subject to the legislation of another Member State, to the extent that such overlapping is explicitly or implicitly admitted in the first Member State.

The person concerned who applies to join a voluntary or optional continued insurance scheme in a Member State whose legislation provides, in addition to such insurance, for complementary optional insurance may only join the latter.

Article 16: Special rules regarding persons employed by diplomatic missions and consular posts, and auxiliary staff of the European Communties

1. Article 13 (2) (a) shall apply to persons employed by diplomatic missions and consular posts and to the private domestic staff of agents of such missions or posts.

2. However, workers covered by paragraph 1 who are nationals of the Member State which is the accrediting or sending State may opt to be subject to the legislation of that State. Such right of option may be renewed at the end of each calendar year and shall not have retrospective effect.

3. Auxiliary staff of the European Communities may opt to be subject to the legislation of the Member State in whose territory they are employed, to the legislation of the Member State to which they were last subject or to the legislation of the Member State whose nationals they are, in respect of provisions other than those relating to family allowances, the granting of which is governed by the conditions of employment applicable to such staff. This right of option, which may be exercised once only, shall take effect from the date of entry into employment.

Article 17: Exceptions to the provisions of Articles 13 to 16

Two or more Member States or the competent authorities of those States may, by common agreement, provide for exceptions to the provisions of Articles 13 to 16 in the interest of certain workers or categories of workers.

TITLE III: SPECIAL PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

CHAPTER 1: SICKNESS AND MATERNITY

Section 1: Common provisions

Article 18: Aggregation of insurance periods

1. The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits conditional upon the completion of insurance periods shall, to the extent necessary, take account of insurance periods completed under the legislation of any other Member State as if they were periods completed under its own legislation.

2. The provisions of paragraph 1 shall apply to seasonal workers, even in respect of periods prior to any break in insurance exceeding the period allowed by the legislation of the competent State, provided however that the worker concerned has not ceased to be insured for a period exceeding four months.

Section 2: Workers and members of their families

Article 19: Residence in a Member State other than the competent State - General rules

1. A worker residing in the territory of a Member State other than the competent State, who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, shall receive in the State in which he is resident:

(a) benefits in kind provided on behalf of the competent institution by the institution of the place of residence in accordance with the legislation administered by that institution as though he were insured with it;

(b) cash benefits provided by the competent institution in accordance with the legislation which it administers. However, by agreement between the competent institution and the institution of the place of residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the legislation of the competent State.

2. The provisions of paragraph 1 (a) shall apply by analogy to members of the family who are residing in the territory of a Member State other than the competent State, where they are not entitled to such benefits under the legislation of the State in whose territory they reside.

Article 20: Frontier workers and members of their families - Special rules

A frontier worker may also obtain benefits in the territory of the competent State. Such benefits shall be provided by the competent institution in accordance with the legislation of that State, as though the worker were resident there. Members of his family may receive benefits in kind under the same conditions; however, receipt of such benefits shall, except in urgent cases, be conditional upon an agreement between the States concerned or between the competent authorities of those States or, in its absence, on prior authorisation by the competent institution.

Article 21: Stay in or transfer of residence to the competent State

1. A worker and members of his family referred to in Article 19 who are staying in the territory of the competent State shall receive benefits in accordance with the legislation of that State as though they were resident there even if they have already received benefits for the same case of sickness or maternity before their stay. This provision shall not, however, apply to frontier workers and members of their families.

2. A worker and members of his family referred to in Article 19 who transfer their residence to the territory of the competent State, shall receive benefits in accordance with the legislation of that State, even if they have already received benefits for the same case of sickness or maternity before transferring their residence.

Article 22: Stay outside the competent State - Return to or transfer of residence to another Member State during sickness or maternity - Need to go to another Member State in order to receive appropriate treatment

1. A worker who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, and:

(a) whose condition necessitates immediate benefits during a stay in the territory of another Member State, or

(b) who, having become entitled to benefits chargeable to the competent institution, is authorised by that institution to return to the territory of the Member State where he resides, or to transfer his residence to the territory of another Member State, or

(c) who is authorised by the competent institution to go to the territory of another Member State to receive there the treatment appropriate to his condition, shall be entitled:

(i) to benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence in accordance with the legislation which it administers, as though he were insured with it; the length of the period during which benefits are provided shall be governed however by the legislation of the competent State;

(ii) to cash benefits provided by the competent institution in accordance with the legislation which it administers. However, by agreement between the competent institution and the institution of the place of stay or residence, such

benefits may be provided by the latter institution on behalf of the former, in accordance with the legislation of the competent State.

2. The authorisation required under paragraph 1 (b) may be refused only if it is established that movement of the person concerned would be prejudicial to his state of health or the receipt of medical treatment.

The authorisation required under paragraph 1 (c) may not be refused where the treatment in question cannot be provided for the person concerned within the territory of the Member State in which he resides.

3. The provisions of paragraphs 1 and 2 shall apply to members of a worker's family in respect of benefits in kind.

4. The fact that the provisions of paragraph 1 apply to a worker shall not affect the right to benefit of members of his family.

Article 23: Calculation of cash benefits

1. The competent institution of a Member State whose legislation provides that the calculation of cash benefits shall be based on an average wage or salary, shall determine that average wage or salary exclusively by reference to wages or salaries confirmed as having been paid during the periods completed under the said legislation.

2. The competent institution of a Member State whose legislation provides that the calculation of cash benefits shall be based on a standard wage or salary, shall take account exclusively of the standard wage or salary or, where appropriate, of the average of the standard wages or salaries for the periods completed under the said legislation.

3. The competent institution of a Member State under whose legislation the amount of cash benefits varies with the number of members of the family, shall also take into account the members of the family of the person concerned who are resident in the territory of another Member State as if they were resident in the territory of the competent State.

Article 24: Substantial benefits in kind

1. Where the right of a worker or a member of his family to a prosthesis, a major appliance or other substantial benefits in kind has been recognised by the institution of a Member State before be becomes insured with the institution of another Member State, the said worker shall receive such benefits at the expense of the first institution, even if they are granted after he becomes insured with the second institution.

2. The Administrative Commission shall draw up the list of benefits to which the provisions of paragraph 1 apply.

Section 3: Unemployed persons and members of their families

Article 25

1. An unemployed person, to whom Article 69 (1) and the second sentence of Article 71 (1) (b) (ii) apply, and who satisfies the conditions of the legislation of the competent State for entitlement to benefits in kind and in cash, taking account where appropriate of the provisions of Article 18, shall receive for the period provided under Article 69 (1) (c):

(a) benefits in kind provided on behalf of the competent institution by the institution of the Member State in which he seeks employment in accordance with the legislation of the latter institution, as though he were insured with it;

(b) cash benefits provided by the competent institution in accordance with the legislation which it administers. However, by agreement between the competent institution and the institution of the Member State in which the unemployed person seeks employment, benefits may be provided by the latter institution on behalf of the former

institution in accordance with the legislation of the competent State. Unemployment benefits under Article 69 (1) shall not be granted for the period during which cash benefits are received.

2. A totally unemployed person to whom the provisions of Article 71 (1) (a) (ii) or the first sentence of Article 71 (1) (b) (ii) apply shall receive benefits in kind and in cash in accordance with the legislation of the Member State in whose territory he resides, as though he had been subject to that legislation during his last employment, taking account where appropriate of the provisions of Article 18; the cost of such benefits shall be met by the institution of the country of residence.

3. Where an unemployed person satisfies the conditions of the legislation of the Member State which is responsible for the cost of unemployment benefits for entitlement to benefits in kind, taking account where appropriate of the provisions of Article 18, the members of his family shall receive such benefits, irrespective of the Member State in whose territory they reside or are staying. Such benefits shall be provided by the institution of the place of residence or of stay, in accordance with the legislation which it administers on behalf of the competent institution of the Member State which is responsible for the cost of unemployment benefits.

4. Without prejudice to any legislative provisions of a Member State which permit an extension of the period during which sickness benefits may be granted, the period provided for in paragraph 1 may, in cases of force majeure, be extended by the competent institution within the limit fixed by the legislation administered by the institution.

CHAPTER 6: UNEMPLOYMENT

Section 1: Common provisions

Article 67: Aggregation of periods of insurance or employment

1. The competent institution of a Member State whose legislation makes the acquiçsition, retention or recovery of the right to benefits subject to the completion of insurance periods shall takes into account, to the extent necessary, periods of insurance or employment completed under the legislation of any other Member States, as though they were periods completed under the legislation with it administers, provided, however, that the periods of employment would have been counted as insurance periods had they been completed under that legislation.

2. The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of periods of employment shall take into account, to the extent necessary, periods of insurance or employment completed under the legislation of any other Member State, as though they were periods of employment completed under the legislation which it administers.

3. Except in the cases referred to in Article 71 (1) (a) (ii) and (b) (ii), application of the provisions of paragraphs 1 and 2 shall be subject to the condition that the person concerned should have completed lastly:

- in the case of paragraph 1, periods of insurance,

- in the case of paragraph 2, periods of employment,

in accordance with the provisions of the legislation under which the benefits are claimed.

4. Where the length of the period during which benefits may be granted depends on the lengh of periods of insurance or employment, the provisions of paragraph 1 or 2 shall apply, as appropriate.

Article 68: Calculation of benefits

1. The competent institution of a Member State whose legislation provides that the calculation of benefits should be based on the amount of the previous wage or salary shall take into account exclusively the wage or salary received by

the person concerned in respect of his last employment in the territory of that State. However, if the person concerned had been in his last employment in that territory for less than four weeks, the benefits shall be calculated on the basis of the normal wage or salary corresponding, in the place where the unemployment person is residing or staying, to an equivalent or similar employment to his last employment in the territory of another Member State.

2. The competent institution of a Member State whose legislation provides that the amount of benefits varies with the number of members of the family, shall take into account also members of the family of the person concerned who are residing in the territory of another Member State, as though they were residing in the territory of the competent State. This provision shall not apply if, in the country of residence of the members of the family, another person is entitled to unemployment benefits for the calculation of which the members of the family are taken into consideration.

Section 2: Unemployment persons going to a Member State other than the competent State

Article 69: Conditions and limits for the retention of the right to benefits

1. A worker whos is wholly unemployed and who satisfies the conditions of the legislation of a Member State for entitlement to benefits and who goes to one or more other Member States in order to seek employment there shall retain his entitlement to such benefits under the conditions and within the limits hereinafter indicated:

(a) before his departure, he must have been registered with the employment services of the competent State as a person seeking work and must have remained available for at least four weeks after becoming unemployed. However, the competent services or institutions may authorise his departure before such time has expired;

(b) he must register as a person seeking work with the employment services of each of the Member States to which he goes and be subject to the control procedure organised therein. This condition shall be considered satisfied for the period before registration if the person concerend registered within seven days of the date when he ceased to be available to the employment services of the State he left. In exceptional cases, this period may be extended by the competent services or institutions;

(c) entitlement to benefits shall continue for a maximum period of three months from the date when the person concerned ceased to be available to the employment services of the State which he left, provided that the total duration of the benefits does not exceed the duration of the period of benefits he was entitled to under the legislation of the State. In the case of a seasonal worker such duration shall, moreover, be limited to the period remaining until the end of the season for which he was engaged.

2. If the person concerned returns to the competent State before the expiry of the period during which he is entitled to benefits under paragraph 1 (c), he shall continue to be entitled to benefits under the legislation of that State; he shall lose all entitlement to benefits under the legislation of the competent State if he does not return there before the expiry of that period. In exceptional cases, this time limit may be extended by the competent services or institutions.

3. The provisions of paragraph 1 may be invoked only once between two periods of employment.

4. Where the competent State is Belgium, an unemployed Person who returns there after the expiry of the three month period laid down in paragraph 1 (c), shall not requalify for benefits in that country until he has been employed there for at least three months.

Article 70: Provision of benefits and reimbursements

1. In the case referred to in Article 69 (1), benefits shall be provided by the institution of each of the States to which an unemployed person goes to seek employment.

The competent institution of the Member State to whose legislation a worker was subject at the time of his last employment shall be obliged to reimburse the amount of such benefits.

2. The reimbursements referred to in paragraph 1 shall be determined and made in accordance with the procedure laid down by the implementing Regulation referred to in Article 97, on proof of actual expenditure, or by lump sum payments.

3. Two or more Member States, or the competent authorities of those States, may provide for other methods of reimbursements or payment, or may waive all reimbursement between the institutions coming under their jurisdiction.

Section 3: Unemployment persons who during their last employment, were residing in a Member State other than the competent State

Article 71

1. An unemployed person who, during his last employment, was residing in the territory of a Member State other the competent State shall receive benefits in accordance with the following provisions:

(a) (i) a frontier worker who is partially or intermittently unemployed in the undertaking which employs him, shall receive benefits in accordance with the legislation of the competent State as if he were residing in the territory of that State; these benefits shall be provided by the competent institution;

(ii) a frontier worker who is wholly unemployed shall receive benefits in accordance with the legislation of the Member State in whose territory he resides as though he had been subject to that legislation while last employed the institution of the place of residence shall provide such benefits at its own expense;

(b) (i) a worker, other than a frontier worker, who is partially, intermittently or wholly unemplyed and who remains available to his employer or to the employment services in the territory of the competent State shall receive benefits in accordance with the legislation of that State as though he were residing in its territory; these benefits shall be provided by the competent institution;

(ii) a worker, other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides, or who returns to that territory, shall receive benefits in accordance with the legislation of that State as if he had last been employed there; the institution of the place of residence shall provide such benefits at its own expense However, if such worker has become entitled to benefits at the expense of the competent institution of the Member State to whose legislation he was last subject, he shall receive benefits under the provisions of Article 69. Receipt of benefits under the legislation of the State in which he resides shall be suspended for any period during which the unemployed person may, under Article 69, make a claim for benefits under the legislation to which he was last subject.

2. An unemployed person may not claim benefits under the legislation of the Member State in whose territory he resides while he is entitled to benefits under paragraph 1 (a) (i) or (b) (i).

CHAPTER 7: FAMILY BENEFITS AND FAMILY ALLOWANCES FOR EMPLOYED AND UNEMPLOYED PERSONS

Section 1: Common Provision

Article 72: Aggregation of periods of employment

Where the legislation of one Member State makes acquisition of the right to benefits conditional upon the completion of periods of employment, the competent institution of that State shall take into account, to the extent necessary, periods of employment completed in the territory of any other Member State, as if they had been completed under its own legislation.

Section 2: Workers and unemployed workers whose families reside in a Member State other than the competent State

Article 73: Workers

1. A worker subject to the legislation of a Member State other than France shall be entitled to the family benefits provided for by the legislation of the first Member State for members of his family residing in the territory of another Member State, as though they were residing in the residing in the territory of the first State.

2. A worker subject to French legislation shall be entitled, in respect of members of his family residing in the territory of a Member State other than France, to the family allowances provided for by the legislation of such Member State; the worker must satisfy the conditions regarding employment on which French legislation bases entitlement to such benefits.

3. However, a worker who is subject to French legislation by virtue of the provisions of Article 14 (1) (a) shall be entitled to the family benefits provided for by French legislation and set out in Annex V in respect of members of his family who accompany him to the territory of the Member State where he is posted.

Article 74: Unemployed persons

1. An unemployed person drawing unemployment benefits under the legislation of a Member State other than France shall be entitled to the family benefits provided for by the legislation of the first Member State for members of his family residing in the territory of another Member State as though they were residing in the territory of the first State.

2. An unemployed person drawing unemployment benefits under French legislation shall be entitled, in respect of members of his family residing in the territory of a Member State other than France, to the family allowances provided for by legislation of the State in whose territory those members of the family are residing.

Article 75: Provision of benefits and reimbursements

1. (a) Family benefits shall be provided, in the cases referred to in Article 73 (1) and (3), by the competent institution of the State to whose legislation to worker is subject and, in the case referred to in Article 74 (1), by the competent institution of the State under whose legislation the unemployed worker is receiving unemployement benefits. They shall be provided in accordance with the provisions administered by such institutions, whether the natural or legal person to whom such benefits are payable is staying, residing or situated in the territory of the competent State or in that of another Member State;

(b) however, if the family benefits are not applied by the person to whom they should be provided for the maintenance of the members of the family, the competent institution shall discharge its legal obligations by providing the said benefits to the natural or legal person actually maintaining the members of the family, on application by and through the agency of the institution of their place of residence or of the institution or body appointed to that end by the competent authority of their country of residence;

(c) two or more Member States may agree, in accordance with Article 8, that the competent institution shall provide the family benefits due under the legislation of one or more of those States to the natural or legal person actually maintaining the members of the family, either directly, or through the agency of the institution of their place of residence.

2. (a) family allowances shall be provided, in the cases referred to in Articles 73 (2) and 74 (2), by the institution of the place of residence of the members of the family, in accordance with the legislation administered by that institution;

(b) however, if, under that legislation, the allowances must be provided to the worker, the institution referred to in the preceding subparagraph shall pay such allowances to the natural or legal person actually maintaining the members of the family in their place of residence or, where appropriate, directly to the members of the family;

(c) the competent institution shall reimburse the full amount of the allowances provided in accordance with the preceding subparagraphs. The reimbursements shall be determined and made in accordance with the procedures laid down by the implementing Regulation referred to in Article 97.

Article 76

Rules of priority in cases of overlapping entitlement to family benefits or family allowances in pursuance of Articles 73 and 74 by reason of the pursuit of a professional or trade activity in the country of residence of the members of the family

Entitlement to family benefits or family allowances under Articles 73 and 74 shall be suspended if, by reason of the pursuit of a professional or trade activity, family benefits or family allowances are also payable under the legislation of the Member State in whose territory the members of the family are residing.

TITLE VI: MISCELLANEOUS PROVISIONS

Article 84: Co-operation between competent authorities

1. The competent authorities of Member States shall communicate to each other all information regarding:

(a) measures taken to implement this Regulation;

(b) changes in their legislation which are likely to affect the implementation of this Regulation.

2. For the purposes of implementing this Regulation, the authorities and institutions of Member States shall lend their good offices and act as though implementing their own legislation. The administrative assistance furnished by the said authorities and institutions shall, as a rule, be free of charge. However, the competent authorities of the Member States may agree to certain expenses being reimbursed.

3. The authorities and institutions of Member States may, for the purpose of implementing this Regulation, communicate directly with one another and with the persons concerned or their representatives.

4. The authorities, institutions and tribunals of one Member State may not reject claims or other documents submitted to them on the grounds that they are written in an official language of another Member State. They shall have recourse where appropriate to the provisions of Article 81 (b).

Article 85: Exemptions from or reductions of taxes - Exemption from authentication

1. Any exemption from or reduction of taxes, stamp duty, notarial or registration fees provided for in the legislation of one Member State in respect of certificates or documents required to be produced for the purposes of the legislation of that State shall be extended to similar documents required to be produced for the purposes of the legislation of another Member State or of this Regulation.

2. All statements, documents and certificates of any kind whatsoever required to be produced for the purposes of this Regulation shall be exempt from authentication by diplomatic or consular authorities.

Article 86: Claims, declarations or appeals submitted to an authority, institution or court of a Member State other than the competent State

Any claim, declaration or appeal which should have been submitted, in order to comply with the legislation of one Member State, within a specified, period to an authority, institution or court of that State shall be admissable if it is submitted within the same period to a corresponding authority, institution, or court of another Member State. In such a case the authority, institution, or court receiving the claim, declaration or appeal shall forward it without delay to the competent authority, institution or court of the former State either directly or through the competent authorities of the Member State concerned. The date on which such claims, declarations or appeals were submitted to the authority, institution or court of the second State shall be considered as the date of their submission to the competent authority, institution, or court.

Article 87: Medical examinations

1. Medical examinations provided for by the legislation of one Member State may be carried out at the request of the competent institution, in the territory of another Member State, by the institution of the place of stay or residence of the person entitled to benefits, under conditions laid down in the implementing Regulation referred to in Article 97 or, failing these, under conditions agreed upon between the competent authorities of the Member States concerned.

2. Medical examinations carried out under the conditions laid down in paragraph 1 shall be considered as having been carried out in the territory of the competent State.

Article 88: Transfers from one Member State to another of sums of money payable pursuant to this Regulation

Subject to the provisions of Article 106 of the Treaty, money transfers effected pursuant to this Regulation shall be made in accordance with the relevant agreements in force between the Member States concerned at the time of transfer. Where no such agreements are in force between two Member Sates, the competent authorities of the said States or the authorities responsible for international payments shall, by mutual agreement, determine the measures necessary for effecting such transfers.

Article 89: Special procedures for implementing certain legislations

Special procedures for implementing the legislations of certain Member States are set out in Annex V.

Article 90: Housing allowances and family benefits introduced after the entry into force of this Regulation

Housing allowances and, in the case of Luxembourg, family benefits introduced after the entry into force of this Regulation for demographic reasons shall not be granted to persons resident in the territory of a Member State other than the competent State.

Article 91: Contributions chargeable to employers or undertakings not established in the competent State

An employer shall not be bound to pay increased contributions by reason of the fact that his place of business or the registered office or place of business of his undertaking is in the territory of a Member State other than the competent State.

Article 92: Collection of contributions

1. Contributions payable to an institution of one Member State may be collected in the territory of another Member State in accordance with the administrative procedure and with the guarantees and privileges applicable to the collection of contributions payable to the corresponding institution of the latter State.

2. The procedure for the implementation of paragraph 1 shall be governed, in so far as is necessary, by the implementing Regulation referred to in Article 97 or by means of agreements between Member States. Such implementing procedure may also cover procedure for enforcing payment.

Article 93: Rights of institutions responsible for benefits against liable third parties

1. If a person receives benefits under the legislation of one Member State in respect of an injury resulting from an occurrence in the territory of another State, any rights of the institution responsible for benefits against a third party bound to compensate for the injury shall be governed by the following rules:

(a) where the institution responsible for benefits is, by virtue of the legislation which it administers, subrogated to the rights which the recipient has against the third party, such subrogation shall be recognised by each Member State;

(b) where the said institution has direct rights against the third party, such rights shall be recognised by each Member State.

2. If a person receives benefits under the legislation of one Member State in respect of an injury resulting from an occurence in the territory of another Member State, the provisions of the said legislation which determine in which cases the civil liability of employers or of their employees is to be excluded shall apply with regard to the said person or to the institution responsible for benefits.

The provisions of paragraph 1 shall also apply to any rights of the institution responsible for benefit against an employer or his employees in cases where their liability is not excluded.

TITLE VII: TRANSITIONAL AND FINAL PROVISIONS

Article 94: Miscellaneous provisions

1. No right shall be acquired under this Regulation for a period prior to the date of its entry into force.

2. All insurance periods and, where appropriate, all periods of employment or residence completed under the legislation of a Member State before the date of entry into force of this Regulation shall be taken into consideration for the determination of rights to benefits under this Regulation.

3. Subject to the provisions of paragraph 1, a right shall be acquired under this Regulation though relating to a contingency which materialised prior to the date of entry into force of this Regulation.

4. Any benefit which has not been awarded or which has been suspended by reason of the nationality or place of residence of the person concerned shall, on the application of the person concerned, be awarded or resumed with effect from the entry into force of this Regulation provided that the rights previously determined have not given rise to a lump sum payment.

5. The rights of a person to whom a pension was awarded prior to the entry into force of this Regulation may, on the application of the person concerned, be reviewed, taking into account the provisions of this Regulation. This provision shall also apply to the other benefits referred to in Article 78.

6. If an application referred to in paragraph 4 or 5 is submitted within two years from the date of entry into force of this Regulation, the rights acquired under this Regulation shall have effect from that date, and the provisions of the legislation of any Member State concerning the forfeiture or limitation of rights may not be invoked against the persons concerned.

7. If an application referred to in paragraph 4 or 5 is submitted after the expiry of the two-year period following the entry into force of this Regulation, rights which have not been forfeited or are not barred by limitation shall have effect from the date on which the application was submitted, except where more favourable provisions of the legislation of any Member State apply.

8. In cases of sclerogenic pneumoconiosis, Article 57 (3) (c) shall apply to cash benefits for an occupational disease the expense of which, in the absence of an agreement between the institutions concerned, could not be divided between those institutions before the date of entry into force of this Regulation.

9. The implementation of Article 73 (2) shall not have the effect of reducing any rights existing at the date of entry into force of this Regulation. As regards persons who at that date are receiving more favourable benefits by virtue of bilateral agreements concluded with France, those agreements shall continue to apply to such persons for as long as they are subject to French legislation. Account shall not be taken of interruptions lasting less than one month, nor of periods in which unemployment or sickness benefit is drawn. The procedure for implementing those provisions shall be laid down by the implementing Regulation referred to in Article 97.

Article 95: Annexes to this Regulation

The Annexes to this Regulation may be amended by a Regulation adopted by the Council on a proposal from the Commission, at the request of one or more Member States concerned, and after receiving the Opinion of the Administrative Commission.

Article 96: Notifications pursuant to certain provisions

1. The notifications referred to in Articles 1 (j), 5 and 8 (2) shall be addressed to the President of the Council of the European Communities. They shall indicate the date of entry into force of the laws and schemes in question or, in the case of the notifications referred to in Article 1 (j), the date from which this Regulation shall apply to the schemes mentioned in the declarations of the Member States.

2. Notifications received in accordance with paragraph 1 shall be published in the Official Journal of the European Communities.

Article 97: Implementing regulation

A further regulation shall lay down the procedure for implementing this Regulation.

Article 98: Re-examination of the problem of payment of family benefits

Before 1 January 1973 the Council shall, on a proposal from the Commission, re-examine the whole problem of payment of family benefits to members of families who are not residing in the territory of the competent State, in order to reach a uniform solution for all Member States.

Article 99: Entry into force

This Regulation shall enter into force on the first day of the seventh month following the publication in the Official Journal of the European Communities of the implementing Regulation referred to in Article 97.

These two Regulations shall repeal the following Regulations:

- Council Regulation No 3 concerning social security for migrant workers,

- Council Regulation No 4 laying down implementing procedures and supplementary provisions in respect of Regulation No 3, [6] and

- Council Regulation No 36/63/EEC of 2 April 1963 concerning social security for frontier workers [7]

However, the provisions of Articles 82 and 83 concerning the setting up of the Advisory Committee, shall enter into force on the day of publication of the implementing regulation referred to in Article 97.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Luxembourg, 14 June 1971.

For the Council

The President

M. COINTAT

DIRECTIVE 2004/38/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 12, 18, 40, 44 and 52 thereof,
Having regard to the proposal from the Commission
Having regard to the Opinion of the European Economic and Social Committee
Having regard to the Opinion of the Committee of the Regions
Acting in accordance with the procedure laid down in Article 251 of the Treaty

Whereas:

(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.

(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

(4) With a view to remedying this sector-by-sector, piecemeal approach to the right of free movement and residence and facilitating the exercise of this right, there needs to be a single legislative act to amend Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within t

he Community, and to repeal the following acts:

Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on

movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, Council Directive 90/364/EEC of 28 June 1990 on the right of residence, Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students.

(5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of "family member" should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.

(6) In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.

(7) The formalities connected with the free movement of Union citizens within the territory of Member States should be clearly defined, without prejudice to the provisions applicable to national border controls.

(8) With a view to facilitating the free movement of family members who are not nationals of a Member State, those

who have already obtained a residence card should be exempted from the requirement to obtain an entry visa within the meaning of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement **1** or, where appropriate, of the applicable national legislation.

(9) Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case-law of the Court of Justice.

(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.

(11) The fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures.

(12) For periods of residence of longer than three months, Member States should have the possibility to require Union citizens to register with the competent authorities in the place of residence, attested by a registration certificate issued to that effect.

(13) The residence card requirement should be restricted to family members of Union citizens who are not nationals of a Member State for periods of residence of longer than three months.

(14) The supporting documents required by the competent authorities for the issuing of a registration certificate or of a residence card should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members.

(15) Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.

(16) As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security.

(17) Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure.

(18) In order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions.

(19) Certain advantages specific to Union citizens who are workers or self-employed persons and to their family members, which may allow these persons to acquire a right of permanent residence before they have resided five years in the host Member State, should be maintained, as these constitute acquired rights, conferred by Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State **1** and Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity.

(20) In accordance with the prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals in areas covered by the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law.

(21) However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.

(22) The Treaty allows restrictions to be placed on the right of free movement and residence on grounds of public policy, public security or public health. In order to ensure a tighter definition of the circumstances and procedural safeguards subject to which Union citizens and their family members may be denied leave to enter or may be expelled, this Directive should replace Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals, which are justified on grounds of public policy, public security or public health.

(23) Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.

(24) Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989.

(25) Procedural safeguards should also be specified in detail in order to ensure a high level of protection of the rights of Union citizens and their family members in the event of their being denied leave to enter or reside in another Member State, as well as to uphold the principle that any action taken by the authorities must be properly justified.

(26) In all events, judicial redress procedures should be available to Union citizens and their family members who have been refused leave to enter or reside in another Member State.

(27) In line with the case-law of the Court of Justice prohibiting Member States from issuing orders excluding for life persons covered by this Directive from their territory, the right of Union citizens and their family members who have been excluded from the territory of a Member State to submit a fresh application after a reasonable period, and in any event after a three year period from enforcement of the final exclusion order, should be confirmed.

(28) To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures.

(29) This Directive should not affect more favourable national provisions.

(30) With a view to examining how further to facilitate the exercise of the right of free movement and residence, a report should be prepared by the Commission in order to evaluate the opportunity to present any necessary proposals to this effect, notably on the extension of the period of residence with no conditions.

(31) This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I: General provisions

Article 1: Subject

This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.

Article 2: Definitions

For the purposes of this Directive:

1) "Union citizen" means any person having the nationality of a Member State;

2) "Family member" means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

Article 3: Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

CHAPTER II: Right of exit and entry

Article 4: Right of exit

1. Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.

2. No exit visa or equivalent formality may be imposed on the persons to whom paragraph 1 applies.

3. Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality.

4. The passport shall be valid at least for all Member States and for countries through which the holder must pass when travelling between Member States. Where the law of a Member State does not provide for identity cards to be issued, the period of validity of any passport on being issued or renewed shall be not less than five years.

Article 5: Right of entry

1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport. No entry visa or equivalent formality may be imposed on Union citizens.

2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement. Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.

3. The host Member State shall not place an entry or exit stamp in the passport of family members who are not nationals of a Member State provided that they present the residence card provided for in Article 10.

4. Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence.

5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.

CHAPTER III: Right of residence

Article 6: Right of residence for up to three months

1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.

Article 7: Right of residence for more than three months

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and

have comprehensive sickness insurance cover in the host Member State; or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered

partner.

Article 8: Administrative formalities for Union citizens

1. Without prejudice to Article 5(5), for periods of residence longer than three months, the host Member State may require Union citizens to register with the relevant authorities.

2. The deadline for registration may not be less than three months from the date of arrival. A registration certificate shall be issued immediately, stating the name and address of the person registering and the date of the registration. Failure to comply with the registration requirement may render the person concerned liable to proportionate and non-discriminatory sanctions.

3. For the registration certificate to be issued, Member States may only require that – Union citizens to whom point (a) of Article 7(1) applies present a valid identity card or passport, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed persons;

– Union citizens to whom point (b) of Article 7(1) applies present a valid identity card or passport and provide proof that they satisfy the conditions laid down therein;

– Union citizens to whom point (c) of Article 7(1) applies present a valid identity card or passport, provide proof of enrolment at an accredited establishment and of comprehensive sickness insurance cover and the declaration or equivalent means referred to in point (c) of Article 7(1). Member States may not require this declaration to refer to any specific amount of resources.

4. Member States may not lay down a fixed amount which they regard as "sufficient resources"**,** but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.

5. For the registration certificate to be issued to family members of Union citizens, who are themselves Union citizens, Member States may require the following documents to be presented:

(a) a valid identity card or passport;

(b) a document attesting to the existence of a family relationship or of a registered partnership;

(c) where appropriate, the registration certificate of the Union citizen whom they are accompanying or joining;

(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;

(e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;

(f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.

Article 9: Administrative formalities for family members who are not nationals of a Member State

1. Member States shall issue a residence card to family members of a Union citizen who are not nationals of a Member State, where the planned period of residence is for more than three months.

2. The deadline for submitting the residence card application may not be less than three months from the date of arrival.

3. Failure to comply with the requirement to apply for a residence card may make the person concerned liable to proportionate and non-discriminatory sanctions.

Article 10: Issue of residence cards

1. The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called "Residence card of a family member of a Union citizen" no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.

2. For the residence card to be issued, Member States shall require presentation of the following documents:

(a) a valid passport;

(b) a document attesting to the existence of a family relationship or of a registered partnership;

(c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;

(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;

(e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;

(f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.

Article 11: Validity of the residence card

1. The residence card provided for by Article 10(1) shall be valid for five years from the date of issue or for the envisaged period of residence of the Union citizen, if this period is less than five years.

2. The validity of the residence card shall not be affected by temporary absences not exceeding six months a year, or by absences of a longer duration for compulsory military service or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a

third country.

Article 12: Retention of the right of residence by family members in the event of death or departure of the Union citizen

1. Without prejudice to the second subparagraph, the Union citizen's death or departure from the host Member State shall not affect the right of residence of his/her family members who are nationals of a Member State. Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, the Union citizen's death shall not entail loss of the right of residence of his/her family members who are not nationals of a Member State and who have been residing in the host Member State as family members for at least one year before the Union citizen's death.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on a personal basis.

3. The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.

Article 13: Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership

1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:

(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or

(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or

(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or

(d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4). Such family members shall retain their right of residence exclusively on personal basis.

Article 14: Retention of the right of residence

1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein. In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State. 4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

(a) the Union citizens are workers or self-employed persons, or

(b) the Union citizens entered the territory of the host Member State in order to seek employment.

In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

Article 15: Procedural safeguards

1. The procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health.

2. Expiry of the identity card or passport on the basis of which the person concerned entered the host Member State and was issued with a registration certificate or residence card shall not constitute a ground for expulsion from the host Member State.

3. The host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 applies.

CHAPTER IV: Right of permanent residence

Section I: Eligibility

Article 16: General rule for Union citizens and their family members

1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a

third country.

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

Article 17: Exemptions for persons no longer working in the host Member State and their family members

1. By way of derogation from Article 16, the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by:

(a) workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension or workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years. If the law of the host Member State does not grant the right to an old age pension to certain categories of self-employed persons, the age condition shall be deemed to have been met once the person concerned has reached the age of 60;

(b) workers or self-employed persons who have resided continuously in the host Member State for more than two years and stop working there as a result of permanent incapacity to work.

If such incapacity is the result of an accident at work or an occupational disease entitling the person concerned to a benefit payable in full or in part by an institution in the host Member State, no condition shall be imposed as to length of residence;

(c) workers or self-employed persons who, after three years of continuous employment and residence in the host Member State, work in an employed or self-employed capacity in another Member State, while retaining their place of residence in the host Member State, to which they return, as a rule, each day or at least once a week.

For the purposes of entitlement to the rights referred to in points (a) and (b), periods of employment spent in the Member State in which the person concerned is working shall be regarded as having been spent in the host Member State.

Periods of involuntary unemployment duly recorded by the relevant employment office, periods not worked for reasons not of the person's own making and absences from work or cessation of work due to illness or accident shall be regarded as periods of employment.

2. The conditions as to length of residence and employment laid down in point (a) of paragraph 1 and the condition as to length of residence laid down in point (b) of paragraph 1 shall not apply if the worker's or the self-employed person's spouse or partner as referred to in point 2(b) of Article 2 is a national of the host Member State or has lost the nationality of that Member State by marriage to that worker or self-employed person.

3. Irrespective of nationality, the family members of a worker or a self-employed person who are residing with him in the territory of the host Member State shall have the right of permanent residence in that Member State, if the worker or self-employed person has acquired himself the right of permanent residence in that Member State on the basis of paragraph 1.

4. If, however, the worker or self-employed person dies while still working but before acquiring permanent residence status in the host Member State on the basis of paragraph 1, his family members who are residing with him in the host

Member State shall acquire the right of permanent residence there, on condition that:

(a) the worker or self-employed person had, at the time of death, resided continuously on the territory of that Member State for two years; or

(b) the death resulted from an accident at work or an occupational disease; or

(c) the surviving spouse lost the nationality of that Member State following marriage to the worker or self-employed person.

Article 18: Acquisition of the right of permanent residence by certain family members who are not nationals of a Member State

Without prejudice to Article 17, the family members of a Union citizen to whom Articles 12(2) and 13(2) apply, who satisfy the conditions laid down therein, shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State**.**

Section II: Administrative formalities

Article 19: Document certifying permanent residence for Union citizens

1. Upon application Member States shall issue Union citizens entitled to permanent residence, after having verified duration of residence, with a document certifying permanent residence.

2. The document certifying permanent residence shall be issued as soon as possible.

Article 20: Permanent residence card for family members who are not nationals of a Member State

1. Member States shall issue family members who are not nationals of a Member State entitled to permanent residence with a permanent residence card within six months of the submission of the application. The permanent residence card shall be renewable automatically every ten years.

2. The application for a permanent residence card shall be submitted before the residence card expires. Failure to comply with the requirement to apply for a permanent residence card may render the person concerned liable to proportionate and non-discriminatory sanctions.

3. Interruption in residence not exceeding two consecutive years shall not affect the validity of the permanent residence card.

Article 21: Continuity of residence

For the purposes of this Directive, continuity of residence may be attested by any means of proof in use in the host Member State. Continuity of residence is broken by any expulsion decision duly enforced against the person concerned.

CHAPTER V: Provisions common to the right of residence and the right of permanent residence

Article 22: Territorial scope

The right of residence and the right of permanent residence shall cover the whole territory of the host Member State. Member States may impose territorial restrictions on the right of residence and the right of permanent residence only where the same restrictions apply to their own nationals.

Article 23: Related rights

Irrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self-employment there.

Article 24: Equal treatment

1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

Article 25: General provisions concerning residence documents

1. Possession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.

2. All documents mentioned in paragraph 1 shall be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents.

Article 26: Checks

Member States may carry out checks on compliance with any requirement deriving from their national legislation for non-nationals always to carry their registration certificate or residence card, provided that the same requirement applies to their own nationals as regards their identity card.

In the event of failure to comply with this requirement, Member States may impose the same sanctions as those imposed on their own nationals for failure to carry their identity card.

CHAPTER VI: Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health

Article 27: General principles

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when

issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.

4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.

Article 28: Protection against expulsion

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous ten years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

Article 29: Public health

1. The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.

2. Diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory.

3. Where there are serious indications that it is necessary, Member States may, within three months of the date of arrival, require persons entitled to the right of residence to undergo, free of charge, a medical examination to certify that they are not suffering from any of the conditions referred to in paragraph 1. Such medical examinations may not be required as a matter of routine.

Article 30: Notification of decisions

1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.

2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.

3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.

Article 31: Procedural safeguards

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

– where the expulsion decision is based on a previous judicial decision; or

– where the persons concerned have had previous access to judicial review; or

– where the expulsion decision is based on imperative grounds of public security under Article 28(3).

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

Article 32: Duration of exclusion orders

1. Persons excluded on grounds of public policy or public security may submit an application for lifting of the exclusion order after a reasonable period, depending on the circumstances, and in any event after three years from enforcement of the final exclusion order which has been validly adopted in accordance with Community law, by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion.

The Member State concerned shall reach a decision on this application within six months of its submission.

2. The persons referred to in paragraph 1 shall have no right of entry to the territory of the Member State concerned while their application is being considered.

Article 33: Expulsion as a penalty or legal consequence

1. Expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27, 28 and 29.

2. If an expulsion order, as provided for in paragraph 1, is enforced more than two years after it was issued, the Member State shall check that the individual concerned is currently and genuinely a threat to public policy or public security and shall assess whether there has been any material change in the circumstances since the expulsion order was issued.

CHAPTER VII: Final provisions

Article 34: Publicity

Member States shall disseminate information concerning the rights and obligations of Union citizens and their family members on the subjects covered by this Directive, particularly by means of awareness-raising campaigns conducted through national and local media and other means of communication.

Article 35: Abuse of rights

Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.

Article 36: Sanctions

Member States shall lay down provisions on the sanctions applicable to breaches of national rules adopted for the implementation of this Directive and shall take the measures required for their application. The sanctions laid down shall be effective and proportionate. Member States shall notify the Commission of these provisions not later than .....* and as promptly as possible in the case of any subsequent changes.

Article 37: More favourable national provisions

The provisions of this Directive shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive.

Article 38: Repeals

1. Articles 10 and 11 of Regulation (EEC) No 1612/68 shall be repealed with effect from … *****.

2. Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC shall be repealed with effect from …. *.

***** Two years from the date of entry into force of this Directive.

3. References made to the repealed provisions and Directives shall be construed as being made to this Directive.

Article 39: Report

No later than.....***** the Commission shall submit a report on the application of this Directive to the European Parliament and the Council, together with any necessary proposals, notably on the opportunity to extend the period of time during which Union citizens and their family members may reside in the territory of the host Member State without any conditions. The Member States shall provide the Commission with the information needed to produce the report.

Article 40: Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ……******.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

***** Four years from the date of entry into force of this Directive

****** Two years from the date of entry into force of this Directive.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive together with a table showing how the provisions of this Directive correspond to the national provisions adopted.

Article 41: Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.

Article 42: Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 29 April 2004.

For the European Parliament For the Council

The President The President

P. COX M. McDOWELL

Excerpts from the preparatory works of Directive 2004/38/EC

Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the common position of the Council on the adoption of a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. SEC(2003) 1293 final - 2001/0111 (COD) (link):

"3.3.2. Articles

Articles 2 and 3: these articles, on the definition of the family and persons entitled, have been amended in several places:

- the concept of registered partner and durable relationship.

The definition given in Article 2(2)(b) of the amended proposal included both registered partners and partners having a de facto relationship, if the law of the host Member State recognises this type of situation. The Council has decided to restrict this definition to registered partners, if the law of the host Member States treats registered partnerships as equivalent to marriage.

At the same time, the text of Article 3 has been amended to provide that any Member State must facilitate the entry and residence of the partner to whom the Union citizen is linked by a duly attested durable relationship. The Commission has accepted the approach proposed by the Council. While it is true that the definition of Article 2(2)(b) is more limited than the text of the amended proposal, it must be considered that the content of Article 3 has been extended to include any type of durable relationship. The Commission considers that the concept of durable relationship may cover different situations: same-sex marriage, registered partnership, legal cohabitation and common-law marriage. The concept of facilitation has been clarified in recital 6a.

The Commission considers that the text of the common position represents a fair compromise which makes it possible to facilitate the right to free movement and residence of unmarried partners of Union citizens without imposing changes in the national law of the Member States."

Amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (presented by the Commission pursuant to Article 250 (2) of the EC-Treaty). COM(2003) 199 final - 2001/0111 (COD) (link):

"3. Amended proposal

1. Parliament endorses the general approach and the main principles underlying the Commission proposal, notably in respect of the major items, such as abolition of the residence card and its replacement by optional registration, introduction of a statement instead of a requirement to prove compliance with the conditions for residence, establishment of the right of unconditional permanent residence and absolute protection against expulsion for minors and persons having acquired a right of permanent residence.

It adopted 82 amendments. The Commission is able to accept all or part of most of these amendments as they comply fully with its approach and constitute valuable additions, expanding on and clarifying the Commission text.

However, it is not possible to incorporate some of the amendments in the amended proposal.

These include firstly the amendments to Article 2 on the definition of family members, in particular the concept of spouse and partner. Parliament's amendments would recognise as family members the spouse of the same sex in the same way as the spouse of a different sex, the registered partner in accordance with the legislation of the Member State of origin, and non-married partners in accordance with the legislation or practice of the host or home Member State.

On this point the Commission feels that harmonisation of the conditions of residence for Union citizens in Member States of which they are not nationals must not result in the imposition on certain Member States of amendments to family law legislation, an area which does not fall within the Community's legislative jurisdiction.

The Commission feels that the amended proposal represents an equitable solution to these issues: firstly, it complies with the principle of non-discrimination in as much as it requires Member States to treat couples from other Member States in the same way as its own nationals; and, secondly, it allows for a possible change in interpretation in the light of developments in family law in the Member States.

[...]

Amendments 14, 15 and 16

These proposed amendments are designed to recognise as family members the spouse and registered partner, irrespective of sex, on the basis of the relevant national legislation, and the unmarried partner, irrespective of sex, with whom the Union citizen has a durable relationship, if the legislation or practice of the host and/home Member States treats unmarried couples and married couples in a corresponding manner and in accordance with the conditions laid down in any such legislation. These amendments cannot be accepted.

With regard to marriage, the Commission is reluctant to opt for a definition of the term spouse which makes a specific reference to spouse of the same sex. For the moment only two Member States make legislative provision for marriage between partners of the same sex. Moreover, in its case-law [5] the Court of Justice has made it clear that, according to the definition generally accepted by the Member States, the term marriage means a union between two persons of the opposite sex. The Court has also ruled that an interpretation of legal terms on the basis of social developments that has effects in all the Member States must take into account the situation in the whole Community. [6] The Commission therefore prefers to restrict the proposal to the concept of spouse as meaning in principle spouse of a different sex, unless there are subsequent developments."

Common Position (EC) No 6/2004 of 5 December 2003 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (link):

"B. European Parliament Amendments which have been rejected by the Council

[...]

Amendments 4, 14, 15 and 16: the text of these amendments recognises as family members the spouse and registered partner, irrespective of sex, on the basis of the relevant national legislation, and the unmarried partner, irrespective of sex, with whom the Union citizen has a durable relationship, if the legislation or practice of the host and/home Member States treats unmarried couples and married couples in a corresponding manner

and in accordance with the conditions laid down in any such legislation. These amendments have not be accepted for the following reasons:

With regard to marriage, the Council has been reluctant to opt for a definition of the term ‘spouse’ which makes a specific reference to spouses of the same sex. For the moment only two Member States have legal provisions for marriages between partners of the same sex. Moreover, in its case-law the Court of Justice has made it clear that, according to the definition generally accepted by the Member States, the term ‘marriage’ means a union between two persons of the opposite sex.

With regard to partners, whether they are registered partners or unmarried partners, the Council is of the opinion that recognition of such situations must be based exclusively on the legislation of the host Member State. Recognition for purposes of residence of non-married couples in accordance with the legislation of other Member States could pose problems for the host Member State if its family law does not recognise this possibility. To confer rights which are not recognised for its own nationals on couples from other Member States could in fact create reverse discrimination, which must be avoided.”

DECISION OF THE EEA JOINT COMMITTEE No 158/2007

of 7 December 2007

amending Annex V (Free movement of workers) and Annex VIII (Right of establishment) to the EEA Agreement

THE EEA JOINT COMMITTEE,

Having regard to the Agreement on the European Economic Area, as amended by the Protocol adjusting the Agreement on the European Economic Area, hereinafter referred to as 'the Agreement', and in particular Article 98 thereof,

Whereas:

(1) Annex V to the Agreement was amended by Decision of the EEA Joint Committee No 43/2005 of 11 March 2005.

(2) Annex VIII to the Agreement was amended by Decision of the EEA Joint Committee No 43/2005 of 11 March 2005.

(3) Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC , as corrected by OJ L 229, 29.6.2004, p. 35, OJ L 30, 3.2.2005, p. 27 and OJ L 197, 28.7.2005, p. 34, is to be incorporated into the Agreement.

(4) Commission Regulation (EC) No 635/2006 of 25 April 2006 repealing Regulation (EEC) No 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State4 is to be incorporated into the Agreement.

(5) Directive 2004/38/EC repeals, with effect from 30 April 2006, Council Directives 64/221/EC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, which are incorporated into the Agreement and which are consequently to be repealed under the Agreement.

(6) Directive 2004/38/EC repeals, with effect from 30 April 2006, Articles 10 and 11 of Council Regulation (EEC) No 1612/68, which is incorporated into the Agreement.

(7) Regulation (EC) No 635/2006 repeals, with effect from 30 April 2006, Regulation (EEC) No 1251/70, which is incorporated into the Agreement and which consequently is to be repealed under the Agreement.

(8) The concept of 'Union Citizenship' is not included in the Agreement.

(9) Immigration policy is not part of the Agreement.

(10) The Agreement does not apply to third country nationals. Family members within the meaning of the Directive having third country nationality shall nevertheless enjoy certain derived rights such as those foreseen in Articles 12(2), 13(2) and 18 when entering or moving to the host country.

(11) Decision of the EEA Joint Committee No 191/1999 of 17 December 1999 introduced new sectoral adaptations to Annex V and Annex VIII to the Agreement with regard to Liechtenstein, which were amended by the Agreement on the Participation of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic in the European Economic Area, signed in Luxembourg on 14 October 2003.

(12) The incorporation of Directive 2004/38/EC into the Agreement shall be without prejudice to these sectoral adaptations with regard to Liechtenstein,

HAS DECIDED AS FOLLOWS:

Article 1

Annex VIII to the Agreement shall be amended as follows:

1. The text of point 3 (Council Directive 73/148/EEC) shall be replaced by the following:

'32004 L 0038: Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004, p. 77), as corrected by OJ L 229, 29.6.2004, p. 35, OJ L 30, 3.2.2005, p. 27 and OJ L 197, 28.7.2005, p. 34.

The provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations:

(a) The Directive shall apply, as appropriate, to the fields covered by this Annex.

(b) The Agreement applies to nationals of the Contracting Parties. However, members of their family within the meaning of the Directive possessing third country nationality shall derive certain rights according to the Directive.

(c) The words 'Union citizen(s)' shall be replaced by the words 'national(s) of EC Member States and EFTA States'.

(d) In Article 24(1) the word 'Treaty' shall read 'Agreement' and the words 'secondary law' shall read 'secondary law incorporated in the Agreement'.'

2. The texts of points 4 (Council Directive 75/34/EEC), 5 (Council Directive 75/35/EEC), 6 (Council Directive 90/364/EEC), 7 (Council Directive 90/365/EEC) and 8 (Council Directive 93/96/EEC) shall be deleted.

Article 2

Annex V to the Agreement shall be amended as follows:

1. The text of point 1 (Council Directive 64/221/EEC) shall be replaced by the following:

'The act referred to in point 3 of Annex VIII to this Agreement (Directive 2004/38/EC of the European Parliament and of the Council), as adapted for the purposes of the Agreement shall apply, as appropriate, to the fields covered by this Annex.'

2. The following indent shall be added in point 2 (Council Regulation (EEC) No 1612/68):

‘- 32004 L 0038: Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 (OJ L 158, 30.4.2004, p. 77), as corrected by OJ L 229, 29.6.2004, p. 35, OJ L 30, 3.2.2005, p. 27 and OJ L 197, 28.7.2005, p. 34.’ 3. The text of point 4 (Commission Regulation (EEC) No 1251/70) shall be replaced by the following: ‘32006 R 0635: Commission Regulation (EC) No 635/2006 of 25 April 2006 repealing Regulation (EEC) No 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State (OJ L 112, 26.4.2006, p. 9).

4. The texts of points 3 (Council Directive 68/360/EEC) and 5 (Council Directive 72/194/EEC) shall be deleted.

Article 3

The texts of Directive 2004/38/EC and Regulation (EC) No 635/2006 in the Icelandic and Norwegian languages, to be published in the EEA Supplement to the Official Journal of the European Union, shall be authentic.

Article 4

This Decision shall enter into force on 8 December 2007, provided that all the notifications under Article 103(1) of the Agreement have been made to the EEA Joint Committee*.

Article 5

This Decision shall be published in the EEA Section of, and in the EEA Supplement to, *the Official Journal of the European Union.*

Done at Brussels, 7 December 2007.

For the EEA Joint Committee

The President

Stefán Haukur Jóhannesson

The Secretaries to the EEA Joint Committee

Bergdis Ellertsdóttir Matthias Brinkmann

Available under the following link:

http://www.efta.int/media/documents/legal-texts/eea/other-legal-documents/adopted-joint-committee-decisions/2007%20-%20English/158-2007.pdf

Joint Declaration by the Contracting Parties to Decision No 158/2007 incorporating Directive 2004/38/EC of the European Parliament and of the Council into the Agreement

"The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq. EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals.

The Contracting Parties agree that immigration policy is not covered by the EEA Agreement. Residence rights for third country nationals fall outside the scope of the Agreement with the exception of rights granted by the Directive to third country nationals who are family members of an EEA national exercising his or her right to free movement under the EEA Agreement as these rights are corollary to the right of free movement of EEA nationals. The EFTA States recognise that it is of importance to EEA nationals making use of their right of free movement of persons, that their family members within the meaning of the Directive and possessing third country nationality also enjoy certain derived rights such as foreseen in Articles 12(2), 13(2) and 18. This is without prejudice to Article 118 of the EEA Agreement and the future development of independent rights of third country nationals which do not fall within the scope of the EEA Agreement."

B. JURISPRUDENCE

Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health. - Reference for a preliminary ruling: Corte suprema di Cassazione - Italy. - Obligation to request a preliminary ruling. - Case 283/81.

Judgment of the Court of 6 October 1982.

Parties

IN CASE 283/81
REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE FIRST CIVIL DIVISION OF THE CORTE SUPREMA DI CASSAZIONE (SUPREME COURT OF CASSATION) FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT

SRL CILFIT - IN LIQUIDATION - AND 54 OTHERS, ROME,
V
MINISTRY OF HEALTH, IN THE PERSON OF THE MINISTER, ROME,
AND
LANIFICIO DI GAVARDO SPA, MILAN,
V
MINISTRY OF HEALTH, IN THE PERSON OF THE MINISTER, ROME,

Subject of the case

ON THE INTERPRETATION OF THE THIRD PARAGRAPH OF ARTICLE 177 OF THE EEC TREATY,

Grounds

1 BY ORDER OF 27 MARCH 1981, WHICH WAS RECEIVED AT THE COURT ON 31 OCTOBER 1981, THE CORTE SUPREMA DI CASSAZIONE (SUPREME COURT OF CASSATION) REFERRED TO THE COURT OF JUSTICE FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE EEC TREATY A QUESTION ON THE INTERPRETATION OF THE THIRD PARAGRAPH OF ARTICLE 177 OF THE EEC TREATY.

2 THAT QUESTION WAS RAISED IN CONNECTION WITH A DISPUTE BETWEEN WOOL IMPORTERS AND THE ITALIAN MINISTRY OF HEALTH CONCERNING THE PAYMENT OF A FIXED HEALTH INSPECTION LEVY IN RESPECT OF WOOL IMPORTED FROM OUTSIDE THE COMMUNITY. THE FIRMS CONCERNED RELIED ON REGULATION (EEC) NO 827/68 OF 28 JUNE 1968 ON THE COMMON ORGANIZATION OF THE MARKET IN CERTAIN PRODUCTS LISTED IN ANNEX II TO THE TREATY (OFFICIAL JOURNAL, ENGLISH SPECIAL EDITION 1968 (I) P. 209). ARTICLE 2 (2) OF THAT REGULATION PROHIBITS MEMBER STATES FROM LEVYING ANY CHARGE HAVING AN EFFECT EQUIVALENT TO A CUSTOMS DUTY ON IMPORTED ' ' ANIMAL PRODUCTS ' ', NOT SPECIFIED OR INCLUDED ELSEWHERE, CLASSIFIED UNDER HEADING 05.15 OF THE COMMON CUSTOMS TARIFF. AGAINST THAT ARGUMENT THE MINISTRY FOR HEALTH CONTENDED THAT WOOL IS NOT INCLUDED IN ANNEX II TO THE TREATY AND IS THEREFORE NOT SUBJECT TO A COMMON ORGANIZATION OF AGRICULTURAL MARKETS.

3 THE MINISTRY OF HEALTH INFERS FROM THOSE CIRCUMSTANCES THAT THE ANSWER TO THE QUESTION CONCERNING THE INTERPRETATION OF THE MEASURE ADOPTED BY THE COMMUNITY INSTITUTIONS IS SO OBVIOUS AS TO RULE OUT THE POSSIBILITY OF THERE BEING ANY INTERPRETATIVE DOUBT AND THUS OBVIATES THE NEED TO REFER THE MATTER TO THE COURT OF JUSTICE FOR A PRELIMINARY RULING. HOWEVER, THE COMPANIES CONCERNED MAINTAIN THAT SINCE A QUESTION CONCERNING THE INTERPRETATION OF A REGULATION HAS BEEN RAISED BEFORE THE CORTE SUPREMA DI CASSAZIONE, AGAINST WHOSE DECISIONS THERE IS NO JUDICIAL REMEDY UNDER NATIONAL LAW, THAT COURT CANNOT, ACCORDING TO THE TERMS OF THE THIRD PARAGRAPH OF ARTICLE 177, ESCAPE THE OBLIGATION TO BRING THE MATTER BEFORE THE COURT OF JUSTICE.

4 FACED WITH THOSE CONFLICTING ARGUMENTS, THE CORTE SUPREMA DI CASSAZIONE REFERRED TO THE COURT THE FOLLOWING QUESTION FOR A PRELIMINARY RULING:

"DOES THE THIRD PARAGRAPH OF ARTICLE 177 OF THE EEC TREATY, WHICH PROVIDES THAT WHERE ANY QUESTION OF THE SAME KIND AS THOSE LISTED IN THE FIRST PARAGRAPH OF THAT ARTICLE IS RAISED IN A CASE PENDING BEFORE A NATIONAL COURT OR TRIBUNAL AGAINST WHOSE DECISIONS THERE IS NO JUDICIAL REMEDY UNDER NATIONAL LAW THAT COURT OR TRIBUNAL MUST BRING THE MATTER BEFORE THE COURT OF JUSTICE, LAY DOWN AN OBLIGATION SO TO SUBMIT THE CASE WHICH PRECLUDES THE NATIONAL COURT FROM DETERMINING WHETHER THE QUESTION RAISED IS JUSTIFIED OR DOES IT, AND IF SO WITHIN WHAT LIMITS, MAKE THAT OBLIGATION CONDITIONAL ON THE PRIOR FINDING OF A REASONABLE INTERPRETATIVE DOUBT?"

5 IN ORDER TO ANSWER THAT QUESTION IT IS NECESSARY TO TAKE ACCOUNT OF THE SYSTEM ESTABLISHED BY ARTICLE 177, WHICH CONFERS JURISDICTION ON THE COURT OF JUSTICE TO GIVE PRELIMINARY RULINGS ON, INTER ALIA, THE INTERPRETATION OF THE TREATY AND THE MEASURES ADOPTED BY THE INSTITUTIONS OF THE COMMUNITY.

6 THE SECOND PARAGRAPH OF THAT ARTICLE PROVIDES THAT ANY COURT OR TRIBUNAL OF A MEMBER STATE MAY, IF IT CONSIDERS THAT A DECISION ON A QUESTION OF INTERPRETATION IS NECESSARY TO ENABLE IT TO GIVE JUDGMENT, REQUEST THE COURT OF JUSTICE TO GIVE A RULING THEREON. THE THIRD PARAGRAPH OF THAT ARTICLE PROVIDES THAT, WHERE A QUESTION OF INTERPRETATION 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 OF JUSTICE.

7 THAT OBLIGATION TO REFER A MATTER TO THE COURT OF JUSTICE IS BASED ON COOPERATION, ESTABLISHED WITH A VIEW TO ENSURING THE PROPER APPLICATION AND UNIFORM INTERPRETATION OF COMMUNITY LAW IN ALL THE MEMBER STATES, BETWEEN NATIONAL COURTS, IN THEIR CAPACITY AS COURTS RESPONSIBLE FOR THE APPLICATION OF COMMUNITY LAW, AND THE COURT OF JUSTICE. MORE PARTICULARLY, THE THIRD PARAGRAPH OF ARTICLE 177 SEEKS TO PREVENT THE OCCURRENCE WITHIN THE COMMUNITY OF DIVERGENCES IN JUDICIAL DECISIONS ON QUESTIONS OF COMMUNITY LAW. THE SCOPE OF THAT OBLIGATION MUST THEREFORE BE ASSESSED, IN VIEW OF THOSE OBJECTIVES, BY REFERENCE TO THE POWERS OF THE NATIONAL COURTS, ON THE ONE HAND, AND THOSE OF THE COURT OF JUSTICE, ON THE OTHER, WHERE SUCH A QUESTION OF INTERPRETATION IS RAISED WITHIN THE MEANING OF ARTICLE 177.

8 IN THIS CONNECTION, IT IS NECESSARY TO DEFINE THE MEANING FOR THE PURPOSES OF COMMUNITY LAW OF THE EXPRESSION ' ' WHERE ANY SUCH QUESTION IS RAISED ' ' IN ORDER TO DETERMINE THE CIRCUMSTANCES IN WHICH A NATIONAL COURT OR TRIBUNAL AGAINST WHOSE DECISIONS THERE IS NO JUDICIAL REMEDY UNDER NATIONAL LAW IS OBLIGED TO BRING A MATTER BEFORE THE COURT OF JUSTICE.

9 IN THIS REGARD, IT MUST IN THE FIRST PLACE BE POINTED OUT THAT ARTICLE 177 DOES NOT CONSTITUTE A MEANS OF REDRESS AVAILABLE TO THE PARTIES TO A CASE PENDING BEFORE A NATIONAL COURT OR TRIBUNAL. THEREFORE THE MERE FACT THAT A PARTY CONTENDS THAT THE DISPUTE GIVES RISE TO A QUESTION CONCERNING THE INTERPRETATION OF COMMUNITY LAW DOES NOT MEAN THAT THE COURT OR TRIBUNAL CONCERNED IS COMPELLED TO CONSIDER THAT A QUESTION HAS BEEN RAISED WITHIN THE MEANING OF ARTICLE 177. ON THE OTHER HAND, A NATIONAL COURT OR TRIBUNAL MAY, IN AN APPROPRIATE CASE, REFER A MATTER TO THE COURT OF JUSTICE OF ITS OWN MOTION.

10 SECONDLY, IT FOLLOWS FROM THE RELATIONSHIP BETWEEN THE SECOND AND THIRD PARAGRAPHS OF ARTICLE 177 THAT THE COURTS OR TRIBUNALS REFERRED TO IN THE THIRD PARAGRAPH HAVE THE

SAME DISCRETION AS ANY OTHER NATIONAL COURT OR TRIBUNAL TO ASCERTAIN WHETHER A DECISION ON A QUESTION OF COMMUNITY LAW IS NECESSARY TO ENABLE THEM TO GIVE JUDGMENT. ACCORDINGLY, THOSE COURTS OR TRIBUNALS ARE NOT OBLIGED TO REFER TO THE COURT OF JUSTICE A QUESTION CONCERNING THE INTERPRETATION OF COMMUNITY LAW RAISED BEFORE THEM IF THAT QUESTION IS NOT RELEVANT, THAT IS TO SAY, IF THE ANSWER TO THAT QUESTION, REGARDLESS OF WHAT IT MAY BE, CAN IN NO WAY AFFECT THE OUTCOME OF THE CASE.

11 IF, HOWEVER, THOSE COURTS OR TRIBUNALS CONSIDER THAT RECOURSE TO COMMUNITY LAW IS NECESSARY TO ENABLE THEM TO DECIDE A CASE, ARTICLE 177 IMPOSES AN OBLIGATION ON THEM TO REFER TO THE COURT OF JUSTICE ANY QUESTION OF INTERPRETATION WHICH MAY ARISE.

12 THE QUESTION SUBMITTED BY THE CORTE DI CASSAZIONE SEEKS TO ASCERTAIN WHETHER, IN CERTAIN CIRCUMSTANCES, THE OBLIGATION LAID DOWN BY THE THIRD PARAGRAPH OF ARTICLE 177 MIGHT NONE THE LESS BE SUBJECT TO CERTAIN RESTRICTIONS.

13 IT MUST BE REMEMBERED IN THIS CONNECTION THAT IN ITS JUDGMENT OF 27 MARCH 1963 IN JOINED CASES 28 TO 30/62 (DA COSTA V NEDERLANDSE BELASTINGADMINISTRATIE (1963) ECR 31) THE COURT RULED THAT: ' ' ALTHOUGH THE THIRD PARAGRAPH OF ARTICLE 177 UNRESERVEDLY REQUIRES COURTS OR TRIBUNALS OF A MEMBER STATE AGAINST WHOSE DECISIONS THERE IS NO JUDICIAL REMEDY UNDER NATIONAL LAW... TO REFER TO THE COURT EVERY QUESTION OF INTERPRETATION RAISED BEFORE THEM, THE AUTHORITY OF AN INTERPRETATION UNDER ARTICLE 177 ALREADY GIVEN BY THE COURT MAY DEPRIVE THE OBLIGATION OF ITS PURPOSE AND THUS EMPTY IT OF ITS SUBSTANCE. SUCH IS THE CASE ESPECIALLY WHEN THE QUESTION RAISED IS MATERIALLY IDENTICAL WITH A QUESTION WHICH HAS ALREADY BEEN THE SUBJECT OF A PRELIMINARY RULING IN A SIMILAR CASE. ' '

14 THE SAME EFFECT, AS REGARDS THE LIMITS SET TO THE OBLIGATION LAID DOWN BY THE THIRD PARAGRAPH OF ARTICLE 177, MAY BE PRODUCED WHERE PREVIOUS DECISIONS OF THE COURT HAVE ALREADY DEALT WITH THE POINT OF LAW IN QUESTION, IRRESPECTIVE OF THE NATURE OF THE PROCEEDINGS WHICH LED TO THOSE DECISIONS, EVEN THOUGH THE QUESTIONS AT ISSUE ARE NOT STRICTLY IDENTICAL.

15 HOWEVER, IT MUST NOT BE FORGOTTEN THAT IN ALL SUCH CIRCUMSTANCES NATIONAL COURTS AND TRIBUNALS, INCLUDING THOSE REFERRED TO IN THE THIRD PARAGRAPH OF ARTICLE 177, REMAIN ENTIRELY AT LIBERTY TO BRING A MATTER BEFORE THE COURT OF JUSTICE IF THEY CONSIDER IT APPROPRIATE TO DO SO.

16 FINALLY, THE CORRECT APPLICATION OF COMMUNITY LAW MAY BE SO OBVIOUS AS TO LEAVE NO SCOPE FOR ANY REASONABLE DOUBT AS TO THE MANNER IN WHICH THE QUESTION RAISED IS TO BE RESOLVED. BEFORE IT COMES TO THE CONCLUSION THAT SUCH IS THE CASE, THE NATIONAL COURT OR TRIBUNAL MUST BE CONVINCED THAT THE MATTER IS EQUALLY OBVIOUS TO THE COURTS OF THE OTHER MEMBER STATES AND TO THE COURT OF JUSTICE. ONLY IF THOSE CONDITIONS ARE SATISFIED, MAY THE NATIONAL COURT OR TRIBUNAL REFRAIN FROM SUBMITTING THE QUESTION TO THE COURT OF JUSTICE AND TAKE UPON ITSELF THE RESPONSIBILITY FOR RESOLVING IT.

17 HOWEVER, THE EXISTENCE OF SUCH A POSSIBILITY MUST BE ASSESSED ON THE BASIS OF THE CHARACTERISTIC FEATURES OF COMMUNITY LAW AND THE PARTICULAR DIFFICULTIES TO WHICH ITS INTERPRETATION GIVES RISE.

18 TO BEGIN WITH, IT MUST BE BORNE IN MIND THAT COMMUNITY LEGISLATION IS DRAFTED IN SEVERAL LANGUAGES AND THAT THE DIFFERENT LANGUAGE VERSIONS ARE ALL EQUALLY AUTHENTIC. AN INTERPRETATION OF A PROVISION OF COMMUNITY LAW THUS INVOLVES A COMPARISON OF THE DIFFERENT LANGUAGE VERSIONS.

19 IT MUST ALSO BE BORNE IN MIND, EVEN WHERE THE DIFFERENT LANGUAGE VERSIONS ARE ENTIRELY IN ACCORD WITH ONE ANOTHER, THAT COMMUNITY LAW USES TERMINOLOGY WHICH IS PECULIAR TO IT. FURTHERMORE, IT MUST BE EMPHASIZED THAT LEGAL CONCEPTS DO NOT NECESSARILY HAVE THE SAME MEANING IN COMMUNITY LAW AND IN THE LAW OF THE VARIOUS MEMBER STATES.

20 FINALLY, EVERY PROVISION OF COMMUNITY LAW MUST BE PLACED IN ITS CONTEXT AND INTERPRETED IN THE LIGHT OF THE PROVISIONS OF COMMUNITY LAW AS A WHOLE, REGARD BEING HAD TO THE OBJECTIVES THEREOF AND TO ITS STATE OF EVOLUTION AT THE DATE ON WHICH THE PROVISION IN QUESTION IS TO BE APPLIED.

21 IN THE LIGHT OF ALL THOSE CONSIDERATIONS, THE ANSWER TO THE QUESTION SUBMITTED BY THE CORTE SUPREMA DI CASSAZIONE MUST BE THAT THE THIRD PARAGRAPH OF ARTICLE 177 OF THE EEC TREATY IS TO BE INTERPRETED AS MEANING THAT A COURT OR TRIBUNAL AGAINST WHOSE DECISIONS THERE IS NO JUDICIAL REMEDY UNDER NATIONAL LAW IS REQUIRED, WHERE A QUESTION OF COMMUNITY LAW IS RAISED BEFORE IT, TO COMPLY WITH ITS OBLIGATION TO BRING THE MATTER BEFORE THE COURT OF JUSTICE, UNLESS IT HAS ESTABLISHED THAT THE QUESTION RAISED IS IRRELEVANT OR THAT THE COMMUNITY PROVISION IN QUESTION HAS ALREADY BEEN INTERPRETED BY THE COURT OR THAT THE CORRECT APPLICATION OF COMMUNITY LAW IS SO OBVIOUS AS TO LEAVE NO SCOPE FOR ANY REASONABLE DOUBT. THE EXISTENCE OF SUCH A POSSIBILITY MUST BE ASSESSED IN THE LIGHT OF THE SPECIFIC CHARACTERISTICS OF COMMUNITY LAW, THE PARTICULAR DIFFICULTIES TO WHICH ITS INTERPRETATION GIVES RISE AND THE RISK OF DIVERGENCES IN JUDICIAL DECISIONS WITHIN THE COMMUNITY.

Decision on costs

22 THE COSTS INCURRED BY THE ITALIAN GOVERNMENT, THE DANISH GOVERNMENT AND THE COMMISSION OF THE EUROPEAN COMMUNITIES, WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT, ARE NOT RECOVERABLE. AS THESE PROCEEDINGS ARE, IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED, IN THE NATURE OF A STEP IN THE ACTION PENDING BEFORE THE CORTE SUPREMA DI CASSAZIONE, THE DECISION ON COSTS IS A MATTER FOR THAT COURT.

Operative part

ON THOSE GROUNDS, THE COURT, IN ANSWER TO THE QUESTION SUBMITTED TO IT BY THE CORTE SUPREMA DI CASSAZIONE BY ORDER OF 27 MARCH 1981, HEREBY RULES:

THE THIRD PARAGRAPH OF ARTICLE 177 OF THE EEC TREATY MUST BE INTERPRETED AS MEANING THAT A COURT OR TRIBUNAL AGAINST WHOSE DECISIONS THERE IS NO JUDICIAL REMEDY UNDER NATIONAL LAW IS REQUIRED, WHERE A QUESTION OF COMMUNITY LAW IS RAISED BEFORE IT, TO COMPLY WITH ITS OBLIGATION TO BRING THE MATTER BEFORE THE COURT OF JUSTICE, UNLESS IT HAS ESTABLISHED THAT THE QUESTION RAISED IS IRRELEVANT OR THAT THE COMMUNITY PROVISION IN QUESTION HAS ALREADY BEEN INTERPRETED BY THE COURT OF JUSTICE OR THAT THE CORRECT APPLICATION OF COMMUNITY LAW IS SO OBVIOUS AS TO LEAVE NO SCOPE FOR ANY REASONABLE DOUBT. THE EXISTENCE OF SUCH A POSSIBILITY MUST BE ASSESSED IN THE LIGHT OF THE SPECIFIC CHARACTERISTICS OF COMMUNITY LAW, THE PARTICULAR DIFFICULTIES TO WHICH ITS INTERPRETATION GIVES RISE AND THE RISK OF DIVERGENCES IN JUDICIAL DECISIONS WITHIN THE COMMUNITY.

Case C-138/02: Brian Francis Collins and Secretary of State for Work and Pensions

JUDGMENT OF THE COURT (Full Court) 23 March 2004

(Freedom of movement for persons – Article 48 of the EC Treaty (now, after amendment, Article 39 EC) – Concept of 'worker' – Social security allowance paid to jobseekers – Residence requirement – Citizenship of the European Union)

In Case C-138/02,
REFERENCE to the Court under Article 234 EC by the Social Security Commissioner (United Kingdom) for a preliminary ruling in the proceedings pending before the Commissioner between
Brian Francis Collins

and

Secretary of State for Work and Pensions,
on the interpretation of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992 (OJ 1992 L 245, p. 1), and of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485),

THE COURT (Full Court),

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, C. Gulmann, J.N. Cunha Rodrigues (Rapporteur) and A. Rosas, Presidents of Chambers, A. La Pergola, J.-P. Puissochet, R. Schintgen, N. Colneric and S. von Bahr, Judges,
Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

–
Mr Collins, by R. Drabble QC, instructed by P. Eden, solicitor,
–
the United Kingdom Government, by J.E. Collins, acting as Agent, assisted by E. Sharpston QC,
–
the German Government, by W.-D. Plessing, acting as Agent,
–
the Commission of the European Communities, by N. Yerrell and D. Martin, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Collins, represented by R. Drabble, of the United Kingdom Government, represented by R. Caudwell, acting as Agent, and E. Sharpston, and of the Commission, represented by N. Yerrell and D. Martin, at the hearing on 17 June 2003,

after hearing the Opinion of the Advocate General at the sitting on 10 July 2003,

gives the following

Judgment

1
By ruling of 28 March 2002, received at the Court on 12 April 2002, the Social Security Commissioner referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992 (OJ 1992 L 45, p. 1) ('Regulation No 1612/68'), and of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485).
2
Those questions were raised in proceedings between Mr Collins and the Secretary of State for Work and Pensions concerning the latter's refusal to grant Mr Collins the jobseeker's allowance provided for by legislation of the United Kingdom of Great Britain and Northern Ireland.

Relevant provisions
Community legislation
3
The first paragraph of Article 6 of the EC Treaty (now, after amendment, the first paragraph of Article 12 EC) provides: 'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'
4
Article 8 of the EC Treaty (now, after amendment, Article 17 EC) states:
'1. Citizenship of the Union is hereby established.
Every person holding the nationality of a Member State shall be a citizen of the Union.
2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.'
5
Article 8a(1) of the EC Treaty (now, after amendment, Article 18(1) EC) provides that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the EC Treaty and by the measures adopted to give it effect.
6
As provided by Article 48(2) of the EC Treaty (now, after amendment, Article 39(2) EC), freedom of movement for workers entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
7
In accordance with Article 48(3) of the Treaty, freedom of movement for workers '[entails] the right, subject to limitations justified on grounds of public policy, public security or public health:
(a)
to accept offers of employment actually made;
(b)
to move freely within the territory of Member States for this purpose;
…'
8
Article 2 of Regulation No 1612/68 states:
'Any national of a Member State and any employer pursuing an activity in the territory of a Member State may exchange their applications for and offers of employment, and may conclude and perform contracts of employment in

accordance with the provisions in force laid down by law, regulation or administrative action, without any discrimination resulting therefrom.'

9

Article 5 of Regulation No 1612/68 provides that 'a national of a Member State who seeks employment in the territory of another Member State shall receive the same assistance there as that afforded by the employment offices in that State to their own nationals seeking employment'.

10

In accordance with Article 7(2) of Regulation No 1612/68, a worker who is a national of a Member State is to enjoy, in the territory of another Member State, the same social and tax advantages as national workers.

11

Article 1 of Directive 68/360 provides:

'Member States shall, acting as provided in this Directive, abolish restrictions on the movement and residence of nationals of the said States and of members of their families to whom Regulation (EEC) No 1612/68 applies.'

12

Article 4(1) of Directive 68/360 provides that Member States are to grant the right of residence in their territory to the persons referred to in Article 1 thereof who are able to produce the documents listed in Article 4(3).

13

Under the first indent of Article 4(3) of the directive, those documents are, for a worker:

'(a)

the document with which he entered their territory;

(b)

a confirmation of engagement from the employer or a certificate of employment'.

14

In accordance with Article 8(1) of Directive 68/360, Member States are to recognise, without issuing a residence permit, the right of residence in their territory (a) of workers pursuing an activity as an employed person where the activity is not expected to last for more than three months, (b) of frontier workers and (c) of seasonal workers.

National legislation

15

Jobseeker's allowance is a social security benefit provided under the Jobseekers Act 1995 ('the 1995 Act'), section 1(2)(i) of which requires the claimant to be in Great Britain.

16

Regulations made under the 1995 Act, namely the Jobseeker's Allowance Regulations 1996 ('the 1996 Regulations') lay down the conditions to be met in order to be eligible for jobseeker's allowance and the amounts that may be claimed by the various categories of claimant. Paragraph 14(a) of Schedule 5 to the 1996 Regulations prescribes an amount of nil for the category of 'persons from abroad' who are without family to support.

17

Regulation 85(4) of the 1996 Regulations defines 'person from abroad' as follows:

'… a claimant who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland, but for this purpose, no claimant shall be treated as not habitually resident in the United Kingdom who is –

(a)

a worker for the purposes of Council Regulation (EEC) No 1612/68 or (EEC) No 1251/70 or a person with a right to reside in the United Kingdom pursuant to Council Directive No 68/360/EEC or No 73/148/EEC;

…'

The main proceedings and the questions referred for a preliminary ruling

18

Mr Collins was born in the United States and possesses dual Irish and American nationality. As part of his college studies, he spent one semester in the United Kingdom in 1978. In 1980 and 1981 he returned there for a stay of approximately 10 months, during which he did part-time and casual work in pubs and bars and in sales. He went back to the United States in 1981. He subsequently worked in the United States and in Africa.

19

Mr Collins returned to the United Kingdom on 31 May 1998 in order to find work there in the social services sector. On 8 June 1998 he claimed jobseeker's allowance, which was refused by decision of an adjudication officer of 1 July 1998, on the ground that he was not habitually resident in the United Kingdom. Mr Collins appealed to a Social Security Appeal Tribunal, which upheld the refusal, stating that he could not be regarded as habitually resident in the United Kingdom since (i) he had not been resident for an appreciable time and (ii) he was not a worker for the purposes of Regulation No 1612/68, nor did he have a right to reside in the United Kingdom pursuant to Directive 68/360.

20

Mr Collins then appealed to the Social Security Commissioner, who decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1)

Is a person in the circumstances of the claimant in the present case a worker for the purposes of Regulation No 1612/68 of the Council of 15 October 1968?

(2)

If the answer to question 1 is not in the affirmative, does a person in the circumstances of the claimant in the present case have a right to reside in the United Kingdom pursuant to Directive No 68/360 of the Council of 15 October 1968?

(3)

If the answers to both questions 1 and 2 are not in the affirmative, do any provisions or principles of European Community law require the payment of a social security benefit with conditions of entitlement like those for income-based jobseeker's allowance to a person in the circumstances of the claimant in the present case?'

Question 1

Observations submitted to the Court

21

Mr Collins contends that, as Community law currently stands, his position in the United Kingdom as a person genuinely seeking work gives him the status of a 'worker' for the purposes of Regulation No 1612/68 and brings him within the scope of Article 7(2) of that regulation. At paragraph 32 of its judgment in Case C-85/96 *Martínez Sala* [1998] ECR I-2691, the Court deliberately laid down the rule that persons seeking work are to be considered to be workers for the purposes of Regulation No 1612/68 if the national court is satisfied that the person concerned was genuinely seeking work at the appropriate time.

22

The United Kingdom Government, the German Government and the Commission of the European Communities, on the other hand, submit that a person in Mr Collins' position is not a worker for the purposes of Regulation No 1612/68.

23

The United Kingdom Government and the Commission argue that Mr Collins cannot claim to be a 'former' migrant worker who is now merely seeking a benefit under Article 7(2) of Regulation No 1612/68, because there is no relationship between the work which he did in the course of 1980 and 1981 and the type of work which he says he wished to find in 1998.

24

In Case 316/85 *Lebon* [1987] ECR 2811, the Court held that equal treatment with regard to social and tax advantages, which is laid down by Article 7(2) of Regulation No 1612/68, applies only to workers, and that those who move in search of employment qualify for such equal treatment only as regards access to employment in accordance with Article 48 of the Treaty and Articles 2 and 5 of that regulation.

25

The German Government draws attention to the specific circumstances in *Martínez Sala*, cited above, which were characterised by very close connections of long duration between the plaintiff and the host Member State, whereas in the main proceedings there is clearly no link between the earlier work carried out by Mr Collins and the work sought by him.

The Court's answer

26

In accordance with the Court's case-law, the concept of 'worker', within the meaning of Article 48 of the Treaty and of Regulation No 1612/68, has a specific Community meaning and must not be interpreted narrowly. Any person who

pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see, in particular, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17, *Martínez Sala*, paragraph 32, and Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 13).

27

The Court has also held that migrant workers are guaranteed certain rights linked to the status as a worker even when they are no longer in an employment relationship (Case C-35/97 *Commission* v *France* [1998] ECR I-5325, paragraph 41, and Case C-413/01 *Ninni-Orasche* [2003] ECR I-0000, paragraph 34).

28

As is apparent from the documents sent to the Court by the Social Security Commissioner, Mr Collins performed casual work in the United Kingdom, in pubs and bars and in sales, during a 10-month stay there in 1981. However, even if such occupational activity satisfies the conditions as set out in paragraph 26 of this judgment for it to be accepted that during that stay the appellant in the main proceedings had the status of a worker, no link can be established between that activity and the search for another job more than 17 years after it came to an end.

29

In the absence of a sufficiently close connection with the United Kingdom employment market, Mr Collins' position in 1998 must therefore be compared with that of any national of a Member State looking for his first job in another Member State.

30

In this connection, it is to be remembered that the Court's case-law draws a distinction between Member State nationals who have not yet entered into an employment relationship in the host Member State where they are looking for work and those who are already working in that State or who, having worked there but no longer being in an employment relationship, are nevertheless considered to be workers (see Case 39/86 *Lair* [1988] ECR 3161, paragraphs 32 and 33).

31

While Member State nationals who move in search for work benefit from the principle of equal treatment only as regards access to employment, those who have already entered the employment market may, on the basis of Article 7(2) of Regulation No 1612/68, claim the same social and tax advantages as national workers (see in particular, *Lebon*, cited above, paragraph 26, and Case C-278/94 *Commission* v *Belgium* [1996] ECR I-4307, paragraphs 39 and 40).

32

The concept of 'worker' is thus not used in Regulation No 1612/68 in a uniform manner. While in Title II of Part I of the regulation this term covers only persons who have already entered the employment market, in other parts of the same regulation the concept of 'worker' must be understood in a broader sense.

33

Accordingly, the answer to the first question must be that a person in the circumstances of the appellant in the main proceedings is not a worker for the purposes of Title II of Part I of Regulation No 1612/68. It is, however, for the national court or tribunal to establish whether the term 'worker' as referred to by the national legislation at issue is to be understood in that sense.

Question 2

Observations submitted to the Court

34

Mr Collins submits that Directive 68/360 grants a right of residence for a period of three months to persons seeking work.

35

The United Kingdom Government, the German Government and the Commission contend that it is on the basis of Article 48 of the Treaty directly, and not of the provisions of Directive 68/360, which are applicable exclusively to persons who have found work, that Mr Collins would be entitled to go to the United Kingdom to seek work and to stay there as a person looking for work for a reasonable period.

The Court's answer

36

In the context of freedom of movement for workers, Article 48 of the Treaty grants nationals of the Member States a right of residence in the territory of other Member States in order to pursue or to seek paid employment (Case C-171/91 *Tsiotras* [1993] ECR I-2925, paragraph 8).

37

The right of residence which persons seeking employment derive from Article 48 of the Treaty may be limited in time. In the absence of Community provisions prescribing a period during which Community nationals who are seeking employment may stay in their territory, the Member States are entitled to lay down a reasonable period for this purpose. However, if after expiry of that period, the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged, he cannot be required to leave the territory of the host Member State (see Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 21, and Case C-344/95 *Commission* v *Belgium* [1997] ECR I-1035, paragraph 17).

38

Directive 68/360 seeks to abolish, within the Community, restrictions concerning the movement and residence of Member State nationals and of members of their families to whom Regulation No 1612/68 applies.

39

So far as concerns restrictions on movement, first, Article 2(1) of Directive 68/360 requires Member States to grant the right to leave their territory to Community nationals intending to go to another Member State to seek employment there. Second, in accordance with Article 3(1) of the directive, Member States are to allow those nationals to enter their territory simply on production of a valid identity card or passport.

40

In addition, given that the right of residence is a right conferred directly by the Treaty (see, in particular, Case C-363/89 *Roux* [1991] ECR I-273, paragraph 9), issue of a residence permit to a national of a Member State, as provided for by Directive 68/360, is to be regarded not as a measure giving rise to rights but as a measure by a Member State serving to prove the individual position of a national of another Member State with regard to provisions of Community law (Case C-459/99 *MRAX* [2002] ECR I-6591, paragraph 74).

41

Under Article 4 of Directive 68/360, Member States are to grant the right of residence in their territory only to workers who are able to produce, in addition to the document with which they entered the Member State's territory, a confirmation of engagement from the employer or a certificate of employment.

42

Article 8 of the directive sets out an exhaustive list of the circumstances in which certain categories of workers may have their right of residence recognised without issue of a residence permit to them.

43

It follows that the right of residence in a Member State referred to in Articles 4 and 8 of Directive 68/360 is accorded only to nationals of a Member State who are already in employment in the first Member State. Persons seeking employment are excluded. They can rely solely on the provisions of that directive concerning their movement within the Community.

44

The answer to the second question must therefore be that a person in the circumstances of the appellant in the main proceedings does not have a right to reside in the United Kingdom solely on the basis of Directive 68/360.

Question 3

Observations submitted to the Court

45

In Mr Collins' submission, there is no doubt that he is a national of another Member State who was lawfully in the United Kingdom and that jobseeker's allowance is within the scope of the Treaty. The result, as the Court held in Case C-184/99 *Grzelczyk* [2001] ECR I-6193, is that the payment of a non-contributory means-tested benefit to a national of a Member State other than the host Member State cannot be made conditional on the satisfaction of a condition when such a condition is not applied to nationals of the host Member State. Mr Collins acknowledges that the habitual residence test is applied to United Kingdom nationals as well. However, it is well established that a provision of national law is to be regarded as discriminatory for the purposes of Community law if it is inherently more likely to be satisfied by nationals of the Member State concerned.

46

The United Kingdom Government and the German Government argue that there is no provision or principle of Community law which requires that a benefit such as the jobseeker's allowance be paid to a person in the circumstances of Mr Collins.

47

With regard to the possible existence of indirect discrimination, the United Kingdom Government submits that there are relevant objective justifications for not making income-based jobseeker's allowance available to persons in the situation of Mr Collins. Unlike the position in Case C-224/98 *D'Hoop* [2002] ECR I-6191, the eligibility criteria adopted for the allowance at issue here do not go beyond what is necessary to attain the objective pursued. They represent a proportionate and hence permissible method of ensuring that there is a real link between the claimant and the geographic employment market. In the absence of such criteria, persons who have little or no link with the United Kingdom employment market, as in the case of Mr Collins, would then be able to claim that allowance.

48

According to the Commission, it is not disputed that Mr Collins was genuinely seeking work in the United Kingdom during the two months following his arrival in that Member State and that he was lawfully resident there in his capacity as a person seeking work. As a citizen of the Union lawfully residing in the United Kingdom, he was clearly entitled to the protection conferred by Article 6 of the Treaty against discrimination on grounds of nationality in any situation falling within the material scope of Community law. That is precisely the case with regard to jobseeker's allowance, which should be considered to be a social advantage within the meaning of Article 7(2) of Regulation No 1612/68.

49

The Commisson also observes that it is clear that the right to stay in another Member State to seek work there can be limited to a reasonable period and that Mr Collins' right to rely on Articles 6 and 8 of the Treaty in order to claim the allowance, on the same basis as United Kingdom nationals, is therefore similarly restricted to that period of lawful residence.

50

None the less, the Commission submits that a requirement of habitual residence may be indirectly discriminatory because it can be more easily met by nationals of the host Member State than by those of other Member States. Whilst such a requirement may be justified on objective grounds necessarily intended to avoid 'benefit tourism' and thus the possibility of abuse by work-seekers who are not genuine, the Commission notes that in the case of Mr Collins the genuine nature of the search for work is not in dispute. Indeed, it appears that he has remained continuously employed in the United Kingdom ever since first finding work there shortly after his arrival.

The Court's answer

51

By the third question, the Social Security Commissioner asks essentially whether there is a provision or principle of Community law on the basis of which a national of a Member State who is genuinely seeking employment in another Member State may claim there a jobseeker's allowance such as that provided for by the 1995 Act.

52

First of all, without there being any need to consider whether a person such as the appellant in the main proceedings falls within the scope *ratione personae* of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1) ('Regulation No 1408/71'), it is clear from the order for reference that the person concerned never resided in another Member State before seeking employment in the United Kingdom, so that the aggregation rule contained in Article 10a of Regulation No 1408/71 is inapplicable in the main proceedings.

53

Under the 1996 Regulations, nationals of other Member States seeking employment who are not workers for the purposes of Regulation No 1612/68 and do not derive a right of residence from Directive 68/360 can claim the allowance only if they are habitually resident in the United Kingdom.

54

It must therefore be determined whether the principle of equal treatment precludes national legislation which makes entitlement to a jobseeker's allowance conditional on a residence requirement.

55

In accordance with the first paragraph of Article 6 of the Treaty, any discrimination on grounds of nationality is

prohibited within the scope of application of the Treaty, without prejudice to any special provisions contained therein. Since Article 48(2) of the Treaty is such a special provision, it is appropriate to consider first the 1996 Regulations in the light of that article.

56

Among the rights which Article 48 of the Treaty confers on nationals of the Member States is the right to move freely within the territory of the other Member States and to stay there for the purposes of seeking employment (*Antonissen*, cited above, paragraph 13).

57

Nationals of a Member State seeking employment in another Member State thus fall within the scope of Article 48 of the Treaty and, therefore, enjoy the right laid down in Article 48(2) to equal treatment.

58

As regards the question whether the right to equal treatment enjoyed by nationals of a Member State seeking employment in another Member State also encompasses benefits of a financial nature such as the benefit at issue in the main proceedings, the Court has held that Member State nationals who move in search of employment qualify for equal treatment only as regards access to employment in accordance with Article 48 of the Treaty and Articles 2 and 5 of Regulation No 1612/68, but not with regard to social and tax advantages within the meaning of Article 7(2) of that regulation (*Lebon*, paragraph 26, and Case C-278/94 *Commission* v *Belgium*, cited above, paragraphs 39 and 40).

59

Article 2 of Regulation No 1612/68 concerns the exchange of applications for and offers of employment and the conclusion and performance of contracts of employment, while Article 5 of the regulation relates to the assistance afforded by employment offices.

60

It is true that those articles do not expressly refer to benefits of a financial nature. However, in order to determine the scope of the right to equal treatment for persons seeking employment, this principle should be interpreted in the light of other provisions of Community law, in particular Article 6 of the Treaty.

61

As the Court has held on a number of occasions, citizens of the Union lawfully resident in the territory of a host Member State can rely on Article 6 of the Treaty in all situations which fall within the scope *ratione materiae* of Community law. Citizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for (see, in particular, *Grzelczyk*, cited above, paragraphs 31 and 32, and Case C-148/02 *Garcia Avello* [2003] ECR I-0000, paragraphs 22 and 23).

62

It is to be noted that the Court has held, in relation to a student who is a citizen of the Union, that entitlement to a non-contributory social benefit, such as the Belgian minimum subsistence allowance (‘minimex’), falls within the scope of the prohibition of discrimination on grounds of nationality and that, therefore, Articles 6 and 8 of the Treaty preclude eligibility for that benefit from being subject to conditions which are liable to constitute discrimination on grounds of nationality (*Grzelczyk*, paragraph 46).

63

In view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 48(2) of the Treaty – which expresses the fundamental principle of equal treatment, guaranteed by Article 6 of the Treaty – a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.

64

The interpretation of the scope of the principle of equal treatment in relation to access to employment must reflect this development, as compared with the interpretation followed in *Lebon* and in Case C-278/94 *Commission* v *Belgium*.

65

The 1996 Regulations introduce a difference in treatment according to whether the person involved is habitually resident in the United Kingdom. Since that requirement is capable of being met more easily by the State’s own nationals, the 1996 Regulations place at a disadvantage Member State nationals who have exercised their right of movement in order to seek employment in the territory of another Member State (see, to this effect, Case C-237/94 *O’Flynn* [1996] ECR I-2617, paragraph 18, and Case C-388/01 *Commission* v *Italy* [2003] ECR I-721, paragraphs 13 and 14).

66
A residence requirement of that kind can be justified only if it is based on objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions (Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraph 27).
67
The Court has already held that it is legitimate for the national legislature to wish to ensure that there is a genuine link between an applicant for an allowance in the nature of a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 and the geographic employment market in question (see, in the context of the grant of tideover allowances to young persons seeking their first job, *D'Hoop*, cited above, paragraph 38).
68
The jobseeker's allowance introduced by the 1995 Act is a social security benefit which replaced unemployment benefit and income support, and requires in particular the claimant to be available for and actively seeking employment and not to have income exceeding the applicable amount or capital exceeding a specified amount.
69
It may be regarded as legitimate for a Member State to grant such an allowance only after it has been possible to establish that a genuine link exists between the person seeking work and the employment market of that State.
70
The existence of such a link may be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question.
71
The United Kingdom is thus able to require a connection between persons who claim entitlement to such an allowance and its employment market.
72
However, while a residence requirement is, in principle, appropriate for the purpose of ensuring such a connection, if it is to be proportionate it cannot go beyond what is necessary in order to attain that objective. More specifically, its application by the national authorities must rest on clear criteria known in advance and provision must be made for the possibility of a means of redress of a judicial nature. In any event, if compliance with the requirement demands a period of residence, the period must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State.
73
The answer to the third question must therefore be that the right to equal treatment laid down in Article 48(2) of the Treaty, read in conjunction with Articles 6 and 8 of the Treaty, does not preclude national legislation which makes entitlement to a jobseeker's allowance conditional on a residence requirement, in so far as that requirement may be justified on the basis of objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions.

Costs
74
The costs incurred by the United Kingdom and German Governments and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the Social Security Commissioner, the decision on costs is a matter for the Commissioner.

On those grounds,

THE COURT

in answer to the questions referred to it by the Social Security Commissioner by ruling of 28 March 2002, hereby rules:
1.

A person in the circumstances of the appellant in the main proceedings is not a worker for the purposes of Title II of Part I of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, as amended by Council Regulation (EEC) No 2434/92 of

27 July 1992. It is, however, for the national court or tribunal to establish whether the term 'worker' as referred to by the national legislation at issue is to be understood in that sense.

2.

A person in the circumstances of the appellant in the main proceedings does not have a right to reside in the United Kingdom solely on the basis of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families.

3.

The right to equal treatment laid down in Article 48(2) of the EC Treaty (now, after amendment, Article 39(2) EC), read in conjunction with Articles 6 and 8 of the EC Treaty (now, after amendment, Articles 12 EC and 17 EC), does not preclude national legislation which makes entitlement to a jobseeker's allowance conditional on a residence requirement, in so far as that requirement may be justified on the basis of objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions.

Case C-200/02: Kunqian Catherine Zhu, Man Lavette Chen v Secretary of State for the Home Department

JUDGMENT OF THE COURT (sitting as a full Court) 19 October 2004

(Right of residence – Child with the nationality of one Member State but residing in another Member State – Parents nationals of a non-member country – Mother's right to reside in the other Member State)

In Case C-200/02,
REFERENCE to the Court under Article 234 EC
from the Immigration Appellate Authority (United Kingdom), made by decision of 27 May 2002, received at the Court on 30 May 2002, in the proceedings
Kunqian Catherine Zhu,
Man Lavette Chen,

v

Secretary of State for the Home Department,

THE COURT (sitting as a full Court),

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, R. Silva de Lapuerta and K. Lenaerts, Presidents of Chambers, C. Gulmann, R. Schintgen, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues (Rapporteur), Judges,
Advocate General: A. Tizzano,
Registrar: L. Hewlett, Principal Administrator,
having regard to the written procedure and further to the hearing on 11 November 2003,
after considering the observations submitted on behalf of:
–
Man Lavette Chen, by R. de Mello and A. Berry, barristers, assisted by M. Barry, solicitor,
–
the Irish Government, by D.J. O'Hagan, acting as Agent, assisted by P. Callagher SC, and P. McGarry, BL,
–
the United Kingdom Government, by J.E. Collins, R. Plender QC, and R. Caudwell, acting as Agents,
–
the Commission of the European Communities, by C. O'Reilly, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 18 May 2004,

gives the following

Judgment

1
This reference for a preliminary ruling concerns the interpretation of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with

regard to establishment and the provision of services (OJ 1973 L 172, p. 14), of Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26) and of Article 18 EC.

2

The reference was made in the course of proceedings brought by Kunqian Catherine Zhu (hereinafter 'Catherine'), of Irish nationality, and her mother, Man Lavette Chen (hereinafter 'Mrs Chen'), a Chinese national, against the Secretary of State for the Home Department concerning the latter's rejection of applications by Catherine and Mrs Chen for a long-term permit to reside in the United Kingdom.

Legal background

Community legislation

3

Article 1 of Directive 73/148 provides:

'1.

The Member States shall, acting as provided in this Directive, abolish restrictions on the movement and residence of:

(a)

nationals of a Member State who are established or who wish to establish themselves in another Member State in order to pursue activities as self-employed persons, or who wish to provide services in that State;

(b)

nationals of Member States wishing to go to another Member State as recipients of services;

(c)

the spouse and the children under 21 years of age of such nationals, irrespective of their nationality;

(d)

the relatives in the ascending and descending lines of such nationals and of the spouse of such nationals, which relatives are dependent on them, irrespective of their nationality.

2.

Member States shall favour the admission of any other member of the family of a national referred to in paragraph 1(a) or (b) or of the spouse of that national, which member is dependent on that national or spouse of that national or who in the country of origin was living under the same roof.'

4

Article 4(2) of the same directive states:

'The right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided.

Where such period exceeds three months, the Member State in the territory of which the services are performed shall issue a right of abode as proof of the right of residence.

Where the period does not exceed three months, the identity card or passport with which the person concerned entered the territory shall be sufficient to cover his stay. The Member State may, however, require the person concerned to report his presence in the territory.'

5

Under Article 1 of Directive 90/364:

'1. Member States shall grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law and to members of their families as defined in paragraph 2, provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.

The resources referred to in the first subparagraph shall be deemed sufficient where they are higher than the level of resources below which the host Member State may grant social assistance to its nationals, taking into account the personal circumstances of the applicant and, where appropriate, the personal circumstances of persons admitted pursuant to paragraph 2.

Where the second subparagraph cannot be applied in a Member State, the resources of the applicant shall be deemed sufficient if they are higher than the level of the minimum social security pension paid by the host Member State.

2. The following shall, irrespective of their nationality, have the right to install themselves in another Member State with the holder of the right of residence:

(a)
his or her spouse and their descendants who are dependants;
(b)
dependent relatives in the ascending line of the holder of the right of residence and his or her spouse.'

The United Kingdom legislation

6

Under Regulation 5 of the Immigration (European Economic Area) Regulations 2000 (the 'EEA Regulations'):

'1. In these Regulations, "qualified person" means a person who is an EEA national and in the United Kingdom as (a) a worker; (b) a self employed person; (c) a provider of services; (d) a recipient of services; (e) a self sufficient person; (f) a retired person; (g) a student; or (h) a self employed person who has ceased activity; or who is a person to whom paragraph (4) applies.

…'

The main proceedings and the questions referred to the Court of Justice

7

The order for reference states that Mrs Chen and her husband, both of Chinese nationality, work for a Chinese undertaking established in China. Mrs Chen's husband is a director and the majority shareholder of that company. For the purposes of his work, he travels frequently to various Member States, in particular the United Kingdom.

8

The couple's first child was born in the People's Republic of China in 1998. Mrs Chen, who wished to give birth to a second child, entered the United Kingdom in May 2000 when she was about six months pregnant. She went to Belfast in July of the same year and Catherine was born there on 16 September 2000. The mother and her child live at present in Cardiff, Wales (United Kingdom).

9

Under section 6(1) of the Irish Nationality and Citizenship Act of 1956, which was amended in 2001 and applies retroactively as from 2 December 1999, Ireland allows any person born on the island of Ireland to acquire Irish nationality. Under section 6(3), a person born in the island of Ireland is an Irish citizen from birth if he or she is not entitled to citizenship of any other country.

10

Under those rules, Catherine was issued with an Irish passport in September 2000. According to the order for reference, Catherine is not entitled, on the other hand, to acquire United Kingdom nationality since, in enacting the British Nationality Act 1981, the United Kingdom departed from the *jus soli*, so that birth in the territory of that Member State no longer automatically confers United Kingdom nationality.

11

It is common ground that Mrs Chen took up residence in the island of Ireland in order to enable the child she was expecting to acquire Irish nationality and, consequently, to enable her to acquire the right to reside, should the occasion arise, with her child in the United Kingdom.

12

The referring court also observes that Ireland forms part of the Common Travel Area within the meaning of the Immigration Acts, so that, because Irish nationals do not as a general rule have to obtain a permit to enter and reside in the United Kingdom, Catherine, in contrast to Mrs Chen, may move freely within the United Kingdom and within Ireland. Aside from Catherine's right of free movement limited to those two Member States, neither of the appellants in the main proceedings is entitled to reside in the United Kingdom under its domestic legislation.

13

The order for reference also makes it clear that Catherine is dependent both emotionally and financially on her mother, that her mother is her primary carer, that Catherine receives private medical services and child-care services in return for payment in the United Kingdom, that she lost the right to acquire Chinese nationality by virtue of having been born in Northern Ireland and her subsequent acquisition of Irish nationality and, as a result, that she only has the right to enter Chinese territory under a visa allowing residence for a maximum of 30 days per visit; that the two appellants in the main proceedings provide for their needs by reason of Mrs Chen's employment, that the appellants do not rely upon public funds in the United Kingdom and there is no realistic possibility of their becoming so reliant, and, finally, that the appellants are insured against ill health.

14

The Secretary of State for the Home Department's refusal to grant a long-term residence permit to the two appellants in the main proceedings was based on the fact that Catherine, a child of eight months of age, was not exercising any rights arising from the EC Treaty such as those laid down by Regulation 5(1) of the EEA Regulations and the fact that Mrs Chen was not entitled to reside in the United Kingdom under those regulations.

15

The decision not to grant a permit was the subject of an appeal to the Immigration Appellate Authority, which stayed the proceedings pending a preliminary ruling from the Court of Justice on the following questions:

'1. On the facts of the present case, does Article 1 of Council Directive 73/148/EEC or in the alternative Article 1 of Council Directive 90/364/EEC:

(a)

confer the right on the First Appellant, who is a minor and a citizen of the Union, to enter and reside in the host Member State?

(b)

and if so, does it consequently confer the right on the Second Appellant, a third country national who is the First Appellant's mother and primary carer, to reside with the First Appellant (i) as her dependent relative, or (ii) because she lived with the First Appellant in her country of origin, or (iii) on any other special basis?

2. If and to the extent that the First Appellant is not a 'national of a Member State' for purposes of exercising Community rights pursuant to Council Directive 73/148/EEC or Article 1 of Council Directive 90/364/EEC, what then are the relevant criteria for identifying whether a child, who is a citizen of the Union, is a national of a Member State for purposes of exercising Community rights?

3. In the circumstances of the present case, does the receipt of child care by the First Appellant constitute services for purposes of Council Directive 73/148/EEC?

4. In the circumstances of the present case, is the First Appellant precluded from residing in the host State pursuant to Article 1 of Council Directive 90/364/EEC because her resources are provided exclusively by her third country national parent who accompanies her?

5. On the special facts of this case does Article 18(1) EC give the First Appellant the right to enter and reside in the host Member State even when she does not qualify for residence in the host State under any other provision of EU law?

6. If so, does the Second Appellant consequently enjoy the right to remain with the First Appellant, during that time in the host State?

7. In this context, what is the effect of the principle of respect for fundamental human rights under Community law claimed by the Appellants, in particular where the Appellants rely on Article 8 ECHR that everyone has the right to respect for his private and family life and his home in conjunction with Article 14 ECHR given that the First Appellant cannot live in China with the Second Appellant and her father and brother?'

The questions referred to the Court of Justice

16

By those questions, the national court seeks in essence to ascertain whether Directive 73/148, Directive 90/364 or Article 18 EC, if appropriate, read in conjunction with Articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), confer, in circumstances such as those of the main proceedings, upon a young minor who is a national of a Member State, and is in the care of a parent who is a national of a non-member country, the right to reside in another Member State where the minor receives child-care services. If such right be conferred, the national court wishes to ascertain whether those same provisions consequently confer a right of residence on the parent concerned.

17

It is therefore necessary to examine the provisions of Community law concerning the right of residence in the light of the situation of a national not of legal age such as Catherine, and then that of a parent who is a national of a non-member country and looks after the child.

The right of residence of a person in Catherine's situation

Preliminary considerations

18

The Irish and United Kingdom Governments' contention that a person in Catherine's situation cannot claim the benefit

of the provisions of Community law on free movement of persons and residence simply because that person has never moved from one Member State to another Member State must be rejected at the outset.

19

The situation of a national of a Member State who was born in the host Member State and has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation, thereby depriving that national of the benefit in the host Member State of the provisions of Community law on freedom of movement and of residence (to that effect, see, in particular, Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraphs 13 and 27).

20

Moreover, contrary to the Irish Government's contention, a young child can take advantage of the rights of free movement and residence guaranteed by Community law. The capacity of a national of a Member State to be the holder of rights guaranteed by the Treaty and by secondary law on the free movement of persons cannot be made conditional upon the attainment by the person concerned of the age prescribed for the acquisition of legal capacity to exercise those rights personally (to that effect, see, in particular, in the context of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition, Series I, 1968 (II), p. 475), Joined Cases 389/87 and 390/87 *Echternach and Moritz* [1989] ECR 723, paragraph 21, and Case C-413/99 *Baumbastand R* [2002] ECR I-7091, paragraphs 52 to 63, and, in relation to Article 17 EC, *Garcia Avello*, paragraph 21). Moreover, as the Advocate General made clear in points 47 to 52 of his Opinion, it does not follow either from the terms of, or from the aims pursued by, Articles 18 EC and 49 EC and Directives 73/148 and 90/364 that the enjoyment of the rights with which those provisions are concerned should be made conditional upon the attainment of a minimum age.

Directive 73/148

21

The national court wishes to ascertain whether a person in Catherine's situation may rely on the provisions of Directive 73/148 with a view to residing on a long-term basis in the United Kingdom as a recipient of child-care services provided in return for payment.

22

According to the case-law of the Court, the provisions on freedom to provide services do not cover the situation of a national of a Member State who establishes his principal residence in the territory of another Member State with a view to receiving services there for an indefinite period (to that effect, see, in particular, Case 196/87 *Steymann* [1988] ECR 6159). The child-care services to which the national court refers fall precisely within that case.

23

As regards the medical services that Catherine is receiving on a temporary basis, it must be observed that, under the first subparagraph of Article 4(2) of Directive 73/148, the right of residence of persons receiving services by virtue of the freedom to provide services is co-terminous with the duration of the period for which they are provided. Consequently, that directive cannot in any event serve as a basis for a right of residence of indefinite duration of the kind with which the main proceedings are concerned.

Article 18 EC and Directive 90/364

24

Since Catherine cannot rely on Directive 73/148 for a right of long-term residence in the United Kingdom, the national court would like to know whether Catherine might have a right to long-term residence under Article 18 EC and under Directive 90/364, which, subject to certain conditions, guarantees such a right for nationals of Member States to whom it is not available under other provisions of Community law, and for members of their families.

25

By virtue of Article 17(1) EC, every person holding the nationality of a Member State is a citizen of the Union. Union citizenship is destined to be the fundamental status of nationals of the Member States (see, in particular, *Baumbast and R*, paragraph 82).

26

As regards the right to reside in the territory of the Member States provided for in Article 18(1) EC, it must be observed that that right is granted directly to every citizen of the Union by a clear and precise provision of the Treaty. Purely as a national of a Member State, and therefore as a citizen of the Union, Catherine is entitled to rely on Article 18(1) EC.

That right of citizens of the Union to reside in another Member State is recognised subject to the limitations and conditions imposed by the Treaty and by the measures adopted to give it effect (see, in particular, *Baumbast and R*, paragraphs 84 and 85).

27

With regard to those limitations and conditions, Article 1(1) of Directive 90/364 provides that the Member States may require that the nationals of a Member State who wish to benefit from the right to reside in their territory and the members of their families be covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.

28

It is clear from the order for reference that Catherine has both sickness insurance and sufficient resources, provided by her mother, for her not to become a burden on the social assistance system of the host Member State.

29

The objection raised by the Irish and United Kingdom Governments that the condition concerning the availability of sufficient resources means that the person concerned must, in contrast to Catherine's case, possess those resources personally and may not use for that purpose those of an accompanying family member, such as Mrs Chen, is unfounded.

30

According to the very terms of Article 1(1) of Directive 90/364, it is sufficient for the nationals of Member States to 'have' the necessary resources, and that provision lays down no requirement whatsoever as to their origin.

31

The correctness of that interpretation is reinforced by the fact that provisions laying down a fundamental principle such as that of the free movement of persons must be interpreted broadly.

32

Moreover, the limitations and conditions referred to in Article 18 EC and laid down by Directive 90/364 are based on the idea that the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the Member States. Thus, although, according to the fourth recital in the preamble to Directive 90/364, beneficiaries of the right of residence must not become an 'unreasonable' burden on the public finances of the host Member State, the Court nevertheless observed that those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the principle of proportionality (see, in particular, *Baumbast and R*, paragraphs 90 and 91).

33

An interpretation of the condition concerning the sufficiency of resources within the meaning of Directive 90/364, in the terms suggested by the Irish and United Kingdom Governments would add to that condition, as formulated in that directive, a requirement as to the origin of the resources which, not being necessary for the attainment of the objective pursued, namely the protection of the public finances of the Member States, would constitute a disproportionate interference with the exercise of the fundamental right of freedom of movement and of residence upheld by Article 18 EC.

34

The United Kingdom Government contends, finally, that the appellants in the main proceedings are not entitled to rely on the Community provisions in question because Mrs Chen's move to Northern Ireland with the aim of having her child acquire the nationality of another Member State constitutes an attempt improperly to exploit the provisions of Community law. The aims pursued by those Community provisions are not, in its view, served where a national of a non-member country wishing to reside in a Member State, without however moving or wishing to move from one Member State to another, arranges matters in such a way as to give birth to a child in a part of the host Member State to which another Member State applies its rules governing acquisition of nationality *jure soli*. It is, in their view, settled case-law that Member States are entitled to take measures to prevent individuals from improperly taking advantage of provisions of Community law or from attempting, under cover of the rights created by the Treaty, illegally to circumvent national legislation. That rule, which is in conformity with the principle that rights must not be abused, was in their view reaffirmed by the Court in its judgment in Case C-212/97 *Centros* [1999] ECR I-1459.

35

That argument must also be rejected.

36

It is true that Mrs Chen admits that the purpose of her stay in the United Kingdom was to create a situation in which

the child she was expecting would be able to acquire the nationality of another Member State in order thereafter to secure for her child and for herself a long-term right to reside in the United Kingdom.

37

Nevertheless, under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality (see, in particular, Case C-369/90 *Micheletti and Others* [1992] ECR I-4329, paragraph 10, and Case C-192/99 *Kaur* [2001] ECR I-1237, paragraph 19).

38

None of the parties that submitted observations to the Court has questioned either the legality, or the fact, of Catherine's acquisition of Irish nationality.

39

Moreover, it is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty (see, in particular, *Micheletti*, paragraph 10, and *Garcia Avello*, paragraph 28).

40

However, that would be precisely what would happen if the United Kingdom were entitled to refuse nationals of other Member States, such as Catherine, the benefit of a fundamental freedom upheld by Community law merely because their nationality of a Member State was in fact acquired solely in order to secure a right of residence under Community law for a national of a non-member country.

41

Accordingly, in circumstances like those of the main proceedings, Article 18 EC and Directive 90/364 confer on a young minor who is a national of a Member State, is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside for an indefinite period in that State.

The right of residence of a person in Mrs Chen's situation

42

Article 1(2)(b) of Directive 90/364, which guarantees 'dependent' relatives in the ascending line of the holder of the right of residence the right to install themselves with the holder of the right of residence, regardless of their nationality, cannot confer a right of residence on a national of a non-member country in Mrs Chen's situation either by reason of the emotional bonds between mother and child or on the ground that the mother's right to enter and reside in the United Kingdom is dependent on her child's right of residence.

43

According to the case-law of the Court, the status of 'dependent' member of the family of a holder of a right of residence is the result of a factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence (see, to that effect, in relation to Article 10 of Regulation No 1612/68, Case 316/85 *Lebon* [1987] ECR 2811, paragraphs 20 to 22).

44

In circumstances such as those of the main proceedings, the position is exactly the opposite in that the holder of the right of residence is dependent on the national of a non-member country who is her carer and wishes to accompany her. In those circumstances, Mrs Chen cannot claim to be a 'dependent' relative of Catherine in the ascending line within the meaning of Directive 90/364 with a view to having the benefit of a right of residence in the United Kingdom.

45

On the other hand, a refusal to allow the parent, whether a national of a Member State or a national of a non-member country, who is the carer of a child to whom Article 18 EC and Directive 90/364 grant a right of residence, to reside with that child in the host Member State would deprive the child's right of residence of any useful effect. It is clear that enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence (see, *mutatis mutandis*, in relation to Article 12 of Regulation No 1612/68, *Baumbast and R*, paragraphs 71 to 75).

46

For that reason alone, where, as in the main proceedings, Article 18 EC and Directive 90/364 grant a right to reside for an indefinite period in the host Member State to a young minor who is a national of another Member State, those same

provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State.

47

The answer to be given to the national court must therefore be that, in circumstances like those of the main proceedings, Article 18 EC and Directive 90/364 confer on a young minor who is a national of a Member State, is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside for an indefinite period in that State. In such circumstances, those same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State.

Costs

48

Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (sitting as a full Court) hereby rules:

1.

In circumstances like those of the main proceedings, Article 18 EC and Council Directive 90/364/EEC of 28 June 1990 on the right of residence confer on a young minor who is a national of a Member State, is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside for an indefinite period in that State. In such circumstances, those same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State.

Case C-456/02: Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)

JUDGMENT OF THE COURT (Grand Chamber) 7 September 2004 (1)

(Freedom of movement of persons – Citizenship of the European Union – Right of residence – Directive 90/364/EEC – Limitations and conditions – Person working in a hostel in return for benefits in kind – Entitlement to social assistance benefits)

In Case C-456/02,
REFERENCE for a preliminary ruling under Article 234 EC
from the Tribunal du travail de Brussels (Belgium), made by decision of 21 November 2002, received on 18 December 2002, in the proceedings:
Michel Trojani

v

Centre public d'aide sociale de Bruxelles (CPAS),

THE COURT (Grand Chamber),

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, C. Gulmann, J.-P. Puissochet and J.N. Cunha Rodrigues (Rapporteur), Presidents of Chambers, R. Schintgen, F. Macken, N. Colneric, S. von Bahr and K. Lenaerts, Judges,
Advocate General: L.A. Geelhoed,
Registrar: M. Múgica Arzamendi, Principal Administrator,
having regard to the written procedure and following the hearing on 6 January 2004,
after considering the observations submitted on behalf of:
–
Mr Trojani, by P. Leclerc, avocat,
–
the Centre public d'aide sociale de Bruxelles (CPAS), by M. Legein, avocat,
–
the Belgian Government, by A. Snoecx, acting as Agent, assisted by C. Doutrelepont, avocat,
–
the Danish Government, by J. Molde, acting as Agent,
–
the German Government, by W.-D. Plessing and M. Lumma, acting as Agents,
–
the French Government, by G. de Bergues and D. Petrausch, acting as Agents,
–
the Netherlands Government, by H.G. Sevenster and N. Bel, acting as Agents,
–
the United Kingdom Government, by R. Caudwell, acting as Agent, assisted by E. Sharpston QC,
–
the Commission of the European Communities, by D. Martin, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 19 February 2004,

gives the following

Judgment

1
This reference for a preliminary ruling concerns the interpretation of Articles 18 EC, 39 EC, 43 EC and 49 EC; Article 7(1) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992 (OJ 1992 L 245, p. 1) ('Regulation No 1612/68'); and Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26).
2
The reference was made in the course of proceedings between Mr Trojani and the Centre public d'aide sociale de Bruxelles ('the CPAS') concerning its refusal to grant him the minimum subsistence allowance ('the minimex').

Legal background
Community legislation
3
Under Article 18 EC:
'1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.
...'
4
Article 39(1) EC reads as follows:
'Freedom of movement for workers shall be secured within the Community.'
5
Under Article 39(3) EC, freedom of movement for workers 'shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
...
(c)
to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
...'
6
Article 1(1) of Directive 90/364 provides:
'Member States shall grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law and to members of their families as defined in paragraph 2, provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.'

National legislation
7
Article 1 of the Law of 7 August 1974 establishing the right to a minimum subsistence allowance (*Moniteur belge*, 18 September 1974, p. 11363) provides:
'1. Any Belgian having reached the age of majority, who is actually resident in Belgium and who does not have adequate resources and is not able to obtain them either by his own efforts or by other means, is entitled to a minimum subsistence allowance.
...'
8
Under Article 1 of the Royal Decree of 27 March 1987 (*Moniteur belge*, 7 April 1987, p. 5086) extending the scope of the Law of 7 August 1974 establishing the right to a minimum subsistence allowance to persons not possessing

Belgian nationality:

‘The scope of the Law of 7 August 1974 establishing the right to a minimum subsistence allowance is extended to the following persons:

1. those to whom Regulation (EEC) No 1612/68 of the Council of the European Communities of 15 October 1968 on freedom of movement for workers within the Community applies;

...’

The main proceedings and the reference for a preliminary ruling

9

Mr Trojani is a French national who after a short stay in Belgium in 1972, during which he is said to have worked as a self-employed person in the sales sector, returned there in 2000. He resided, without being registered, first at a campsite in Blankenberge and then from December 2001 in Brussels. After a stay at the Jacques Brel youth hostel, he was given accommodation in a Salvation Army hostel from 8 January 2002, where in return for board and lodging and some pocket money he does various jobs for about 30 hours a week as part of a personal socio-occupational reintegration programme.

10

As he had no resources, he approached the CPAS with a view to obtaining the minimex, on the grounds that he had to pay EUR 400 a month to the hostel and should also be able to leave the hostel and live independently.

11

The CPAS’s refusal, on the grounds that, first, Mr Trojani did not have Belgian nationality and, second, he could not benefit from the application of Regulation No 1612/68, was the subject of proceedings in the Tribunal du travail de Bruxelles (Labour Court, Brussels).

12

That court granted Mr Trojani the right to receive provisional financial assistance of EUR 300 from the CPAS. It also decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘1.

Can a citizen of the Union in the factual circumstances described in this judgment

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who has temporary leave to reside,

–

does not have sufficient resources,

–

carries out work for the hostel to the extent of approximately 30 hours a week in the context of a personal reintegration programme,

–

and receives in return benefits in kind which cover his basic needs at the hostel itself

claim a right of residence

–

as a worker within the meaning of Article 39 EC or Article 7(1) of Regulation No 1612/68,

–

or as a worker pursuing an activity as a self-employed person within the meaning of Article 43 EC,

–

or as a person providing a service, in view of the tasks he performs at the hostel, or as a person for whom services are intended, in view of the benefits in kind granted to him by that hostel, within the meaning of Article 49 EC,

–

or merely because he is taking part in a programme for his socio-occupational reintegration?

2.

If not, can he rely directly on Article 18 EC, which guarantees the right to move and reside freely in the territory of another Member State of the Union, merely in his capacity as a European citizen?

What then becomes of the conditions laid down by Directive 90/364 … and/or the “limitations and conditions” laid down in the EC Treaty, in particular the condition as to minimum resources which, if it were applied on entry to the host country, would deprive him of the very substance of the right of residence?

If, on the other hand, the right of residence arises automatically on the basis of citizenship of the Union, could the host State subsequently refuse an application for the minimex or for social assistance (non-contributory benefits), curtailing his right of residence on the ground that he does not have sufficient resources, when those benefits are granted to nationals of the host country subject to conditions which Belgians too must satisfy (proof of their availability for work, proof that they are in need)?
Must the host country comply with any other rules in order to avoid rendering meaningless the right of residence, such as a duty to assess the situation in the light of the fact that the application for the minimex or for social assistance is temporary, or to take into account the principle of proportionality (would the burden on the State in question be unreasonable)?'

The questions referred for a preliminary ruling

The first question

13
By its first question, the national court essentially asks whether a person in a situation such as that of the claimant in the main proceedings can claim a right of residence as a worker, a self-employed person or a provider or recipient of services, within the meaning of Articles 39 EC, 43 EC and 49 EC respectively.
14
In the context of freedom of movement for workers, it should be recalled that Article 39(3)(c) EC grants nationals of the Member States the right of residence in the territory of a Member State for the purpose of employment.
15
As the Court has held, the concept of 'worker' within the meaning of Article 39 EC has a specific Community meaning and must not be interpreted narrowly. Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see, in particular, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17, and Case C-138/02 *Collins* [2004] ECR I-0000, paragraph 26).
16
Moreover, neither the *sui generis* nature of the employment relationship under national law, nor the level of productivity of the person concerned, the origin of the funds from which the remuneration is paid or the limited amount of the remuneration can have any consequence in regard to whether or not the person is a worker for the purposes of Community law (see Case 53/81 *Levin* [1982] ECR 1035, paragraph 16; Case 344/87 *Bettray* [1989] ECR 1621, paragraphs 15 and 16; and Case C-188/00 *Kurz* [2002] ECR I-10691, paragraph 32).
17
With respect more particularly to establishing whether the condition of the pursuit of real and genuine activity for remuneration is satisfied, the national court must base its examination on objective criteria and make an overall assessment of all the circumstances of the case relating to the nature both of the activities concerned and of the employment relationship at issue (see Case C-413/01 *Ninni-Orasche* [2003] ECR I-0000, paragraph 27).
18
In this respect, the Court has held that activities cannot be regarded as a real and genuine economic activity if they constitute merely a means of rehabilitation or reintegration for the persons concerned (*Bettray*, paragraph 17).
19
However, that conclusion can be explained only by the particular characteristics of the case in question, which concerned the situation of a person who, by reason of his addiction to drugs, had been recruited on the basis of a national law intended to provide work for persons who, for an indefinite period, are unable, by reason of circumstances related to their situation, to work under normal conditions (see, to that effect, Case C-1/97 *Birden* [1998] ECR I-7747, paragraphs 30 and 31).
20
In the present case, as is apparent from the decision making the reference, Mr Trojani performs, for the Salvation Army and under its direction, various jobs for approximately 30 hours a week, as part of a personal reintegration programme, in return for which he receives benefits in kind and some pocket money.
21
Under the relevant provisions of the decree of the Commission communautaire française of 27 May 1999 on the grant

of authorisation and subsidies to hostels (*Moniteur belge*, 18 June 1999, p. 23101), the Salvation Army has the task of receiving, accommodating and providing psycho-social assistance appropriate to the recipients in order to promote their autonomy, physical well-being and reintegration in society. For that purpose it must agree with each person concerned a personal reintegration programme setting out the objectives to be attained and the means to be employed to attain them.

22

Having established that the benefits in kind and money provided by the Salvation Army to Mr Trojani constitute the consideration for the services performed by him for and under the direction of the hostel, the national court has thereby established the existence of the constituent elements of any paid employment relationship, namely subordination and the payment of remuneration.

23

For the claimant in the main proceedings to have the status of worker, however, the national court, in the assessment of the facts which is within its exclusive jurisdiction, would have to establish that the paid activity in question is real and genuine.

24

The national court must in particular ascertain whether the services actually performed by Mr Trojani are capable of being regarded as forming part of the normal labour market. For that purpose, account may be taken of the status and practices of the hostel, the content of the social reintegration programme, and the nature and details of performance of the services.

25

On the question of the applicability of Articles 43 EC and 49 EC, it must be stated that, in the case at issue in the main proceedings, neither of those provisions of the EC Treaty may be relied on as a legal basis for a right of residence.

26

As may be seen from paragraph 20 above, Mr Trojani performs services on a continuing basis for and under the direction of the Salvation Army, in return for which he receives a remuneration.

27

Now, first, the freedom of establishment provided for in Articles 43 EC to 48 EC, includes only the right to take up and pursue all types of self-employed activity, to set up and manage undertakings, and to set up agencies, branches or subsidiaries (see, in particular, Case C-255/97 *Pfeiffer* [1999] ECR I-2835, paragraph 18, and Case C-79/01 *Payroll and Others* [2002] ECR I-8923, paragraph 24). Paid activities are therefore excluded.

28

Second, according to the settled case-law of the Court, an activity carried out on a permanent basis, or at least without a foreseeable limit to its duration, does not fall within the Community provisions concerning the provision of services (see Case 196/87 *Steymann* [1988] ECR 6159, paragraph 16, and Case C-215/01 *Schnitzer* [2003] I-0000, paragraphs 27 to 29).

29

In those circumstances, the answer to the first question must be that a person in a situation such as that of the claimant in the main proceedings, first, does not come under Articles 43 EC and 49 EC and, second, can claim a right of residence as a worker within the meaning of Article 39 EC only if the paid activity he carries out is real and genuine. It is for the national court to carry out the examinations of fact necessary to determine whether that is so in the case pending before it.

The second question

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By its second question, the national court essentially asks whether, if the first question is answered in the negative, a person in the situation of the claimant in the main proceedings may, simply by virtue of being a citizen of the European Union, enjoy a right of residence in the host Member State by the direct application of Article 18 EC.

31

It must be recalled that the right to reside in the territory of the Member States is conferred directly on every citizen of the Union by Article 18(1) EC (see Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 84). Mr Trojani therefore has the right to rely on that provision of the Treaty simply as a citizen of the Union.

32

That right is not unconditional, however. It is conferred subject to the limitations and conditions laid down by the

Treaty and by the measures adopted to give it effect.

33

Among those limitations and conditions, it follows from Article 1 of Directive 90/364 that Member States can require of the nationals of a Member State who wish to enjoy the right to reside within their territory that they themselves and the members of their families be covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of that State during their period of residence.

34

As the Court has previously held, those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality (*Baumbast and R*, paragraph 91).

35

It follows from the judgment making the reference that a lack of resources was precisely the reason why Mr Trojani sought to receive a benefit such as the minimex.

36

In those circumstances, a citizen of the Union in a situation such as that of the claimant in the main proceedings does not derive from Article 18 EC the right to reside in the territory of a Member State of which he is not a national, for want of sufficient resources within the meaning of Directive 90/364. Contrary to the circumstances of the case of *Baumbast and R* (paragraph 92), there is no indication that, in a situation such as that at issue in the main proceedings, the failure to recognise that right would go beyond what is necessary to achieve the objective pursued by that directive.

37

However, it must be observed that, according to information put before the Court, Mr Trojani is lawfully resident in Belgium, as is attested by the residence permit which has in the meantime been issued to him by the municipal authorities of Brussels.

38

It should be recalled here that it is for the Court to provide the national court with all those elements for the interpretation of Community law which may be of assistance in adjudicating on the case pending before it, whether or not that court has specifically referred to them in its questions (see inter alia, to that effect, Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 8; Case C-315/92 *Verband Sozialer Wettbewerb ('Clinique')* [1994] ECR I-317, paragraph 9; and Case C-87/97 *Consorzio per la tutela del formaggio Gorgonzola* [1999] ECR I-1301, paragraph 16).

39

In the context of the present case, it should be examined more particularly whether, despite the conclusion in paragraph 36 above, a citizen of the Union in a situation such as that of the claimant in the main proceedings may rely on Article 12 EC, under which, within the scope of application of the Treaty and without prejudice to any special provisions contained therein, all discrimination on grounds of nationality is prohibited.

40

In the present case, it must be stated that, while the Member States may make residence of a citizen of the Union who is not economically active conditional on his having sufficient resources, that does not mean that such a person cannot, during his lawful residence in the host Member State, benefit from the fundamental principle of equal treatment as laid down in Article 12 EC.

41

In that connection three points should be made.

42

First, as the Court has held, a social assistance benefit such as the minimex falls within the scope of the Treaty (see Case C-184/99 *Grzelczyk* [2001] ECR I-6193, in particular paragraph 46).

43

Second, with regard to such benefits, a citizen of the Union who is not economically active may rely on Article 12 EC where he has been lawfully resident in the host Member State for a certain time or possesses a residence permit.

44

Third, national legislation such as that at issue in the main proceedings, in so far as it does not grant the social assistance benefit to citizens of the European Union, non-nationals of the Member State, who reside there lawfully even though they satisfy the conditions required of nationals of that Member State, constitutes discrimination on grounds of nationality prohibited by Article 12 EC.

45
It should be added that it remains open to the host Member State to take the view that a national of another Member State who has recourse to social assistance no longer fulfils the conditions of his right of residence. In such a case the host Member State may, within the limits imposed by Community law, take a measure to remove him. However, recourse to the social assistance system by a citizen of the Union may not automatically entail such a measure (see, to that effect, *Grzelczyk*, paragraphs 42 and 43).
46
Consequently, the answer to the second question must be that a citizen of the Union who does not enjoy a right of residence in the host Member State under Articles 39 EC, 43 EC or 49 EC may, simply as a citizen of the Union, enjoy a right of residence there by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities must ensure that those limitations and conditions are applied in compliance with the general principles of Community law, in particular the principle of proportionality. However, once it is ascertained that a person in a situation such as that of the claimant in the main proceedings is in possession of a residence permit, he may rely on Article 12 EC in order to be granted a social assistance benefit such as the minimex.

Costs
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Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:
1.

A person in a situation such as that of the claimant in the main proceedings, first, does not come under Articles 43 EC and 49 EC and, second, can claim a right of residence as a worker within the meaning of Article 39 EC only if the paid activity he carries out is real and genuine. It is for the national court to carry out the examinations of fact necessary to determine whether that is so in the case pending before it.

2.

A citizen of the European Union who does not enjoy a right of residence in the host Member State under Articles 39 EC, 43 EC or 49 EC may, simply as a citizen of the Union, enjoy a right of residence there by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities must ensure that those limitations and conditions are applied in compliance with the general principles of Community law, in particular the principle of proportionality. However, once it is ascertained that a person in a situation such as that of the claimant in the main proceedings is in possession of a residence permit, he may rely on Article 12 EC in order to be granted a social assistance benefit such as the minimex.

Case C-408/03: Commission of the European Communities v Kingdom of Belgium

OPINION OF ADVOCATE GENERAL

RUIZ-JARABO COLOMER

delivered on 25 October 2005 [1](1)

Case C-408/03

Commission of the European Communities

v

Kingdom of Belgium

(Failure of a Member State to fulfil its obligations – Belgium – Citizenship of the European Union – Freedom of movement for persons – Right of residence – Availability of sufficient resources – Portuguese national who moves to Belgium to live with her partner, who undertakes to maintain her – Refusal of right of residence on the ground that resources must be 'personal' – Residence permit – Procedure for grant of the permit – Failure to submit required documents within the time-limit – Automatic deportation order)

1. In this action, brought under the second paragraph of Article 226 EC, the Commission alleges that the Kingdom of Belgium:

1) failed to comply with Article 18 EC and with Directive 90/364/EEC on the right of residence; (2)

2) infringed:

a) Article 4 of Council Directive 68/360/EEC (3) on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, and Article 4 of Council Directive 73/148/EEC (4) on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services; and

b) Article 2 of Council Directives 93/96/EC (5) and 90/365/EEC, (6) on the right of residence for students and of employees and self-employed persons who have ceased their occupational activity.

2. The first allegation of failure to fulfil obligations relates to the fact that the nationals of other Member States who wish to establish themselves in Belgium are required to possess sufficient 'personal' resources. The second relates to the practice of automatically issuing a deportation order to European Union citizens who fail, within a given time-limit, to submit the documents required to obtain a residence permit.

I – **The legal framework**

A – *Community law*

1. Primary law

3. Article 18(1) EC recognises the right of all citizens of the Union 'to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'.

2. Secondary law

a) The requirement of sufficient resources

4. According to the first subparagraph of Article 1(1) of Directive 90/634:

'Member States shall grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law and to members of their families as defined in paragraph 2, provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.'

b) Residence permits

5. Article 2(1) of Directive 90/364 provides:

'Exercise of the right of residence shall be evidenced by means of the issue of a document known as a "residence permit for a national of a Member State of the EEC" … .

For the purpose of issuing the residence permit or document, the Member State may require only that the applicant present a valid identity card or passport and provide proof that he or she meets the conditions laid down in Article 1.'

6. Article 4 of Directive 68/360 provides:

'1. Member States shall grant the right of residence in their territory to the persons referred to in Article 1 [employed persons] who are able to produce the documents listed in paragraph 3.

…

3. For the issue of a residence permit for a national of a Member State of the EEC, Member States may require only the production of the following documents … .'

7. Article 4(1) of Directive 73/148 provides:

'Each Member State shall grant the right of permanent residence to nationals of other Member States who establish themselves within its territory in order to pursue activities as self-employed persons, when the restrictions on these activities have been abolished pursuant to the Treaty.

As proof of the right of residence, a document entitled "residence permit for a national of a Member State of the European Communities" shall be issued …'

8. Directive 93/96, which relates to students, states in Article 2(1) that:

'… The right of residence shall be evidenced by means of the issue of a document known as a "Residence permit for a national of a Member State of the Community" …

For the purpose of issuing the residence permit or document, the Member State may require only that the applicant

present a valid identity card or passport and provide proof that he or she meets the conditions laid down in Article 1.'

9. Lastly, Article 2(1) of Directive 90/365, which concerns retired persons, provides:

'Exercise of the right of residence shall be evidenced by means of the issue of a document known as a "Residence permit for a national of a Member State of the EEC" …

For the purposes of issuing the residence permit or document, the Member State may require only that the applicant present a valid identity card or passport and provide proof that he or she meets the conditions laid down in Article 1.' (7)

B – *The Belgian legislation*

1. Possession of sufficient resources

10. According to Article 53(1) of the Royal Decree of 8 October 1981 (8) on foreigners' entry into residence and establishment in, and expulsion from Belgian territory, Community citizens enjoy a right to live in the Kingdom, provided they have 'sufficient resources' not to become a burden on the public authorities.

2. The issue of residence permits

11. Paragraphs (2) to (6) of Article 53, as worded in the Royal Decree of 12 June 1998, (9) govern the issue of residence permits.

12. A Community citizen who produces the documents necessary to enter Belgium is registered in a foreigners' register and a certificate is issued, valid for five months from the date of its issue. As from that moment, the citizen has to apply for residence (the first and second subparagraphs of Article 53(2)).

13. During that period, the person concerned must provide evidence that he satisfies the conditions of Article 53(1) (third subparagraph of Article 53(2)). If he does not satisfy them, or fails to provide the required proof, the right of residence is refused, which means he has to leave Belgian territory (Article 53(4)).

14. However, if that five month period has not elapsed and the applicant is in possession of the registration certificate referred to above, he is asked to produce the necessary documents before the period expires, and the stay is extended by one month (Article 53(5)).

15. When the application is refused after expiry of those time-limits, it is accompanied by an order to leave Belgian territory, which becomes enforceable in 15 days (Article 53(6)). (10)

16. Articles 45, (11) 55 and 51 lay down similar arrangements for employed and self-employed workers, students (12) and retired persons from other Member States.

II – **Pre-litigation procedure**

17. The Commission received various complaints about Belgian legislation and practice relating to residence permits and deportation orders for Community nationals.

18. In particular, it was struck by the situation of Mrs Mamade De Figueiredo, a Portuguese citizen who, in August 1999, together with her three children, joined her long-standing partner, a Belgian national. The municipal authorities of Waterloo requested authorisation from her husband for her to establish residence in that country, since they had not yet divorced in Portugal, where the couple had its marital home. It would appear that no such authorisation ever arrived.

19. Even though she had completed the entry declaration, accompanied by a document in which her partner undertook to maintain her and her children, on 16 December 1999 the authorities notified her of the refusal of the application and served a deportation order.

20. On 7 January 2000, the Commission conveyed to the authorities of the defendant Member State its misgivings as to whether the requirements which they were imposing for the issue of a residence permit were compatible with Community law, and with regard to Mrs Mamade De Figueiredo, stressed that there was nothing whatsoever to prevent the grant of the permit, since she had provided evidence that her partner would be responsible for feeding her. On 8 March 2000, they responded that the undertaking in question did not amount to proof that the applicant had her own means of subsistence.

21. Dissatisfied with the stance taken by the Kingdom of Belgium, on 8 May 2001 the Commission, whose departments had received a number of further complaints, put the State on formal notice on two grounds. The first was that, in its view, Directive 90/364 does not make the grant of a residence permit conditional on the applicant's resources being personal, and the second was that to issue an automatic deportation order if the appropriate supporting documents for obtaining such a permit are not available contravenes the principle of proportionality.

22. On 6 July 2001, Belgium again asserted that the income of a person wishing to live in its territory had to be that person's own income, and added that it was possible to order a citizen of the Union to leave if, on expiry of three months from entry, that person remained in the country and had not made an administrative application for residence and had not filed the necessary documents.

23. Since it took issue with that view of the national authorities, on 3 April 2002 the Commission issued a reasoned opinion, alleging that Belgium had failed to comply with the obligations set out in point 1 of this Opinion, and giving it two months to comply with the requirements of Community law. The Member State reiterated its arguments in a document of 10 July 2002.

III – **The forms of order sought by the parties and the proceedings before the Court of Justice**

24. On 1 October 2003, the Commission brought this action, under the second paragraph of Article 226 EC, seeking a declaration that the Kingdom of Belgium had failed to comply with its obligations under Article 18 EC and Directive 90/364, Article 4 of Directive 68/360, Article 4 of Directive 73/148, Article 2 of Directive 93/96 and Article 2 of Directive 90/365, and the Member State defended the action, with the United Kingdom of Great Britain and Northern Ireland intervening in its support. (13)

25. At the hearing, held on 20 September 2005, the parties' representatives confirmed their respective positions.

IV – **Analysis of the alleged infringements**

26. The application turns on two very specific questions: the source of the financial resources of a Community citizen who wishes to establish himself in Belgium (first point), and whether it is possible to order his expulsion if he does not produce the necessary documents for the residence permit within the prescribed time-limit (second point).

A – ***The source of the resources***

1. Defining the issues: admission of one infringement

27. All those involved in these proceedings have acknowledged that the Belgian authorities require nationals of other Member States, who seek a residence permit under Directive 90/364, to have sufficient income 'of their own'. (14) Mrs Mamade De Figueiredo is a good example of this.

28. However, as the debate proceeded, both in the administrative proceedings and before this Court, the Kingdom

of Belgium has adopted a less stringent position, tempering its argument so far as to concede that Article 1 of that directive does not expressly require the Union citizen personally to have the relevant financial resources, in order not to become a burden on the coffers of the host State, but accepts that they may come from a person linked to the applicant by ties which oblige that person to maintain the latter, such as spouses, children, and even a third party with a contractual obligation, provided there is a binding legal relationship (paragraphs 3 to 12 of the defence and paragraphs 2 to 4 of the rejoinder).

29. That change of strategy in the proceedings constitutes an implicit admission of the alleged infringement, since Mrs Mamade De Figueiredo included in her application a document in which her partner undertook to 'maintain' her, and it is not for the national administrative authorities nor for this Court to determine its effect, since the power to do so lies with the courts of Belgium, whose legal order permits freedom of contract. (15)

30. The discussion could end here. Yet, in view of the terms in which the dispute has unfolded, it is appropriate to analyse the notion of freedom of movement within the European Union, in order to ascertain the meaning of the requirement under Article 1 of Directive 90/364 for the beneficiary of the right to have sufficient income.

2. Freedom of movement of citizens of the Union

31. Union citizenship, which is of a secondary nature,(16) is the 'fundamental status' of the Community individual. That view, expressed for the first time in *Grzelczyk* (paragraph 31), (17) has become settled Community case-law. (18)

32. Union citizenship comprises, according to Article 17(2) EC, all the rights and obligations for which the Treaty provides, in particular in Articles 18 EC to 21 EC.

33. Article 18(1) EC, in establishing the right to reside in the territory of the Member States, creates a privileged legal status with four characteristic features. First, it is a personal guarantee, which forms the bedrock of the Union's system of coexistence. (19) Furthermore, as it is structured, it has direct effect, and is therefore immediately applicable and can be relied upon by its beneficiaries. (20) Thirdly, it is not unconditional, since there is no such thing as an unfettered right. Article 18(1) EC itself contains the qualification that its exercise is subject to the limitations and conditions laid down in the Treaty itself and by the measures adopted to give it effect, a point which the case-law has made repeatedly. (21) Lastly, as a fundamental right, it merits a broad interpretation, which entails a highly restrictive interpretation of any conditions to be attached, confining such conditions, in the name of the principle of proportionality, (22) to the aspects strictly indispensable in order to safeguard any collective values which might limit freedom, whilst not undermining the scope of that freedom. (23)

3. 'Sufficient resources' as a requirement for exercise of the right of residence

34. So, from entry into force of the Maastricht Treaty, which included the articles on Union citizenship, (24) nationals of the Member States, simply by virtue of their status as citizens of the Union, are entitled to live in other Member States under Article 18(1) EC, and that right cannot be subject to the exercise of an economic activity. (25) The only conditions appear in Article 1(1) of Directive 90/364, and require the person concerned and family members to have sickness insurance and income enabling them to live without being dependent on the social assistance system of the host country.

35. The directive contains nothing to support the arguments of the Kingdom of Belgium during the pre-litigation procedure. This is apparent from the judgment in *Zhu and Chen*, where it states that the relevant provision of Directive 90/364 lays down no requirement whatsoever as to the origin of the financial resources (paragraph 30), with the effect that any prescription of that nature would involve a disproportionate interference with the exercise of the fundamental right in question (paragraph 33).

36. Nor is the position eventually adopted by the defendant State consistent with the spirit of Article 1(1). The purpose of the provision is to ensure that the right freely to reside does not become an additional burden on the host

Member State, which means that a Community citizen who wishes to establish himself in a Member State other than that of which he is a national must show that he has sufficient funds, and it is irrelevant whether they are his own or those of a third party or, in the latter case, to what extent that party is legally bound or whether he provides the funds out of pure generosity. (26)

37. The administrative authority which issues a residence permit must ascertain whether the conditions are satisfied for an existing right to be valid, (27) making the relevant checks and assessing the evidence offered by the applicant. It must confine itself, then, to verifying that the applicant has sufficient resources, (28) without investigating their origin or nature, although it can make a finding as to possible fraud. Because it is a fundamental right, no obstacles not intended by the legislature can be put in its way, and any additional restraint is out of the question, whether it relates directly to the source of the income or indirectly limits the means of confirming the resources and their sufficiency. (29)

38. Obviously, there are risks, since it is possible that the source of the sufficient income might dry up, although that can happen not only where the income is the applicant's own but also where it comes from another person. However, no one would refuse residence to a Community citizen because he cannot guarantee that his income at the time the application is determined will continue throughout his stay in the host country. For that purpose, as the Commission points out, the directive lays down a system of safeguards: Article 3 gives power to withdraw the right of residence if the circumstances which gave rise to its grant cease to exist; further, Article 2(1) allows a requirement that the permit be renewed and compliance with the specific conditions thereby confirmed, on expiry of the first two years of residence.

39. In the light of those considerations, it is apparent that the Kingdom of Belgium is disregarding the principle of proportionality given that, because the aim is to protect the public finances of the host Member States, (30) there is nothing to justify excluding funds paid by third parties, since the misfortune of their loss can also occur if they are the person's own income, and the directive contains appropriate mechanisms to circumvent such a contingency.

40. In short, the nature of the right granted to Community citizens in Article 18(1) EC and governed by Article 1 of Directive 90/365 only allows for the restrictions expressly provided for, and requires the cancellation of rules such as those of the defendant State which seek, on a general basis and from the outset, to give that right a narrower scope than the Community legislature intended, precluding the possibility that the sufficient resources to which the directive refers might come from a person other than the applicant.

41. On that basis the authorities refused Mrs Mamade De Figueiredo's application, and the claim that the Member State failed to fulfil its obligations must therefore be upheld.

B – ***The automatic issue of the deportation order***

42. The Commission takes issue with the fact that citizens of the Union wishing to establish themselves in Belgium are deported if, on expiry of the period allowed by the entry registration, they have not regularised their situation. (31)

43. There are four possible situations in which deportation can occur. The first arises when the person concerned has not made the administrative application for a residence permit; the second, when it is found that the person does not satisfy the requirements on which the authorisation depends; the third when, in the course of that application, the person concerned has not produced the relevant evidence and it has been proven that he does not enjoy the right; the fourth when, once the applicant has been requested to submit the relevant documents, he fails to do so, and it is not known whether he is entitled to the permit. It is to that fourth situation that the Commission's second claim refers.

44. The solution to the dispute turns on the very nature of the freedom to reside, and is clear from the Community case-law.

45. *Royer*, (32) interpreting Directive 68/360, stated that the mere infringement by a national of a Member State of

the formalities concerning the access, movement and residence of foreigners in the territory of a different Member State does not justify their expulsion (paragraph 38), which, according to *Pieck*, (33) is a measure incompatible with the Treaty, since it implies negating the very right which the Treaty confers and guarantees (paragraph 18).

46. That view is borne out by Article 18 EC which, as already indicated, enshrines a fundamental right of Union citizens, and has given the Court of Justice the opportunity to confirm unequivocally that the contested decision, in so far as it impairs the very essence of the right, is manifestly disproportionate to the gravity of the infringement. (34) It is, therefore, an excessive sanction.

47. I consider, in that context, that Belgian law and administrative practice, by deporting the nationals of other Member States simply because they have failed to comply in time with the formal procedures necessary for issue of a residence permit, are inconsistent with Community law, and the defendant Kingdom has failed to fulfil its obligations as the Commission alleges. (35)

48. I accept that the directives set out in part at the beginning of this Opinion oblige applicants to provide the relevant documents, and to assume the burden of proving that they fulfil the requirements for the grant of the permit. (36) However, as the case-law already suggests, to link the failure to comply with that formality with denial of the freedom of movement strikes me as disproportionate, (37) given that the freedom in question already exists (Article 18 EC) (38) and all that has to be demonstrated in the procedure in question is that the conditions for it to be valid are satisfied, hence the declaratory nature of the procedure. I have already pointed out that the issue of a residence permit merely certifies an earlier right. (39)

49. It would be more appropriate to treat the application as having lapsed, leaving the right pending, and to put the person concerned on notice to remedy the shortcoming within a strict time-limit, with a warning that, if he fails to act, he will be presumed to have withdrawn the application. (40) A fair balance is thus achieved meeting the needs of both the rights of the individual and the public interest, preventing a situation in which persons who are not entitled to settle in the host Member State because they do not fulfil the due requirements, can do so by remaining silent. The Belgian State concurs with that argument in paragraph 5 of its rejoinder.

V – **Costs**

50. The forms of order sought by the applicant having been upheld, the defendant must be ordered to pay the costs, in accordance with Article 69(2) of the Rules of Procedure, since they have been applied for by the Commission.

VI – **Conclusion**

51. In view of the foregoing considerations, I propose that the Court of Justice should:

1) declare that the Kingdom of Belgium has failed to comply with its obligations under:

a) Article 18 EC and Council Directive 90/364/EEC on the right of residence, by requiring Community citizens wishing to reside in its territory to have sufficient ‘personal’ resources;

b) Article 4 of Council Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families; Article 4 of Council Directive 73/148/EEC on the abolition of such restrictions with regard to establishment and the provision of services; Article 2 of Council Directive 93/96/EC and Article 2 of Council Directive 90/365/EEC on the right of residence for students and of employees and self-employed persons who have ceased their occupational activity, by allowing the issue of deportation orders against Community citizens who have failed within a given time-limit to submit the documents required to obtain a residence permit;

2) order the Kingdom of Belgium to pay the costs.

1 – Original language: Spanish.

2 – Council Directive of 28 June 1990 (OJ 1990 L 180, p. 26).

3 – Directive of 15 October 1968 (OJ, English Special Edition 1968 (II), p. 485).

4 – Directive of 21 May 1973 (OJ 1973 L 172, p. 14).

5 – Directive of 29 October 1993 (OJ 1993 L 317, p. 59).

6 – Directive of 28 June 1990 (OJ 1990 L 180, p. 28).

7 – Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 158, p. 77), which repealed the above directives and entered into force on 30 April 2004 (Article 41), preserves the essential aspects of the legal environment described above. Article 7 refers to the 'sufficient resources' of applicants, for themselves and their family members, and Article 8 replaces the residence permit or card with entry in a register which, by means of a certificate, confirms the name and address of the person concerned and the date of the registration.

8 – *Moniteur Belge*, supplement to No 206, of 27 October 1981, p. 1. The current wording of Article 53(1) is based on the Royal Decree of 22 December 1992, *Moniteur Belge*, No 14, of 23 January 1993, p. 1053.

9 – *Moniteur Belge*, No 160, of 21 August 1998, p. 26854.

10 – The Interior Ministry Circular of 14 July 1998, on the conditions of residence of EC foreign nationals and members of their family, and foreign family members of Belgian citizens (*Moniteur Belge*, No 160 of 21 August 1998, p. 27032) confirms that understanding in Chapter III, part A, point 3.b.1.

11 – Article 45(6) allows the foreigner, prior to deportation, to deliver the documents he did not produce previously, with the grant of a new registration certificate for a further five months.

12 – In that case, the registration in the foreigners' register lasts for three months (Article 55(2)).

13 – The observations of the United Kingdom, as the Commission points out, are irrelevant, since they relate to issues not in dispute (the adequacy of the income and the burden of proving it), and fail to address the real point of the discussion (whether that income has to be personal to the applicant and the consequences of failure to provide evidence).

14 – In the oral phase of proceedings, the United Kingdom persisted in its erroneous line of argument, concentrating on the requirement of adequacy and taking as read that the resources must come from the applicant, overlooking the fact that the debate turned on that latter issue.

15 – Article 1126 et seq. of the Belgian Civil Code establishes the principle of bargaining autonomy.

16 – According to Article 17(1) EC, its acquisition is subject to possession of the nationality of a Member State, which it complements but does not replace. Kovar, R., described it as 'subordinate' in 'L'émergence et l'affirmation du concept de citoyenneté européenne dans le processus d'intégration européenne', *La citoyenneté européenne*, University of Montreal, 2000, pp. 81 to 94, in particular, pp. 85 to 87.

17 – Case C-184/99 [2001] ECR I-6193.

18 – This Court also ruled to that effect in, amongst others, Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 82; Case C-148/02 *García Avello* [2003] ECR I-11613, paragraph 22, and Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraph 25.

19 – *Grzelczyk*, paragraph 33, and *García Avello*, paragraph 24, describe it as a fundamental freedom. This Court recently ruled to the same effect in Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 33, and Case C-403/03 *Schempp* [2005] ECR I-0000, paragraph 18. The Charter of Fundamental Rights of the European Union (OJ 2000 C 364, p. 1) includes that right in Article 45,

and it appears also in Article II-105 of the Treaty establishing a Constitution for Europe (OJ 2004 C 310, p. 1). In his Opinion in Case C-456/02 *Trojani* [2004] ECR I-7573, Advocate General Geelhoed asserted that the right of residence is a fundamental right of every European citizen (point 12). Advocate General Tizzano treats it in the same way in his Opinion in *Zhu and Chen* (point 73).

20 – *Baumbast and R*, paragraph 84, *Trojani*, paragraph 31, and *Zhu and Chen*, paragraph 26.

21 – By way of example, *Baumbast and R*, paragraph 86; *Trojani*, paragraph 32; and *Zhu and Chen*, paragraph 26.

22 – In my Opinion in Case C-138/02 *Collins* [2004] ECR I-2703, delivered on 10 July 2003, I pointed out once again how the principle of proportionality operates in that field (point 70).

23 – Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, held that the status of citizen of the Union warrants a restrictive interpretation of the derogations from that freedom (paragraph 65). The judgment in *Trojani*, in turn, added that the limitations to which exercise of the right is subject must comply with the general principles of Community law and, in particular, the principle of proportionality (paragraph 46).

24 – That Treaty, in force since 1 November 1993, established the notion of citizenship of the Union in Article G (subsequently, Articles 8 to 8 E of the EC Treaty) which, with the amendments made by the Treaty of Amsterdam, currently comprise the second part of the EC Treaty (Articles 17 EC to 22 EC).

25 – The judgment in *Trojani* (paragraph 46), paraphrasing that in *Baumbast and R* (paragraph 46), pointed out that a citizen of the Union who does not have a right of residence in the host Member State under Article 39 EC, 43 EC or 49 EC can exercise that right simply as a citizen of the Union, in reliance on Article 18(1) EC.

26 – Clearly, it is irrelevant that the income may come from the non-Community spouse or child of the Union citizen, and that those third parties may not be legally resident in Belgium, since their right is not at issue. The fate of family members follows that of their 'principal': if the latter lives in the Member State of which he is a national, no one can prevent them from residing with him. Something similar occurs when the person moves to another country in the Union. That outcome is not unreasonable. The opposite solution, which renders the effectiveness of the freedom to reside subject to the right of a third party and which is, moreover, subordinate to that freedom, would, however, be unreasonable.

27 – Case C-215/03 *Oulane* [2005] ECR I-1215 laid emphasis on the fact that the issue of a residence permit to a national of a Member State is to be regarded not as a measure giving rise to rights, but as proof of that person's individual position in relation to Community law (paragraph 18).

28 – Nor are the authorities totally at liberty in that regard, since Community law (the first and second paragraphs of Article 1(1) of Directives 90/364 and 90/365), as well as their transposition into national law (Article 53(1), paragraph two, of the Royal Decree of 8 October 1981) lay down certain criteria.

29 – The judgment in Case C-424/98 *Commission* v *Italy* [2000] ECR I-4001, in which I delivered my Opinion on 19 November 1999, held that, in such matters, the Member States cannot limit the means of proof (paragraphs 34 to 37).

30 – So state the fourth recital to Directive 90/364 and the first paragraph of Article 1(1), as confirmed by *Zhu and Chen* (paragraph 33).

31 – Case C-344/95 *Commission* v *Belgium* [1997] ECR I-1035 held that the Member State in question was infringing its Community obligations by requiring nationals of the other Member States who were trying to work in its territory to leave automatically on expiry of three months, without ascertaining whether they were continuing to seek employment or if they had genuine chances of being engaged (paragraphs 17 and 18).

32 – Case 48/75 [1976] ECR 497.

33 – Case 157/79 [1980] ECR 2171.

34 – Case C-459/99 *MRAX* [2002] ECR I-6591, paragraph 78; and *Oulane*, paragraph 40.

35 – At the hearing, the representative of the Belgian Government, in reply to my questions, indicated that there is no such

automatic deportation, but his statement contradicts the sense of Article 45(3), Article 51(4), Article 53(4) and Article 55(3) of the Royal Decree of 12 June 1998.

36 – *Commission* v *Italy*, cited above, stated that the directives do not refer to the manner in which the beneficiaries have to prove those facts (paragraph 34).

37 – The United Kingdom expressed the same view at the hearing.

38 – Either because the person concerned carries on or has ceased to carry on an activity as an employee or self-employed person in the host State (Directives 68/360, 73/148 and 90/365), or because he is pursuing studies (Directive 93/96), or because he holds the nationality of another Member State (Directive 90/364). The sole exceptions are those based on reasons of public policy, security or public health (Article 2(2), third paragraph, of Directives 90/364 and 90/365).

39 – As expressed in paragraph 18 of *Oulane*.

40 – The recommendation does not disregard the burden of proof, since it does not require the Member State to prove the lack of resources.

Case C-408/03: Commission of the European Communities v Kingdom of Belgium

JUDGMENT OF THE COURT (Grand Chamber)

23 March 2006 (*)

(Failure to fulfil obligations – Breach of Community legislation on the right of residence of citizens of the Union – National legislation and administrative practice relating to the requirement of sufficient personal resources and the issuing of orders to leave the territory of the Member State concerned)

In Case C-408/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 30 September 2003,

Commission of the European Communities, represented by M. Condou-Durande and D. Martin, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Belgium, represented by E. Dominkovits, acting as Agent,

defendant,

supported by:

United Kingdom of Great Britain and Northern Ireland, represented by C. Jackson, acting as Agent, and by E. Sharpston QC,

intervener,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Schiemann (Rapporteur) and J. Makarczyk, Presidents of Chambers, J.-P. Puissochet, R. Schintgen, P. Kūris, J. Klučka, U. Lõhmus, E. Levits and A. Ó Caoimh, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 20 September 2005,

after hearing the Opinion of the Advocate General at the sitting on 25 October 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that:

– by making the right of residence of citizens of the European Union subject to the requirement that they have sufficient personal resources, the Kingdom of Belgium has failed to fulfil its obligations under Article 18 EC and Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26),

– by making provision for automatic service of an order to leave Belgian territory on citizens of the Union who do not produce within the prescribed period the documents required to obtain a residence permit, the Kingdom of Belgium has failed to fulfil its obligations under Article 2 of Directive 90/364, Article 4 of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485), Article 4 of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14), Article 2 of Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (OJ 1993 L 317, p. 59) and Article 2 of Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ 1990 L 180, p. 28).

Legal context

Community legislation

2 The first subparagraph of Article 1(1) of Directive 90/364 provides:

‘Member States shall grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law and to members of their families as defined in paragraph 2, provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.’

3 Article 2(1) of that directive provides:

‘Exercise of the right of residence shall be evidenced by means of the issue of a document known as a “Residence permit for a national of a Member State of the EEC”, the validity of which may be limited to five years on a renewable basis. However, the Member States may, when they deem it to be necessary, require revalidation of the permit at the end of the first two years of residence. Where a member of the family does not hold the nationality of a Member State, he or she shall be issued with a residence document of the same validity as that issued to the national on whom he or she depends.

For the purposes of issuing the residence permit or document, the Member State may require only that the applicant present a valid identity card or passport and provide proof that he or she meets the conditions laid down in Article 1.’

4 Under Article 3 of that directive, the right of residence is to remain for as long as the beneficiaries of that right fulfil the conditions laid down in Article 1 of the directive.

5 Article 4 of Directive 68/360 provides:

‘1. Member States shall grant the right of residence in their territory to the persons referred to in Article 1 who are able to produce the documents listed in paragraph 3.

2. As proof of the right of residence, a document entitled “Residence Permit for a National of a Member State of the EEC” shall be issued. ...

3. For the issue of a Residence Permit for a National of a Member State of the EEC, Member States may require only the production of the following documents: …'

6 The first and second subparagraphs of Article 4(1) of Directive 73/148 provide:

'Each Member State shall grant the right of permanent residence to nationals of other Member States who establish themselves within its territory in order to pursue activities as self-employed persons, when the restrictions on these activities have been abolished pursuant to the Treaty.

As proof of the right of residence, a document entitled "Residence Permit for a National of a Member State of the European Communities" shall be issued. …'

7 Article 6 of that directive provides:

'An applicant for a residence permit or [certificate] shall not be required by a Member State to produce anything other than the following, namely:

(a) the identity card or passport with which he or she entered its territory;

(b) proof that he or she comes within one of the classes of person referred to in Articles 1 and 4.'

8 Article 1 of Directive 93/96 provides:

'In order to lay down conditions to facilitate the exercise of the right of residence and with a view to guaranteeing access to vocational training in a non-discriminatory manner for a national of a Member State who has been accepted to attend a vocational training course in another Member State, the Member States shall recognise the right of residence for any student who is a national of a Member State and who does not enjoy that right under other provisions of Community law, and for the student's spouse and their dependent children, where the student assures the relevant national authority, by means of a declaration or by such alternative means as the student may choose that are at least equivalent, that he has sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence, provided that the student is enrolled in a recognised educational establishment for the principal purpose of following a vocational training course there and that he is covered by sickness insurance in respect of all risks in the host Member State.'

9 Under the second and third subparagraphs of Article 2(1) of that directive:

'The right of residence shall be evidenced by means of the issue of a document known as a "Residence permit for a national of a Member State of the Community", …

For the purpose of issuing the residence permit or document, the Member State may require only that the applicant present a valid identity card or passport and provide proof that he or she meets the conditions laid down in Article 1.'

10 The first subparagraph of Article 1(1) of Directive 90/365 provides:

'Member States shall grant the right of residence to nationals of Member States who have pursued an activity as an employee or self-employed person and to members of their families as defined in paragraph 2, provided that they are recipients of an invalidity or early retirement pension, or old age benefits, or of a pension in respect of an industrial accident or disease of an amount sufficient to avoid becoming a burden on the social security system of the host Member State during their period of residence and provided they are covered by sickness insurance in respect of all risks in the host Member State.'

11 Article 2(1) of that directive provides:

‘Exercise of the right of residence shall be evidenced by means of the issue of a document known as a “Residence permit for a national of a Member State of the EEC” …

For the purposes of issuing the residence permit or document, the Member State may require only that the applicant present a valid identity card or passport and provide proof that he or she meets the conditions laid down in Article 1.’

National legislation

12 The conditions governing the residence of citizens of the Union in Belgium are laid down in the Royal Decree of 8 October 1981 on foreigners’ entry into, residence and establishment in, and expulsion from Belgium (*Moniteur belge* of 27 October 1981, p. 1), as amended by the Royal Decree of 12 June 1998 (*Moniteur belge* of 21 August 1998, p. 26854; ‘the Royal Decree’).

13 As regards the right of residence of nationals of Member States under Directive 90/364, Article 53 of the Royal Decree provides:

‘1. An EC foreign national … has a right to live in the Kingdom provided that he is covered by sickness insurance in respect of all risks in Belgium and provided that he has sufficient resources not to become a burden on the public authorities.

2. …

Before the end of the fifth month after the application for establishment an EC foreign national must provide evidence that he meets the conditions laid down in paragraph 1.

…

4. The Minister or his deputy shall refuse establishment where the conditions for establishment are not met. The mayor or his deputy shall refuse establishment where the documents required have not been produced within the prescribed period [of five months].

In both cases, the foreign national shall be notified of the decision by service of a document … where appropriate including an order to leave the territory.

…

6. Where establishment is refused pursuant to paragraph 4, at the end of the fifth month following the application … the EC foreign national shall be given an order to leave the territory. The order to leave the territory is enforceable 15 days after expiry of the validity of the registration certificate.’

14 Article 5(3)(b)(1) of the circular of 14 July 1998 concerning the conditions of residence of EC foreign nationals and members of their families and foreign family members of Belgian nationals (*Moniteur belge* of 21 August 1998, p. 27032) confirms that, if the necessary evidence is not produced within the prescribed period, the administration is bound not only to refuse residence but also to serve an order to leave Belgian territory.

15 As regards the right of residence of employed or self-employed persons, Article 45 of the Royal Decree provides:

‘1. An EC foreign national who comes to Belgium in order to pursue an activity as an employed or self-employed person … shall … be registered in the Foreigners’ Register and be issued with a registration certificate ... valid for five months from the date of its issue.

…

Before the end of the fifth month following the application, an EC foreign national must produce either an employer's certificate ... if he is pursuing, or intends to pursue, an activity as an employed person, or the documents required for the exercise of a profession if he is pursuing, or intends to pursue, an activity as a self-employed person.

…

3. The Minister or his deputy shall refuse to allow establishment if the conditions for establishment are not met. The mayor or his deputy shall refuse to allow establishment where the documents required are not produced within the period prescribed in paragraph 1(3).

In both cases, the foreign national will receive notification of the decision, … containing, where appropriate, an order to leave Belgian territory.

…

5. … The order to leave the territory shall be enforceable 30 days after expiry of the validity of the registration certificate.

…'

16 Similarly, as regards employed or self-employed persons who have ceased their professional activity, Article 51(4) of the Royal Decree provides that the foreign national is to be served with the decision refusing establishment together with an order to leave the territory where the required documents have not been produced before the end of the fifth month following the application for establishment. The order to leave the territory is enforceable 15 days after expiry of the validity of the registration certificate.

17 As regards the right of residence of students, Article 55 of the Royal Decree provides that where the Member State national provides no supporting documents to establish that he meets the conditions for residence within the period of three months following his application for residence, the local authority is to serve him with a decision terminating his residence and ordering him to leave the territory.

The pre-litigation procedure

18 According to the case-file, the Commission received various complaints about Belgian legislation and administrative practice concerning both the conditions for granting residence permits under Directive 90/364 and orders to leave Belgian territory issued to citizens of the Union.

19 It states that it was particularly struck by the situation of Mrs De Figueiredo, a Portuguese national who came to Belgium with her three daughters in August 1999 to live with her long-standing partner, a Belgian national. The declaration of entry drawn up on 30 August 1999 indicates that residence was authorised until 29 October 1999. At the same time, Mrs De Figueiredo's partner gave an undertaking to support her.

20 On 16 December 1999, an order to leave Belgian territory was served on Mrs De Figueiredo on the ground that she had remained in Belgium after the expiry date appearing on the declaration of entry. The Belgian authorities took the view that she did not fulfil the requirement of sufficient resources laid down in Article 1 of Directive 90/364, stating that the undertaking to support her given by her partner did not constitute evidence that she had sufficient resources.

21 Following correspondence between the Belgian authorities and the Commission, the Commission sent a letter of formal notice on 8 May 2001 informing the Kingdom of Belgium that it took the view that resources other than the personal resources of the person seeking a residence permit could be taken into account. Moreover, as regards the order to leave Belgian territory, the Commission took issue with the automatic nature under Belgian law of the

administration's decision to issue such an order once a failure to produce the supporting documents necessary to obtain a residence permit was recorded.

22 In their reply to the letter of formal notice, the Belgian authorities stated that, in their view, the first subparagraph of Article 1(1) of Directive 90/364 implied that a citizen of the Union who relied on the protection of the directive had to have sufficient personal resources.

23 The authorities argued that the income of a third party could also be taken into account provided that it belonged to the spouse and/or children of the citizen of the Union relying on Directive 90/364. The connection between that citizen and the person he claims to be the source, even if only in part, of his income must be one regulated by law so that the host Member State can be sure that that person is bound by a legal obligation to support that citizen of the Union financially.

24 Moreover, the Belgian authorities stated that they considered themselves entitled to take steps to deport a citizen of the Union who resided in Belgium for more than three months without commencing the procedure for establishment or who did not produce the documents required to support the application for establishment made.

25 Taking the view that the arguments relied on by the Kingdom of Belgium in reply to the letter of formal notice were not satisfactory, the Commission sent a reasoned opinion to that Member State on 3 April 2002, calling on it to take the measures necessary to comply with the opinion within two months of the date of its notification.

26 As it was not satisfied with the reply of the Kingdom of Belgium to that reasoned opinion, the Commission brought this action.

27 By order of the President of the Court of 9 March 2004, the United Kingdom of Great Britain and Northern Ireland was granted leave to intervene in support of the form of order sought by the Kingdom of Belgium.

The action

The first plea, concerning the requirement that the citizen of the Union must have sufficient personal resources

Arguments of the parties

28 The Commission submits that the first subparagraph of Article 1(1) of Directive 90/364 in no way requires that a citizen of the Union must have sufficient personal resources for himself and his family.

29 That literal interpretation of that provision is borne out by the purpose of Directive 90/364 which is to prevent the holder of a right of residence or the members of his family becoming a burden on the social security system of the host Member State. The Commission submits that, to achieve that purpose, it is irrelevant whether the resources are the personal resources of the holder of the right of residence or come from another source.

30 For instance, such resources might be, or be supplemented by, those of a relative or a third party, such as a person living with the holder of the right of residence or offering himself as a guarantor for the holder, provided that appropriate supporting documents are supplied. The Commission considers that the distinction made by the Belgian authorities regarding the source of the income according to whether or not it comes from persons with whom the citizen of the Union has a legal connection is artificial and has no foundation in Community law.

31 The Commission concludes that, in requiring a citizen of the Union to have sufficient personal resources for himself and his family, the Belgian authorities are in breach of Article 18 EC and fail to observe the principle of proportionality in applying the condition relating to the existence of sufficient resources laid down by Directive 90/364.

32 Having initially taken a firm position, the Kingdom of Belgium relaxed its position in its rejoinder, accepting that a partner's resources could be taken into account, but only where that partner had undertaken by contract to make them available to the citizen of the Union by means of an agreement made before a notary and containing an assistance clause.

33 As regards the source of those resources, the United Kingdom submits that an applicant for a residence permit must have sufficient personal resources and may not rely on the resources of a member of his family in that regard.

Findings of the Court

– Preliminary observations

34 The right to reside within the territory of the Member States under Article 18(1) EC is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty subject to the limitations and conditions laid down by the EC Treaty and by the measures adopted to give it effect (Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraphs 84 and 85).

35 For the purposes of the present case, those limitations and conditions derive from Directive 90/364.

36 According to the first subparagraph of Article 1(1) of that directive, Member States may require of nationals of another Member State who wish to enjoy a right of residence on their territory that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of that State during their period of residence.

37 Those conditions, read in the light of the fourth recital in the preamble to that directive, according to which beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State, are based on the idea that the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the Member States (*Baumbast and R*, paragraph 90).

– Consideration of the first plea

38 By its first plea, the Commission complains that the Kingdom of Belgium took into account, for the purposes of applying Directive 90/364, only the personal resources of the citizen of the Union who is seeking a right of residence or those of the spouse or of a child of that citizen to the exclusion of resources of a third person, such as a partner with whom he has no legal link.

39 It must be borne in mind that it is settled case-law that the limitations and conditions laid down in the first subparagraph of Article 1(1) of Directive 90/364 must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality. That means that national measures adopted on that subject must be necessary and appropriate to attain the objective pursued (see *Baumbast and R*, paragraph 91).

40 In paragraphs 30 and 31 of its judgment in Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, the Court held that according to the very terms of the first subparagraph of Article 1(1) of Directive 90/364, it is sufficient for the nationals of Member States to 'have' the necessary resources, and that provision lays down no requirement whatsoever as to their origin. The correctness of that interpretation is reinforced by the fact that provisions laying down a fundamental principle such as that of the free movement of persons must be interpreted broadly.

41 The Court therefore held that an interpretation of the condition concerning the sufficiency of resources within the meaning of Directive 90/364 to mean that the person concerned must himself have such resources and may not rely on the resources of a member of the family accompanying him would add to that condition, as formulated in that directive, a requirement as to the origin of the resources which, not being necessary for the attainment of the objective

pursued, namely the protection of the public finances of the Member States, would constitute a disproportionate interference with the exercise of the fundamental right of freedom of movement and of residence upheld by Article 18 EC (*Zhu and Chen*, paragraph 33).

42 According to that case-law, the condition concerning the sufficiency of resources laid down in the first subparagraph of Article 1(1) of Directive 90/364 is met where the financial resources are provided by a member of the family of the citizen of the Union.

43 It must be examined whether the same conclusion is called for where a citizen of the Union intends to rely on the income of his partner who resides in the host Member State.

44 Consideration of that question essentially focuses on the source of such income, as the authorities of the host Member State are, in any event, entitled to undertake the necessary checks as to its existence, amount and availability.

45 The Kingdom of Belgium accepts that such income may be taken into account where it comes from a person connected with the beneficiary by a legal link which obliges him to provide for the beneficiary. It contends that such a requirement is justified by the fact that, if account were taken of the income of a person whose link with the citizen of the Union was not legally defined and could, therefore, be severed easily, the risk of that citizen becoming a burden for the social security system of the host Member State after a certain time would be all the greater.

46 Such a justification cannot be accepted, as the requirement of a legal link, as advocated by the Kingdom of Belgium, between the provider and the recipient of the resources is disproportionate in that it goes beyond what is necessary to achieve the purpose of Directive 90/364, which is the protection of the public finances in the host Member State.

47 The loss of sufficient resources is always an underlying risk, whether those resources are personal or come from a third party, even where that third party has undertaken to support the holder of the residence permit financially. The source of those resources thus has no automatic effect on the risk of such a loss arising, as the materialisation of such a risk is the result of a change of circumstances.

48 It is for that reason that, in order to protect the legitimate interests of the host Member State, Directive 90/364 contains provisions allowing that State to act in the event of an actual loss of financial resources, to prevent the holder of the residence permit from becoming a burden on the public finances of that State.

49 Thus, Article 3 of Directive 90/364 provides that the right of residence is to remain for as long as beneficiaries of that right fulfil the conditions laid down in Article 1 of that directive.

50 That provision enables the host Member State to monitor whether citizens of the Union who enjoy a right of residence continue to meet the conditions laid down for that purpose by Directive 90/364 throughout the period of their residence. In addition, the first subparagraph of Article 2(1) of that directive allows the Member States, when they deem it to be necessary, to require revalidation of the permit at the end of the first two years of residence.

51 It follows from all those considerations that, by excluding the income of a partner residing in the host Member State in the absence of an agreement concluded before a notary and containing an assistance clause, the Kingdom of Belgium has failed to fulfil its obligations under Article 18 EC and Directive 90/364 when applying that directive to nationals of a Member State who wish to rely on their rights under that directive and on Article 18 EC.

52 Accordingly, it must be held that the first plea relied on by the Commission is well founded.

The second plea, concerning the order to leave the territory served on citizens of the Union who have not produced the documents required for the issue of a residence permit within the time specified

Arguments of the parties

53 The Commission submits that a citizen of the Union can only be deported, other than in the case of decisions on grounds of public policy, public security or public health, if the person concerned does not meet the conditions laid down by Community law for the grant of a right of residence or no longer meets those conditions.

54 The deportation order served by the Belgian authorities on the citizen of the Union in this case was actually a penalty imposed because the applicant had failed to produce within the prescribed period the documents required for the issue of a residence permit.

55 The Commission takes the view that the fact that the person concerned did not comply with the necessary administrative requirements for the issue of a residence permit does not necessarily mean that she does not in fact meet the conditions laid down by Community law for the recognition of the right of residence. The automatic service of an order to leave Belgian territory is thus contrary to Article 2 of Directive 90/364, Article 4 of Directive 68/360, Article 4 of Directive 73/148, Article 2 of Directive 93/96 and Article 2 of Directive 90/365.

56 In its defence, the Kingdom of Belgium contends that a national of a Member State may reside for more than three months in another Member State only if he meets the conditions laid down by the various regulations and directives on freedom of movement. Provided that he meets those conditions, which can be established only by production of the documents required by those regulations and directives, he enjoys the protection granted by them and can be issued with a residence permit which certifies his right to freedom of movement.

57 Production of the supporting documents to prove that those conditions are met is, the Kingdom of Belgium argues, a condition *sine qua non* for the exercise of the right of residence.

58 Consequently, if the citizen of the Union has not produced, within the prescribed period, in this case, five months, the documents required to establish that he meets the conditions laid down for the recognition of his right of residence, he must be deemed to have resided for more than three months in Belgium without valid reason and, in those circumstances, a deportation order is justified.

59 However, the Kingdom of Belgium points out that the deportation order is qualified. It is not enforced by coercive measures and is intended, by bringing to a close the procedure for the application of a residence permit, to establish that the citizen of the Union concerned has no document authorising him to remain on Belgian territory for more than three months.

60 It points out, further, that there is nothing to prevent the person concerned from initiating a fresh procedure for establishment in the course of which he can adduce evidence that he meets the conditions for residence.

61 The United Kingdom contends that, where an applicant for a residence permit does not produce the necessary evidence within the prescribed period, the competent national authority must be entitled to take an unfavourable decision as regards that applicant.

Findings of the Court

– Preliminary observations

62 The right of nationals of a Member State to enter the territory of another Member State and reside there for the purposes intended by the Treaty is a right conferred directly by the Treaty, or, as the case may be, by the provisions adopted for its implementation (see Case 48/75 *Royer* [1976] ECR 497, paragraph 31).

63 The grant of a residence permit to a national of a Member State is to be regarded not as a measure giving rise to rights but as a measure by a Member State serving to prove the individual position of a national of another Member

State with regard to provisions of Community law (see *Royer*, paragraph 33, and Case C-459/99 *MRAX* [2002] ECR I-6591, paragraph 74).

64 However, as the right of residence under Article 18 EC is not unconditional, it is for the citizens of the Union to adduce the necessary evidence that they meet the conditions laid down in that regard by the relevant Community provisions.

65 The conditions for the grant of a residence permit are governed, as regards employed persons, by Directive 68/360, as regards self-employed persons, by Directive 73/148, as regards students, by Directive 93/96, as regards employees and self-employed persons who have ceased their occupational activity, by Directive 90/365, and, as regards nationals of Member States who do not enjoy a right of residence under other provisions of Community law, by Directive 90/364.

– **Consideration of the second plea**

66 Only if a national of a Member State is not able to prove that those conditions are fulfilled may the host Member State undertake deportation subject to the limits imposed by Community law (see Case C-215/03 *Oulane* [2005] ECR I-1215, paragraph 55).

67 By its second plea, the Commission takes issue with the Belgian legislation because, under it, failure by the national of a Member State to produce, within a specified period, the supporting documents necessary for the grant of a residence permit automatically entails the service of an order for deportation.

68 Such automatic deportation impairs the very substance of the right of residence directly conferred by Community law. Even if a Member State may, where necessary, decide to deport a national of another Member State where that person is unable to produce, within the required period, the documents proving that he fulfils the necessary financial conditions, where that deportation is automatic, as it is under the Belgian legislation, it is disproportionate.

69 Since the order for deportation is automatic, that legislation does not allow account to be taken of the reasons why the person concerned did not take the necessary administrative measures or of whether he was able to establish that he fulfilled the conditions which Community law attached to his right of residence.

70 In that regard, it is of no relevance that there is in practice no immediate enforcement of orders for deportation. The Belgian legislation, notably Articles 45, 51 and 53 of the Royal Decree, provides for time-limits on expiry of which the orders for deportation issued are enforceable. In any event, the fact that the deportation orders are allegedly qualified does not alter the fact that those measures are disproportionate to the seriousness of the infringement and are liable to deter citizens of the Union from exercising their right to freedom of movement.

71 In view of the foregoing, the Court finds that the second plea relied on by the Commission is well founded.

72 Accordingly, it must be held that:

– by excluding the income of a partner residing in the host Member State in the absence of an agreement concluded before a notary and containing an assistance clause, the Kingdom of Belgium has failed to fulfil its obligations under Article 18 EC and Directive 90/364 when applying that directive to nationals of a Member State who wish to rely on their rights under that directive and on Article 18 EC,

– by making provision for automatic service of an order to leave Belgian territory on citizens of the Union who do not produce within the prescribed period the documents required to obtain a residence permit, the Kingdom of Belgium has failed to fulfil its obligations under Article 2 of Directive 90/364, Article 4 of Directive 68/360, Article 4 of Directive 73/148, Article 2 of Directive 93/96 and Article 2 of Directive 90/365.

Costs

73 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Belgium has been unsuccessful, the latter must be ordered to pay the costs. Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, the Member States which have intervened in the proceedings must bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. Declares that

(a) by excluding the income of a partner residing in the host Member State in the absence of an agreement concluded before a notary and containing an assistance clause, the Kingdom of Belgium has failed to fulfil its obligations under Article 18 EC and Council Directive 90/364/EEC of 28 June 1990 on the right of residence when applying that directive to nationals of a Member State who wish to rely on their rights under that directive and on Article 18 EC,

(b) by making provision for automatic service of an order to leave Belgian territory on citizens of the Union who do not produce within the prescribed period the documents required to obtain a residence permit, the Kingdom of Belgium has failed to fulfil its obligations under Article 2 of Directive 90/364, Article 4 of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, Article 4 of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, Article 2 of Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students and Article 2 of Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity;

2. Orders the Kingdom of Belgium to pay the costs;
3. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.

Joined Cases C-22/08 and C-23/08: Athanasios Vatsouras (C-22/08), Josif Koupatantze (C-23/08) v Arbeitsgemeinschaft (ARGE) Nürnberg 900

JUDGMENT OF THE COURT (Third Chamber)

4 June 2009 (*)

(European citizenship – Free movement of persons – Articles 12 EC and 39 EC – Directive 2004/38/EC – Article 24(2) – Assessment of validity – Nationals of a Member State – Professional activity in another Member State – Level of remuneration and duration of the activity – Retention of the status of 'worker' – Right to receive benefits in favour of job-seekers)

In Joined Cases C-22/08 and C-23/08,

REFERENCES for a preliminary ruling under Article 234 EC from the Sozialgericht Nürnberg (Germany), made by decisions of 18 December 2007, received at the Court on 22 January 2008, in the proceedings

Athanasios Vatsouras (C-22/08),

Josif Koupatantze (C-23/08)

v

Arbeitsgemeinschaft (ARGE) Nürnberg 900,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Ó Caoimh, J.N. Cunha Rodrigues (Rapporteur), U. Lõhmus and P. Lindh, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 4 February 2009,

after considering the observations submitted on behalf of:

– the German Government, by M. Lumma and C. Blaschke, acting as Agents,

– the Danish Government, by J. Bering Liisberg and B. Weis Fogh, acting as Agents,

– the Netherlands Government, by C. Wissels and M. de Grave, acting as Agents,

– the United Kingdom Government, by I. Rao and J. Coppel, acting as Agents,

– the European Parliament, by E. Perillo, A. Auersperger Matić and U. Rösslein, acting as Agents,

– the Council of the European Union, by M. Veiga and M. Simm, acting as Agents,

– the Commission of the European Communities, by D. Maidani and F. Hoffmeister, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 March 2009,

gives the following

Judgment

1 The references for a preliminary ruling in the present cases concern the interpretation of Articles 12 EC and 39 EC and the validity of Article 24(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda (OJ 2004 L 229, p. 35, OJ 2005 L 197, p. 34, and OJ 2007 L 204, p. 28)).

2 The references have been made in the course of proceedings between Mr Vatsouras and Mr Koupatantze, on the one hand, and the Arbeitsgemeinschaft (ARGE) Nürnberg 900 (Job Centre, Nuremberg 900) ('the ARGE'), on the other, concerning the withdrawal of basic benefits in favour of job-seekers which Mr Vatsouras and Mr Koupatantze had been receiving.

Legal framework

Community legislation

3 Recitals 1 and 9 in the preamble to Directive 2004/38 are worded as follows:

'(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

…

(9) Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case-law of the Court of Justice.'

4 Article 6 of Directive 2004/38 states:

'1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.'

5 Article 7 of Directive 2004/38 provides:

'1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; … .

…

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

…

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

… ’

6 Article 14 of that directive provides in particular:

‘1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

…

4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

…

(b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.’

7 Article 24 of Directive 2004/38 provides:

‘1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.’

National legislation

8 Paragraph 7(1) of Book II of the German Code of Social Law – Benefits in favour of job-seekers (Sozialgesetzbuch II) (‘the SGB II’) provides:

‘Under this Book benefits shall be received by people who:

1. have attained the age of 15 and have not yet attained the age of 65,

2. are capable of earning a living,

3. are in need of assistance and

4. whose ordinary place of residence is in the Federal Republic of Germany … .

The following are excluded …

(2) foreign nationals whose right of residence arises solely out of the search for employment, their family members and those entitled to benefits under Paragraph 1 of the Asylbewerberleistungsgesetz (Law on the benefits to be granted to asylum-seekers). Provisions relating to the right of residence are unaffected.’

9 Under Paragraph 23(3) of Book XII of the German Code of Social Law – Social assistance for foreign nationals (Sozialgesetzbuch XII), foreign nationals who have entered the country in order to obtain social assistance or whose right of residence arises solely out of the search for employment have no right to social assistance benefits.

10 Paragraph 1 of the Asylbewerberleistungsgesetz provides:

‘1 Those entitled to benefits under this Law are foreign nationals who actually reside in the Federal Republic of Germany and who

(1) possess a temporary residence permit for asylum-seekers under the Asylverfahrengesetz (Law on asylum proceedings).

…’

The actions in the main proceedings and the questions referred for preliminary ruling

Case C-22/08

11 Mr Vatsouras, who was born on 10 December 1973 and is a Greek national, arrived in Germany in March 2006.

12 On 10 July 2006, he applied to the ARGE for entitlement to benefits under the SGB II. By decision of the ARGE of 27 July 2006, those benefits were granted to him until 30 November 2006. The income received by Mr Vatsouras in respect of his professional activity was deducted from the amount of the benefits at issue, with the result that those benefits amounted to EUR 169 per month. By decision of the ARGE of 29 January 2007, entitlement to those benefits was extended up to 31 May 2007.

13 Mr Vatsouras’ professional activity concluded at the end of January 2007.

14 By decision of 18 April 2007, the ARGE brought those benefits to an end, with effect from 30 April 2007. The objection filed by Mr Vatsouras against that decision was dismissed by decision of the ARGE of 4 July 2007 on the ground that Mr Vatsouras did not have a right to the benefits under point 2 of the second sentence of Paragraph 7(1) of the SGB II. Mr Vatsouras appealed against that decision to the Sozialgericht Nürnberg (Social Court, Nuremberg).

15 In the intervening period, on 4 June 2007, Mr Vatsouras recommenced professional activity which allowed him to be no longer dependent on social assistance.

16 Mr Koupatantze, who was born on 15 May 1952, is a Greek national.

17 He entered Germany in October 2006 and accepted employment on 1 November 2006. His employment contract ended on 21 December 2006, the employer invoking a shortage of orders.

18 On 22 December 2006, Mr Koupatantze applied to the ARGE for basic benefits in favour of job-seekers under the SGB II. By decision of the ARGE of 15 January 2007, benefits in the amount of EUR 670 per month were granted to him up to 31 May 2007. However, by decision of 18 April 2007, the ARGE ended payment of those benefits with effect from 28 April 2007.

19 The objection filed by Mr Koupatantze against that decision was dismissed by decision of the ARGE of 11 May 2007, on the ground that he was not entitled to benefits under point 2 of the second sentence of Paragraph 7(1) of the SGB II. Mr Koupatantze appealed against that decision to the referring court.

20 As of 1 June 2007, Mr Koupatantze again took up a professional activity which allowed him to be no longer dependent on social assistance.

The questions referred for preliminary ruling

21 On 18 December 2007, the Sozialgericht Nürnberg decided to stay the respective proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Is Article 24(2) of Directive 2004/38 … compatible with Article 12 EC, read in conjunction with Article 39 EC?

2. If the answer to Question 1 is in the negative, does Article 12 EC, read in conjunction with Article 39 EC, preclude national rules which exclude Union citizens from receipt of social assistance if the maximum period of residence permitted under Article 6 of Directive 2004/38 … has been exceeded and there is no right of residence under other provisions?

3. If the answer to Question 1 is in the affirmative, does Article 12 EC preclude national rules which exclude nationals of Member States of the European Union even from receipt of the social assistance benefits which are granted to illegal immigrants?’

22 By order of the President of the Court of 7 April 2008, Case C-22/08 and Case C-23/08 were joined for the purposes of the written and oral procedure and of the judgment.

The questions referred for preliminary ruling

Preliminary observations

23 Although, as regards the division of jurisdiction between the Community judicature and national courts, it is in principle for the national court to determine whether the factual conditions triggering the application of a Community rule are fulfilled in the case pending before it, the Court, when giving a preliminary ruling, may, where appropriate, provide clarification to guide the national court in its interpretation (see, to that effect, Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 58).

24 As is apparent from the orders for reference, the questions referred are based on the premiss that, at the time material to the main proceedings, Mr Vatsouras and Mr Koupatantze did not have the status of ‘worker’ within the meaning of Article 39 EC.

25 The referring court found that the 'brief minor' professional activity engaged in by Mr Vatsouras 'did not ensure him a livelihood' and that the activity pursued by Mr Koupatantze 'lasted barely more than one month'.

26 It must be pointed out in that regard that, according to settled case-law, the concept of 'worker' within the meaning of Article 39 EC has a specific Community meaning and must not be interpreted narrowly. Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see, inter alia, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17, and Case C-228/07 *Petersen* [2008] ECR I-0000, paragraph 45).

27 Neither the origin of the funds from which the remuneration is paid nor the limited amount of that remuneration can have any consequence in regard to whether or not the person is a 'worker' for the purposes of Community law (see Case 344/87 *Bettray* [1989] ECR 1621, paragraph 15, and Case C-10/05 *Mattern and Cikotic* [2006] ECR I-3145, paragraph 22).

28 The fact that the income from employment is lower than the minimum required for subsistence does not prevent the person in such employment from being regarded as a 'worker' within the meaning of Article 39 EC (see Case 53/81 *Levin* [1982] ECR 1035, paragraphs 15 and 16, and Case C-317/93 *Nolte* [1995] ECR I-4625, paragraph 19), even if the person in question seeks to supplement that remuneration by other means of subsistence such as financial assistance drawn from the public funds of the State in which he resides (see Case 139/85 *Kempf* [1986] ECR 1741, paragraph 14).

29 Furthermore, with regard to the duration of the activity pursued, the fact that employment is of short duration cannot, in itself, exclude that employment from the scope of Article 39 EC (see Case C-3/90 *Bernini* [1992] ECR I-1071, paragraph 16, and Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187, paragraph 25).

30 It follows that, independently of the limited amount of the remuneration and the short duration of the professional activity, it cannot be ruled out that that professional activity, following an overall assessment of the employment relationship, may be considered by the national authorities as real and genuine, thereby allowing its holder to be granted the status of 'worker' within the meaning of Article 39 EC.

31 Were the referring court to reach such a conclusion in regard to the activities pursued by Mr Vatsouras and Mr Koupatantze, the latter would have been able to retain the status of workers for at least six months, subject to compliance with the conditions laid down in Article 7(3)(c) of Directive 2004/38. The national court alone is responsible for factual assessments of this kind.

32 If Mr Vatsouras and Mr Koupatantze had retained the status of workers, they would have had the right to benefits such as those provided for by the SGB II, in accordance with Article 24(1) of Directive 2004/38, during that period of at least six months.

The first question

33 By this question, the referring court asks whether Article 24(2) of Directive 2004/38 is compatible with Article 12 EC, read in conjunction with Article 39 EC.

34 Article 24(2) of Directive 2004/38 establishes a derogation from the principle of equal treatment enjoyed by Union citizens other than workers, self-employed persons, persons who retain such status and members of their families, who reside within the territory of the host Member State.

35 Under that provision, the host Member State is not obliged to confer entitlement to social assistance on, among others, job-seekers for the longer period during which they have the right to reside there.

36 Nationals of a Member State seeking employment in another Member State fall within the scope of Article 39 EC and therefore enjoy the right to equal treatment laid down in paragraph 2 of that provision (Case C-258/04 *Ioannidis* [2005] ECR I-8275, paragraph 21).

37 Furthermore, in view of the establishment of citizenship of the Union and the interpretation of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 39(2) EC a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State (Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 63, and *Ioannidis*, paragraph 22).

38 It is, however, legitimate for a Member State to grant such an allowance only after it has been possible to establish a real link between the job-seeker and the labour market of that State (Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 38, and *Ioannidis*, paragraph 30).

39 The existence of such a link can be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question (*Collins*, paragraph 70).

40 It follows that nationals of the Member States seeking employment in another Member State who have established real links with the labour market of that State can rely on Article 39(2) EC in order to receive a benefit of a financial nature intended to facilitate access to the labour market.

41 It is for the competent national authorities and, where appropriate, the national courts not only to establish the existence of a real link with the labour market, but also to assess the constituent elements of that benefit, in particular its purposes and the conditions subject to which it is granted.

42 As the Advocate General has noted in point 57 of his Opinion, the objective of the benefit must be analysed according to its results and not according to its formal structure.

43 A condition such as that in Paragraph 7(1) of the SGB II, under which the person concerned must be capable of earning a living, could constitute an indication that the benefit is intended to facilitate access to employment.

44 In any event, the derogation provided for in Article 24(2) of Directive 2004/38 must be interpreted in accordance with Article 39(2) EC.

45 Benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of Article 24(2) of Directive 2004/38.

46 In the light of the foregoing, the answer must be that, with respect to the rights of nationals of Member States seeking employment in another Member State, examination of the first question has not disclosed any factor capable of affecting the validity of Article 24(2) of Directive 2004/38.

The second question

47 In the light of the answer given to the first question, it is not necessary to answer the second question.

The third question

48 By this question, the referring court asks whether Article 12 EC precludes national rules which exclude nationals of Member States of the European Union from receipt of social assistance benefits which are granted to illegal immigrants.

49 In relation to that question, the referring court cites provisions of the Asylbewerberleistungsgesetz, point (1) of Paragraph 1(1) of which provides that foreign nationals actually residing within the territory of the Federal Republic of Germany are entitled to those benefits where they possess a temporary residence permit for asylum-seekers.

50 That question should, therefore, be construed as meaning that the referring court is essentially asking whether Article 12 EC precludes national rules which exclude nationals of Member States from receipt of social assistance benefits in cases where those benefits are granted to nationals of non-member countries.

51 The first paragraph of Article 12 EC prohibits, within the scope of application of the EC Treaty, and without prejudice to any provisions contained therein, any discrimination on grounds of nationality.

52 That provision concerns situations coming within the scope of Community law in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely on the basis of his nationality and is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries.

53 The answer to the third question, therefore, must be that Article 12 EC does not preclude national rules which exclude nationals of Member States of the European Union from receipt of social assistance benefits which are granted to nationals of non-member countries.

Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **With respect to the rights of nationals of Member States seeking employment in another Member State, examination of the first question has not disclosed any factor capable of affecting the validity of Article 24(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.**

2. **Article 12 EC does not preclude national rules which exclude nationals of Member States of the European Union from receipt of social assistance benefits which are granted to nationals of non-member countries.**

Case C-73/08: Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française

OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 25 June 2009 (1)

Case C-73/08

Nicolas Bressol and Others

and

Céline Chaverot and Others

v

Gouvernement de la Communauté française

(Reference for a preliminary ruling from the Cour constitutionnelle (Belgium))

(Higher education – Public health – Numerus clausus – Residence requirement – Equal treatment – Principle of non-discrimination – Justifications)

1. Students have wanted to pursue (part of) their education outside their country of origin throughout a significant part of European history. (2) This reference raises, not for the first time, the question whether the host State can limit the number of foreign students that may enter its education system.

2. In this reference from the Cour constitutionnelle (Constitutional Court) (Belgium), the Court is asked to interpret the first paragraph of Article 12 and Article 18(1) EC, in conjunction with Article 149(1), the second indent of Article 149(2) and the third indent of Article 150(2) EC.

3. The case before the national court concerns an action for annulment brought by a number of students, the majority of whom are French, and by teaching and administrative staff of institutions of higher education of the Communauté française de Belgique (French Community of Belgium; 'the French Community') against the Décret régulant le nombre d'étudiants dans certains cursus de premier cycle de l'enseignement supérieur (Decree regulating the number of students in certain programmes in the first two years of undergraduate studies in higher education; 'the Decree') adopted on 16 June 2006 by the Parlement de la Communauté française de Belgique (Parliament of the French Community of Belgium). (3)

Legal framework

International law

4. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (4) provides:

'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to … national or social origin …'

5. Article 13(2)(c) of the ICESCR provides:

‘The States Parties to the present Covenant recognise that, with a view to achieving the full realisation of [the right of everyone to education]:

…

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

…’

Community law

6. Article 2 EC provides:

‘The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community … economic and social cohesion and solidarity among Member States.’

7. Article 10 EC provides:

‘Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.’

8. Article 12(1) EC provides:

‘Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.’

9. Article 18(1) EC provides:

‘Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.’

10. Article 149(1) and (2), second indent, EC provides:

‘1. The Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.

2. Community action shall be aimed at:

…

– encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study,

…’

11. The third indent of Article 150(2) EC provides:

‘Community action shall aim to:

…

– facilitate access to vocational training and encourage mobility of instructors and trainees and particularly young people,

…’

National law

12. By its Article 1, the Decree defines who qualifies as a resident student for the purpose of the Decree: (5)

‘A resident student for the purposes of this decree is a student who, at the time of his registration in an institution of higher education, proves that his principal residence is in Belgium and that he fulfils one of the following conditions:

1° he has the right to remain permanently in Belgium;

2° he has had his principal residence in Belgium for at least six months prior to his registration in an institution of higher education, at the same time carrying on a remunerated or unremunerated professional activity or benefiting from a replacement income granted by a Belgian public service;

3° he has permission to remain for an unlimited period [in Belgium] on the basis of [the relevant Belgian legislation];

4° he has permission to remain in Belgium because he enjoys refugee status [as defined by Belgian legislation] or has submitted a request to be recognised as a refugee;

5° he has the right to reside in Belgium because he benefits from temporary protection on the basis of [the relevant Belgian legislation];

6° he has a mother, father, legal guardian, or spouse who fulfils one of the above conditions;

7° he has had his principal residence in Belgium for at least three years at the time of his registration in an institution of higher education;

8° he has been granted a scholarship for his studies within the framework of development cooperation for the academic year and for the studies for which the request for registration was introduced.

The “right to remain permanently” within the meaning of paragraph 1, 1°, means, for citizens of another Member State of the European Union, the right recognised by virtue of Articles 16 and 17 of Directive 2004/38/EC [(6)] [and], for citizens of non-Member States, the right to reside in Belgium by virtue of [the relevant Belgian legislation].’

13. Chapter II of the Decree contains provisions in relation to access to universities. Article 2 limits the number of students enrolling for the first time in a university in the French Community in a course listed in Article 3, according to the method set out in Article 4.

14. Article 3 of the Decree provides that the provisions of Chapter II apply to courses leading to bachelor’s degrees

in physiotherapy and rehabilitation and in veterinary medicine.

15. Article 4 of the Decree provides as follows:

‘For each university and for each course referred to in Article 3, there will be a total number “T” of students enrolling for the first time in the relevant course and who are taken into account for the purposes of financing, as well as a number “NR” of students enrolling for the first time in the relevant course and who are not considered to be resident within the meaning of Article 1.

When the ratio between NR, on the one hand, and T of the previous academic year, on the other hand, reaches a specified percentage “P”, the academic authorities shall refuse further registration to students who have not yet been enrolled on the relevant course and who are not considered to be resident within the meaning of Article 1.

P in the previous paragraph is fixed at 30 percent. However, when, in a particular academic year, the number of students studying in a country other than in the one where they have obtained their secondary school diploma is above 10 percent on average in all the higher education establishments of the European Union, P equals, for the next academic year, that percentage multiplied by 3.’

16. Article 5 of the Decree provides as follows:

‘[1] … students who are not considered to be resident within the meaning of Article 1 may apply for registration in a course listed in Article 3 at the earliest three working days before 2 September preceding the relevant academic year. Students … will be enrolled on a first come, first served basis.

…

[3] Each application for registration lodged starting from the 2 September preceding the academic year pursuant to the first paragraph will be recorded in a register …

[4] By derogation from the first paragraph, as regards non-resident students who present themselves in order to lodge an application for registration in one of the courses referred to in Article 3 at the latest on the last working day before the 2 September preceding the academic year, if the number of those students who have so presented themselves exceeds NR as referred to in Article 4, paragraph 2, the priority [for the purposes of enrolment] as between those students will be determined by drawing lots…

[5] Every non-resident student may only lodge one application for registration in respect of the courses referred to in Articles 3 and 7 before the 2 September preceding the academic year. Students infringing this provision will be excluded from the higher education institution to which they would have been admitted in order to follow one of the courses referred to in Articles 3 or 7.

…’

17. Chapter III contains provisions relating to schools of higher education. The first paragraph of Article 6, and Articles 8 and 9 (which form part of that chapter) contain provisions analogous to the first paragraph of Article 2, and Articles 4 and 5.

18. Article 7 of the Decree applies the provisions of Chapter III to courses leading to bachelor’s degrees in midwifery, occupational therapy, speech therapy, podiatry-chiropody, physiotherapy, audiology and educator specialised in psycho-educational counselling.

The main proceedings and the questions referred

19. According to the order for reference, the legislature of the French Community has noted for several years a large increase in the number of students enrolled for the first time in the programmes at issue. Concern has been expressed that, having regard to the budgetary, human and material resources available to the teaching institutions concerned, this is jeopardising the quality of teaching – and, because of the nature of the programmes at issue, public health.

20. In the academic year 2003/04, the number of students holding secondary school diplomas awarded by another Member State who were enrolled in other programmes not covered by the Decree represented less than 10% of enrolments. In the academic year 2004/05, it was between 41% and 75% for the programmes covered by the Decree in the schools of higher education. In the academic year 2005/06, it was between 78% and 86% for the university programmes covered by the Decree.

21. Most of the enrolled students holding secondary school diplomas obtained outside the French Community of Belgium are of French nationality. That is, according to the referring court, due to several factors.

22. First, in France admission to veterinary schools is through a national competitive examination, open only to students who have completed two years of preparatory studies after their secondary school diploma. In 2004, 329 candidates were admitted to the four national veterinary schools through that competition. That number was reduced to 221 in 2005 and increased to 436 in 2006. Generally, only one fifth of the candidates in the competitive examination are admitted.

23. Secondly, France has fixed a *numerus clausus* for physiotherapy students.

24. As a result, many French students come to study in French in the French Community of Belgium. At the end of their studies, they return to France to exercise their profession. Nearly one third of veterinarians establishing themselves in France each year have obtained their diploma in the French Community of Belgium. That does not appear to create overcrowding of the profession in France. In 2005, more than 800 students obtained diplomas in physiotherapy in the French Community of Belgium.

25. In response to this situation, the Parliament of the French Community enacted the Decree on 16 June 2006. It effectively lays down a *numerus clausus* for enrolment by non-residents and defines ‘residents’ who are not subject to the *numerus clausus* by means of a double condition. Essentially, ‘residents’ are persons who both have their principal residence in Belgium and have a right of permanent residence in Belgium.

26. Each university or school of higher education may admit only a limited number of non-resident students. That number is fixed for each course in each institution, for the academic year 2006/07, at 30% of the total number of students enrolled for the first time in the institution in the programmes concerned. Non-resident candidates may apply for enrolment only during the three working days preceding 2 September. If their number exceeds the *numerus clausus*, the successful candidates are selected by drawing lots.

27. On 9 August 2006, Mr Bressol and 43 others brought an action before the Constitutional Court seeking the annulment of the Decree. On 13 December 2006, Ms Chaverot and 18 others likewise brought an action seeking the annulment of several articles of the Decree. They challenge the difference in treatment that the Decree establishes between residents and non-residents in regard to admission to the programmes at issue.

28. On 24 January 2007, the Commission sent a letter of formal notice to Belgium, expressing concerns about the compatibility of the Decree with Community law. On 24 May 2007, Belgium replied to that letter, providing certain statistics and explanations. On 28 November 2007, considering that, without appropriate protective measures, the French Community of Belgium ran the risk of not being ‘able to maintain sufficient levels of territorial cover and quality in its public health system’, the Commission decided to suspend the procedure for five years ‘so as to permit

the Belgian authorities to provide additional information in support of the argument that the restrictive measures imposed are both necessary and proportionate'. (7)

29. The Constitutional Court has doubts as to the compatibility of Articles 4 and 8 of the Decree with various provisions of the Belgian Constitution, read in conjunction with Articles 12, paragraph 1, 18(1), 149(1) and (2), and 150(2) EC. It has therefore referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Are the first paragraph of Article 12 and Article 18(1) of the Treaty Establishing the European Community, in conjunction with Article 149(1), the second indent of Article 149(2) and the third indent of Article 150(2) thereof, to be interpreted as meaning that those provisions preclude an autonomous community in a Member State with responsibility for higher education, which is faced, as a result of a restrictive policy practised by a neighbouring Member State, with an influx of students from the neighbouring Member State in a number of programmes of study of a medical nature financed principally out of public funds, from adopting measures such as those contained in the Decree of the French Community of 16 June 2006 regulating the number of students in certain programmes in the first two years of undergraduate studies in higher education, when that community relies on valid reasons for claiming that that situation could place an excessive burden on public finances and jeopardise the quality of the education provided?

(2) Would the answer to the first question be different if that community could show that the effect of that situation is that too few students residing in the community in question obtain diplomas for there to be, over a long period, a sufficient number of qualified medical personnel to ensure the quality of the public health system in that community?

(3) Would the answer to the first question be different if that community, having regard to the last part of Article 149(1) of the Treaty and Article 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights, which contains a standstill obligation, chooses to maintain wide and democratic access to quality higher education for the population of that community?'

30. Written observations were submitted by the applicants in the main proceedings, the Austrian and Belgian Governments and the Commission.

31. A hearing was held on 3 March 2009, at which all those parties made oral submissions.

Preliminary remarks

32. Whilst Article 149(1) EC provides that Member States remain responsible for 'the content of teaching and the organisation of education systems and their cultural and linguistic diversity', the Court has made it clear that the conditions of access to vocational training fall within the scope of the Treaty. (8) It has referred in that regard to the second indent of Article 149(2) EC, which expressly provides that Community action is to be aimed at encouraging mobility of students and teachers, inter alia by encouraging the academic recognition of diplomas and periods of study and to the third indent of Article 150(2) EC, which provides that Community action should aim to facilitate access to vocational training and encourage mobility of instructors and trainees and particularly young people. (9) The Court has also held that both higher education and university education constitute vocational training. (10)

33. It is common ground that the Decree lays down conditions governing access to higher or university education in the French Community of Belgium. It therefore regulates a matter that falls within the scope of the Treaty.

34. It is equally clear that the Decree differentiates between students, classifying them as resident or non-resident depending on whether they do, or do not, fulfil certain criteria. Resident students enjoy unrestricted access to all courses. Non-resident students are subject to a *numerus clauses* for certain courses. There is therefore, self-evidently, a differentiation in treatment of the two groups of students.

35. Article 12 EC prohibits, within the scope of application of the Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality. The Decree must therefore be assessed in the light of that provision.

36. The first two questions posed by the referring Court request guidance on the applicability of three possible justifications for discriminatory treatment. The answer to those questions depends in part on whether the discrimination is direct or indirect. (11) I must therefore first clarify the nature of the discriminatory treatment at issue.

Nature of the discriminatory treatment

37. The Decree limits the number of first time enrolments in certain courses (listed in Articles 3 and 7) of non-resident students. In order to be considered resident and escape that restriction, a student must satisfy two cumulative conditions set out in Article 1 of the Decree: (i) he must show that his principal residence is in Belgium; (ii) he needs to fulfil one of eight further conditions listed there. (12)

38. The order for reference makes it clear that, because all Belgian nationals enjoy (by virtue of their nationality) a right to remain permanently in Belgium within the meaning of the first paragraph of Article 1 of the Decree, they will automatically fulfil the two cumulative conditions for being regarded as 'residents' as long as they have their principal residence in Belgium at the time of their enrolment application. (13)

39. Conversely, for any prospective student who is not a Belgian national, the second cumulative condition presents a real obstacle. In order to satisfy that condition, EU citizens who do not have Belgian nationality may claim the right to 'reside permanently in Belgium' only within the limits laid down in Directive 2004/38, that is to say, essentially, after a continuous period of lawful residence in Belgium of five years. (14) If they cannot do so (and cannot satisfy any of the seven other criteria), they will be classified as non-resident. That is, indeed, precisely the purpose of the Decree.

40. Is this difference in treatment direct or indirect discrimination based on nationality?

41. In its letter of formal notice of 24 January 2007, (15) the Commission took the view that, because Belgian nationals merely have to establish their residence in Belgium to satisfy the condition in the first paragraph of Article 1 of the Decree, while all others have to satisfy an additional condition, the discrimination is direct. The Commission did not pursue this line of argument in the present proceedings, contenting itself (as did all other parties) with examining the questions referred on the basis of indirect discrimination. However, I do not believe that the Court can or should avoid the issue.

42. For clarity's sake, I shall analyse the two conditions imposed by the Decree separately. I must, however, first explain what I take to be the essential distinction between direct and indirect discrimination.

The distinction between direct and indirect discrimination

43. Rather surprisingly, the Court's case-law contains no clear definition of 'direct discrimination'. What is meant by that concept must therefore be deduced from the Court's pronouncements on the general principle of equality and on the concept of indirect discrimination.

44. The classic phrase used by the Court to define the general principle of equal treatment, as a general principle of Community law, is that that principle requires 'that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified'. (16) That appears to apply

to both forms of discrimination. (17)

45. The definitions of direct discrimination in the Sex Discrimination Directive, (18) the Race Discrimination Directive (19) and the Equal Treatment Framework Directive (20) likewise provide little assistance. Essentially, these define direct discrimination as occurring where one person is treated less favourably on any of the prohibited grounds than another person is, has been or would be treated in a comparable situation. (21) These definitions may be contrasted with the definitions, in each directive, of indirect discrimination. Indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons with a characteristic that may not serve to draw distinctions at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. (22)

46. Even so, the distinction between direct and indirect discrimination lacks precision.

47. The problem lies, in my view, in determining *precisely* what constitutes 'an apparently neutral provision'. That key phrase appears to be inextricably bound up with the concept of 'covert discrimination' which appears elsewhere in the Court's case-law.

48. The Court has held that 'the principle of equal treatment, of which the prohibition on any discrimination on grounds of nationality in the first paragraph of Article 12 EC is a specific instance, prohibits not only *overt* discrimination by reason of nationality but also all *covert* forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result'. (23) That formula is frequently coupled with a phrase setting out possible justifications for indirect discrimination. For example, as regards migrant workers, the Court has held that unless 'it is objectively justified and proportionate to the aim pursued, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage'. (24)

49. The Court therefore appears to regard the difference between 'overt' and 'covert' discrimination as the crux of what distinguishes direct from indirect discrimination. This may be seen even more clearly in the judgment in the second *Defrenne* case (the start of the Court's case-law on sex discrimination), where the Court referred to 'direct and overt discrimination' and contrasted it with 'indirect and disguised discrimination'. (25)

50. I must confess that I do not find it helpful to draw the distinction in this manner. (26) It is quite clear that the distinction between overt and covert discrimination does not necessarily always coincide with that between direct and indirect discrimination.

51. A clear example of covert *direct* discrimination is found in *Dekker*. Ms Dekker was told in terms that the reason she did not get the job for which she was indisputably the best candidate was not her pregnancy per se, but the financial consequences for her prospective employer. The Court was asked whether the refusal to hire her should be regarded as direct discrimination on grounds of sex. It rightly held that the answer depended 'on whether the fundamental reason for the refusal of employment is one which applies without distinction to workers of either sex or, conversely, whether it applies exclusively to one sex'. The Court concluded that 'only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex'. (27) The Court has subsequently confirmed this approach in a number of other cases. (28)

52. Advocate General Jacobs put the distinction between direct and indirect discrimination slightly differently – and, I think, more clearly – in his Opinion in *Schnorbus*: 'it may be said that discrimination on grounds of sex arises where members of one sex are treated more favourably than the other. The discrimination is direct where the difference in treatment is based on a criterion which is either explicitly that of sex or *necessarily linked to a characteristic indissociable from* sex. It is indirect where some other criterion is applied but a substantially higher proportion of one sex than of the other is in fact affected.' (29)

53. That analysis of what constitutes direct discrimination can be adapted to suit direct discrimination on any

prohibited ground. Thus, as regards discrimination on grounds of nationality, discrimination can be considered to be direct where the difference in treatment is based on a criterion which is either explicitly that of nationality or necessarily linked to a characteristic indissociable from nationality.

54. In *Dekker* the Court would have reached the same conclusion that the discrimination was direct if it had applied a 'but for' test, according to which, 'but for' a particular characteristic (sex, race, age, nationality, etc), the person concerned would have enjoyed the more favourable treatment experienced by the relevant comparator. (30) Thus reformulated, the question the national court had to resolve was: 'but for her pregnancy (a characteristic indissociably linked to sex), other things being equal, would Ms Dekker have been hired?' If the answer was yes the refusal to hire constituted direct discrimination based on sex. (31)

55. This analysis implies – crucially – that, for there to be direct discrimination, it is sufficient that at some point in the chain of causation, the adverse treatment received by the victim is grounded upon, or caused by, using a characteristic that may not serve to draw distinctions to distinguish that person from others. I shall refer to this process, for convenience, as 'a prohibited classification'.

56. A general definition can be formulated on this basis that, so far as I can see, accurately reflects all situations recognised by the Court as constituting direct discrimination on any ground prohibited by Community law. I take there to be direct discrimination when the category of those receiving a certain advantage and the category of those suffering a correlative disadvantage coincide exactly with the respective categories of persons distinguished only by applying a prohibited classification.

57. Thus, in the case of Ms Dekker, the category of those receiving a certain advantage (those considered suitable for employment) coincided exactly with the category of persons distinguished only by applying a prohibited classification (sex – specifically, people who can under no circumstances get pregnant, i.e. men). The category of those suffering the correlative disadvantage (those not considered suitable for employment) coincided exactly with the corresponding category of persons distinguished only by applying a prohibited classification (sex, in this case people who can get pregnant, i.e. women). The adverse treatment (refusal to hire) therefore constituted direct discrimination on the basis of the prohibited classification (sex).

58. What is the result of applying this test for direct discrimination to the two conditions set out in Article 1 of the Decree?

The first cumulative condition in the first paragraph of Article 1 of the Decree

59. The first cumulative condition in the first paragraph of Article 1 of the Decree requires prospective students to have their principal residence in Belgium at the time of their registration in an institution of higher education ('the principal residence requirement').

60. It is clear that such a condition does not constitute direct discrimination on the basis of nationality. Belgians and non-Belgians alike may establish their principal residence in Belgium. Thus, the category of those satisfying the first cumulative condition in the first paragraph of Article 1 of the Decree does not coincide with the category of Belgian nationals.

61. Does the principal residence requirement constitute indirect discrimination?

62. The Court has held that the prohibition on discrimination on the basis of apparently neutral criteria of differentiation which lead in fact to a discriminatory result applies, in particular, to a measure which draws a distinction on the basis of residence. That requirement is liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreigners. (32)

63. It is not seriously disputed that the principal residence requirement constitutes an indirectly discriminatory measure.

The second cumulative condition in the first paragraph of Article 1 of the Decree

64. It seems to me, in contrast, that the second cumulative condition in the first paragraph of Article 1 of the Decree constitutes direct discrimination based on nationality.

65. All Belgian nationals *automatically* enjoy the right to remain permanently in Belgium (the first of the eight possible criteria within the second cumulative condition of Article 1 of the Decree). No non-Belgians automatically have such a right. Therefore, they must either meet certain additional conditions to acquire such a right (namely those prescribed by Directive 2004/38) or fulfil one of the other criteria listed in that provision. (33)

66. The category of those receiving a certain advantage (those *automatically* having a right to remain permanently in Belgium and thus *automatically* satisfying the second cumulative condition in the first paragraph of Article 1 of the Decree) therefore coincides exactly with the category of persons distinguished only on the basis of a prohibited classification (nationality, in this case those possessing Belgian nationality). The category of those suffering a corresponding disadvantage (those *not automatically* having such a right) coincides exactly with the category of persons distinguished only on the basis of a prohibited classification (nationality, in this case those not possessing Belgian nationality).

67. The difference in treatment is clearly based on a criterion (the right to remain permanently in Belgium) which is necessarily linked to a characteristic indissociable from nationality. (34) The discrimination based on nationality at issue is therefore direct.

68. The fact that non-Belgian EU citizens can, if they satisfy the conditions in Directive 2004/38, obtain the right to remain permanently in Belgium does not alter that conclusion. The direct discrimination lies precisely in the fact that, for *all* non-Belgians, including all other EU citizens, the right to remain permanently in Belgium is *conditional* upon the fulfilment of either one of the remaining criteria in the second cumulative condition, or those in Directive 2004/38. For Belgians, the right is necessarily and automatically linked to being Belgian and therefore to a prohibited classification: nationality.

69. I reach the same conclusion by applying the ‘but for’ test. Let us take two prospective students of veterinary medicine, both finishing their secondary schooling in Luxembourg, where their parents live and work. Both wish to study in Belgium. Student A is Belgian. Student B is Bulgarian. Both move to a student room in Louvain-la-Neuve in the same building and take up residence there at the start of the academic year 2008/09 in anticipation of registration. Both can therefore prove that they satisfy the principal residence requirement.

70. Student A will *automatically* satisfy the second cumulative condition in the first paragraph of Article 1 of the Decree. As a Belgian, he has the right to remain permanently in Belgium. He will therefore count as a ‘resident student’ and enjoy unrestricted access to the course in veterinary medicine. Student B will not *automatically* satisfy that condition. Nor presumably will he satisfy the requirements of Directive 2004/38. Unless he happens to satisfy either that or one of the remaining criteria in the second cumulative condition (which, on these facts, is unlikely), student B will be subject to the *numerus clausus*.

71. It is clear that, ‘but for’ the fact that student A has Belgian nationality, he would not *automatically* have satisfied the second cumulative condition. (35)

72. I note that, in its opinion on the draft Decree, the Belgian Council of State already appeared to entertain some doubts as to whether what was being proposed was not direct discrimination – at all events, it pointed out that the

national legislation at issue in *Commission* v *Austria* treated Austrian students who had obtained their secondary education diploma outside Austria in the same (adverse) manner as students from other Member States. (36)

73. Finally, contrary to the Belgian Government's submissions at the hearing, the Court's judgment in *Bidar* does not support the claim that any discrimination arising from application of the second cumulative condition in the first paragraph of Article 1 of the Decree is indirect, and not direct. The United Kingdom legislation giving rise to *Bidar* made eligibility for a student loan conditional upon (i) being 'settled' in the United Kingdom for the purposes of national law and (ii) satisfying certain residence conditions. (37) Under the applicable United Kingdom immigration law, a person was 'settled' in the United Kingdom if he was ordinarily resident there without being subject to any restriction on the period for which he could remain in the territory. (38) A national of another Member State could not, in his capacity as a student, obtain the status of being settled in the United Kingdom, because he would fail both limbs of that test.

74. It is true that (like a Belgian national in Belgium) no United Kingdom national is subject to a restriction on the period for which he can remain in the territory of the United Kingdom. However, it was clear from the United Kingdom's response to the questions asked by the Court in *Bidar* that United Kingdom nationals could, under certain circumstances, *also* fall foul of the 'ordinary residence' limb of the test and therefore not have the status of being 'settled' in the United Kingdom. (39) The category of those receiving a certain advantage (those having the status of being settled in the United Kingdom) therefore did *not* coincide exactly with the category of persons distinguished only on the basis of a prohibited classification (nationality, in this case United Kingdom nationality).

75. The Court therefore correctly held the discrimination in *Bidar* to be indirect rather than direct. None the less, because United Kingdom legislation precluded any possibility of a national of another Member State obtaining settled status as a student, and thus made it impossible for him to qualify for a loan whatever his actual degree of integration into the society of the host Member State, the Court made short shrift of the 'settlement condition'. (40)

76. It is of course for the national court to determine what the position under Belgian law is. However, if it should conclude that all Belgian nationals automatically and without exception enjoy the right to remain permanently in Belgium and thus *automatically* satisfy the second cumulative condition, whilst all others, including all other EU citizens, do *not automatically* enjoy that right, the second cumulative condition in the first paragraph of Article 1 of the Decree would discriminate directly on the basis of nationality, contrary to Article 12 EC.

The first and second questions

77. The first and second questions essentially request clarification on whether the Decree can be justified on the basis of three possible reasons: (i) the influx of foreign students poses an excessive burden on public finances; (ii) the quality of education is likely to be jeopardised; (iii) the quality of the French Community's public health system is likely to be jeopardised because of a shortage of qualified medical personnel.

78. The answer depends in part on whether the discriminatory treatment is direct or indirect. (41) It is well established that indirect discrimination is, in principle, capable of justification. (42) The position in respect of direct discrimination is much more restrictive. (43) Given that I consider the first cumulative condition to be indirectly discriminatory, and the second to be directly discriminatory, I shall analyse each condition in turn.

Is the first cumulative condition in the first paragraph of Article 1 of the Decree justifiable?

79. The Belgian Government relies heavily on the Court's judgment in *Bidar* which, it submits, sanctions the legitimacy of residence requirements as regards access to education, because it allows the host State to require the

prospective student, through such a residence requirement, to demonstrate a certain degree of integration into the society of the host State. (44)

80. There is, however, a fundamental difference between *access to financial aid* to cover the costs of education in another Member State, at issue in *Bidar*, and *access to education itself* in other Member States, at issue in the present case.

81. In *Bidar*, the Court rightly took into account the legitimate interests of Member States faced with claims to financial assistance by students from other Member States. It held that the Member States must show a certain degree of financial solidarity with nationals of other Member States in the organisation and application of their social assistance systems. (45) However, they may 'ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State'. (46)

82. By contrast, the possibility for a student from the European Union to gain access to higher or university education in another Member State under the same conditions as nationals of that Member State constitutes the very essence of the principle of freedom of movement for students guaranteed by the Treaty. (47) What the Court held as regards residence requirements for financial assistance in *Bidar* cannot therefore be transposed to the present case. (48)

83. It is settled case-law that indirectly discriminatory treatment on the basis of nationality may be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued. (49)

84. The Court has likewise held that it is for the national authorities invoking a derogation from the fundamental principle of freedom of movement for persons to show, in each individual case, that their rules are necessary and proportionate to attain the aim pursued. The reasons that may be invoked by a Member State by way of justification 'must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State and specific evidence substantiating its arguments'. (50)

85. The order for reference quotes the *travaux préparatoires* (51) of the Decree as indicating that the principal purpose of its contested provisions is 'to ensure wide and democratic access to quality higher education for the population of the French Community'. The contested provisions are also inspired by public health considerations. First, a reduction in the quality of education is likely to alter, in the long term, the quality of the care provided. Second, the great majority of non-resident students do not intend to practise in Belgium, which leads to a risk of shortage of professionals. A shortage is said to be 'certain' if selection before entry were introduced.

86. Under the separation of functions between this Court and the referring court, it is for this Court to say whether, if established, any of the grounds advanced would provide objective justification for indirect discrimination. If so, it is then for the national court to determine whether, on the evidence, the grounds are in fact established.

Excessive burden on public finances

87. The *travaux préparatoires* of the Decree contain the following reference to an excessive burden on public finances as a justification: (52)

'The number of those obtaining a diploma in the higher education system of the French Community in the [courses concerned] manifestly exceeds the needs of the sectors concerned in francophone Belgium. The French Community cannot support the excessive burden represented by students not resident in Belgium, who come to study in the French Community for the sole reason that they do not have access to those studies in their country of origin, and who have absolutely no intention of exercising their profession in the French Community.'

88. The first sentence, which asserts that the number of students obtaining a diploma 'manifestly exceeds' the needs of the French Community, is not immediately reconcilable with the alternative justification based on the risk that the public health system will be jeopardised, which is predicated upon a potential future shortage of qualified health personnel. (53)

89. The argument advanced in the second sentence is, essentially, purely economic. It is problematic for the following reasons.

90. First, I recall that according to settled case-law, aims of a purely economic nature cannot normally constitute overriding reasons in the public interest that justify restricting a fundamental freedom guaranteed by the Treaty. (54)

91. The Court has, it is true, accepted that it cannot be excluded that the risk of seriously undermining the financial balance of a social security system might constitute an overriding reason in the public interest capable of justifying a barrier to freedom to provide services. (55) Thus, economic or budgetary reasons may, in particular circumstances, be advanced as a justification. That may, in part, reflect the inescapable fact that every public service provided by our welfare states is dependent on there being sufficient budgetary means to finance it.

92. However, I share the reservations expressed by Advocate General Jacobs as regards applying statements made by the Court in the context of burdens on national social security systems to the domain of higher education. Such statements contain a double derogation: they derogate both from the fundamental principle of freedom of movement for persons and from the accepted grounds on which those derogations can be justified (which, in Treaty terms, are exclusively *non*-economic). Justifications argued on an economic basis therefore need to be treated with particular circumspection. (56)

93. Advocate General Jacobs also suggested that, should the Court extend the actual scope of student entitlement to financial assistance beyond tuition and registration fees, the range of possible justifications available to Member States should likewise be extended in line with the case-law on recipients of public health-care services. (57) In *Bidar*, the Court did indeed extend the scope of student entitlement to financial assistance, to include maintenance loans, and accepted (in parallel) that a student must demonstrate a certain level of integration in the host Member State before he may access such a loan. Budgetary reasons can therefore, within certain constraints, justify limiting access to financial support for education.

94. However, as I have already emphasised, the present case concerns access to education, not access to financial support for education; and the Court's decision in *Bidar* is not therefore transposable. I do not accept that budgetary reasons can be invoked to justify limiting access to education for non-resident students. Rather, it seems to me that the Court's statement in *Grzelczyk* that Directive 93/96 (58) 'accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States', (59) made in the context of financial support for education, applies a fortiori to access to education.

95. Second, the French Community legislator appears to be relying on the familiar 'free rider' argument: students moving abroad to study reap the benefits from publicly funded education in the host Member State but do not contribute to financing it through (their parents') national taxes, nor do they necessarily themselves 'pay back' by staying to work in the host Member State and becoming taxpayers there. (60) The implicit argument is that the non-Belgian students concerned are committing some form of abuse. That is plainly not the case. Students moving to another Member State in order to pursue their education there are exercising their right to freedom of movement – a right which, as citizens of the Union, they are entitled to enjoy without any discrimination based on nationality. (61) Their supposed intentions, invoked by the legislator of the French Community, are quite irrelevant. (62)

96. I likewise share the views expressed by Advocates General Jacobs and Geelhoed (in *Commission* v *Austria* and *Bidar* respectively) that whilst students may not contribute directly to the tax system of the State in which they pursue their university studies, they are a source of income for local economies where the university is located, and also, to a limited extent, for the national treasuries via indirect taxes. (63) Taken to its logical conclusion, the argument that only

those who have contributed through taxes should be allowed to benefit from State-financed benefits would bar a Member State's own nationals who have not so contributed, or who have done so only modestly, from claiming any such benefits. (64)

97. Thirdly, the explanation given by the French Community, as it appears from the order for reference and Belgium's submissions before the Court, does not show in what way the financial burden placed on the French Community by these categories of students is 'excessive' or how the Decree resolves the alleged problem. (65) Rather, it appears that higher education is financed through a 'closed envelope' system. If I have understood it correctly, that implies that a decrease in the number of students (of whatever nationality) does not entail any corresponding saving of money for the French Community. An increase or decrease in student numbers is budget-neutral.

98. Finally, I note that, before the Constitutional Court, the applicants suggested that all non-resident students should be admitted to their chosen course of studies but not necessarily to financial support. In its written submissions to the Court of Justice, the Belgian Government responded by stating that such a proposal 'would not make it possible to attain the objectives [of the Decree], which are after all not of a financial nature'.

99. To summarise in respect of the first ground of justification advanced by the Belgian Government: I do not accept that the danger of an excessive burden on public finance should be available in principle as a justification for indirect discrimination in respect of access to education. Nor (if, contrary to my view, such a justification is theoretically available to a Member State) do I consider that it has been made out in the present case.

Jeopardising the quality of education

100. The *travaux préparatoires* of the Decree continue by invoking an alternative justification: (66)

'In addition to the financial burden …, there is also an issue of the quality of education. If there are too many students, it is impossible to guarantee them an adequate educational framework in terms of both quantity and quality. Nor are there unlimited possibilities for internships in a professional environment.'

101. Before the referring court, the French Community argued that the Decree targets the 'perverse effects of absolute mobility': namely, that the ever-increasing number of non-resident students threatened the quality of education to the detriment of all students. Educational establishments had a finite capacity to welcome students. Teaching personnel, budget and opportunities for practical training were all limited.

102. The problem of overcrowded classes is familiar to students and academics alike. It is a legitimate concern. The Court has recognised that 'the preservation or improvement of the education system' (67) and 'ensuring high standards of university education' (68) constitute legitimate aims under the Treaty. Restrictions based on these grounds must nevertheless satisfy the proportionality test: they must be suitable for attaining the objective which they pursue and must not go beyond what is necessary in order to attain it. (69)

103. The material before the Court indicates that the adoption of the Decree was based primarily on statistics showing the increase in the number of registered students who had not obtained their secondary school diploma in Belgium. That varies significantly between the different courses covered by the Decree. (70) Figures showing the numbers of non-resident students enrolled in the courses at issue were not available before the adoption of the Decree. Overall, one is left with the clear impression that legislation imposing a *numerus clausus* on non-Belgian students for a number of courses with rather different profiles was introduced on the basis of rather patchy information about some aspects of student enrolment on some of those courses. That is impermissible. To avoid misunderstanding, I should make it clear that I am not saying that the French Community had to wait passively until significant damage had been caused to specific sectors of its higher education system before taking any action. My point is, rather, that the specific material that would lead a prudent legislator legitimately to conclude that a specific burgeoning problem needed to be nipped

in the bud (and that, accordingly, specific focused measures were necessary and proportionate) was – so far as I can tell from what has been placed before the Court – simply not to hand and/or not examined when the Decree was enacted.

104. Moreover, it seems to me that if student numbers are a problem, they are not more or less problematic depending on where the extra students come from. The problem is an excess of student numbers *per se*, not an excess of *non-resident* student numbers. It seems, rather, that the intention of the Decree was to preserve unrestricted access to higher education for Belgians, while making it more difficult for those foreign students (coming mainly from France) for whom the higher education system in the French Community constitutes a natural alternative to access that system. Such an aim is clearly discriminatory in essence and inconsistent with the objectives of the Treaty. (71)

105. The Court has already held that excessive demand for access to certain courses can lawfully be addressed by adopting specific non-discriminatory measures such as an entrance examination or requiring a minimum grade for registration. Such measures comply with Article 12 EC. (72)

106. Individual Member States may wish to maintain unlimited free access to higher education. They are of course at perfect liberty to do so. If so, they must however be prepared to offer unlimited free access for *all* EU students regardless of nationality. Article 12 EC requires each Member State to ensure that nationals of other Member States in a situation governed by Community law are placed on a completely equal footing with its own nationals. (73) Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality. (74) Free access to education cannot mean 'free access – but only for our own nationals'.

107. A restrictive policy as regards access to certain courses (such as is practised by France) is in principle equally acceptable. That choice is as open to a Member State as the choice of unlimited access. Indeed, Belgium nowhere claims that France is contravening the EC Treaty by acting as it does. It is settled case-law that, even if another Member State may be infringing Community law, that does not legitimise corrective or defensive measures by another Member State that would otherwise be unlawful. (75) A fortiori that is so if a Member State enacts discriminatory measures in response to the side-effects of another Member State's legitimate policy choice.

108. It seems to me very possible that implementing less discriminatory measures may mean abandoning the current system of unrestricted public access to higher education for all Belgians. I can well see that that will be thought undesirable and that it might well be better if (to the extent that it is necessary) the flow of students across borders were regulated at Community level. (76) In the absence of such a system, however, the fact that such changes may be necessary reflects the need to comply with the obligations arising from the principle of equal treatment under the Treaty. (77)

109. Belgium and certain other Member States facing similar situations have sought to claim that they are in a uniquely vulnerable position. (78)

110. The problems faced by the French Community in Belgium and by the Austrian Government arising from the influx of a number of foreign students able or willing to pursue their studies in, respectively, French and German are, in fact, not exclusive to Belgium and Austria. Other Member States may also find that they have to cope with an influx of students from other Member States that is driven by a common language or by some other particular consideration. (79)

111. The *travaux préparatoires* of the Decree (80) state that an entrance examination (the obvious neutral solution to a perceived threat to the quality of education from excessive student numbers) (81) would favour students who, through their advantaged social background or for other reasons, are best prepared for their proposed courses of study. That assertion was not buttressed by any empirical evidence that the Court has seen. If such is indeed the case, it seems to me that the appropriate remedies must lie elsewhere. The problem per se cannot justify recourse to discriminatory measures that infringe Community law.

112. It is conceivable that circumstances might arise in which a real, serious and imminent threat to the quality of university education in a specific sector was shown to exist. The Court might, in such a case, wish to re-examine whether indirectly discriminatory measures to counter such a threat are in principle capable of objective justification. In the present proceedings, even if such justification may theoretically be possible (a question that I expressly leave open), the material available to the Court falls far short of what would be required to justify discriminatory treatment.

113. I therefore conclude that the measures taken in the Decree at issue cannot be justified on the basis of perceived jeopardy to the quality of university education in the French Community.

The quality of the public health system

114. The final justification advanced is that too few students residing in the French Community (as distinct from non-resident students) obtain diplomas in certain specialities. Over the longer term, there may therefore not be sufficient qualified medical personnel to ensure the quality of that community's public health system.

115. The *travaux préparatoires* of the Decree focus, in this respect, on veterinary medicine, for which it appears that the French Community organised an entrance examination in 2003, 2004, and 2005. In the 2005 competition, only 192 candidates out of a total of 795 had obtained their secondary school diploma in the French Community. Of the 250 successful candidates (a number fixed by the legislator), 216 obtained their secondary school diploma abroad. That implies that only 34 home-grown candidates were able to start their studies in veterinary medicine. (82) The legislator draws the following conclusions: (83)

'That number is clearly insufficient. If no measure is taken, the French Community runs the risk of encountering a lack of veterinarians. There is a significant chance that the insufficient number of veterinarians will not be compensated by veterinarians from other States, because of the limitations that exist in other countries. It is self-evident that such a lack of veterinarians is likely to pose very serious dangers to public health.'

116. In the context of infringement proceedings, the Court requires a detailed assessment of the risk alleged by the Member State when invoking the public health derogation in Article 30 EC. (84) A similar standard of scrutiny is applicable in references for a preliminary ruling, (85) although the final determination of the facts is of course a matter for the national court.

117. In my view, the material provided by Belgium in the documents before the Court indicates that the risk assessment underpinning the public health justification that is claimed falls well short of the required standard.

118. First, as the written submissions of the Belgian Government show, the potential lack of veterinarians appears to have been created by the system put in place by the French Community itself – namely, reducing the number of students in veterinary science in order to ensure the quality of education. It is (to say the least) conceptually curious that action taken to preserve the quality of education (a justification duly advanced for the discriminatory measures enacted) should simultaneously lead the Belgian Government to invoke the potential shortage of suitably qualified health professionals.

119. Second, the material before the Court suggests that the perceived potential problem for the future is traceable to some combination of (at least) the following: (i) a shortage of candidates who have obtained their secondary school diplomas in the French Community who want to study to be veterinarians *and* who are good enough to get one of the 250 places to study veterinary science in the face of competition from other EU candidates; (ii) a presumption that the majority of students admitted to the courses in veterinary science who have *not* obtained their secondary school diplomas in the French Community will automatically return to their home Member State(s) after completing their studies. Of these, (i) seems to find some foundation in the statistics; (86) but (ii) is a mere presumption. It assumes, specifically, that non-Belgian veterinarians will generally return to their own Member State(s) after qualifying,

irrespective of job prospects locally. One might have thought that (on the contrary), if there were to be a shortage of qualified veterinarians in Francophone Belgium, such a shortage might prompt a reaction (from the market or from the public authorities) that would render local job prospects more attractive and encourage some newly qualified non-Belgian veterinarians to start their professional careers in the Member State in which they trained.

120. Third, either the French Community or the Federal Government (or both acting together) (87) have the necessary regulatory tools to address the potential problem. The possible solutions mentioned in the material referred to before the Court include adjusting the number of veterinarians who are allowed to graduate each year or who are admitted into the second (clinical) part of studies in veterinary medicine, (88) cooperation between secondary schools and faculties to adjust the level of pre-university education in order to ensure that enough Belgians meet the requirements of an examination set at an appropriate standard, and putting in place a preparatory year of study to prepare potential veterinarians better for the actual university course. (89)

121. I understand that implementing such measures might pose practical difficulties. It is, however, settled case-law that such difficulties cannot of themselves justify the infringement of a freedom guaranteed by the Treaty. (90)

122. Moreover, the legislative section of the Belgian Council of State noted that the experience with veterinary medicine does not necessarily extend to other courses. For example, despite the federal quota for physiotherapy studies, the number of those obtaining a diploma who want to exercise their profession in Belgium apparently corresponds closely to the needs of the profession, as estimated by the Federal Government. (91)

123. Fourth, 'the knowledge acquired by a student in the course of his higher education does not in general assign him to a particular geographical employment market'. (92) Non-residents obtaining a diploma in the French Community might therefore be encouraged, by appropriate incentives, to start their professional career in the region in which they studied.

124. These observations apply *mutatis mutandis* to the other courses targeted by the contested Decree.

125. In respect of any putative public health justification, the Decree seems essentially to have been preventive. Unless the national court is presented with substantially stronger material than has been shown to this Court, the proportionality test cannot in my view be said to be satisfied. (93) Where discriminatory treatment as a precautionary measure against a perceived future problem is concerned, the proportionality test must be applied with particular vigilance.

126. On the basis of the material before the Court, I conclude that the contested Decree cannot be justified on the basis that too few students residing in the French Community obtain diplomas for there to be, over a long period, a sufficient number of qualified medical personnel to ensure the quality of the public health system in that community.

Conclusion as to the first cumulative condition in the first paragraph of Article 1 of the Decree

127. It follows that the (indirectly discriminatory) residence requirement in the first paragraph of Article 1 of the Decree cannot be justified on any of the grounds relied on by Belgium.

The second cumulative condition in the first paragraph of Article 1 of the Decree

128. To the best of my knowledge, the Court has never held that a measure that discriminates directly on grounds of nationality, contrary to Article 12 EC, may be justified. (94) I have indicated earlier why I consider that the second cumulative condition in the contested Degree constitutes direct discrimination. (95)

129. The Court's approach hitherto seems logical. Direct discrimination on grounds prohibited by the Treaty is so contrary to the very idea of a European Union that it should be tolerated only for very good reason. According to settled case-law, such discrimination can only be justified on the basis of explicit Treaty derogations. (96) There is no such Treaty derogation from the *general* prohibition on discrimination on grounds of nationality contained in Article 12 EC. (97)

130. The prohibition of discrimination on grounds of nationality has immense symbolic importance. As Advocate General Jacobs so eloquently stated, it demonstrates that the Community is 'not just a commercial arrangement between the governments of the Member States but is a common enterprise in which all the citizens of Europe are able to participate as individuals. No other aspect of Community law touches the individual more directly or does more to foster that sense of common identity and shared destiny without which the "ever closer union among the peoples of Europe", proclaimed by the preamble to the Treaty, would be an empty slogan.' (98)

131. Should the Court nevertheless be prepared to entertain the idea that direct discrimination on grounds of nationality falling within Article 12 EC is capable in principle of justification, I refer to the reasons (set out above) why I consider that the indirectly discriminatory first cumulative condition imposed by the contested Decree cannot be justified. A fortiori, those considerations apply to the Decree's directly discriminatory second cumulative condition.

Conclusion as to the second cumulative condition in the first paragraph of Article 1 of the Decree

132. It follows that the provisions in the first paragraph of Article 1 of the Decree (whereby a Belgian national *automatically* satisfies the second cumulative condition by virtue of possessing the right, indissociable from his nationality, to remain permanently in Belgium whilst all non-Belgian nationals – including all other EU citizens – have either to satisfy one of the seven other criteria there laid down or fulfil the requirements of Directive 2004/38) cannot be justified.

Answer to the first and second questions

133. To accept the restrictions put in place by the French Community would amount to allowing Member States to compartmentalise their higher education systems. (99) The Court should therefore be very slow to accept that access to higher education may be restricted even by indirectly discriminatory measures that satisfy the proportionality test (which, so far as appears from the material before the Court, the Belgian measures do not). It should not be prepared to countenance measures that discriminate directly on that basis for such a purpose.

134. I therefore conclude that the first paragraph of Article 12 and Article 18(1) EC, in conjunction with Article 149(1), the second indent of Article 149(2) and the third indent of Article 150(2) EC, should be interpreted as precluding measures such as those contained in the Décret régulant le nombre d'étudiants dans certains cursus de premier cycle de l'enseignement supérieur enacted by the French Community of Belgium.

The third question

135. The referring court's third question asks whether the answer to the first question would be different if the French community, having regard to the last part of Article 149(1) EC and to Article 13(2)(c) of the ICESCR, (100) which contains a standstill obligation, chooses to maintain wide and democratic access to quality higher education for the population of that community.

136. The Court has held that the International Covenant on Civil and Political Rights (ICCPR) (101) is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law. (102) It seems to me that the same should hold good for the ICESCR which, like the ICCPR, binds each individual Member State. (103)

137. The referring court rightly notes that Article 13(2)(c) of the ICESCR, inasmuch as it requires 'the progressive introduction of free education' contains a standstill clause.

138. The General Comments on this provision note that the prohibition against discrimination enshrined in Article 2(2) of the ICESCR is 'subject to neither progressive realisation nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination'. (104) By way of illustration, the General Comments provide that 'violations of article 13 include: the introduction or failure to repeal legislation which discriminates against individuals or groups, on any of the prohibited grounds, in the field of education'. (105) Article 2(2) of the ICESCR lists 'national or social origin' among the prohibited grounds.

139. Article 13 of the ICESCR is – quintessentially – a measure that outlaws discrimination, on a prohibited ground, in access to education. The attempt to rely upon Article 13(2)(c) of the ICESCR to justify a measure that clearly discriminates on one of the grounds explicitly prohibited by both Article 12 EC and Article 2(2) of the ICESCR is therefore inexplicable. (106) (Indeed, the applicants in the main action relied in part on Article 13 of the ICESCR to challenge the contested Decree.)

140. For completeness, I add that the General Comments on Article 13(2)(c) of the ICESCR also provide that 'while secondary education "shall be made generally available and accessible to all", higher education "shall be made equally accessible to all, on the basis of capacity". According to that article, higher education is not to be "generally available", but only available "on the basis of capacity". The "capacity" of individuals should be assessed by reference to all their relevant expertise and experience'. (107)

141. As regards Article 149(1) EC, I repeat that while that Article provides that Member States remain responsible for 'the content of teaching and the organisation of education systems and their cultural and linguistic diversity', the Court has made it clear that the conditions of access to vocational training fall within the scope of the Treaty. (108) Moreover, it is settled case-law that, even in matters which do not fall within the scope of the Treaty (which is the case as regards certain aspects of education policy) the competences retained by the Member States must be exercised consistently with Community law and, in particular, in compliance with the Treaty provisions on the freedom to move and reside within the territory of the Member States, as conferred by Article 18(1) EC. (109)

142. The prohibition on discrimination should indeed be seen as the cornerstone of the Treaty precisely because it leaves Member States' regulatory autonomy intact – provided that their laws apply equally to nationals and non-nationals. The key underlying principle is that all citizens of the Union must be treated as individuals, without regard to their nationality. (110) 'Free and equal access to education for all' therefore means exactly what it says. It may not mean 'free and equal access to education for all my nationals'.

143. I accept that the problems faced by the French Community are not insignificant. However, they must be resolved in a way that is not a variant of 'equality for those inside the magic circle' (111) (in this case Belgian nationals), but that respects the 'fundamental status' of EU citizenship by ensuring equal access to education for all EU citizens regardless of nationality.

144. The answer to the first and second questions is therefore not invalidated by the last part of Article 149(1) EC. It is, on the contrary, reinforced by a proper reading of Article 13(2)(c) of the ICESCR.

The request for the judgment to be limited in time

145. The Belgian Government has asked the Court, should it interpret Article 12 EC as precluding national legislation such as the Decree at issue, to limit the temporal effects of its judgment.

146. In support of its request, the Belgian Government invoked the following grounds: the impact on the public finances of the French Community; the fact that the Decree was conceived specifically to comply with the Court's case-law and with Community legislation; the fact that the Commission has indicated that the system may be justifiable; and the lack of relevant case-law.

147. According to settled case-law, it is only exceptionally that the Court may be moved to restrict for any party concerned the opportunity of relying on a provision which it has interpreted. When the Court so limits the effects of a judgment, it does so in application of the principle of legal certainty inherent in the Community legal order. Two essential criteria must be fulfilled before such a limitation can be imposed: those on whose behalf a temporal limitation is sought must have acted in good faith and there must be a risk of serious difficulties. (112)

148. More specifically, the Court has imposed a temporal limitation only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with Community legislation by reason of objective, significant uncertainty regarding the implications of Community provisions, to which the conduct of other Member States or the Commission may even have contributed. The financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effects of that ruling. (113)

149. In the present case, whatever the merits of its other arguments, Belgium has not placed material before the Court that demonstrates that there is a risk of serious economic repercussions.

150. It is accordingly not appropriate for the Court, should it rule that Article 12 EC precludes national legislation such as the contested Decree, to limit the effects of that ruling in time.

Final remark

151. I have emphasised the importance, for the development of the Union, of freedom of movement for students based on equality. Equally, however, the EU must not ignore the very real problems that may arise for Member States that host many students from other Member States. (114)

152. The Protocol on the application of the principles of subsidiarity and proportionality (115) provides that action at Community level is justified where, 'the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community'. It also provides for the following guidelines to be used in examining whether that condition is fulfilled: (i) the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States; (ii) actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty or would otherwise significantly damage Member States' interests; (iii) action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.

153. I invite the Community legislator and the Member States to reflect upon the application of these criteria to the movement of students between Member States. (116)

154. Finally, I recall that one of the objectives of the Community listed in Article 2 EC is to promote solidarity among

the Member States, and that the Member States have a mutual duty of loyal cooperation on the basis of Article 10 EC. (117) It seems to me that those provisions are very pertinent here. Where linguistic patterns and differing national policies on access to higher education encourage particularly high volumes of student mobility that cause real difficulties for the host Member State, it is surely incumbent on both the host Member State *and* the home Member State actively to seek a negotiated solution that complies with the Treaty.

Conclusion

155. Accordingly, I am of the opinion that the questions referred by the Cour constitutionnelle (Belgium) should be answered as follows:

Questions 1 and 2

The first paragraph of Article 12 and Article 18(1) EC, in conjunction with Article 149(1), the second indent of Article 149(2) and the third indent of Article 150(2) EC, should be interpreted as precluding measures such as those contained in the Décret régulant le nombre d'étudiants dans certains cursus de premier cycle de l'enseignement supérieur enacted by the French Community of Belgium.

Question 3

Consideration of the last part of Article 149(1) EC and Article 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights does not affect the answer to the first two questions.

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1 – Original language: English.

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2 – See, for an historical overview, the Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] ECR I-9161, points 37 to 47. The Ministers responsible for Higher Education in the 46 countries of the Bologna Process have recently held mobility to be 'the hallmark of the European Higher Education Area' and have called 'upon each country to increase mobility': Communiqué of the Conference of European Ministers responsible for Higher Education, Leuven and Louvain-la-Neuve, 28 and 29 April 2009, paragraph 18 (available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/675&format=HTML&aged=0&language=EN&guiLanguage=en).

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3 – *Moniteur belge* of 6 July 2006, p. 34 055. The Decree was amended most recently by the Décret fixant des conditions d'obtention des diplômes de bachelier sage-femme et de bachelier en soins infirmiers, renforçant la mobilité étudiante et portant diverses mesures en matière d'enseignement supérieur (Decree fixing the conditions for obtaining the diplomas of bachelor in midwifery and bachelor in nursing, reinforcing student mobility and containing various measures regarding higher education) of 18 July 2008, *Moniteur belge* of 10 September 2008, p. 47 115. I refer in this Opinion to the original version of the Decree as set out in the order for reference. Decrees are the legal instruments by which the three Communities of Belgium, as well as the Flemish and the Walloon Regions, exercise their legislative competences. They have the same force of law as federal laws. See Articles 127(2), 128(2), 129(2), 130(2) and 134, second paragraph, of the Belgian Constitution, Article 19(2) of the Loi spéciale de réformes institutionnelles (Special law on the reform of the institutions) of 8 August 1980, *Moniteur belge* of 15 August 1980, and my Opinion in Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* [2008] ECR I-1683, points 4 to 7.

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4 – Adopted and opened for signature, ratification and accession by United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966. The Covenant entered into force, in accordance with its Article 27, on 3 January 1976.

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5 – All translations of Belgian legislation and *travaux préparatoires* pertaining to that legislation in the present Opinion are my own.

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6 – Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union

and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (corrected version in OJ 2004 L 229, p. 35).

7 – On the same date, the Commission sent a letter of formal notice to Austria for non-compliance with the Court's judgment in Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969. It has likewise suspended that procedure.

8 – See Case 293/83 *Gravier* [1985] ECR 593, paragraph 25; Case 42/87 *Commission* v *Belgium* [1988] ECR 5445, paragraphs 7 and 8; Case C-65/03 *Commission* v *Belgium* [2004] ECR I-6427, paragraph 25; *Commission* v *Austria*, cited in footnote 7, paragraph 32; and Case C-40/05 *Lyyski* [2007] ECR I-99, paragraph 28.

9 – Case C-65/03 *Commission* v *Belgium*, cited in footnote 8, paragraph 25.

10 – *Commission* v *Austria*, cited in footnote 7, paragraph 33; and *Lyyski*, cited in footnote 8, paragraph 29. The Court's approach in Case 24/86 *Blaizot* [1988] ECR 379, paragraphs 15 to 20 seemed more restrictive. There, the Court held that university education fell within the scope of the term 'vocational training' to the extent that it prepares or provides the necessary training and skills for a qualification for a particular profession, trade or employment. The Court held that that was the case 'not only where the final academic examination directly provides the required qualification for a particular profession, trade or employment but also in so far as the studies in question provide specific training and skills, that is to say where a student needs the knowledge so acquired for the pursuit of a profession, trade or employment, even if no legislative or administrative provisions make the acquisition of that knowledge a prerequisite for that purpose'. The Court concluded that, in general, university studies fulfil these criteria. 'The only exceptions are certain courses of study which, because of their particular nature, are intended for persons wishing to improve their general knowledge rather than prepare themselves for an occupation.' In any event, the courses at issue here are clearly vocational.

11 – See further point 78 below.

12 – See point 12 above.

13 – See also the *travaux préparatoires* of the Decree: Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, pp. 16-17; ibid., No 263/3, p. 18; and the opinion of the legislative section of the Belgian Council of State, Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, p. 50.

14 – Article 16 of Directive 2004/38.

15 – See point 28 above.

16 – See Case C-127/07 *Arcelor Atlantique and Lorraine and Others* [2008] ECR I-0000, paragraph 23 and the case-law cited there. Case C-544/07 *Rüffler* [2009] ECR I-0000, paragraph 59, reiterates the classic definition in the specific context of discrimination based on Article 12 EC.

17 – See, similarly, the Opinion of Advocate General Van Gerven in Case C-132/92 *Birds Eye Walls* v *Roberts* [1993] ECR I-5579, points 12 to 14.

18 – Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ 2006 L 204, p. 23).

19 – Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22).

20 – Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

21 – See Article 2(1)(a) of the Sex Discrimination Directive, Article 2(2)(a) of the Race Discrimination Directive, and Article 2(2)(a) of the Equal Treatment Framework Directive.

22 – See Article 2(1)(b) of the Sex Discrimination Directive, Article 2(2)(b) of the Race Discrimination Directive, and Article

2(2)(b) of the Equal Treatment Framework Directive.

23 – See Case C-65/03 *Commission* v *Belgium*, cited in footnote 8, paragraph 28 (emphasis added) and the case-law cited there and, as regards Article 39(2) EC, Case C-228/07 *Petersen* [2008] ECR I-0000, paragraph 53 and the case-law cited there.

24 – *Petersen*, cited in footnote 23, paragraph 54 and the case-law cited there.

25 – Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455, paragraph 18. See also the remarks on this distinction, which the Court seemed to suggest coincided with the difference between direct effect or the lack of it, by Advocate General Warner in his Opinion in Case 69/80 *Worringham and Humphreys* v *Lloyds Bank* [1981] ECR 767, pp. 802 and 803.

26 – See, similarly, E. Ellis, *EU Anti-Discrimination Law* (2005), pp. 89 and 90. See, further, Advocate General VerLoren van Themaat who, in his Opinion in Case 19/81 *Burton* v *British Railways Board* [1982] ECR 554, point 2.6, considered that the Court's judgment in Case 96/80 *Jenkins* v *Kingsgate* [1981] ECR 911, had shown that the distinction drawn in the second *Defrenne* judgment between direct and indirect discrimination, which is important in determining whether or not Article 119 is directly applicable, does not coincide with a distinction as regards content between direct discrimination or discrimination in form, on the one hand, and indirect discrimination or discrimination in substance, on the other.

27 – Case C-177/88 *Dekker* [1990] ECR I-3941, paragraphs 10 and 12.

28 – See Case C-179/88 *Handels- og Kontorfunktionærernes Forbund(Hertz)* [1990] ECR I-3979, paragraph 13; Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657, paragraph 15; Case C-32/93 *Webb* [1994] ECR I-3567, paragraph 19; and Case C-207/98 *Mahlburg* [2000] ECR I-549, paragraph 20.

29 – Case C-79/99 [2000] ECR I-10997, point 33 (emphasis added).

30 – See also C. Barnard, *EC Employment Law* (3rd edition, 2006), p. 321, referring to the decision of the House of Lords in *James* v *Eastleigh Borough Council* [1990] 3 WLR 55, in which it recognised the 'but for' test.

31 – *Dekker*, cited in footnote 27, paragraphs 10, 12 and 14.

32 – See Case C-388/01 *Commission* v *Italy* [2003] ECR I-721, paragraph 14 and the case-law cited there; and Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 53. See also, to that effect, for example, Case C-212/05 *Hartmann* [2007] ECR I-6303, paragraphs 30 and 31; and *Petersen*, cited in footnote 23, paragraphs 54 and 55.

33 – See points 38 and 39 above.

34 – Compare the Opinion of Advocate General Jacobs in *Schnorbus*, cited in footnote 29, point 33. In that case, if the number of applications for admission to practical legal training in Germany on a particular commencement date exceeded the number of available training places, admission could be deferred by up to 12 months; but that rule did not apply if deferment would result in particular hardship, which was taken to occur when an applicant had completed compulsory national service. The Advocate General rightly held that this resulted in indirect discrimination based on sex. Under German law as it stood, women could never be accorded priority under the rule in issue whereas the *overwhelming majority* of men could. That resulted directly from the fact that the criterion used – completion of compulsory national service – related to an obligation imposed by law on all men and on men alone. Because some men did not complete compulsory national service and were therefore (like all women) not granted priority admission, the category of persons receiving a certain advantage (those accorded priority on the basis of having completed compulsory national service) did not coincide exactly with the category of persons distinguished only on the basis of a prohibited classification (sex, in this case men).

35 – The 'but for' test is usually applied to the person discriminated against rather than the person who enjoys the advantage; and here the reverse, *mutatis mutandis*, is also true but slightly more clumsy to express: but for the fact that student B is *not* a Belgian national, he too would have a right to remain permanently in Belgium derived from his nationality; and he too would automatically satisfy the second cumulative condition.

36 – Opinion of the legislative section of the Belgian Council of State, Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, p. 50. The Council of State also drew attention to Articles 3, second paragraph, and 7, second paragraph, in the draft Decree, which provided for the relevant restrictions to be abolished if and when France abolished its restrictions for similar studies. The Council of State observed in that regard: 'Thus again a condition has been formulated that is very close to

the nationality criterion, given that *students of French nationality are directly targeted*' (emphasis added). These provisions were deleted from the final text of the Decree as adopted.

37 – Namely that the person concerned must be resident in England and Wales on the first day of the first academic year and must have resided in the United Kingdom and Islands for the three years preceding that day, not including years spent in the United Kingdom as a student.

38 – *Bidar*, cited in footnote 32, paragraphs 14 to 18.

39 – For example, the British child of British parents who had worked in Austria for the previous 10 years, and who had completed his secondary education in Austria, would not have been eligible for a student loan to assist with his maintenance costs on taking up a place at Cambridge.

40 – *Bidar*, cited in footnote 32, paragraphs 61 and 62.

41 – See point 36 above.

42 – See points 45 to 48 above.

43 – See points 128 and 131 below.

44 – *Bidar*, cited in footnote 32, paragraphs 57 to 59. See in general on residence as a potentially justifiable alternative to nationality: G. Davies, '"Any Place I Hang My Hat?" or: Residence is the New Nationality', *European Law Journal* 2005, pp. 43 to 56.

45 – *Bidar*, cited in footnote 32, paragraph 56, citing Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 44.

46 – *Bidar*, cited in footnote 32, paragraphs 56 and 57.

47 – See, to that effect, *Commission* v *Austria*, cited in footnote 7, paragraph 70.

48 – See Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, p. 54, where the legislative section of the Belgian Council of State alerted the Government of the French Community to precisely this issue.

49 – See Case C-524/06 *Huber* [2008] ECR I-0000, paragraph 75 and the case-law cited there.

50 – *Commission* v *Austria*, cited in footnote 7, paragraph 63, and the case-law cited there.

51 – Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, pp. 12 and 13.

52 – Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, p. 9.

53 – See further points 114 to 126 below.

54 – Case C-109/04 *Kranemann* [2005] ECR I-2421, paragraph 34 and the case-law cited there. The phrase 'raisons impérieuses d'intérêt général', used systematically by the Court in French, has been translated in English in a variety of ways. It seems to me that 'overriding reasons in the public interest' is the translation which best reflects the meaning. It was recently used, for example, in Case C-326/07 *Commission* v *Italy* [2009] ECR I-0000, paragraph 41.

55 – See Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 41, and Case C-368/98 *Vanbraekel* [2001] ECR I-5363, paragraph 47.

56 – Opinion of Advocate General Jacobs in *Commission* v *Austria*, cited in footnote 7, point 31; see also points 33 to 35 on why higher education differs significantly from national social security systems (most obviously because it is not a service within the meaning of Article 49 EC: see, in that respect, Case 263/86 *Humbel* [1988] ECR 5365, paragraphs 17, 18 and 19; and Case C-109/92 *Wirth* [1993] ECR I-6447, paragraphs 15 to 19).

57 – Opinion of Advocate General Jacobs in *Commission* v *Austria*, cited in footnote 7, point 46.

58 – Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (OJ 1993 L 317, p. 59).

59 – Cited in footnote 45, paragraph 44.

60 – See the Opinion of Advocate General Jacobs in *Commission* v *Austria*, cited in footnote 7, point 36.

61 – *Commission* v *Austria*, cited in footnote 7, paragraph 45 and the case-law cited there.

62 – See *Commission* v *Austria*, cited in footnote 7, paragraph 70, and (in the same vein), the Opinion of Advocate General Jacobs, point 41. The Court has held unequivocally that the motives which may have prompted a worker of a Member State to seek employment in another Member State are of no importance as regards his right to enter and reside in the territory of the latter State provided that he there pursues or wishes to pursue an effective and genuine activity: see Case 53/81 *Levin* [1982] ECR 1035, paragraph 23; and Case C-109/01 *Akrich* [2003] ECR I-9607, paragraph 55.

63 – Opinion of Advocate General Jacobs in *Commission* v *Austria*, cited in footnote 7, footnote 29. See, in that regard, the statements by Mr Rémy, director of paramedical and pedagogical studies at the Haute École provinciale du Hainaut occidental, who emphasises the beneficial consequence of the presence of foreign students: 'The massive presence of French students has permitted us to broaden our perspectives. An entire series of projects have been developed thanks to the success of our physiotherapy and occupational therapy courses which ensure us a good level of financing, for example as regards research and continuing education. Sadly, all that will disappear.' ('C'est une vraie catastrophe pour notre école', *La Libre*, 3 February 2006).

64 – Opinion of Advocate General Geelhoed in *Bidar*, cited in footnote 32, point 65. See, already in that vein, the Opinion of Advocate General Slynn in *Gravier*, cited in footnote 8, p. 604.

65 – As also noted in the *Avis du Corps interfédéral de l'inspection des finances* of 31 January 2006, included in the file before the Court, p. 5.

66 – Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, p. 9. See point 87 above.

67 – *Lyyski*, cited in footnote 8, paragraph 39.

68 – Case C-153/02 *Neri* [2003] ECR I-13555, paragraph 46.

69 – *Neri*, paragraph 46.

70 – The comments accompanying the statistical data contained in the documents before this Court note explicitly that the increase in students with a foreign secondary school diploma is attributable exclusively to two courses: 'physiotherapy and re-adaptation' and 'veterinary medicine'.

71 – See, by analogy, the Opinion of Advocate General Jacobs in *Commission* v *Austria*, cited in footnote 7, point 30.

72 – *Commission* v *Austria*, cited in footnote 7, paragraph 61. See also the Opinion of Advocate General Jacobs, point 52.

73 – Case C-360/00 *Ricordi* [2002] ECR I-5089, paragraph 31.

74 – *Grzelczyk*, cited in footnote 45, paragraph 31; *Commission* v *Austria*, cited in footnote 7, paragraph 45 and the case-law cited there.

75 – Case C-111/03 *Commission* v *Sweden* [2005] ECR I-8789, paragraph 66 and the case-law cited there.

76 – See points 151 to 153 below.

77 – See, to the same effect, the Opinion of Advocate General Jacobs in *Commission* v *Austria*, cited in footnote 7, point 53.

78 – Notably Austria in *Commission* v *Austria*, cited in footnote 7.

79 – According to the OECD's statistics for 2006 (available online at www.oecd.org), Belgium had 40 607 non-citizen students

out of a total population of 10 511 382 (a ratio of 1 : 258.8). By comparison, Denmark, had 19 123 non-citizen students out of a total population of 5 427 459 (a ratio of 1 : 283.8); Sweden had 41 410 non-citizen students out of a total population of 9 047 752 (a ratio of 1 : 218.4); and the United Kingdom had 418 353 non-citizen students out of a total population of 60 412 870 (a ratio of 1 : 144.4). Given the prevalence of English-language studies, that last figure is hardly surprising. It is however not possible to tell what proportion of those non-citizen students are non-EU nationals whose access to higher education may lawfully be restricted.

80 – Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, p. 9.

81 – See point 105 above and *Commission* v *Austria*, cited in footnote 7, paragraph 61.

82 – I note that even if all the 192 candidates who had obtained their secondary school diplomas in the French Community had been successful, there would still have been a shortage of such candidates to fill the 250 available places.

83 – Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, p. 5.

84 – See, for example, Case 178/84 *Commission* v *Germany* [1987] ECR 1227; Case C-24/00 *Commission* v *France* [2004] ECR I-1277, paragraph 54; and Case C-192/01 *Commission* v *Denmark* [2003] ECR I-9693, paragraph 47.

85 – See, for example, Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraphs 112 to 124.

86 – See the figures in point 115 and footnote 82 above.

87 – At the hearing, the applicants claimed that public health is, in fact, not a competence of the French Community, but of the Federal Government and that the procedures under Belgian constitutional law required to enact a measure intended to safeguard public health had not been followed in the present case. That issue is for the referring court to decide.

88 – It appears that the competition for veterinaries that has caused problems was set up largely because of an excess of students in the second part of the course: Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, pp. 5 and 6.

89 – As suggested by Mr Claude Ancion, member of the parliament of the French Community, in a question to the Minister of Higher Education, Scientific Research and International Relations: *Compte rendu intégral*, Parlement de la Communauté française, 2004/05, 13 October 2005, p. 53 (the question and reply by the Minister are referred to in the *travaux préparatoires* of the Decree: Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, p. 9, footnote 8).

90 – Case C-418/07 *Papillon* [2008] ECR I-0000, paragraph 54 and the case-law cited there. The same holds true of financial difficulties, which it is for the Member States to overcome by adopting appropriate measures: see Case C-42/89 *Commission* v *Belgium* [1990] ECR I-2821, paragraph 24.

91 – Doc. parl., Parlement de la Communauté française, 2005/06, No 263/1, p. 53 and 56. The latest available Eurostat data (2007) show that Belgium has a national average of 242.7 physiotherapists per 100 000 inhabitants. The Walloon Region of Belgium has 268 per 100 000 inhabitants (and as many as 416.9 per 100 000 inhabitants for the province of Walloon Brabant). The Brussels-Capital Region has 218.1 per 100 000 inhabitants. That compares to a national average of 104 physiotherapists per 100 000 inhabitants for France and 103 physiotherapists per 100 000 inhabitants for Germany (Eurostat 2006 data). The Minister for Health has indicated that the examination at the end of the physiotherapy studies (which enables the physiotherapist to get a Belgian National Institute for Health and Invalidity Insurance number which gives their patients the right to be reimbursed by their health insurance) will have to be abolished – perhaps, to be replaced by an examination at the beginning of the studies: Note de Politique Générale de la Vice-première Ministre et Ministre des Affaires sociales et de la Santé publique, Doc. parl., Chambre, 2008/09, No 1529/5, p. 16.

92 – *Bidar*, cited in footnote 32, paragraph 58.

93 – See, by analogy, the Opinion of Advocate General Jacobs in *Commission* v *Austria*, cited in footnote 7, point 51.

94 – For cases in which the Court, having established that there had been direct discrimination on the basis of nationality, did not go on to examine potential justifications see for example *Gravier*, cited in footnote 8, paragraphs 15, 25 and 26; Case 186/87 *Cowan* [1989] ECR 195, paragraph 10; and Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145, paragraphs 32 and 33. Advocate General Kokott rightly observes in her Opinion in Case C-164/07 *Wood* [2008] ECR I-4143 (at

point 42 and footnote 11) that, while it is questionable whether a national rule that discriminates directly on grounds of nationality can ever be justified, a number of cases do hint at the theoretical possibility of justifying direct discrimination (for example, *Ricordi*, cited in footnote 73, paragraph 33; Case C-122/96 *Saldanha and MTS* [1997] ECR I-5325, paragraph 26 et seq.; and Case C-323/95 *Hayes* [1997] ECR I-1711, paragraph 24).

95 – See points 64 to 76 above.

96 – See, for example, the derogation from free movement of workers in Article 39(4) EC (employment in the public service) and the derogation from freedom of establishment in Article 45 EC (exercise of official authority) – derogations that, as is well known, are interpreted very strictly. See further Case C-490/04 *Commission* v *Germany* [2007] ECR I-6095, paragraph 86 and the case-law cited there.

97 – See Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 64, where the Court held: 'Since the unequal treatment in question thus comes within the scope of the Treaty, it cannot be considered to be justified: it is discrimination directly based on the appellant's nationality.' It is true that the Court then added: 'and, in any event, nothing to justify such unequal treatment has been put before the Court'. However, I read that as an afterthought which does not undermine the clear implications of the first statement.

98 – Opinion in *Phil Collins and Others*, cited in footnote 94, point 11.

99 – See, by analogy, the Opinion of Advocate General Jacobs in *Commission* v *Austria*, cited in footnote 7, point 53.

100 – See footnote 4.

101 – Adopted and opened for signature, ratification and accession by United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966. The Convention entered into force, in accordance with its Article 49, on 23 March 1976.

102 – See Case C-244/06 *Dynamic Medien* [2008] ECR I-505, paragraph 39; and Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 37 and the case-law cited there.

103 – See, by analogy, *Parliament* v *Council*, cited in footnote 102, paragraph 37.

104 – General Comments on the right to education (Art.13), E/C.12/1999/10 ('E/C.12/1999/10'), paragraph 31 (see also paragraph 43).

105 – E/C.12/1999/10, paragraph 59.

106 – The Belgian Government made the following interpretative declaration to the ICESCR: 'With respect to Article 2, paragraph 2, the Belgian Government interprets non-discrimination as to national origin as not necessarily implying an obligation on States automatically to guarantee to foreigners the same rights as to their nationals. The term should be understood to refer to the elimination of any arbitrary behaviour but not of differences in treatment based on objective and reasonable considerations, in conformity with the principles prevailing in democratic societies'. Regardless of whether this declaration should be considered as a disguised reservation to the ICESCR, it cannot affect the interpretation of the principle of non-discrimination within the EC Treaty. See further on disguised reservations: A. Aust, *Modern Treaty Law and Practice* (2007), pp. 129 and 130.

107 – E/C.12/1999/10, paragraph 19.

108 – See point 32 above and the case-law referred to in footnote 8.

109 – See *Morgan and Bucher*, cited in footnote 2, paragraph 24 and the case-law cited there.

110 – See also the Opinion of Advocate General Jacobs in *PhilCollins and Others*, cited in footnote 94, point 11: 'They must not simply be tolerated as aliens, but welcomed by the authorities of the host State as Community nationals who are entitled, "within the scope of application of the Treaty", to all the privileges and advantages enjoyed by the nationals of the host State'.

111 – See my Opinion in Case C-427/06 *Bartsch* [2008] ECR I-0000, point 45.

112 – See, to this effect, Case C-138/07 *Cobelfret* [2009] ECR I-0000, paragraph 68 and the case-law cited there.

113 – See Case C-313/05 *Brzeziński* [2007] ECR I-513, paragraphs 57 and 58 and the case-law referred to there.

114 – See, in that sense, M. Dougan, 'Fees, Grants, Loans and Dole Cheques: Who Covers the Costs of Migrant Education Within the EU?', *Common Market Law Review* 2005, pp. 955 and 956.

115 – Protocol No 30 annexed to the EC Treaty.

116 – See also on subsidiarity my Opinion in *Gouvernement de la Communauté française and Gouvernement wallon*, cited in footnote 3, point 118, footnote 68, referring to N. MacCormick, *Questioning Sovereignty* (1999), p. 135.

117 – See, for an example relating to education: Case 235/87 *Matteucci* v *Communauté française de Belgique* [1988] ECR 5589, paragraph 19.

Case C-73/08: Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française

JUDGMENT OF THE COURT (Grand Chamber)

13 April 2010 (*)

(Citizenship of the Union – Articles 18 and 21 TFEU – Directive 2004/38/EC – Article 24(1) – Freedom to reside – Principle of non-discrimination – Access to higher education – Nationals of a Member State moving to another Member State in order to pursue studies there – Restriction on enrolment by non-resident students for university courses in the public health field – Justification – Proportionality – Risk to the quality of education in medical and paramedical matters – Risk of shortage of graduates in the public health sectors)

In Case C-73/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour constitutionnelle (Belgium), made by decision of 14 February 2008, received at the Court on 22 February 2008, in the proceedings

Nicolas Bressol and Others,

Céline Chaverot and Others

v

Gouvernement de la Communauté française,

THE COURT (Grand Chamber),

composed of V. Skouris, President, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, R. Silva de Lapuerta and C. Toader, Presidents of Chambers, C.W.A. Timmermans, A. Rosas, K. Schiemann, J. Malenovský (Rapporteur), T. von Danwitz, A. Arabadjiev and J.-J. Kasel, Judges,

Advocate General: E. Sharpston,

Registrar: M.-A. Gaudissart, head of unit,

having regard to the written procedure and further to the hearing on 3 March 2009,

after considering the observations submitted on behalf of:

– Mr Bressol and others, by M. Snoeck and J. Troeder, avocats,

– Ms Chaverot and others, by J. Troeder and M. Mareschal, avocats,

– the Belgian Government, by L. Van den Broeck, acting as Agent, and M. Nihoul, avocat,

– the Austrian Government, by E. Riedl, acting as Agent,

– the Commission of the European Communities, by C. Cattabriga and G. Rozet, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 June 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the first paragraph of Article 12 EC and Article 18(1) EC, in conjunction with Articles 149(1) and (2) EC and Article 150(2) EC.

2 The reference was made in proceedings between Mr Bressol and others and Ms Chaverot and others, on the one hand, and the Gouvernement de la Communauté française (Government of the French Community), on the other hand, seeking a review of the constitutionality of the decree of the French Community of 16 June 2006 which regulates the number of students in certain programmes in the first two years of undergraduate studies in higher education (*Moniteur belge* of 6 July 2006, p. 34055; 'the decree of 16 June 2006').

Legal framework

International law

3 Under Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, which was adopted by the United Nations General Assembly on 16 December 1966 and which entered into force on 3 January 1976 ('the Covenant'):

'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to … national … origin …'

4 Article 13(2)(c) of the Covenant provides:

'The States Parties to the present Covenant recognise that, with a view to achieving the full realisation of [the right of everyone to education]:

…

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; …'

European Union law

5 Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and – corrigenda – OJ 2004 L 229, p. 35; OJ 2005 L 197, p. 34 and OJ 2007 L 204, p. 28), which was adopted in accordance with the second paragraph of Article 12 EC and Articles 18 EC, 40 EC, 44 EC and 52 EC, states in recitals 1, 3 and 20 in the preamble as follows:

'(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

…

(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

…

(20) In accordance with the prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals in areas covered by the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law.'

6 Article 3(1) of Directive 2004/38 states:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members …'

7 Under Article 24(1) of Directive 2004/38, under the heading 'equal treatment':

'Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.'

National law

8 According to the decree of 16 June 2006, the universities and schools of higher education of the French Community are to limit, subject to certain detailed rules, the number of students not considered as resident in Belgium for the purposes of that decree at the time of their registration ('non-resident students') who may register for the first time in one of the nine medical or paramedical programmes referred to in that decree.

9 Under Article 1 of the decree of 16 June 2006:

'A resident student for the purposes of this decree is a student who, at the time of his registration in an institution of higher education, proves that his principal residence is in Belgium and that he fulfils one of the following conditions:

1° he has the right to remain permanently in Belgium;

2° he has had his principal residence in Belgium for at least six months prior to his registration in an institution of higher education, at the same time carrying on a remunerated or unremunerated professional activity or benefiting from a replacement income granted by a Belgian public service;

3° he has permission to remain for an unlimited period [in Belgium] on the basis of [the relevant Belgian legislation];

4° he has permission to remain in Belgium because he enjoys refugee status [as defined by Belgian legislation] or has submitted a request to be recognised as a refugee;

5° he has the right to reside in Belgium because he benefits from temporary protection on the basis of [the relevant Belgian legislation];

6° he has a mother, father, legal guardian, or spouse who fulfils one of the above conditions;

7° he has had his principal residence in Belgium for at least three years at the time of his registration in an institution of higher education;

8° he has been granted a scholarship for his studies within the framework of development cooperation for the academic year and for the studies for which the request for registration was introduced.

The "right to remain permanently" within the meaning of paragraph 1, 1°, means, for citizens of another Member State of the European Union, the right recognised by virtue of Articles 16 and 17 of Directive 2004/38/EC …'

10 Chapter II of that decree, comprising Articles 2 to 5, contains provisions concerning universities.

11 Under Article 2 of the decree:

'The academic authorities shall limit the number of students who enrol for the first time with a university of the French Community in one of the courses referred to in Article 3, according to the method set out in Article 4.

…'

12 Article 3 of the decree states:

'The provisions of [chapter II] are applicable to the courses leading to the following degrees:

1° Bachelor in physiotherapy and rehabilitation;

2° Bachelor in veterinary medicine.'

13 Article 4 of the decree states as follows:

'For each university and for each course referred to in Article 3, there will be a total number "T" of students enrolling for the first time in the relevant course and who are taken into account for the purposes of financing, as well as a number "NR" of students enrolling for the first time in the relevant course and who are not considered to be resident within the meaning of Article 1.

When the ratio between NR, on the one hand, and T of the previous academic year, on the other hand, reaches a specified percentage "P", the academic authorities shall refuse further registration to students who have not yet been enrolled on the relevant course and who are not considered to be resident within the meaning of Article 1.

P in the previous paragraph is fixed at 30 percent. However, when, in a particular academic year, the number of students studying in a country other than in the one where they have obtained their secondary school diploma is above 10 percent on average in all the higher education institutions of the European Union, P equals, for the next academic year, that percentage multiplied by 3.'

14 Article 5 of the decree of 16 June 2006 provides:

'… students who are not considered to be resident within the meaning of Article 1 may apply for registration in a course listed in Article 3 at the earliest three working days before 2 September preceding the relevant academic year.
…

…

By derogation from the first paragraph, as regards non-resident students who present themselves in order to lodge an application for registration in one of the courses referred to in Article 3 at the latest on the last working day before the 2 September preceding the academic year, if the number of those students who have so presented themselves exceeds NR as referred to in Article 4, paragraph 2, the priority as between those students will be determined by drawing lots.
…

…'

15 Chapter III of the decree of 16 June 2006, comprising Articles 6 to 9, contains provisions relating to schools of higher education. The first paragraph of Article 6, and Articles 8 and 9 of the decree, contain provisions analogous to the first paragraph of Article 2, and Articles 4 and 5 of the decree.

16 Under Article 7 of that decree, those provisions are applicable to the course leading to the following degrees:

'1° Bachelor of midwifery;

2° Bachelor of occupational therapy;

3° Bachelor of speech therapy;

4° Bachelor of podiatry-chiropody;

5° Bachelor of physiotherapy;

6° Bachelor of audiology;

7° Educator specialised in psycho-educational counselling.'

The actions in the main proceedings and the questions referred for a preliminary ruling

17 The system of higher education of the French Community is based on free access to education, without restriction on the registration of students.

18 However, for some years, that Community has noted a significant increase in the number of students from Member States other than the Kingdom of Belgium enrolling in its institutions of higher education, in particular in nine medical or paramedical courses. According to the order for reference, that increase was due, inter alia, to the influx of French students who turn to the French Community, because higher education there shares the same language of instruction as France and because the French Republic has restricted access to the studies concerned.

19 Considering that the number of those students attending those courses had become too large, the French Community adopted the decree of 16 June 2006.

20 On 9 August and 13 December 2006, the applicants in the main proceedings brought an action before the Constitutional Court seeking annulment of the decree.

21 Some of those applicants are students, in particular of French nationality, who do not fall into any of the categories referred to in Article 1 of the decree of 16 June 2006 and who, in respect of the academic year 2006/07, applied for registration in a higher education institution of the French Community, in order to follow one of the courses referred to in that decree.

22 Since the number of non-resident students exceeded the threshold fixed by that decree, the institutions concerned organised the drawing of lots between those students, in which the applicants in the main proceedings were unsuccessful. Therefore, the institutions concerned refused to agree to their applications for enrolment.

23 The other applicants in the main proceedings are lecturers at the universities and schools of higher education covered by the decree of 16 June 2006, who consider that the application of that decree directly and immediately places their jobs in jeopardy, as it will, ultimately, lead to a reduction in the number of students enrolled in their higher education institutions.

24 In support of their action, the applicants in the main proceedings have claimed in particular that the decree of 16 June 2006 infringes the principle of non-discrimination by treating resident and non-resident students differently, for no valid reason. Whereas the resident students continue to enjoy free access to the courses referred to in that decree, access by non-resident students to those courses is restricted in such a way that the number of students enrolled in those courses may not exceed the 30% threshold.

25 The referring court has expressed doubts as to the legality of the decree of 16 June 2006, considering that the provisions of the Belgian constitution – the alleged infringement of which it has jurisdiction to review – must be read in conjunction with the first paragraph of Article 12 EC, Article 18(1) EC, Article 149(1) EC and the second indent of Article 149(2) EC, and the third indent of Article 150(2) EC.

26 In those circumstances, the Constitutional Court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Are the first paragraph of Article 12 [EC] and Article 18(1) [EC], in conjunction with Article 149(1), the second indent of Article 149(2) [EC] and the third indent of Article 150(2) [EC] thereof, to be interpreted as meaning that those provisions preclude an autonomous community in a Member State with responsibility for higher education, which is faced, as a result of a restrictive policy practised by a neighbouring Member State, with an influx of students from the neighbouring Member State in a number of programmes of study of a medical nature financed principally out of public funds, from adopting measures such as those contained in the [Decree of 16 June 2006], when that community relies on valid reasons for claiming that that situation could place an excessive burden on public finances and jeopardise the quality of the education provided?

(2) Would the answer to the first question be different if that community could show that the effect of that situation is that too few students residing in the community in question obtain diplomas for there to be, over a long period, a sufficient number of qualified medical personnel to ensure the quality of the public health system in that community?

(3) Would the answer to the first question be different if that community, having regard to the last part of Article 149(1) [EC] and Article 13(2)(c) of the [Covenant], which contains a standstill obligation, chooses to maintain wide and democratic access to quality higher education for the population of that community?’

The first and second questions

27 By its first two questions, which should be examined together, the referring court asks, essentially, whether European Union law precludes legislation of a Member State, such as that at issue in the main proceedings, which restricts the number of non-resident students who may enrol for the first time in medical and paramedical courses at higher education establishments, where that Member State faces an influx of students from a neighbouring Member State prompted by the latter Member State’s pursuit of a restrictive policy and where the result of that situation is that too few students resident in the first Member State graduate from those courses.

Member States’ competence in education matters

28 As a preliminary point, it should be recalled that whilst European Union law does not detract from the power of the Member States as regards the organisation of their education systems and of vocational training – pursuant to Articles 165(1) and 166(1) TFEU – the fact remains that, when exercising that power, Member States must comply with European Union law, in particular the provisions on the freedom to move and reside within the territory of the Member States (see, to that effect, Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I-6849, paragraph 70, and Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] ECR I-9161, paragraph 24).

29 The Member States are thus free to opt for an education system based on free access – without restriction on the number of students who may register – or for a system based on controlled access in which the students are selected. However, where they opt for one of those systems or for a combination of them, the rules of the chosen system must comply with European Union law and, in particular, the principle of non-discrimination on grounds of nationality.

Identification of the rules applicable to the cases in the main proceedings

30 Article 21(1) TFEU provides that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

31 Furthermore, the Court's case-law makes clear that every citizen of the Union may rely on Article 18 TFEU, which prohibits any discrimination on grounds of nationality, in all situations falling within the scope *ratione materiae* of European Union law, those situations including the exercise of the freedom conferred by Article 21 TFEU to move and reside within the territory of the Member States (see, to that effect, Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 24; Case C-209/03 *Bidar* [2005] ECR I-2119, paragraphs 32 and 33; and Case C-158/07 *Förster* [2008] ECR I-8507, paragraphs 36 and 37).

32 In addition, it is apparent from that case-law that that prohibition also covers situations concerning the conditions of access to vocational training, and that both higher education and university education constitute vocational training (Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969, paragraphs 32 and 33 and case-law cited).

33 It follows that the students in question in the main proceedings may rely on the right, enshrined in Articles 18 and 21 TFEU, to move and reside freely within the territory of a Member State, such as the Kingdom of Belgium, without being subject to direct or indirect discrimination on ground of their nationality.

34 That being so, it cannot be ruled out that the situation of some of the applicants in the main proceedings may be covered by Article 24(1) of Directive 2004/38, which applies to every citizen who resides in the territory of the host Member State in accordance with that directive.

35 In that regard, it is clear from the documents before the Court, first, that the students in question in the main proceedings are citizens of the Union.

36 Second, the fact that they do not exercise, if that be the case, any economic activity in Belgium is irrelevant, since Directive 2004/38 applies to all citizens of the Union irrespective of whether they exercise an economic activity as an employee or as a self-employed person in the territory of another Member State or whether they do not exercise any economic activity there.

37 Third, it cannot be ruled out that some of the applicants concerned in the main proceedings already resided in Belgium before deciding that they would like to enrol in one of the courses concerned.

38 Fourth, it must be held that Directive 2004/38 applies *ratione temporis* to the cases in the main proceedings. The Member States were obliged, first, to implement that directive before 30 April 2006. Second, the decree at issue in the main proceedings was adopted after that date, on 16 June 2006. In addition, it is common ground that the students in question in the main proceedings applied for enrolment in the institutions of higher education concerned for the

academic year 2006/07, and that their enrolment was refused on the basis of that decree. Their request must therefore have been refused after 30 April 2006.

39 However, as the Court is not in possession of all the facts which would enable it to hold that the situation of the applicants in the main proceedings also falls within Article 24(1) of Directive 2004/38, it is for the referring court to assess whether that provision actually applies in the cases in the main proceedings.

The existence of unequal treatment

40 It should be recalled that the principle of non-discrimination prohibits not only direct discrimination on grounds of nationality but also all indirect forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (see, to that effect, Case C-212/05 *Hartmann* [2007] ECR I-6303, paragraph 29).

41 Unless objectively justified and proportionate to the aim pursued, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect nationals of other Member States more than nationals of the host State and there is a consequent risk that it will place the former at a particular disadvantage (see, to that effect, Case C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I-10497, paragraph 40, and *Hartmann*, paragraph 30).

42 In the cases in the main proceedings, the decree of 16 June 2006 provides that unrestricted access to the medical and paramedical courses covered by that decree is available only to resident students, that is those who satisfy both the requirement that their principal residence be in Belgium and one of the eight other alternative conditions listed in points 1° to 8° of the first paragraph of Article 1 of that decree.

43 The students who do not satisfy those conditions, by contrast, enjoy only restricted access to those institutions, since the total number of those students is in principle limited, for each university institution and for each course, to 30% of all enrolments in the preceding academic year. Once that percentage has been reached, the non-resident students are selected, with a view to their registration, by drawing lots.

44 Thus, the national legislation at issue in the main proceedings creates a difference in treatment between resident and non-resident students.

45 A residence condition, such as that required by that legislation, is more easily satisfied by Belgian nationals, who more often than not reside in Belgium, than by nationals of other Member States, whose residence is generally in a Member State other than Belgium (see, by analogy, Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraphs 23 and 24, and *Hartmann*, paragraph 31).

46 It follows, as the Belgian Government moreover admits, that the national legislation at issue in the main proceedings affects, by its very nature, nationals of Member States other than the Kingdom of Belgium more than Belgian nationals and that it therefore places the former at a particular disadvantage.

The justification for the unequal treatment

47 As stated in paragraph 41 of the present judgment, a difference in treatment, such as that put in place by the decree of 16 June 2006, constitutes indirect discrimination on the ground of nationality which is prohibited, unless it is objectively justified.

48 In addition, in order to be justified, the measure concerned must be appropriate for securing the attainment of the legitimate objective it pursues and must not go beyond what is necessary to attain it (see, to that effect, Case C-527/06 *Renneberg* [2008] ECR I-7735, paragraph 81, and Joined Cases C-171/07 and C- 172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-0000, paragraph 25).

The justification relating to excessive burdens on the financing of higher education

49 The Belgian Government, supported by the Austrian Government, submits, first, that the difference in treatment of resident and non-resident students is necessary to avoid excessive burdens on the financing of higher education arising as a result of the fact that, were a difference in treatment not to be made, the number of non-resident students enrolled in higher education institutions of the French Community would reach an excessively high level.

50 In that regard, it should be held that, according to the explanations of the French Community as they appear from the order for reference, the financial burden is not an essential reason which justified the adoption of the decree of 16 June 2006. Those explanations indicate that the financing of education is organised through a 'closed envelope' system in which the overall allocation does not vary depending on the total number of students.

51 In those circumstances, the fear of an excessive burden on the financing of higher education cannot justify the unequal treatment of resident students and non-resident students.

The justification relating to the protection of the homogeneity of the higher education system

52 The Belgian Government, supported by the Austrian Government, claims that the presence of non-resident students in the courses concerned has reached a level which is likely to cause a deterioration in the quality of higher education owing to the inherent limits in the capacity of the educational establishments to welcome them and in the staff available. Thus, to safeguard the homogeneity of that system and to ensure wide and democratic access for the population of the French Community to quality higher education, it proved necessary to treat resident students and non-resident students differently and to limit the number of the latter.

53 Admittedly, it cannot be excluded from the outset that the prevention of a risk to the existence of a national education system and to its homogeneity may justify a difference in treatment between some students (see, to that effect, *Commission* v *Austria*, paragraph 66).

54 However, the matters put forward as justification in that regard are the same as those linked to the protection of public health, since all the courses concerned fall within that field. They must, therefore, be examined only in the light of the justifications relating to the safeguarding of public health.

The justification relating to public health requirements

– Observations submitted to the Court

55 The Belgian Government, supported by the Austrian Government, confirms that the legislation at issue in the main proceedings is necessary to attain the objective of ensuring the quality and continuing provision of medical and paramedical care within the French Community.

56 The large number of non-resident students causes, first, a significant reduction in the quality of teaching in the medical and paramedical courses, as that teaching requires, inter alia, the provision of a significant number of hours of practical training. It became apparent that such training cannot be correctly provided where a certain number of students is exceeded, because the capacity of the higher education establishments, the available staff and the possibilities of practical training are not unlimited.

57 In order to illustrate the teaching difficulties which have been experienced, the Belgian Government refers, in particular, to the situation of veterinary medicine studies. It points out, with reference to the quality standards for veterinary education – which require inter alia clinical practice by each student on a sufficient number of animals – that it had been established that it was not possible to train, within the French Community, more than 200 veterinarians per year in the second part of the university-level studies. However, because of an influx of non-resident students, the

total number of students spread over the six years of studies rose from 1233 to 2343 between the academic years 1995/96 and 2002/03.

58 The situation is similar with regard to the other courses covered by the decree of 16 June 2006.

59 Second, the Belgian Government maintains that the large numbers of non-resident students are likely ultimately to bring about a shortage of qualified medical personnel throughout the territory which would undermine the system of public health within the French Community. That stems from the fact that, after their studies, the non-resident students return to their country of origin to exercise their profession there, whereas the number of resident graduates remains too low in some specialties.

60 The applicants in the main proceedings claim in particular that, even assuming those justifications were admissible, the Belgian Government has not established that the circumstances referred to above actually exist.

61 The Commission states that it takes the risks referred to by the Belgian Government very seriously. It considers however that it does not, at present, possess all the facts which would enable it to judge whether the justification is well founded.

– The Court's reply

62 It follows from the case-law that a difference in treatment based indirectly on nationality may be justified by the objective of maintaining a balanced high-quality medical service open to all, in so far as it contributes to achieving a high level of protection of health (see, to that effect, Case C-169/07 *Hartlauer* [2009] ECR I-0000, paragraph 47 and case-law cited).

63 Thus, it must be determined whether the legislation at issue in the main proceedings is appropriate for securing the attainment of that legitimate objective and whether it goes beyond what is necessary to attain it.

64 In that regard, it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent such legislation satisfies those conditions (see, to that effect, Case 171/88 *Rinner-Kühn* [1989] ECR 2743, paragraph 15, and Joined Cases C-4/02 and C-5/02 *Schönheit and Becker* [2003] ECR I-12575, paragraph 82).

65 However, the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance based on the documents relating to the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment (Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, paragraph 52, and *Schönheit and Becker*, paragraph 83).

66 In the first place, it is for the referring court to establish that there are genuine risks to the protection of public health.

67 In that regard, it cannot be ruled out a priori that a reduction in the quality of training of future health professionals may ultimately impair the quality of care provided in the territory concerned, since the quality of the medical or paramedical service within a given area depends on the competence of the health professionals who carry out their activity there.

68 It also cannot be ruled out that a limitation of the total number of students in the courses concerned – in particular with a view to ensuring the quality of training – may reduce, proportionately, the number of graduates prepared in the future to ensure the availability of the service in the territory concerned, which could then have an effect on the level of public health protection. On that point, it must be acknowledged that a shortage of health professionals would cause serious problems for the protection of public health and that the prevention of that risk requires that a sufficient number

of graduates establish themselves in that territory in order to carry out there one of the medical or paramedical occupations covered by the decree at issue in the main proceedings.

69 In assessing those risks, the referring court must take into consideration, first, the fact that the link between the training of future health professionals and the objective of maintaining a balanced high-quality medical service open to all is only indirect and the causal relationship less well established than in the case of the link between the objective of public health and the activity of health professionals who are already present on the market (see *Hartlauer*, paragraphs 51 to 53, and *Apothekerkammer des Saarlandes and Others*, paragraphs 34 to 40). The assessment of such a link will depend inter alia on a prospective analysis which will have to extrapolate on the basis of a number of contingent and uncertain factors and take into account the future development of the health sector concerned, but also depend on an analysis of the situation at the outset, that is to say, as it currently stands.

70 Second, when specifically assessing the circumstances of the cases in the main proceedings, the referring court must take into account the fact that, where there is uncertainty as to the existence or extent of the risks to the protection of public health in its territory, the Member State may take protective measures without having to wait for the shortage of health professionals to materialise (see, by analogy, *Apothekerkammer des Saarlandes*, paragraph 30 and case-law cited). The same applies with regard to the risks to the quality of education in that field.

71 That being the case, it is for the competent national authorities to show that such risks actually exist (see, by analogy, *Apothekerkammer des Saarlandes and Others*, paragraph 39). According to settled case-law, it is for those authorities, where they adopt a measure derogating from a principle enshrined by European Union Law, to show in each individual case that that measure is appropriate for securing the attainment of the objective relied upon and does not go beyond what is necessary to attain it. The reasons invoked by a Member State by way of justification must thus be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments (see, to that effect, Case C-8/02 *Leichtle* [2004] ECR I-2641, paragraph 45, and *Commission* v *Austria*, paragraph 63). Such an objective, detailed analysis, supported by figures, must be capable of demonstrating, with solid and consistent data, that there are genuine risks to public health.

72 In the main proceedings, that analysis must inter alia make it possible to assess, for each of the nine courses covered by the decree of 16 June 2006, the maximum number of students who can be trained at a level which complies with the desired training quality standards. It must, in addition, state the number of graduates who must establish themselves within the French Community to carry out a medical or paramedical occupation there in order to be able to ensure adequate public health services.

73 In addition, that analysis cannot just refer to the figures concerning one or other group of students and infer, in particular, that at the end of their studies all the non-resident students will establish themselves in the State in which they resided before commencing their studies and pursue there one of the occupations at issue in the main proceedings. Consequently, that analysis must take into account the impact of the group of non-resident students on the pursuit of the objective of ensuring the availability of professionals within the French Community. Also, it must take into account the possibility that resident students may decide to exercise their profession in a State other than the Kingdom of Belgium at the end of their studies. Equally, it must take into account the extent to which persons who have not studied within the French Community may establish themselves there later in order to exercise one of those professions.

74 It is for the competent authorities to provide the referring court with an analysis which satisfies those requirements.

75 In the second place, if the referring court considers that there are genuine risks to the protection of public health, that court must assess, in the light of the evidence provided by the national authorities, whether the legislation at issue in the main proceedings can be regarded as appropriate for attaining the objective of protecting public health.

76 In that context, it must in particular assess whether a limitation of the number of non-resident students can really bring about an increase in the number of graduates ready to ensure the future availability of public health services within the French Community.

77 In the third place, it is for the referring court to assess whether the legislation at issue in the main proceedings goes beyond what is necessary to attain the stated objective, that is whether it could be attained by less restrictive measures.

78 In that regard, it should be pointed out that it is for that court to ascertain, in particular, whether the objective in the public interest relied upon could not be attained by less restrictive measures which aim to encourage students who undertake their studies in the French Community to establish themselves there at the end of their studies or which aim to encourage professionals educated outside the French Community to establish themselves within it.

79 Equally, it is for the referring court to examine whether the competent authorities have reconciled, in an appropriate way, the attainment of that objective with the requirements of European Union law and, in particular, with the opportunity for students coming from other Member States to gain access to higher education, an opportunity which constitutes the very essence of the principle of freedom of movement for students (see, to that effect, *Commission* v *Austria*, paragraph 70). The restrictions on access to such education, introduced by a Member State, must therefore be limited to what is necessary in order to obtain the objectives pursued and must allow sufficiently wide access by those students to higher education.

80 In that regard, it is apparent from the documents before the Court that non-resident students who are interested in higher education are selected, with a view to their registration, by drawing lots which, as such, does not take into account their knowledge or experience.

81 In those circumstances, it is for the referring court to ascertain whether the selection process for non-resident students is limited to the drawing of lots and, if that is the case, whether that means of selection based not on the aptitude of the candidates concerned but on chance is necessary to attain the objectives pursued.

82 Consequently, the answer to the first and second questions is that Articles 18 and 21 TFEU preclude national legislation, such as that at issue in the main proceedings, which limits the number of non-resident students who may enrol for the first time in medical and paramedical courses at higher education establishments, unless the referring court, having assessed all the relevant evidence submitted by the competent authorities, finds that that legislation is justified in the light of the objective of protection of public health.

The third question

83 By its third question, the referring court asks the Court to explain, essentially, the effect on the situation at issue in the main proceedings of the Member States' obligations under Article 13(2)(c) of the Covenant.

84 The Belgian Government submits that the adoption of the decree of 16 June 2006 was indispensable in order to comply with the right to education of members of the French Community as that right to education flows from Article 13(2)(c) of the Covenant. The provision contains a standstill clause obliging that community to maintain wide and democratic access to quality higher education. In the absence of that decree, the maintenance of such access would be undermined.

85 In that regard, it must however be pointed out that there is no incompatibility between the Covenant and the requirements flowing, as the case may be, from Articles 18 and 21 TFEU.

86 As is apparent from the wording of Article 13(2)(c), the Covenant pursues in essence the same objective as Articles 18 and 21 TFEU, that is to ensure that the principle of non-discrimination is observed in relation to access to

higher education. That is confirmed by Article 2(2) of the Covenant, according to which the States Parties to the Covenant undertake to guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind as to, inter alia, national origin.

87 By contrast, Article 13(2)(c) of the Covenant does not require a State Party, nor indeed authorise it, to ensure wide access to quality higher education only for its own nationals.

88 In the light of the foregoing, the answer to the third question is that the competent authorities may not rely on Article 13(2)(c) of the Covenant if the referring court holds that the decree of 16 June 2006 is not compatible with Articles 18 and 21 TFEU.

Temporal effect of the judgment

89 If the Court were to hold that European Union law precludes the national legislation at issue in the main proceedings, the Belgian Government requests that the temporal effect of the judgment delivered be limited. That limitation would be necessary because a large number of legal relationships have been established in good faith, on account of the fact that a large number of non-resident students have filed documents with a view to enrolment for the academic year 2006/07 in one of the courses referred to by the decree of 16 June 2006. Were those relationships to be called into question, there could therefore be serious economic repercussions tending to destabilise the French Community's education budget.

90 It has consistently been held that the interpretation which the Court, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, gives to a rule of European Union law clarifies and where necessary defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force. It follows that the rule as thus interpreted can, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions are satisfied for bringing an action relating to the application of that rule before the courts having jurisdiction (see Case 24/86 *Blaizot and Others* [1988] ECR 379, paragraph 27, and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 141).

91 It is only exceptionally that the Court may, having regard to the general principle of legal certainty inherent in the European Union legal order, find it necessary to limit the possibility for interested parties, relying on the Court's interpretation of a provision, to call in question legal relations established in good faith. For there to be such a limitation, two essential criteria must be fulfilled, namely that those concerned acted in good faith and there is a risk of serious difficulties (see, inter alia, Case C-57/93 *Vroege* [1994] ECR I-4541, paragraph 21, and Case C-402/03 *Skov and Bilka* [2006] ECR I-199, paragraph 51).

92 It is also settled case-law that the financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effect of the ruling (see, inter alia, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 52).

93 Indeed, the Court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that both individuals and national authorities had been led into adopting practices which did not comply with European Union law by reason of objective, significant uncertainty regarding the implications of European Union provisions, to which the conduct of other Member States or the Commission may even have contributed (*Grzelczyk*, paragraph 53).

94 In the cases in the main proceedings, it must be held that the Belgian Government has not provided the Court with any specific evidence making it possible to maintain that the framers of the decree of 16 June 2006 had been led

into adopting practices which may not have complied with European Union law by reason of objective, significant uncertainty regarding the implications of that law.

95 Equally, that government has clearly failed to substantiate in any way, by specific evidence, its argument that there is a risk that the present judgment would have serious financial consequences if its temporal effects are not limited.

96 In those circumstances, there is no need to limit the temporal effects of the present judgment.

Costs

97 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Articles 18 and 21 TFEU preclude national legislation, such as that at issue in the main proceedings, which limits the number of students not regarded as resident in Belgium who may enrol for the first time in medical and paramedical courses at higher education establishments, unless the referring court, having assessed all the relevant evidence submitted by the competent authorities, finds that that legislation is justified in the light of the objective of protection of public health.**

2. **The competent authorities may not rely on Article 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly on 16 December 1966, if the referring court holds that the decree of the French Community of 16 June 2006 which regulates the number of students in certain programmes in the first two years of undergraduate studies in higher education is not compatible with Articles 18 and 21 TFEU.**

Case C 127/08: Blaise Baheten Metock (and Others) v Minister for Justice, Equality and Law Reform

JUDGMENT OF THE COURT (Grand Chamber)

25 July 2008 (*)

(Directive 2004/38/EC – Right of Union citizens and their family members to move and reside freely in the territory of a Member State – Family members who are nationals of non-member countries – Nationals of non-member countries who entered the host Member State before becoming spouses of Union citizens)

In Case C-127/08,

REFERENCE for a preliminary ruling under Article 234 EC from the High Court (Ireland), made by decision of 14 March 2008, received at the Court on 25 March 2008, in the proceedings

Blaise Baheten Metock,

Hanette Eugenie Ngo Ikeng,

Christian Joel Baheten,

Samuel Zion Ikeng Baheten,

Hencheal Ikogho,

Donna Ikogho,

Roland Chinedu,

Marlene Babucke Chinedu,

Henry Igboanusi,

Roksana Batkowska

v

Minister for Justice, Equality and Law Reform,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and K. Lenaerts, Presidents of Chambers, A. Tizzano, U. Lõhmus, J.N. Cunha Rodrigues, M. Ilešič (Rapporteur), J. Malenovský, J. Klučka, C. Toader and J.-J. Kasel, Judges,

Advocate General: M. Poiares Maduro,

Registrar: M. Ferreira, Principal Administrator,

having regard to the decision of the President of the Court of 17 April 2008 to apply an accelerated procedure in accordance with Article 23a of the Statute of the Court of Justice and the first paragraph of Article 104a of the Rules of Procedure,

having regard to the written procedure and further to the hearing on 3 June 2008,

after considering the observations submitted on behalf of:

– B. Baheten Metock, H.E. Ngo Ikeng, C.J. Baheten and S.Z. Ikeng Baheten, by M. de Blacam, SC, and J. Stanley, BL, instructed by V. Crowley, S. Burke and D. Langan, Solicitors,

– H. Ikogho and D. Ikogho, by R. Boyle, SC, G. O'Halloran, BL, and A. Lowry, BL, instructed by S. Mulvihill, Solicitor,

– R. Chinedu and M. Babucke Chinedu, by A. Collins, SC, M. Lynn, BL, and P. O'Shea, BL, instructed by B. Burns, Solicitor,

– H. Igboanusi and R. Batkowska, by M. Forde, SC, and O. Ladenegan, BL, instructed by K. Tunney and W. Mudah, Solicitors,

– the Minister for Justice, Equality and Law Reform, by D. O'Hagan, acting as Agent, and B. O'Moore, SC, S. Moorhead, SC, and D. Conlan Smyth, BL,

– the Czech Government, by M. Smolek, acting as Agent,

– the Danish Government, by J. Bering Liisberg and B. Weis Fogh, acting as Agents,

– the German Government, by M. Lumma and J. Möller, acting as Agents,

– the Greek Government, by T. Papadopoulou and M. Michelogiannaki, acting as Agents,

– the Cypriot Government, by D. Lisandrou, acting as Agent,

– the Maltese Government, by S. Camilleri, acting as Agent,

– the Netherlands Government, by C. Wissels and C. ten Dam, acting as Agents,

– the Austrian Government, by E. Riedl and T. Fülöp, acting as Agents,

– the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,

– the United Kingdom Government, by I. Rao, acting as Agent, and T. Ward, Barrister,

– the Commission of the European Communities, by D. Maidani and M. Wilderspin, acting as Agents,

after hearing the Advocate General,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda (OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, OJ 2005 L 197, p. 34, and OJ 2007 L 204, p. 28)).

2 The reference was made in the course of four applications for judicial review before the High Court, each seeking inter alia an order of certiorari quashing the decision of the Minister for Justice, Equality and Law Reform ('the Minister for Justice') refusing to grant a residence card to a national of a non-member country married to a Union citizen residing in Ireland.

Legal context

Community legislation

3 Directive 2004/38 was adopted on the basis of Articles 12 EC, 18 EC, 40 EC, 44 EC and 52 EC.

4 Recitals 1 to 5, 11, 14 and 31 in the preamble to that directive read as follows:

'(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.

(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

(4) With a view to remedying this sector-by-sector, piecemeal approach to the right of free movement and residence and facilitating the exercise of this right, there needs to be a single legislative act …

(5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality …

…

(11) The fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures.

…

(14) The supporting documents required by the competent authorities for the issuing of a registration certificate or of a residence card should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members.

…

(31) This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation'.

5 According to Article 1(a) of Directive 2004/38, the directive concerns inter alia 'the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members'.

6 According to Article 2(2)(a) of Directive 2004/38, for the purposes of the directive, 'family member' means inter alia the spouse.

7 Article 3 of Directive 2004/38, 'Beneficiaries', provides in paragraph 1:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.'

8 Article 5 of Directive 2004/38, 'Right of entry', states:

'1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

…

2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.

…

5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.'

9 Article 7 of Directive 2004/38, 'Right of residence for more than three months', states:

'1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; …

…

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

…'

10 Article 9 of Directive 2004/38, 'Administrative formalities for family members who are not nationals of a Member State', provides:

'1. Member States shall issue a residence card to family members of a Union citizen who are not nationals of a Member State, where the planned period of residence is for more than three months.

2. The deadline for submitting the residence card application may not be less than three months from the date of arrival.

3. Failure to comply with the requirement to apply for a residence card may make the person concerned liable to proportionate and non-discriminatory sanctions.'

11 Article 10 of Directive 2004/38, 'Issue of residence cards', provides:

'1. The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called "Residence card of a family member of a Union citizen" no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.

2. For the residence card to be issued, Member States shall require presentation of the following documents:

(a) a valid passport;

(b) a document attesting to the existence of a family relationship or of a registered partnership;

(c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;

(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;

…'

12 Article 27 of Directive 2004/38, which appears in Chapter VI of the directive, 'Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health', provides in paragraphs 1 and 2:

‘1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.’

13 Article 35 of Directive 2004/38, ‘Abuse of rights’, provides:

‘Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.’

14 As stated in Article 38 of Directive 2004/38, it repealed inter alia Articles 10 and 11 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992 (OJ 1992 L 245, p. 1) (‘Regulation No 1612/68’).

National legislation

15 At the material time, Directive 2004/38 was transposed into Irish law by the European Communities (Free Movement of Persons) (No 2) Regulations 2006, which were made on 18 December 2006 and entered into force on 1 January 2007 (‘the 2006 Regulations’).

16 Regulation 3(1) and (2) of the 2006 Regulations provides:

‘(1) These Regulations shall apply to –

(a) Union citizens,

(b) subject to paragraph (2), qualifying family members of Union citizens who are not themselves Union citizens, and

(c) subject to paragraph (2), permitted family members of Union citizens.

(2) These Regulations shall not apply to a family member unless the family member is lawfully resident in another Member State and is –

(a) seeking to enter the State in the company of a Union citizen in respect of whom he or she is a family member, or

(b) seeking to join a Union citizen, in respect of whom he or she is a family member, who is lawfully present in the State.’

17 ‘Qualifying family members of Union citizens’ within the meaning of Regulation 3 of the 2006 Regulations include spouses of Union citizens.

The main proceedings

The Metock case

18 Mr Metock, a national of Cameroon, arrived in Ireland on 23 June 2006 and applied for asylum. His application was definitively refused on 28 February 2007.

19 Ms Ngo Ikeng, born a national of Cameroon, has acquired United Kingdom nationality. She has resided and worked in Ireland since late 2006.

20 Mr Metock and Ms Ngo Ikeng met in Cameroon in 1994 and have been in a relationship since then. They have two children, one born in 1998 and the other in 2006. They were married in Ireland on 12 October 2006.

21 On 6 November 2006 Mr Metock applied for a residence card as the spouse of a Union citizen working and residing in Ireland. The application was refused by decision of the Minister for Justice of 28 June 2007, on the ground that Mr Metock did not satisfy the condition of prior lawful residence in another Member State required by Regulation 3(2) of the 2006 Regulations.

22 Mr Metock, Ms Ngo Ikeng and their children brought proceedings against that decision.

The Ikogho case

23 Mr Ikogho, a national of a non-member country, arrived in Ireland in November 2004 and applied for asylum. His application was definitively refused and the Minister for Justice made a deportation order against him on 15 September 2005. A challenge to the deportation order was dismissed by order of the High Court of 19 June 2007.

24 Mrs Ikogho, who is a United Kingdom national and a Union citizen, has resided and worked in Ireland since 1996.

25 Mr and Mrs Ikogho met in Ireland in December 2004 and were married there on 7 June 2006.

26 On 6 July 2006 Mr Ikogho applied for a residence card as the spouse of a Union citizen residing and working in Ireland. His application was refused by decision of the Minister for Justice of 12 January 2007, on the ground that, by reason of the deportation order of 15 September 2005, Mr Ikogho was staying in Ireland illegally at the time of his marriage.

27 Mr and Mrs Ikogho brought proceedings against that decision.

The Chinedu case

28 Mr Chinedu, a Nigerian national, arrived in Ireland in December 2005 and applied for asylum. His application was definitively refused on 8 August 2006. Ms Babucke, of German nationality, is lawfully resident in Ireland.

29 Mr Chinedu and Ms Babucke were married in Ireland on 3 July 2006.

30 By application received by the Minister for Justice on 1 August 2006, Mr Chinedu applied for a residence card as the spouse of a Union citizen. The application was refused by decision of the Minister for Justice of 17 April 2007, on the ground that Mr Chinedu did not satisfy the condition of prior lawful residence in another Member State required by Regulation 3(2) of the 2006 Regulations.

31 Mr Chinedu and Ms Babucke brought proceedings against that decision.

The Igboanusi case

32 Mr Igboanusi, a Nigerian national, arrived in Ireland on 2 April 2004 and applied for asylum. His application was refused on 31 May 2005 and the Minister for Justice made a deportation order against him on 15 September 2005.

33 Ms Batkowska, a Polish national, has resided and worked in Ireland since April 2006.

34 Mr Igboanusi and Ms Batkowska met in Ireland and were married there on 24 November 2006.

35 On 27 February 2007 Mr Igboanusi applied for a residence card as the spouse of a Union citizen. His application was refused by decision of the Minister for Justice of 27 August 2007, on the ground that Mr Igboanusi did not satisfy the condition of prior lawful residence in another Member State required by Regulation 3(2) of the 2006 Regulations.

36 Mr Igboanusi and Ms Batkowska brought proceedings against that decision.

37 On 16 November 2007 Mr Igboanusi was arrested and detained pursuant to the deportation order against him. He was deported to Nigeria in December 2007.

The main proceedings and the order for reference

38 The four cases were heard together before the national court.

39 All the applicants in the main proceedings submitted essentially that Regulation 3(2) of the 2006 Regulations is not compatible with Directive 2004/38.

40 They argued that nationals of non-member countries who are spouses of Union citizens have a right, consequential to and dependent on that of the Union citizen, to move and reside in a Member State other than that of which the Union citizen is a national, a right which derives from the family relationship alone.

41 They submitted that Directive 2004/38 governs exhaustively the conditions of entry into and residence in a Member State for a Union citizen who is a national of another Member State and his family members, so that the Member States are not entitled to impose additional conditions. Since the directive makes no provision for a condition of prior lawful residence in another Member State, such as that imposed by the Irish legislation, that legislation is not consistent with Community law.

42 The applicants in the main proceedings further submitted that a national of a non-member country who becomes a family member of a Union citizen while that citizen is resident in a Member State other than that of which he is a national accompanies that citizen within the meaning of Articles 3(1) and 7(2) of Directive 2004/38.

43 The Minister for Justice replied essentially that Directive 2004/38 does not preclude the condition of prior lawful residence in another Member State laid down in Regulation 3(2) of the 2006 Regulations.

44 He submitted that there is a division of competences between the Member States and the Community, under which the Member States have competence in relation to the admission into a Member State of nationals of non-member countries coming from outside Community territory, while the Community has competence to regulate the movement of Union citizens and their family members within the Union.

45 He argued that Directive 2004/38 therefore leaves Member States discretion to impose on nationals of non-member countries who are spouses of Union citizens a condition of prior lawful residence in another Member State. Moreover, that such a condition is consistent with Community law follows from Case C-109/01 *Akrich* [2003] ECR I-9607 and Case C-1/05 *Jia* [2007] ECR I-1.

46 The national court points out that none of the marriages in question is a marriage of convenience.

47 Since it considered that an interpretation of Directive 2004/38 was necessary for it to give judgment in the main proceedings, the High Court decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘(1) Does Directive 2004/38/EC permit a Member State to have a general requirement that a non-EU national spouse of a Union citizen must have been lawfully resident in another Member State prior to coming to the host Member State in order that he or she be entitled to benefit from the provisions of Directive 2004/38/EC?

(2) Does Article 3(1) of Directive 2004/38/EC include within its scope of application a non-EU national who is:

– a spouse of a Union citizen who resides in the host Member State and satisfies a condition in Article 7(1)(a), (b) or (c) and

– is then residing in the host Member State with the Union citizen as his/her spouse

irrespective of when or where their marriage took place or when or how the non-EU national entered the host Member State?

(3) If the answer to the preceding question is in the negative does Article 3(1) of Directive 2004/38/EC include within its scope of application a non-EU national spouse of a Union citizen who is:

– a spouse of a Union citizen who resides in the host Member State and satisfies a condition in Article 7(1)(a), (b) or (c) and

– resides in the host Member State with the Union citizen as his/her spouse

– has entered the host Member State independently of the Union citizen and

– subsequently married the Union citizen in the host Member State?’

The first question

48 By its first question the referring court asks whether Directive 2004/38 precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive.

49 In the first place, it must be stated that, as regards family members of a Union citizen, no provision of Directive 2004/38 makes the application of the directive conditional on their having previously resided in a Member State.

50 As Article 3(1) of Directive 2004/38 states, the directive applies to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 of the directive who accompany them or join them in that Member State. The definition of family members in point 2 of Article 2 of Directive 2004/38 does not distinguish according to whether or not they have already resided lawfully in another Member State.

51 It must also be pointed out that Articles 5, 6(2) and 7(2) of Directive 2004/38 confer the rights of entry, of residence for up to three months, and of residence for more than three months in the host Member State on nationals

of non-member countries who are family members of a Union citizen whom they accompany or join in that Member State, without any reference to the place or conditions of residence they had before arriving in that Member State.

52 In particular, the first subparagraph of Article 5(2) of Directive 2004/38 provides that nationals of non-member countries who are family members of a Union citizen are required to have an entry visa, unless they are in possession of the valid residence card referred to in Article 10 of that directive. In that, as follows from Articles 9(1) and 10(1) of Directive 2004/38, the residence card is the document that evidences the right of residence for more than three months in a Member State of the family members of a Union citizen who are not nationals of a Member State, the fact that Article 5(2) provides for the entry into the host Member State of family members of a Union citizen who do not have a residence card shows that Directive 2004/38 is capable of applying also to family members who were not already lawfully resident in another Member State.

53 Similarly, Article 10(2) of Directive 2004/38, which lists exhaustively the documents which nationals of non-member countries who are family members of a Union citizen may have to present to the host Member State in order to have a residence card issued, does not provide for the possibility of the host Member State asking for documents to demonstrate any prior lawful residence in another Member State.

54 In those circumstances, Directive 2004/38 must be interpreted as applying to all nationals of non-member countries who are family members of a Union citizen within the meaning of point 2 of Article 2 of that directive and accompany or join the Union citizen in a Member State other than that of which he is a national, and as conferring on them rights of entry and residence in that Member State, without distinguishing according to whether or not the national of a non-member country has already resided lawfully in another Member State.

55 That interpretation is supported by the Court's case-law on the instruments of secondary law concerning freedom of movement for persons adopted before Directive 2004/38.

56 Even before the adoption of Directive 2004/38, the Community legislature recognised the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the EC Treaty (Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 38; Case C-459/99 *MRAX* [2002] ECR I-6591, paragraph 53; Case C-157/03 *Commission* v *Spain* [2005] ECR I-2911, paragraph 26; Case C-503/03 *Commission* v *Spain* [2006] ECR I-1097, paragraph 41; Case C-441/02 *Commission* v *Germany* [2006] ECR I-3449, paragraph 109; and Case C-291/05 *Eind* [2007] ECR I-0000, paragraph 44).

57 To that end, the Community legislature has considerably expanded, in Regulation No 1612/68 and in the directives on freedom of movement for persons adopted before Directive 2004/38, the application of Community law on entry into and residence in the territory of the Member States to nationals of non-member countries who are spouses of nationals of Member States (see, to that effect, Case C-503/03 *Commission* v *Spain*, paragraph 41).

58 It is true that the Court held in paragraphs 50 and 51 of *Akrich* that, in order to benefit from the rights provided for in Article 10 of Regulation No 1612/68, the national of a non-member country who is the spouse of a Union citizen must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated. However, that conclusion must be reconsidered. The benefit of such rights cannot depend on the prior lawful residence of such a spouse in another Member State (see, to that effect, *MRAX*, paragraph 59, and Case C-157/03 *Commission* v *Spain*, paragraph 28).

59 The same interpretation must be adopted a fortiori with respect to Directive 2004/38, which amended Regulation No 1612/68 and repealed the earlier directives on freedom of movement for persons. As is apparent from recital 3 in the preamble to Directive 2004/38, it aims in particular to 'strengthen the right of free movement and residence of all Union citizens', so that Union citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals.

60 In the second place, the above interpretation of Directive 2004/38 is consistent with the division of competences between the Member States and the Community.

61 It is common ground that the Community derives from Articles 18(2) EC, 40 EC, 44 EC and 52 EC – on the basis of which Directive 2004/38 inter alia was adopted – competence to enact the necessary measures to bring about freedom of movement for Union citizens.

62 As already pointed out in paragraph 56 above, if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed.

63 Consequently, within the competence conferred on it by those articles of the Treaty, the Community legislature can regulate the conditions of entry and residence of the family members of a Union citizen in the territory of the Member States, where the fact that it is impossible for the Union citizen to be accompanied or joined by his family in the host Member State would be such as to interfere with his freedom of movement by discouraging him from exercising his rights of entry into and residence in that Member State.

64 The refusal of the host Member State to grant rights of entry and residence to the family members of a Union citizen is such as to discourage that citizen from moving to or residing in that Member State, even if his family members are not already lawfully resident in the territory of another Member State.

65 It follows that the Community legislature has competence to regulate, as it did by Directive 2004/38, the entry and residence of nationals of non-member countries who are family members of a Union citizen in the Member State in which that citizen has exercised his right of freedom of movement, including where the family members were not already lawfully resident in another Member State.

66 Consequently, the interpretation put forward by the Minister for Justice and by several of the governments that have submitted observations that the Member States retain exclusive competence, subject to Title IV of Part Three of the Treaty, to regulate the first access to Community territory of family members of a Union citizen who are nationals of non-member countries must be rejected.

67 Indeed, to allow the Member States exclusive competence to grant or refuse entry into and residence in their territory to nationals of non-member countries who are family members of Union citizens and have not already resided lawfully in another Member State would have the effect that the freedom of movement of Union citizens in a Member State whose nationality they do not possess would vary from one Member State to another, according to the provisions of national law concerning immigration, with some Member States permitting entry and residence of family members of a Union citizen and other Member States refusing them.

68 That would not be compatible with the objective set out in Article 3(1)(c) EC of an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of persons. Establishing an internal market implies that the conditions of entry and residence of a Union citizen in a Member State whose nationality he does not possess are the same in all the Member States. Freedom of movement for Union citizens must therefore be interpreted as the right to leave any Member State, in particular the Member State whose nationality the Union citizen possesses, in order to become established under the same conditions in any Member State other than the Member State whose nationality the Union citizen possesses.

69 Furthermore, the interpretation mentioned in paragraph 66 above would lead to the paradoxical outcome that a Member State would be obliged, under Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12), to authorise the entry and residence of the spouse of a national of a non-member country lawfully resident in its territory where the spouse is not already lawfully resident in another Member State, but would be free to refuse the entry and residence of the spouse of a Union citizen in the same circumstances.

70 Consequently, Directive 2004/38 confers on all nationals of non-member countries who are family members of a Union citizen within the meaning of point 2 of Article 2 of that directive, and accompany or join the Union citizen in a Member State other than that of which he is a national, rights of entry into and residence in the host Member State, regardless of whether the national of a non-member country has already been lawfully resident in another Member State.

71 The Minister for Justice and several of the governments that have submitted observations contend, however, that, in a context typified by strong pressure of migration, it is necessary to control immigration at the external borders of the Community, which presupposes an individual examination of all the circumstances surrounding a first entry into Community territory. An interpretation of Directive 2004/38 prohibiting a host Member State from requiring prior lawful residence in another Member State would undermine the ability of the Member States to control immigration at their external frontiers.

72 The Minister for Justice submits in particular that that interpretation would have serious consequences for the Member States by bringing about a great increase in the number of persons able to benefit from a right of residence in the Community.

73 On this point, the answer must be, first, that it is not all nationals of non-member countries who derive rights of entry into and residence in a Member State from Directive 2004/38, but only those who are family members, within the meaning of point 2 of Article 2 of that directive, of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national.

74 Second, Directive 2004/38 does not deprive the Member States of all possibility of controlling the entry into their territory of family members of Union citizens. Under Chapter VI of that directive, Member States may, where this is justified, refuse entry and residence on grounds of public policy, public security or public health. Such a refusal will be based on an individual examination of the particular case.

75 Moreover, in accordance with Article 35 of Directive 2004/38, Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by that directive in the case of abuse of rights or fraud, such as marriages of convenience, it being understood that any such measure must be proportionate and subject to the procedural safeguards provided for in the directive.

76 Those governments further submit that that interpretation of Directive 2004/38 would lead to unjustified reverse discrimination, in so far as nationals of the host Member State who have never exercised their right of freedom of movement would not derive rights of entry and residence from Community law for their family members who are nationals of non-member countries.

77 In that regard, it is settled case-law that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to activities which have no factor linking them with any of the situations governed by Community law and which are confined in all relevant respects within a single Member State (Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-0000, paragraph 33).

78 Any difference in treatment between those Union citizens and those who have exercised their right of freedom of movement, as regards the entry and residence of their family members, does not therefore fall within the scope of Community law.

79 Moreover, it should be recalled that all the Member States are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, which enshrines in Article 8 the right to respect for private and family life.

80 The answer to the first question must therefore be that Directive 2004/38 precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State

but not possessing its nationality to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive.

The second question

81 By its second question the referring court asks essentially whether the spouse of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State whose nationality he does not possess accompanies or joins that citizen within the meaning of Article 3(1) of Directive 2004/38, and consequently benefits from the provisions of that directive, irrespective of when and where the marriage took place and of the circumstances in which he entered the host Member State.

82 It should be noted at the outset that, as may be seen from recitals 1, 4 and 11 in the preamble, Directive 2004/38 aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by the Treaty.

83 Moreover, as recital 5 in the preamble to Directive 2004/38 points out, the right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of dignity, be also granted to their family members, irrespective of nationality.

84 Having regard to the context and objectives of Directive 2004/38, the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness (see, to that effect, *Eind*, paragraph 43).

85 Article 3(1) of Directive 2004/38 provides that the directive is to apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 of the directive who accompany or join them.

86 Articles 6 and 7 of Directive 2004/38, relating respectively to the right of residence for up to three months and the right of residence for more than three months, likewise require that the family members of a Union citizen who are not nationals of a Member State 'accompany' or 'join' him in the host Member State in order to enjoy a right of residence there.

87 First, none of those provisions requires that the Union citizen must already have founded a family at the time when he moves to the host Member State in order for his family members who are nationals of non-member countries to be able to enjoy the rights established by that directive.

88 By providing that the family members of the Union citizen can join him in the host Member State, the Community legislature, on the contrary, accepted the possibility of the Union citizen not founding a family until after exercising his right of freedom of movement.

89 That interpretation is consistent with the purpose of Directive 2004/38, which aims to facilitate the exercise of the fundamental right of residence of Union citizens in a Member State other than that of which they are a national. Where a Union citizen founds a family after becoming established in the host Member State, the refusal of that Member State to authorise his family members who are nationals of non-member countries to join him there would be such as to discourage him from continuing to reside there and encourage him to leave in order to be able to lead a family life in another Member State or in a non-member country.

90 It must therefore be held that nationals of non-member countries who are family members of a Union citizen derive from Directive 2004/38 the right to join that Union citizen in the host Member State, whether he has become established there before or after founding a family.

91 Second, it must be determined whether, where the national of a non-member country has entered a Member State before becoming a family member of a Union citizen who resides in that Member State, he accompanies or joins that Union citizen within the meaning of Article 3(1) of Directive 2004/38.

92 It makes no difference whether nationals of non-member countries who are family members of a Union citizen have entered the host Member State before or after becoming family members of that Union citizen, since the refusal of the host Member State to grant them a right of residence is equally liable to discourage that Union citizen from continuing to reside in that Member State.

93 Therefore, in the light of the necessity of not interpreting the provisions of Directive 2004/38 restrictively and not depriving them of their effectiveness, the words 'family members [of Union citizens] who accompany … them' in Article 3(1) of that directive must be interpreted as referring both to the family members of a Union citizen who entered the host Member State with him and to those who reside with him in that Member State, without it being necessary, in the latter case, to distinguish according to whether the nationals of non-member countries entered that Member State before or after the Union citizen or before or after becoming his family members.

94 Application of Directive 2004/38 solely to the family members of a Union citizen who 'accompany' or 'join' him is thus equivalent to limiting the rights of entry and residence of family members of a Union citizen to the Member State in which that citizen resides.

95 From the time when the national of a non-member country who is a family member of a Union citizen derives rights of entry and residence in the host Member State from Directive 2004/38, that State may restrict that right only in compliance with Articles 27 and 35 of that directive.

96 Compliance with Article 27 is required in particular where the Member State wishes to penalise the national of a non-member country for entering into and/or residing in its territory in breach of the national rules on immigration before becoming a family member of a Union citizen.

97 However, even if the personal conduct of the person concerned does not justify the adoption of measures of public policy or public security within the meaning of Article 27 of Directive 2004/38, the Member State remains entitled to impose other penalties on him which do not interfere with freedom of movement and residence, such as a fine, provided that they are proportionate (see, to that effect, *MRAX*, paragraph 77 and the case-law cited).

98 Third, neither Article 3(1) nor any other provision of Directive 2004/38 contains requirements as to the place where the marriage of the Union citizen and the national of a non-member country is solemnised.

99 The answer to the second question must therefore be that Article 3(1) of Directive 2004/38 must be interpreted as meaning that a national of a non-member country who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that directive, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State.

The third question

100 In view of the answer to the second question, there is no need to answer the third question.

Costs

101 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive.**

2. **Article 3(1) of Directive 2004/38 must be interpreted as meaning that a national of a non-member country who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that directive, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State.**

Case C-34/09: Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)

OPINION OF ADVOCATE GENERAL

Sharpston

delivered on 30 September 2010 (1)

Case C-34/09

Gerardo Ruiz Zambrano

v

Office national de l'emploi (ONEM)

(Reference for a preliminary ruling from the Tribunal du travail de Bruxelles (Belgium))

(Articles 18, 20 and 21 TFEU – Fundamental rights as general principles of European Union law – Article 7 of the Charter of Fundamental Rights of the European Union – European citizenship – Unemployment benefits – Child with the nationality of a Member State – Right of residence of parents who are third country nationals – Hindering effects of national measures – Reverse discrimination – Relationship between the European Convention of Human Rights and the Court of Justice of the European Union – Standards of fundamental rights protection)

1. The present reference from the Tribunal du travail de Bruxelles concerns the scope of the right of residence for third country nationals who are the parents of an infant Union citizen who has not, as yet, left the Member State of his birth.

2. In answering the questions referred by the national court, the Court has a number of difficult and important choices to make. What precisely does Union citizenship entail? Do the circumstances giving rise to the national proceedings constitute a situation that is 'purely internal' to the Member State concerned, in which European Union ('EU') law has no role to play? Or does full recognition of the rights (including the future rights) that necessarily flow from Union citizenship mean that an infant EU citizen has a right, based on EU law rather than national law, to reside anywhere within the territory of the Union (including in the Member State of his nationality)? If so, ensuring that he can exercise that right effectively may entail granting residence to his third country national parent if there would otherwise be a substantial breach of fundamental rights.

3. At a more conceptual level, is the exercise of rights as a Union citizen dependent – like the exercise of the classic economic 'freedoms' – on some trans-frontier free movement (however accidental, peripheral or remote) having taken place before the claim is advanced? Or does Union citizenship look forward to the future, rather than back to the past, to define the rights and obligations that it confers? To put the same question from a slightly different angle: is Union citizenship merely the non-economic version of the same generic kind of free movement rights as have long existed for the economically active and for persons of independent means? Or does it mean something more radical: true citizenship, carrying with it a uniform set of rights and obligations, in a Union under the rule of law (2) in which respect for fundamental rights must necessarily play an integral part?

Legal framework

Relevant EU law

4. Article 6 TEU (former Article 6 EU) provides:

‘1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.

3. 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.’

5. Article 18 TFEU (former Article 12 EC) provides:

‘Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

…’

6. Article 20 TFEU (former Article 17 EC) states:

‘1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties.

…’

7. Article 21 TFEU (former Article 18 EC) provides:

‘1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

…’

8. Articles 7, 21 and 24 of the Charter of Fundamental Rights of the European Union (3) state:

‘Article 7

Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

…

Article 21

Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

…

Article 24

The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.'

Relevant international provisions

9. Article 17 of the International Covenant on Civil and Political Rights (4) provides:

'1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.'

10. Article 9.1 of the Convention on the Rights of the Child (5) states:

'1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.'

11. Article 8 of, and Article 3 of Protocol 4 to, the European Convention of Human Rights ('the ECHR') state as

follows: (6)

‘Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

…

Article 3 of Protocol 4

No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.

No one shall be deprived of the right to enter the territory of the State of which he is a national.’

Relevant national legislation

The Royal Decree of 25 November 1991

12. Article 30 of the Royal Decree of 25 November 1991 concerning rules on unemployment provides as follows:

‘In order to be eligible for unemployment benefit, a full-time worker must have completed a qualifying period comprising the following number of working days:

1. ...

2. 468 during the 27 months preceding the claim, if the worker is more than 36 and less than 50 years of age,

…’

13. Article 43(1) of the Royal Decree states:

‘Without prejudice to the previous provisions, a foreign or stateless worker is entitled to unemployment benefit if he or she complies with the legislation relating to aliens and to the employment of foreign workers.

Work undertaken in Belgium is not taken into account unless it complies with the legislation relating to the employment of foreign workers.’

14. According to the relevant provisions of Belgian legislation (Article 40 of the Law of 15 December 1980 and Article 2 of the Royal Decree of 9 June 1999), the spouse of an EC foreign national and his children or those of his spouse who are dependent on them, whatever their nationality, are to be treated in the same way as the EC foreign national provided that they come with the purpose of settling with him.

15. Dependent relatives in the ascending line of a Belgian national or of an EC foreign national, whatever their nationality, do not require work permits (by virtue of, respectively, Article 2(2)2º(b) of the Royal Decree implementing the Law of 30 April 1999 on the employment of foreign workers and Article 40(4)(iii) of the Law of 15 December

1980).

The Belgian Nationality Code

16. Under Article 10(1) of the Belgian Nationality Code, in the version applicable at the relevant time, those having Belgian nationality included:

‘[A]ny child born in Belgium who, at any time before reaching the age of 18 or being declared of full age, would be stateless if he or she did not have Belgian nationality.’

17. Subsequently, the Law of 27 December 2006 rendered it impossible for a child born in Belgium to non-Belgian nationals to acquire Belgian nationality ‘if, by appropriate administrative action instituted with the diplomatic or consular authorities of the country of nationality of the child’s parent(s), the child’s legal representative(s) can obtain a different nationality for it’.

Facts and main proceedings

18. Mr Ruiz Zambrano and his wife, Mrs Moreno López are both Colombian nationals. They arrived in Belgium on 7 April 1999, holding a visa issued by the Belgian embassy in Bogotá, accompanied by their first child.

19. A week later, Mr Ruiz Zambrano requested asylum in Belgium. He based that application on the need to flee from Colombia after being exposed since 1997 to continuous extortion demands (backed by death threats) from private militias, witnessing assaults on his brother and suffering the abduction of his three-year old son for one week during January 1999.

20. On 11 September 2000 the Commissariat général aux réfugiés et aux apatrides (Commissariat-general for Refugees and Stateless Persons) refused Mr Ruiz Zambrano’s application for asylum and made an order requiring him to leave Belgium. However, it added a *non-refoulement* clause, stating that Mr Ruiz Zambrano and his family should not be sent back to Colombia in view of the critical situation there.

21. Notwithstanding that order, Mr Ruiz Zambrano requested a residence permit from the Office des Étrangers (Aliens’ Office) on 20 October 2000. He subsequently made two further applications. (7) All three applications were refused. Mr Ruiz Zambano sought annulment of those decisions and, in the meantime, requested the suspension of the order requiring him to leave Belgium. At the time when the present reference for a preliminary ruling was made, the action for annulment was still pending before the Conseil d’État.

22. Since 18 April 2001, Mr Ruiz Zambrano and his wife have been registered in the municipality of Schaerbeek.

23. In October 2001 Mr Ruiz Zambrano obtained full-time employment with a Belgian company, Plastoria SA (‘Plastoria’), in its Brussels workshop, carrying out workshop duties under an employment contract for an unlimited period. The work was duly declared to the Office national de la sécurité sociale (National Social Security Office). His pay was subject to statutory social security deductions in the usual way and his employer was accordingly required to pay (and did pay) the corresponding contributions. The order for reference does not explicitly indicate whether (as is often the case) his earnings were also subject to deduction of income tax at source.

24. Mr Ruiz Zambrano did not hold a work permit when he was hired by Plastoria. Nor did he obtain one in the course of the five years during which he worked for the company.

25. In the meantime his wife gave birth to a second child, Diego, on 1 September 2003, and to a third, Jessica, on 26 August 2005. Both children were born in Belgium. Pursuant to Article 10(1) of the Belgian Nationality Code, both acquired Belgian nationality. (8) Mr Ruiz Zambrano’s counsel informed the Court during the hearing that both Diego and Jessica are presently enrolled in school in Schaerbeek.

26. The birth of Diego and Jessica gave rise, respectively, to the second and third applications lodged with the Aliens' Office. (9) In each of those applications, Mr Ruiz Zambrano claimed that the birth of a child who is a Belgian national entitled him to a residence permit on the basis of the Law of 15 December 1980 and Article 3 of Protocol 4 to the European Convention of Human Rights.

27. As a result of the third application, the Belgian authorities issued a decision granting Mr Ruiz Zambrano a residence registration certificate covering his stay in Belgium from 13 September 2005 until 13 February 2006. Following his appeal against the various decisions refusing him a residence permit, Mr Ruiz Zambrano's stay in Belgium was covered by a special authorisation pending final determination of those proceedings.

28. On 10 October 2005 Mr Ruiz Zambrano's contract was temporarily suspended. He immediately applied to the Office national de l'emploi (National Employment Office) for temporary unemployment benefits. That application was eventually refused, on the ground that he did not hold a work permit (because his stay in Belgium was irregular). He brought a first action before the Tribunal du travail (Employment Tribunal) challenging that refusal ('the first claim'), but was shortly after recruited again by Plastoria to work full-time.

29. However, as a result of that first action, the Belgian labour authorities made enquiries to verify the conditions upon which Mr Ruiz Zambrano was employed. An official investigator visited Plastoria's premises on 11 October 2006. He found Mr Ruiz Zambrano at work and confirmed that he did not have a work permit. The investigator issued an order for the immediate termination of his employment. Plastoria duly ended Mr Ruiz Zambrano's employment contract, without compensation, on grounds of force majeure; and gave him the official document ('form C4') that certified that social security contributions and unemployment insurance had been paid covering his entire period of employment from October 2001 to October 2006.

30. The Belgian labour authorities decided not to bring criminal charges against Plastoria, stating that, apart from the fact that the company had recruited Mr Ruiz Zambrano without a work permit, no other breaches had been found of the requirements relating to social security obligations, deposit of correct employment documents, coverage against accidents at work, or obligations in respect of remuneration.

31. Finding himself unemployed, Mr Ruiz Zambrano again applied to the National Employment Office, this time for full unemployment benefit. Again he was refused payment of the benefit. Mr Ruiz Zambrano brought a further action before the Tribunal du travail de Bruxelles against that decision ('the second claim'). The first claim and the second claim form the subject-matter of the main proceedings before the referring court.

32. In its written submissions, the Belgian Government states that, as a result of a government measure to regularise specific situations of illegal residents in the country, on 30 April 2009 Mr Ruiz Zambrano was granted a provisional and renewable residence permit, as well as a work permit (type C). The latter does not have retroactive effect; and Mr Ruiz Zambrano's employment with Plastoria from 2001 to 2006 is still considered as not being covered by a work permit.

The questions referred

33. In the proceedings brought against the two decisions of the National Employment Office refusing Mr Ruiz Zambrano's claim to temporary and full unemployment benefit, the Tribunal du travail de Bruxelles (Employment Tribunal, Brussels) referred the following questions for a preliminary ruling:

'(1) Do Articles 12 [EC], 17 [EC] and 18 [EC], or one or more of them when read separately or in conjunction, confer a right of residence upon a citizen of the Union in the territory of the Member State of which that citizen is a national, irrespective of whether he has previously exercised his right to move within the territory of the Member States?

(2) Must Articles 12 [EC], 17 [EC] and 18 [EC], in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right which they recognise, without

discrimination on the grounds of nationality, in favour of any citizen of the Union to move and reside freely in the territory of the Member States means that, where that citizen is an infant dependent on a relative in the ascending line who is a national of a non-member State, the infant's enjoyment of the right of residence in the Member State in which he resides and of which he is a national must be safeguarded, irrespective of whether the right to move freely has been previously exercised by the child or through his legal representative, by coupling that right of residence with the useful effect whose necessity is recognised by Community case-law (Case C-200/02 *Zhu and Chen*), and granting the relative in the ascending line who is a national of a non-member State, upon whom the child is dependent and who has sufficient resources and sickness insurance, the secondary right of residence which that same national of a non-member State would have if the child who is dependent upon him were a Union citizen who is not a national of the Member State in which he resides?

(3) Must Articles 12 [EC], 17 [EC] and 18 [EC], in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right of a minor child who is a national of a Member State to reside in the territory of the State in which he resides must entail the grant of an exemption from the requirement to hold a work permit to the relative in the ascending line who is a national of a non-member State, upon whom the child is dependent and who, were it not for the requirement to hold a work permit under the national law of the Member State in which he resides, fulfils the condition of sufficient resources and the possession of sickness insurance by virtue of paid employment making him subject to the social security system of that State, so that the child's right of residence is coupled with the useful effect recognised by Community case-law (Case C-200/02 *Zhu and Chen*) in favour of a minor child who is a European citizen with a nationality other than that of the Member State in which he resides and is dependent upon a relative in the ascending line who is a national of a non-member State?'

34. Written observations were submitted by Mr Ruiz Zambrano, by the Belgian, Danish, German, Greek, Irish, Netherlands, Austrian and Polish Governments and by the Commission.

35. Counsel for Mr Ruiz Zambrano and agents for the Belgian, Danish, Greek, French, Irish and Netherlands Governments and the Commission attended the hearing on 26 January 2010 and presented oral argument.

Preliminary matters

36. No one involved in the present reference has specifically questioned its admissibility. However, there are two matters that I should briefly address.

37. The first is whether the questions referred have any real bearing upon the case before the national court.

38. It is apparent from the material contained in the order for reference that Mr Ruiz Zambrano has fulfilled the substantive conditions to be able to claim unemployment benefit (such as having worked for at least 468 days during the 27 months preceding the claim, as required by Article 30 of the Royal Decree of 25 November 1991, and having paid the appropriate social security contributions). His claim faces two interlinked obstacles. First, national law states (10) that only work that complies with the legislation relating to aliens and foreign workers may be taken into account. Applying that condition would mean disregarding Mr Ruiz Zambrano's full-time employment with Plastoria from 1 October 2001 to 12 October 2006, because at no stage during that period did he hold a work permit; and he only held a residence registration certificate from 13 September 2005 onward. (11) Second, national law states that in order to receive allowances a foreign worker must comply with the legislation relating to aliens. (12)

39. Mr Ruiz Zambrano's whole claim before the national court turns on whether, as a third country national who is the father of children who hold Belgian nationality, either (a) his position can be assimilated to that of an EU national or (b) he enjoys a derivative right of residence from the fact that, as well as being Belgian nationals, his children are citizens of the Union. Both (a) and (b) would confer the necessary substantive right of residence as a matter of EU law; (13) (a) would of itself also exempt him from the need to hold a work permit; and (b) would arguably permit him to benefit, by necessary analogy, from the dispensation from the work permit requirement that is available, under Article 2(2)2º(b) of the Law of 30 April 1999, to *dependent* relatives in the ascending line of a Belgian national. If

such were not the case (the argument runs), there would be reverse discrimination against Belgian nationals who had not exercised rights of free movement under EU law, in as much as they would be unable to benefit from the family reunification provisions (14) that enable both an EU national who has moved to Belgium from another Member State and a Belgian who has previously exercised freedom of movement to be joined by a non-dependent ascendant family member who is a third country national.

40. Even though the immediate subject-matter of the action before the national court concerns a claim under social security/employment law for unemployment benefit, rather than an administrative law application for a residence permit, it is thus clear that the national court cannot decide the case with which it is seised without knowing (a) whether Mr Ruiz Zambrano can claim derivative rights under EU law by virtue of the fact that, as Belgian nationals, his children are also citizens of the Union and (b) what rights would be enjoyed by a Belgian who, as a citizen of the Union, *had* moved to another Member State and then returned to Belgium (in order to evaluate the reverse discrimination argument and apply any relevant rules of national law). Furthermore, the national court has explained in some detail that national law (15) refers to EU law for the definition of who is considered to be a 'family member' of a citizen of the Union, indicating that this is pertinent for the resolution of the case before it. (16)

41. The second matter arises from the fact that counsel for Mr Ruiz Zambrano informed the Court that the Belgian Conseil d'État and the Cour Constitutionnelle have both recently ruled in similar circumstances that, as a result of the reverse discrimination created by EU law, there had been a breach of the constitutional principle of equality. (17) It could perhaps be thought that, in consequence, the present reference has become superfluous. Put another way: does the referring court still need answers to its questions about EU law now that it has that guidance under national law from its own superior courts?

42. In my view, it does.

43. Before the Tribunal du travail can apply the case-law developed by the Conseil d'État and the Cour Constitutionnelle, it will have to ascertain whether a situation of reverse discrimination does indeed arise as a result of the interaction between EU law and national law. To do that, it needs guidance from the Court as to the proper interpretation of EU law. The Court has in the past determined references that serve precisely that purpose: to facilitate the referring court's task of comparing the position under EU law with the position under national law. (18) It has accepted in a series of cases that it should give a ruling where the 'interpretation of provisions of Community [now EU] law might possibly be of use to the national court, in particular if the law of the Member State concerned were to require every national of that State to be allowed to enjoy the same rights as those which a national of another Member State would derive from Community [now EU] law in a situation considered to be comparable by that court'. (19) Indeed, the agent for Belgium accepted in oral argument that the referring court would need a reply from the Court of Justice in order to examine whether there was reverse discrimination caused by EU law.

44. It follows that the Court should answer the questions referred.

Rearrangement of the issues to be resolved

45. The questions posed by the national court envisage three strands of argument. Whilst these are, perhaps, not entirely clear from the actual wording of the questions referred, they may be deduced from the more detailed analysis set out in the order for reference.

46. The referring court's main concern has to do with whether movement is needed to trigger the Treaty's provisions on citizenship of the Union. The referring court is well aware that Articles 20 and 21 TFEU are different, conceptually, from free movement for workers under Article 45 TFEU, freedom of establishment under Article 49 TFEU (or, indeed, from all the 'economic' freedoms enshrined in Articles 34 TFEU and following). But just how different are the citizenship provisions?

47. The national court next enquires into the role that fundamental rights play (in particular the fundamental right

to family life, as developed by the Court in *Carpenter*, (20)*MRAX* (21) and *Zhu and Chen* (22)) in determining the scope of application of Articles 20 and 21 TFEU.

48. Finally, the national court asks about the function of Article 18 TFEU in protecting individuals against reverse discrimination created by EU law through the provisions relating to citizenship of the Union.

49. For the sake of clarity, and so as to give a useful answer to the referring court, I will approach the three questions as follows.

50. I shall deal first with the question of whether Diego and Jessica can invoke rights under Articles 20 and 21 TFEU as citizens of the Union, notwithstanding that they have not (as yet) moved from their Member State of nationality; and whether Mr Ruiz Zambrano can therefore claim a derivative right of residence in order to be present in Belgium to look after and support his young children ('question 1'). Addressing that question requires me to consider whether this is – as has been strongly suggested – a 'purely internal' situation, or whether there is indeed a sufficient link with EU law for citizenship rights to be invoked. It also raises the issue of whether Article 21 TFEU encompasses two independent rights – a right to move *and* a free-standing right to reside – or whether it merely confers a right to move (and *then* reside).

51. Second, I shall address the issue of reverse discrimination, which is repeatedly raised by the national court. I shall therefore enquire into the scope of Article 18 TFEU and ask whether it can be applied so as to resolve instances of reverse discrimination created by the provisions of EU law relating to citizenship of the Union ('question 2'). Although this question has been touched upon in recent years, (23) it still remains unresolved.

52. Finally I shall deal with the fundamental rights issue ('question 3'). The national court has made it very plain in the order for reference that it seeks guidance as to whether the fundamental right to family life plays a role in the present case, where neither the Union citizen nor his Colombian parents have moved outside Belgium. That question raises in turn a more basic question: what is the scope of EU fundamental rights? Can they be relied upon independently? Or must there be some point of attachment to another, classic, EU right?

53. Since it is clear that the issue of fundamental rights appears as a leitmotif running through all three questions, before commencing that analysis I shall – as a prologue – look at whether it is plausible to think that Mr Ruiz Zambrano and his family run a real risk of suffering a breach of the fundamental right to family life under EU law.

Prologue: the Ruiz Zambrano family's circumstances and the potential breach of the EU fundamental right to family life

54. In *Carpenter*, (24) the Court recognised the fundamental right to family life as part of the general principles of EU law. In reaching that conclusion, it relied on the case-law of the European Court of Human Rights ('the Strasbourg court'). In *Boultif* (25) that court held that 'the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed in Article 8(1) of the [ECHR]'. (26) The ECHR definition of 'family' is mostly limited to the nuclear family, (27) which clearly encompasses Mr Ruiz Zambrano and Mrs Moreno López as the parents of Diego and Jessica.

55. The Strasbourg court's settled case-law likewise establishes that removal of a person from his family members is permissible only when it is shown to be 'necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued'. (28) The application of Article 8(2) of the ECHR, derogating from the right guaranteed by Article 8(1) of the ECHR, entails a proportionality test that takes account (inter alia) of elements such as when the family settled, the good faith of the claimant, the cultural and social contrasts of the State to which the family members would be taken and their degree of integration in the contracting State's society. (29)

56. For its part, the Court of Justice, although relying closely on the Strasbourg court's case-law, has developed its

own line of reasoning. In summary, the Court will grant protection in the following cases and/or by reference to the following factors. (30)

57. First, the Court does not require the citizen of the Union to be the claimant in the main proceedings in order to trigger protection. Thus, the fundamental right to family life under EU law has already served indirectly to protect third country nationals who were close family members of the Union citizen. Because there would have been interference with the Union citizen's right to family life, the third country national who was the family member bringing the claim also enjoyed protection. (31)

58. Second, the fundamental right may be invoked even if the family member who is being ordered to leave the country is not a legal resident. (32)

59. Third, the Court takes into account whether the family member constitutes a danger to public order or public safety (which would justify removal from the territory). (33)

60. Fourth, the Court will accept a justification based on abuse of rights only where the Member State can put forward clear evidence of bad faith on the part of the applicant. (34)

61. These and other features of the fundamental rights at issue here – the right to family life and the rights of the child – are reflected, respectively, in Articles 7 and 24(3) of the Charter. At the material time the Charter was 'soft' law and did not bind the Belgian authorities. However, it was already being relied upon by the Court as an aid to interpretation, including in cases involving the right to family life. (35) Since the entry into force of the Treaty of Lisbon, the Charter has acquired the status of primary law. (36)

62. In my view, the Belgian authorities' decision to order Mr Ruiz Zambrano to leave Belgium, followed by their continued refusal to grant him a residence permit, constitutes a potential breach of his children's fundamental right to family life and to protection of their rights as children; and thus (applying *Carpenter* and *Zhu and Chen*) of Mr Ruiz Zambrano's equivalent right to family life as their father. I say 'potential' because Mr Ruiz Zambrano is still on Belgian territory. It is however evident that activating the deportation order would trigger the breach of those rights.

63. It is equally evident that the breach would be likely to be serious. If Mr Ruiz Zambrano were to be deported, then so, too, would his wife. The effect of such steps on the children would be radical. Given their age, the children would no longer be able to live an independent life in Belgium. The lesser evil would therefore, presumably, be for them to leave Belgium with their parents. That would, however, involve uprooting them from the society and culture in which they were born and have become integrated. Whilst it is ultimately for the national court to make the detailed assessment in the individual case, it seems appropriate to proceed on the basis that the breach might well be significant.

64. It is true that Mr Ruiz Zambrano's children were born at a time when his situation was already irregular. However, the material set out in the order for reference suggests that Mr Ruiz Zambrano has become fully integrated into Belgian society and does not pose a threat or danger. Whilst it is for the national court, as sole judge of fact, to make any necessary finding in that regard, the following elements seem to me to support that view.

65. First, Mr Ruiz Zambrano worked regularly after entering Belgium, duly contributed to the Belgian social security system and made no claim for financial support. (37) Second, he and his wife Mrs Moreno López appear to have lived a normal family life and their children are now at school in Belgium. Third, the Belgian authorities were willing to accept Mr Ruiz Zambrano's social security contributions to the coffers of the Belgian State for five years while he worked at Plastoria – a willingness that contrasts curiously with a different Belgian ministry's reluctance to grant him a residence permit. (38) Fourth, the fact that the Commissariat-general for Refugees and Stateless Persons made a *non-refoulement* order indicates that Mr Ruiz Zambrano and his family cannot be returned to Colombia because that would place them in real danger. Thus, if they were required to leave Belgium they would have to find a third State that was willing to accept them, with which they might or might not have existing ties. Fifth, by granting Mr Ruiz Zambrano a temporary renewable residence permit in 2009, the Belgian authorities have tacitly confirmed that his

presence in Belgium does not pose a risk to society and that there are no overriding considerations of public order that would justify requiring him to leave the country immediately.

66. For those reasons, it seems to me that, were the Belgian authorities to follow up on their refusal to grant Mr Ruiz Zambrano a residence permit after the birth of his first Belgian child (Diego) by implementing the outstanding order made against him requiring him to leave the country, (39) it is likely that that would fall to be regarded as a significant breach of Diego's – and hence, indirectly, Mr Ruiz Zambrano's – fundamental right to family life under EU law.

Question 1 – Citizenship of the Union

Introductory remarks

67. In 1992, the Maastricht Treaty introduced European citizenship as a novel and complementary status for all Member State nationals. By granting to every citizen the right to move and reside freely within the territory of the Member States, the new Treaty recognised the essential role of individuals, *irrespective of whether or not they were economically active*, within the newly created Union. Each individual citizen enjoys rights and owes duties that together make up a new status – a status which the Court declared in 2001 was 'destined to become the fundamental status of nationals of the Member States'. (40)

68. The consequences of that statement are, I suggest, as important and far-reaching as those of earlier milestones in the Court's case-law. Indeed, I regard the Court's description of citizenship of the Union in *Gryzelczyk* as being potentially of similar significance to its seminal statement in *Van Gend en Loos* that 'the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights ... and the subjects of which comprise not only Member States but also their nationals'. (41)

Can one invoke rights derived from Union citizenship merely from residence in one's Member State of nationality?

Movement and the classic (economic) rights to freedom of movement

69. It is trite law that, in order to be able to claim classic economic rights associated with the four freedoms, some kind of movement between Member States is normally required. Even in that context, however, it is noteworthy that the Court has accepted the importance of not hindering or impeding the exercise of such rights and has looked askance at national measures that might have a dissuasive effect on the potential exercise of the right to freedom of movement.

70. In *Dassonville*, (42) the Court stated famously that 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-[Union] trade are to be considered as measures having an effect equivalent to quantitative restrictions'. The breadth of that formula has allowed the Court to scrutinise discriminatory and non-discriminatory national measures even when no goods have necessarily moved. (43) The chilling effect of a national measure can be sufficient to trigger the application of what is now Article 34 TFEU (formerly Article 28 EC). Thus in *Carbonati* (44) the Court, following Advocate General Poiares Maduro, found that charges imposed on goods within an individual Member State were in breach of the Treaty. (45) The Court stated clearly that Article 26(2) TFEU (formerly Article 14(2) EC), in defining the internal market as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured', does so 'without drawing any distinction between inter-State frontiers and frontiers within a State'. (46)

71. A similar test was extended to free movement of persons and services in *Säger* (47) where the Court explained that Article 59 EEC (now Article 56 TFEU) required 'not only the elimination of all discrimination against a person providing services on the ground of his nationality, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services'. (48) This line of argument came full circle in *Kraus*, (49) where the Court held that measures 'liable to hamper or to render less attractive the exercise by [EU] nationals, including those of the Member State which

enacted the measure, of fundamental freedoms guaranteed by the Treaty' also came within the scope of Community law. (50)

72. Therefore, it is now settled case-law that a person whose ability to move within the EU is 'hampered' or 'made less attractive', even by his Member State of nationality, can rely on Treaty rights. (51)

73. The Court has, indeed, already accepted some dilution of the notion that the exercise of rights requires actual physical movement across a frontier. Thus, in *Alpine Investments*, (52) it stated that a prohibition against telephoning potential clients in another Member State came within the scope of the Treaty provisions on freedom to provide services, even though no physical movement was involved. In *Carpenter*, (53) the Court accepted that EU law was determinative of the outcome of a challenge to a deportation order made by the United Kingdom authorities against a Philippine national. The basis for reliance on EU law was that Mrs Carpenter's husband, a British national, travelled occasionally to other Member States to sell advertising space in a British journal. The Court accepted the argument that it was easier for Mrs Carpenter's husband to provide and receive services because she was looking after his children from his first marriage. Therefore, the Court concluded that Mrs Carpenter's deportation would restrict her husband's right to provide and receive services, as well as his fundamental right to family life (54)

74. More recently, in *Metock* (55) the Court accepted that the past exercise of rights to freedom of movement by Mrs Metock, a Cameroonian who subsequently acquired British nationality and who was already established and working in Ireland when she married her husband (also Cameroonian, whom she had met 12 years earlier in that country) sufficed to enable him to acquire a derivative right of residence in Ireland, notwithstanding that he did not satisfy the requirement in national law that he should have been lawfully resident in another Member State prior to arrival in Ireland. (56)

Movement and citizenship of the Union

75. In many citizenship cases, there is a clearly identifiable cross-border element that parallels the exercise of classic economic free movement rights. Thus, in *Bickel and Franz*, (57) the defendants were, respectively, an Austrian and a German national facing criminal proceedings in the Trentino – Alto Adige region of Italy (that is, in the former Süd Tirol) and hoping to stand trial in German rather than in Italian. In *Martínez Sala* (58) the claimant was a Spanish national who had moved to Germany. In *Bidar*, (59) Dany Bidar had moved from France to the United Kingdom where he stayed with his grandmother to complete his schooling after his mother's death before seeking a student loan to finance his university studies.

76. Moreover, when nationals of a Member State are invoking rights arising from citizenship of the Union against their own Member State, there has usually been some previous movement away from that Member State followed by a return. In *D'Hoop*, (60) Marie-Nathalie D'Hoop moved from Belgium to France, where she completed her schooling, and then returned to Belgium where she sought to claim the 'tideover' allowance granted to young people who had just completed their studies and who were seeking their first employment. In *Grunkin and Paul*, (61) Leonhard Matthias Grunkin Paul travelled between Denmark (where he was born and lived and attended school) and Germany (the country of which he was a national) in order to spend time with his divorced father there. He needed his German passport to be issued in the same name as he had lawfully been given in Denmark, rather than in a different name.

77. However, I do not think that exercise of the rights derived from citizenship of the Union is always inextricably and necessarily bound up with physical movement. There are also already citizenship cases in which the element of true movement is either barely discernable or frankly non-existent.

78. In *García Avello*, (62) the parents were Spanish nationals who had moved to Belgium; but their children Esmeralda and Diego (who held dual Spanish and Belgian nationality and whose contested surname formed the subject-matter of the proceedings) were born in Belgium and, so far as can be gleaned from the case report, had never moved from there. In *Zhu and Chen*, (63) Catherine Zhu was born in one part of the United Kingdom (Northern Ireland) and merely moved *within* the United Kingdom (going to England). The laws then granting Irish nationality to anyone

born on the island of Ireland (including in Northern Ireland), coupled with good legal advice, enabled her to rely on citizenship of the Union to found a right of residence in the United Kingdom for herself and her Chinese mother, since otherwise it would have been impossible for her, as a toddler, to exercise her rights as a citizen of the Union effectively. In *Rottmann*, (64) the crucial citizenship (German citizenship by naturalisation, rather than his earlier Austrian citizenship by birth) was acquired by Dr Rottmann after he had moved to Germany from Austria. However, the judgment disregards that earlier move and looks exclusively to the *future* effects that withdrawal of German citizenship would have by rendering Dr Rottmann stateless. (I shall return later, in more detail, to this recent important judgment.) (65)

79. When one examines the various rights that the Treaty confers on citizens of the Union, it is clear that some – notably, the right to vote and to stand as a candidate in municipal elections and elections to the European Parliament – can only be invoked in a Member State other than the Member State of which the person concerned is a national. (66) Others – the right to petition the European Parliament in accordance with Article 227 TFEU and the right to apply to the Ombudsman in accordance with Article 228 TFEU – appear to be capable of being exercised without geographical limitation. (67) The right to diplomatic or consular protection under Article 23 TFEU (formerly Article 20 EC) is exercisable in any third country in which the Member State of which that person is a national is not represented.

80. What is, perhaps, the 'core' right – the 'right to move and reside freely within the territory of the Member States' (68) – is less easy to pin down. Is it a combined right (the right to 'move-and-reside')? A sequential right ('the right to move and, having moved at some stage in the past, to reside')? Or two independent rights ('the right to move' *and* 'the right to reside')?

The impact of fundamental rights

81. Given a choice between confining the interpretation of 'the right to move and reside freely within the territory of the Member States' enshrined in Articles 20(2)(a) and 21(1) TFEU to situations in which the EU citizen has first moved to another Member State or accepting that the terms 'move' and 'reside' can be read disjunctively so that an EU citizen is not disbarred from invoking such rights when he resides (without prior movement) in his Member State of nationality, what should the Court do?

82. At this point, it is necessary to revert to the question of fundamental rights protection within the EU legal order.

83. The importance of fundamental rights in the classic context of free moment was put most eloquently by Advocate General Jacobs in *Konstantinidis*, (69) a case involving a Greek masseur working in Germany who claimed that the official transliteration of his name breached his rights under EU law. Advocate General Jacobs' approach to the existing *Wachauf* case-law had far-reaching consequences. *Konstantinidis* ceased to be merely a case about discrimination on grounds of nationality and became a case about the fundamental right to personal identity. Accepting the applicant's right (as the Court did in its judgment) implies accepting the premiss that an EU national who goes to another Member State *is* entitled to assume 'that, wherever he goes to earn his living in the EU, he will be treated in accordance with a common code of fundamental values … In other words, he is entitled to say "civis europeus sum" and to invoke that status in order to oppose any violation of his fundamental freedoms'. (70) The Union citizen exercising rights to freedom of movement can invoke the complete range of fundamental rights protected by EU law (whether or not they are connected with the economic work that he is moving between Member States to perform). If that were not the case, he might be dissuaded from exercising those rights to freedom of movement.

84. It would be paradoxical (to say the least) if a citizen of the Union could rely on fundamental rights under EU law when exercising an economic right to free movement as a worker, or when national law comes within the scope of the Treaty (for example, the provisions on equal pay) or when invoking EU secondary legislation (such as the services directive), but could not do so when merely 'residing' in that Member State. Setting aside, for the purposes of the illustration, any protection to be derived within the national legal order itself from invoking Article 8 of the ECHR, let us suppose (rather implausibly) that a national rule in Member State A grants enhanced protection for freedom of religious expression only to persons who have resided there continuously for 20 years. A national of Member State A

(like Marie-Nathalie D'Hoop) who had in the past exercised rights to freedom of movement by going to the neighbouring Member State B and who had only recently returned to Member State A would be able to rely on his fundamental rights against his Member State of nationality in the context of his citizenship of the Union (invoking both Article 9 of the ECHR and Article 10 of the Charter). Would an 18 year old citizen of the Union who was a national of Member State B, but who had been born and had always lived in Member State A, be able to do likewise? (There is no discrimination in the contested national rule that is based directly or indirectly on nationality, so Article 18 TFEU [formerly Article 12 EC] cannot be invoked.) On the basis of *Garcia Avello*, the answer is surely 'yes' – but giving that answer implies that the 'right to reside' is a free-standing right, rather than a right that is linked by some legal umbilical cord to the right to move. What, finally (and here I also foreshadow the discussion of reverse discrimination) of the 18 year old citizen of the Union who is a national of Member State A, who resides there and who cannot point to some further link with EU law that has arisen either by accident or design (for example, that he has travelled to Member State B on a school visit)?

85. Against that background, I return to the Court's existing case-law on citizenship.

86. If one insists on the premiss that physical movement to a Member State other than the Member State of nationality is required before residence rights as a citizen of the Union can be invoked, the result risks being both strange and illogical. Suppose a friendly neighbour had taken Diego and Jessica on a visit or two to Parc Astérix in Paris, or to the seaside in Brittany. (71) They would then have received services in another Member State. Were they to seek to claim rights arising from their 'movement' it could not be suggested that their situation was 'purely internal' to Belgium. (72) Would one visit have sufficed? Two? Several? Would a day trip have been enough; or would they have had to stay over for a night or two in France?

87. If the family, having been obliged to leave Belgium and indeed the European Union, were to seek refuge in, say, Argentina, Diego and Jessica would be able, as EU citizens, to invoke diplomatic and consular protection from other Member States' missions in that third country. They could seek access to documents and write to the Ombudsman. But they would not, on this hypothesis, be able to rely on their rights as citizens of the Union to go on residing in Belgium.

88. It is difficult to avoid a sense of unease at such an outcome. Lottery rather than logic would seem to be governing the exercise of EU citizenship rights.

89. Would it be necessary to construct some radical extension of the citizenship case-law in order to hold, in the present case, that Mr Ruiz Zambrano's children's rights as citizens of the Union were engaged – notwithstanding that they have not yet ventured outside their Member State of nationality – and (if so) to go on to consider whether he can claim a derivative right of residence?

90. I do not think that a particularly large step is required.

Is this a purely internal situation?

91. In the present proceedings, the Member States that have submitted observations have argued, unanimously, that Mr Ruiz Zambrabo's situation is one that is 'purely internal' to Belgium and that EU law provisions, including those relating to citizenship of the Union, are therefore not triggered. The Commission has adopted a similar line of argument. To a greater or lesser extent, all point to potential protection that may be afforded to Mr Ruiz Zambrano and his family under either national law or the ECHR and invite the Court, with varying degrees of vehemence, not to contemplate the possibility that rights under the citizenship provisions might be engaged.

92. I do not share their view.

93. It is noteworthy that in *Rottmann*, both Germany (Dr Rottmann's Member State of naturalisation) and Austria (his Member State of origin), supported by the Commission, argued that 'when the decision withdrawing [his]

naturalisation in the main proceedings was adopted, [Dr Rottmann] was a German national, living in Germany, to whom an administrative act by a German authority was addressed ... [T]his is, therefore, a *purely internal situation* not in any way concerning EU law, the latter not being applicable simply because a Member State has adopted a measure in respect of one of its nationals. The fact that, in a situation such as that in the main proceedings, *the person concerned exercised his right to freedom of movement before his naturalisation cannot of itself constitute a cross-border element* capable of playing a part with regard to the withdrawal of that naturalisation'. (73)

94. In dealing with that argument, the Court accepted the invitation to disregard Dr Rottmann's earlier exercise of his right to free movement (from Austria to Germany) and looked to the future, not the past. It pointed out, robustly, that even though the grant and withdrawal of nationality are matters that fall within the competence of the Member States, in situations covered by EU law the national rules concerned must nevertheless have regard to the latter. The Court concluded that, 'the situation of a citizen of the Union who ... is faced with a decision withdrawing his naturalisation ... and placing him ... in *a position capable of causing him to lose his status* conferred by Article 20 TFEU *and the rights attaching thereto* falls, by reason of *its nature and its consequences*, within the ambit of EU law'. (74)

95. It seems to me that the Court's reasoning in *Rottmann*, read in conjunction with its earlier ruling in *Zhu and Chen*, may readily be transposed to the present case. Here, the grant of Belgian nationality to Mr Ruiz Zambrano's children Diego and Jessica was a matter that fell within the competence of that Member State. Once that nationality was granted, however, the children became citizens of the Union and entitled to exercise the rights conferred on them as such citizens, concurrently with their rights as Belgian nationals. They have not yet moved outside their own Member State. Nor, following his naturalisation, had Dr Rottmann. If the parents do not have a derivative right of residence and are required to leave Belgium, the children will, in all probability, have to leave with them. That would, in practical terms, place Diego and Jessica in a 'position capable of causing them to lose the status conferred [by their citizenship of the Union] and the rights attaching thereto'. It follows – as it did for Dr Rottmann – that the *children's situation* 'falls, by reason of its nature and its consequences, within the ambit of EU law'.

96. Moreover, like Catherine Zhu, Diego and Jessica cannot exercise their rights as Union citizens (specifically, their rights to move and to reside in any Member State) fully and effectively without the presence and support of their parents. Through operation of the same link that the Court accepted in *Zhu and Chen* (enabling a young child to exercise its citizenship rights effectively) it follows that *Mr Ruiz Zambrano's situation* is likewise not one that is 'purely internal' to the Member State. It too falls within the ambit of EU law.

97. It therefore also follows (as in *Rottmann*) that 'in those circumstances, it is for the Court to rule on the questions referred by the national court' – or, to put essentially the same point in a different way, that the facts of this case do *not* constitute a purely internal situation, devoid of any link to EU law. In so doing, it will – I suggest – need to decide the following issues: (a) is there likely to be an interference with Mr Ruiz Zambrano's children's rights, as citizens of the Union, to move and reside freely within the territory of the Member States? (b) If such interference exists, is it in principle permissible? (c) If it is in principle permissible, is it nevertheless subject to any limitations (for example, on grounds of proportionality)?

Is there interference?

98. As citizens of the Union, Mr Ruiz Zambrano's children unquestionably have a 'right to move and reside freely within the territory of the Member States'. In theory, they can exercise that right. In practice, they cannot do so independently of their parents because of their age.

99. If Mr Ruiz Zambrano cannot enjoy a derivative right of residence in Belgium (the issue on which his entitlement to unemployment benefit turns) then, sooner or later, he will have to leave the Member State of which his children hold the nationality. Given their age (and provided, of course that any departure was not so far delayed that the children had reached the age of majority), his children will have to leave with him. (75) They will be unable to exercise their right to move and reside within the territory of the European Union. The parallels with *Rottmann* are obvious.

Dr Rottmann's rights as a citizen of the Union were under serious threat because revocation of his naturalisation in Germany would leave him unable to exercise those rights *ratione personae*. Here, Mr Ruiz Zambrano's children face a not dissimilar threat to their rights *ratione loci*. They need to be able to remain physically present within the territory of the European Union in order to move between Member States or reside in any Member State. (76)

100. As we have seen (most notably in *Garcia Avello*, *Zhu and Chen* and *Rottmann*), the existing case-law already allows certain citizenship rights to be invoked independently of prior trans-border movement by the EU citizen in question. It seems to me that if the applicant(s) in the first two of those cases had *needed* to assert a free-standing right of residence against the authorities of the Member States concerned (Spanish nationals in Belgium, Irish national in the United Kingdom) the Court would surely have recognised such a right. In *Rottmann*, the Court has already gone further by protecting the future citizenship rights of a German national resident in Germany. Against that background, it would be artificial not openly to recognise that (although in practice the right to reside is, in the vast majority of cases, probably exercised after exercise of the right to move) Article 21 TFEU contains a separate right to reside that is independent of the right of free movement.

101. Accordingly, I recommend that the Court now recognise the existence of that free-standing right of residence.

102. For the reasons I have already discussed, Diego and Jessica cannot exercise such a right of residence without the support of their parents. I therefore conclude that, in the circumstances of the present case, a refusal to recognise a derivative right of residence for Mr Ruiz Zambrano is capable, potentially, of constituting an interference with Diego's and Jessica's right of residence as Union citizens.

103. I add that, if the Court is not disposed to accept that Article 21 TFEU confers a free-standing right of residence, I would still conclude, in the circumstances of this case, that the potential interference with Diego's and Jessica's right to move and reside within the territory of the Union is sufficiently analogous to that affecting Catherine Zhu (who had never resided in the Republic of Ireland and had, indeed, never left the territory of the United Kingdom) that their situation should be assimilated to hers.

Can the interference be justified?

104. I begin by observing that, in choosing not to make an express declaration that his children should become Columbian and in opting instead for them to acquire the nationality of the EU Member State in which they were born, Mr Ruiz Zambrano availed himself of a possibility that was lawfully available to him. In that respect, his conduct may fairly be compared with that of Mr and Mrs Zhu. The Court has made it clear that there is nothing reprehensible about taking advantage of a possibility conferred by law and that this is clearly distinguishable from an abuse of rights. (77) Since the facts of the present case arose, Belgian nationality law has been amended (78) and it would no longer be open to someone in Mr Ruiz Zambrano's position to choose not to register his child with the diplomatic or consular authorities of his own country in order to ensure that they obtained Belgian nationality. But at the time there was nothing wrong in his acting as he did.

105. It is important to bear this fact in mind – in particular, in relation to any 'floodgates' argument. Member States control who can become one of their nationals. (79) The Court is here concerned exclusively with the rights that such persons may invoke, *once they have become nationals of a Member State*, through their simultaneous acquisition of citizenship of the Union.

106. Thus, in *Kaur* (80) Mrs Manjit Kaur could not be 'deprived' of the rights deriving from the status of citizen of the Union because she did not meet the definition of a national of the United Kingdom of Great Britain and Northern Ireland. Since she fell at the first hurdle and did not qualify, under the nationality rules applicable to her, as someone 'holding the nationality of a Member State', she was unable subsequently to invoke EU law rights as a citizen of the Union to reside in any Member State (including the United Kingdom). (81) In the present case, however, Mr Ruiz Zambrano's children hold and enjoy the normal rights of Belgian nationals, just as Dr Rottmann held and enjoyed the normal rights of his German nationality by naturalisation.

107. There are, clearly, situations in which the exercise of rights by an EU citizen is *not* contingent upon the grant of residence rights to an ascendant family member. Thus, an EU citizen who has attained his majority is able to exercise his rights to travel and to reside within the territory of the European Union without it being necessary to grant his parent(s) concurrent rights of residence in the chosen Member State.

108. In my view, therefore, the potential interference with EU citizenship rights that arises if an ascendant family member does not enjoy an automatic derivative right of residence in the EU citizen's Member State of nationality is acceptable in principle. However, it may not be a permissible interference in certain circumstances (in particular, because it may not be proportionate).

Proportionality

109. As the Court has stated in *Micheletti*, (82)*Kaur* (83) and more recently in *Rottmann*, although the grant of nationality is a matter that falls within the competence of each Member State, it must, none the less, when exercising that competence, comply with [EU] law. (84) The same result was reached in *Bickel and Franz* when it came to criminal law and procedure, (85) in *García Avello* as regards national rules governing surnames (86) and in *Schempp*, concerning direct taxation (87) – all sensitive areas in which Member States still exercise significant powers.

110. Here, as so often, the situation is one that involves exercise of a right and a potential justification for interfering with (or derogating from) that right; and the question comes down to one of proportionality. Is it proportionate, in the circumstances of this case, to refuse to recognise a right of residence for Mr Ruiz Zambrano, derived from his children's rights as EU citizens? Whilst the decision on proportionality is (as usual) ultimately a matter for the national court, some brief remarks may be of assistance.

111. Application of the principle of proportionality in the present case (as in *Rottmann*) requires 'the national court to ascertain ... whether the ... decision at issue in the main proceedings observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of [EU] law' (88) (in addition to any examination of proportionality that may be required under national law). As the Court went on to explain in that case, '[h]aving regard to the importance which primary law attaches to the status of citizen of the Union ... it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified ...'. (89)

112. During the hearing, the intervening Member States emphasised that residence requirements for third country nationals fall within Member State competence. Counsel for Belgium and Denmark stated that Mr Ruiz Zambrano is a failed asylum seeker who was ordered to leave Belgian territory shortly after his arrival in 1999. He resided illegally for a considerable period of time thereafter and should not benefit from a right of residence under EU law. Counsel for Ireland painted a dramatic picture of the wave of immigration by third country nationals that would inevitably result if Mr Ruiz Zambrano were held to enjoy a right of residence derived from his children's Belgian nationality.

113. Counsel for Mr Ruiz Zambrano pointed out that his client had worked without interruption for Plastoria for almost five years. Throughout that period, he had duly paid his social security contributions. The Belgian authorities' investigation at Plastoria had found no fault with the tax, social security and employment law arrangements relating to his employment. The only issues had been his lack of work permit and residence permit; and no action had been taken against his employer. Diego and Jessica were born several years after Mr Ruiz Zambrano and his wife entered Belgium with their first child. There was no evidence that adding first Diego and then Jessica to the family represented a cynical attempt to exploit any available loophole so as to stay in Belgium. This was a genuine family. Mr Ruiz Zambrano was fully integrated in Belgium. His children attended their local school regularly. He had no criminal record. He had, indeed, since been granted both a provisional and renewable residence permit and a type C work permit.

114. I have already dealt in essence with the Irish Government's 'floodgates' argument. As that Member State itself demonstrated after the Court's ruling in *Zhu and Chen*, if particular rules on the acquisition of its nationality are – or

appear to be – liable to lead to ‘unmanageable’ results, it is open to the Member State concerned to amend them so as to address the problem.

115. In so saying, I am not encouraging the Member States to be xenophobic or to batten down the hatches and turn the European Union into ‘Fortress Europe’. That would indeed be a retrograde and reprehensible step – and one, moreover, that would be in clear contradiction to stated policy objectives. (90) I am merely recalling that the rules on acquisition of nationality are the Member States’ exclusive province. However, the Member States – having themselves created the concept of ‘citizenship of the Union’ – cannot exercise the same unfettered power in respect of the *consequences*, under EU law, of the Union citizenship that comes with the grant of the nationality of a Member State.

116. So far as Mr Ruiz Zambrano’s failure to leave Belgium after his asylum application was rejected is concerned, I recall that he challenged the administrative decisions in question; and that those judicial proceedings have been long-running. I also recall that, in *Carpenter*, the third country national (Mrs Carpenter) had infringed national immigration law by not leaving the United Kingdom before her leave to remain as a visitor expired. The Court did not treat that as an insuperable obstacle to her subsequent claim to rights under EU law, pointing out that, ‘her conduct, since her arrival in the United Kingdom in September 1994, had not been the subject of any other complaint that could give cause to fear that she might in the future constitute a danger to public order or public safety’. (91)

117. In contrast, in the present case the longer term consequences for Diego and Jessica of *not* recognising a derivative right of residence for Mr Ruiz Zambrano are stark. They cannot exercise their right to reside as Union citizens effectively without the help and support of their parents. Their residence right will therefore – until they are old enough to exercise it on their own – be almost completely devoid of content (as Catherine Zhu’s would have been without the continued presence in the United Kingdom of her mother, Mrs Zhu).

118. For the sake of completeness, I should deal briefly with an additional argument that arises from the subject-matter of the proceedings before the national court, namely the possible risk that Mr Ruiz Zambrano may become an ‘unreasonable burden’ on public finances.

119. In *Baumbast*, (92) the Court stressed that the limitations and conditions which are referred to in Article 21 TFEU are based on the idea that the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the Member States. In that regard, ‘beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State’. (93) However, the Court also held that ‘those limitations and conditions must be applied in compliance with the limits imposed by EU law and in accordance with the general principles of that law, in particular the principle of proportionality’. (94) In other words, the national measures adopted on that subject must be necessary and appropriate to attain the objective pursued. (95)

120. In assessing proportionality in the present case, the national court will need to take into account the fact that Mr Ruiz Zambrano worked full time for nearly five years for Plastoria. His employment was declared to the Office national de la sécurité sociale. He paid the statutory social security deductions, and his employer paid the corresponding employer’s contributions. He has thus in the past contributed steadily and regularly to the public finances of the host Member State.

121. In my view, these are factors that point to the conclusion that it would be disproportionate not to recognise a derivative right of residence in the present case. Ultimately, however, the decision is one for the national court, and the national court alone.

122. I therefore conclude that Articles 20 and 21 TFEU are to be interpreted as conferring a right of residence in the territory of the Member States, based on citizenship of the Union, that is independent of the right to move between Member States. Those provisions do not preclude a Member State from refusing to grant a derivative right of residence to an ascendant relative of a citizen of the Union who is a national of the Member State concerned and who has not yet exercised rights of free movement, provided that that decision complies with the principle of proportionality.

Question 2 – Reverse discrimination

123. This question asks whether Article 18 TFEU may be invoked to resolve reverse discrimination created by the interaction of EU law (here, the provisions governing citizenship of the Union) with national law. The problem may be stated thus. If young children (such as Catherine Zhu) have acquired the nationality of a different Member State from their Member State of residence, their parent(s) will enjoy a derivative right of residence in the host Member State by virtue of Article 21 TFEU and the Court's ruling in *Zhu and Chen*. Diego and Jessica have Belgian nationality and reside in Belgium. Can Mr Ruiz Zambrano rely on Article 18 TFEU, which prohibits, within the scope of application of the Treaties, 'any discrimination on grounds of nationality', so as to claim the same derivative right of residence?

124. If the Court accepts the reasoning that I have put forward in respect of question 1, this question becomes redundant. If the Court does not follow me, however, it becomes necessary to consider whether Article 18 TFEU may be invoked to address reverse discrimination of this kind.

The current case-law: a critique

125. In *Baumbast*, (96) the Court stated that Article 18 EC (now Article 21 TFEU) has direct effect, conferring on non-economically active individuals a free-standing right of free movement. In so holding, it extended rights of free movement to persons having no direct connection with the economics of the single market, who were therefore unable to invoke 'classic' free movement rights. The evolution was, I suggest, both coherent and inevitable, following logically from the creation of citizenship of the Union. If the European Union was to evolve into something more than a convenient and effective framework for the development of trade, it had to ensure a proper role for those it had decided to start calling its citizens. (97)

126. However, that development necessarily entailed a number of further consequences.

127. First, from the moment that the Member States decided to add, to existing concepts of nationality, a new and complementary status of 'citizen of the Union', it became impossible to regard such individuals as mere economic factors of production. Citizens are not 'resources' employed to produce goods and services, but individuals bound to a political community and protected by fundamental rights. (98)

128. Second, when citizens move, they do so as human beings, not as robots. They fall in love, marry and have families. The family unit, depending on circumstances, may be composed solely of EU citizens, or of EU citizens and third country nationals, closely linked to one another. If family members are not treated in the same way as the EU citizen exercising rights of free movement, the concept of freedom of movement becomes devoid of any real meaning. (99)

129. Third, by granting fundamental rights under EU law to its citizens, and stating that such rights are the very foundation of the Union (Article 6(1) TEU), the European Union committed itself to the principle that citizens exercising rights to freedom of movement will do so under the protection of those fundamental rights. (100)

130. Fourth, by ratifying the Maastricht Treaty and the subsequent amending Treaties, the Member States accepted that – because their nationals are also EU citizens – the task of dealing with tensions or difficulties arising from those citizens' exercise of free movement rights is a shared one. It pertains to the individual Member States, but also to the European Union. (101)

131. Those consequences sit uncomfortably with the idea that one should simply follow, in respect of citizenship of the Union, the orthodox approach to free movement of goods and freedom of movement for employed and self-employed workers and capital.

132. The underlying rationale of economic fundamental freedoms is to create a single market by eliminating barriers to trade and enhancing competition. The tools that the Treaty confers to pursue the single market goals (set out, inter

alia, in what is now Article 3 TEU) have been developed by the Court accordingly. Thus, the Court has, inter alia, established criteria to determine what constitutes the necessary link with each fundamental freedom. To take one example: ever since *Dassonville* (102) potential as well as actual physical movement has been relevant to free movement of goods. Although that specific case-law does not require actual previous movement to have taken place, it is nevertheless still the idea of *movement* (even if that movement is hypothetical) that serves as the key to the rights granted by the fundamental freedoms.

133. A consequence of that approach to the internal market is the risk that 'static' factors of production will be left in a worse position than their 'mobile' counterparts, even though in all other respects their circumstances may be similar or identical. The outcome is reverse discrimination created by the interaction of EU law with national law – a discrimination that the Court has hitherto left each Member State to solve, notwithstanding that such a result is, prima facie, a breach of the principle of non-discrimination on the grounds of nationality. (103)

134. Is such a result acceptable, from the perspective of EU law, in the present specific context of citizenship of the Union?

135. An examination of three recent cases serves to demonstrate that continuing to apply that traditional, hands-off approach is capable of generating results that are curiously random. (104)

136. As a result of *Carpenter*, (105) a self-employed person who has clients in other Member States can confer a derivative right of residence on his third-country national spouse, in the interests of protecting the right to family life. If the same self-employed person has clients only in his own Member State, EU law is irrelevant. But nowadays, and precisely because of the success of the internal market, drawing such a clear-cut distinction between self-employed persons with interests in another Member State and self-employed persons with interests solely in their own Member State is problematic. Mr Carpenter travelled occasionally to other Member States to sell journal advertisements. Suppose he had not physically moved but had still provided occasional services to clients in other Member States, via the telephone or the internet? Suppose his clients had occasionally included subsidiaries, within the United Kingdom, of German or French parent companies? Suppose that he had, on one occasion, sold advertising space in one journal to one client who was not exclusively based in the United Kingdom?

137. In *Zhu and Chen*, (106) Catherine Zhu's Chinese mother became entitled to a derivative right of residence as a result of her daughter's Irish nationality, acquired through application of the extraterritorial rule that then formed part of that Member State's nationality law. All the 'movement' in the case took place across the St George's Channel, between England and Northern Ireland, within one and the same Member State (the United Kingdom). A sufficient link with EU law nevertheless existed to enable mother and daughter both to claim residence rights in the United Kingdom. This was only brought about by arranging for Catherine Zhu to be born in Northern Ireland. But should it be a matter of chance conditioned by history (the extraterritorial rule in one Member State's nationality law) that governs whether EU law can be relied upon in such circumstances? Is that a reasonable outcome in terms of legal certainty and equal treatment of Union citizens?

138. The recent decision in *Metock* illustrates the uncertainty – and the consequent discrimination – neatly. In 2003, the Grand Chamber held in *Akrich* that 'in order to benefit from rights under Article 10 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968(II), p. 475), the national of a non-member country who is the spouse of a Union citizen must have been lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated'. (107) Five years later, the Court held that, in the light of *MRAX* (108) and *Commission* v *Spain*, (109)*Akrich* had to be reconsidered. And so it was: the benefit of the same rights that were at issue in *Akrich* cannot now depend on the prior lawful residence of a third-country national spouse in another Member State. Nevertheless, the Court continued to draw a distinction between Union citizens who had already exercised rights to freedom of movement and those who had not, recalling laconically that all Member States are signatories to the ECHR and that Article 8 of the ECHR protects the right to family life. (110) 'Static' Union citizens were thereby still left to suffer the potential consequences of reverse discrimination even though the rights of 'mobile' Union citizens

were significantly extended.

A proposal

139. In my view, there are significant drawbacks to the Court's current line of thought. I therefore believe that it is time to invite the Court to deal openly with the issue of reverse discrimination. The arguments I shall put forward follow the line that I advanced in *Government of the French Community and Walloon Government*; but I shall venture to suggest – in the specific context of cases involving citizenship rights under Article 21 TFEU – criteria that might be used to determine whether Article 18 TFEU may itself be relied upon to counter such discrimination.

140. A radical change in the entire case-law on reverse discrimination is not going to happen overnight. That is, indeed, not what I am proposing. My suggestions are confined to cases involving citizenship of the Union. It is in this area that the results of the present case-law are the most clearly damaging; and where a change is perhaps most called for.

141. The cases I have just discussed – *Carpenter, Zhu and Chen* and *Metock* – all share two traits. They create legal uncertainty in a delicate area of both EU law and domestic law; and they are cases in which the Court has opted for a generous interpretation of Article 21 TFEU in order to protect fundamental rights. In striking the balance between legal certainty and protection of fundamental rights, the Court has thus consistently given precedence to the latter. Its reasoning accords well with its earlier seminal statement that citizenship of the Union is 'destined to become the fundamental status of the nationals of Member States'. (111)

142. However, the uncertainty created by the case-law is undesirable. In which direction should the Court therefore now go?

143. On the one hand, it is necessary to avoid the temptation of 'stretching' Article 21 TFEU so as to extend protection to those who 'just' fail to qualify. There must be a boundary to every rule granting an entitlement. If there is no such limit, the rule becomes undecipherable and no one can tell with certainty who will, and who will not, enjoy the benefit it confers. That is not in the interests of the Member States or the citizen; and it undermines the authority of the Court. On the other hand, if Article 21 TFEU is interpreted too restrictively, a greater number of situations of reverse discrimination will be created and left to Member States to deal with. That, too, does not seem a very satisfactory outcome.

144. I therefore suggest to the Court that Article 18 TFEU should be interpreted as prohibiting reverse discrimination caused by the interaction between Article 21 TFEU and national law that entails a violation of a fundamental right protected under EU law, where at least equivalent protection is not available under national law.

145. If such an approach were pursued, Article 18 TFEU would be triggered when (but only when) three cumulative conditions were met.

146. First, the claimant would have to be a citizen of the Union resident in his Member State of nationality who had not exercised free movement rights under the TFEU (whether a classic economic free movement right or free movement under Article 21 TFEU), but whose situation was comparable, in other material respects, to that of other citizens of the Union in the same Member State who were able to invoke rights under Article 21 TFEU. Thus, the reverse discrimination complained of would have to be *caused by* the fact that the appropriate comparators (other Union citizens) were able to assert rights under Article 21 TFEU whereas a 'static' Union citizen residing in his Member State of nationality was *prima facie* unable to rely on national law for such protection.

147. Second, the reverse discrimination complained of would have to entail a violation of a fundamental right protected under EU law. Not every minor instance of reverse discrimination would be caught by Article 18 TFEU. What constituted a 'violation of a fundamental right' would be defined where possible by reference to the case-law of the Strasbourg court. (112) Where reverse discrimination led to a result that would be considered to be a violation of a protected right by the Strasbourg court, it would likewise be regarded as a violation of a protected right by our Court.

Thus, EU law would assume responsibility for remedying the consequences of reverse discrimination caused by the interaction of EU law with national law when (but only when) those consequences were inconsistent with the minimum standards of protection set by the ECHR. By thus guaranteeing, in such circumstances, effective protection of fundamental rights to minimum 'Strasbourg' standards, the Court would in part anticipate the requirements that might flow from the planned accession of the European Union to the ECHR. Such a development could only enhance the existing spirit of cooperation and mutual trust between the two jurisdictions. (113)

148. Third, Article 18 TFEU would be available only as a subsidiary remedy, confined to situations in which national law did not afford adequate fundamental rights protection. EU law has an extensive history of conferring protection that is subsidiary in nature. Thus, the principles of effectiveness (114) and equivalence, (115) the right to effective legal protection (116) and the principle of State liability for breach of EU law (117) are all tools that come into play only when domestic rules prove inadequate. This final condition serves to maintain an appropriate balance between Member State autonomy and the 'effet utile' of EU law. (118) It ensures that subsidiary protection under EU law complements national law rather than riding roughshod over it. It would be for the national court to determine (a) whether any protection was available under national law and (b) if protection was in principle available, whether that protection was (or was not) at least equivalent to the protection available under EU law.

149. At the hearing, counsel for Mr Ruiz Zambrano indicated that the Belgian Conseil d'État and Cour Constitutionnelle have recently ruled on the reverse discrimination suffered by a non-Member State national in a comparable situation to that of his client. (119) It is, of course, entirely for the national court to ascertain whether, in the present case, Mr Ruiz Zambrano can derive the necessary protection from national law, without recourse to Article 18 TFEU. Under my proposal, it would remain the task of the national court to apply the three cumulative criteria that I suggest; and to permit EU law to be invoked to prevent reverse discrimination only where those criteria were satisfied.

150. I therefore suggest that the answer to the second question should be that Article 18 TFEU should be interpreted as prohibiting reverse discrimination caused by the interaction of Article 21 TFEU with national law that entails a violation of a fundamental right protected under EU law, where at least equivalent protection is not available under national law.

Question 3 – Fundamental rights

151. If the Court considers that both the first and the second question (as set out above) should be answered in a way that does not assist Mr Ruiz Zambrano, it becomes necessary to turn to the third question. Can he rely on the EU fundamental right to family life independently of any other provisions of EU law?

152. This raises a very major issue of principle: what is the scope of application of fundamental rights under EU law? Can they be invoked as free-standing rights against a Member State? Or must there be some other link with EU law? It is unnecessary to dwell on the potential significance of the answer to that question.

153. The Court itself was, of course, responsible for the early recognition of fundamental principles of law and fundamental rights within the EU legal order. (120) In 1992, the Treaty on European Union incorporated the fruits of that case-law into the Treaty on European Union, setting out (in Article 6 TEU) the obligation on the Union to respect fundamental rights.

154. Over succeeding years, the EU has reinforced its policy on fundamental rights through (for example) setting up a Fundamental Rights Agency, (121) creating an independent portfolio within the Commission responsible for fundamental rights, (122) supporting humanitarian projects throughout the world (123) and transforming the Charter of Fundamental Rights of the EU, first proclaimed in 2000, from a non-binding text ('soft law') into primary law. (124) Fundamental rights have thus become a core element in the development of the Union as a process of economic, legal and social integration aimed at providing peace and prosperity to all its citizens.

155. Of course, it is true that this Court is not, as such, a 'human rights court'. As the supreme interpreter of EU law,

the Court nevertheless has a permanent responsibility to ensure respect for such rights within the sphere of the Union's competence. Indeed, in *Bosphorus* (125) the Strasbourg court indicated that the European Court of Justice has an essential role to play in safeguarding rights deriving from the ECHR and its associated protocols as they apply to matters governed by EU law – a function that can only assume greater significance as and when the European Union accedes to the ECHR. (126) For that reason, it is essential for the Court to ensure that it interprets the Treaties in a way that reflects, coherently, the current role and significance of EU fundamental rights.

The scope of application of EU fundamental rights

156. According to the Court's settled case-law, EU fundamental rights may be invoked when (but only when) the contested measure comes within the scope of application of EU law. (127) All measures enacted by the institutions are therefore subject to scrutiny as to their compliance with EU fundamental rights. The same applies to acts of the Member States taken in the implementation of obligations under EU law or, more generally, that fall within the field of application of EU law. (128) This aspect is obviously delicate, (129) as it takes EU fundamental rights protection into the sphere of each Member State, where it coexists with the standards of fundamental rights protection enshrined in domestic law or in the ECHR. The consequential issues that arise as to overlapping levels of protection under the various systems (EU law, national constitutional law and the ECHR) and the level of fundamental rights protection guaranteed by EU law are well known; (130) and I shall not explore them further here.

157. The Court has developed ample case-law confirming its initial statement in *Wachauf* (131) that '[fundamental rights] requirements are also binding on the Member States when they implement [EU] rules'. Significantly, that rule has also been held to apply when a Member State derogates from a fundamental economic freedom guaranteed under EU law. (132) In *Carpenter*, (133) the Court went further, building on the 'cold-calling' case-law in *Alpine Investments* (134) so as to protect the fundamental rights of an EU citizen (Mr Carpenter) residing in his own Member State but providing occasional services to recipients located in other Member States. Recognition of the fact that Mrs Carpenter's deportation would be a disproportionate interference with Mr Carpenter's right to family life had the effect of granting Mrs Carpenter – a third country national who could not possibly have exercised EU rights of free movement – a right of residence.

158. The Court has, however, applied limits to the scope of EU fundamental rights – specifically, in relation to situations that it has held fell outside the scope of EU law.

159. Thus, in *Maurin* (135) the defendant was charged with selling food products after their 'use by' date had expired. He claimed that his rights of defence had been breached during the course of the national procedure. The Court pointed out that, although there was a directive requiring food products to indicate a 'sell by' date, the directive did *not* regulate the sale of properly-labelled food products whose 'use by' date had expired. Consequently, the offence with which Mr Maurin was charged 'involve[d] national legislation falling outside the scope of … [EU] law … [T]he Court therefore [did] not have jurisdiction to determine whether the procedural rules applicable to such an offence amount[ed] to a breach of the principles concerning observance of the rights of the defence and of the adversarial nature of proceedings'. (136)

160. In *Kremzow*, (137) the Court likewise rejected the claims of an Austrian national who had been convicted in Austria, but whose appeal was later held by the Strasbourg court to have breached the right to a fair trial under Article 6 of the ECHR. Mr Kremzow sought compensation and also claimed that his right to freedom of movement under EU law had been infringed as a result of his unlawful imprisonment. The Court disagreed with that approach, stating that 'whilst any deprivation of liberty may impede the person concerned from exercising his right to free movement, … a purely hypothetical prospect of exercising that right does not establish a sufficient connection with [EU] law to justify the application of [EU] provisions'. (138)

161. However, the *Kremzow* judgment adds an important gloss to the earlier case-law. Having confirmed the hypothetical nature of the claim, the Court stated that since 'Mr Kremzow was sentenced for murder and for illegal possession of a firearm under provisions of national law which were not designed to secure compliance with rules of

[EU] law, [it thus follows] that the national legislation applicable in the main proceedings relates to a situation which does not fall within the field of application of [EU] law'. (139)*A contrario*, it seems to follow that a relevant link with EU law *could* have been found if the offences had had a connection with an area of EU policy (for example, if they had been created in order to secure compliance with an EU law objective laid down in EU secondary legislation). (140)

162. Is the specific area of law involved and the extent of EU competence in that area of law of relevance to the question of fundamental rights? The question seems an important one to ask. The desire to promote appropriate protection of fundamental rights must not lead to usurpation of competence. As long as the European Union's powers remain based on the principle of conferral, EU fundamental rights must respect the limits of that conferral. (141)

163. Transparency and clarity require that one be able to identify with certainty what 'the scope of Union law' means for the purposes of EU fundamental rights protection. It seems to me that, in the long run, the clearest rule would be one that made the availability of EU fundamental rights protection dependent neither on whether a Treaty provision was directly applicable nor on whether secondary legislation had been enacted, but rather on *the existence and scope of a material EU competence.* To put the point another way: the rule would be that, provided that the EU had competence (whether exclusive or shared) in a particular area of law, EU fundamental rights should protect the citizen of the EU *even if such competence has not yet been exercised*.

164. Why do I advance that suggestion?

165. The Member States have conferred competences upon the European Union that empower it to adopt measures that will take precedence over national law and that may be directly effective. As a corollary, once those powers have been granted the European Union should have both the competence and the responsibility to guarantee fundamental rights, independently of whether those powers have in fact been exercised. The EU 'is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'. (142) That Treaty guarantee ought not to be made conditional upon the actual exercise of legislative competence. In a European Union founded on fundamental rights and the rule of law, protection should not depend on the legislative initiative of the institutions and the political process. Such contingent protection of rights is the antithesis of the way in which contemporary democracies legitimise the authority of the State. (143)

166. Such an approach would have a number of advantages.

167. First, it avoids the need to create or promote fictitious or hypothetical 'links with Union law' of the kind that have, in the past, sometimes confused and possibly stretched the scope of application of Treaty provisions. A person who had exercised rights to freedom of movement would not need to prove some link between the fundamental right subsequently invoked and facilitating that freedom of movement. (144) A person who had not yet exercised such rights would not need to set about doing so in order to create the circumstances in which he could benefit from fundamental rights protection (145) (freedom to move to receive services is, perhaps, the easiest of the four freedoms to exploit in this regard). Reverse discrimination against nationals of a Member State caused by the protection of EU fundamental rights afforded to their fellow EU citizens and fellow nationals who *had* exercised rights of free movement would cease to exist. (146) There would, in future, be no discrepancy (as far as EU fundamental rights protection was concerned), between fully harmonised and partially harmonised policies. In terms of legal certainty, the improvement would be significant.

168. Second, such an approach keeps the EU within the four corners of its powers. Fundamental rights protection under EU law would only be relevant when the circumstances leading to its being invoked fell within an area of exclusive or shared EU competence. (147) The type of competence involved would be of relevance for the purpose of defining the proper scope of protection. In the case of shared competence, the very logic behind the sharing of competence would tend to imply that fundamental rights protection under EU law would be complementary to that provided by national law. (148) (This mirrors the approach that I have suggested above in respect of reverse discrimination.)

169. Third, if fundamental rights under EU law were known to be guaranteed in all areas of shared or exclusive Union

competence, Member States might be encouraged to move forward with detailed EU secondary legislation in certain areas of particular sensitivity (such as immigration or criminal law), which would *include* appropriate definition of the exact extent of EU fundamental rights, rather than leaving fundamental rights problems to be solved by the Court on an *ad hoc* basis, as and when they are litigated.

170. Fourth, such a definition of the scope of application of EU fundamental rights would be coherent with the full implications of citizenship of the Union, which is 'destined to become the fundamental status of the nationals of Member States'. (149) Such a status sits ill with the notion that fundamental rights protection is partial and fragmented; that it is dependent upon whether some relevant substantive provision has direct effect or whether the Council and the European Parliament have exercised legislative powers. In the long run, only seamless protection of fundamental rights under EU law in all areas of exclusive or shared EU competence matches the concept of EU citizenship.

171. Despite those significant advantages, I do not think that such a step can be taken unilaterally by the Court in the present case.

172. Making the application of EU fundamental rights dependent solely on the existence of exclusive or shared EU competence would involve introducing an overtly federal element into the structure of the EU's legal and political system. Simply put, a change of the kind would be analogous to that experienced in US constitutional law after the decision in *Gitlow* v *New York*, (150) when the US Supreme Court extended the reach of several rights enshrined in the Constitution's First Amendment to individual states. The 'incorporation' case-law, based since then on the 'due process' clause of the Fourteenth Amendment, does not require an inter-state movement nor legislative acts from Congress. According to the Supreme Court, certain fundamental rights are so significant that they are 'among the fundamental personal rights and liberties protected by the due process clause […] from impairment by the states'. (151)

173. The federalising effect of the American incorporation doctrine is well known. A change of that kind would alter, in legal and political terms, the very nature of fundamental rights under EU law. It therefore requires both an evolution in the case-law *and* an unequivocal political statement from the constituent powers of the EU (its Member States), pointing at a new role for fundamental rights in the EU.

174. For present purposes, the material point in time is the birth of Mr Ruiz Zambrano's second child, Diego, on 1 September 2003. It is that event (the entry into the equation of a citizen of the Union) which – if Mr Ruiz Zambrano is right – ought to have led the Belgian authorities to accept that he had derivative rights of residence and to treat his claim for unemployment benefit accordingly.

175. At that stage, the Treaty on European Union had remained essentially unchanged since Maastricht. The Court had clearly stated in Opinion 2/94 that the European Community had, at that point, no powers to ratify the European Convention of Human Rights. (152) The Charter was still soft law, with no direct effect or Treaty recognition. The Lisbon Treaty was not even on the horizon. Against that background, I simply do not think that the necessary constitutional evolution in the foundations of the EU, such as would justify saying that fundamental rights under EU law were capable of being relied upon independently as free-standing rights, had yet taken place.

176. I therefore conclude, in answer to the last of the questions that I have reformulated, that, at the time of the relevant facts, the fundamental right to family life under EU law could not be invoked as a free-standing right, independently of any other link with EU law, either by a non-Member State national or by a citizen of the Union, whether in the territory of the Member State of which that citizen was a national or elsewhere in the territory of the Member States.

177. In proposing that answer, I am accepting that the Court should not, in the present case, overtly anticipate change. I do suggest, however, that (sooner rather than later) the Court will have to choose between keeping pace with an evolving situation or lagging behind legislative and political developments that have already taken place. At some point, the Court is likely to have to deal with a case – one suspects, a reference from a national court – that requires it to confront the question of whether the Union is not now on the cusp of constitutional change (as the Court itself partially foresaw when it delivered Opinion 2/94). Answering that question can be put off for the moment, but probably

not for all that much longer.

Conclusion

178. In the light of all the above considerations, I am of the opinion that the Court should answer the matters raised by the Tribunal du travail de Bruxelles as follows:

– Articles 20 and 21 TFEU (formerly Articles 17 and 18 EC) are to be interpreted as conferring a right of residence in the territory of the Member States, based on citizenship of the Union, that is independent of the right to move between Member States. Those provisions do not preclude a Member State from refusing to grant a derived right of residence to an ascendant relative of a citizen of the Union who is a national of the Member State concerned and who has not yet exercised rights of free movement, provided that that decision complies with the principle of proportionality.

– Article 18 TFEU (formerly Article 12 EC) should be interpreted as prohibiting reverse discrimination caused by the interaction of Article 21 TFEU with national law that entails a violation of a fundamental right protected under EU law, where at least equivalent protection is not available under national law.

– At the material time in the main proceedings, the fundamental right to family life under EU law could not be invoked as a free-standing right, independently of any other link with EU law, either by a non-Member State national or by a citizen of the Union, whether in the territory of the Member State of which that citizen was a national or elsewhere in the territory of the Member States.

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1 – Original language: English.

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2 – I borrow the expression ‘Union under the rule of law’ from Advocate General Dámaso Ruiz-Jarabo Colomer’s Opinion in Case C-228/07 *Petersen* [2008] ECR I-6989, point 32. Following his sudden and untimely death on 12 November 2009, I took over responsibility for the present reference. I should like at the outset to acknowledge both the work and commitment that he had already invested in this case and, more generally, the quality and extent of his contribution to what was still, for him, ‘Community’ rather than ‘EU’ law.

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3 – Proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1). An updated version was approved by the European Parliament on 29 November 2007, after removal of references to the European Constitution (OJ 2007 C 303, p. 1).

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4 – Treaty opened for signature on 19 December 1966; *United Nations Treaty Series*, vol. 999, p. 171 and vol. 1057, p. 407. All Member States of the European Union are party to the Covenant and no reservations have been introduced to Article 17.

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5 – Treaty adopted by resolution 44/25 of 20 November 1989; *United Nations Treaty Series*, vol. 1577, p. 3. All Member States of the EU are party to the Covenant and no reservations have been entered to Article 9.1.

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6 – Signed in Rome on 4 November 1950 and ratified by all Member States of the European Union. The position is slightly more complicated in respect of Protocol 4. At present, Greece has neither signed nor ratified that Protocol, whilst the United Kingdom has signed but not ratified it. Austria, Ireland and the Netherlands have entered reservations to Article 3 on specific points that are not relevant to the facts and issues of the present case.

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7 – The further applications followed the birth of his second and third children: see below, point 26.

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8 – According to the relevant Colombian legislation, children born outside the territory of Colombia do not acquire Colombian nationality unless an express declaration is made to that effect with the appropriate consular officials. No such declaration was made in respect of Diego and Jessica Ruiz Moreno.

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9 – See point 21 above.

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10 – Article 43(1), second sentence, of the Royal Decree of 25 November 1991 and Article 7(14), second sentence, of the Decree-Law of 28 December 1944.

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11 – See, respectively, points 24 and 22 above.

12 – Article 43(1), first sentence, and Article 69(1) of the Royal Decree of 25 November 1991 and Article 7(14), first sentence, of the Decree-Law of 28 December 1944.

13 – It is settled case-law that a residence permit serves to confirm the right of residence rather than to confer it: see Case 48/75 *Royer* [1976] ECR 497, paragraph 50, and Case C-215/03 *Oulane* [2005] ECR I-1215, paragraph 25.

14 – Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26), now replaced by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 158, p. 77, with corrigendum OJ 2004 L 229, p. 35).

15 – Article 40a of the Law of 15 December 1980 and Article 2 of the Royal Decree of 9 June 1999.

16 – See Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 42.

17 – Conseil d'État, arrêt 193.348 of 15 May 2009 and arrêt 196.294 of 22 September of 2009; Cour Constitutionnelle, arrêt 174/2009 of 3 November 2009.

18 – See, for example, Case C-448/98 *Guimont* [2000] ECR I-10663, paragraph 23; Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch* [2002] ECR I-2157, paragraph 26; Case C-6/01 *Anomar and Others* [2003] ECR I-8621, paragraph 41; and Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 29.

19 – *Government of the French Community and Walloon Government*, cited in previous footnote, paragraph 40.

20 – Case C-60/00 [2002] ECR I-6279.

21 – Case C-459/99 [2002] ECR I-6591.

22 – Case C-200/02 [2004] ECR I-9925. Having checked the national file in *Zhu and Chen*, I take this opportunity to clarify a long-running confusion in nomenclature. Catherine's mother was born Lavette Man Chen. She married Guoqing Zhu (known as Hopkins Zhu) and became Mrs Zhu. The couple's daughter was therefore Catherine Zhu. Both mother and daughter bore the surname Zhu when the application that gave rise to Case C-200/02 was lodged. The reference to Chen (and the ensuing confusion as to which applicant was Zhu and which Chen) flows from a simple misunderstanding.

23 – See notably my Opinion in *Government of the French Community and Walloon Government*, cited in footnote 18 above.

24 – Cited in footnote 20 above, paragraph 41; see also *MRAX*, cited in footnote 21 above, paragraph 53; Case C-441/02 *Commission* v *Germany* [2006] ECR I-3449, paragraph 109; Case C-157/03 *Commission* v *Spain* [2005] ECR I-2911, paragraph 26; Case C-503/03 *Commission* v *Spain* [2006] ECR I-1097, paragraph 41; Case C-109/01 *Akrich* [2003] ECR I-9607, paragraphs 58 and 59; Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 52; and Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraph 79. On the Community fundamental right to family life and its impact on third country nationals, see S. Carrera, *In Search of the Perfect Citizen?*, Marinus Nijhoff Publishers, Leiden, 2009, pp. 375 to 388.

25 – *Boultif* v *Switzerland*, judgment of 2 August 2001, §§ 39, 41 and 46, ECHR 2001-IX.

26 – See also *Amrollahi* v *Denmark*, judgment of 11 July 2002, §§ 33 to 44, unreported.

27 – *Slivenko* v *Latvia*, judgment of 9 October 2003 § 94, ECHR 2003-X.

28 – See *Mehemi* v *France*, judgment of 26 September 1997 § 34, ECHR 1997-VI and *Dalia* v *France*, 19 February 1998 § 52, ECHR 1998-I.

29 – *Sen* v *Netherlands*, judgment of 21 December 2001, § 40, unreported.

30 – On the differences between the Court's case-law and the Strasbourg court's case-law on Article 8 of the ECHR, see F. Sudre,

Les grands arrêts de la Cour européenne des Droits de l'Homme, 3rd edition, Paris, PUF, 2003, pp. 510 and 511.

31 – See *Carpenter*, cited in footnote 20 above. In *Zhu and Chen*, cited in footnote 22 above, both the infant daughter (Catherine Zhu, the Union citizen) and the third country national (her mother, Mrs Zhu) were, formally, applicants. Given Catherine's age, the action was effectively brought by the mother alone, on behalf of her daughter and herself.

32 – See *Carpenter*, cited in footnote 20 above, paragraph 44. Under UK immigration law, Mrs Carpenter was an 'overstayer' (someone who had had permission to enter the United Kingdom but who had then stayed beyond the expiry of that permission), whereas Mr Ruiz Zambrano is an asylum seeker whose claim to asylum has been refused. As I understand it, however, no distinction can be drawn on that basis. It is clear from the judgment in *Carpenter* that the Secretary of State was as entitled under national law to proceed against Mrs Carpenter as the Belgian authorities are to proceed against Mr Ruiz Zambrano in the present case.

33 – See *Carpenter*, cited in footnote 20 above, paragraph 44.

34 – See *Carpenter*, cited in footnote 20 above, paragraph 44; *Zhu and Chen*, cited in footnote 22 above, paragraphs 36 to 41; *Akrich*, cited in footnote 24 above, paragraph 57; and *Metock*, cited in footnote 24 above, paragraph 75.

35 – See *Parliament* v *Council*, cited in footnote 24 above, paragraph 38.

36 – See Article 6(1) TEU.

37 – It will be recalled that the unemployment benefit Mr Ruiz Zambrano is now claiming is one to which his contribution record would entitle him, were his employment with Plastoria to be treated, as from Diego's birth, as counting towards the qualifying period of employment.

38 – In *Trojani* (Case C-456/02 [2004] ECR I-7573), the fact that, although the Belgian social security authorities were contesting payment of the *minimex*, the municipal authorities of Brussels had granted a residence permit (*permis de séjour*) appears to have been a factor in the Court's decision that Mr Trojani could rely on Article 18 EC (now Article 21 TFEU) read in conjunction with Article 12 EC (now Article 18 TFEU): see paragraph 44 of the judgment. Mr Ruiz Zambrano's current temporary renewable residence permit is limited to the duration of the appeal proceedings before the Conseil d'État. See point 27 above.

39 – As I understand it, whilst the deportation order has been suspended pending the determination of his appeal to the Conseil d'État, it has not been rescinded.

40 – Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31, confirmed later in, inter alia, Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 28; Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 82; Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 65; Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 22; *Zhu and Chen*, cited in footnote 22 above, paragraph 25; Case C-224/02 *Pusa* [2004] ECR I-5763, paragraph 16; Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969, paragraph 45; Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 31; Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 15; Case C-145/04 *Spain* v *United Kingdom* [2006] ECR I-7917, paragraph 74; Case C-50/06 *Commission* v *Netherlands* [2007] ECR I-9705, paragraph 32; and Case C-524/06 *Huber* [2008] ECR I-9705, paragraph 69.

41 – Case 26/62 *Van Gend en Loos* [1963] ECR 1, p. 12. In *Van Gend en Loos* the Court said that the Member States had limited their sovereign rights 'albeit within limited fields'. When the *Van Genden Loos* statement was repeated in Opinion 2/94, the second part of the phrase was not retained.

42 – Case 8/74 [1974] ECR 837, paragraph 5.

43 – See, inter alia, Case 178/84 *Commission* v *Germany* [1987] ECR 1227, paragraph 27; Case C-192/01 *Commission* v *Denmark* [2003] ECR I-9693, paragraph 39; Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 66; Case C-420/01 *Commission* v *Italy* [2003] ECR I-6445, paragraph 25; and Case C-24/00 *Commission* v *France* [2004] ECR I-1277, paragraph 22.

44 – Case C-72/03 [2004] ECR I-8027.

45 – The Advocate General openly described the nature of the measures at stake in cases like *Carbonati*, admitting that

‘discrimination is not caused by either the national legislation or Community law alone. It is the result of the partial application of EU law to the national legislation at issue. Even though it was not intended or anticipated, that situation is a necessary consequence of the application of EU law. Even though, essentially, it falls within the scope of domestic law, that situation is also a “residual” situation from the point of view of EU law. As a consequence of the effects it has voluntarily or involuntarily created, EU law becomes one of the constituent parts of the situation’ (point 62).

46 – *Carbonati*, cited in footnote 44 above, paragraph 23.

47 – Case C-76/90 [1991] ECR I-4221.

48 – *Säger*, paragraph 12.

49 – Case C-19/92 [1993] ECR I-1663, paragraphs 28 and 32.

50 – *Kraus*, paragraph 32. See further, in particular, Case C-370/90 *Singh* [1992] ECR I-4265, paragraphs 23, applying this case-law to the family unit of husband and wife.

51 – See, inter alia, Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; Case C-285/01 *Burbaud* [2003] ECR I-8219, paragraph 95; Case C-299/02 *Commission* v *Netherlands* [2004] ECR I-9761, paragraph 15; Case C-249/04 *Allard* [2005] ECR I-4535, paragraph 32; and Case C-389/05 *Commission* v *France* [2008] ECR I-5337, paragraph 56.

52 – Case C-384/93 [1995] ECR I-1141.

53 – Cited in footnote 20 above.

54 – *Carpenter*, cited in footnote 20 above, paragraph 39.

55 – Cited in footnote 24 above.

56 – *Metock*, cited in footnote 24 above, paragraph 58.

57 – Case C-274/96 [1998] ECR I-7637.

58 – Case C-85/96 [1998] ECR I-2591.

59 – Cited in footnote 40 above.

60 – Cited in footnote 40 above.

61 – Case C-353/06 [2008] ECR I-7639.

62 – Cited in footnote 40 above.

63 – Cited in footnote 22 above.

64 – Case C-135/08 [2010] ECR I-0000.

65 – See point 93 et seq. below.

66 – See Article 22 TFEU (formerly Article 19 EC), which refers specifically to ‘residing in a Member State of which he is not a national’, and Article 20(2)(b) TFEU (formerly Article 17 EC) which refers to citizens of the Union exercising those rights ‘in their Member State of residence, under the same conditions as nationals of that State’.

67 – Both rights are established by Article 24 TFEU (formerly Article 21 EC). Under the same article, a citizen of the Union could also (presumably) write to any of the institutions from anywhere on the globe, provided that he respected the language regime, and have the right to have an answer. Thus (for example) Mr Ruiz Zambrano’s children could write to one of the institutions in Spanish from any third country, as well as from any Member State, and be entitled to a reply.

68 – As set out in Article 20(2)(a) TFEU (formerly Article 17 EC) and Article 21(1) TFEU (formerly Article 18(1) EC).

69 – Case C-168/91 [1993] ECR I-1191.

70 – Opinion in *Konstantinidis*, cited in previous footnote, point 46.

71 – It is clear that the children's parents could not sensibly contemplate making such an expedition themselves and risk finding that they could not regain admission to Belgium.

72 – See Case 186/87 *Cowan* [1989] ECR 195, paragraph 15.

73 – *Rottmann*, cited in footnote 64 above, paragraph 38, emphasis added.

74 – *Rottmann*, paragraph 42, emphasis added.

75 – See points 86 and 87 above, where the impact on the right to family life is examined.

76 – It is of course theoretically possible that another Member State might be prepared to take the family. If so, Diego and Jessica could still exercise their rights as Union citizens, at least to some extent.

77 – See *Akrich*, cited in footnote 24 above, paragraphs 55 to 57 (in respect of rights under EU law) and *Zhu and Chen*, cited in footnote 22 above, paragraph 36 (in respect of rights derived initially from national law).

78 – Irish nationality law has similarly been amended (there, *after* the Court's ruling in *Zhu and Chen*) by the Irish Nationality and Citizenship Act 2004.

79 – See Case C-369/90 *Micheletti* [1992] ECR I-4239, paragraph 10; Case C-179/98 *Mesbah* [1999] ECR I-7955, paragraph 29; Case C-192/99 *Kaur* [2001] ECR I-1237, paragraph 19; and *Zhu and Chen*, cited in footnote 22 above, paragraph 37.

80 – Cited in preceding footnote.

81 – *Kaur*, cited in footnote 79 above (and cited in *Rottmann*, paragraph 49): see, in particular, paragraphs 20 to 24.

82 – Cited in footnote 79 above, paragraph 10.

83 – Cited in footnote 79 above, paragraph 19.

84 – *Rottmann*, cited in footnote 64 above, paragraphs 41 and 42.

85 – Cited in footnote 40 above, paragraph 17.

86 – Cited in footnote 40 above, paragraph 25.

87 – Cited in footnote 40 above, paragraph 19.

88 – *Rottmann*, cited in footnote 79 above, paragraph 55.

89 – *Rottmann*, cited in footnote 79 above, paragraph 56.

90 – The Presidency Conclusions of the Tampere European Council, of 15 and 16 October 1999, stated that 'the challenge … is now to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all … This freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others worldwide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory' (points 2 and 3). In a similar vein, in the European Pact on Immigration and Asylum of 15-16 October 2008, the European Council invites Member States 'to promote the harmonious integration in their host countries of immigrants who are likely to settle permanently; those policies, the implementation of which will call for a genuine effort on the part of the host countries, should be based on a balance between migrants' rights (in particular to education, work, security, and public and

social services) and duties'.

91 – *Carpenter*, cited in footnote 20 above, paragraph 44.

92 – Cited in footnote 40 above.

93 – *Baumbast*, cited in footnote 40 above, paragraph 90.

94 – *Baumbast*, cited in footnote 40 above, paragraph 91.

95 – See, inter alia, Joined Cases C-259/91, C-331/91 and C-332/91 *Allué and Others* [1993] ECR I-4309, paragraph 15; *Zhu andChen*, cited in footnote 22 above, paragraph 32; and *Rottmann*, cited in footnote 64 above, paragraph 56.

96 – Cited in footnote 40 above, paragraphs 82 to 84.

97 – For two early, thoughtful examinations of the scope and meaning of European citizenship after Maastricht, see, S. O'Leary, *The Evolving Concept of Community Citizenship*, The Hague/London/Boston, Kluwer Law International, 1996, and C. Closa, 'The Concept of Citizenship in the Treaty on European Union', *Common Market Law Review* 1992, pp. 1137 to 1169.

98 – On the importance of EU citizenship and the ties of the individual to a political community, see *Spain* v *United Kingdom*, cited in footnote 40 above, paragraphs 78 and 79.

99 – See *Carpenter*, cited in footnote 20 above, paragraph 39. Directive 2004/38, although not applicable in the present case, states in recital 5 that 'the right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality'.

100 – See *Metock*, cited in footnote 24 above, paragraph 56.

101 – See *Rottmann*, cited in footnote 64 above, paragraphs 41 and 42.

102 – Cited in footnote 42 above.

103 — See, inter alia, Case 86/78 *Peureux* [1979] ECR 897, paragraph 38; Case 355/85 *Cognet* [1986] ECR 3231, paragraphs 10 and 11; Case 98/86 *Mathot* [1987] ECR 809, paragraph 7; *Government of the French Community and Walloon Government*, cited in footnote 18 above, paragraph 33 and *Metock*, cited in footnote 24 above, paragraph 77. Advocates General have taken different stances on this point. See the Opinion of Advocate General Léger in Case C-294/01 *Granarolo* [2003] ECR I-13429, point 78 et seq.; Opinion of Advocate General Poiares Maduro in *Carbonati*, cited in footnote 44 above, paragraph 51 et seq.; and my Opinion in *Government of the French Community and Walloon Government*, cited in footnote 18 above, paragraph 112 et seq.

104 – For a critical analysis, see, inter alia, A. Tryfonidou, *Reverse Discrimination in EC Law*, Kluwer Law International, The Hague, 2009; E. Spaventa, *Free Movement of Persons in the EU: Barriers to Movement in their Constitutional Context*, Kluwer Law International, The Hague, 2007; C. Barnard, *EC Employment Law*, Third Edition, Oxford, OUP, 2006, pp. 213 and 214; N. Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move On?', *Common Market Law Review*, 2002, p. 748; and C. Ritter, 'Purely internal situations, reverse discrimination, Guimont, Dzodzi and Article 234', *31 European Law Review*, 2006.

105 – Cited in footnote 20 above.

106 – Cited in footnote 22 above.

107 – *Akrich*, cited in footnote 24 above, paragraph 50, summarised in *Metock*, paragraph 58.

108 – Cited in footnote 21 above.

109 – Cited in footnote 24 above.

110 – See *Akrich*, cited in footnote 24 above, paragraphs 77 to 79.

111 – See the case-law cited in footnote 40 above.

112 – To the extent that fundamental rights under the Charter that did not replicate ECHR rights were invoked, a separate jurisprudence would necessarily need to be developed; but that would be likely to happen in any event in the ordinary context of EU law.

113 – That collaborative task is implicitly attributed to the Court by Article 52(3) of the Charter of Fundamental Rights, when it states that: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent EU law providing more extensive protection.' The practical need for the Court to take a proactive stance in promoting minimum 'Strasbourg' standards has been portrayed, inter alia, by R. Alonso, 'The General Provisions of the Charter of Fundamental Rights of the European Union', *European Law Journal*, 8 2002, p. 450 et seq., and A. Torres Pérez, *Conflicts of Rights in the European Union. A Theory of Supranational Adjudication*, Oxford University Press, Oxford, 2009, p. 31 et seq.

114 – See, inter alia, Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 14, and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 123.

115 – See, inter alia, Case C-231/96 *Edis* [1998] ECR I-4951, paragraph 36, and Case C-326/96 *Levez* [1998] ECR I-7835, paragraph 41.

116 – See, inter alia, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, and Case C-424/99 *Commission* v *Austria* [2001] ECR I-9285, paragraph 45.

117 – See, inter alia, Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357, paragraph 35; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 31; and Case C-445/06 *Danske Slagterier* [2009] ECR I-2119, paragraph 19.

118 – It is unfortunately not the case that national courts invariably address and remedy reverse discrimination caused by EU law. In its judgment in *Government of the French Community*, cited previously in footnote 18 above, the Court openly invited the national court to remedy the difference of treatment suffered by those who did not come within the scope of EU law (paragraph 40). The case then returned before the Belgian Constitutional Court, which omitted to deal with the issue (see judgment 11/2009 of 21 January 2009 and the critical analysis by P. van Elsuwege and S. Adam, 'The Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination', *European Constitutional Law Review*, 5 2009, p. 327 et seq.). For a more encouraging example of a national supreme jurisdiction being willing to remedy reverse discrimination (albeit without necessarily drawing on a related judgment in a preliminary ruling), see the ruling of the Spanish Constitutional Court (judgment 96/2002 of 25 April 2002).

119 – See judgments cited in footnote 17 above.

120 – See, for example, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; Case 4/73 *Nold* v *Commission* [1974] ECR 491; Case 44/79 *Hauer* [1979] ECR 3727; and Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859.

121 – See Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights (OJ 2007 L 53, p. 1) and Council Decision 2008/203/EC of 28 February 2008 implementing Council Regulation (EC) No 168/2007 as regards the adoption of a Multi-annual Framework (MAF) for the Fundamental Rights Agency for 2007-2012 (OJ 2008 L 63 p. 14).

122 – For the first time, one of the current Commission's Vice-Presidents is Commissioner for Justice, Fundamental Rights and Citizenship.

123 – See, inter alia, Council Regulation (EC) No 1257/96 of 20 June 1996 concerning humanitarian aid (OJ 1996 L 163, p. 1) and Regulation (EC) No 1889/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide (OJ 2006 L 386, p. 1).

124 – Article 6(1) TEU now confers on the rights, freedoms and principles set out in the Charter 'the same legal value as the Treaties'.

125 – *Bosphorus Hava Yolları Turizm v. Ireland ve Ticaret Anonim Şirketi*, ECHR 2005-VI.

126 – See Article 6(2) TEU and Protocol No 8 relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

127 – Case 36/75 *Rutili* [1975] ECR 1219, paragraph 26; Case 222/84 *Johnston* [1986] ECR 1651, paragraphs 17 to 19; and Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraphs 14 and 15.

128 – See, inter alia, Joined Cases 201/85 and 202/85 *Klensch and Others* [1986] ECR 3477, paragraphs 10 and 11; Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 22; Case C-2/92 *Bostock* [1994] ECR I-955, paragraph 16; and Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, paragraph 68.

129 – See, for example, Case C-285/98 *Kreil* [2000] ECR I-69, paragraphs 15 and 16.

130 – See, inter alia, the judgments of the German *Bundesverfassungsgericht* of 29 May 1974, known as Solange I (2 BvL 52/71) and of 22 October 1986, known as Solange II (2 BvR 197/83); the judgment of the Italian *Corte Costituzionale* of 21 April 1989 (No 232, Fragd, in Foro it., 1990, I, 1855); the declaration of the Spanish *Tribunal Constitucional* of 13 December 2004 (DTC 1/2004) and the European Court of Human Rights' judgment in *Bosphorus*, cited in footnote 125 above.

131 – Cited in footnote 128 above, paragraph 19.

132 – See, inter alia, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 42 et seq.; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 75; and Case C-36/02 *Omega* [2004] ECR I-9609, paragraphs 30 and 31.

133 – Cited in footnote 20 above, paragraphs 43 and 44.

134 – Cited in footnote 52 above.

135 – Case C-144/95 *Maurin* [1996] ECR I-2909.

136 – *Maurin*, paragraphs 12 and 13.

137 – Case C-299/95 [1997] ECR I-2629, paragraph 15.

138 – *Kremzow*, paragraph 16.

139 – *Kremzow*, cited in footnote 137 above, paragraphs 17 and 18.

140 – See Case C-176/03 *Commission* v *Council* [2005] ECR I-7879.

141 – See, inter alia, Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-8419, paragraph 83; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 203; Joined Cases C-393/07 and C-9/08 *Italy* v *Parliament* [2009] ECR I-3679, paragraph 67; and Case C-370/07 *Commission* v *Council* [2009] ECR I-8917, paragraph 46.

142 – Article 2 TEU. Its predecessor, Article 6(1) EU, stated that '[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'.

143 – J. Locke, *Two Treatises of Government*, Cambridge University Press, Cambridge, 1988, Book II, section II.

144 – *Singh*, cited in footnote 50 above, *Cowan*, cited in footnote 72 above, and *Carpenter*, cited in footnote 20 above, all provide examples of circumstances where the link between the free movement and the fundamental right/additional protection afforded by EU law was not particularly direct. I am in no sense querying the correctness, from a rights protection perspective, of the decision reached by the Court in those three cases. My purpose is simply to highlight the sometimes tenuous nature of the link on which that protection was based.

145 – In *Akrich*, cited in footnote 24 above, Mr and Mrs Akrich were very open, during their interview by the competent national

authorities, about the fact that she had moved to take up a temporary job in Ireland so as to be able to return to the United Kingdom with her husband and claim a right of entry for him based upon Community law.

146 – See *Government of the French Community and Walloon Government*, cited in footnote 18 above.

147 – See, concerning exclusive and shared competence, Case 41/76 *Donckerwolcke and Schou* [1976] ECR 1921, paragraph 32; Case 174/84 *Bulk Oil* [1986] ECR 559, paragraph 31; and Case 68/76 *Commission* v *France* [1977] ECR 515, paragraph 23. On the application of these rules in relation to the EU's external competence, see, inter alia, Case 22/70 *ERTA* [1971] ECR 263.

148 – The explanatory notes attached to the Charter (OJ 2007 C 303, p. 17) are clear on this point: 'The fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaties. Consequently, an obligation … for the Union's institutions to promote principles laid down in the Charter may arise only within the limits of these same powers.' However, the explanatory notes go on to state that 'it goes without saying that the reference to the Charter in Article 6 of the Treaty on European Union cannot be understood as extending by itself the range of Member State action considered to be "implementation of Union law"'. As I understand them, those remarks unequivocally link fundamental rights protection under EU law to what lies within the EU's sphere of competence. Taken together, fundamental rights protection under EU law and fundamental rights protection under national law should nevertheless result in adequate protection (at least for all fundamental rights that can be found both within the Charter and within the ECHR).

149 – See case-law cited in footnote 40 above.

150 – 268 U.S. 652 (1925).

151 – On *Gitlow* v *New York* and the incorporation doctrine, see R. Cortner, *The Supreme Court and the Second Bill of Rights: The Fourteenth Amendment and the Nationalization of Civil Liberties*, Madison, University of Wisconsin Press, 1981; L. Henkin, '"Selective Incorporation" in the Fourteenth Amendment', *Yale Law Journal*, 1963, pp. 74 to 88, and H.L., Pohlman, *Justice Oliver Wendell Holmes: Free Speech & the Living Constitution*, NYU Press, New York, 1991, pp. 82 to 87.

152 – Opinion 2/94 [1996] ECR I-1759, paragraph 6.

Case C-34/09: Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)

JUDGMENT OF THE COURT (Grand Chamber)

8 March 2011 (*)

(Citizenship of the Union – Article 20 TFEU – Grant of right of residence under European Union law to a minor child on the territory of the Member State of which that child is a national, irrespective of the previous exercise by him of his right of free movement in the territory of the Member States – Grant, in the same circumstances, of a derived right of residence, to an ascendant relative, a third country national, upon whom the minor child is dependent – Consequences of the right of residence of the minor child on the employment law requirements to be fulfilled by the third-country national ascendant relative of that minor)

In Case C-34/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal du travail de Bruxelles (Belgium), made by decision of 19 December 2008, received at the Court on 26 January 2009, in the proceedings

Gerardo Ruiz Zambrano,

v

Office national de l'emploi (ONEm),

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues (Rapporteur), K. Lenaerts, J.-C. Bonichot, Presidents of Chamber, A. Rosas, M. Ilešič, J. Malenovský, U. Lõhmus, E. Levits, A. Ó Caoimh, L. Bay Larsen and M. Berger, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure and further to the hearing on 26 January 2010,

after considering the observations submitted on behalf of:

– Mr Ruiz Zambrano, by P. Robert, avocat,

– the Belgian Government, by C. Pochet, acting as Agent, assisted by F. Motulsky and K. de Haes, avocats,

– the Danish Government, by B. Weis Fogh, acting as Agent,

– the German Government, by M. Lumma and N. Graf Vitzthum, acting as Agents,

– Ireland, by D. O'Hagan, acting as Agent, assisted by D. Conlan Smyth, Barrister,

– the Greek Government, by S. Vodina, T. Papadopoulou and M. Michelogiannaki, acting as Agents,

– the Netherlands Government, by C. Wissels, M. de Grave and J. Langer, acting as Agents,

– the Austrian Government, by E. Riedl, acting as Agent,

– the Polish Government, by M. Dowgielewicz, and subsequently by M. Szpunar, acting as Agents,

– the European Commission, by D. Maidani and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 September 2010,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 17 EC and 18 EC, and also Articles 21, 24 and 34 of the Charter of Fundamental Rights of the European Union ('the Charter of Fundamental Rights').

2 That reference was made in the context of proceedings between Mr Ruiz Zambrano, a Columbian national, and the Office national de l'emploi (National Employment Office) ('ONEm') concerning the refusal by the latter to grant him unemployment benefits under Belgian legislation.

Legal context

European Union law

3 Article 3(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34), provides:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.'

National law

The Belgian Nationality Code

4 Under Article 10(1) of the Belgian Nationality Code (*Moniteur belge*, 12 July 1984, p. 10095), in the version applicable at the time of the facts in the main proceedings ('the Belgian Nationality Code'):

'Any child born in Belgium who, at any time before reaching the age of 18 or being declared of full age, would be stateless if he or she did not have Belgian nationality, shall be Belgian.'

The Royal Decree of 25 November 1991

5 Article 30 of the Royal Decree of 25 November 1991 (*Moniteur belge* of 31 December 1991, p. 29888) concerning rules on unemployment provides as follows:

'In order to be eligible for unemployment benefit, a full-time worker must have completed a qualifying period comprising the following number of working days:

…

2. 468 during the 27 months preceding the claim [for unemployment benefit], if the worker is more than 36 and less than 50 years of age,

…'

6 Article 43(1) of the Royal Decree states:

'Without prejudice to the previous provisions, a foreign or stateless worker is entitled to unemployment benefit if he or she complies with the legislation relating to aliens and to the employment of foreign workers.

Work undertaken in Belgium is not taken into account unless it complies with the legislation relating to the employment of foreign workers.

…'

7 Under Article 69(1) of the Royal Decree:

'In order to receive benefits, foreign and stateless unemployed persons must satisfy the legislation concerning aliens and that relating to the employment of foreign labour.'

The Decree-Law of 28 December 1944

8 Article 7(14) of the Decree-Law of 28 December 1944 on social security for workers (*Moniteur belge* of 30 December 1944), inserted by the Framework Law of 2 August 2002 (*Moniteur belge* of 29 August 2002, p. 38408), is worded as follows:

'Foreign and stateless workers shall be eligible to receive benefits only if, at the time of applying for benefits, they satisfy the legislation concerning residency and that relating to the employment of foreign labour.

Work done in Belgium by a foreign or stateless worker shall be taken into account for the purpose of the qualifying period only if it was carried out in accordance with the legislation on the employment of foreign labour.

…'

The Law of 30 April 1999

9 Article 4(1) of the Law of 30 April 1999 on the employment of foreign workers (*Moniteur belge* of 21 May 1999, p. 17800) provides:

'An employer wishing to employ a foreign worker must obtain prior employment authorisation from the competent authority.

The employer may use the services of that worker only as provided for in that authorisation.

The King may provide for exceptions to the first paragraph herein, as He deems appropriate.'

10 Under Article 7 of that law:

'The King may, by a decree debated in the Council of Ministers, exempt such categories of foreign workers as He shall determine from the requirement to obtain a work permit.

Employers of foreign workers referred to in the preceding paragraph shall be exempted from the obligation to obtain a work permit.'

The Royal Decree of 9 June 1999

11 Article 2(2) of the Royal Decree of 9 June 1999 implementing the Law of 30 April 1999 on the employment of foreign workers (*Moniteur belge* of 26 June 1999, p. 24162) provides:

'The following shall not be required to obtain a work permit:

…

2. the spouse of a Belgian national, provided that s/he comes in order to settle, or does settle, with that national;

(a) descendants under 21 years of age or dependants of the Belgian national or his spouse;

(b) dependent ascendants of the Belgian national or his/her spouse;

(c) the spouse of the persons referred to in (a) or (b);

…'

The Law of 15 December 1980

12 Article 9 of the Law of 15 December 1980 on access to Belgian territory, residence, establishment and expulsion of foreign nationals (*Moniteur belge* du 31 December 1980, p. 14584), in the version thereof applicable to the main proceedings ('the Law of 15 December 1980'), provides:

'In order to be able to reside in the Kingdom beyond the term fixed in Article 6, a foreigner who is not covered by one of the cases provided for in Article 10 must be authorised by the Minister or his representative.

Save for exceptions provided for by international treaty, a law or royal decree, the foreigner must request that authorisation from the competent diplomatic mission or Belgian consul in his place of residence or stay abroad.

In exceptional circumstances, the foreigner may request that authorisation from the mayor of the municipality where he is residing, who will forward to the Minister or his representative. It will, in that case, be issued in Belgium.'

13 Article 40 of the same law provides:

'1. Without prejudice to the provisions in the regulations of the Council [of the European Union] and the Commission of the European Communities and more favourable ones on which an EC foreign national might rely, the following provisions shall apply to him.

2. For the purposes of this Law, "EC foreign national" shall mean any national of a Member State of the European Communities who resides in or travels to the Kingdom and who:

(i) pursues or intends to pursue there an activity as an employed or self-employed person;

(ii) receives or intends to receive services there:

(iii) enjoys or intends to enjoy there a right to remain;

(iv) enjoys or intends to enjoy there a right of residence after ceasing a professional activity or occupation pursued in the Community;

(v) undergoes or intends to undergo there, as a principal pursuit, vocational training in an approved educational establishment; or

(vi) belongs to none of the categories under (i) to (v) above.

3. Subject to any contrary provisions of this Law, the following persons shall, whatever their nationality, be treated in the same way as an EC foreign national covered by paragraph 2(i), (ii) and (iii) above, provided that they come in order to settle, or do settle, with him:

(i) the spouse of that national;

(ii) the national's descendants or those of his spouse who are under 21 years of age and dependent on them;

(iii) the national's ascendants or those of his spouse who are dependent on them;

(iv) the spouse of the persons referred to in (ii) or (iii).

4. Subject to any contrary provisions of this Law, the following persons shall, whatever their nationality, be treated in the same way as an EC foreign national covered by paragraph 2(iv) and (vi) above, provided that they come in order to settle, or do settle, with him:

(i) the spouse of that national;

(ii) the national's descendants or those of his spouse who are dependent on them;

(iii) the national's ascendants or those of his spouse who are dependent on them;

(iv) the spouse of the persons referred to in (ii) or (iii).

5. Subject to any contrary provisions of this Law, the spouse of an EC foreign national covered by paragraph 2(v) above and his children or those of his spouse who are dependent on them shall, whatever their nationality, be treated in the same way as the EC foreign national provided that they come in order to settle, or do settle, with him.

6. The spouse of a Belgian who comes in order to settle, or does settle, with him, and also their descendants who are under 21 years of age or dependent on them, their ascendants who are dependent on them and any spouse of those descendants or ascendants, who come to settle, or do settle, with them, shall also be treated in the same way as an EC foreign national.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 On 14 April 1999, Mr Ruiz Zambrano, who was in possession of a visa issued by the Belgian embassy in Bogotá (Colombia), applied for asylum in Belgium. In February 2000, his wife, also a Columbian national, likewise applied for refugee status in Belgium.

15 By decision of 11 September 2000, the Belgian authorities refused their applications and ordered them to leave Belgium. However, the order notified to them included a *non-refoulement* clause stating that they should not be sent back to Colombia in view of the civil war in that country.

16 On 20 October 2000, Mr Ruiz Zambrano applied to have his situation regularised pursuant to the third paragraph of Article 9 of the Law of 15 December 1980. In his application, he referred to the absolute impossibility of returning to Colombia and the severe deterioration of the situation there, whilst emphasising his efforts to integrate into Belgian society, his learning of French and his child's attendance at pre-school, in addition to the risk, in the event of a return to Columbia, of a worsening of the significant post-traumatic syndrome he had suffered in 1999 as a result of his son, then aged 3, being abducted for a week.

17 By decision of 8 August 2001, that application was rejected. An action was brought for annulment and suspension of that decision before the Conseil d'État, which rejected the action for suspension by a judgment of 22 May 2003.

18 Since 18 April 2001, Mr Ruiz Zambrano and his wife have been registered in the municipality of Schaerbeek (Belgium). On 2 October 2001, although he did not hold a work permit, Mr Ruiz Zambrano signed an employment contract for an unlimited period to work full-time with the Plastoria company, with effect from 1 October 2001.

19 On 1 September 2003, Mr Ruiz Zambrano's wife gave birth to a second child, Diego, who acquired Belgian nationality pursuant to Article 10(1) of the Belgian Nationality Code, since Columbian law does not recognise Colombian nationality for children born outside the territory of Colombia where the parents do not take specific steps to have them so recognised.

20 The order for reference further indicates that, at the time of his second child's birth, Mr Ruiz Zambrano had sufficient resources from his working activities to provide for his family. His work was paid according to the various applicable scales, with statutory deductions made for social security and the payment of employer contributions.

21 On 9 April 2004, Mr and Mrs Ruiz Zambrano again applied to have their situation regularised pursuant to the third paragraph of Article 9 of the Law of 15 December 1980, putting forward as a new factor the birth of their second child and relying on Article 3 of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('ECHR'), which prevents that child from being required to leave the territory of the State of which he is a national.

22 Following the birth of their third child, Jessica, on 26 August 2005, who, like her brother Diego, acquired Belgian nationality, on 2 September 2005 Mr and Mrs Ruiz Zambrano lodged an application to take up residence pursuant to Article 40 of the Law of 15 December 1980, in their capacity as ascendants of a Belgian national. On 13 September 2005, a registration certificate was issued to them provisionally covering their residence until 13 February 2006.

23 Mr Ruiz Zambrano's application to take up residence was rejected on 8 November 2005, on the ground that he '[could] not rely on Article 40 of the Law of 15 December 1980 because he had disregarded the laws of his country by not registering his child with the diplomatic or consular authorities, but had correctly followed the procedures available to him for acquiring Belgian nationality [for his child] and then trying on that basis to legalise his own residence'. On 26 January 2006, his wife's application to take up residence was rejected on the same ground.

24 Since the introduction of his action for review of the decision rejecting his application for residence in March 2006, Mr Ruiz Zambrano has held a special residence permit valid for the entire duration of that action.

25 In the meantime, on 10 October 2005, Mr Ruiz Zambrano's employment contract was temporarily suspended on economic grounds, which led him to lodge a first application for unemployment benefit, which was rejected by a decision notified to him on 20 February 2006. That decision was challenged before the referring court by application of 12 April 2006.

26 In the course of the inquiries in the action brought against that decision, the Office des Étrangers (Aliens' Office) confirmed that 'the applicant and his wife cannot pursue any employment, but no expulsion measure can be taken against them because their application for legalising their situation is still under consideration'.

27 In the course of an inspection carried out on 11 October 2006 by the Direction générale du contrôle des lois sociales (Directorate General, Supervision of Social Legislation) at the registered office of Mr Ruiz Zambrano's employer, he was found to be at work. He had to stop working immediately. The next day, Mr Ruiz Zambrano's employer terminated his contract of employment with immediate effect and without compensation.

28 The application lodged by Mr Ruiz Zambrano for full-time unemployment benefits as from 12 October 2006 was rejected by a decision of the ONEm (National Employment Office), which was notified on 20 November 2006. On 20 December 2006 an action was also brought against that decision before the referring court.

29 On 23 July 2007, Mr Ruiz Zambrano was notified of the decision of the Office des Étrangers rejecting his application of 9 April 2004 to regularise his situation. The action brought against that decision before the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) was declared to be devoid of purpose by a judgment of 8 January 2008, as the Office des Étrangers had withdrawn that decision.

30 By letter of 25 October 2007, the Office des Étrangers informed Mr Ruiz Zambrano that the action for review he had brought in March 2006 against the decision rejecting his application to take up residence of 2 September 2005 had to be reintroduced within 30 days of the notification of that letter, in the form of an action for annulment before the Conseil du contentieux des étrangers.

31 On 19 November 2007, Mr Ruiz Zambrano brought such an action for annulment, based, first, on the inexistence of the 'legal engineering' of which he had been charged in that decision, since the acquisition of Belgian nationality by his minor children was not the result of any steps taken by him, but rather of the application of the relevant Belgian legislation. Mr Ruiz Zambrano also alleges infringement of Articles 2 and 7 of Directive 2004/38, as well as infringement of Article 8 of the ECHR, and of Article 3(1) of Protocol No 4 thereto.

32 In its written observations lodged before the Court, the Belgian Government states that, since 30 April 2009, Mr Ruiz Zambrano has had a provisional and renewable residence permit, and should have a type C work permit, pursuant to the instructions of 26 March 2009 of the Minister for immigration and asylum policy relating to the application of the former third paragraph of Article 9 and Article 9a of the Law of 15 December 1980.

33 It is apparent from the order for reference that the two decisions which are the subject-matter of the main proceedings, by which the ONEm refused to recognise Mr Ruiz Zambrano's entitlement to unemployment benefit, first, during the periods of temporary unemployment from 10 October 2005 and then 12 October 2006, following the loss of his job, are based solely on the finding that the working days on which he relies for the purpose of completing the qualifying period for his age category, that is, 468 working days during the 27 months preceding his claim for unemployment benefit, were not completed as required by the legislation governing foreigners' residence and employment of foreign workers.

34 Mr Ruiz Zambrano challenges that argument before the referring court, stating inter alia that he enjoys a right of residence directly by virtue of the EC Treaty or, at the very least, that he enjoys the derived right of residence, recognised in Case C-200/02 *Zhu and Chen* [2004] ECR I-9925 for the ascendants of a minor child who is a national of a Member State and that, therefore, he is exempt from the obligation to hold a work permit.

35 In those circumstances, the Tribunal du travail de Bruxelles (Employment Tribunal, Brussels) (Belgium) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Do Articles 12 [EC], 17 [EC] and 18 [EC], or one or more of them when read separately or in conjunction, confer a right of residence upon a citizen of the Union in the territory of the Member State of which that citizen is a national, irrespective of whether he has previously exercised his right to move within the territory of the Member States?

2. Must Articles 12 [EC], 17 [EC] and 18 [EC], in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right which they recognise, without discrimination on the grounds of nationality, in favour of any citizen of the Union to move and reside freely in the territory of the Member States means that, where that citizen is an infant dependent on a relative in the ascending line who is a national of a non-member State, the infant's enjoyment of the right of residence in the Member State in which he resides and of which he is a national must be safeguarded, irrespective of whether the right to move freely has been previously exercised by the child or through his legal representative, by coupling that right of residence with the useful effect whose necessity is recognised by Community case-law [*Zhu and Chen*], and granting the relative in the ascending line who is a national of a non-member State, upon whom the child is dependent and who has sufficient resources and sickness insurance, the secondary right of residence which that same national of a non-member State would have if the child who is dependent upon him were a Union citizen who is not a national of the Member State in which he resides?

3. Must Articles 12 [EC], 17 [EC] and 18 [EC], in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right of a minor child who is a national of a Member State to reside in the territory of the State in which he resides must entail the grant of an exemption from the requirement to hold a work permit to the relative in the ascending line who is a national of a non-member State, upon whom the child is dependent and who, were it not for the requirement to hold a work permit under the national law of the Member State in which he resides, fulfils the condition of sufficient resources and the possession of sickness insurance by virtue of paid employment making him subject to the social security system of that State, so that the child's right of residence is coupled with the useful effect recognised by Community case-law [*Zhu and Chen*] in favour of a minor child who is a European citizen with a nationality other than that of the Member State in which he resides and is dependent upon a relative in the ascending line who is a national of a non-member State?'

The questions referred for a preliminary ruling

36 By its questions, which it is appropriate to consider together, the referring court asks, essentially, whether the provisions of the TFEU on European Union citizenship are to be interpreted as meaning that they confer on a relative in the ascending line who is a third country national, upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of which they are nationals and in which they reside, and also exempt him from having to obtain a work permit in that Member State.

37 All governments which submitted observations to the Court and the European Commission argue that a situation such as that of Mr Ruiz Zambrano's second and third children, where those children reside in the Member State of which they are nationals and have never left the territory of that Member State, does not come within the situations envisaged by the freedoms of movement and residence guaranteed under European Union law. Therefore, the provisions of European Union law referred to by the national court are not applicable to the dispute in the main proceedings.

38 Mr Ruiz Zambrano argues in response that the reliance by his children Diego and Jessica on the provisions relating to European Union citizenship does not presuppose that they must move outside the Member State in question and that he, in his capacity as a family member, is entitled to a right of residence and is exempt from having to obtain a work permit in that Member State.

39 It should be observed at the outset that, under Article 3(1) of Directive 2004/38, entitled '[b]eneficiaries', that directive applies to 'all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members …'. Therefore, that directive does not apply to a situation such as that at issue in the main proceedings.

40 Article 20 TFEU confers the status of citizen of the Union on every person holding the nationality of a Member State (see, inter alia, Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 27, and Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 21). Since Mr Ruiz Zambrano's second and third children possess Belgian nationality, the conditions for the acquisition of which it is for the Member State in question to lay down (see, to that effect, inter

alia, Case C-135/08 *Rottmann* [2010] ECR I-0000, paragraph 39), they undeniably enjoy that status (see, to that effect, *Garcia Avello*, paragraph 21, and *Zhu and Chen*, paragraph 20).

41 As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see, inter alia, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31; Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 82; *Garcia Avello*, paragraph 22; *Zhu and Chen*, paragraph 25; and *Rottmann*, paragraph 43).

42 In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (see, to that effect, *Rottmann*, paragraph 42).

43 A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.

44 It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

45 Accordingly, the answer to the questions referred is that Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

Case E-4/11: Arnulf Clauder

JUDGMENT OF THE COURT

of 26 July 2011

in Case E-4/11

Arnulf Clauder

(Directive 2004/38/EC — Family reunification — Right of residence for family members of EEA nationals holding a right of permanent residence — Condition to have sufficient resources)

2011/C 344/06

In Case E-4/11, REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Verwaltungsgerichtshof des Fürstentums Liechtenstein (Administrative Court of the Principality of Liechtenstein), in the case of

Arnulf Clauder

concerning the interpretation of Article 16(1) in conjunction with Article 7(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, as adapted to the EEA Agreement by Protocol 1 thereto,

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen (JudgeRapporteur), and Benedikt Bogason (ad hoc), Judges,

Registrar: Skúli Magnússon,

having considered the written observations submitted on behalf of:
- the Complainant, Arnulf Clauder;
- the Liechtenstein Government, represented by Dr Andrea Entner-Koch and Thomas Bischof of the EEA Coordination Unit, acting as Agents;
- the Netherlands Government, represented by Corinna Wissels, Mielle Bulterman and Jurian Langer, respectively head and staff members of the European Law Division of the Legal Affairs Department of the Ministry of Foreign Affairs, acting as Agents;
- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Florence Simonetti, Senior Officer, Department of Legal & Executive Affairs, acting as Agents;
- the European Commission ("the Commission"), represented by Christina Tufvesson and Michael Wilderspin, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing, having heard oral argument of the Liechtenstein Government, represented by its agent, Dr Andrea Entner-Koch; the Government of Denmark, represented by its agent, Christian Vang; ESA, represented by its agent, Florence Simonetti; and the Commission, represented by its agent, Christina Tufvesson, at the hearing on 28 June 2011,

gives the following

Judgment

I Introduction

1 By a letter of 14 February 2011, registered at the EFTA Court on 16 February 2011, the Administrative Court of the Principality of Liechtenstein ("the Administrative Court") made a request for an Advisory Opinion in a case pending before it concerning Arnulf Clauder ("Mr Clauder" or "the Complainant").

2 The case before the Administrative Court concerns the decision by the Liechtenstein Government not to grant the Complainant, who is economically inactive and in receipt of social welfare benefits, a family reunification permit for his spouse.

3 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

II Legal background

European Convention on Human Rights

4 Article 8 of the European Convention on Human Rights ("ECHR") – Right to respect for private and family life – reads as follows:

> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

…

EEA law

5 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 258, p. 77), as adapted to the EEA Agreement by EEA Joint Committee Decision No 158/2007 of 7 December 2007 ("Directive 2004/38" or "the Directive"), is referred to at point 1 of Annex V and point 3 of Annex VIII to the EEA Agreement. In particular, point 3(c) of Annex VIII provides that for the purposes of the EEA Agreement, the words "Union citizen(s)" shall be replaced by the words "national(s) of EC Member States and EFTA States"

6 Article 2 of the Directive – Definitions – reads as follows:

> *For the purposes of this Directive: ...*
> *2. "family member" means:*
> *(a) the spouse; ...*

7 Article 3 of the Directive – Beneficiaries – reads as follows:

> *(1) This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them. ...*

8 Article 7 of the Directive – Right of residence for more than three months – reads as follows:

> *(1) All Union citizens shall have the right of residence on the territory of another Member State for*

a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

…

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) … …

9 Article 16 of the Directive – General rule for Union citizens and their family members – provides:

(1) Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

(2) Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

…

(4) Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

National law

10 Pursuant to the Liechtenstein Act of 20 November 2009 on the free movement of EEA and Swiss citizens ("PFZG") and the Regulation on the Free Movement of Persons ("PFZV"), economically inactive foreigners holding a permanent residence permit may have their family members take up residence with them only upon provision of evidence of the necessary financial means for maintaining all family members, obviating any claim for social welfare benefits.

III Facts and pre-litigation procedure

11 Mr Clauder, a German national, has been continuously resident in Liechtenstein since 1992. His first wife, of German nationality, took up residence in Liechtenstein and, initially, Mr Clauder was granted a right of residence as a family member of a worker.

12 In 2002, after repeated renewals of his residence permit, Mr Clauder received a permanent residence permit. Under Liechtenstein legislation, a permanent residence permit is issued for an indefinite period.

13 In 2009, Mr Clauder and his first wife divorced. In 2010, Mr Clauder remarried. His new wife, Mrs Eva-Maria Clauder, née Verlohr, a German national, was resident at that time in Germany. On 1 February 2010, Mr Clauder applied to the Liechtenstein Office for Immigration and Passports for a family reunification permit for his second wife.

14 Mr Clauder is a pensioner in receipt of old-age pensions from both Germany and Liechtenstein. As the old-age pensions, even in combination, are relatively modest, Mr Clauder receives supplementary benefits in Liechtenstein pursuant to the Act of 10 December 1965 on supplementary benefits to old-age, survivors" and invalidity insurance.

15 According to the order for reference, if Mrs Clauder were allowed to reside with her husband in

Liechtenstein, the amount of the supplementary benefits received by Mr Clauder would increase, even if Mrs Clauder were to take up employment.

16 On 12 February 2010, the Office for Immigration and Passports rejected Mr Clauder‟s application for family reunification. The basis for the rejection was that Mr Clauder, who was granted a permit of permanent residence as an economically inactive person, could not prove that he had sufficient financial resources for himself and his wife without having recourse to social welfare benefits. Mr Clauder submitted written observations to that office on 19 February 2010. In an administrative notice of 12 April 2010, the Office for Immigration and Passports confirmed the position it had previously taken and formally rejected the application for family reunification.

17 Mr Clauder lodged an administrative complaint on 26 April 2010 against this administrative notice. The complaint was rejected by the Liechtenstein Government in November 2010. On 6 December 2010, Mr Clauder challenged the Government‟s decision before the Administrative Court.

18 In its request for an Advisory Opinion, the Administrative Court appears inclined towards the view that a person in Mr Clauder‟s position, that is, an economically inactive person who is a national of one EEA State who enjoys a right of permanent residence in another EEA State, does not need to demonstrate that he has sufficient means of subsistence in order for a family member to benefit from a derived right of residence in that other EEA State. Notwithstanding that general position, the Administrative Court submits the following three questions to the Court:

1. Is Directive 2004/38/EC, in particular Article 16(1) in conjunction with Article 7(1), to be interpreted such that a Union citizen with a right of permanent residence, who is a pensioner and in receipt of social welfare benefits in the host Member State, may claim the right to family reunification even if the family member will also be claiming social welfare benefits?

2. Is it of relevance for the answer to Question 1, whether the Union citizen with a right of permanent residence was employed or selfemployed in the host Member State prior to attaining retirement age?

3. Is it of relevance for the answer to Question 1, whether the family member will be employed or self-employed in the host Member State and still be claiming social welfare benefits?

IV The first question

Observations submitted to the Court

19 Mr Clauder, ESA and the Commission assert that the Directive, in particular Article 16(1) in conjunction with Article 7(1), should be interpreted as meaning that an EEA national with a right of permanent residence, who is a pensioner and in receipt of social welfare benefits in the host State, may claim the right to family reunification even if the family member will also be claiming social welfare benefits.

20 They note that Article 16 of the Directive states that EEA nationals who have been residing legally for a continuous period of five years in the host Member State shall be granted a right of permanent residence in that State, and that this right of permanent residence also applies to family members who themselves fulfil the same criteria. They observe, however, that Article 16 of the Directive does not contain any express provision regarding the acquisition of a right of residence for a family member seeking to join an EEA national who has already acquired a right of permanent residence when the family member himself does not

fulfil the requirements for permanent residence.

21 In their view, although Article 16 of the Directive, unlike Articles 6 and 7, does not contain an explicit provision conferring on the beneficiary of the right of permanent residence the right to have (existing or future) family members who are not already resident with him in the host State join him in order to reside there, the legislature clearly intended such a right to be conferred. They argue that since the right of permanent residence represents the highest level of integration in the host State, it is inconceivable that the legislature did not intend to confer derived rights on family members.

22 According to Mr Clauder, ESA and the Commission, the silence of the Directive on this point should be interpreted to the effect that family members who do not yet fulfil the requirements laid down in Article 16 of the Directive in their own right derive a right of residence from the EEA national with the right of permanent residence. The family member does not have to fulfil the conditions laid down in Article 7. They stress that Article 16 of Directive 2004/38 clearly states that, once acquired, the right of permanent residence shall not be subject to the conditions provided for in Chapter III, inter alia, the condition to have sufficient resources. They observe that this is in contrast to the situation under earlier legislation, which entitled the host State to monitor whether EEA nationals who enjoyed a right of residence continued to meet the conditions laid down for that purpose, including the condition to have sufficient resources, throughout the period of their residence.

23 Mr Clauder, ESA and the Commission assert that the conditions imposed by Article 7(1)(d) of the Directive are logical when a family member claims rights derived from a person who falls within the scope of Article 7, since this reflects the conditions which that person himself must satisfy to acquire and retain a right of residence. The same reasoning does not hold good where the family member‟s right of residence is derived from a right of permanent residence, since Article 16 does not create different categories of beneficiaries with greater or lesser rights depending on the circumstances in which that right was acquired.

24 They argue further that EEA secondary legislation on free movement and residence cannot be interpreted restrictively and that, where a provision of EEA law is open to several interpretations, preference must be given to the interpretation which ensures that the provision retains its effectiveness.

25 In the view of Mr Clauder, ESA and the Commission, if the derived right to residence for family members of an EEA national holding a permanent residence right were subject to the conditions laid down in Article 7 of the Directive, including the condition to have sufficient resources, this would entail that economically inactive beneficiaries of a right of permanent residence who do not have sufficient resources may not be joined by members of their family. They submit that if EEA nationals are not allowed to lead a normal family life in the host State, the exercise of the right of residence granted to EEA nationals by Directive 2004/38 could be seriously obstructed and even deprived of any useful effect.

26 They contend that the abolition of the condition to have sufficient resources included in earlier directives was a deliberate choice of the legislature. This applies not merely to the enjoyment of the right of permanent residence by an EEA national himself but must equally extend to the circumstances in which his family members may themselves acquire a right of residence there.

27 Against this background, they consider that a refusal to recognise Mrs Clauder‟s derived right of residence in Liechtenstein because of the insufficient resources of her husband would constitute a breach both of Mr Clauder‟s right of permanent residence under Article 16 of Directive 2004/38 and of his right to family life.

28 The Governments of Liechtenstein, the Netherlands and Denmark submit that Article 16 of the Directive

must be interpreted to the effect that a holder of a permanent residence right who is a pensioner may claim the right to family reunification only on the fulfilment of the conditions laid down in Article 7(1)(d) in conjunction with Article 7(1)(b) of the Directive. Accordingly, the family member must not become a burden on the social assistance system in the host EEA State and must have comprehensive sickness insurance cover.

29 The Governments observe that, in contrast to Articles 6 and 7 of the Directive, Article 16 does not explicitly regulate the right to family reunification. As a consequence, it must be assumed that the legislature did not intend to grant any further right to family reunification to nationals of EEA States holding a permanent residence status in the host EEA State beyond those mentioned in Articles 6 and 7 of the Directive. They assert, therefore, that since the Directive is silent as regards the right to family reunification for holders of a permanent residence right, the EEA States are free to decide whether the right to family reunification shall be subject to a condition to have sufficient resources.

30 They contend further that a distinction must be made between (i) the personal right of residence that the family member as an EEA national may have and (ii) the right of residence that the family member may derive from his status as family member of an EEA national holding a right of permanent residence. In their view, in both situations Directive 2004/38 allows host States to set the requirement of sufficient resources.

31 According to the Governments, only where an EEA national himself does not satisfy the conditions of Article 7(1)(a), (b) or (c) of the Directive does the question arise whether a right of residence can be derived from the status as a family member of an EEA national holding a right of permanent residence in the host State. They observe further that a family member has a derived right of residence on the basis of Article 7(1)(d) of the Directive if the family member is accompanying or joining an EEA national who satisfies the conditions in Article 7(1)(a), (b) or (c).

32 They assert that the standard conditions for a derived right of residence laid down in Article 7(1)(d) of the Directive also apply if the EEA national, whom the family member is joining, has obtained a right of permanent residence in the host State. This understanding of the Directive follows from the wording of Article 16, which stipulates that a family member can claim a right of permanent residence only where the family member himself fulfils the requirement of legal residence in the host State for a continuous period of five years. The fact that an EEA national has acquired a right of permanent residence does not automatically bring about any changes in the residence status of his family members. In this regard, the Governments argue that Articles 16(1) and 17 of the Directive explicitly concern family members who are already residing in the host State, and that neither these Articles, nor any other provision in the Directive, explicitly address the position of a family member wishing to join an EEA national holding a right of permanent residence.

Findings of the Court

33 As a preliminary point, the Court notes that Directive 2004/38 amended Regulation (EEC) No 1612/68 (OJ English Special Edition 1968 (II), p. 475) and repealed the earlier directives on freedom of movement for persons (Council Directive 90/364/EEC of 28 June 1990 on the right of residence, OJ 1990 L 180, p. 26, and Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, OJ 1990 L 180, p. 28). As is apparent from recital 3 in the preamble to Directive 2004/38, it aims in particular to "strengthen the right of free movement and residence" of EEA nationals (see, for comparison, Case C-127/08 Metock and Others [2008] ECR I-6241, paragraph 59).

34 Having regard to the context and objectives of Directive 2004/38 – promoting the right of nationals of EC Member States and EFTA States and their family members to move and reside freely within the territory of

the EEA States – the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness (see, to that effect, Metock and Others, cited above, paragraph 84, and the case-law cited).

35 The Court notes further that even before the adoption of Directive 2004/38, the legislature recognised the importance of ensuring the protection of the family life of nationals of the EEA States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by EEA law (see, in a similar vein, Metock and Others, cited above, paragraph 56, and the case-law cited).

36 Moreover, as recital 5 in the preamble to the Directive points out, the right of all EEA nationals to move and reside freely within the territory of the EEA States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality.

37 Consequently, Article 3(1) of the Directive provides that it is to apply to all EEA nationals who move to or reside in an EEA State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

38 In this regard, the Court notes that, in contrast to Article 1 of Directive 90/364/EEC and Article 1 of Directive 90/365/EEC, Directive 2004/38 does not contain a general requirement of sufficient resources. Such a requirement exists neither with regard to workers and self-employed persons nor with regard to persons who have acquired a permanent right of residence pursuant to the Directive. Moreover, in comparison to the position under earlier legislation, the Directive has expanded the rights of family members also on several other points. For instance, Article 13 of the Directive now ensures that family members‟ rights of residence are retained in the event of divorce, annulment of marriage or termination of registered partnership.

39 The rights conferred on the family members of a beneficiary under the Directive are not autonomous rights, but derived rights, acquired through their status as members of the beneficiary‟s family (see, in a similar vein, Case C-434/09 McCarthy, judgment of 5 May 2011, not yet reported, paragraph 42). Family members who are themselves EEA nationals may also have an autonomous right of residence. However, such an autonomous right is not at issue in the present case.

40 Directive 2004/38 provides for three levels of residence rights for EEA nationals: first, in Article 6, the right of residence for up to three months; second, in Article 7, the right of residence for more than three months, which applies to workers, economically self-supporting persons or other persons to be assimilated to them; and third, in Article 16(1), the right of permanent residence.

41 The Court observes that the first question essentially involves two issues, that is, whether an EEA national‟s right of permanent residence confers a derived right of residence in the host State on his family members, and, whether such a derived right may be exercised independently of the resources possessed by the family member and the primary beneficiary.

42 Article 16(1) of the Directive is silent on whether an EEA national‟s right to permanent residence pursuant to that article confers a right of residence on his family members. Article 7(1), which concerns the right of residence for more than three months, expressly stipulates in point (d) that family members may accompany or join the EEA national having a residence right, but only if the beneficiary satisfies the conditions in points (a), (b) or (c), in other words, that the beneficiary either is working or self-employed or has sufficient resources for himself and his family members not to become a burden on the social assistance system of the host State.

43 The Court finds it apparent that although not explicitly stated in the wording of the provision, the right to permanent residence under Article 16(1) of the Directive must confer a derived right of residence in the host State on the holder‟s family members. It follows from the scheme and purpose of the Directive that the right to permanent residence, which represents the highest level of integration under the Directive, cannot be read as not including the right to live with one‟s family, or be limited such as to confer on family members a right of residence derived from a different, lower status. In that regard, it must be noted that the right to permanent residence under Article 16 does not confer an autonomous right of permanent residence on family members, but a right to reside with the beneficiary of a right of permanent residence as a member of his or her family. Hence, only on satisfying the condition of legal residence in the host State for a continuous period of five years may a family member acquire an autonomous right to permanent residence, either pursuant to Article 16(1) in the case of EEA nationals or Article 16(2) in the case of non-EEA nationals.

44 Turning to the second issue, the Court notes that Article 16 of the Directive explicitly states that, once acquired, the right of permanent residence is not subject to the conditions laid down in Chapter III of the Directive, in which Article 7 on the right to residence for more than three months, including the condition to have sufficient resources, is set out.

45 This is in contrast to the situation under the repealed Directives 90/364/EEC and 90/365/EEC, which entitled the host EEA State to monitor whether EEA nationals who enjoyed a right of residence continued to meet the conditions laid down for that purpose, including the condition to have sufficient resources, throughout the period of their residence.

46 If an EEA national who has a permanent and unconditional right to residence in an EEA State other than that of which he is a national were precluded from founding a family in that State, this would impair the right of EEA nationals to move and reside freely within the EEA, and thus be contrary to the purpose of the Directive and deprive it of its full effectiveness (see, in a similar vein, Metock and Others, cited above, paragraphs 89 and 93). This conclusion cannot be different even if the family member becomes a burden on the social assistance system of the host EEA State.

47 Since the retention of a right to permanent residence under Article 16 of the Directive is not subject to the conditions in Chapter III and it is apparent that the right must be understood to confer a derived right on the beneficiary‟s family members, it must be presumed prima facie that also the derived right is not subject to a condition to have sufficient resources.

48 This interpretation is underpinned by the discontinuation of a general requirement to have sufficient resources in the Directive, as mentioned in paragraphs 33 to 38. Thus, in the Court‟s view, whereas under the previous directives to have sufficient resources was a general condition for residence rights, under Directive 2004/38 it is only a legitimate condition for residence rights in the cases specifically mentioned in the Directive. In that regard, the Court also considers that, where a provision of EEA law is open to several interpretations, preference must be given to the interpretation which ensures that the provision retains its effectiveness (see, for comparison, Joined Cases C-402/07 and C-432/07 Sturgeon and Others [2009] ECR I-10923, paragraph 47, and the case-law cited).

49 Finally, it should be recalled that all the EEA States are parties to the ECHR, which enshrines in Article 8(1) the right to respect for private and family life. According to established case-law, provisions of the EEA Agreement are to be interpreted in the light of fundamental rights (see, for example, Case E-2/03 Ásgeirsson [2003] EFTA Ct. Rep. 18, paragraph 23, and Case E-12/10 EFTA Surveillance Authority v Iceland, judgment of 28 June 2011, not yet reported, paragraph 60 and the case-law cited). The Court notes that in the European

Union the same right is protected by Article 7 of the Charter of Fundamental Rights.

50 In light of the foregoing, the answer to the referring court‟s first question must be that Article 16(1) of Directive 2004/38 is to be interpreted such that an EEA national with a right of permanent residence, who is a pensioner and in receipt of social welfare benefits in the host EEA State, may claim the right to family reunification even if the family member will also be claiming social welfare benefits.

V The second and third questions

51 As a result of the Court‟s reply to the first question, it is unnecessary for the Court to answer the second and third questions.

VI Costs

52 The costs incurred by the Liechtenstein Government, the Netherlands Government, the Danish Government, ESA and the European Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the Verwaltungsgerichtshof des Fürstentums Liechtenstein, any decision on costs for Mr Clauder, who is a party to those proceedings, is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Verwaltungsgerichtshof des Fürstentums Liechtenstein hereby gives the following Advisory Opinion:

Article 16(1) of Directive 2004/38/EC is to be interpreted such that an EEA national with a right of permanent residence, who is a pensioner and in receipt of social welfare benefits in the host EEA State, may claim the right to family reunification even if the family member will also be claiming social welfare benefits.

Carl Baudenbacher
Per Christiansen
Benedikt Bogason

Delivered in open court in Luxembourg on 26 July 2011.
Skúli Magnússon Registrar
Carl Baudenbacher President

Case C-542/09: European Commission v Kingdom of the Netherlands

OPINION OF ADVOCATE GENERAL

SHARPSTON

delivered on 16 February 2012 (1)

Case C-542/09

European Commission

v

Kingdom of the Netherlands

(Access to education — Funding for higher education abroad — Residence requirement — 'Three out of six years rule')

1. Erasmus of Rotterdam was an early beneficiary of funding to study abroad. The then bishop of Cambray, Henry of Bergen (for whom Erasmus had started to work as secretary), gave him both leave and a stipend in 1495 to go and study at the University of Paris. Erasmus never looked back; and, in a career that spanned Paris, Leuven, Cambridge and Basel, he became arguably the outstanding scholar of his generation: the 'Prince of the Humanists'. It is tolerably safe to say that he put the funding for his university studies abroad to excellent use (2) — and, indeed, the current exchange programmes between EU universities bear his name.

2. Modern day compatriots of Erasmus enjoy similar good fortune. Under the provisions of the Wet Studiefinanciering (Law on the Financing of Studies — 'the WSF'), they can often obtain funding for higher education pursued outside the Netherlands. However, do the detailed rules governing the grant of such funding — in particular, the rule under which an applicant must, in addition to being eligible for funding to study in the Netherlands, also have resided lawfully in the Netherlands during at least three out of the last six years (the 'three out of six years rule') — fall foul of Article 45 TFEU (formerly Article 39 EC) (3) and Article 7(2) of Regulation (EEC) No 1612/68 (4) inasmuch as they discriminate indirectly and without justification against migrant workers and their dependent family members?

Legal background

Treaty provisions

3. Article 45 TFEU states:

'1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

…'

4. Pursuant to Article 165(1) TFEU (formerly Article 149(1) EC), Member States are responsible 'for the content of teaching and the organisation of education systems'. Article 165(1) states that '[t]he Union shall contribute to the

development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action'. Union action is also to be aimed at 'encouraging mobility of students'. (5)

Regulation No 1612/68

5. Regulation No 1612/68 aimed to secure the freedom of nationals of one Member State to work in another Member State and thereby implement the Treaty provisions on freedom of movement for workers. The first recital in the preamble to that regulation described its overall objective as being to achieve 'the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment, as well as the right of such workers to move freely within the [Union] in order to pursue activities as employed persons subject to any limitations justified on grounds of public policy, public security or public health'.

6. The third and fourth recitals, respectively, stated that 'freedom of movement constitutes a fundamental right of workers and their families' and that that right was to be enjoyed 'by permanent, seasonal and frontier workers and by those who pursue their activities for the purpose of providing services'.

7. According to the fifth recital, the exercise of this fundamental freedom, 'by objective standards, in freedom and dignity, require[d] that equality of treatment shall be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country'.

8. Article 7(2) of Regulation No 1612/68 provided that a worker, who is a national of a Member State, in the territory of another Member State 'shall enjoy the same social and tax advantages as national workers'.

9. Article 12 of Regulation No 1612/68 read:

'The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

...'

Directive 2004/38

10. Article 7 of Directive 2004/38/EC (6) governs the conditions under which EU citizens can reside more than three months in another Member State. It states:

'1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

...'

11. Article 24 of that directive provides:

‘1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged … prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.’

National law

12. The WSF defines who can receive funding to study in the Netherlands and abroad. Funding to study abroad is called ‘meeneembare studie financiering’ (‘MNSF’), that is to say, ‘portable’ funding for studies.

13. For higher education in the Netherlands, funding for studies is available to students who are between 18 and 29 years old, study at a designated or approved educational establishment and satisfy a nationality condition. (7) Article 2(2) defines the nationality condition. Those eligible are: (i) Netherlands nationals, (ii) non-Netherlands nationals who are treated, in the area of funding for studies, as Netherlands nationals based on a treaty or a decision of an international organisation and (iii) non-Netherlands nationals who live in the Netherlands and belong to a category of persons who are treated, in the area of funding for studies, as Netherlands nationals on the basis of a general administrative measure.

14. The second category includes EU citizens who are economically active in the Netherlands and their family members. They need not have resided in the Netherlands to qualify for this type of funding. Thus, cross-border workers and their family members are covered. The third category includes EU citizens who are not economically active in the Netherlands. They qualify for funding after five years of lawful residence in the Netherlands.

15. For funding for higher education pursued outside the Netherlands, students must be eligible for funding for higher education in the Netherlands and, pursuant to Article 2(14)(2)(c) of the WSF, must additionally have resided lawfully in the Netherlands during at least three out of the six years preceding enrolment at an educational establishment abroad. This requirement applies irrespective of students’ nationality.

16. As long as they satisfy the relevant conditions, students can apply sequentially for funding to study in the Netherlands and then for MNSF to study abroad.

17. Until 1 January 2014, the three out of six years rule does not apply to students, whatever their nationality, pursuing higher education in the ‘border areas’ of the Netherlands (Flanders and the Brussels-Capital Region in Belgium, and North-Rhine Westphalia, Lower Saxony and Bremen in Germany).

18. MNSF consists of four components: (i) a basic grant, which is a fixed amount paid per month and based on whether the student lives at home or independently, together with an allowance for travel costs and an additional allowance if the student has a partner or is a single parent, (ii) an additional grant, based on the income and contribution of the student’s parents and subject to a maximum limit, (iii) a basic loan, if applied for, subject to a maximum limit and (iv) a loan to cover fees, if applied for, limited in principle to the maximum fee chargeable by Netherlands educational institutions for an equivalent course.

19. The basic grant, the additional grant (except for the first year of studies) and the allowance for travel costs are given as loans. They become grants if the studies are completed within 10 years of their commencement.

20. The maximum limit for MNSF funding, excluding allowances, ranges from EUR 739.15 to EUR 929.69 per month, depending on whether the student lives at home or independently. The same limit applies to funding for studies

in the Netherlands.

Procedure

21. Following a regular pre-litigation procedure, the Commission asks the Court to declare that, by requiring that migrant workers, including cross-border workers, and their dependent family members fulfil a residence requirement (that is, the three out of six years rule) to be eligible under the WSF for the funding of educational studies abroad, the Kingdom of the Netherlands indirectly discriminates against migrant workers and has failed to fulfil its obligations under Article 45 TFEU and Article 7(2) of Regulation No 1612/68, and to order the Kingdom of the Netherlands to pay the costs.

22. The Netherlands Government contends that the Court should dismiss the application and order the Commission to pay the costs.

23. The Governments of Belgium, Denmark, Germany and Sweden have intervened in support of the Netherlands.

24. The principal parties and all the interveners made oral submissions at the hearing on 10 November 2011.

Assessment

Preliminary remarks

25. The Commission has throughout limited its claim to Article 45 TFEU and Article 7(2) of Regulation No 1612/68. It argues that there is indirect discrimination against migrant workers working in the Netherlands and their dependent family members with respect to MNSF. It makes no complaint under Article 24 of Directive 2004/38, Article 21 TFEU or any other provisions of EU law governing citizenship rights.

26. Article 7(2) of Regulation No 1612/68 expresses the principle of equal treatment set out in Article 45 TFEU with regard to social and tax advantages and must be interpreted in the same manner. (8) Thus, if a measure regulating access to a social advantage infringes Article 7(2) because it treats migrant workers less favourably than national workers, it is also incompatible with Article 45 TFEU. However, even if a measure is compatible with Article 7(2), it may still infringe Article 45. (9) I shall therefore first consider the residence requirement in the light of Article 7(2) of Regulation No 1612/68. If it infringes Article 7(2), it is equally prohibited by Article 45 TFEU.

27. The Netherlands, supported by the intervening Member States, submits that Article 7(2) of Regulation No 1612/68 does not apply. In the alternative, the Netherlands argues that the residence requirement is not indirectly discriminatory against migrant workers.

28. In any event, the Netherlands and the intervening Member States contend that the residence requirement is justified for two reasons. First, the requirement serves to identify the desired target group of students: namely, those who, without MNSF, would study in the Netherlands and, if they study abroad, will return to the Netherlands. Second, the residence requirement prevents the scheme from becoming an unreasonable financial burden which could have consequences for the overall level of funding that is granted. That objective was endorsed by the Court in *Bidar* and confirmed in *Förster*. (10)

Does the residence requirement infringe Article 7(2) of Regulation No 1612/68 in principle?

The beneficiaries of equal treatment under Article 7(2) of Regulation No 1612/68

29. The Netherlands contends that Article 7(2) of Regulation No 1612/68 does not apply in principle to dependent family members of migrant workers, irrespective of their place of residence. It accepts that an exception exists in cases

of direct discrimination against children of migrant workers. Generally, however, such persons are covered by Article 12 of Regulation No 1612/68, not by Article 7(2). This is because Article 12 is a specific expression of the equal treatment obligation as it applies to children and to access to general educational, apprenticeship and vocational training courses. Reading Article 7(2) as applying to children of migrant workers risks rendering the residence requirement in Article 12 meaningless.

30. The Commission contends that the Court's case-law confirms that Article 7(2) applies to all dependent family members of the migrant workers.

31. I agree with the Commission.

32. The direct beneficiaries of the equal treatment guaranteed by Article 7(2) are nationals of a Member State who work in another Member State. Cross-border workers, who reside by definition outside the host Member State, belong to this category. (11) Thus, workers are not required to reside where they work to enjoy protection under Article 7(2), nor does Article 7(2) make entitlement to equal treatment conditional on where the social advantage is actually enjoyed.

33. Dependent family members of a migrant worker are the indirect beneficiaries of the equal treatment obligation under Article 7(2) because discrimination against them with respect to a social advantage also discriminates against the migrant worker who then has to support the family member. The Court has already made clear that this group of indirect beneficiaries includes the workers' dependent family members in the descending and ascending line and spouses. (12) They are not required to reside in the Member State where the migrant worker is employed to enjoy protection under Article 7(2). (13)

34. The term 'social advantages' in Article 7(2) includes funding for higher education studies pursued by migrant workers or their dependent family members. (14) In the present case, the dependent children of migrant workers working in the Netherlands may, in particular, wish to apply for MNSF to study elsewhere than in the Netherlands.

35. The Netherlands relies heavily on the fact that the cases in which the Court has held that Article 7(2) applies to children of migrant workers have all involved direct discrimination. Unlike the Netherlands, I see no logic in an interpretation which renders the personal scope of an equal treatment obligation dependent on the type of discrimination involved. I therefore consider that it is of no consequence whether the alleged discrimination is direct or indirect.

36. Article 12 of Regulation No 1612/68 gives a separate, distinct entitlement to children of migrant workers in their own right.

37. Pursuant to that provision, the host Member State must allow children of migrant workers access to its general educational, apprenticeship and vocational training courses. Article 12 applies also to children who pursue education outside the host Member State. (15)

38. Article 12 specifically applies to '[t]he children of a national of a Member State who is or has been employed in the territory of another Member State' and who 'are residing in its territory'. The Court has held that Article 12 grants children who have established their residence in a Member State during their parent's exercise of the right of residence as a migrant worker in that Member State an independent right of residence in order to attend general educational courses there. (16) The child enjoys that right whether or not the parent retains the status of migrant worker in the host Member State. (17)

39. Furthermore, a child does not have to demonstrate dependence on the migrant worker to rely on Article 12. If the parent is no longer a migrant worker benefiting from equal treatment under Article 7(2) or providing for the maintenance of the child, the child may none the less claim in his own right access to the types of social advantage defined in Article 12 and under the same conditions as nationals, provided that the child resides in the host Member

State. (18)

40. Unlike the Netherlands, I do not consider that because Article 12 expressly governs a defined, limited group of family members as direct beneficiaries, it necessarily follows that the personal scope of Article 7(2) should be read as excluding that group as indirect beneficiaries. The Netherlands relies on a series of cases in support of its position. None of these cases resolves the issue as to whether Article 7(2) protects dependent family members of a migrant worker seeking financial support for higher education.

41. In *Brown*, the claimant was denied protection under Article 7(2) because he acquired the status of migrant worker exclusively as a result of being accepted to undertake studies in the host Member State. (19) He could not seek protection under Article 12 (nor, on my reasoning, as an indirect beneficiary under Article 7(2)) because neither parent had the status of migrant worker after his birth. (20)*Lair* and *Matteucci*, on the other hand, concerned the application of Article 7(2) to claimants who were themselves migrant workers. (21)

42. In *Casagrande*, the Court interpreted Article 12 in a dispute involving the child of a migrant worker residing where the parent was employed, and held that that provision also covered general measures intended to facilitate educational attendance. (22) Similarly, *di Leo* (23) concerned the application of Article 12 to the child of a migrant worker leaving the host Member State to study abroad.

43. I conclude that dependent family members, including children, benefit from the migrant worker's right to equal treatment under Article 7(2) of Regulation No 1612/68. That conclusion applies irrespective of where they or the migrant worker reside and whether the alleged discrimination is direct or indirect.

Does an objective difference exist between workers residing in the Netherlands and those residing outside the Netherlands?

44. The Commission claims that migrant workers (including cross-border workers) working in the Netherlands and their dependent family members are treated less favourably than Netherlands workers and their dependent family members.

45. The Netherlands argues that an objective difference exists between workers residing in the Netherlands and those residing outside the Netherlands because the latter do not require incentives to study abroad. That argument implies that migrant workers working in the Netherlands and residing in another Member State are not in a comparable situation to Netherlands workers (and migrant workers, for that matter) working and residing in the Netherlands.

46. I disagree with the Netherlands.

47. Discrimination under Article 7(2) exists when migrant workers are treated less favourably than national workers in a comparable situation. To decide whether that is the case, it is necessary to determine who benefits from equal treatment and in connection with what particular benefit. In that regard, the object of the rules establishing the difference in treatment is relevant to assessing whether an objective difference exists between the relevant categories of people. (24) I add that, in my view, the alleged objective difference must generally reflect a distinction made in law or in fact *other* than that made by the very legal rule that is at issue.

48. In the present case, the benefit is the grant of funding for studies anywhere outside the Netherlands. In the context of Article 7(2), migrant workers in the Netherlands benefit from equal treatment.

49. There is relatively little difficulty about accepting that the following two categories contain workers who may properly be compared with each other. First, migrant workers residing and working in the Netherlands are clearly comparable to, and are to be treated equally with, Netherlands nationals residing and working in the Netherlands. Second, migrant workers working in the Netherlands but residing elsewhere are clearly comparable to, and are to be treated equally with, Netherlands nationals working in the Netherlands but residing elsewhere.

50. The Netherlands uses the fact that these two identifiable categories exist to argue that no comparison can be made *between* those categories — that is, it claims that those residing in the Netherlands are objectively different from those residing outside the Netherlands. At one level, this is self-evidently true. Living in Amsterdam is not the same as living in Paris. But is this a relevant difference such as, objectively, to justify different treatment? (25)

51. I do not think so.

52. The Netherlands accepts (rightly) that children of migrant workers who wish to study in the Netherlands should have access to funding for such studies on exactly the same terms as Netherlands nationals, irrespective of whether those migrant workers (and their dependent children) reside in the Netherlands or elsewhere.

53. In so doing, it has implicitly accepted that at least some children of migrant workers may — like the children of Netherlands workers — be pre-disposed to study in the Netherlands (*whether or not they are residing there*) and that they should have access to funding to do so. But the necessary corollary of that — it seems to me — is that the Netherlands can no longer legitimately assert that the place of residence will, in a quasi-automatic manner, determine where the migrant worker or his dependent children will study. And, if that is right, then it is not legitimate to use place of residence as an allegedly 'objective' criterion for different treatment. On the contrary: a migrant worker employed in the Netherlands but residing in another Member State can properly be compared with a Netherlands worker residing and working in the Netherlands.

Does the residence requirement result in indirect discrimination?

54. It is settled case-law that, in infringement proceedings, the Commission must prove the existence of the alleged infringement and provide the Court with the evidence necessary for it to establish that an obligation has not been fulfilled. In so doing, the Commission may not rely on a presumption. (26)

55. In this case, the Commission must demonstrate that migrant workers and Netherlands workers are treated differently with results similar to those that would follow from applying a condition of nationality.

56. The Commission argues that the residence requirement infringes Article 7(2) of Regulation No 1612/68 because national workers are always likely to satisfy it more easily than migrant workers. It submits that *Meeusen* (27) and *Meints* (28) establish that a residence requirement is, by definition, indirectly discriminatory. In the present case, the residence requirement is indirectly discriminatory in any event to the extent that it necessarily excludes cross-border workers and their dependent family members. The Netherlands relies on *Sotgiu* and *Kaba II* to argue that a residence requirement is not discriminatory in all circumstances. (29)

57. I share neither reading of the Court's case-law.

58. In *Meeusen*, the Court found that 'a Member State may not make the grant of a social advantage within the meaning of Article 7 … dependent on the condition that the beneficiaries be resident within its territory'. (30)*Meeusen* concerned a residence requirement that was directly discriminatory and therefore prohibited. The Court's statement in *Meeusen* was based in turn on *Meints*. (31) In that case, the Court concluded that the residence requirement at issue was indirectly discriminatory only after examining whether that requirement was more easily met by national workers (and whether it could be justified). (32) Neither judgment therefore establishes that a residence requirement is always indirectly discriminatory.

59. However, nor are the Court's rulings in *Sotgiu* and *Kaba II* authority for the contrary position, namely that it may be possible to impose a residence requirement on nationals and non-nationals who are in a comparable situation without that resulting in indirect discrimination. In *Sotgiu*, the workers concerned belonged to different categories based on whether they were obliged to move. The Court therefore considered that residence formed an objective criterion for different treatment of workers in objectively different situations. In *Kaba II*, the spouse of a migrant worker who was a national of a Member State other than the United Kingdom and the spouse of a person who was

‘present and settled’ in the United Kingdom were held not to be comparable due to a distinction made in a provision of national law *other* than that at issue. (33)

60. I agree none the less with the Commission that the residence requirement indirectly discriminates against migrant workers.

61. A requirement of past, present or future residence (especially if it stipulates residence for a particular duration) is intrinsically likely to affect national workers of a Member State less than migrant workers who are in a comparable situation. That is because such a condition *always* distinguishes between workers who do not need to move to satisfy it and workers who do need to move. The former are usually, although possibly not invariably, more likely to be nationals of the host Member State.

62. The three out of six years rule pertains to past residence of a certain duration. I consider that Netherlands workers are more likely to be able to satisfy that condition than migrant workers residing in the Netherlands.

63. It is conceivable that such a residence requirement may not discriminate against every cross-border worker. (34) Nevertheless, it is likely that a considerable number of cross-border workers and their dependent family members are excluded from MNSF because the family resides together in a border area and thus outside the Netherlands.

64. I therefore conclude that the residence requirement constitutes indirect discrimination prohibited in principle by Article 7(2) of Regulation No 1612/68.

Is the residence requirement none the less justified?

65. If the residence requirement constitutes indirect discrimination prohibited by Article 7(2) of Regulation No 1612/68, the Court must determine whether it is none the less justified. To that effect, the Netherlands must demonstrate that the residence requirement (i) pursues a legitimate aim which is justified by overriding reasons of public interest, (ii) is appropriate to achieve the legitimate objective pursued (appropriateness) and (iii) does not go beyond what is necessary to achieve the desired objective (proportionality). (35)

66. The Netherlands argues that the residence requirement is justified because it is appropriate and does not go beyond what it necessary (i) to avert an unreasonable financial burden resulting from making MNSF available to all students (the *economic* objective) and, at the same time, (ii) to ensure that MNSF is available solely to students who, without it, would pursue higher education in the Netherlands, and who are likely to return there if they study abroad (the *social* objective).

67. Before turning to the justification of the residence requirement on the basis of each objective, I should like to comment on the principles governing the burden of proof and the standard of proof. I do so because neither party in this case has applied those principles properly.

68. The Court has held that the defendant Member State must provide ‘reasons which may be invoked by a Member State by way of justification’ and ‘an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State and specific evidence substantiating its arguments’. (36) It thus bears the onus of establishing a prima facie case that the measure is appropriate and does not go beyond what is necessary to achieve its objective(s).

69. However, the burden on the defendant Member State to demonstrate proportionality ‘cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions’. (37) Put another way, the Member State cannot be required to prove a negative.

70. If the defendant Member State establishes that the contested measure is prima facie proportionate, it is then for the Commission to rebut the Member State’s analysis by suggesting other less restrictive measures. The Commission cannot merely propose an alternative measure. It must also explain why and how that measure is appropriate to achieve

the stated objective(s) and is, above all, less restrictive than the contested measure. Without such an explanation, the defendant Member State cannot know on what its rebuttal should focus.

Is the residence requirement justified on the basis of the economic objective?

– Is the economic objective a legitimate aim which is justified by overriding reasons in the public interest?

71. The Netherlands argues that the residence requirement is justified because it seeks to ensure that MNSF does not impose an excessive financial burden on society. In *Bidar* and *Förster*, the Court accepted that Member States may be legitimately concerned with the financial consequences of policies and therefore require a degree of integration before making funding for studies available. (38) The Netherlands estimates that eliminating the residence requirement would result in an additional financial burden of some EUR 175 million per year spent on providing MNSF for, in particular, children of migrant workers and Netherlands nationals who either live outside the Netherlands or have lived less than three out of the previous six years in the Netherlands.

72. The Commission argues that the reasoning in *Bidar* and *Förster* does not apply to migrant workers because EU law treats economically active EU citizens differently from economically inactive EU citizens. Article 24(2) of Directive 2004/38 confirms that distinction. Even if the Netherlands were allowed to require a degree of connection, the status of migrant worker itself demonstrates a sufficiently close connection with the Netherlands; and the Court in *Bidar* recognised that no residence requirement can be imposed in such circumstances. (39) Furthermore, mere concerns about budgetary implications cannot qualify as overriding reasons relating to the general interest.

73. I agree with the Commission.

74. The Court is being invited to apply the reasoning in *Bidar* and *Förster* as regards economically inactive EU citizens to migrant workers. But first: what precisely did the Court rule in *Bidar* and *Förster*?

75. In *Bidar*, the United Kingdom sought to justify a residence requirement of three years based on the need to ensure that (i) contributions made through taxation were sufficient to justify the grant of the funding and (ii) a genuine link existed between the student claiming the funding and the employment market of the host Member State. (40) In essence, the concern was that students from all over the European Union might arrive in the United Kingdom and forthwith apply for funding to study there.

76. In response to the first part of the United Kingdom's argument, the Court accepted that 'it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State'. (41) As a result, it was legitimate to grant funding 'only to students who have demonstrated a certain degree of integration into the society of that State'. (42)

77. The Court did not accept the second part of the United Kingdom's argument. A Member State was not entitled to make the grant of funding for studies dependent on a link between the student and the employment market. In essence, the Court found that an indirectly discriminatory residence requirement could not be justified based on the need to grant funding only to students who had already worked in the host Member State or would work there after their studies. Indeed, the Court found that education does not necessarily assign a student to a particular geographical employment market. (43) Unlike the Commission, I do not read this part of the judgment in *Bidar* as precluding any requirement that migrant workers demonstrate a degree of connection to the host Member State. The Court simply did not address that point. What it did was to reject the argument that linking the place of studies and the place of employment was an objective that could justify indirect discrimination.

78. The Court went on to accept that past residence for a certain time in the host Member State may establish the necessary degree of connection. (44) Limiting the group of recipients through a criterion expressing a degree of closeness to the financing Member State, such as past residence, was thus an appropriate measure to ensure that the

grant of funding to students from other Member States did not become an unreasonable burden which could have consequences for the overall level of assistance which might be granted by that State.

79. The Netherlands appears to read the judgment in *Förster* as confirming that in *Bidar*.

80. I am not convinced by that reading of *Förster*.

81. In *Förster*, the Court first noted that, according to *Bidar*, it is legitimate for a Member State to ensure that a social advantage does not become an unreasonable burden which could have consequences for the overall level of assistance. (45) That was, indeed, the legitimate objective recognised in *Bidar*. (46)

82. Next, the Court stated that, also according to *Bidar*, it is legitimate to grant assistance to cover maintenance costs only to students demonstrating a certain degree of integration into the society of the Member State. (47) The Court referred to the passage in *Bidar* where it held that a student may be regarded as demonstrating a certain degree of integration in the host Member State if the student has resided there for a certain period of time. (48)

83. The Court next applied that reasoning to the facts in *Förster*. The Court needed to resolve whether the indirectly discriminatory residence requirement of five years could 'be justified by the objective, for the host Member State, of ensuring that students who are nationals of other Member States have to a certain degree integrated into its society'. (49) The Court in *Förster* therefore examined the proportionality of the residence requirement in relation to the *objective of ensuring integration of the student*, and not that of avoiding the collapse of the existing scheme due to its financial cost. (50)

84. However, the Court in *Bidar* had not recognised that objective. In that judgment, evidence of a degree of integration was treated as a *means* to avert an unreasonable financial burden.

85. It would be unfortunate if a superficial reading of *Förster* were to lead to confusion between means and end. There is a risk that *Förster* might be read as indicating that Member States can set a residence requirement, irrespective of whether its purpose is to ensure that making available a social advantage does not adversely affect the stability of its public finances or the pursuit of any other legitimate objective justified by overriding reasons of public interest. On that basis, Member States might seek to justify less favourable treatment of (both economically active and inactive) EU citizens in terms of social policy (integration) by applying access criteria such as length of residence, marital and family status, language, diplomas, employment, and so forth, *without* ever explaining *why* the availability of a social benefit should be limited in that way.

86. Against the background of that reading of *Bidar* and *Förster*, I turn to examine whether averting an unreasonable financial burden which could have consequences for the overall level of funding for studies is an objective that can be transposed from the context of economically inactive EU citizens and invoked to justify indirect discrimination against migrant workers.

87. I consider it cannot.

88. I accept that the financial burden of making a social advantage widely available may compromise its existence and overall level. (51) In such circumstances, concerns about budgetary implications are intrinsically linked with the existence and objective of the social advantage itself and cannot therefore be wholly disregarded. Member States might otherwise forgo altogether providing particular forms of social advantage, to the detriment of the public interest.

89. I am nevertheless of the view that the Netherlands cannot invoke budgetary concerns to justify discriminatory treatment of migrant workers and their dependent family members. Any conditions attached to MNSF in order to keep expenditure within acceptable limits must be borne equally by migrant workers and Netherlands workers.

90. Migrant workers and their families enjoy the freedom to move to another Member State based on the

consideration that ‘mobility of labour within the [Union] must be one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement, while helping to satisfy the requirements of the economies of the Member States’. (52) Member States must therefore eliminate any obstacles to the exercise of the freedom of movement and related rights of migrant workers, including those affecting ‘the worker’s right to be joined by his family and the conditions for the integration of that family into the host country’. (53)

91. In my opinion, if Member States make a social advantage available to their own workers, irrespective of whether the benefit is tied to a person’s contributions or not, they must grant it on equal terms to migrant workers. Any limitation imposed for preserving financial integrity must be applied on equal terms to national workers and migrant workers. (54)

92. It is true that the Court has accepted that the objective of averting an unreasonable financial burden which can have consequences for the overall level of social assistance granted can justify discrimination against economically inactive EU citizens. In my opinion, the Court has done so because, as EU law stands, all EU citizens are not yet guaranteed full equal treatment with regard to social advantages.

93. Before the introduction of EU citizenship, several directives provided that nationals of Member States who were not exercising an economic right to free movement had the right to move to and reside in another Member State on condition that they and their family members were covered by sickness insurance and had ‘sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence’. (55) The condition was imposed because these nationals ‘must not become an unreasonable burden on the public finances of the host Member State’. (56) In particular, Directive 93/96 limited the right of students to reside in another Member State and did not establish any right to payment of maintenance grants by the host Member State. (57)

94. These nationals whatever their activity became EU citizens (58) following the entry into force of the Maastricht Treaty. Based on that status, they have the right to move and reside freely within the territory of the Member States, subject to limitations laid down in EU law. The Court has held that the host Member State must show a certain degree of financial solidarity to students who are nationals of other Member States and have exercised their right to move to and reside in the host Member State. (59)

95. Directive 2004/38 consolidated much of the earlier legislation and case-law. It maintains the distinction between EU citizens who have exercised an economic right of free movement and other EU citizens and expressly preserves the right of Member States to discriminate for a certain time against the latter. Thus, Article 24(2) of Directive 2004/38 provides that, until students have acquired permanent residence in the Member State where they study, ‘[b]y way of derogation from’ the obligation to treat equally nationals and other EU citizens, the host Member State cannot be obliged to grant them maintenance assistance for studies, consisting out of grants or loans. Although the facts giving rise to *Bidar* preceded the adoption of Directive 2004/38, the reasoning in that case reflects Member States’ freedom to discriminate in those circumstances. The derogation does not, however, apply to ‘workers, self-employed persons, persons who retain such status and members of their families’. Such persons are, on the contrary, protected by the general rule of equal treatment.

96. I therefore conclude that the *economic* objective cannot be regarded as a legitimate aim which is justified by overriding reasons in the public interest. It follows that, unless the *social* objective can be upheld, the Netherlands’ defense must fail.

97. However, in case the Court should disagree with my conclusions on the economic objective, I shall briefly examine both the appropriateness of the residence requirement in relation to that objective and its proportionality.

– Is the residence requirement appropriate to achieve the economic objective?

98. The Netherlands argues that the residence requirement is an appropriate means to ensure that MNSF does not

lead to an excessive, unreasonable financial burden. The Netherlands has submitted a study which it contends demonstrates that eliminating the requirement would result in an additional burden of some EUR 175 million per year.

99. The Commission laconically indicates that it has 'doubts' about the Netherlands' position on the appropriateness of the measure.

100. Even if the Commission makes no convincing effort to refute the Netherlands' argument and evidence, it is for the Netherlands to make a persuasive case that excluding students who have lived less than three out of six years in the Netherlands is correlated to the unreasonable financial burden it allegedly averts. That does not involve establishing that the residence requirement is the most appropriate measure to achieve the stated objective. (60)

101. I accept the Netherlands' argument.

102. The residence requirement necessarily excludes a group of potential claimants and hence limits the cost of MNSF. The Netherlands appears to take the view that the additional burden of EUR 175 million per year would undermine the MNSF scheme as it presently stands.

103. I find no reason to question that position. After all, Member States remain free to decide at what point a particular level of funding for studies becomes an unreasonable financial burden with consequences for the overall level of assistance granted under the scheme. It is for the Member State, and not the Court, to determine where that threshold lies.

104. Since the Commission has made no effort to rebut the Netherlands' position, I conclude that the Netherlands has established that the residence requirement is appropriate.

– Is the residence requirement proportionate in relation to the economic objective?

105. The parties' arguments on proportionality became clearer at the hearing held at the Court's initiative.

106. The parties disagree in essence about whether it is proportionate to require migrant workers, who are already connected to the Netherlands through their employment there, also to comply with the three out of six years rule.

107. The Commission contends that the status of migrant worker is sufficient by itself to demonstrate the required degree of connection and that the Netherlands cannot impose an additional residence requirement. It suggests coordination with other Member States as an alternative measure. The Netherlands argues that the status of migrant worker is insufficient and that no alternative measures are available. When deciding to impose the residence requirement, it also took into account that alternative sources of funding and types of financial support may be available, that other Member States make funding similar to MNSF conditional on past residence and that the residence requirement prevents certain risks of fraud.

108. I am not convinced that the residence requirement is proportionate.

109. Unlike the Netherlands, I find that the fact that the Court accepted a residence requirement of five years as proportionate in *Förster* does not mean that the three out of six years rule is proportionate here. In *Förster*, the Court relied on the text of Articles 16(1) and 24(2) of Directive 2004/38 to rule that a Member State was not required to grant maintenance assistance for studies to economically inactive EU citizens who had not resided legally in that Member State for a continuous period of five years. (61) Unlike the Advocate General, (62) the Court appeared not to be inclined to question the thesis that the required degree of connection could not be demonstrated through other means.

110. However, Article 24(2) makes clear that the five years' residence condition in Directive 2004/38 cannot be imposed on migrant workers and their dependent families.

111. Can a Member State nevertheless impose a requirement of three out of six years residence on such persons?

112. I consider it cannot.

113. Unlike the Netherlands, I do not read *Bidar* as endorsing such a residence requirement. In that case, the Court did not need to examine proportionality because the effect of the residence requirement coupled with the rules on obtaining 'settled status' in the United Kingdom was that, whatever his actual degree of integration, Mr Bidar could never qualify for assistance to cover his maintenance costs.

114. The difficulty in assessing the proportionality of the residence requirement in this case is that the parties' arguments are based on the understanding that the Netherlands can require a certain degree of connection without taking into account that that is a means to an end.

115. On my reading of *Bidar*, examining the proportionality of the residence requirement involves deciding whether the Netherlands has established that the three out of six years rule does not go beyond what is necessary to avoid an unreasonable financial burden.

116. The Netherlands has indeed submitted evidence to that effect.

117. The figure of EUR 175 million per year is based on a risk analysis that calculates the estimated additional cost of funding, in particular, children of migrant workers (group 1) and Netherlands nationals (group 2) who are currently excluded from MNSF. (63) Eliminating the residence requirement for children in group 2 would, it is said, result in an additional cost of EUR 132.1 million, which is almost three times as high as the cost of EUR 44.5 million resulting from eliminating the requirement for children in group 1.

118. These estimates are based on a range of assumptions that appear, at best, questionable. For example, in calculating the number of children in group 1 residing outside the Netherlands, the authors of the study estimate that between 15% and 30% of Eastern European migrant workers in the Netherlands continue to reside with their families in their home Member State. These workers are therefore assumed to commute either on a daily or a less regular basis from, for example, Warsaw to the Netherlands. At the same time, the fact that these commuting migrant workers may spend more days a week in the Netherlands than in the home Member State is not taken into account in determining whether they are resident in the Netherlands. Another example is that the authors of the study assume that children of cross-border workers will study in the border area where they reside. They therefore do not appear to apply a correction for the children of migrant workers and Netherlands nationals residing abroad, whether or not in a border area, who are entitled to obtain MNSF to study in a border area.

119. Leaving aside these concerns about the methodology applied, children in groups 1 and 2 qualify for funding to study in the Netherlands despite the fact that they do not reside there. The Netherlands has voluntarily assumed the burden of financing such students up to certain maximum limits. The *same limits* apply to funding to study in the Netherlands and abroad. The Netherlands has not explained why the same financial burden is acceptable when assumed in connection with studies in the Netherlands, but unreasonable in the context of MNSF. (64)

120. If the Court should decide that the Netherlands can require a certain degree of connection independently of concerns about the financial cost of MNSF, I consider that it is nevertheless disproportionate to require a migrant worker and his dependent family members to satisfy the three out of six years rule.

121. The Court has accepted that a residence requirement may be disproportionate if it is too exclusive in nature because it 'unduly favours an element which is not necessarily representative of the real and effective degree of connection … to the exclusion of all other representative elements'. (65) To be proportionate, the relevant connecting elements must also be known in advance and provision must be made for the possibility of a means of redress of a judicial nature. (66)

122. In my opinion, the Netherlands has not explained convincingly why either a more flexible residence requirement than the three out of six years rule or other elements expressing a comparable degree of connection, such as employment, would not achieve the same objective in a less restrictive manner. In particular, it has not explained *why* it *accepts* that an EU citizen residing in the Netherlands during three out of six years is always sufficiently connected to the Netherlands, irrespective of his participation in that society but *rejects* outright the possibility that a person's status as a migrant worker might properly serve to demonstrate the requisite degree of connection with the Netherlands.

123. The Netherlands' other arguments do not lead me to reconsider that conclusion.

124. Unlike the Netherlands, I consider that it is of no relevance that alternative sources of funding may be available to study outside the Netherlands or outside the home Member State for students excluded from MNSF, and that other Member States make funding for studies abroad conditional on a similar requirement. The fact that students may apply to the Netherlands to obtain funding to study in the Netherlands or that they may claim a generally available tax benefit and enjoy other benefits in connection with studies abroad cannot remedy the discriminatory treatment afforded to them in connection with MNSF. In any event, as the Commission submits in rebuttal, it would appear that these alternative benefits may not be as beneficial as MNSF; and their availability does not demonstrate that the residence requirement does not go beyond what is necessary to achieve the desired objective. Measures adopted by other Member States likewise cannot remedy the discriminatory treatment applied by the Netherlands. It is settled case-law that a Member State cannot justify an unlawful measure based on the fact that other Member States have adopted the same measure and may thus be infringing EU law in the same manner. (67)

125. The Netherlands further contends that the residence requirement: (i) prevents students residing abroad from claiming that they live independently and are thus entitled to a higher grant when in fact they still live at home, and (ii) prevents people from acquiring the status of migrant worker in the Netherlands after a token period of employment, becoming entitled to MNSF and then studying outside the Netherlands (possibly, indeed, in their home Member State).

126. In my opinion, neither risk is peculiar to MNSF. Both also exist in connection with students' applications to receive funding to study in the Netherlands. The Netherlands has presumably found other ways of addressing the same concerns adequately in relation to that funding since it is granted to Netherlands nationals and migrant workers alike irrespective of where they reside.

127. In any event, the Netherlands can verify a person's status as a migrant worker (68) and take the measures to guard against abuse of rights and fraud, taking into the account the individual circumstances of the case and the distinction between taking advantage of a possibility conferred by law and an abuse of rights. (69)

128. I therefore conclude that the Netherlands has not demonstrated that the residence requirement is prima facie proportionate.

129. For the sake of completeness, I will consider none the less whether the Commission has put forward other less restrictive measures.

130. The Commission has proposed only one alternative. It suggests that the Netherlands should coordinate with other Member States. In so doing, it relies on a remark I made in *Bressol* that the host Member State and the home Member State share a responsibility actively to seek a negotiated solution for problems resulting from high volumes of student mobility. (70)

131. I agree with the Netherlands that EU law imposes no duty of coordination. Rather, coordination is a form of cooperation that requires the consent of at least one other Member State. If the Netherlands is entitled to invoke a legitimate aim to justify indirect discrimination, the means to achieve that aim cannot be made conditional upon other Member States' consent and willingness to find a negotiated solution. Member States remain responsible for the organisation of their education systems. While coordination might resolve some of the difficulties facing Member States which, like the Netherlands, wish to promote student mobility through funding, *requiring* them to achieve

coordination would run counter to the entire spirit of Article 165(1) TFEU. Coordination is not, therefore, an alternative measure.

132. In any event, the Commission has not explained how and why the possibility of coordination demonstrates that the residence requirement is not proportionate.

133. The Netherlands in its rejoinder appears to accept that the Commission put forward three possible measures: limiting where MNSF can be used, limiting the duration of MNSF and the obligation of coordination. However, the first and second options are canvassed in the section of the Commission's reply where the Commission summarises the measures that the *Netherlands* itself put forward and discussed in its defence. I therefore do not consider that the *Commission* has put forward these suggestions. In any event, they are not, properly speaking, less restrictive alternatives. A Member State must be free to offer generous financial support for studies anywhere in the world, provided it respects its obligations under EU law (and, of course, assumes the financial responsibility for the cost of its generous scheme).

– Conclusion

134. I conclude that the indirect discrimination against migrant workers and their dependent family members resulting from the residence requirement cannot be justified on the basis of the *economic* objective recognised by the Court in *Bidar*. However, I must still examine whether the residence requirement can be justified on the basis of the *social* objective invoked by the Netherlands.

Is the residence requirement justified on the basis of the social objective?

– Is the social objective a legitimate aim which is justified by overriding reasons in the public interest?

135. The aim of MNSF is to increase student mobility from the Netherlands to other Member States. It is not to promote mobility between two Member States other than the Netherlands, or from another Member State to the Netherlands, or to fund students residing outside the Netherlands who wish to study where they reside. MNSF is reserved for students who would otherwise study in the Netherlands, and who are — so the Netherlands argues — likely to return there if they study abroad. It thus seeks to target students who are likely to use their experience abroad to enrich Netherlands society and (possibly) the Netherlands employment market.

136. I accept that this is a legitimate aim. Nor does the Commission appear to contest it.

137. 'Encouraging mobility of students' is one of the EU's objectives; and its importance has been stressed by the Parliament and the Council. (71) It is likewise a legitimate objective for Member States to pursue in the organisation of their educational and study finance systems. (72)

138. I also accept that encouraging student mobility serves the public interest. It promotes cultural and linguistic diversity and enhances professional development. In that way, it contributes to a pluralistic society in Member States and in the European Union as a whole.

139. In a fully-integrated European Union, it might not be acceptable to make access to funding conditional on the likely return of a student to the originating Member State, because that would impede freedom of movement for EU citizens. In the absence of harmonisation in this area, however, Member States retain considerable freedom to decide the conditions of entitlement to funding for studies, provided they do so in a manner consistent with EU law.

140. I therefore accept that the social objective is a legitimate aim which is justified by overriding reasons in the public interest.

– Is the residence requirement appropriate to achieve the social objective?

141. The Netherlands argues that the residence requirement is appropriate to ensure that MNSF goes only to the target group.

142. The Commission advances no argument in that regard. It merely states that it has ‘doubts’ about the Netherlands’ position.

143. Even if the Commission once again makes no convincing effort to refute the Netherlands’ argument, it is for the Netherlands to make a persuasive case that the residence requirement is appropriate to achieve the stated objective. (73)

144. I am not convinced that the Netherlands has done so.

145. I accept that where students reside prior to pursuing higher education may have some influence on where they study. It is true that the Netherlands has not submitted evidence substantiating that correlation. I do not consider that to be an obstacle. The actual or potential contribution of a measure to the stated objective can be established through quantitative or qualitative analysis. In the present case, I consider that qualitative analysis is sufficient, and that the argument is inherently plausible.

146. I also agree with the Netherlands that the residence requirement prevents students from using MNSF to study where they reside, since students residing outside the Netherlands are precluded from applying for MNSF.

147. However, I am not convinced that there is an obvious link between where students reside prior to pursuing higher education and the likelihood that they will return to that Member State after completing their studies abroad. I do not regard it as inherently likely that a majority of students who reside in the Netherlands and then study abroad will necessarily return to reside in the Netherlands. There may be ways of encouraging that to happen, (74) but it is not self-evident that past residence is a good way of predicting where students will reside and work in the future.

148. I conclude that the Netherlands has not established that the residence requirement is appropriate to identify the group of students to whom it wishes to give MNSF.

149. For the sake of completeness, I shall consider briefly whether the residence requirement is proportionate in relation to the social objective.

– Is the residence requirement proportionate in relation to the social objective?

150. It is for the Netherlands to show that the three out of six years rule does not go beyond what is necessary to identify the group of students who would otherwise study in the Netherlands and who are likely to return there if they study abroad. (75)

151. I consider that its arguments in that regard are insufficient.

152. I agree with the Netherlands that a requirement to know Dutch or to have a diploma from a Netherlands school would not be effective alternative measures.

153. Proficiency in Dutch is not necessarily a good indicator of whether students would study in the Netherlands without MNSF or whether they will return there after their studies abroad. A Dutch-speaking student may decide to study in Antwerp because he knows the language there. He might also opt to study in Paris to improve his French or in Warsaw to learn Polish.

154. The same reasoning applies to requiring the would-be student to hold a diploma from a Netherlands school. Assuming that a Netherlands school diploma is recognised in other Member States and that the Netherlands similarly accepts the equivalence of diplomas obtained abroad, it is difficult to see any necessary direct correlation between

where a school diploma is obtained and whether a particular student would study in the Netherlands without MNSF and will return there after his studies abroad.

155. In any event, both those requirements appear indirectly discriminatory and likely to affect migrant workers in the same way as the residence requirement.

156. Is it sufficient for the Netherlands to advance two measures that are clearly not proportionate ways of achieving the objective (and that are, in any event, as (if not more) discriminatory as the residence requirement) in order to show that the residence requirement satisfies the proportionality test?

157. I consider it is not.

158. As the party bearing the burden of proof, the Netherlands needs at least to show why it favours residence of three out of six years to the exclusion of all other representative elements, such as (for example) residence of a shorter duration, or why the target group cannot be identified through other (possibly less restrictive) measures, such as (for example) a rule prescribing that MNSF cannot be used to study in the place of residence.

159. If the Court were none the less to take the view that the Netherlands has established that the residence requirement is in principle proportionate, I consider that the Commission has failed to show that other, less restrictive, measures exist that achieve the same result. It is quite unclear from the Commission's written and oral observations whether it was putting forward any such alternatives. If its argument with regard to coordination is meant to apply in relation to the social objective, I consider that that argument should be rejected for the reasons already given. (76)

– Conclusion

160. I conclude that the indirect discrimination against migrant workers and dependent family members resulting from the residence requirement could in principle be justified on the basis of the social objective invoked by the Netherlands. However, I am not convinced that the Netherlands has shown that the residence requirement is an appropriate and proportionate means of attaining that objective. In my view, its defence must accordingly fail.

Conclusion

161. In the light of all the foregoing considerations, I am of the opinion that the Court should:

(1) declare that, by requiring that migrant workers and dependent family members fulfil a residence requirement to be eligible under the Wet Studiefinanciering for the funding of educational studies abroad, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 45 TFEU and Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community;

(2) order the Kingdom of the Netherlands to pay the costs.

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1 – Original language: English.

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2 – Certainly he was devoted to his studies, as witnessed by one of his most charming quoted sayings, '*When I get a little money I buy books; and if any is left I buy food and clothes'. See also the Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-11/06 and C-12/06 Morgan and Bucher [2007] ECR I-9161, point 43.*

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3 – The deadline for complying with the Commission's reasoned opinion expired on 15 June 2009 and thus before the entry into force of the Lisbon Treaty. For ease of reference and the sake of consistency, I shall refer to Article 45 TFEU. In any event, the texts of Article 39 EC and other relevant treaty provisions remain unchanged in the Lisbon Treaty.

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4 – Regulation of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475). Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011

on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1) repealed Regulation No 1612/68 with effect from 16 June 2011, well after the expiry of the deadline in the Commission's reasoned opinion. The texts of Articles 7(2) and 12 of Regulation No 1612/68 remain unchanged in Regulation No 492/2011.

5 – Second indent of Article 165(2) TFEU (formerly Article 149(2) EC). The Erasmus programme and other EU action programmes in the field of education are based on Articles 165 and 166 TFEU. See Decision No 1720/2006/EC of the European Parliament and of the Council of 15 November 2006 establishing an action programme in the field of lifelong learning (OJ 2006 L 327, p. 45) as amended by Decision No 1357/2008/EC (OJ 2008 L 350, p. 56).

6 – Directive of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, OJ 2005 L 197, p. 34 and OJ 2007 L 204, p. 28).

7 – Article 2(1) of the WSF.

8 – Case C-287/05 *Hendrix* [2007] ECR I-6909, paragraph 53 and case-law cited.

9 – See Case C-208/07 *Chamier-Glisczinski* [2009] ECR I-6095, paragraph 66 and case-law cited.

10 – Case C-209/03 *Bidar* [2005] ECR I-2119 and Case C-158/07 *Förster* [2008] ECR I-8507.

11 – Fourth recital in the preamble to Regulation No 1612/68 and Case C-269/07 *Commission* v *Germany* [2009] ECR I-7811, paragraph 52 and case-law cited.

12 – *Commission* v *Germany*, cited in footnote 11 above, paragraph 65 and case-law cited (spouses); Case C-258/04 *Ioannidis* [2005] ECR I-8275, paragraph 35 and case-law cited (descendants); and Case 261/83 *Castelli* [1984] ECR 3199, paragraph 12 (ascendants).

13 – Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 25. That case involved a directly discriminatory residence requirement (in that it applied only to non-Netherlands nationals).

14 – *Meeusen*, cited in footnote 13 above, paragraph 19 and case-law cited.

15 – Case C-308/89 *di Leo* [1990] ECR I-4185, paragraph 12.

16 – See Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 63, and Case C-480/08 *Teixeira* [2010] ECR I-1107, paragraph 46.

17 – *Teixeira*, cited in footnote 16 above, paragraph 51, and Case C-310/08 *Ibrahim* [2010] ECR I-1065, paragraph 39.

18 – Case C-7/94 *Gaal* [1995] ECR I-1031, paragraph 30.

19 – Case 197/86 [1988] ECR 3205, paragraph 28.

20 – *Brown*, cited in footnote 19 above, paragraphs 29 and 31.

21 – Case 39/86 *Lair* [1988] ECR 3161 and Case 235/87 *Matteucci* [1988] ECR 5589. In *Lair*, the claimant had worked in the host Member State, but not for long enough to satisfy the requirement (applicable to foreigners but not to nationals) of five years' regular occupational activity there before applying for study assistance. *Matteucci* proceeded on the basis that the claimant was not merely the child of a migrant worker, but was herself also engaged in genuine and effective activity (see paragraphs 9 and 10 of the judgment).

22 – Case 9/74 *Casagrande* [1974] ECR 773, paragraph 9.

23 – Cited in footnote 15 above.

24 – See Case C-356/09 *Kleist* [2010] ECR I-11939, paragraph 34 and case-law cited.

25 – For some reflections on what are, and are not, relevant differences in the context of the right to equal treatment, see also my Opinion in Case C-427/06 *Bartsch* [2008] ECR I-7245, point 44.

26 – Case C-400/08 *Commission* v *Spain* [2011] ECR I-1915, paragraph 58 and case-law cited.

27 – Cited in footnote 13 above, paragraph 21.

28 – Case C-57/96 [1997] ECR I-6689.

29 – Case 152/73 *Sotgiu* [1974] ECR 153 and Case C-466/00 *Kaba II* [2003] ECR I-2219.

30 – Cited in footnote 13 above, paragraph 21.

31 – Cited in footnote 28 above, paragraph 51.

32 – *Meints*, cited in footnote 28 above, paragraphs 45 and 46.

33 – See *Sotgiu*, cited in footnote 29 above, paragraphs 12 and 13, and *Kaba II*, cited in footnote 29 above, paragraph 55.

34 – For example, the child of a cross-border worker might, for some reason, nevertheless reside in the Netherlands or have resided there for long enough to satisfy the three out of six years rule before moving back across the border.

35 – Case C-325/08 *Olympique Lyonnais* [2010] ECR I-2177, paragraph 38 and case-law cited.

36 – Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969, paragraph 63 and case-law cited.

37 – Case C-110/05 *Commission* v *Italy* [2009] ECR I-519, paragraph 66.

38 – *Bidar* and *Förster*, both cited in footnote 10 above.

39 – *Bidar*, cited in footnote 10 above, paragraph 58.

40 – *Bidar*, cited in footnote 10 above, paragraph 55.

41 – *Bidar*, cited in footnote 10 above, paragraph 56. In *Morgan and Bucher*, cited in footnote 2 above, the Court confirmed that the same reasoning applies as regards the award by a Member State of grants to students wishing to study in other Member States (see paragraph 44).

42 – *Bidar*, cited in footnote 10 above, paragraph 57.

43 – *Bidar*, cited in footnote 10 above, paragraph 58.

44 – *Bidar*, cited in footnote 10 above, paragraph 59.

45 – *Förster*, cited in footnote 10 above, paragraph 48.

46 – See *Bidar*, cited in footnote 10 above, paragraph 56.

47 – *Förster*, cited in footnote 10 above, paragraph 49.

48 – *Förster*, cited in footnote 10 above, paragraph 50.

49 – *Förster*, cited in footnote 10 above, paragraph 51.

50 – *Förster*, cited in footnote 10 above, paragraph 54.

51 – *Bidar*, cited in footnote 10 above, paragraph 56. See also, in the context of health benefits and social security systems, Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 103, and Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 50.

52 – Third recital in the preamble to Regulation No 1612/68.

53 – Fifth recital in the preamble to Regulation No 1612/68.

54 – This conclusion does not mean that I consider that in all circumstances Member States are precluded from requiring a degree of connection from migrant workers. Indeed, the *social* objective invoked by the Netherlands Government as justifying a degree of connection from all applicants is a legitimate aim which is justified by overriding reasons in the public interest (see points 135 to 140 below).

55 – Article 1(1) of Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26). The right of residence was granted under the same conditions to former migrant workers and self-employed persons who had ceased their occupational activity. See Article 1(1) of Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ 1990 L 180, p. 28). See also Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students (OJ 1990 L 180, p. 30) and its successor, Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (OJ 1993 L 317, p. 59). Each of those directives, apart from Directive 90/366 which had already been annulled by the Court in Case C-295/90 *Parliament* v *Council* [1992] ECR I-4193 (see paragraph 21), was repealed by Directive 2004/38.

56 – Fourth recital in the preamble to Directive 90/364.

57 – Articles 1 and 3 of Directive 93/96.

58 – Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177, paragraph 40 and case-law cited.

59 – Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 44. The case concerned the payment of the Belgian ‘minimex’ support to a final year student who had managed to be self-financing for the previous three years of his studies.

60 – See also my Opinion in *Commission* v *Spain*, cited in footnote 26 above, point 89.

61 – *Förster*, cited in footnote 10 above, paragraph 55.

62 – Opinion of Advocate General Mazák in *Förster*, cited in footnote 10 above, points 129 to 135.

63 – These are the largest groups of persons who would qualify for MNSF if the residence requirement were to be eliminated. The estimate is calculated by multiplying the estimated number of such persons by an average cost per capita figure comprising the basic grant, the additional grant and the allowance for travel costs.

64 – Nor is it known how many students receive funding to study in the Netherlands *and* then benefit from MNSF to study abroad. See also point 16 above.

65 – See Case C-503/09 *Stewart* [2011] ECR I-6497, paragraph 95 and case-law cited, and *Morgan and Bucher*, cited in footnote 2 above, paragraph 46 and case-law cited. See also *Förster*, cited in footnote 10 above, Opinion of Advocate General Mazák, point 133.

66 – See Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 72.

67 – Case C-111/03 *Commission* v *Sweden* [2005] ECR I-8789, paragraph 66 and case-law cited.

68 – A migrant worker is ‘[a]ny person who pursues activities which are effective and genuine’ and who ‘for a certain period of time … performs services for and under the direction of another person in return for which he receives remuneration’. That group excludes persons who perform ‘activities on such a small scale as to be regarded as purely marginal and ancillary’. *Meeusen*, cited in footnote 13 above, paragraph 13 and case-law cited.

69 – Case C-212/97 *Centros* [1999] ECR I-1459, paragraphs 24 and 25 and case-law cited.

70 – See point 154 of my Opinion in Case C-73/08 *Bressol* [2010] ECR I-2735.

71 – See Article 149(2) EC (now Article 165(2) TFEU) and the Recommendation of the European Parliament and of the Council of 10 July 2001 on mobility within the Community for students, persons undergoing training, volunteers, teachers and trainers (2001/613/EC) (OJ 2001 L 215, p. 30).

72 – The objective of encouraging students to return to their Member State of origin after studying abroad may be a concern to Member States where the outflow of students exceeds the number of incoming students. See, for example, Working Group on Portability of Grants and Loans, Report to the Bologna Follow Up Group (http://www.ond.vlaanderen.be/hogeronderwijs/bologna/documents/WGR2007/Portability_of_grants_and_loans_final_report2007.pdf), p. 15, and Recommendation of the European Parliament and of the Council of 18 December 2006 on transnational mobility within the Community for education and training purposes: European Quality Charter for Mobility (2006/961/EC) (OJ 2006 L 394, p. 5), Annex.

73 – See point 100 above.

74 – For example, the grant of funding might perhaps be made conditional upon the student returning to the Netherlands to work there for a minimum period of time.

75 – See points 67 to 70 above.

76 – See points 130 to 132 above.

Case C-542/09: European Commission v Kingdom of the Netherlands

JUDGMENT OF THE COURT (Second Chamber)

14 June 2012 (*)

(Failure of a Member State to fulfil obligations — Freedom of movement for persons — Access to education for migrant workers and their family members — Funding for higher educational studies pursued outside the territory of the Member State concerned — Residence requirement)

In Case C-542/09,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 18 December 2009,

European Commission, represented by G. Rozet and M. van Beek, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of the Netherlands, represented by C. Wissels, J. Langer and K. Bulterman, acting as Agents,

defendant,

supported by:

Kingdom of Belgium, represented by L. van den Broeck and M. Jacobs, acting as Agents,

Kingdom of Denmark, represented by V. Pasternak Jørgensen, acting as Agent,

Federal Republic of Germany, represented by J. Möller and C. Blaschke, acting as Agents, with an address for service in Luxembourg,

Kingdom of Sweden, represented by A. Falk, acting as Agent,

interveners,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Chamber, U. Lõhmus, A. Rosas, A. Ó Caoimh and A. Arabadjiev, Judges,

Advocate General: E. Sharpston,

Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 10 November 2011,

after hearing the Opinion of the Advocate General at the sitting on 16 February 2012,

gives the following

Judgment

1 By its action, the European Commission asks the Court to declare that, by requiring that migrant workers and their dependent family members comply with a residence requirement — namely, the so-called 'three out of six years rule' — in order to be eligible to receive funding for higher educational studies pursued outside the Netherlands ('portable funding'), the Kingdom of the Netherlands has failed to fulfil its obligations under Article 45 TFEU and Article 7(2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992 (OJ 1992 L 245, p. 1) ('Regulation No 1612/68').

Legal context

EU Law

2 Under Article 7 of Regulation No 1612/68:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.

...'

3 Article 12 of Regulation No 1612/68 provides:

'The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.'

Netherlands law

4 Article 2.2 of the Law on the Financing of Studies of 2000 (Wet studiefinanciering 2000; 'the WSF 2000'), which sets out the conditions enabling students to obtain full funding for their higher educational studies if they study in the Netherlands, is worded as follows:

'1. Study finance may be granted to the following:

(a) students who are Netherlands nationals;

(b) students who are non-Netherlands nationals but who, in the area of funding for studies, are treated as Netherlands nationals pursuant to a treaty or a decision of an international organisation …

…'

5 As regards portable funding, it follows from Article 2.14(2) of the WSF 2000 that this funding is available to students who are eligible for full funding of studies in the Netherlands and who have resided lawfully in the Netherlands during at least three out of the six years preceding enrolment at a higher education establishment abroad.

6 Under Article 11.5 of the WSF 2000, the competent minister may, in manifest cases of grave injustice, derogate from the residence requirement laid down in Article 2.14(2) of that law.

7 Until 1 January 2014, the 'three out of six years' rule does not apply to all students who are eligible for funding for higher education in the Netherlands and who wish to pursue higher education in certain border areas, namely Flanders and the Brussels-Capital Region in Belgium, and North-Rhine Westphalia, Lower Saxony and Bremen in Germany.

Pre-litigation procedure

8 In mid-2007, a complaint was made to the Commission concerning the residence requirement laid down in Article 2.14(2) of the WSF 2000, by virtue of which, in order to be eligible for portable funding, a student must, among other conditions, have lawfully resided in the Netherlands for at least three of the six years preceding his enrolment for higher education.

9 Following an exchange of correspondence with the Netherlands authorities, the Commission sent the Kingdom of the Netherlands a letter of formal notice on 4 April 2008. In that letter, the Commission claimed that, in so far as the residence requirement laid down in the WSF 2000 applies to migrant workers, including frontier workers and the members of their families, it infringes the provisions of EU law relating to the freedom of movement for workers.

10 By letter of 4 June 2008, the Kingdom of the Netherlands responded to the letter of formal notice, claiming that the 'three out of six years' rule complied with EU law and that the Kingdom of the Netherlands had fulfilled its obligations under Article 7(2) of Regulation No 1612/68.

11 Following a meeting between Commission officials and the Netherlands authorities, the latter sent the Commission a supplementary response by letter of 24 October 2008. The Netherlands authorities also expressed their intention of putting a bill before the Netherlands Parliament amending the 'three out of six years' rule.

12 By letter of 15 April 2009, the Commission issued a reasoned opinion in which it concluded that the Kingdom of the Netherlands had not respected its obligations under Article 45 TFEU and Article 7(2) of Regulation No 1612/68, and called on that Member State to take the measures necessary to comply with that opinion within two months of its notification.

13 On 15 June 2009, the Kingdom of the Netherlands reaffirmed its position, contending that the residence requirement laid down in the WSF 2000 did not infringe EU law.

Procedure before the Court

14 By order of the President of the Court of 20 July 2010, the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, and the Kingdom of Sweden were granted leave to intervene in support of the forms of order sought by the Kingdom of the Netherlands.

The action

Arguments of the parties

15 In its application, the Commission argues that, in Case C-3/90 *Bernini* [1992] ECR I-1071, the Court ruled that assistance granted for maintenance and education in order to pursue secondary or higher education must be regarded as a social advantage for the purposes of Article 7(2) of Regulation No 1612/68. According to that case-law, which was affirmed in Case C-337/97 *Meeusen* [1999] ECR-3289, the child of a migrant worker may rely upon Article 7(2) of Regulation No 1612/68 in order to obtain funding for his studies under the same conditions as apply to the children of national workers, and no additional residence requirement may be imposed upon him.

16 According to the Commission, the Court has consistently held that the equal treatment rule laid down in Article 45 TFEU and in Article 7 of Regulation No 1612/68 prohibits not only direct discrimination by reason of nationality but also all indirect forms of discrimination which, through the application of other distinguishing criteria, lead to the same result. It is for the national authorities which plead an exception from the fundamental principle of freedom of movement for persons to show in each individual case that their rules are necessary and proportionate for the purposes of attaining the aim pursued.

17 The Commission claims that the residence requirement laid down in the WSF 2000 constitutes indirect discrimination. According to the Commission, it is clear that, even if the requirement applied in the same way to nationals and other EU citizens alike, it would naturally be easier for national workers to meet and would therefore be liable to disadvantage migrant workers in particular.

18 Moreover, the Commission argues, the requirement is even more discriminatory for frontier workers and their children, who, by definition, reside in a Member State other than the Member State of employment and cannot possibly satisfy the 'three out of six years' rule. In this respect, the Commission highlights the fact that, having become aware of that issue, the Kingdom of the Netherlands has proposed an amendment of the national legislation in order to allow portable funding for students who, although eligible for funding for higher education in the Netherlands, have lived in 'Belgium, in one of the German border areas or in Luxembourg for at least three years during the six years prior to the start of the studies abroad'.

19 The Commission argues that freedom of movement for workers within the European Union constitutes a fundamental right and that any national obstacle can be justified only if: (i) it relates to an objective that is compatible with the TFEU; (ii) it is justified by overriding reasons relating to the public interest; (iii) it is appropriate to achieve the legitimate objective pursued; and (iv) it does not go beyond what is necessary to achieve that objective.

20 The Commission claims that the necessary and proportionate nature of the 'three out of six years' rule is not, as the Netherlands authorities claim, apparent from Case C-209/03 *Bidar* [2005] ECR I-2119 and Case C-158/07 *Förster* [2008] ECR I-8507. In those judgments, the Court's analysis concerned the situation of economically inactive students who did not come under either Article 45 TFEU or Regulation No 1612/68 and of whom the national authorities were allowed to require a certain degree of integration in the host Member State. By contrast, according to the Commission, the access of migrant workers and dependent members of their families to social advantages, such as assistance for the pursuit of higher education, must be assessed in the light of Article 45 TFEU and Regulation No 1612/68.

21 The Commission submits that budgetary considerations are not covered by the concept of an overriding reason relating to the public interest, justifying an obstacle to the freedom of movement for workers. It doubts that the 'three out of six years' rule is the sole means of achieving the objective pursued. Restriction of the geographic area in which portable funding is applicable and curtailment of the duration of that funding are possible alternative measures. Furthermore, in order to avoid fraud, inspections on the territory of Member States other than the Kingdom of the Netherlands could be carried out through coordination between the Member States.

22 The Kingdom of the Netherlands contends that the action should be dismissed.

23 Primarily, it claims that the 'three out of six years' rule does not constitute indirect discrimination. That rule does establish a distinction, because the two situations are not comparable, between workers who have resided in the Netherlands for more than three years and those who have not. Since the aim of Article 2.14 of the WSF 2000 is to

promote studies outside the Netherlands, that clearly implies a requirement of residence in the national territory. The Kingdom of the Netherlands also submits that the case-law of the Court has already allowed differences in treatment based on different places of residence.

24 In the alternative, if the situations at issue must be regarded as comparable, the Kingdom of the Netherlands claims that the scope which the Commission attributes to Article 7 of Regulation No 1612/68 is too broad. It submits that Article 7 concerns, in principle, only the migrant worker himself, whereas the benefits granted to his children in relation to education come under Article 12 of that regulation. The Kingdom of the Netherlands argues that Article 12 of Regulation No 1612/68 imposes a residence requirement on children for which the justification is precisely to establish a link with the community of the host Member State. Since such a requirement is not laid down in Article 7(2) of Regulation No 1612/68, the application of that provision to children of workers would have the effect of circumventing the requirements laid down in Article 12.

25 In the further alternative, the Kingdom of the Netherlands claims that the 'three out of six years' rule is objectively justified and proportionate to the objective pursued.

26 According to the Kingdom of the Netherlands, the promotion of student mobility is possible only if the recipients of the portable funding maintain a real link with the Netherlands. That funding is intended to offer students who would normally pursue higher education in the Netherlands the possibility to do so abroad. Furthermore, abandonment of the 'three out of six years' rule would have unacceptable financial consequences and would risk affecting the very existence of the funding scheme. Attaching certain limits to eligibility so that funding may continue to be ensured has been accepted by the Court in *Bidar* and *Förster*.

27 According to the Kingdom of the Netherlands, the protection of those interests justifies the application of the 'three out of six years' rule to employed workers also, lest certain categories of student receive portable funding even though it is not intended for them. Such would be the case, for example, of student workers who carry out a short period of employment in the Netherlands solely for the purposes of obtaining that funding.

28 As regards the proportionality of the 'three out of six years' rule, the Kingdom of the Netherlands submits that no other measure — such as knowledge of the Dutch language, the establishment of geographic limits beyond which portable funding would be excluded, or the extension of the duration of residence — is liable to protect as efficiently the interests at stake. In addition, there are other possible sources of financial assistance for the children of migrant workers in the Netherlands who are residing outside that Member State, such as the funding of their studies in the Member State in which they reside or in educational establishments in the Netherlands.

29 The Kingdom of the Netherlands submits, furthermore, that Article 11.5 of the WSF 2000 lays down a rule of equity allowing, in particular cases, derogation from the residence requirement in order to prevent grave injustice.

30 Lastly, according to the Kingdom of the Netherlands, the Commission fails to recognise the fact that, since 1 September 2007, the 'three out of six years' rule does not apply to the children of migrant workers who wish to study in areas bordering the Netherlands, namely in Flanders and in the Brussels-Capital Region, in North-Rhine Westphalia, in Lower Saxony and in Bremen. That exception to the residence requirement has been extended to 1 January 2014.

Findings of the Court

31 Article 45(2) TFEU states that freedom of movement for workers is to entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

32 Under Article 7(2) of Regulation No 1612/68, a worker who is a national of a Member State is to enjoy, in the territory of another Member State, the same social and tax advantages as national workers.

33 That provision equally benefits both migrant workers residing in a host Member State and frontier workers employed in that Member State while residing in another Member State (Case C-213/05 *Geven* [2007] ECR I-16347, paragraph 15).

34 According to settled case-law, assistance granted for maintenance and education in order to pursue university studies evidenced by a professional qualification constitutes a social advantage for the purposes of Article 7(2) of Regulation No 1612/68 (Case 39/86 *Lair* [1988] ECR 3161, paragraph 24, and *Bernini*, paragraph 23).

35 The Court has also held that study finance granted by a Member State to the children of workers constitutes, for the migrant worker, a social advantage for the purposes of Article 7(2) of Regulation No 1612/68, where the worker continues to support the child (*Bernini*, paragraphs 25 and 29, and *Meeusen*, paragraph 19).

36 Article 7(2) of Regulation No 1612/68 requires that, where a Member State gives its national workers the opportunity of pursuing education or training provided in another Member State, it must extend that opportunity to EU workers established within its territory (Case 235/87 *Matteucci* [1988] ECR 5589, paragraph 16, and Case C-308/89 *di Leo* [1990] ECR I-4185, paragraph 14).

37 In that respect, it should be noted that the equal treatment rule laid down both in Article 45 TFEU and in Article 7 of Regulation No 1612/68 prohibits not only overt discrimination on grounds of nationality but also all covert forms of discrimination which, through the application of other criteria of differentiation, lead in fact to the same result (see, inter alia, Case C-57/96 *Meints* [1997] ECR I-6689, paragraph 44, and Case C-269/07 *Commission* v *Germany* [2009] ECR I-7811, paragraph 53).

38 That is the position, in particular, in the case of a measure — such as that at issue in the present case — which requires a specified period of residence, in that it primarily operates to the detriment of migrant workers and frontier workers who are nationals of other Member States, in so far as non-residents are usually non-nationals (see, to that effect, Cases C-224/97 *Ciola* [1999] ECR I-2517, paragraph 14, and C-382/08 *Neukirchinger* [2011] ECR I-139, paragraph 34). In that context, it is immaterial whether, in some circumstances, the contested measure affects, as well as nationals of other Member States, nationals of the Member State in question who are unable to meet such a criterion. In order for a measure to be treated as being indirectly discriminatory, it is not necessary for it to have the effect of placing all the nationals of the Member State in question at an advantage or of placing at a disadvantage only nationals of other Member States, but not nationals of the State in question (see, to that effect, Case C-388/01 *Commission* v *Italy* [2003] ECR I-721, paragraph 14).

39 Article 2.14(2) of the WSF 2000 is based on precisely that type of criterion, in so far as it makes the grant of portable funding conditional, *inter alia*, on the party concerned having resided in the Netherlands for at least three of the six years preceding his enrolment for higher educational studies outside that Member State.

40 The Kingdom of the Netherlands contends, however, that the Netherlands legislation at issue establishes a distinction between workers residing in the Netherlands for at least three years, on the one hand, and those who do not meet that condition, on the other, because those situations are different. From the point of view of student mobility, the situation where students residing in the Netherlands are encouraged to go abroad is completely different from the situation in which students residing outside the Netherlands are encouraged to study outside that Member State. An inherent characteristic of that legislation is that it concerns exclusively individuals who reside in the Netherlands and whose initial instinct would obviously be to study in the Netherlands. Accordingly, the fact that these situations are not comparable rules out any question of discrimination.

41 In that respect, it should be noted that, according to settled case-law, discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations (see, inter alia, Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 30, and Case C-253/09 *Commission* v *Hungary* [2011] ECR I-12391, paragraph 50).

42 The non-discretionary application of that principle requires that the criterion by reference to which the situations are compared be based upon factors which are objective and easily identifiable. That criterion cannot be based upon the simple probability that workers employed in the Netherlands but residing in another Member State will pursue studies, not in the Netherlands, but in the Member State of residence.

43 As the Advocate General pointed out in points 52 and 53 of her Opinion, in accepting that children of migrant workers who wish to study in the Netherlands should have access to funding for such studies on the same terms as Netherlands nationals, irrespective of whether or not they reside in the Netherlands, the Kingdom of the Netherlands implicitly accepted that at least some children of migrant workers may, like the children of Netherlands workers, be pre-disposed to study in the Netherlands, irrespective of whether or not they reside there. That being so, the Kingdom of the Netherlands cannot legitimately assert that the place where the migrant worker or his dependent children will study will be determined, in a quasi-automatic manner, by the place of residence.

44 Consequently, for the purposes of access to portable funding, the situation of a migrant worker employed in the Netherlands but residing in another Member State, or the situation of a migrant worker both employed and residing in the Netherlands but for a length of time which falls short of the period of residence required by the measure at issue, is comparable to that of a Netherlands worker who both resides and works in the Netherlands.

45 In the alternative, the Kingdom of the Netherlands argues that the Commission has construed Article 7(2) of Regulation No 1612/68 far too broadly, in so far as that provision concerns, in principle, only migrant workers. Advantages intended for the children of migrant workers as regards access to education come within the scope of Article 12 of that regulation, which lays down a residence requirement applicable to those children.

46 According to the Kingdom of the Netherlands, in *Bernini* and *Meeusen*, the Court, in ruling that Article 7(2) of Regulation No 1612/68 was applicable to the children of migrant workers, seems to have ignored that difference in scope as between the two provisions. However, the Court only did so because, in the cases which gave rise to those judgments, it was dealing with direct discrimination. It was necessary, therefore, to apply Article 7(2) of Regulation No 1612/68. In contrast, in cases which do not involve direct discrimination, such as the present case, that need is not so paramount and Article 12 of that regulation must be applied.

47 With regard to that argument, the following points must be made.

48 The members of a migrant worker's family are the indirect recipients of the equal treatment granted to the worker under Article 7(2) of Regulation No 1612/68. Since the grant of funding for studies to a child of a migrant worker constitutes a social advantage for the migrant worker, the child may himself rely on that provision in order to obtain the funding if, under national law, such funding is granted directly to the student. For the migrant worker, however, that benefit constitutes a social advantage for the purposes of that provision only inasmuch as he continues to support his descendant (Case 316/85 *Lebon* [1987] ECR 2811, paragraphs 12 and 13, and *Bernini*, paragraphs 25 and 26).

49 Article 12 of Regulation No 1612/68, on the other hand, grants the children of a migrant worker an autonomous right to education. That right is not dependent on possessing the status of dependent child (Case C-7/94 *Gaal* [1995] ECR I-1031, paragraph 25); nor is it dependent on the right of residence of the children's parents in the host Member State (Case C-310/08 *Ibrahim* [2010] ECR I-1065, paragraph 40). Nor yet is it limited to the children of migrant workers, since it applies also to the children of former migrant workers (*Ibrahim*, paragraph 39).

50 Article 12 requires only that the child have lived with his parents or with either parent in a Member State while at least one of the parents resided there as a worker (Case 197/86 *Brown* [1988] ECR 3205, paragraph 30, and Case C-480/08 *Teixeira* [2010] ECR I-1107, paragraph 52).

51 Although it is true that the scope *ratione personae* of Article 7(2) of Regulation No 1612/68 and that of Article 12 of that regulation are different, the Court has nevertheless held that both those provisions lay down, in the same way, a general rule which, in matters of education, requires every Member State to ensure equal treatment

between, on the one hand, its own nationals and, on the other, the children of workers established within its territory who are nationals of another Member State (*di Leo*, paragraph 15).

52 As regards the argument of the Kingdom of the Netherlands relating to *Bernini* and *Meeusen*, it is sufficient to recall the case-law referred to in paragraph 37 above, according to which Article 7(2) of Regulation No 1612/68 prohibits not only overt discrimination on grounds of nationality but also all covert forms of discrimination which, through the application of other criteria of differentiation, lead in fact to the same result.

53 Moreover, as the Advocate General pointed out in point 35 of her Opinion, the personal scope of the equal treatment obligation set out in Article 7(2) of Regulation No 1612/68 is not dependent on the type of discrimination involved.

54 It follows that the residence requirement laid down in Article 2.14(2) of the WSF 2000 creates an inequality in treatment as regards access to portable funding between, on the one hand, Netherlands workers and, on the other, migrant workers residing in the Netherlands or employed in that Member State as frontier workers.

55 Such an inequality constitutes indirect discrimination which, unless objectively justified, is prohibited under Article 7(2) of Regulation No 1612/68. Yet, even if it were objectively justified, it would still have to be of such a nature as to ensure achievement of the aim pursued and not go beyond what was necessary for that purpose (see, inter alia, Case C-325/08 O*lympique Lyonnais* [2010] ECR I-2177, paragraph 38).

56 In the present case, the Kingdom of the Netherlands invokes two reasons to justify the contested residence requirement. First, it claims that the requirement is necessary in order to avoid an unreasonable financial burden which could have consequences for the very existence of the assistance scheme. Secondly, given that the national legislation at issue is intended to promote higher education outside the Netherlands, the requirement ensures that the portable funding is available solely to those students who, without it, would pursue their education in the Netherlands.

57 As regards the justification based on the additional burden which would result from non-application of the residence requirement, it should be borne in mind that, although budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against migrant workers (see, to that effect, Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, paragraph 59, and Case C-196/02 *Nikoloudi* [2005] ECR I-1789, paragraph 53).

58 To accept that budgetary concerns may justify a difference in treatment between migrant workers and national workers would imply that the application and the scope of a rule of EU law as fundamental as non-discrimination on grounds of nationality might vary in time and place according to the state of the public finances of Member States (see, to that effect, Cases C-343/92 *Roks and Others* [1994] ECR I-571, paragraph 36, and C-77/02 *Steinicke* [2003] ECR I-9027, paragraph 67).

59 The Kingdom of the Netherlands nevertheless contends that, in *Bidar*, the Court accepted the legitimacy of the objective of limiting, by means of a residence requirement, the recipients of assistance intended to cover the maintenance costs of students from other Member States in order to ensure that the grant of that assistance did not become an unreasonable burden for the host Member State. That case-law was confirmed in *Förster*.

60 However, it should be noted that, in the cases giving rise to *Bidar* and *Förster*, the Court was asked to rule on residence requirements imposed by the Member State concerned, in relation to the grant of funding for studies, on students from other Member States who were not migrant workers or members of their families.

61 Although the Court ruled that the students in question could be required by the host Member State to demonstrate a certain degree of integration into the society of that State in order to receive a maintenance grant, the fact remains that the Court did so only after finding that the interested parties did not come within the scope of the provisions of

EU law relating to freedom of movement for workers, in particular Regulation No 1612/68 (see *Bidar*, paragraph 29, and *Förster*, paragraphs 32 and 33).

62 Likewise, in Case C-456/02 *Trojani* [2004] ECR I-7573, before determining whether a Member State national who did not have sufficient resources could rely on his EU citizenship and the rights under Article 21 TFEU in order to be granted a social assistance benefit in another Member State, the Court first left it to the national court to carry out the assessments of fact necessary to determine whether the citizen in question had the status of worker for the purposes of Article 45 TFEU.

63 Although the Member States' power — which the Court has recognised, subject to the respect of certain conditions — to require nationals of other Member States to show a certain degree of integration in their societies in order to receive social advantages, such as financial assistance for education, is not limited to situations in which the applicants for assistance are economically inactive citizens, the existence of a residence requirement, such as that laid down in Article 2.14(2) of the WSF 2000, to prove the required degree of integration is, in principle, inappropriate when the persons concerned are migrant workers or frontier workers.

64 The existence of a distinction between migrant workers and the members of their families, on the one hand, and EU citizens who apply for assistance without being economically active, on the other hand, arises from Article 24 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77; corrigendum OJ 2004 L 229, p. 35; corrigendum to the corrigendum OJ 2005 L 197, p. 34). Although Article 24(1) of Directive 2004/38 provides that all EU citizens residing on the basis of that directive in the territory of the host Member State are to enjoy equal treatment 'within the scope of the Treaty', Article 24(2) provides that a Member State may, in relation to persons other than workers, self-employed persons, persons who retain such status and members of their families, limit the grant of maintenance aid, consisting in student grants or student loans, in the case of students who have not acquired a right of permanent residence.

65 As regards migrant workers and frontier workers, the fact that they have participated in the employment market of a Member State establishes, in principle, a sufficient link of integration with the society of that Member State, allowing them to benefit from the principle of equal treatment, as compared with national workers, as regards social advantages. That principle is applicable not only to all employment and working conditions, but also to all the advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory (see, inter alia, Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 25, and *Commission* v *Germany*, paragraph 39).

66 The link of integration arises from, inter alia, the fact that, through the taxes which he pays in the host Member State by virtue of his employment, the migrant worker also contributes to the financing of the social policies of that State and should profit from them under the same conditions as national workers.

67 That conclusion is borne out by the third recital in the preamble to Regulation No 1612/68, according to which the mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement, while helping to satisfy the requirements of the economies of the Member States.

68 As regards the risk of abuse relied upon by the Kingdom of the Netherlands, arising in particular from the performance of short periods of employment solely for the purposes of obtaining portable funding, it should be pointed out that the concept of 'worker' for the purposes of Article 45 TFEU has an autonomous meaning specific to EU law and must not be interpreted narrowly. Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be purely marginal and ancillary, must be regarded as a 'worker'. The essential

feature of an employment relationship is, according to the case-law of the Court, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see, inter alia, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17, and Case C-345/09 *van Delft and Others* [2010] ECR I-9879, paragraph 89).

69 In the light of the above, the objective pursued by the Kingdom of the Netherlands of avoiding an unreasonable financial burden cannot be regarded as an overriding reason relating to the public interest, capable of justifying the unequal treatment of workers from other Member States as compared with Netherlands workers.

70 According to the Kingdom of the Netherlands, the residence requirement laid down in Article 2.14(2) of the WSF 2000 may be rendered legitimate by an objective justification other than that of avoiding an unreasonable financial burden. The purpose of providing portable funding is also to increase student mobility and to encourage students to pursue studies outside the Netherlands. Those studies are not only enriching for the students, they are also advantageous for Netherlands society in general and for the Netherlands employment market in particular.

71 It is not disputed that the objective of encouraging student mobility is in the public interest. It suffices, in this respect, to point out that it is one of the actions which Article 165 TFEU assigns to the European Union in the context of educational policy, vocational training, youth and sport. Moreover, it follows from the first recital to the Recommendation of the European Parliament and of the Council of 18 December 2006 on transnational mobility within the Community for education and training purposes: European Quality Charter for Mobility (OJ 2006 L 394, p. 5) that mobility in education and training is an integral part of freedom of movement for persons and that it is one of the main objectives of the European Union's action.

72 Viewed in that light, the justification relating to encouraging student mobility, as relied upon by the Kingdom of the Netherlands, constitutes an overriding reason relating to the public interest capable of justifying a restriction on the principle of non-discrimination on grounds of nationality.

73 However, as indicated in paragraph 55 above, legislation which is liable to restrict a fundamental freedom guaranteed by the Treaty, such as freedom of movement for workers, can be justified only if it is appropriate for securing the attainment of the legitimate objective pursued and if it does not go beyond what is necessary in order to attain it.

74 As regards the appropriate nature of the residence requirement laid down in Article 2.14(2) of the WSF 2000, the Kingdom of the Netherlands contends that it is the means of ensuring that the portable funding goes only to the students whose mobility must be encouraged.

75 In asserting that the 'three out of six years' rule is essential to ensuring that the portable funding is applicable exclusively to a clearly defined group of students, the Kingdom of the Netherlands bases its argument on two premises.

76 First, the Netherlands scheme of assistance for studies outside the Netherlands is aimed at students residing in the Netherlands who, in the absence of that scheme, would pursue their education in that Member State. By contrast, the first instinct of students who do not reside in the Netherlands would be to study in the Member State in which they are resident and, accordingly, mobility would not be encouraged. The Member State in which a student is resident, whether it is the Kingdom of the Netherlands or elsewhere, determines, in a quasi-automatic manner, the place where that student will study.

77 Secondly, in underlining the merits of a policy which encourages student mobility by pointing to the enrichment which studies outside the Netherlands bring not only to the students but also to the society and the employment market of the Netherlands, the Kingdom of the Netherlands expects that students who benefit from that scheme will return to the Netherlands after completing their studies, in order to reside and work there.

78 As was pointed out in paragraph 43 above, the Netherlands has also accepted that some children of migrant workers may be inclined to study in the Netherlands, whether or not they reside there. It should nevertheless be acknowledged that the aspects indicated in paragraphs 76 and 77 above reflect the situation of most students.

79 It must therefore be held that the residence requirement laid down in Article 2.14(2) of the WSF 2000 is appropriate for the purposes of attaining the objective of promoting student mobility.

80 It remains to be determined whether that requirement does not go beyond what is necessary in order to attain that objective.

81 According to settled case-law, it is for the national authorities, where they adopt a measure derogating from a principle enshrined in EU law, to show in each individual case that that measure is appropriate for securing the attainment of the objective relied upon and does not go beyond what is necessary to attain it. The reasons which may be invoked by a Member State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and specific evidence substantiating its arguments (Cases C-147/03 *Commission* v *Austria* [2005] ECR I-5969, paragraph 63, and C-73/08 *Bressol and Others* [2010] ECR I-2735, paragraph 71).

82 Accordingly, it falls to the Kingdom of the Netherlands not only to establish that the national measure at issue is proportionate to the objective pursued but also to indicate the evidence capable of substantiating that conclusion.

83 In its defence, the Kingdom of the Netherlands contended that no other rule would protect as efficiently the interests which the WSF 2000 is intended to protect. A requirement to the effect that the student must know the national language or have a diploma from a Netherlands school would not be an effective means of promoting the objective pursued by the national legislation in question. According to the Kingdom of the Netherlands, besides the fact that such requirements would give rise to discrimination on grounds of nationality, those criteria would make sense only if they related to studies in the Netherlands.

84 In that respect, it should be pointed out that, for the Kingdom of the Netherlands to discharge the burden of showing that the residence requirement does not go beyond what is necessary, it is not sufficient for that Member State simply to refer to two alternative measures which, in its opinion, are even more discriminatory than the requirement laid down in Article 2.14(2) of the WSF 2000.

85 Admittedly, the Court has ruled that the standard of proof cannot be so high as to require the Member State to prove, positively, that no other conceivable measure could enable the objective pursued to be attained under the same conditions (see, to that effect, Case C-110/05 *Commission* v *Italy* [2009] ECR I-519, paragraph 66).

86 Nevertheless, as the Advocate General indicated in point 158 of her Opinion, the Kingdom of the Netherlands would have needed at least to show why it opted for the ‘three out of six years’ rule, to the exclusion of all other representative elements. It should be pointed out in that regard that the rule is too exclusive. By requiring specific periods of residence in the territory of the Member State concerned, the ‘three out of six years’ rule prioritises an element which is not necessarily the sole element representative of the actual degree of attachment between the party concerned and that Member State.

87 It must accordingly be held that the Kingdom of the Netherlands has not established that the residence requirement laid down in Article 2.14(2) of the WSF 2000 does not go beyond what is necessary for the purposes of attaining the objective sought by that legislation.

88 It follows that, contrary to Article 45 TFEU and Article 7(2) of Regulation No 1612/68, Article 2.14(2) of the WSF 2000 establishes inequality of treatment as between Netherlands workers and migrant workers residing in the Netherlands or employed in that Member State as frontier workers.

89 In the light of all the foregoing, it must be held that, by requiring that migrant workers and dependent family members comply with a residence requirement — namely, the 'three out of six years' rule — in order to be eligible for portable funding, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 45 TFEU and Article 7(2) of Regulation No 1612/68.

Costs

90 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of the Netherlands has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, by requiring that migrant workers and dependent family members comply with a residence requirement — namely, the 'three out of six years' rule — in order to be eligible to receive funding for higher educational studies pursued outside the Netherlands, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 45 TFEU and Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992;**

2. **Orders the Kingdom of the Netherlands to pay the costs.**

Case C-434/10: Petar Aladzhov v **Zamestnik direktor na Stolichna direktsia na vatreshnite raboti kam Ministerstvo na vatreshnite raboti**

JUDGMENT OF THE COURT (Fourth Chamber)

17 November 2011 (*)

(Freedom of movement of a Union citizen – Directive 2004/38/EC – Prohibition on leaving national territory because of non-payment of a tax liability – Whether measure can be justified on grounds of public policy)

In Case C-434/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Administrativen sad Sofia-grad (Bulgaria), made by decision of 24 August 2010, received at the Court on 6 September 2010, in the proceedings

Petar Aladzhov

v

Zamestnik direktor na Stolichna direktsia na vatreshnite raboti kam Ministerstvo na vatreshnite raboti,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, A. Prechal, K. Schiemann, C. Toader and E. Jarašiūnas, Judges,

Advocate General: P. Mengozzi,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Mr Aladzhov, by M. Hristov, avocat,

– the European Commission, by D. Maidani and V. Savov, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 September 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 27(1) and (2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC,

90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77; corrigenda at OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34).

2 The reference has been made in proceedings between Mr Aladzhov, a Bulgarian national who is a joint manager of the company Yu.B.N. Kargo, and the Zamestnik direktor na Stolichna direktsia na vatreshnite raboti kam Ministerstvo na vatreshnite raboti (Deputy Director of the Sofia Directorate of the Ministry for the Interior, 'the Deputy Director'), in relation to the latter's decision to prohibit Mr Aladzhov from leaving the national territory until such time as the tax debt owed to the Bulgarian State by that company is paid or a security covering full payment of that debt is provided.

Legal context

European Union law

Directive 2004/38

3 Article 3(1) of Directive 2004/38 provides that that directive is to apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members.

4 Article 4(1) of that directive provides:

'Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.'

5 Article 27(1) and (2) of that directive provides:

'1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.'

National law

Constitution of the Republic of Bulgaria

6 Under Article 35(1) of the Constitution of the Republic of Bulgaria:

'Everyone shall be free to choose his place of residence and shall have the right to freedom of movement within national territory and to leave that territory. That right may be restricted only by virtue of law for the protection of national security, public health and the rights and freedoms of other citizens.'

Law on Bulgarian identity documents

7 Article 23(2) and (3) of the Law on Bulgarian identity documents (Zakon za balgarskite litschni dokumenti, DV No 93 of 11 August 1998), as amended in 2006 (DV No 105) ('the ZBLD'), provides:

'2. Every Bulgarian citizen shall have the right to leave and return to the country with an identity card via the internal borders of the Republic of Bulgaria with the Member States of the European Union and in the situations provided for under international agreements.

3. No restrictions shall be placed on the right under paragraph 2 other than such as are in accordance with law and have as their objective the protection of national security, public policy, public health or the rights and freedoms of other citizens.'

8 Article 75 of the ZBLD provides:

'Permission to leave the country shall not be granted to:

...

5. persons in relation to whom an application has been made for a prohibition under Article 182(2)(2)(a) and Article 221(6)(1)(a) and (b) of the Code of taxation and social insurance procedure.'

Code of taxation and social insurance procedure

9 Article 182 of the Code of taxation and social insurance procedure (Danachno-osiguritelen protsesualen kodeks, DV No 105 of 29 December 2005) as amended in 2010 (DV No 15 of 23 February 2010), provides:

'1. If the liability is not settled in the prescribed period, the authority which has established the debt, before taking measures for enforced recovery, shall give formal notice to the debtor requesting payment of the debt within seven days. For purposes of service of the letter of formal notice by the authority which has established the debt, the relevant provisions of Chapter 6 are applicable. In respect of debts established by the National Public Revenue Agency, the letter of formal notice shall be dispatched by the public enforcement agent.

2. (a) Concurrently with the letter of formal notice provided for in paragraph 1 or subsequently to that letter, the authority concerned in paragraph 1 may, where the amount of the debt exceeds BGN 5 000 and in the absence of any security for an amount equal to the principal plus interest ..., request the authorities of the Ministry for the Interior not to allow the debtor and members of its surveillance or managing bodies to leave the country, but also to withdraw from them or not to issue to them a passport or other comparable document permitting the crossing of national borders.

...

4. The measures referred to in paragraph 2 may, at the discretion of the competent authority, be adopted simultaneously or separately having regard to the amount of the debt or the conduct of the debtor until the debt is finally extinguished.'

10 Article 221(6) of that code provides:

'In cases where the measures referred to in Article 182(2)(2) or Article 182(4) are not adopted by the competent authority, the public enforcement agent may, where the amount of the debt exceeds BGN 5 000 and in the absence of any security for an amount equal to the principal plus interest:

1. request the authorities of the Ministry for the Interior:

(a) to prohibit the debtor and members of its surveillance or managing bodies from leaving the country;

(b) to withdraw or not to issue a passport or other comparable document permitting the crossing of national borders.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 Mr Aladzhov, a Bulgarian national, is one of three managers of the company Yu.B.N. Kargo.

12 By a tax notice of 10 October 1995, a recovery order of 20 August 1999, a letter of formal notice of 10 April 2000 and a communication of 26 September 2001, the Bulgarian State attempted without success to obtain from that company the recovery of a tax debt amounting in total to BGN 44 449 (around EUR 22 000), corresponding to value added tax and customs duties payable by that company and to the interest thereon.

13 The referring court states that that debt was not time-barred and that attachments of company bank accounts and motor vehicles, carried out on 19 June 2009, did not achieve payment of the sum claimed, since the accounts were not in funds and the vehicles could not be located.

14 Consequently, following a request made on 30 July 2009 by the National Public Revenue Agency, in accordance with Article 221(6)(1)(a) and (b) of the Code of taxation and social insurance procedure, on 25 November 2009 the Deputy Director adopted a measure on the basis of Article 75(5) of the ZBLD which prohibited Mr Aladzhov from leaving the country, until the debt owed to the State was paid or until a security covering its full payment was provided. The referring court states that the adoption of that measure by the Deputy Director was mandatory.

15 Before the referring court, Mr Aladzhov claimed that that decision should be annulled, and argued that, since he was also a sales director of another company, Bultrako AD, the official importer of Hondas in Bulgaria, the prohibition on leaving the country severely restricted the pursuit of his occupation, which requires that he travel abroad on many occasions.

16 The referring court observed that Mr Aladzhov, as a citizen of the Union, could rely on the rights pertaining to that status, including against his Member State of origin, and in particular on the right to freedom of movement under Articles 20 TFEU and 21 TFEU and Article 45(1) of the Charter of Fundamental Rights of the European Union. The court noted that that right is, however, not unconditional but may be subject to the limitations and conditions imposed by the FEU Treaty or by the measures adopted to give it effect.

17 The referring court also observed that, while Article 27(1) of Directive 2004/38 provides that restrictions on the freedom of movement of European Union citizens may be adopted on grounds of public policy, the Constitution of the Republic of Bulgaria does not provide for such a ground for restricting the freedom of movement of Bulgarian citizens. On the other hand, that Constitution includes a ground based on the protection of the rights and freedoms of other citizens, which is not envisaged by Directive 2004/38.

18 The referring court also stated that the decision at issue was not taken on the basis of the legislation which transposed Directive 2004/38 into Bulgarian law, but on the basis of other legislation.

19 Further, the referring court held that, according to the Court's case-law, measures restricting the freedom of movement of citizens of the Union must be justified by a real, present and sufficiently serious threat affecting one of the fundamental interests of society and that they must be necessary and proportionate. In that regard, the referring court also noted that the European Court of Human Rights has already ruled that the objective of effective recovery of tax liabilities can be a legitimate ground for restricting the freedom of movement guaranteed by Article 2 of Protocol No 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (see the judgment of 23 May 2006 in *Riener v. Bulgaria* (No 46343/99)).

20 The referring court also stated that although Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ 2008 L 150, p. 28) and

Commission Regulation (EC) No 1179/2008 of 28 November 2008 laying down detailed rules for implementing certain provisions of Directive 2008/55 (OJ 2008 L 319, p. 21) provide for a system for mutual assistance between Member States for the recovery of claims, it was not apparent from the court file that measures had been implemented within that system in order to recover the debt at issue.

21 Lastly, the referring court observed that the provisions of national law relating to the adoption of such a measure imposing a prohibition on leaving the country did not require the administrative authority to assess the effect of the measure on the occupation of the person concerned or on the business of the debtor company, and therefore on its capacity to repay the debt.

22 It is in those circumstances that the Administrativen sad Sofia-grad (Administrative Court, Sofia) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Must the prohibition on leaving the territory of a Member State of the European Union which has been imposed on a national of that State, as the manager of a commercial company registered under the law of the State concerned, on account of an unpaid debt owed to the public authorities by that company be regarded as falling within the scope of the ground of protection of "public policy" provided for in Article 27(1) of Directive 2004/38 … in the circumstances of the main proceedings and where the following circumstances also obtain:

– the constitution of that Member State makes no provision for restricting the freedom of movement of natural persons for the purpose of protecting "public policy";

– the ground of "public policy" as a basis for imposing the aforementioned prohibition is contained in national legislation which was adopted in order to transpose another legislative act of the European Union;

– the ground of "public policy" within the meaning of the aforementioned provision of the directive also includes the ground of "protection of the rights of other citizens", where a measure is adopted to secure the budgetary revenue of the Member State by means of the settlement of debts owed to a public authority?

(2) In the circumstances of the main proceedings, does it follow from the limitations and conditions laid down in respect of the exercise of freedom of movement for European Union citizens and from the measures adopted in accordance with European Union law to give them effect that national legislation under which the Member State imposes on one of its nationals, in his capacity as manager of a commercial company registered under the law of the Member State concerned, an administrative coercive measure in the form of a "prohibition on leaving the country", on account of unpaid debts owed to that State by that company which are classified as "considerable" under its law is permissible, where the procedure for mutual assistance between the Member States under … Directive 2008/55 … and Regulation … No 1179/2008 … may be applied for the purpose of settling the debt?

(3) In the circumstances of the main proceedings, are the principle of proportionality and the limitations and conditions laid down in respect of the exercise of freedom of movement for European Union citizens and the measures adopted in accordance with European Union law to give them effect, and in particular the criteria contained in Article 27(1) and (2) of Directive 2004/38 … to be interpreted as meaning that, where a commercial company registered under the law of a Member State owes a debt to a public authority classified as a "considerable debt" under the law of that State, they allow a natural person who is the manager of the company concerned to be prohibited from leaving that Member State where the following circumstances obtain:

– the existence of a "considerable" debt owed to a public authority is regarded as a genuine, present and sufficiently serious threat affecting a fundamental interest of society, in the light of which the legislature has considered it necessary to introduce the specific measure of a "prohibition on leaving the country";

– no provision is made for an assessment of circumstances connected with the personal conduct of the manager or with an infringement of his fundamental rights, such as his right to pursue an occupation involving travelling abroad under a separate employment relationship;

– no account is taken of the consequences for the commercial activities of the debtor company and the possibilities of paying the debt to the State after the prohibition has been imposed;

– the prohibition is imposed on the basis of an application which is mandatory if it certifies that a "considerable" debt is owed to the State by a specific commercial company, that the debt is not secured to an extent sufficient to cover the principal and the interest, and that the person against whom the imposition of the prohibition is applied for is a manager of that commercial company;

– the prohibition lasts until such time as the debt to the State is fully settled or secured, but no provision is made for a review of that prohibition on application by the addressee to the authority which imposed the prohibition or for account to be taken of the limitation period applicable to repayment of the debt?'

Consideration of the questions referred

The first question

23 By its first question, the referring court seeks, in essence, to ascertain whether European Union law precludes the adoption of a legislative provision by a Member State which permits an administrative authority to prohibit a national of that State from leaving it on the ground that a tax liability of the company of which he is one of the managers has not been settled.

24 In order to give a useful answer to that question it must be noted that, as a Bulgarian national, Mr Aladzhov enjoys the status of a citizen of the Union under Article 20 TFEU and may therefore rely on the rights pertaining to that status, including against his Member State of origin, and in particular the right conferred by Article 21 TFEU to move and reside freely within the territory of the Member States (see, inter alia, Case C-33/07 *Jipa* [2008] ECR I-5157, paragraph 17, and Case C-434/09 *McCarthy* [2011] ECR I-0000, paragraph 48).

25 The right of freedom of movement includes both the right for citizens of the European Union to enter a Member State other than the one of origin and the corresponding right to leave the State of origin. As the Court has already had occasion to state, the fundamental freedoms guaranteed by the Treaty would be rendered meaningless if the Member State of origin could, without valid justification, prohibit its own nationals from leaving its territory in order to enter the territory of another Member State (see *Jipa*, paragraph 18).

26 Moreover, Article 4(1) of Directive 2004/38 expressly provides that all Union citizens with a valid identity card or passport have the right to leave the territory of a Member State to travel to another Member State.

27 It follows that a situation such as that of Mr Aladzhov, who seeks to travel from the Member State of which he is a national to another Member State, is covered by the right of citizens of the Union to move and reside freely in the Member States.

28 However, the right of free movement of Union citizens is not unconditional but may be subject to the limitations and conditions imposed by the Treaty and by the measures adopted to give it effect (see, inter alia, *Jipa*, paragraph 21 and case-law cited).

29 Those limitations and conditions stem, in particular, from Article 27(1) of Directive 2004/38, which allows Member States to restrict the freedom of movement of Union citizens or their family members on grounds of public

policy, public security or public health. However, those grounds cannot, according to the same article, be invoked 'to serve economic ends'.

30 Accordingly, if European Union law is not to preclude such a national measure as that which has prevented Mr Aladzhov from leaving the national territory, which indisputably was not adopted on grounds of public security or public health, it must be shown that it was adopted on grounds of public policy, subject to the further condition that those grounds were not invoked to serve economic ends.

31 In that regard, the referring court states that the national legislation transposing Directive 2004/38 is not applicable to citizens of the Republic of Bulgaria.

32 However, that fact cannot, in any event, have the effect of preventing a national court from giving full effect to the rules of European Union law which, as stated in paragraph 27 of this judgment, are applicable in the main proceedings, and more particularly to Article 27 of Directive 2004/38. Accordingly, it is the duty of the court seised to refuse, if necessary, to apply any provision of national legislation which is in conflict with European Union law, in particular by annulling an individual administrative decision adopted on the basis of such a provision (see, to that effect, inter alia, Case C-173/09 *Elchinov* [2010] ECR I-0000, paragraph 31 and case-law cited). Further, the provisions of that article, which are unconditional and sufficiently precise, may be relied on by an individual vis-à-vis the Member State of which he is a national (see, by analogy, Case 41/74 *van Duyn* [1974] ECR 1337, paragraphs 9 to 15).

33 Further, it is also of no relevance that, as stated by the referring court, the Constitution of the Republic of Bulgaria, as regards justification for restricting the freedom of movement of Bulgarian citizens, does not rely on grounds of public policy, public security or public health but adopts, in particular, a ground relating to the protection of the rights and freedoms of other citizens, on the basis of which the ZBLD was adopted. All that matters is whether the restriction on the freedom of movement of a Bulgarian national which is imposed in order to secure the recovery, as in the main proceedings, of a tax liability and which is justified, according to national law, in the interests of protecting the rights of other citizens, is based on a ground which can be regarded as within the scope of a ground of public policy, within the meaning of European Union law.

34 The Court has always emphasised that while Member States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another, the fact still remains that, in the European Union context and particularly as justification for a derogation from the fundamental principle of free movement of persons, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union (see, inter alia, *Jipa*, paragraph 23).

35 The Court has thus stated that the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (see, inter alia, *Jipa*, paragraph 23 and case-law cited).

36 The referring court refers in that regard to the public interest involved in the responsibility of the public authorities to ensure budgetary revenue and to the objective of protection of the rights of other citizens which is pursued by the recovery of debts owed to a public authority. The referring court also argues that the non-payment of the tax liability of the debtor company in the main proceedings is a threat to a higher interest of society.

37 Admittedly, the possibility cannot be ruled out as a matter of principle, as has moreover been recognised by the European Court of Human Rights (see *Riener v. Bulgaria*, paragraphs 114 to 117), that non-recovery of tax liabilities may fall within the scope of the requirements of public policy. That can however, in the light of the rules of European Union law relating to the freedom of movement of Union citizens, be the case only in circumstances where there is a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society related, for example, to the amount of the sums at stake or to what is required to combat tax fraud.

38 Moreover, since the purpose of recovery of debts owed to a public authority, in particular the recovery of taxes, is to ensure the funding of actions of the Member State concerned on the basis of the choices which are the expression of, inter alia, its general policy in economic and social matters (see, to that effect, Case C-398/09 *Lady & Kid and Others* [2011] ECR I-0000, paragraph 24), the measures adopted by the public authorities in order to ensure that recovery also cannot be considered, as a matter of principle, to have been adopted exclusively to serve economic ends, within the meaning of Article 27(1) of Directive 2004/38.

39 Nonetheless, on the basis solely of the information provided in the order for reference, as set out in paragraph 36 of this judgment, it is not possible to determine whether the measures of the kind at issue in the main proceedings were adopted on the basis of such considerations and, in particular, it is not possible to conclude that they were adopted solely to serve economic ends. It is for the national court to make the necessary determinations in that regard.

40 In the light of the foregoing, the answer to the first question is that European Union law does not preclude a legislative provision of a Member State which permits an administrative authority to prohibit a national of that State from leaving it on the ground that a tax liability of a company of which he is one of the managers has not been settled, subject, however, to the twofold condition that the measure at issue is intended to respond, in certain exceptional circumstances which might arise from, inter alia, the nature or amount of the debt, to a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and that the objective thus pursued does not solely serve economic ends. It is for the national court to determine whether that twofold condition is satisfied.

The second and third questions

41 By its second and third questions, which should be considered together, the referring court seeks to ascertain under what conditions legislation of the kind at issue in the main proceedings can be regarded as proportionate and as respecting the rule that restrictions on freedom of movement must be based on the personal conduct of the person concerned, where, first, there are Community instruments on assistance in tax matters and, second, the legislation at issue can be described as strict and automatic in application.

42 In that regard, it must be recalled that, under Article 27(2) of Directive 2004/38, measures taken on grounds of public policy or public security are to comply with the principle of proportionality and are to be based exclusively on the personal conduct of the individual concerned. Further, as is clear from the case-law cited in paragraph 35 of this judgment, the conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention are not to be accepted.

43 In those circumstances, a national legislative or regulatory provision under which a decision to prohibit an individual from leaving the country solely on the ground that there is a tax liability is adopted automatically, without taking into account the personal conduct of that individual, would not meet the requirements of European Union law (see, to that effect, Case C-348/96 *Calfa* [1999] ECR I-11, paragraphs 27 and 28).

44 In the main proceedings, it appears, having regard to the order for reference, that there cannot be found, either in the provisions of the Code of taxation and social insurance procedure or in those of the ZBLD, which were the basis for the decision of the authorities to prohibit Mr Aladzhov from leaving Bulgaria, any obligation on the part of the competent administrative authorities to take into consideration the personal conduct of the person concerned. Granted, the provisions of the Code of taxation and social insurance procedure do not appear to rule out such consideration since they confer discretion on the authorities mentioned by providing that they ‘may’ request that such a prohibition be imposed under the ZBLD. In that context, while those authorities are not deprived of the possibility of taking that conduct into consideration, it must however be held that legislative provisions such as those at issue in the main proceedings do not appear to contain any obligation of the kind described above, that alone being compatible with the requirements of European Union law.

45 Further, on the basis of the documents sent to the Court by the referring court, it would appear that the measure taken against the applicant is founded solely on the existence of the tax liability of the company of which he is one of the joint managers, and on the basis of that status alone, without any specific assessment of the personal conduct of the person concerned and with no reference to any threat of any kind which he represents to public policy.

46 However, it is not for the Court to rule on the compatibility of national measures with European Union law and it is for the referring court to make the necessary findings in order to assess that compatibility (*Jipa*, paragraph 28).

47 It will also be for the referring court, when reviewing whether there has been compliance with the principle of proportionality, to determine whether the prohibition on leaving the country is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it (see, to that effect, *Jipa*, paragraph 29). In that respect, even if the impossibility of recovering the debt at issue were to constitute a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, it will be for the referring court to determine, inter alia, whether, by depriving Mr Aladzhov of the possibility of pursuing part of his professional activity abroad and thereby depriving him of part of his income, the measure of prohibition at issue is both appropriate to ensure the recovery of the tax sought and necessary for that purpose. It will be also be for the referring court to determine that there were no other measures other than that of a prohibition on leaving the territory which would have been equally effective to obtain that recovery, but would not have encroached on freedom of movement.

48 Those other measures could, as appropriate, include the measures which the national authorities can adopt under, for example, Directive 2008/55, as mentioned by the national court. However, it is in any event the task of the national court to determine whether the debt owed to the Member State concerned falls within the scope of that directive.

49 In the light of the foregoing, the answer to the second and third questions is that, even if a measure imposing a prohibition on leaving the territory such as that applying to Mr Aladzhov in the main proceedings has been adopted under the conditions laid down in Article 27(1) of Directive 2004/38, the conditions laid down in Article 27(2) thereof preclude such a measure:

– if it is founded solely on the existence of the tax liability of the company of which he is one of the joint managers, and on the basis of that status alone, without any specific assessment of the personal conduct of the person concerned and with no reference to any threat of any kind which he represents to public policy, and

– if the prohibition on leaving the territory is not appropriate to ensure the achievement of the objective it pursues and goes beyond what is necessary to attain it.

It is for the referring court to determine whether that is the position in the case before it.

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **European Union law does not preclude a legislative provision of a Member State which permits an administrative authority to prohibit a national of that State from leaving it on the ground that a tax liability of a company of which he is one of the managers has not been settled, subject, however, to the twofold condition that the measure at issue is intended to respond, in certain exceptional circumstances which might arise from, inter alia, the nature or amount of the debt, to a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and that the objective thus pursued does not solely serve economic ends. It is for the national court to determine whether that twofold condition is satisfied.**

2. **Even if a measure imposing a prohibition on leaving the territory such as that applying to Mr Aladzhov in the main proceedings has been adopted under the conditions laid down in Article 27(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, the conditions laid down in Article 27(2) thereof preclude such a measure:**

– **if it is founded solely on the existence of the tax liability of the company of which he is one of the joint managers, and on the basis of that status alone, without any specific assessment of the personal conduct of the person concerned and with no reference to any threat of any kind which he represents to public policy, and**

– **if the prohibition on leaving the territory is not appropriate to ensure the achievement of the objective it pursues and goes beyond what is necessary to attain it.**

It is for the referring court to determine whether that is the position in the case before it.

Case C-482/10: Teresa Cicala v Regione Siciliana
JUDGMENT OF THE COURT (Third Chamber)

21 December 2011 (*)

(National administrative procedure – Administrative acts – Duty to state reasons – Possibility of failure to state reasons being remedied during legal proceedings against an administrative act – Interpretation of the second paragraph of Article 296 TFEU and Article 41(2)(c) of the Charter of Fundamental Rights of the European Union – Lack of jurisdiction of the Court)

In Case C-482/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Corte dei conti, sezione giurisdizionale per la Regione Siciliana (Italy), made by decision of 20 September 2010, received at the Court on 6 October 2010, in the proceedings

Teresa Cicala

v

Regione Siciliana,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász, G. Arestis, T. von Danwitz (Rapporteur) and D. Šváby, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Regione Siciliana, by V. Farina and D. Bologna, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Varone, avvocato dello Stato,

– the Danish Government, by V. Pasternak Jørgensen, acting as Agent,

– the German Government, by T. Henze, J. Möller and N. Graf Vitzthum, acting as Agents,

– the Greek Government, by E.-M. Mamouna, K. Paraskevopoulou and I. Bakopoulos, acting as Agents,

– the European Commission, by C. Cattabriga and H. Kraemer, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the principle of stating reasons for the acts of public authorities, laid down by the second paragraph of Article 296 TFEU and Article 41(2)(c) of the Charter of Fundamental Rights of the European Union (the 'Charter').

2 The reference has been made in proceedings between Ms Cicala and the Regione Siciliana concerning a decision providing for a reduction in the amount of Ms Cicala's pension and the recovery of amounts paid for earlier periods.

Legal context

3 Law No 241 of 7 August 1990 introducing new rules governing administrative procedure and relating to the right of access to administrative documents (GURI No 192 of 18 August 1990, p. 7), as amended by Law No 15 of 11 February 2005 (GURI No 42 of 21 February 2005, p. 4, 'Law No 241/1990') provides at Article 1(1):

'Administrative activity shall pursue objectives established by law and be governed by the criteria of economy, efficiency, impartiality, right of access and transparency according to the methods prescribed by this law and other provisions governing distinct procedures as well as by principles derived from the Community legal order.'

4 Article 3(1) and (2) of Law No 241/1990 provides, in relation to the duty to state reasons:

'1. All administrative decisions … must state reasons, except in the cases provided for in paragraph 2. The reasons stated must indicate the factual circumstances as well as the legal grounds that led the administration to take that decision, having regard to the results of the preliminary examination of the file.

2. Reasons are not required to be stated for legislative acts and acts of general application.'

5 The first paragraph of Article 21g(2) of Law No 241/1990 is worded as follows:

'A decision adopted in breach of the rules of procedure or the rules relating to the form of measures will not be annulled where, having regard to the fact that it falls within the administration's circumscribed powers, it is clear that its operative part could not have been different from that which was actually adopted.'

6 Article 3 of Sicilian Regional Law No 10 of 30 April 1991 introducing provisions relating to administrative decisions, right of access to administrative documents and the improvement of the functioning of administrative activity (Sicilian Regional Law No 10/1991) reproduces verbatim Article 3 of Law No 241/1990.

7 Article 37 of Sicilian Regional Law No 10/1991 provides:

'For all matters that are not provided for by this law, the provisions of Law No 241/1990 shall be applicable, insofar as they are compatible, including successive amendments and additions, and also implementation and related measures.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 Ms Cicala, who was employed by the Region of Sicily, receives a pension paid to her by the Region of Sicily. By memorandum dated 1997, the Region of Sicily informed Ms Cicala that the amount of her pension, as established by an earlier regional decree, was more than what was actually due to her and that that amount would be reduced, and that the amounts unduly paid to her would correspondingly be recovered. Ms Cicala brought an action for annulment of that memorandum before the Corte dei conti, sezione giurisdizionale per la Regione Siciliana (Court of auditors,

administrative appeals section for the Region of Sicily), alleging a total failure to state reasons for the act which made it, inter alia, impossible to determine the matters of fact and law warranting the reduction in her pension and the recovery of the sums unduly paid.

9 The Region of Sicily submitted, in that regard, that the contested memorandum fell within the administration's circumscribed powers and that its provisions could not have been different from those that were adopted. During the judicial proceedings, it provided information relating to the reasons explaining that memorandum and concluded that it was not possible, in accordance with Article 21g of Law No 241/1990, to annul it.

10 In its decision to refer the matter, the Corte dei conti, sezione giurisdizionale per la Regione Siciliana, sets out considerations relating to the Court's jurisdiction to answer the questions raised. It notes, first of all, that, in the context of the action in the main proceedings, it exercises judicial functions. In the area of pensions, it has exclusive jurisdiction on the merits and has jurisdiction to annul administrative acts. Thus, contrary to the cases giving rise to the orders of 26 November 1999 in Case C-192/98 *ANAS* [1999] ECR I-8583, and Case C-440/98 *RAI* [1999] ECR I-8597, in which the Court declared that it had no jurisdiction to rule on the questions referred by the Corte dei conti, that body must, in the context of these proceedings, be considered to be not an administrative authority but a court within the meaning of Article 267 TFEU.

11 The Corte dei conti, sezione giurisdizionale per la Regione Siciliana, further submits that the questions referred are admissible. Article 1(1) of Law No 241/1990 contains a direct, unconditional *renvoi* to principles derived from the legal order of the Union. The Consiglio di Stato (Council of State) held, in a recent judgment (sez. V 4035/2009), that principles of EU law apply directly in the internal legal order and must govern the actions of the administration. Thus, it must be considered that the duty to state reasons referred to in the second paragraph of Article 296 TFEU and Article 41(2)(c) of the Charter applies to all activities of the Italian administration, whether they are exercised in the implementation of EU law or in the context of the administration's own powers.

12 In those circumstances, even though, in this case, the action in the main proceedings concerns a purely internal situation, this reference for a preliminary ruling should, in accordance with the Court's case-law, be considered as admissible. Considering that the resolution of that dispute depends on the interpretation of those provisions of EU law, the Corte dei conti, sezione giurisdizionale per la Regione Siciliana, has decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Are the interpretation and application of Article 3 of [Law No 241/1990] and Article 3 of [Sicilian Regional Law No 10/1991] – in relation to Article 1 of [Law 241/1990], which requires the Italian administrative authorities to apply the principles of [EU] law, pursuant to the duty to state reasons for the acts of public authorities laid down in the second paragraph of Article 296 [TFEU] and Article 41(2)(c) of [the Charter] – to the effect that measures of public authorities in private-law form, that is to say, measures relating to individual rights and that are in any event mandatory, in matters relating to pensions, may be exempted from the duty to state reasons, compatible with EU law, and does such a case amount to infringement of an essential procedural requirement governing an administrative measure?

(2) Is the first sentence of Article 21g(2) of [Law No 241/1990], as interpreted by the administrative case-law – in relation to the duty to state reasons for an administrative measure laid down by Article 3 of [Law 241/1990] and Article 3 of [Sicilian Regional Law No 10/1991], together with the duty to state reasons for the acts of public authorities laid down by the second paragraph of Article 296 [TFEU] and Article 41(2)(c) of [the Charter] – compatible with Article 1 of [Law No 241/1990], which requires the administration to apply the principles of the legal order of the Union, and, consequently, is it compatible and permissible to interpret and apply that provision as allowing the authorities to supplement a statement of reasons for an administrative measure during the proceedings?'

Jurisdiction of the Court

13 Having regard to the reasons for the decision to refer the matter, questions arise as to whether the Court has jurisdiction to rule on the questions referred to it, as regards, on the one hand, the classification as a 'court or tribunal'

within the meaning of Article 267 TFEU of the Corte dei conti, sezione giurisdizionale per la Regione Siciliana, and, on the other, the subject-matter of those questions.

14 In that latter regard, the Regione Siciliana, the Italian, Danish, German, and Greek Governments, and also the European Commission, argue, in essence, that the Court lacks jurisdiction to answer the questions referred, due to the fact that the action in the main proceedings relates to a purely internal situation. The Italian and Greek Governments, and the Commission too, submit inter alia that the *renvoi* to EU law, provided for in Article 1 of Law No 241/1990, does not fulfil the conditions laid down by the Court's case-law in order to give rise to its jurisdiction.

15 Under Article 267 TFEU the Court has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and acts of the institutions of the Union. In the context of the cooperation between the Court and the national courts established by Article 267 TFEU, it is for the national courts alone to assess, in view of the special features of each case, both the necessity of a preliminary ruling in order to enable them to give their judgment and the relevance of the questions they put to the Court (see, to that effect, Case C-310/10 *Agafiţei and Others* [2011] ECR I-5989, paragraphs 24 and 25 and the case-law cited).

16 Consequently, when questions submitted by national courts concern the interpretation of a provision of EU law, the Court is, in principle, obliged to give a ruling (Case C-3/04 *Poseidon Chartering* [2006] ECR I-2505, paragraph 15; Case C-203/09 *Volvo Car Germany* [2010] ECR I-10721, paragraph 24; and *Agafiţei and Others*, paragraph 26).

17 In accordance with that case-law, the Court has repeatedly held that it has jurisdiction to give preliminary rulings on questions concerning provisions of EU law in situations in which the facts of the case in the main proceedings fell beyond the field of application of EU law but in which those provisions of EU law had been rendered applicable by domestic law due to a *renvoi* made by that law to the content of those provisions. In those cases, the provisions of domestic law incorporating provisions of EU law did not limit the application of the latter (Case C-130/95 *Gilroy* [1997] ECR I-4291, paragraph 23, and Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, paragraph 27 and case-law cited).

18 The Court has stated in that regard that when, in regulating purely internal situations, domestic legislation seeks to adopt the same solutions as those adopted in EU law in order, for example, to avoid discrimination against foreign nationals or any distortion of competition or to provide for a single procedure in comparable situations, it is clearly in the interest of the Union that, in order to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (*Agafiţei and Others*, paragraph 39 and the case-law cited).

19 Thus, an interpretation, by the Court, of provisions of EU law in purely internal situations is warranted on the ground that they have been made applicable by national law directly and unconditionally (see, to that effect, Case C-346/93 *Kleinwort Benson* [1995] ECR I-615, paragraph 16, and Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraph 25), in order to ensure that internal situations and situations governed by EU law are treated in the same way (see, to that effect, *Poseidon Chartering*, paragraph 17, and Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 22).

20 In this instance, it is common ground that the action in the main proceedings concerns provisions of national law that apply in a purely national context and among them, in particular, those relating to the stating of reasons for administrative acts are at issue in that action.

21 Accordingly, it must be examined whether an interpretation by the Court of the provisions referred to by the questions raised is warranted, as the national court maintains, on the ground that those provisions have been made applicable by national law directly and unconditionally, within the meaning of the case-law cited at paragraph 19 herein, by means of a *renvoi* made by Article 1 of Law No 241/1990 to principles derived from the legal order of the Union.

22 In that regard, the Italian Government submits, in particular, that the duty to state reasons is wholly governed by internal law relating to administrative procedure and may not, thus, be the subject of interpretation by the Court.

23 Law No 241/1990 and Sicilian Regional Law No 10/1991 provide for specific rules in relation to the duty to state reasons for administrative acts. Moreover, Law No 241/1990 lays down, in relation to the consequences of an infringement of that duty, specific rules that are made applicable to the procedure in the main proceedings through Article 37 of Sicilian Regional Law No 10/1991.

24 Thus, as was in particular noted by the national court itself, the Region of Sicily and the Italian Government, Article 3 of Law No 241/1990 and Article 3 of Sicilian Regional Law No 10/1991 establish the principle of a duty to state reasons for administrative decisions by laying down, inter alia, what those reasons must cover. Moreover, as regards the consequences of infringing that obligation, Article 21g(2) of Law No 241/1990 provides that a decision cannot be annulled when it falls within the administration's circumscribed powers and it is clear that its provisions could not have been different from those that were adopted. Finally, according to the national court, that latter provision allows, under certain conditions, the possibility of supplementing the statement of reasons for an administrative act during proceedings.

25 On the other hand, Article 1 of Law No 241/1990 makes a *renvoi* in a general manner to 'principles derived from the Community legal order', and not specifically to the second paragraph of Article 296 TFEU and Article 41(2)(c) of the Charter, referred to by the questions raised or even to other rules of EU law concerning the duty to state reasons for acts.

26 Accordingly, it cannot be considered that the provisions referred to by the questions raised have been, as such, made applicable directly by Italian law.

27 Likewise, it cannot be considered, in those circumstances, that the *renvoi* to EU law as a means of regulating purely internal situations is, in this case, unconditional so that the provisions referred to by those questions are applicable without limitation to the situation at issue in the main proceedings.

28 In that regard, it should be noted that the Corte dei conti, sezione giurisdizionale per la Regione Siciliana, does not indicate at all whether that *renvoi* has the consequence of setting aside the national rules relating to the duty to state reasons and of replacing them with the second paragraph of Article 296 TFEU and Article 41(2)(c) of the Charter, which are addressed, indeed, according to their wording, not to the Member States but solely to the EU institutions and bodies, or indeed with other rules of EU law relating to the duty to state reasons, even when it is a purely internal situation at issue, in order to treat purely internal situations and those governed by EU law in the same manner.

29 Thus, neither the decision to refer nor Law No 241/1990 contains precise enough indications from which it could be deduced that, by referring, in Article 1 of Law No 241/1990, to principles deriving from EU law, the national legislature intended, in relation to the duty to state reasons, to make a *renvoi* to the content of the second paragraph of Article 296 TFEU and Article 41(2)(c) of the Charter, or indeed to other rules of EU law concerning the duty to state reasons for acts, in order that internal situations and situations falling within EU law should be treated in the same way. It cannot therefore be concluded that there is, in -this case, a definite interest of the Union in preserving uniformity of interpretation of those provisions.

30 It follows from all the foregoing considerations that the Court does not have jurisdiction to answer the questions referred by the Corte dei conti, sezione giurisdizionale per la Regione Siciliana, having regard to the subject-matter of those questions.

31 In those circumstances, it is not necessary to examine whether the Corte dei conti, sezione giurisdizionale per la Regione Siciliana, is, in the context of the action in the main proceedings, a court or tribunal within the meaning of Article 267 TFEU.

Costs

32 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

The Court of Justice of the European Union has no jurisdiction to answer the questions referred by the Corte dei conti, sezione giurisdizionale per la Regione Siciliana (Italy), by decision of 20 September 2010.

Case C-40/11: Yoshikazu Iida v Stadt Ulm

JUDGMENT OF THE COURT (Third Chamber)

8 November 2012 (*)

(Articles 20 TFEU and 21 TFEU – Charter of Fundamental Rights of the European Union – Article 51 – Directive 2003/109/EC – Third-country nationals – Right of residence in a Member State – Directive 2004/38/EC – Third-country nationals who are family members of Union citizens – Third-country national neither accompanying nor joining a Union citizen in the host Member State and remaining in the citizen's Member State of origin – Right of residence of a third-country national in the Member State of origin of a citizen residing in another Member State – Citizenship of the Union – Fundamental rights)

In Case C-40/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof Baden-Württemberg (Germany), made by decision of 20 January 2011, received at the Court on 28 January 2011, in the proceedings

Yoshikazu Iida

v

Stadt Ulm,

THE COURT (Third Chamber),

composed of R. Silva de Lapuerta (Rapporteur), acting as President of the Third Chamber, K. Lenaerts, E. Juhász, T. von Danwitz and D. Šváby, Judges,

Advocate General: V. Trstenjak,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 22 March 2012,

after considering the observations submitted on behalf of:

– Mr Y. Iida, by T. Oberhäuser and W. Weh, Rechtsanwälte,
– the German Government, by T. Henze and A. Wiedmann, acting as Agents,
– the Belgian Government, by L. Van den Broeck and C. Pochet, acting as Agents,
– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,
– the Danish Government, by C.H. Vang, acting as Agent,
– the Italian Government, by G. Palmieri, acting as Agent, and L. D'Ascia, avvocato dello Stato,
– the Netherlands Government, by C. Wissels, K. Bulterman and J. Langer, acting as Agents,
– the Polish Government, by M. Szpunar, acting as Agent,
– the United Kingdom Government, by S. Hathaway, and subsequently by A. Robinson, acting as Agents, and R. Palmer, barrister,
– the European Commission, by C. Tufvesson and H. Krämer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 May 2012,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the provisions of European Union law on the right of residence in a Member State of third-country nationals and on citizenship of the Union.

2 The reference has been made in proceedings between Mr Iida and Stadt Ulm (City of Ulm) concerning its refusal to grant him a right of residence in Germany on the basis of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34) and to issue him a residence card on that basis.

Legal context

European Union law

Directive 2003/109/EC

3 Under the heading 'Subject matter', Article 1(a) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2003 L 16, p. 44) provides:

'This Directive determines:

(a) the terms for conferring and withdrawing long-term resident status granted by a Member State in relation to third-country nationals legally residing in its territory, and the rights pertaining thereto …'

4 In accordance with Article 3(1) and (2) of Directive 2003/109, 'Scope':

'1. This Directive applies to third-country nationals residing legally in the territory of a Member State.

2. This Directive does not apply to third-country nationals who:

(a) reside in order to pursue studies or vocational training;

(b) are authorised to reside in a Member State on the basis of temporary protection or have applied for authorisation to reside on that basis and are awaiting a decision on their status;

(c) are authorised to reside in a Member State on the basis of a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States or have applied for authorisation to reside on that basis and are awaiting a decision on their status;

(d) are refugees or have applied for recognition as refugees and whose application has not yet given rise to a final decision;

(e) reside solely on temporary grounds such as au pair or seasonal worker, or as workers posted by a service provider for the purposes of cross-border provision of services, or as cross-border providers of services or in cases where their residence permit has been formally limited;

(f) enjoy a legal status governed by the Vienna Convention on Diplomatic Relations of 1961, the Vienna Convention on Consular Relations of 1963, the Convention of 1969 on Special Missions or the Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character of 1975.'

5 Article 4(1) of that directive provides:

'Member States shall grant long-term resident status to third-country nationals who have resided legally and continuously within [their] territory for five years immediately prior to the submission of the relevant application.'

6 Article 5 of that directive, 'Conditions for acquiring long-term resident status', provides:

'1. Member States shall require third-country nationals to provide evidence that they have, for themselves and for dependent family members:

(a) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum wages and pensions prior to the application for long-term resident status;

(b) sickness insurance in respect of all risks normally covered for [its] own nationals in the Member State concerned.

2. Member States may require third-country nationals to comply with integration conditions, in accordance with national law.'

7 Under the heading 'Acquisition of long-term resident status', Article 7(1) and (3) of the directive provides:

'1. To acquire long-term resident status, the third-country national concerned shall lodge an application with the competent authorities of the Member State in which he/she resides. The application shall be accompanied by documentary evidence to be determined by national law that he/she meets the conditions set out in Articles 4 and 5 as well as, if required, by a valid travel document or its certified copy.

The evidence referred to in the first subparagraph may also include documentation with regard to appropriate accommodation.

…

3. If the conditions provided for by Articles 4 and 5 are met, and the person does not represent a threat within the meaning of Article 6, the Member State concerned shall grant the third-country national concerned long-term resident status.'

8 Under the heading 'Long-term resident's EC residence permit', Article 8(1) and (2) of the directive provides:

'1. The status as long-term resident shall be permanent, subject to Article 9.

2. Member States shall issue a long-term resident's EC residence permit to long-term residents. The permit shall be valid at least for five years; it shall, upon application if required, be automatically renewable on expiry.'

Directive 2004/38

9 Chapter I of Directive 2004/38, 'General provisions', comprises Articles 1 to 3.

10 Article 2 of Directive 2004/38, 'Definitions', provides:

‘For the purposes of this Directive:

1. “Union citizen” means any person having the nationality of a Member State;

2. “family member” means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3. “host Member State” means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.’

11 Article 3 of the directive, ‘Beneficiaries’, provides:

‘1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.’

12 Chapter III of the directive, ‘Right of residence’, concerns the conditions of exercise of the right of Union citizens and their family members to reside in the territory of the Member States. The chapter contains inter alia Articles 6, 7 and 10.

13 Article 6 of the directive provides:

‘1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months …

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.’

14 Article 7 of the directive provides:

‘1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months …

….

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State …’

15 Article 10 of the directive, ‘Issue of residence cards’, provides:

‘1. The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called “Residence card of a family member of a Union citizen” no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.

2. For the residence card to be issued, Member States shall require presentation of the following documents:

…

(c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;

(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;

…’

German law

16 Paragraph 7, ‘Residence permit’, of the Law on residence, economic activity and integration of foreigners in national territory (Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet, ‘the AufenthG’) states:

‘1. The residence permit is a residence certificate for a determined period. It is issued for the purposes of residence mentioned in the following sections. In justified cases a residence permit may also be issued for a purpose of residence not provided for by this law.

2. The residence permit is to be subject to a time-limit having regard to the intended purpose of residence. If an essential condition for issue, extension or determination of the period of validity ceases to apply, the period may also be subsequently shortened.’

17 In accordance with Paragraph 18, ‘Employment’, of the AufenthG:

‘1. The admission of foreign employees depends on the requirements of the German economy, having regard to conditions on the labour market and the need to combat unemployment effectively. International treaties are not affected.

2. A foreigner may be issued a residence certificate for the purpose of employment if the Federal Employment Agency (Bundesagentur für Arbeit) has granted approval in accordance with Paragraph 39 or if it is laid down by regulation under Paragraph 42 or by an international agreement that the employment is permitted without approval by the Federal Employment Agency. Restrictions in connection with the grant of approval by the Federal Employment Agency are to be included in the residence certificate.

3. A residence permit for the purpose of employment in accordance with subparagraph 2 which does not require a vocational qualification may be issued only if this is laid down by an international agreement or if the grant of approval for a residence permit in respect of that employment is permitted on the basis of a regulation under Paragraph 42.

4. A residence certificate for the purpose of employment in accordance with subparagraph 2 which requires a vocational qualification may be issued only for employment in an occupational group which has been authorised by regulation under Paragraph 42. In a justified individual case, a residence permit may be issued for the purpose of employment where there is a public interest in the employment, in particular a regional, economic or labour market interest.

5. A residence certificate in accordance with subparagraph 2 and Paragraph 19 may be issued only if a specific job offer exists.'

18 Paragraph 39(2) to (4) of the AufenthG, 'Approval of employment of foreigners', states:

'2. The Federal Employment Agency may approve the issue of a residence permit for the purpose of employment in accordance with Paragraph 18 if

(1) (a) the employment of foreigners does not produce adverse effects on the labour market, in particular with regard to the employment structure, the regions and the sectors of the economy, and

(b) German workers, foreigners who are legally equated with German workers as regards taking up employment, or other foreigners who are entitled to preferential access to the labour market under European Union law are not available for the employment, or

(2) it has established, through investigations in accordance with point 1(a) and (b) of the first sentence, for individual occupational groups or for individual sectors of the economy, that filling the vacancies with foreign applicants is justifiable in terms of labour market policy and integration policy,

and the foreigner is not employed on less favourable conditions of employment than comparable German workers. German workers and foreigners equated with them are also be deemed to be available for employment if they can only be placed with assistance from the Federal Employment Agency. An employer who intends to employ a foreigner who requires approval for that purpose must provide the Federal Employment Agency with information on pay, working hours and other conditions of employment.

…

4. The approval may determine the duration and the occupational activity and restrict the employment to specific establishments or areas.'

19 Under the heading 'Family reunion to join Germans', the first sentence of Paragraph 28(1) of the AufenthG provides:

'A residence permit is to be issued to the foreign

(1) spouse of a German,

(2) unmarried minor child of a German,

(3) parent of an unmarried minor German for the purpose of care of the child,

if the German has his habitual residence in the national territory.'

20 Under the heading ‘Autonomous right of residence of spouses’, Paragraph 31(1) and (2) of the AufenthG provides:

‘1. In cases where marital cohabitation has ceased, the spouse’s residence permit is extended by one year as an autonomous right of residence not dependant on the purpose of family reunion, if

(1) marital cohabitation has lawfully existed in national territory for at least two years, or

(2) the foreigner has died while marital cohabitation in national territory existed,

and the foreigner was until then in possession of a residence permit, establishment permit or EC long-term residence permit, unless he was not able to apply for an extension in due time for reasons beyond his control. …

2. The requirement under point 1 of the first sentence of subparagraph 1 for marital cohabitation to have existed lawfully for two years in national territory is to be waived where it is necessary, in order to avoid particular hardship, to allow the spouse to continue to reside, unless an extension of the foreigner’s residence permit is excluded. …’

21 Paragraph 9a of the AufenthG, ‘Long-term resident’s EC residence permit’, provides in subparagraphs 1 and 2:

‘1. The long-term resident’s EC residence permit is a residence certificate for an unlimited period. The second and third sentences of Paragraph 9(1) apply by analogy. Unless otherwise provided in this law, the long-term resident’s EC residence permit is equivalent to the establishment permit.

2. A foreigner is to be issued a long-term resident’s EC residence permit in accordance with Article 2(b) of Directive [2003/109] if

(1) he has been resident in national territory with a residence certificate for five years,

(2) his subsistence and that of his dependents whom he is obliged to maintain is guaranteed by a stable and regular income,

(3) he possesses an adequate knowledge of the German language,

(4) he possesses a basic knowledge of the legal and social system and conditions of life in national territory,

(5) reasons of public security or public policy, having regard to the severity or the nature of the breach of public security or public policy or the danger emanating from the foreigner having regard to the duration of his residence to date and the existence of ties in national territory, do not preclude this, and

(6) he possesses sufficient living space for himself and the family members living with him as a family.’

22 Paragraph 5(1) and (2) of the Law on general freedom of movement of Union citizens (Gesetz über die allgemeine Freizügigkeit von Unionsbürgern) of 30 July 2004 (‘the FreizügG/EU’) provides:

‘1. Union citizens entitled to freedom of movement and their family members who are nationals of a Member State of the European Union are immediately issued ex officio with a certificate of their right of residence.

2. Family members entitled to freedom of movement who are not Union citizens are issued ex officio, within six months after they have provided the necessary information, with a residence card of a family member of a Union citizen, which is to be valid for five years. The family member is immediately issued with a certificate showing that the necessary information has been provided.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

23 In 1998 Mr Iida, a national of Japan, married Ms N.-I, a national of Germany, in the United States. Their daughter Mia was born on 27 August 2004 in the United States, and has German, American and Japanese nationality.

24 In December 2005 the family moved to Germany. In January 2006 Mr Iida obtained a residence permit for family reunion in accordance with Paragraph 28 of the AufenthG. Since February 2006 he has worked full-time in Ulm under a contract of employment for an unlimited period, and currently receives gross monthly pay of EUR 4 850. Because of his working hours, he was released from the obligation under national law to follow an integration course.

25 In summer 2007 Mr Iida's spouse started full-time work in Vienna. At first the spouses maintained the marriage between Ulm and Vienna, but since January 2008 they have been permanently separated, although they have not divorced. Both spouses jointly hold and exercise parental responsibility for their daughter, even though the mother and daughter have since March 2008 been habitually resident in Vienna, where the daughter attends school.

26 Mr Iida regularly visits his daughter in Vienna for one weekend a month, and she spends most of her holidays with her father in Ulm. They have also undertaken journeys together. According to the information provided by Mr Iida to the referring court, the relationship between father and daughter is excellent.

27 Following the departure of his daughter and his spouse, the autonomous right of residence provided for in Paragraph 31 of the AufenthG could not apply to Mr Iida, because the marital cohabitation of the spouses had not existed in Germany for at least two years and an exemption from that condition had not been sought.

28 However, because of his employment in Ulm, Mr Iida obtained a residence permit, which, in accordance with Paragraph 18 of the AufenthG, was on 18 November 2010 extended to 2 November 2012, subsequent extension being discretionary.

29 On 30 May 2008 Mr Iida asked the City of Ulm to issue him a 'residence card of a family member of a Union citizen' as provided for in Paragraph 5 of the FreizügG/EU. His application was rejected on the ground that he had no claim to such a card under European Union law, first by the City of Ulm and the Regierungspräsidium Tübingen (Administrative District Office, Tübingen) and then by judgment of the Verwaltungsgericht Sigmaringen (Administrative Court, Sigmaringen).

30 On 6 May 2010 Mr Iida appealed against that court's judgment to the Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg).

31 Mr Iida also applied for a long-term resident's residence permit under Paragraph 9a of the AufenthG, but he later withdrew the application.

32 In that context, the Verwaltungsgerichtshof Baden-Württemberg decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. On Articles 2, 3 and 7 of [Directive 2004/38]:

(a) Does "family member" include, in particular in the light of Articles 7 and 24 of the [Charter of Fundamental Rights ("the Charter")] and Article 8 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, "the ECHR")], on an extended interpretation of Article 2(2)(d) of Directive 2004/38, a parent who is a third-country national, has parental responsibility for a child who is a Union citizen entitled to freedom of movement, and is not maintained by that child?

(b) If so, does Directive 2004/38 apply to that parent, in particular in the light of Articles 7 and 24 of the Charter and Article 8 of the ECHR, on an extended interpretation of Article 3(1) of the directive, even where there is no "accompanying" or "joining" with respect to the Member State of origin of the child who is a Union citizen and has moved away?

(c) If so, does it follow that that parent, in particular in the light of Articles 7 and 24 of the Charter and Article 8 of the ECHR, has a right of residence for more than three months in the Member State of origin of the child who is a Union citizen, on an extended interpretation of Article 7(2) of Directive 2004/38, at least as long as parental responsibility subsists and is actually exercised?

2. On Article 6(1) TEU in conjunction with the Charter:

(a) (i) Is the Charter applicable pursuant to the second alternative of the first sentence of Article 51(1) of the Charter simply where the subject-matter of the dispute depends on a national law (or part of a law) which inter alia – but not only – transposed directives?

(ii) If not, is the Charter applicable pursuant to the second alternative of the first sentence of Article 51(1) of the Charter simply because the claimant is possibly entitled to a right of residence under Union law and could accordingly, under the first sentence of Paragraph 5(2) of the FreizügG/EU, claim a residence card for a family member of a Union citizen which has its legal basis in the first sentence of Article 10(1) of [Directive 2004/38]?

(iii) If not, is the Charter applicable pursuant to the second alternative of the first sentence of Article 51(1) of the Charter, in accordance with the case-law deriving from Case C-260/89 *ERT* [1991] ECR I-2925, paragraphs 41 to 45, where a Member State restricts the right of residence of the father who is a third-country national with parental responsibility for a Union citizen who is a minor and resides predominantly with her mother in another Member State of the Union because of the mother's employment?

(b) (i) If the Charter is applicable, can a right of residence under European Union law for the father who is a third-country national be derived directly from Article 24(3) of the Charter, at least as long as he has and actually exercises parental responsibility for his child who is a Union citizen, even if the child resides predominantly in another Member State of the Union?

(ii) If not, does it follow from the freedom of movement of the child who is a Union citizen under Article 45(1) of the Charter, possibly in conjunction with Article 24(3) of the Charter, that the father who is a third-country national has a right of residence under European Union law, at least as long as he has and actually exercises parental responsibility for his child who is a Union citizen, so that in particular the freedom of movement of the child who is a Union citizen is not deprived of all practical effect?

3. On Article 6(3) TEU in conjunction with the general principles of European Union law:

(a) Can the "unwritten" fundamental rights of the European Union developed in the Court's case-law from Case 29/69 *Stauder* [1969] ECR 419, paragraph 7, up to, for example, Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 75, be applied in full even if the Charter is not applicable in the specific case; in other words, do the fundamental rights which continue to apply as general principles of Union law under Article 6(3) TEU stand autonomously and independently alongside the new fundamental rights laid down in the Charter in accordance with Article 6(1) TEU?

(b) If so, can a right of residence under European Union law for the purpose of the effective exercise of parental responsibility be inferred from the general principles of Union law, in particular in the light of the right to respect for family life under Article 8 of the ECHR, for a father, who is a third-country national, of a Union citizen who is a minor and resides predominantly in another EU Member State with her mother on account of the latter's occupation?

4. On Article 21(1) TFEU in conjunction with Article 8 of the ECHR:

If Article 6(1) or (3) TEU does not lead to a right of residence under European Union law for the claimant, can, in accordance with Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraphs 45 to 47, a right of residence under European Union law for the purpose of the effective exercise of parental responsibility be inferred, under Article 21(1)

TFEU, possibly in the light of Article 8 of the ECHR, from the freedom of movement enjoyed by a Union citizen who is a minor and resides predominantly in another EU Member State with her mother on account of the latter's occupation, for the father, who is a third-country national, in the Member State of origin of the child who is a Union citizen?

5. On Article 10 of [Directive 2004/38]:

If a right of residence under European Union law is taken to exist, is a parent who is a third-country national in the claimant's situation entitled to the issue of a "residence card for a family member of a Union citizen", possibly in accordance with the first sentence of Article 10(1) of the directive?'

33 Those questions, according to the referring court, may be summarised in the single following question:

'Does European Union law give a parent who has parental responsibility and is a third-country national, for the purpose of maintaining regular personal relations and direct parental contact, a right to remain in the Member State of origin of his child who is a Union citizen, to be documented by a "residence card of a family member of a Union citizen", if the child moves from there to another Member State in exercise of the right of freedom of movement?'

Consideration of the question referred

34 To answer the question put by the referring court, it should first be ascertained whether a person in a situation such as that of the claimant in the main proceedings can benefit from the provisions of secondary law which, under certain conditions, provide for a residence permit to be granted in a Member State to a third-country national.

35 Should that not be the case, it would then have to be ascertained whether a person in a situation such as that of the claimant in the main proceedings can base a right of residence directly on the provisions of the FEU Treaty concerning citizenship of the Union.

Interpretation of Directive 2003/109

36 In accordance with Article 3(1) of Directive 2003/109, the directive applies to third-country nationals residing legally in the territory of a Member State. Unlike Directive 2004/38 (see Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja* [2011] ECR I-14035, paragraphs 46 and 47), Directive 2003/109 does not lay down the conditions which the residence of those nationals must satisfy for them to be regarded as legally resident in the territory of a Member State. It follows that those conditions are governed by national law alone.

37 In accordance with Article 4(1) of Directive 2003/109, Member States are to grant long-term resident status to those nationals who, in accordance with their national law, have resided legally and continuously within their territory for five years immediately prior to the submission of the relevant application. However, under Article 3(2) of Directive 2003/109, the directive does not apply to certain types of residence.

38 Under Article 5 of Directive 2003/109, to acquire long-term resident status a third-country national must provide evidence that he has, for himself and for dependent family members, stable and regular resources which are sufficient to maintain himself and the members of his family without recourse to the social assistance system of the Member State concerned, and sickness insurance in respect of all risks normally covered for its own nationals in the Member State concerned. Member States may also require third-country nationals to comply with integration conditions in accordance with their national law.

39 Under Article 7(3) of Directive 2003/109, if the above conditions provided for by Articles 4 and 5 of the directive are met and the person does not represent a threat within the meaning of Article 6 of the directive, the Member State concerned is to grant the third-country national concerned long-term resident status.

40 In the present case, as stated in paragraph 24 above, the claimant in the main proceedings, who is a third-country national, commenced legal residence in Germany in January 2006 by virtue of a residence permit for family reunion issued under Paragraph 28 of the AufenthG. Moreover, on the basis of the contract of employment for an unlimited period signed in February 2006, he was subsequently able to obtain a residence permit under Paragraph 18 of the AufenthG valid until 2 November 2012, despite the fact that he could not obtain the autonomous right of residence under Paragraph 31 of the AufenthG because of the interruption of marital cohabitation.

41 It is thus apparent from the documents in the case that the claimant in the main proceedings does not fall within any of the cases mentioned in Article 3(2) of Directive 2003/109, and that he has resided legally and continuously in German territory for five years.

42 Moreover, because of his employment, Mr Iida is prima facie able to provide evidence that he has stable and regular resources which are sufficient to maintain himself and sickness insurance in respect of all risks normally covered for its own nationals in Germany.

43 Nor is there anything in the case-file to show that Mr Iida may represent a threat to public policy or public security within the meaning of Article 6 of Directive 2003/109.

44 With regard, finally, to the conditions of integration provided for in Paragraph 9a(2), points 3 and 4, of the AufenthG, while the level of Mr Iida's knowledge of the German language, or of the legal and social system and conditions of life in national territory, has not been shown, it remains the case that the German Government stated at the hearing that because of the university degree held by Mr Iida he is subject, under the relevant national law, to reduced requirements as regards integration. Furthermore, according to the documents in the case-file, because of his working hours Mr Iida was released from the obligation to follow an integration course.

45 It follows that, in principle, a third-country national in the situation of the claimant in the main proceedings may be granted the status of long-term resident within the meaning of Directive 2003/109.

46 However, as stated in paragraph 31 above, Mr Iida withdrew his application for a long-term resident's residence permit under Paragraph 9a of the AufenthG.

47 In accordance with Article 7(1) of Directive 2003/109, in order to acquire long-term resident status, the third-country national concerned must lodge an application with the competent authorities of the Member State in which he resides. Similarly, in accordance with Article 4(1) of the directive, the Member States are to grant long-term resident status with account being taken of the years immediately prior to the submission of the relevant application.

48 In so far, then, as Mr Iida voluntarily withdrew his application for the status of long-term resident in accordance with Directive 2003/109, he cannot be granted a residence permit on the basis of the provisions of that directive.

Interpretation of Directive 2004/38

49 Paragraph 1 of Article 3, 'Beneficiaries', of Directive 2004/38 provides that the directive is to apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in Article 2(2) who accompany or join them.

50 Under Article 2(2)(a) and (d) of Directive 2004/38, the persons to be regarded as a 'family member' of a Union citizen for the purposes of that directive are the spouse and the dependent direct relatives in the ascending line and those of the spouse or partner as defined in Article 2(2)(b).

51 Thus not all third-country nationals derive rights of entry into and residence in a Member State from Directive 2004/38, but only those who are a 'family member' within the meaning of Article 2(2) of that directive of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the

Member State of which he is a national (Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraph 73, and Case C-256/11 *Dereci and Others* [2011] ECR I-11315, paragraph 56).

52 In the dispute in the main proceedings, both the spouse and the daughter of Mr Iida are beneficiaries of Directive 2004/38, in that they moved to and reside in a Member State other than that of which they are nationals, namely Austria.

53 As regards the possible status of 'family member' within the meaning of Article 2(2) of Directive 2004/38 of the claimant in the main proceedings, a distinction must be drawn between his links with his daughter and his links with his spouse.

54 In the first place, as regards the relationship between the claimant in the main proceedings and his daughter, it is apparent from Article 2(2)(d) of Directive 2004/38 that a direct relative in the ascending line of the Union citizen concerned must be 'dependent' on that citizen in order to be regarded as a 'family member' within the meaning of that provision.

55 According to the case-law of the Court, the status of 'dependent' family member of a Union citizen holding a right of residence is the result of a factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence, so that, when the converse situation occurs and the holder of the right of residence is dependant on a third-country national, the third-country national cannot rely on being a 'dependent' relative in the ascending line of that right-holder, within the meaning of Directive 2004/38, with a view to having the benefit of a right of residence in the host Member State (see, in relation to the similar provisions of the instruments of European Union law prior to Directive 2004/38, *Zhu and Chen*, paragraphs 43 and 44 and the case-law cited).

56 It follows that the claimant in the main proceedings cannot be regarded as a 'family member' of his daughter within the meaning of Article 2(2) of Directive 2004/38.

57 In the second place, as regards the relationship between the claimant in the main proceedings and his spouse, it should be observed that, to be regarded as a 'family member' within the meaning of Article 2(2)(a) of Directive 2004/38 of a Union citizen who has exercised his right to freedom of movement, that provision does not require the person concerned to satisfy any conditions other than that of being a spouse.

58 The Court has previously had occasion to rule, in connection with the instruments of European Union law prior to Directive 2004/38, that the marital relationship cannot be regarded as dissolved as long as it has not been terminated by the competent authority, and that is not the case where the spouses merely live separately, even if they intend to divorce at a later date, so that the spouse does not necessarily have to live permanently with the Union citizen in order to hold a derived right of residence (see Case 267/83 *Diatta* [1985] ECR 567, paragraphs 20 and 22).

59 That interpretation of a similar provision to Article 2(2)(a) of Directive 2004/38, one which moreover required the family of the Union citizen concerned to have normal housing, must apply *a fortiori* in connection with Article 2(2)(a), which does not impose that requirement.

60 In the present case, the marriage of Mr and Mrs Iida has not been dissolved by the competent authority, so that Mr Iida may be regarded as a family member of his spouse within the meaning of that provision of Directive 2004/38.

61 However, while he may be regarded as a 'family member' of his spouse within the meaning of Article 2(2)(a) of Directive 2004/38, he cannot be classified as a 'beneficiary' of that directive, as Article 3(1) of the directive requires that the family member of the Union citizen moving to or residing in a Member State other than that of which he is a national should accompany or join him.

62 The same requirement of accompanying or joining the Union citizen is furthermore repeated in Articles 6(2) and 7(2) of Directive 2004/38 in connection with the extension of the citizen's right of residence to his family members

who are not nationals of a Member State, and also in Article 10(2)(c) in connection with the issue of the residence card provided for by that directive.

63 That requirement moreover corresponds to the purpose of the derived rights of entry and residence provided for by Directive 2004/38 for family members of Union citizens, as otherwise the fact of its being impossible for the Union citizen to be accompanied or joined by his family in the host Member State would be such as to interfere with his freedom of movement by discouraging him from exercising his rights of entry into and residence in that Member State (see, to that effect, *Metock and Others*, paragraph 63).

64 It thus follows that the right of a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement to install himself with that Union citizen pursuant to Directive 2004/38 can be relied on only in the host Member State in which that citizen resides (see, to that effect, in relation to the similar provisions of the instruments of European Union law prior to Directive 2004/38, Case C-291/05 *Eind* [2007] ECR I-10719, paragraph 24).

65 Consequently, since Mr Iida neither accompanied nor joined in the host Member State the member of his family who is a Union citizen who exercised her right of freedom of movement, he cannot be granted a right of residence on the basis of Directive 2004/38.

Interpretation of Articles 20 TFEU and 21 TFEU

66 First of all, the Treaty provisions on citizenship of the Union do not confer any autonomous right on third-country nationals.

67 Like the rights conferred by Directive 2004/38 on third-country nationals who are family members of a Union citizen who is a beneficiary of that directive, any rights conferred on third-country nationals by the Treaty provisions on Union citizenship are not autonomous rights of those nationals but rights derived from the exercise of freedom of movement by a Union citizen (see, to that effect, Case C-434/09 *McCarthy* [2011] ECR I-3375, paragraph 42, and *Dereci and Others*, paragraph 55).

68 As stated in paragraph 63 above, the purpose and justification of those derived rights are based on the fact that a refusal to allow them would be such as to interfere with the Union citizen's freedom of movement by discouraging him from exercising his rights of entry into and residence in the host Member State.

69 Thus it has been held that a refusal to allow the parent, whether a national of a Member State or of a third country, who is the carer of a minor child who is a Union citizen to reside with that child in the host Member State would deprive the child's right of residence of any useful effect, since enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence (*Zhu and Chen*, paragraph 45).

70 Similarly, it has been held that, when a worker returns to the Member State of which he is a national after being gainfully employed in another Member State, a third-country national who is a member of his family has a right of residence in the Member State of which the worker is a national, even where that worker does not carry on any effective and genuine economic activities. If the third-country national did not have such a right, the worker who is a Union citizen could be discouraged from leaving the Member State of which he is a national in order to pursue gainful employment in another Member State simply because of the prospect for that worker of not being able, on returning to his Member State of origin, to continue living together with close relatives, a way of life which may have come into being in the host Member State as a result of marriage or family reunification (*Eind*, paragraphs 45, 35 and 36).

71 Finally, there are also very specific situations in which, despite the fact that the secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of his freedom

of movement, a right of residence exceptionally cannot, without undermining the effectiveness of the Union citizenship that citizen enjoys, be refused to a third-country national who is a family member of his if, as a consequence of refusal, that citizen would be obliged in practice to leave the territory of the European Union altogether, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status (see *Dereci and Others*, paragraphs 67, 66 and 64).

72 The common element in the above situations is that, although they are governed by legislation which falls a priori within the competence of the Member States, namely legislation on the right of entry and stay of third-country nationals outside the scope of Directives 2003/109 and 2004/38, they none the less have an intrinsic connection with the freedom of movement of a Union citizen which prevents the right of entry and residence from being refused to those nationals in the Member State of residence of that citizen, in order not to interfere with that freedom.

73 As regards cases such as that at issue in the main proceedings, first, it must be observed that the claimant, who is a third-country national, is not seeking a right of residence in the host Member State in which his spouse and his daughter, who are Union citizens, reside, but in Germany, their Member State of origin.

74 Next, it is common ground that that the claimant has always resided in that Member State in accordance with national law, without the absence of a right of residence under European Union law having discouraged his daughter or his spouse from exercising their right of freedom of movement by moving to Austria.

75 Finally, as may be seen from paragraphs 28 and 40 to 45 above, the claimant in the main proceedings has a right of residence under national law until 2 November 2012, which is prima facie renewable, according to the German Government, and can in principle be granted the status of long-term resident within the meaning of Directive 2003/109.

76 In those circumstances, it cannot validly be argued that the decision at issue in the main proceedings is liable to deny Mr Iida's spouse or daughter the genuine enjoyment of the substance of the rights associated with their status of Union citizen or to impede the exercise of their right to move and reside freely within the territory of the Member States (see *McCarthy*, paragraph 49).

77 It must be recalled that the purely hypothetical prospect of exercising the right of freedom of movement does not establish a sufficient connection with European Union law to justify the application of that law's provisions (see Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 16). The same applies to purely hypothetical prospects of that right being obstructed.

78 As to the fundamental rights mentioned by the referring court, in particular the right to respect for private and family life and the rights of the child, laid down in Articles 7 and 24 of the Charter respectively, it must be borne in mind that, in accordance with Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing European Union law. Under Article 51(2) of the Charter, it does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Accordingly, the Court is called on to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it (see *Dereci and Others*, paragraph 71).

79 To determine whether the German authorities' refusal to grant Mr Iida a 'residence card of a family member of a Union citizen' falls within the implementation of European Union law within the meaning of Article 51 of the Charter, it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it (see Case C-309/96 *Annibaldi* [1997] ECR I-7493, paragraphs 21 to 23).

80 While Paragraph 5 of the FreizügG/EU, which provides for the issue of a ‘residence card of a family member of a Union citizen’, is indeed intended to implement European Union law, it is none the less the case that the situation of the claimant in the main proceedings is not governed by European Union law, since he does not satisfy the conditions for the grant of that card in accordance with Article 10 of Directive 2004/38. Moreover, in the absence of an application by him for the status of long-term resident in accordance with Directive 2003/109, his situation shows no connection with European Union law.

81 In those circumstances, the German authorities’ refusal to grant Mr Iida a ‘residence card of a family member of a Union citizen’ does not fall within the implementation of European Union law within the meaning of Article 51 of the Charter, so that its conformity with fundamental rights cannot be examined by reference to the rights established by the Charter.

82 In the light of the foregoing, the answer to the referring court’s question is that, outside the situations governed by Directive 2004/38 and where there is no other connection with the provisions on citizenship of European Union law, a third-country national cannot claim a right of residence derived from a Union citizen.

Costs

83 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Outside the situations governed by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC and where there is no other connection with the provisions on citizenship of European Union law, a third-country national cannot claim a right of residence derived from a Union citizen.

Case C-256/11: Murat Dereci, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduike, Dragica Stevic v **Bundesministerium für Inneres**

JUDGMENT OF THE COURT (Grand Chamber)

15 November 2011 (*)

(Citizenship of the Union – Right of residence of nationals of third countries who are family members of Union citizens – Refusal based on the citizen's failure to exercise the right to freedom of movement – Possible difference in treatment compared with EU citizens who have exercised their right to freedom of movement – EEC-Turkey Association Agreement – Article 13 of Decision No 1/80 of the Association Council – Article 41 of the Additional Protocol – 'Standstill' clauses)

In Case C-256/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Austria), made by decision of 5 May 2011, received at the Court on 25 May 2011, in the proceedings

Murat Dereci,

Vishaka Heiml,

Alban Kokollari,

Izunna Emmanuel Maduike,

Dragica Stevic

v

Bundesministerium für Inneres,

THE COURT (Grand Chamber),

composed of V. Skouris, President, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, J. Malenovský, U. Lõhmus, Presidents of Chambers, R. Silva de Lapuerta (Rapporteur), M. Ilešič and E. Levits, Judges,

Advocate General: P. Mengozzi,

Registrar: K. Malacek, Administrator,

having regard to the order of the President of the Court of 9 September 2011 applying an accelerated procedure to the reference for a preliminary ruling under Article 23a of the Statute of the Court of Justice of the European Union and the first paragraph of Article 104a of the Rules of Procedure of the Court,

having regard to the written procedure and further to the hearing on 27 September 2011,

after considering the observations submitted on behalf of:

– M. Dereci, by H. Blum, Rechtsanwalt,
– the Austrian Government, by G. Hesse, acting as Agent,

– the Danish Government, by C. Vang, acting as Agent,
– the German Government, by T. Henze and N. Graf Vitzthum, acting as Agents,
– Ireland, by D. O'Hagan, acting as Agent, assisted by P. McCann, BL,
– the Greek Government, by T. Papadopoulou, acting as Agent,
– the Netherlands Government, by C. Wissels and J. Langer, acting as Agents,
– the Polish Government, by B. Majczyna, acting as Agent,
– the United Kingdom Government, by S. Hathaway and S. Ossowski, acting as Agents, assisted by K. Beal, barrister,
– the European Commission, by D. Maidani and C. Tufvesson and by B.-R. Killmann, acting as Agents,
after hearing the Advocate General,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of European Union law provisions on citizenship of the Union, and Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association set up by the Agreement establishing an Association between the European Economic Community and Turkey, signed in Ankara on 12 September 1963 by Turkey, on the one hand, and by Member States of the EEC and the Community, on the other, and concluded, approved and confirmed on behalf of the Community by Council Decision No 64/732/EEC of 23 December 1963 (OJ 1964, 217, p. 3685) ('Decision No 1/80' and 'the Association Agreement' respectively), and the Additional Protocol, signed in Brussels on 23 November 1970 and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1972 L 293, p. 1) ('the Additional Protocol').

2 The reference has been made in proceedings between Mr Dereci, Mrs Heiml, Mr Kokollari, Mr Maduike and Mrs Stevic, on the one hand, and the Bundesministerium für Inneres (Ministry of Home Affairs), on the other, concerning the latter's rejection of the application for residence authorisations by the applicants in the main proceedings, coupled with, in four of the disputes in the main proceedings, an expulsion order and individual removal orders from Austria.

Legal context

International Law

3 Under the heading 'Right to respect for private and family life', Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, ('ECHR') provides:

'(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

European UnionLaw

Association Agreement

4 The Association Agreement is intended, in the words of Article 2(1), ‘to promote the continuous and balanced strengthening of trade and economic relations between the parties, while taking full account of the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and the living conditions of the Turkish people’. Under Article 12 of the Association Agreement, ‘the Contracting Parties agree to be guided by Articles [39 EC], [40 EC] and [41 EC] for the purpose of progressively securing freedom of movement for workers between them’ and, under Article 13 of that agreement, those parties ‘agree to be guided by Articles [43 EC] to [46 EC] and [48 EC] for the purpose of abolishing restrictions on freedom of establishment between them’.

Decision No 1/80

5 Article 13 of Decision No 1/80 states:

‘The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories.’

Additional Protocol

6 According to Article 62 thereof, the Additional Protocol and its Annexes form an integral part of the Association Agreement.

7 Article 41(1) of the Additional Protocol provides:

‘The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.’

Directive 2003/86/EC

8 Article 1 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12) states:

‘The purpose of this Directive is to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.’

9 According to Article 3(3) of that directive:

‘This Directive shall not apply to members of the family of a Union citizen.’

Directive 2004/38/EC

10 Under the heading ‘General provisions’, Chapter I of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35 and OJ 2005 L 197, p. 34) consists of Articles 1 to 3.

11 Article 1 of that directive, which is entitled ‘Subject’, provides:

‘This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.'

12 Under the heading 'Definitions', Article 2 of that directive states:

'For the purposes of this Directive:

(1) "Union citizen" means any person having the nationality of a Member State;

(2) "Family member" means:

a) the spouse;

b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.'

13 Article 3 of Directive 2004/38, which is entitled 'Beneficiaries', provides in paragraph 1:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.'

National law

14 The Federal Law on establishment and residence in Austria (Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich, BGBl. I, 100/2005, 'NAG'), makes a distinction, in its provisions on establishment and residence in Austria, between rights derived from European Union law, on the one hand, and those derived from Austrian law, on the other.

15 Under the heading 'General conditions for obtaining a residence permit', Paragraph 11 of the NAG provides:

'...

(2) A residence permit may be issued to an alien only if

1. the residence of the alien is not contrary to the public interest;

2. the alien can provide evidence of a legal right to accommodation considered usual for a family of comparable size;

3. the alien has comprehensive sickness insurance cover valid in Austria;

4. the residence of the alien is not liable to entail a financial burden for the public authorities in Austria;

…

(3) a residence permit may be issued despite a ground for refusal under subparagraph 1(3), (5) or (6) or where the conditions under subparagraph 2(1) to (6) are not met if required by respect for private and family life within the meaning of Article 8 of the [ECHR]. Private and family life within the meaning of Article 8 of the [ECHR] shall be assessed in the light, in particular, of:

1. the nature and duration of residence so far and the question of the lawfulness or otherwise of the residence so far of the third country national;

2. the actual existence of family life;

3. whether the private life is worthy of protection;

4. the degree of integration;

5. the links of the third country national with his own country;

6. the absence of a criminal record;

7. breaches of public policy, in particular in the area of the law on asylum, on border policing and on immigration;

8. whether the private and family life of the third country national arose at the time the persons concerned became aware of the uncertain status of their residence;

(4) the residence of an alien is contrary to the public interest (subparagraph 2(1)) where

1. his residence would compromise public policy or public security …

(5) The residence of an alien does not entail a financial burden for the public authorities in Austria (subparagraph 2(4)) where the alien has a fixed and regular income of his own which allows him to live without seeking social security benefits from the public authorities and the amount of which corresponds to the scales laid down by Paragraph 293 of the General law on social security (Allgemeines Sozialversicherungsgesetz) …'

16 Paragraph 21 of the NAG, entitled 'Procedure applicable to initial applications', provides:

'(1) the initial application must be made abroad, before entering Austrian territory, to the competent local diplomatic services. The applicant is required to remain abroad until a decision has been made on his application.

(2) By way of derogation from subparagraph 1, the following persons are authorised to submit their application in Austria:

1. Family members of Austrians, EEA nationals and Swiss nationals, residing permanently in Austria who have not exercised the right of residence of more than three months conferred on them by Community law or by the [Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed in Luxembourg on 21 June 1999 (OJ 2002 L 114, p. 6)], following lawful entry and during their lawful residence;

...

(3) By way of derogation from subparagraph 1, the authorities may accept, on submission of a reasoned request, the lodging of an application in Austria if there are no grounds for refusal under Paragraph 11(1)(1), (2) or (4), and if it is established that it is impossible for the alien to leave Austria in order to submit his application or if this cannot reasonably be required of him:

...

2. in order to respect private and family life within the meaning of Article 8 of the ECHR (Paragraph 11(3)).

...

(6) An application submitted in Austria under subparagraph 2(1) and (4) to (6), subparagraph 3 and subparagraph 5, does not confer any right to remain in Austria beyond the authorised residence without a visa or with a visa. Nor does it preclude the adoption and implementation of measures for the registration of aliens and therefore can have no suspensory effect on aliens' registration procedures.'

17 Paragraph 47 of the NAG provides:

'(1) Persons seeking to reunite their family within the meaning of subparagraphs 2 to 4 are Austrians or EEC or Swiss nationals residing permanently in Austria who have not exercised their right of residence of more than three months conferred on them by Community law or the [agreement mentioned in Paragraph 21(2)].

(2) Third country nationals who are family members of a person seeking to reunite their family within the meaning of subparagraph 1 shall be issued with a 'residence permit for family members in the strict sense' if they fulfil the conditions of part 1. If the conditions of part 1 are met, that residence permit shall be renewed for the first time after 12 months and thereafter every 24 months.

(3) Other family members of a person seeking to reunite a family within the meaning of subparagraph 1 may be issued on request with a 'residence authorisation for other family members' if they fulfil the conditions of part 1 and

1. they are relatives in the direct ascending line of the person seeking family reunification, his spouse or registered partner, provided that they are actually maintained by that person;

2. they are partners of that person who can demonstrate the existence of a permanent relationship in their country of origin and are actually being maintained; or

3. they are other family members,

a) who have already been maintained in their country of origin by the person seeking family reunification;

b) who have already lived in their country of origin under the same roof as the person seeking family reunification or

c) who suffer from serious health problems such that the person seeking family reunification is required to take care of them personally.

…'

18 The NAG considers only spouses, registered partners and unmarried minor children to be 'family members in the strict sense' and spouses and registered partners must additionally be over 21 at the time of the application. Other members of the family, in particular parents and adult children, are considered to be 'other family members'.

19 According to Paragraph 57 of the NAG, third country nationals who are family members of an Austrian citizen are given the status granted to family members of a citizen of a Member State other than the Republic of Austria where that Austrian citizen has exercised in such a Member State or in Switzerland a right of residence of more than three months and has returned to Austria at the end of that period of residence. Other than in that situation, such nationals must meet the same conditions as those imposed on other third country nationals who have moved to Austria, that is to say the conditions laid down in Paragraph 47 of the NAG.

20 The NAG repealed, with effect from 1 January 2006, the Federal Law on the entry, residence and establishment of aliens (Bundesgesetz über die Einreise, den Aufenthalt und die Niederlassung von Fremden, BGBl. I, 75/1997, 'the 1997 Law'). Under Paragraph 49 of the 1997 Law:

'(1) The family members of Austrian nationals pursuant to Paragraph 47(3), who are nationals of a third country, enjoy freedom of establishment; they are covered, save as otherwise provided below, by the provisions applicable to nationals of third countries enjoying a favourable regime under section 1. Such aliens may submit in Austria an application for an initial residence authorisation. The residence authorisations issued to them on the first two occasions shall be valid for one year each.

(2) Such third country nationals shall be issued on request with a residence authorisation of unlimited duration if the conditions for the issue of a residence permit (Paragraph 8(1)) are fulfilled and if the aliens

1. have been married for two years at least to an Austrian citizen and live with that citizen under the same roof in Austria;

…'

21 The 1997 Law also repealed the Law on Residence (Aufenthaltsgesetz, BGBl. 466/1992) and the Law on Aliens (Fremdengesetz, BGBl. 838/1992), which were in force at the time of the accession of the Republic of Austria to the European Union on 1 January 1995.

The actions in the main proceedings and the questions referred for a preliminary ruling

22 It is apparent from the order for reference that the applicants in the main proceedings are all third-country nationals who wish to live with their family members, who are European Union citizens resident in Austria and who are nationals of that Member State. It should also be noted that the Union citizens concerned have never exercised their right to free movement and that they are not maintained by the applicants in the main proceedings.

23 By contrast, it must be observed that the facts giving rise to the dispute differ as regards, inter alia, whether the entry into Austria of the applicants in the main proceedings was lawful or unlawful, their current place of residence as well as the nature of their family relationship with the Union citizen concerned and whether they are maintained by that Union citizen.

24 For instance, Mr Dereci, who is a Turkish national, entered Austria illegally and married an Austrian national by whom he had three children who are also Austrian nationals and who are still minors. Mr Dereci currently resides with his family in Austria. Mr Maduike, a Nigerian national, also entered Austria illegally and married an Austrian national with whom he currently resides in Austria.

25 By contrast, Mrs Heiml, a Sri Lankan national, married an Austrian national before entering Austria legally where she currently lives with her husband, despite the subsequent expiry of her residence permit.

26 Mr Kokollari, who entered Austria legally at the age of two with his parents who possessed Yugoslav nationality at the time, is 29 years old and states that he is maintained by his mother who is now an Austrian national. He currently resides in Austria. Mrs Stevic, a Serbian national, is 52 years old and has applied for family reunification with her father who has resided in Austria for many years and who obtained Austrian nationality in 2007. She has regularly received monthly support from her father and she claims that he would continue to support her if she resided in Austria. Mrs Stevic currently resides in Serbia with her husband and their three adult children.

27 All of the applicants in the main proceedings had their applications for residence permits in Austria rejected. In addition, Mrs Heiml, Mr Dereci, Mr Kokollaria and Mr Maduike have all been subject to expulsion orders and individual removal orders from Austria.

28 The applications were rejected by the Bundesministerium für Inneres, inter alia, on one or more of the following grounds: the existence of procedural defects in the application; failure to comply with the obligation to remain abroad whilst awaiting the decision on the application on account of either irregular entry into Austria or regular entry followed by an extended stay beyond that which was originally permitted; lack of sufficient resources; or a breach of public policy.

29 In all of the disputes in the main proceedings, the Bundesministerium für Inneres refused to apply, in respect of the applicants in the main proceedings, a similar regime to that provided for in Directive 2004/38 for the family members of a Union citizen, on the ground that the Union citizen concerned has not exercised his right of free movement. Similarly, that authority refused to grant the applicants a right of residence pursuant to Article 8 of the ECHR on the ground, in particular, that their residence status in Austria had to be considered to be uncertain from the start of their private and family life.

30 The referring court has before it the rejection of the appeals brought by the applicants in the main proceedings against the decisions of the Bundesministerium für Inneres. The referring court considers that the question arises whether the indications given by the Court in its judgment of 8 March 2011 in *Ruiz Zambrano* (C-34/09 *Ruiz Zambrano* [2011] ECR I-0000) may be applied to one or more of the disputes in the main proceedings.

31 In that regard, the referring court notes that, as in the circumstances at issue in *Ruiz Zambrano*, the third-country nationals and their family members who are Union citizens who possess Austrian nationality and who have not exercised their right of free movement wish, primarily, to live together.

32 However, unlike the situation in *Ruiz Zambrano*, there is no risk here that the Union citizens concerned may be deprived of their means of subsistence.

33 The referring court therefore asks whether the refusal of the Bundesministerium für Inneres to grant the applicants in the main proceedings a right of residence may be interpreted as leading, for their family members who are Union citizens, to a denial of the genuine enjoyment of the substance of the rights conferred on them by virtue of their status as citizens of the Union.

34 In the event that that question is answered in the negative, the referring court points out that Mr Dereci is contemplating not only reunification with his family in Austria but also the pursuit of employed or self-employed activities. In so far as the provisions of the 1997 Law were more favourable than those of the NAG, the referring court asks whether Article 13 of Decision No 1/80 and Article 41 of the Additional Protocol must be interpreted as meaning that, in a situation such as that of Mr Dereci, the more favourable provisions of the 1997 Law are applicable.

35 In those circumstances the Verwaltungsgerichtshof decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1)

(a) Is Article 20 TFEU to be interpreted as precluding a Member State from refusing to grant to a national of a non-member country – whose spouse and minor children are Union citizens – residence in the Member State of residence of the spouse and children, who are nationals of that Member State, even in the case where those Union citizens are not dependent on the national of a non-member country for their subsistence? (*Dereci* case)

(b) Is Article 20 TFEU to be interpreted as precluding a Member State from refusing to grant to a national of a non-member country – whose spouse is a Union citizen – residence in the Member State of residence of that spouse, who is a national of that Member State, even in the case where that Union citizen is not dependent on the national of a non-member country for his or her subsistence? (*Heiml* and *Maduike* cases)

(c) Is Article 20 TFEU to be interpreted as precluding a Member State from refusing to grant to a national of a non-member country – who has reached the age of majority and whose mother is a Union citizen – residence in the Member State of residence of the mother, who is a national of that Member State, even in the case where it is not the Union citizen who is dependent on the national of a non-member country for her subsistence but rather that national of a non-member country who is dependent on the Union citizen for his subsistence? (*Kokollari* case)

(d) Is Article 20 TFEU to be interpreted as precluding a Member State from refusing to grant to a national of a non-member country – who has reached the age of majority and whose father is a Union citizen – residence in the Member State of residence of the father, who is a national of that Member State, even in the case where it is not the Union citizen who is dependent on the national of a non-member country for his subsistence but rather the national of a non-member country who receives subsistence support from the Union citizen? (*Stevic* case)

(2) If any of the questions under 1 is to be answered in the affirmative:

Does the obligation on the Member States under Article 20 TFEU to grant residence to nationals of non-member countries relate to a right of residence which follows directly from European Union law, or is it sufficient that the Member State grants the right of residence to the national of a non-member country on the basis of its law establishing such a right?

(3)

(a) If, according to the answer to Question 2, a right of residence exists by virtue of European Union law:

Under what conditions, exceptionally, does the right of residence which follows from European Union law not exist, or under what conditions may the national of a non-member country be deprived of the right of residence?

(b) If, according to the answer to Question 2, it should be sufficient for the national of a non-member country to be granted the right of residence on the basis of the law of the Member State concerned which establishes such a right:

Under what conditions may the national of a non-member country be denied the right of residence, notwithstanding an obligation in principle on the Member State to enable that person to acquire residence?

(4) In the event that Article 20 TFEU does not prevent a national of a non-member country, as in the situation of Mr Dereci, from being denied residence in the Member State:

Does Article 13 of Decision No 1/80 of 19 September 1980 …, or Article 41 of the Additional Protocol…, which, according to Article 62 thereof, forms an integral part of the [Association] Agreement …, preclude, in a case such as that of Mr Dereci, the subjection of the initial entry of a Turkish national to stricter national rules than those which previously applied to the initial entry of Turkish nationals, even though those national provisions which had facilitated the initial entry did not enter into force until after the date on which the aforementioned provisions concerning the association with Turkey entered into force in the Member State in question?'

36 By order of the President of the Court of 9 September 2011, the accelerated procedure is to be applied to this reference for a preliminary ruling pursuant to under Article 23a of the Statute of the Court of Justice of the European Union and the first paragraph of Article 104a of the Rules of Procedure of the Court.

Consideration of the questions referred

The first question

37 The first question must be understood as seeking to determine, in essence, whether European Union law and, in particular, the provisions concerning citizenship of the Union, must be interpreted as precluding a Member State from refusing to grant residence within its territory to a third country national, although that third country national wishes to reside with a family member who is a European Union citizen, resident in that Member State and a national of that Member State, who has never exercised his right to free movement and who is not maintained by that third country national.

Observations submitted to the Court

38 The Austrian, Danish, German, Irish, Netherlands, Polish and United Kingdom Governments and the European Commission consider that the provisions of European Union law concerning citizenship of the Union do not preclude a Member State from refusing to grant a right of residence to a third country national in situations such as those in the main proceedings.

39 According to those governments and to the Commission, firstly, Directive 2004/38 does not apply to the disputes in the main proceedings, given that the Union citizens concerned have not exercised their right to free movement and, secondly, the provisions of the TFEU concerning citizenship of the Union do not apply either in so far as the disputes concern purely internal situations that possess no connecting factors to European Union law.

40 In essence, they consider that the principles laid down in *Ruiz Zambrano* apply to very exceptional situations in which the application of a national measure would lead to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of the status of citizen of the Union. In this case, the events which gave rise to the disputes in the main proceedings differ substantially from those which gave rise to the aforementioned judgment in so far as the Union citizens concerned were not at risk of having to leave the territory of the Union and thus of being denied the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. Similarly, according to the Commission, neither is there a barrier to the exercise of the right conferred on Union citizens to freedom of movement and residence within the territory of the Member States.

41 Mr Dereci, on the other hand, considers that European Union law must be interpreted as precluding a Member State from refusing to grant residence within its territory to a third country national, although that national wishes to reside with his wife and three children who are European Union citizens resident in that Member State and who are nationals of that Member State.

42 According to Mr Dereci, the question whether there is a cross-border situation or not is irrelevant. In that regard, Article 20 TFEU should be interpreted as meaning that the question to be taken into consideration is whether the Union citizen is denied the genuine enjoyment of the substance of the rights conferred by virtue of his status. This is the case for Mr Dereci's children in so far as they are maintained by him, and the effectiveness of that maintenance is likely to be compromised if they were subject to expulsion from Austria.

43 Lastly, the Greek Government considers that developments in the case-law of the Court impose an obligation to be guided, by analogy, by the provisions of European Union law, in particular by the provisions of Directive 2004/38, and therefore to grant residence to the applicants in the main proceedings, provided the following conditions are satisfied. First of all, the situation of the Union citizens who have not exercised their right to free movement should be similar to that of those who have exercised that same right, which would mean, in this case, that a national and his family members must satisfy the conditions laid down by that directive. Second, the national measures should entail a significant infringement of the right of free movement and residence. Third, national law should not provide at least equivalent protection to the party concerned.

The Court's reply

– **Applicability of Directives 2003/86 and 2004/38**

44 It should be noted at the outset that the applicants in the main proceedings are all third country nationals who have applied for the right of residence in a Member State in order to live with their family members who are European Union citizens and who have not exercised their right to free movement within the territory of the Member States.

45 In order to answer the first question, as reformulated by the Court, it is necessary to analyse at the outset whether Directives 2003/86 and 2004/38 are applicable to the applicants in the main proceedings.

46 So far as concerns, first of all, Directive 2003/86, it must be stated that, under Article 1, its purpose is to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.

47 However, in accordance with Article 3(3) of Directive 2003/86, that directive is not to apply to members of the family of a Union citizen.

48 In so far as the disputes in the main proceedings concern Union citizens who reside in a Member State and their family members who are third country nationals who wish to enter and to reside in that Member State for the purposes of living as a family with those citizens, it must be held that Directive 2006/38 is not applicable to the applicants in the main proceedings.

49 Furthermore, as the Commission has correctly observed, although the proposal for a Council Directive on the right to family reunification ((2000/C 116 E/15), COM(1999)638 final - 1999/0258 (CNS)), submitted by the Commission on 11 January 2000 (OJ C 116 E, p. 66), included within its scope Union citizens who have not exercised their right to free movement, that inclusion was deleted in the course of the legislative process leading to Directive 2003/86.

50 Second, the Court has already had occasion to point out that Directive 2004/38 aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by the Treaty and that it aims in particular to strengthen that right (see Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraphs 82 and 59, and Case C-434/09 *McCarthy* [2011] ECR I-0000, paragraph 28).

51 As is apparent from paragraphs 24 to 26 of the present judgment, Mrs Heiml, Mr Dereci and Mr Maduike, as spouses of Union citizens, fall within the definition of ‘family member’ in point 2 of Article 2 of Directive 2004/38. Similarly, Mr Kokollari and Mrs Stevic, as direct descendants over the age of 21 of Union citizens, are covered by that definition provided that the requirement of being dependent on those citizens is satisfied, pursuant to point 2(c) of Article 2 of that Directive.

52 However, as the referring court observed, Directive 2004/38 does not apply in situations such as those at issue in the main proceedings.

53 Indeed, as provided for in Article 3(1) of Directive 2004/38, that directive applies to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 of the directive who accompany them or join them in that Member State (see *Ruiz Zambrano*, paragraph 39).

54 The Court has already had occasion to state that, in accordance with a literal, teleological and contextual interpretation of that provision, a Union citizen, who has never exercised his right of free movement and has always resided in a Member State of which he is a national, is not covered by the concept of ‘beneficiary’ for the purposes of Article 3(1) of Directive 2004/38, so that that directive is not applicable to him (*McCarthy*, paragraphs 31 and 39).

55 Similarly, it has been held that, in so far as a Union citizen is not covered by the concept of ‘beneficiary’ for the purposes of Article 3(1) of Directive 2004/38, their family member is not covered by that concept either, given that

the rights conferred by that directive on the family members of a beneficiary of that directive are not autonomous rights of those family members, but derived rights, acquired through their status as members of the beneficiary's family (see, so far as concerns spouses, *McCarthy*, paragraph 42, and the case-law cited).

56 Indeed, not all third country nationals derive rights of entry into and residence in a Member State from Directive 2004/38, but only those who are family members, within the meaning of point 2 of Article 2 of that directive, of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national (*Metock and Others*, paragraph 73).

57 In the present case, as the Union citizens concerned have never exercised their right to free movement and have always resided in a Member State of which they are nationals, it must be held that they are not covered by the concept 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, so that that directive is neither applicable to them nor to their family members.

58 It follows that Directives 2003/86 and 2004/38 are not applicable to third country nationals who apply for the right of residence in order to join their European Union citizen family members who have never exercised their right to free movement and who have always resided in the Member State of which they are nationals.

– **Applicability of the Treaty provisions concerning citizenship of the Union**

59 Notwithstanding the inapplicability to the disputes in the main proceedings of Directives 2003/86 and 2004/38, it is necessary to consider whether the Union citizens concerned by those disputes may rely on the provisions of the Treaty concerning citizenship of the Union.

60 In that regard, it must be borne in mind that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to situations which have no factor linking them with any of the situations governed by European Union law and which are confined in all relevant respects within a single Member State (see, to that effect, Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 33; *Metock and Others*, paragraph 77 and, *McCarthy*, paragraph 45).

61 However, the situation of a Union citizen who, like each of the citizens who are family members of the applicants in the main proceedings, has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation (see Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 22, and *McCarthy*, paragraph 46).

62 Indeed, the Court has stated several times that citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see *Ruiz Zambrano*, paragraph 41, and the case-law cited).

63 As nationals of a Member State, family members of the applicants in the main proceedings enjoy the status of Union citizens under Article 20(1) TFEU and may therefore rely on the rights pertaining to that status, including against their Member State of origin (see *McCarthy*, paragraph 48).

64 On this basis, the Court has held that Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status (see *Ruiz Zambrano*, paragraph 42).

65 Indeed, in the case leading to that judgment, the question arose as to whether a refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside and a refusal to grant such a person a work permit have such an effect. The Court considered in particular that such a refusal would lead to a situation where those children, who are citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. In those circumstances, those citizens of the Union would,

in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union (see *Ruiz Zambrano*, paragraphs 43 and 44).

66 It follows that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.

67 That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.

68 Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.

69 That finding is, admittedly, without prejudice to the question whether, on the basis of other criteria, inter alia, by virtue of the right to the protection of family life, a right of residence cannot be refused. However, that question must be tackled in the framework of the provisions on the protection of fundamental rights which are applicable in each case.

– **The right to respect for private and family life**

70 As a preliminary point, it must be observed that in so far as Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), concerning respect for private and family life, contains rights which correspond to rights guaranteed by Article 8(1) of the ECHR, the meaning and scope of Article 7 of the Charter are to be the same as those laid down by Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights (Case C-400/10 PPU *McB.* [2010] ECR I-0000, paragraph 53).

71 However, it must be borne in mind that the provisions of the Charter are, according to Article 51(1) thereof, addressed to the Member States only when they are implementing European Union law. Under Article 51(2), the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does not 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 (*McB.*, paragraph 51, see also Joined Cases C-483/09 and C-1/10 *Gueye and Salmerón Sánchez* [2011] ECR I-0000, paragraph 69).

72 Thus, in the present case, if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR.

73 All the Member States are, after all, parties to the ECHR which enshrines the right to respect for private and family life in Article 8.

74 In the light of the foregoing observations the answer to the first question is that European Union law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for

the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the referring court to verify.

The second and third questions

75 Since the second and third questions were raised only in the event of the first question being answered in the negative, there is no need to provide an answer.

The fourth question

76 By its fourth question, the referring court is asking, essentially, whether Article 13 of Decision No 1/80 or Article 41(1) of the Additional Protocol must be interpreted as meaning that they preclude a Member State from subjecting the initial entry of a Turkish national to stricter national rules than those which previously applied to such entry, even though those previous national rules, which had relaxed the initial entry regime, did not enter into force until after those articles were given effect in the Member State in question, following its accession to the Union.

Observations submitted to the Court

77 The Austrian, German and United Kingdom Governments consider that neither Article 13 of Decision No 1/80 nor Article 41(1) of the Additional Protocol preclude stricter national rules than those which existed on the entry into force of those provisions from being applied to Turkish nationals wishing to pursue employed or self-employed activities in a Member State, given that those provisions apply only to Turkish nationals whose position was lawful in the host Member State and do not cover situations such as that of Mr Dereci, who entered and has always resided unlawfully in Austria.

78 On the other hand, the Netherlands Government and the Commission consider that such provisions preclude the introduction into the national legislation of the Member States of any new restriction on the exercise of freedom of movement for workers and freedom of establishment, including those relating to the conditions of substance or procedure as regards the initial entry into the territory of the Member States.

79 Mr Dereci observes that he entered Austria on the basis of an application for asylum and that he had withdrawn that application because of his marriage to an Austrian national. That marriage, under the law in force at the time, gave him a right of establishment. Moreover, from 1 July 2002 to 30 June 2003, he worked as a salaried employee and, subsequently, from 1 October 2003 to 31 August 2008, he was self-employed, having taken over his brother's hairdressing salon.

Reply of the Court

80 As a preliminary point, it must be observed that the fourth question relates to Article 13 of Decision No 1/80 and to Article 41(1) of the Additional Protocol without making any distinction between them.

81 Although those two provisions have the same meaning, each of them has been given a very specific scope, with the result that they cannot be applied concurrently (Joined Cases C-317/01 and C-369/01 *Abatay and Others* [2003] ECR I-12301, paragraph 86).

82 In that connection, it must be observed that, according to the referring court, Mr Dereci married an Austrian national on 24 July 2003 and subsequently, on 24 June 2004, submitted an initial application for a residence authorisation under the 1997 law. Moreover, Mr Dereci states that it was at that time that he took over his brother's hairdressing salon.

83 It follows that Mr Dereci's situation concerns freedom of establishment and is thus covered by Article 41(1) of the Additional Protocol.

84 Moreover, it must be borne in mind that the Law on Residence and the Law on Aliens, mentioned in paragraph 21 of the present judgment, were the provisions applicable to the conditions for the exercise of freedom of establishment of Turkish nationals in Austria, at the time of the accession of that Member State to the European Union on 1 January 1995 and, therefore, of the entry into force of the Additional Protocol in that Member State.

85 Although the 1997 Law repealed those laws, it was in turn repealed by the NAG as of 1 January 2006, and the latter legislation constituted, according to the referring court, a stricter approach compared with the 1997 Law, as regards the conditions for the exercise of freedom of establishment by Turkish nationals.

86 Accordingly, the fourth question must be understood as seeking to know whether Article 41(1) of the Additional Protocol must be interpreted as meaning that the enactment of new legislation more restrictive than the previous legislation, which, for its part, had relaxed earlier legislation concerning the conditions for the exercise of the freedom of establishment of Turkish nationals at the time of the entry into force of that protocol in the Member State concerned must be considered to be a 'new restriction' within the meaning of that provision.

87 In that regard, it must be recalled that Article 41(1) of the Additional Protocol has direct effect in the Member States, so that the rights which it confers on the Turkish nationals to whom it applies may be relied on before the national courts to prevent the application of inconsistent rules of national law. That provision lays down, in terms which are clear, precise and unconditional, an unequivocal 'standstill' clause, which contains an obligation entered into by the contracting parties which amounts in law to a duty not to act (see Case C-16/05 *Tum and Dari* [2007] ECR I-7415, paragraph 46, and the case-aw cited).

88 According to consistent case-law, even if the 'standstill' clause set out in Article 41(1) of the Additional Protocol is not, in itself, capable of conferring on Turkish nationals – on the basis of European Union legislation alone – a right of establishment or, as a corollary, a right of residence, nor a right to freedom to provide services or to enter the territory of a Member State, the fact remains that such a clause prohibits generally the introduction of any new measures having the object or effect of making the exercise by a Turkish national of those economic freedoms on the territory of that Member State subject to stricter conditions than those which applied to him at the time when the Additional Protocol entered into force with regard to the Member State concerned (see Case C-228/06 *Soysal and Savatli* [2009] ECR I-1031, paragraph 47, and the case-law cited).

89 A standstill clause, such as that embodied in Article 41(1) of the Additional Protocol, does not operate in the same way as a substantive rule by rendering inapplicable the relevant substantive law which it replaces, but as a quasi-procedural rule which specifies, *ratione temporis*, the provisions of a Member State's legislation that must be referred to for the purposes of assessing the position of a Turkish national who wishes to exercise freedom of establishment in a Member State (*Tum and Dari*, paragraph 55, and Case C-186/10 *Oguz* [2011] ECR I-0000, paragraph 28).

90 In that regard, Article 41(1) of the Additional Protocol is intended to create conditions conducive to the progressive establishment of freedom of establishment by way of an absolute prohibition on national authorities from creating any new obstacle to the exercise of that freedom by making more stringent the conditions which exist at a given time, so as not to render more difficult the gradual securing of that freedom between the Member States and the Republic of Turkey. That provision thus appears to be the necessary corollary to Article 13 of the Association Agreement, and constitutes the indispensable precondition for achieving the progressive abolition of national restrictions on freedom of establishment (*Tum and Dari*, paragraph 61, and the case-law cited).

91 Accordingly, even if, initially, with a view to the progressive implementation of that freedom, existing national restrictions as regards establishment may be retained, it is important to ensure that no new obstacle is introduced in order not to further obstruct the gradual implementation of such freedom of establishment (*Tum and Dari*, paragraph 61, and the case-law cited).

92 The Court has already had occasion to find, as regards a national provision concerning the granting of a residence permit to Turkish nationals that it is necessary to ensure that the Member States do not depart from the objective

pursued by reversing measures which they have adopted in favour of the free movement of Turkish workers subsequent to the entry into force of Decision No 1/80 within their territory (Joined Cases C-300/09 and C-301/09 *Toprak and Oguz* [2010] ECR I-0000, paragraph 55).

93 Moreover, the Court has held that Article 13 of Decision No 1/80 must be interpreted as meaning that a tightening of a provision which provided for a relaxation of the provision applicable to the conditions for the exercise of the freedom of movement of Turkish workers at the time of the entry into force of Decision No 1/80 in the Member State concerned, constitutes a 'new restriction', even where that tightening does not make those conditions more stringent than those under the provision applicable at the time of the entry into force of Decision No 1/80 in that Member State (see, to that effect, *Toprak and Oguz*, paragraph 62).

94 Having regard to the convergence in the interpretation of both Article 41(1) of the Additional Protocol and Article 13 of Decision No 1/80 as regards the objective pursued, it must be held that the scope of the standstill obligation in Article 13 extends by analogy to any new obstacle to the exercise of freedom of establishment, freedom to provide services or freedom of movement for workers which makes more stringent the conditions which exist at a given time (see, to that effect, *Toprak and Oguz*, paragraph 54), so that it is necessary to ensure that the Member States do not depart from the objective pursued by the standstill clauses by reversing measures which they have adopted in favour of the free movement of Turkish workers subsequent to the entry into force of Decision No 1/80 or the Additional Protocol within their territory.

95 In the present case, it is not disputed that, with the entry into force of the NAG on 1 January 2006, the conditions for the exercise of freedom of establishment for Turkish nationals in Mr Dereci's position worsened.

96 According to Paragraph 21 of the NAG, third country nationals, including Turkish nationals in Mr Dereci's position, must, as a general rule, submit their application for residence from outside Austrian territory and are required to remain outside that territory until a decision has been made on their application.

97 On the other hand, pursuant to Paragraph 49 of the 1997 Law, Turkish nationals in Mr Dereci's position, as family members of Austrian nationals, enjoyed freedom of establishment and could submit an application for an initial establishment permit in Austria.

98 In those circumstances, it must be held that, by worsening the conditions for the exercise of freedom of establishment by Turkish nationals compared with the conditions applicable to them previously under the provisions adopted since the entry into force of the Additional Protocol, the NAG constitutes a 'new restriction' within the meaning of Article 41(1) of that protocol.

99 Finally, as regards the argument relied on by the Austrian, German and United Kingdom Governments, according to which Mr Dereci was in an 'unlawful position' and could not therefore benefit from the application of Article 41(1) of the Additional Protocol, suffice it to note that, according to the order for reference, while it is true that Mr Dereci entered Austrian territory illegally in November 2001, the fact remains that, at the time he lodged his application for establishment, he had, under the national legislation in force at the time, a right of establishment by reason of his marriage to an Austrian national, and he was entitled to submit an application to that effect in Austria, which, moreover, he did. According to the referring court, it was only the entry into force of the NAG which caused his initially lawful residence to become subsequently unlawful, which led to the rejection of his application for a residence authorisation.

100 It follows that his position cannot be classed as unlawful, given that that unlawfulness arose following the application of the provision which constitutes a new restriction.

101 In the light of the foregoing observations, the answer to the fourth question is that Article 41(1) of the Additional Protocol must be interpreted as meaning that the enactment of new legislation more restrictive than the previous legislation, which, for its part, relaxed earlier legislation concerning the conditions for the exercise of the freedom of

establishment of Turkish nationals at the time of the entry into force of that protocol in the Member State concerned must be considered to be a 'new restriction' within the meaning of that provision.

Costs

102 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **European Union law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the referring court to verify.**

2. **Article 41(1) of the Additional Protocol, signed in Brussels on 23 November 1970 and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972, must be interpreted as meaning that the enactment of new legislation more restrictive that the previous legislation, which, for its part, relaxed earlier legislation concerning the conditions for the exercise of the freedom of establishment of Turkish nationals at the time of the entry into force of that protocol in the Member State concerned must be considered to be a 'new restriction' within the meaning of that provision.**

Joined Cases C-523/11 and C-585/11: Laurence Prinz v Region Hannover and Philipp Seeberger v Studentenwerk Heidelberg

OPINION OF ADVOCATE GENERAL

Sharpston

delivered on 21 February 2013 (1)

Joined Cases C-523/11 and C-585/11

Laurence Prinz

v

Region Hannover

(Request for a preliminary ruling from the Verwaltungsgericht Hannover (Germany))

Philipp Seeberger

v

Studentenwerk Heidelberg

(Request for a preliminary ruling from the Verwaltungsgericht Karlsruhe (Germany))

(Freedom of movement for EU citizens – Funding for higher education abroad – Residence requirement – 'Three-year rule' – Proportionality)

1. Germany is one of the Member States where European Union ('EU') citizens may apply for funding of higher education and training at institutions located elsewhere in the European Union. Miss Prinz and Mr Seeberger, both German nationals, applied for such funding. Their applications were refused because neither could demonstrate three years of uninterrupted residence in Germany immediately before commencing their studies abroad ('the three-year rule'). The three-year rule is imposed, the German Government says, in order to address the risk of an unreasonable financial burden which might have effects on the overall level of assistance available ('the economic objective'), to identify those who are integrated into German society and to ensure that funding is awarded to those students who are most likely to return to Germany following their studies and contribute there to society ('the social objective'). Students who cannot show three years of such uninterrupted residence are refused funding for the full duration of their studies abroad. They can however receive funding for the first year of such studies or for the full duration of studies in Germany.

Legal background

EU law

Treaty on the Functioning of the European Union

2. Article 20 TFEU states:

‘1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States;

…

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.’

3. According to Article 21(1) TFEU, every EU citizen ‘shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect’.

4. Pursuant to Article 165(1) TFEU, the Member States are responsible ‘for the content of teaching and the organisation of education systems’. Article 165(1) states that ‘[t]he Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action’. According to the second indent of Article 165(2), Union action is also to be aimed at ‘encouraging mobility of students’.

Directive 2004/38/EC

5. Article 24 of Directive 2004/38 (2) provides:

‘1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged … prior to acquisition of the right of permanent residence, [(3)] to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.’

National law

6. The Bundesausbildungsförderungsgesetz (Bundesgesetz über individuelle Förderung der Ausbildung - Bundesausbildungsförderungsgesetz: ‘the BAföG’ or ‘the student assistance law’) is the German law that sets out conditions for obtaining funding of studies and training. It has been amended several times, (4) including in order to give effect to the Court’s judgment in *Morgan and Bucher*. (5) There, the Court found that what are now Articles 20 and 21 TFEU preclude a condition such as that included at point 3 of Paragraph 5(2) of the (old) student assistance law making the award of a grant for studies at an educational establishment abroad dependent on whether those studies are a continuation of the education or training pursued for at least one year in the Member State of origin (the ‘first-stage condition’).

7. Subparagraph 1 of the revised Paragraph 5 defines ‘permanent residence’ as the place which is the centre of interests, not only temporarily, of the person concerned, irrespective of any intention to become permanently established. It further provides that a person who resides at a place only for education or training purposes has not established his permanent residence there.

8. Point 3 of Paragraph 5(2) states that students having their permanent residence in Germany shall be awarded a grant for attending an educational or training establishment in an EU Member State or in Switzerland to start or continue education or training there.

9. According to Paragraph 6, entitled 'Assistance for Germans abroad', German nationals who have their permanent residence outside Germany may be awarded an education or training grant to study where they reside or in a neighbouring State if that is justified by the particular circumstances of an individual case.

10. Paragraph 8(1) indicates that German nationals and other EU citizens who enjoy a right of permanent residence may apply for funding.

11. Paragraph 16 sets out the duration for which funding of studies or training can be obtained. Paragraph 16(3) contains the three-year rule and reads as follows:

'… an education or training grant shall be awarded … in the cases referred to in Paragraph 5(2)(3), for more than a year only if, at the commencement of a stay abroad beginning after 31 December 2007, the student has been permanently resident in Germany for at least the previous three years.'

12. The explanatory memorandum of the Federal Government to the draft legislation introducing the three-year rule stated that that rule was intended to ensure that grants for the full duration of education and training courses abroad were not awarded to students who had hardly resided in Germany. It is a principle of German education policy that receipt of education and training grants is normally contingent upon the education or training being completed in Germany or at least upon there being a special connection to Germany. The explanatory memorandum notes that other Member States also impose a residence requirement as an additional requirement for a longer-term grant for studies abroad. That requirement gives concrete expression to the justifiable interest of the State awarding social benefits to restrict financial benefits funded from the public purse to those who can demonstrate a minimum degree of close relationship to that State.

Facts, procedure and questions referred

Prinz

13. Laurence Prinz was born in Cologne in 1991 and is a German national. She lived for about 10 years with her family in Tunisia where her father worked for a German firm. Since January 2007, she has lived with her family in Germany.

14. From February 2007, Miss Prinz attended school in Germany and completed her secondary education there in June 2009. On 1 September 2009, she started business management studies at the Erasmus University in the Netherlands.

15. Before commencing her studies in the Netherlands, Miss Prinz applied on 18 August 2009 to the relevant German authority for funding. By decision of 30 April 2010, she was granted funding for the academic year 2009/10.

16. Miss Prinz made a further application for funding for the following academic year. Her application was rejected by decision of 4 May 2010 because she had permanently resided in Germany only as from January 2007 and therefore did not satisfy the three-year rule.

17. Miss Prinz appealed against that decision to the Verwaltungsgericht Hannover (Administrative Court, Hanover). First, she argued that she had been resident in Germany for a total of three years and four months, namely from September 1993 to April 1994 (6) and from January 2007 to August 2009. Second, she claimed that a residence requirement such as the three-year rule is contrary to the right of freedom of movement laid down in Article 21 TFEU.

18. The Third Chamber of the Verwaltungsgericht stayed the proceedings and referred the following question to the Court for a preliminary ruling:

‘Does it constitute a restriction of the right to freedom of movement and residence conferred on citizens of the [EU] by Articles 20 and 21 TFEU, which is not justified under [EU] law, if, pursuant to the [student assistance law], a German national, who has her permanent residence in Germany and attends an educational establishment in a Member State of the European Union, is awarded an education grant for attending that educational establishment abroad for only one year because when she commenced her stay abroad she had not already had her permanent residence in Germany for at least three years?’

19. Written observations have been submitted by the Austrian, Danish, Finnish, German, Greek, Netherlands and Swedish Governments and by the Commission. At the hearing on 29 November 2012, oral submissions were made by the same parties except for the Netherlands Government.

Seeberger

20. Philipp Seeberger is a German national. He was born in Germany in 1983 and lived there with his parents, who are also German nationals, until 1994. From 1989 to 1994, he attended primary and secondary schools in Germany.

21. Between 1994 and December 2005, Mr Seeberger lived with his parents in Spain, where his father worked as a self-employed business consultant. The national court states that, in moving there for that reason, Mr Seeberger’s father exercised his rights under what are now Articles 45 and 49 TFEU. Mr Seeberger completed his secondary schooling in Spain, leaving in 2000 after passing the lower secondary examination. In April 2005, he qualified as an estate agent after professional training undertaken during 2004 and 2005, still in Spain. In January 2006, Mr Seeberger’s parents returned to Germany. Although he claims that, as of that time, he also had his permanent residence in Germany, Mr Seeberger was not registered in Munich until 26 October 2009. A statement by a former employer appears to show that he completed an internship as a web designer in Cologne between 2 April and 27 June 2007.

22. In April 2009, Mr Seeberger passed an external examination admitting him to study at the University of the Balearics in Palma de Mallorca. In September 2009, he began a course in economics there. He applied in Germany for funding for those studies.

23. The relevant German authority rejected his application on the grounds that there was insufficient evidence that he had actually established permanent residence in Germany for the three years immediately prior to the start of his course.

24. Mr Seeberger challenged that decision, arguing that the three-year rule was contrary to his right of freedom of movement as an EU citizen. Following the rejection of that challenge, Mr Seeberger initiated proceedings before the Verwaltungsgericht Karlsruhe (Administrative Court, Karlsruhe). There, he argued that his freedom of movement was restricted because the three-year rule required him to abandon his permanent residence in another Member State and to move his permanent residence back to Germany well in advance in order to be eligible for funding of his studies abroad.

25. The Fifth Chamber of the Verwaltungsgericht Karlsruhe has stayed the proceedings and referred the following question to the Court for a preliminary ruling:

‘Does [EU] law preclude national legislation which denies an education or training grant for studies in another Member State solely on the ground that the student, who has exercised the right to freedom of movement, has not, at the commencement of the studies, had his permanent residence in his Member State of origin for at least three years?’

26. Written observations have been submitted by Mr Seeberger, the Austrian, Danish, Finnish, German, Netherlands and Swedish Governments and by the Commission. At the hearing on 29 November 2012, oral

submissions were made by the same parties who filed written observations except for the Netherlands Government; the Greek Government also attended and made oral submissions.

Assessment

Preliminary remarks

27. In both cases, the Court is asked to consider whether Articles 20 and 21 TFEU preclude a Member State from making funding of studies abroad dependent on a residence requirement such as the three-year rule.

28. Unlike the referring court in *Prinz*, that in *Seeberger* has formulated its question in terms that are silent as to whether the student is a national of the Member State awarding the grant. However, the rest of the reference in that case makes it clear that guidance is sought in relation to the position of a German national.

29. Prior to exercising their freedom of movement to study elsewhere in the EU, Miss Prinz and Mr Seeberger both moved away from Germany for different reasons. Miss Prinz moved outside the EU when her father took up employment in Tunisia. Mr Seeberger moved to Spain when his father exercised his right of freedom of establishment to engage in a self-employed activity there.

30. Unlike Miss Prinz, Mr Seeberger thus appears previously to have exercised his right of freedom of movement under EU law. That fact does not affect the analysis of the questions referred to the Court because both, as EU citizens, may rely against their Member State of origin on rights conferred by that status, (7) such as the freedom to move in order to study elsewhere in the EU. The Commission none the less questions whether the position of Mr Seeberger should also be examined under the law on freedom of establishment. I shall address this point as an issue pertaining to the relevant law. (8)

31. The Court has already considered on a number of occasions whether the Member States can make funding of studies dependent on a residence condition of the same general nature as that at issue. These cases have appeared before the Court in various guises. They have involved migrant workers and their dependent family members, (9) but also students who were not basing their claim to funding on their link to an EU citizen engaged in gainful economic activity. (10) They have concerned requests for funding from the Member State of origin, (11) the Member State of employment, (12) or the host Member State where the student hoped to study. (13) Some cases predate the entry into force of Directive 2004/38 while others refer directly or indirectly to Article 24(2) of that directive. In many of these cases, the measure at issue was claimed to be justified because, inter alia, it avoided an unreasonable burden on the public budget of the Member State awarding the funding and/or made it possible to identify those who were sufficiently connected to that Member State and those who, following their studies, were likely to return to the Member State awarding the funding.

32. Whilst the Court accepts that the Member States enjoy wide discretion in defining whether and how to finance studies and to whom to award that funding, it has, in my view, been less clear in explaining precisely what elements are to be taken into account in examining whether a particular restriction can be justified. Is it sufficient for a Member State to put forward the economic objective or must it also establish the existence of a risk of an unreasonable financial burden? May a Member State justify a restriction like the three-year rule based on the objective of granting funding to students showing a certain degree of integration, independently of concerns about the financial cost of the scheme? Is it appropriate to assess the proportionality of a restriction like the three-year rule in relation to the economic objective by verifying whether that rule is not more restrictive than necessary to establish the required degree of integration?

33. These, and possibly other, uncertainties may explain why some Member States continue to use a residence requirement as the sole measure to achieve what are clearly complex objectives, why six Member States have intervened in the present cases in support of Germany and why the Court is repeatedly asked to decide whether some variation on a residence requirement is in conformity with EU law.

Relevant law

34. The referring courts have asked the Court solely to interpret the Treaty provisions on EU citizenship.

35. They were clearly right not to ask the Court to examine Article 24 of Directive 2004/38. That provision governs when a host Member State is required to give EU citizens who reside in its territory on the basis of the directive equal treatment with its own nationals, including in relation to maintenance aid for studies. However, there is no indication that Miss Prinz and Mr Seeberger have applied for funding in, respectively, the Netherlands and Spain. Rather, they have applied for funding to their Member State of origin.

36. What of the Commission's suggestion that Mr Seeberger's position should be examined by reference to the law relating to freedom of establishment?

37. The three-year rule was not in place when Mr Seeberger and his family exercised their right to move to Spain. It cannot therefore have affected that initial move.

38. Now that the rule is in place, however, it does potentially have a 'chilling effect' on any EU citizen contemplating exercising free movement rights within the EU as a worker, a self-employed person or simply as a citizen. It also disadvantages those who have exercised those rights and do not return to Germany sufficiently far in advance to satisfy the three-year rule.

39. The referring court was asked to consider the validity of the decision refusing funding for Mr Seeberger. It has made no findings as to whether Mr Seeberger is still dependent on (either of) his parents or, if not, when he stopped being dependent. The Court therefore has insufficient elements to understand whether the referring court should approach the case before it on the basis that Mr Seeberger exercised free movement rights in connection with (i) his father's exercise of his freedom of establishment and (ii) his father's subsequent decision to return to his Member State of origin.

40. I add that nothing in the orders for reference suggests that Miss Prinz and Mr Seeberger are relying on their status as economically active EU citizens or on relevant family ties to, for example, a migrant worker in Germany. I shall therefore, like the referring courts, approach the matter exclusively on the basis of Articles 20 and 21 TFEU.

Definition of residence

41. Where one physically resides is a question of fact. However, the place where a person actually lives or is registered as living may not necessarily be the place at which a Member State defines, as a matter of law, that person to have his permanent residence or domicile.

42. The three-year rule is defined by reference to uninterrupted permanent residence in Germany. In accordance with Paragraph 5(1) of the student assistance law, permanent residence is defined as 'the place which is the centre of interests, not only temporarily, of the person concerned, irrespective of the intention to become permanently established'.

43. Yet, at least in the case of Mr Seeberger, it would appear that the decision refusing him funding was based on a different notion of residence. Mr Seeberger claims to have resided in Germany from January 2006 but he was only registered as resident in Munich as of 26 October 2009.

44. At the hearing, the German Government confirmed that the relevant authorities sometimes use the date of registration as an indicative fact to determine whether the three-year rule is satisfied. If funding is refused because the period between the date of registration and starting studies abroad is less than three years, an applicant may challenge that decision and produce evidence that he resided in Germany prior to registering there before the German courts. The German Government emphasised that all facts and circumstances must be considered in assessing whether the applicant

has his residence in Germany within the meaning of Paragraph 5(1) of the student assistance law.

Restriction on EU citizens' right of freedom of movement

45. EU law does not oblige the Member States to award funding for studies pursued either within their territory or elsewhere. However, whilst the Member States remain competent in this area, they must none the less comply with EU law in exercising their competences. (14)

46. The referring courts in *Prinz* and *Seeberger* consider that the three-year rule is likely to restrict free movement rights for EU citizens under Articles 20 and 21 TFEU. For reasons similar to those applied by the Court in *Morgan and Bucher*, (15) they consider that the three-year rule is liable to discourage an EU citizen from moving to another Member State to start study or training there or, if such study or training abroad has already commenced, to put pressure on the student to discontinue the studies and return to Germany.

47. I agree that the three-year rule is a restriction.

48. A measure that makes entitlement to a social advantage dependent on residence in the Member State granting it is likely to restrict free movement. It disadvantages any EU citizen who has already exercised his freedom of movement rights (namely, any citizen who resides or has resided elsewhere in the EU) before applying for the benefit. By its very nature, a residence requirement of the kind at issue is likely to discourage an EU citizen from exercising his right to move to another Member State (16) and pursue secondary education there prior to applying for funding for tertiary education ('the chilling effect').

49. In the present cases, Mr Seeberger finds himself at a disadvantage when he wishes to pursue studies outside Germany solely because, prior to commencing those studies, he and his parents had exercised their freedom of movement and he is not considered to have returned to Germany sufficiently far in advance of the start of his studies. Miss Prinz is also under financial pressure to study in Germany rather than follow her preferred course in the Netherlands because she cannot obtain funding to study in the Netherlands beyond the first year of her course.

50. I therefore agree that the three-year rule constitutes a restriction on the free movement rights of EU citizens conferred by Articles 20 and 21 TFEU.

51. Such a restriction can be justified only if it is based on objective considerations of public interest, is appropriate to achieve that legitimate objective and is proportionate to it, that is to say, it is not more restrictive than necessary to achieve the objective.

52. The German Government identifies two objectives on the basis of which the three-year rule can be justified. I shall consider each in turn.

Justification based on the economic objective

Legitimacy of the objective

53. The German Government relies on the Court's rulings in *Bidar* and *Morgan and Bucher* to justify the three-year rule. That approach is consistent with the explanatory memorandum to the draft legislation introducing the rule. (17)

54. In *Bidar*, the Court stated that, in relation to economically inactive EU citizens, 'it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State'. (18) As a result, it was legitimate to grant funding 'only to students who have demonstrated a certain degree of integration into the society of that State'. (19) In *Morgan and Bucher*, the Court applied the same

reasoning as regards the award by a Member State of grants to its own nationals wishing to study in another Member State, (20) before concluding that the first-stage studies condition there at issue was too general and exclusive to satisfy the proportionality test. (21)

55. The Court has thus recognised that the objective of avoiding an unreasonable burden which could have consequences for the overall level of assistance may in principle justify a restriction on freedom of movement such as the three-year rule.

56. But is it sufficient for a Member State merely to assert, without more, that such an economic objective exists?

57. In my view, it is not.

58. In *Morgan and Bucher*, the Court found that in principle considerations such as those advanced in *Bidar* may apply to grants for students wishing to study abroad 'if a risk of such an unreasonable burden *exists*'. (22) The Commission points out in the present cases that Germany has not shown the existence of the risk that it seeks to avoid or limit.

59. It is clearly for each Member State to decide what part of its public budget it is willing to set aside to fund studies at home and abroad and to assess what overall financial burden it considers to be reasonable. (23) Some Member States may decide to make only a modest amount of funding available. Others may be willing to devote a significantly larger part of their public budget to that purpose. Whilst it is not for the Court to review a Member State's decision as to what is 'reasonable', it may give guidance to national courts regarding their examination of whether, *given that decision*, covering the maintenance (and possibly other) costs of students from other Member States will create a risk of an unreasonable burden.

60. Attaching any type of condition to entitlement to a social advantage is likely to limit the number of persons who can apply successfully and hence the overall budgetary cost of making that advantage available. That fact cannot of itself suffice to justify a restriction on free movement rights under Articles 20 and 21 TFEU. Rather, I consider that a Member State must assess the actual or potential risks arising from making particular versions of funding available. Based on that assessment, it may then determine what would be an unreasonable financial burden and define measures aimed at avoiding or limiting the risk that such a burden will be created.

61. In the present cases, the German Government relies on data generated by the federal statistical office ('Statistisches Bundesamt') showing that in 2008 approximately one million German nationals lived in other Member States, including half a million in neighbouring Member States. The German Government submits that, if the residence requirement were to be eliminated, that group, together with certain non-nationals, would qualify for funding for the entire duration of studies outside Germany.

62. Whilst I see no basis for doubting the accuracy of those figures, they obviously say nothing about the existence of an actual or potential risk of an unreasonable financial burden. It is doubtful whether all Germans residing elsewhere in the EU, from babes in arms to old-age pensioners, intend to pursue further studies (and in particular outside Germany). Nor is it evident that those who do intend to be students will all apply to the German authorities for funding.

63. The German Government confirmed at the hearing that it did not have further, more detailed material to put before the Court.

64. In my view, a more robust assessment of the likely risk of 'an unreasonable financial burden that could have consequences for the overall level of assistance that may be granted' (24) is required in order to establish that a restriction such as the three-year rule is justified on the basis of the economic objective. Such an assessment would need also to consider the appropriateness of the restriction as a means of avoiding or limiting the risk that such a burden will be created.

65. To the extent that the legitimate objective recognised in *Bidar* and *Morgan and Bucher* is that of avoiding an unreasonable financial burden which might affect the overall level of assistance granted, the appropriateness and proportionality of the restriction must be assessed in relation to that objective.

66. However, whilst Germany in the present cases certainly invokes the economic objective, it also argues that the restriction is proportionate in relation to the need to give funding only to those students showing a certain degree of integration in its society.

67. That position suggests that the Member State understands the Court's case-law as showing that a restriction like the three-year rule can be justified on the basis of the need to require a certain degree of integration ('the integration objective') independently of concerns about the financial cost of the scheme (the economic objective).

68. It is true that the Court has accepted that the economic objective can be *achieved* by awarding funding only to students demonstrating a certain degree of integration in the Member State awarding the grant – whether it be the host Member State or the Member State of origin. If funding is sought from the host Member State, financial solidarity has only to be shown to students who are nationals of another Member State after an initial period of residence. (25)

69. In my Opinion in *Commission* v *Netherlands*, I set out what I understand the Court to have decided in *Bidar*. As I read that judgment, the Court did not recognise a separate integration objective. Rather, requiring evidence of a degree of integration was treated as the *means* to limit those entitled to support and hence to avert an unreasonable financial burden. (26) A residence requirement serves such a purpose. The Court in *Commission* v *Netherlands* did not decide this point. It held that the economic objective was not capable of justifying unequal treatment of migrant workers but, as part of the same analysis, recognised Member States' right to require nationals of other Member States to show a certain degree of integration in their societies in order to receive social advantages. (27)

70. As EU law currently stands, it is unreasonable to require a Member State to assume financial responsibility for a student who has no connection to it. The opposite proposition would imply that the Member States have agreed on full financial solidarity for funding students and that there is full 'mobility' of that social advantage, which is clearly not the case. Member States are thus justified in refusing funding to students who have *no meaningful connection* in order to avoid an unreasonable burden which could have consequences for the overall level of assistance. Put differently, they can limit the range of beneficiaries in order to achieve the economic objective; and it is acceptable for that purpose to use a criterion that establishes evidence of a degree of integration.

71. In my Opinion in *Commission* v *Netherlands*, I left open the possibility of reading the Court's case-law differently: that is, as indicating that a Member State can require a degree of integration *independently* of concerns about the financial cost of making funding for studies available. (28) Under such an approach, the integration objective (appropriately defined) would suffice of itself to justify the restriction on free movement rights. Whether a residence requirement such as the three-year rule was deemed to be proportionate would then depend on whether that rule was more restrictive than necessary to identify which applicants showed the required degree of connection. (29)

72. I believe that it would assist the referring courts in the present cases if the Court were to clarify its position on the relationship between the economic objective and the integration objective. Is the integration objective a separate legitimate objective capable of justifying a restriction on the right of freedom of movement, (30) including when that restriction is applied to a Member State's own nationals? Or do both objectives represent interests that are linked and that should therefore be considered as part of a single objective? Or is the degree of integration criterion merely a means to achieve the economic objective?

73. In the remaining part of my analysis I shall consider the appropriateness and proportionality of a measure such as the three-year rule in relation to each objective in turn.

Appropriateness of the restriction

– **Economic objective**

74. Clearly any measure that limits the group of beneficiaries will reduce the cost of the scheme as compared to the cost of a scheme that gave funding to all EU citizens without differentiation. The three-year rule does indeed so limit the group of potential beneficiaries.

75. However, the national court must still decide whether the three-year rule is reasonably connected to the objective of avoiding an unreasonable burden which could have consequences for the overall level of assistance. That will depend on whether the risk is reduced to a reasonable burden by the application of the three-year rule.

– **Integration objective**

76. Where a person resides normally shows where he or she is integrated into society. A requirement based on residence is therefore prima facie an appropriate means of achieving the integration objective.

Proportionality of the restriction

77. The ambiguity as to whether a restriction such as the residence requirement contained in the three-year rule can be justified on the basis of the economic objective or the integration objective appears to have resulted in false logic when it comes to assessing the proportionality of such a restriction. The Member States appear to invoke the economic objective in order to justify a restriction but then submit that the measure is proportionate by reference to the integration objective.

78. Thus, in the present cases the German Government in essence claims that the three-year rule identifies those applicants who are sufficiently connected to German society to be awarded funding paid out of the public budget. It submits that it is important to verify the existence of that connection for its own nationals because the type of solidarity underlying paying out of the public budget to fund studies is a solidarity that exists between inhabitants of a Member State and not necessarily between its nationals. (31) As a separate argument, the German Government maintains that the three-year rule operates in a manner that is transparent, offers legal certainty and is administratively efficient.

79. I will consider the proportionality of the three-year rule in relation both to the economic objective and to the integration objective.

– **Economic objective**

80. A measure like the three-year rule is proportionate if it imposes no greater restriction than is needed to bring the financial burden within the limits of the reasonable. In making that assessment, it is necessary to consider the availability of alternative but less restrictive measures. Reasons of administrative efficiency, legal certainty and transparency will enter into the equation when comparing the actual (or preferred) measure with alternative measures.

81. The national court cannot undertake that assessment without knowing (i) what is considered to be an unreasonable financial burden and (ii) what the quantitative impact of the three-year rule on that burden is estimated to be.

82. Suppose, for example, a Member State decides that it is prepared to devote EUR 800 million to student finance for tertiary education. It reviews the new arrangements that it proposes to put in place and realises that, unless it imposes some additional criterion, there is a risk that it will have to pay out over EUR 1 billion. It classes that risk as unacceptable. After examining the past residence history of a representative sample of existing students benefiting from funding (a sufficiently large sample to be statistically reliable), it reaches the conclusion that, were it to impose the requirement that the applicant must have resided four years within its territory, that would exclude sufficient prospective candidates to limit the risk of running seriously over budget. The single additional criterion is chosen in order to attain the economic objective. Provided that the risk-cost analysis is properly carried out, I do not find the

arrangements intrinsically objectionable, even though they may well result in a restriction on free movement rights of EU citizens. And, when compared with alternative measures, such a criterion might be proportionate. I emphasis, though, that such an analysis would be purely economic. The residence requirement would *not* be prayed in aid as a proxy measure for 'a certain degree of integration'.

– **Integration objective**

83. The German Government argues that limiting the group of beneficiaries, whatever their nationality, to those satisfying the three-year rule is a proportionate measure to ensure that only students who can show a sufficient degree of connection to German society obtain funding paid out of the public budget. In support of its position, it relies in particular on *Bidar* and *Förster*.

84. As I pointed out in my Opinion in *Commission* v *Netherlands*, the Court in *Bidar* did not need to examine proportionality. (32) And in *Förster* it relied on the text of Directive 2004/38 to conclude that the restriction resulting from the residence requirement at issue in that case was justified. In so doing, the Court focused on the fact that that directive lays down specific requirements with respect to the degree of integration of non-nationals in the host Member State. (33)

85. Directive 2004/38 does not apply here. (34) For that reason, this is not an appropriate moment to revisit *Förster* or to take a closer look at the relationship between Article 24(2) of that directive and the principle of proportionality. By the same token, I do not find the analysis in *Förster* of a five year residence requirement for showing integration in order to claim student finance from a *host* Member State of great assistance in resolving the present cases.

86. In the absence of harmonisation, I consider that Member States should be allowed a certain freedom to define the degree of integration they require from applicants for funding of studies or training; and to choose an appropriate primary measure to establish evidence of that integration.

87. An EU citizen's connection to the society of a particular Member State is a complex question, both from the perspective of the citizen and of the State. Such a connection may exist by birth (and therefore be involuntary) or be acquired. It is likely to evolve over time, with varying intensity. Its appreciation may be subjective or objective. It appears reasonable to assume that, in any context, it implies membership of a defined community.

88. However, whilst the Member States should be allowed a certain freedom to define that community, it is insufficient for them to argue that the required degree of connection is invariably demonstrated by residence for a certain number of years. That argument is circular because it suggests that, in the context of the present cases, the three-year rule would thus be proportionate because it is not more restrictive than necessary to establish who can show three years of uninterrupted residence immediately prior to the start of studies abroad.

89. If a Member State chooses to require evidence of integration through a measure that restricts the right of freedom of movement, it must accept that the exercise of its discretion in this area be subject to, inter alia, the principles of proportionality and non-discrimination. Thus, in *Bidar*, the Court expressly recognised that the requirement that an applicant for a student loan be settled in the United Kingdom for the purposes of national law and satisfy a three year residence requirement resulted in indirect discrimination against non-nationals: it was therefore justified only if it was based on objective considerations independent of the nationality of the persons concerned and was proportionate to the legitimate aim of the national provisions. (35)

90. The Court appears already to have rejected the notion that, in relation to the integration objective, a single criterion can be proportionate.

91. For example, in *Morgan and Bucher*, the Court concluded that the first-stage condition (36) was not proportionate because 'the degree of integration into its society which a Member State could legitimately require must, in any event, be regarded as satisfied by the fact that the applicants … were raised in Germany and completed their

schooling there'. Whilst the first-stage studies condition was imposed to test the degree of integration, the Court (and the national court) accepted that the necessary degree of integration was shown 'in any event' in the case of the applicants (who were German nationals) based on *other factors* such as where they were raised and where they completed their schooling. (37)

92. More recently, in *Commission* v *Austria*, the Court has confirmed in general terms that 'the proof required to demonstrate the genuine link must not be too exclusive in nature or unduly favour an element which is not necessarily representative of the real and effective degree of connection between the claimant … and the Member State … to the exclusion of all other representative elements'. (38) The genuine link required 'should be established according to the constitutive elements of the benefit in question, including its nature and purpose or purposes'. (39)

93. These considerations lead me to conclude that the three-year rule at issue here is likewise more restrictive than necessary.

94. At the hearing, the Commission put forward the example of two German nationals: the first, having lived 17 years outside Germany, returns to Germany three years prior to starting his studies abroad; the second, having lived 17 years in Germany, leaves Germany three years prior to the start of his studies elsewhere in the European Union. Under the three-year rule, the first can obtain funding but the second cannot. Yet who is more integrated in German society?

95. That example demonstrates that the three-year rule is too rigid. It risks excluding from funding students who, despite not having resided for an uninterrupted period of three years in Germany immediately prior to studying abroad, are nevertheless sufficiently connected to German society due to their German nationality, residence, schooling or employment there, language skills, family and other social or economic ties, or other elements capable of showing that connection.

96. Under the student assistance law, it is entirely irrelevant if a German student who wishes to study in France has, for example, lived and studied in Germany previously or has his family living nearby and/or his parents working in Germany. By contrast, if that student were, for example, Bulgarian and had moved to Germany only three years before starting university studies in Poland or his Member State of origin, he would be entitled to funding paid out of the German public budget and no other facts would need to be considered in deciding whether he belonged to the targeted group of 'integrated' beneficiaries.

97. The issue at stake is, of course, not whether Bulgarian or German students are entitled to receive funding from the German Government. What matters is the relationship between the three-year rule, the objective it aims to achieve and the basis on which the decision is made (in this example) that the Bulgarian student gets funding whereas the German student does not.

98. Under the three-year rule, it is irrelevant whether the claimant has German nationality. However, nationality is, as the Court put it in *Rottman*, a 'special relationship of solidarity and good faith' which together with 'the reciprocity of rights and duties … form[s] the bedrock of the bond of nationality'. (40) I find it difficult to conceive that that is a connection that can be entirely disregarded when assessing the proportionality of the measures that a Member State adopts to achieve the integration objective.

99. I therefore consider that a measure such as the three-year rule is too rigid and does not enable national authorities to establish the real and effective degree of integration.

100. Are there alternative, less restrictive, measures that are available?

101. I consider that there might be.

102. The national court may consider that the rule could be designed in a less restrictive manner without losing its

ability to identify those students having a sufficient degree of integration in Germany. Possible alternative rules might be less restrictive but still effective. A different approach might incorporate more flexibility. I emphasise that I am not recommending any particular rule – that is the province of the Member State. I merely observe that it would be possible to construct less rigid, and therefore more proportionate, arrangements.

103. In comparing alternative measures, it is obviously important to assess whether the application of a measure 'rest[s] on clear criteria known in advance and [provides] for the possibility of means of redress of a judicial nature'. (41)

104. Here, I agree with the German Government that the three-year rule is transparent and administratively efficient and offers legal certainty. The relevant information can easily be collected and the decision is mechanical, yes or no. The cost of administering the scheme is likely to be relatively low, especially in relation to the overall budget allocation for student funding. These are all relevant matters to take into account when comparing the three-year rule with other possible measures.

105. However, the most transparent and efficient measure is not necessarily a proportionate measure. Whether it is depends on other elements such as the design and structure of the scheme, the overall coherence of the scheme and the objective being considered.

106. A measure like the three-year rule is likely to be more transparent and efficient than one requiring individual circumstances to be examined in each case. The latter would arguably be less restrictive and more inclusive. A third type of measure might provide that residence can be used as the primary or usual way of demonstrating the required degree of integration, without precluding the applicant or the authority from putting forward facts showing the existence (or the absence) of a real and effective connection. Such a measure would appear to be more transparent and efficient than the second type I have described and less restrictive than a measure like the three-year rule.

107. The benefits of a measure like the three-year rule must also be appreciated against the background of the overall regulatory scheme of which it forms part. In that connection, the national court may wish to bear in mind that in other respects – such as the assessment of whether a student has his residence in Germany (42) or whether 'particular circumstances' exist justifying the grant of funding under Paragraph 6 of the student assistance law (43) – it appears possible to reconcile a careful assessment of individual circumstances with the need to ensure legal certainty, transparency and administrative efficiency.

Justification based on the social objective

108. It was not entirely clear from the German Government's written observations whether it was advancing another basis for justification of the three-year rule, namely that it wished to award funding only to those students who would, following their studies abroad, become effective members of the German workforce or otherwise be absorbed into its economy and society.

109. However, several of the other Member States presenting observations submitted that whether making funding available to study abroad is a success depends partly on whether students return to the Member State that provided the funds when they complete their studies. Member States often award such funding because of the expected positive effects on their labour market, based on the perceived probability that a student so funded is likely to return and contribute to that Member State's society.

110. At the hearing, the German Government confirmed that it took the view that the three-year rule was also justified on the basis of the social objective.

Legitimacy of the objective

111. This objective corresponds partly with the social objective invoked in *Commission* v *Netherlands* to justify the three out of six years rule at issue in that case. (44) There, the Court accepted that encouraging student mobility was

an objective in the public interest capable of justifying a restriction. (45) It also accepted the twin premises that (i) the scheme was aimed at encouraging students residing in the Netherlands to consider studying abroad rather than at home, and (ii) the Netherlands expected that students who benefited from the scheme would return to the Netherlands after completion of their studies in order to reside and work there. (46)

112. I consider that the same objective is capable of justifying the three-year rule here at issue.

Appropriateness of the restriction

113. In *Commission* v *Netherlands*, the Court accepted that the three out of six years rule was appropriate to achieve the social objective because students otherwise normally study in the Member State where they reside and studies abroad enrich students as well as the society and labour market of the Member States. (47)

114. In my Opinion in that case, I took a different view, based on a consideration that is not discussed in the Court's judgment. I was not convinced that there was an obvious link between the place where students reside prior to their studies abroad and the place where they will reside and work after their studies. (48)

115. I have not changed my view; and the three-year rule itself helps to illustrate why.

116. First, that rule excludes from funding for studies abroad all students who cannot show three years of uninterrupted residence in Germany. It is argued that such a rule is likely to identify those who will return to Germany. But does not the same logic lead equally well to the conclusion that, after three years or more studying and residing abroad, a student once he graduates will stay to work and live in the Member State where he studied?

117. Second, where a graduate, having completed studies abroad, will take up work may plausibly be determined in part by such practical matters as where jobs are available, what language(s) he speaks and the general state of the employment market in the EU. Of course he may return to his previous Member State of residence; but he may equally well remain where he studied or move on elsewhere. Should it really be assumed that attachment to the Member State where he lived without interruption for the three years immediately before starting his studies will automatically override every other consideration?

118. For these reasons, I consider the connection between the three-year rule and the social objective to be far from self-evident.

119. For the sake of completeness, I shall none the less briefly consider the proportionality of the three-year rule in relation to the social objective.

Proportionality of the restriction

120. Here, the German Government's written and oral observations were considerably less developed than in relation to the economic objective and the integration objective.

121. Whilst the German Government stressed the attractiveness of the three-year rule in terms of legal certainty, transparency and administrative efficiency in the context of the economic objective, it did not expressly state whether it also relied upon those arguments in relation to the social objective. On the assumption that it intended to do so, I consider, for reasons already set out, (49) that those elements are insufficient to demonstrate that the three-year rule is not more restrictive than necessary in relation to the social objective.

122. In similar circumstances in *Commission* v *Netherlands*, the Court considered that it was incumbent upon the Member State to explain why it preferred a residence requirement, to the exclusion of other representative elements. The Court held that requirement to be 'too exclusive' because it 'prioritises an element which is not necessarily the sole element representative of the actual degree of attachment between the party concerned and [the Member State

granting the funding]'. (50)

123. I reach the same conclusion with regard to the three-year rule. I am not convinced that past residence in one Member State can be used as the sole criterion to predict future residence following an intervening residence in another Member State. (51) Rather, as the Commission put it in its Green Paper, 'Europeans who are mobile as young learners are more likely to be mobile as workers later in life'. (52)

Conclusion

124. I therefore suggest that the Court should answer the questions referred as follows:

Articles 20 and 21 TFEU must be interpreted as meaning that a Member State is precluded from making an education grant for attending an educational establishment abroad for the full duration of those studies dependent on the fulfilment of a condition requiring any EU citizen, including its own nationals, to have resided in its territory during an uninterrupted period of three years immediately prior to the start of those studies abroad.

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1 – Original language: English.

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2 – Directive of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, OJ 2005 L 197, p. 34, and OJ 2007 L 204, p. 28).

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3 – As a general rule, the right of permanent residence is acquired after five years of continuous legal residence: see Article 16 of Directive 2004/38.

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4 – Based on the German Government's observations, it appears that the version put before the Court is that which was published on 7 December 2010.

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5 – Joined Cases C-11/06 and C-12/06 [2007] ECR I-9161.

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6 – It is not clear from the reference for a preliminary ruling how soon after her birth Miss Prinz moved with her family to Tunisia, or why she briefly returned from Tunisia to Germany in September 1993 before apparently leaving again in April 1994.

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7 – *Morgan and Bucher*, cited in footnote 5 above, paragraphs 22 and 23 and case-law cited.

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8 – See points 36 to 39 below.

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9 – See, for example, Case C-542/09 *Commission* v *Netherlands* [2012] ECR.

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10 – See, for example, Case C-209/03 *Bidar* [2005] ECR I-2119.

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11 – See, for example, *Morgan and Bucher*, cited in footnote 5 above.

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12 – See, for example, *Commission* v *Netherlands*, cited in footnote 9 above.

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13 – See, for example, *Bidar*, cited in footnote 10 above.

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14 – *Morgan and Bucher*, cited in footnote 5 above, paragraph 24 and case-law cited.

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15 – See *Morgan and Bucher*, cited in footnote 5 above, paragraphs 25 and 26.

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16 – See for example, in the context of a disability pension, Case C-499/06 *Nerkowska* [2008] ECR I-3993, paragraph 31 and case-law cited.

17 – See point 12 above.

18 – *Bidar*, cited in footnote 10 above, paragraph 56.

19 – *Bidar*, cited in footnote 10 above, paragraph 57.

20 – *Morgan and Bucher*, cited in footnote 5 above, paragraphs 43 and 44.

21 – *Morgan and Bucher*, cited in footnote 5 above, paragraph 46.

22 – *Morgan and Bucher*, cited in footnote 5 above, paragraph 44 (emphasis added).

23 – See also, for example, my Opinion in *Commission* v *Netherlands*, cited in footnote 9 above, point 103.

24 – *Bidar*, cited in footnote 10 above, paragraph 56.

25 – See recital 10 in the preamble to Directive 2004/38; see also Case C-75/11 *Commission* v *Austria* [2012] ECR, paragraph 60.

26 – See my Opinion in *Commission* v *Netherlands*, cited in footnote 9 above, point 84.

27 – *Commission* v *Netherlands*, cited in footnote 9 above, paragraphs 63 and 69.

28 – See my Opinion in *Commission* v *Netherlands*, cited in footnote 9 above, point 120.

29 – See points 80 to 82 below.

30 – Whilst *Stewart* did not involve the same type of social advantage as that at issue in the present cases, the Court there considered that it is legitimate to wish (i) to ensure that there is a genuine link between a claimant to a benefit and the competent Member State and (ii) to guarantee the financial balance of a national social security system. It then appeared to examine the appropriateness and proportionality of the measure at issue in relation to the first objective before concluding that, in relation to the second objective, 'the foregoing considerations also apply with regard to [the second objective]' and that 'the necessity of establishing a genuine and sufficient connection … enables that State to satisfy itself that the economic cost of paying the benefit at issue … does not become unreasonable': Case C-503/09 *Stewart* [2011] ECR I-6497, paragraphs 89 and 103.

31 – Whilst these arguments might suggest that Germany makes entitlement to funding of studies abroad conditional on a connection to its tax system, the German Government confirmed at the hearing that that is not the case. It expressly stated that it did not aim to award funding only to those EU citizens who had previously contributed to the public budget out of which grants are paid. When asked at the hearing to define the solidarity to which it referred in its written observations, the German Government answered that beneficiaries should be those with some attachment to German society.

32 – *Commission* v *Netherlands*, cited in footnote 9 above, point 113 of the Opinion.

33 – See Case C-158/07 *Förster* [2008] ECR I-8507, paragraphs 54 and 55.

34 – See point 35 above.

35 – See *Bidar*, cited in footnote 10 above, paragraphs 51 to 54 and case-law cited.

36 – See point 6 above.

37 – *Morgan and Bucher*, cited in footnote 5 above, paragraphs 45 and 46.

38 – Cited in footnote 25 above, paragraph 62.

39 – Cited in footnote 25 above, paragraph 63.

40 – Case C-135/08 *Rottman* [2010] ECR I-1449, paragraph 51.

41 – Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 72. In that case, the residence requirement was a condition applied to restrict access to a social advantage of the type that, according to the Court's previous case-law, could be linked to the geographic employment market in question (see paragraph 67).

42 – See point 44 above.

43 – See point 9 above. At the hearing, there was disagreement on the scope of application of that rule. The German Government described it as a 'hardship rule' applicable in exceptional circumstances where the student is unable to move to Germany in order to study there (for example, because the student is disabled or under-age). Counsel for Mr Seeberger suggested that it was used to accommodate the children of German diplomats living abroad. The Court will have an opportunity to consider Paragraph 6 of the BAföG in Case C-220/12 *Thiele Meneses*, which is currently pending.

44 – That rule required an applicant for 'portable' student finance, in addition to being eligible for funding to study in the Netherlands, also to have resided lawfully in the Netherlands during at least three out of the previous six years.

45 – *Commission* v *Netherlands*, cited in footnote 9 above, paragraph 72; see also points 135 to 140 of my Opinion in that case.

46 – *Commission* v *Netherlands*, cited in footnote 9 above, paragraph 77.

47 – *Commission* v *Netherlands*, cited in footnote 9 above, paragraphs 76 to 79.

48 – See point 147 of my Opinion in *Commission* v *Netherlands*, cited in footnote 9 above.

49 – See points 103 to 106 above.

50 – *Commission* v *Netherlands*, cited in footnote 9 above, paragraph 86.

51 – See also point 117 above.

52 – Commission Green Paper Promoting the learning mobility of young people COM(2009) 329 final, page 2.

Joined Cases C-523/11 and C-585/11: Laurence Prinz v Region Hannover and Philipp Seeberger v Studentenwerk Heidelberg

JUDGMENT OF THE COURT (Third Chamber)
18 July 2013 (*)

(Citizenship of the Union – Articles 20 TFEU and 21 TFEU – Right of freedom of movement and residence – Education or training grant awarded to nationals of a Member State in order to pursue their studies in another Member State – Requirement of residence in the home Member State for at least three years prior to the commencement of studies)

In Joined Cases C-523/11 and C-585/11,

REQUEST for a preliminary ruling under Article 267 TFEU made by the Verwaltungsgericht Hannover (Germany) and the Verwaltungsgericht Karlsruhe (Germany), by decisions of 5 October and 16 November 2011 respectively, received at the Court on 13 October and 24 November 2011, in the proceedings

Laurence Prinz

v

Region Hannover (C-523/11),

and

Philipp Seeberger

v

Studentenwerk Heidelberg (C-585/11),

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as Judge of the Third Chamber, E. Jarašiūnas, A. Ó Caoimh (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: E. Sharpston,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 29 November 2012,

after considering the observations submitted on behalf of:

– Mr Seeberger, by M.Y. Popper, Rechtsanwalt,
– the German Government, by T. Henze and J. Möller, acting as Agents,
– the Danish Government, by V. Pasternak Jørgensen and C. Thorning, acting as Agents,
– the Greek Government, by G. Papagianni, acting as Agent,
– the Netherlands Government, by B. Koopman and C. Wissels, acting as Agents,
– the Austrian Government, by C. Pesendorfer and G. Eberhard, acting as Agents,
– the Finnish Government, by M. Pere and J. Leppo, acting as Agents,
– the Swedish Government, by A. Falk, C. Stege and U. Persson, acting as Agents,

– the European Commission, by S. Grünheid, D. Roussanov and V. Kreuschitz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 February 2013,

gives the following

Judgment

1 The requests for a preliminary ruling concern the interpretation of Articles 20 TFEU and 21 TFEU.

2 Those requests have been made in proceedings between Ms Prinz, a German national and Region Hannover (Hanover Region, Department for Education and Training Grants) and Mr Seeberger, also a German national and Studentenwerk Heidelberg, Amt für Ausbildungsförderung (Student Administration, Heidelberg, Office for Education and Training Assistance; 'Studentenwerk') concerning the right to a grant for studies in educational establishments in Member States other than the Federal Republic of Germany.

Legal context

3 Under the heading 'Education and training abroad', Paragraph 5 of the Federal Law on assistance for education and training [Bundesgesetz über individuelle Förderung der Ausbildung (Bundesausbildungsförderungsgesetz)], as amended on 1 January 2008, by the twenty-second law amending the Federal Law on assistance for education and training (BGBl. I, p. 3254; 'the BAföG'), states:

'1. Permanent residence for the purposes of this Law shall be established in the place where, in a manner which is not merely temporary, the person concerned has his centre of family interests, without any requirement that he intends to be permanently established there. A person who resides in a place solely for the purposes of education or training has not established his permanent residence there.

2. Students who have their permanent residence in Germany shall be awarded an education or training grant for attending an education or training establishment abroad if:

…

(3) the student commences or continues his education or training in an educational establishment in a Member State of the European Union or in Switzerland.

…'

4 Paragraph 6 of the BAföG, entitled 'Grants for education or training for German citizens abroad' provides that German nationals whose permanent residence is situated in a foreign State and who attend an educational institution there or who attend an establishment situated in a neighbouring State from that residence may receive an education or training grant where the particular circumstances of a specific case justify one.

5 Paragraph 16 of the BAföG, entitled 'Duration of the grant for education or training abroad' is worded as follows:

'1. For education or training abroad within the meaning of Paragraph 5(2)(1) or (5), the education or training grant shall be paid for a maximum period of one year …

…

3. In the cases referred to in Paragraph 5(2)(2) and 5(2)(3) receipt of the education or training grant is not subject to the time limit laid down in Paragraph 5(1) and (2). However, as regards the cases referred to in Paragraph 5(2)(3), the grant shall be paid for more than one year only if, when the student commenced his residence abroad after 31 December 2007, his permanent residence was situated in Germany for a minimum of 3 years.'

Background to the disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-523/11

6 Ms Prinz, who was born in Germany in 1991, lived with her family for 10 years in Tunisia where her father was employed by a German company. On her return to Germany, in January 2007, Ms Prinz finished her studies in Frankfurt (Germany) where she obtained the baccalaureat (Abitur) in June 2009. She commenced her studies at the Erasmus University in Rotterdam (Netherlands) on 1 September 2009.

7 In response to an application for an education grant for the academic year 2009/2010 made by Ms Prinz on 18 August 2009, the Region Hannover, by decision of 30 April 2010, awarded that grant for the period from September 2009 to August 2010.

8 However, the grant application submitted by Ms Prinz for the academic year 2010/2011 was rejected, by decision of 4 May 2010, on the ground that since she did not fulfill the condition of residence laid down by the BAföG she could not claim an education grant for an unlimited period, her rights being limited, in accordance with Paragraph 16(3) of that law to a period of one year.

9 On 1 June 2010, Ms Prinz brought an action against that decision. She argued that she fulfilled the condition in question as she had resided in Germany from September 1993 until April 1994 and from January 2007 until August 2009, that is, for three years and four months. She also argued that the residence condition laid down by the BAföG is contrary to Article 21 TFEU and relied on the connections she had maintained with the Member State concerned, explaining that she was born there, has German nationality, that she left that Member State only because of her father's work transfer and that she had always maintained links with her country of origin. According to Ms Prinz, residence of a further four months would not have significantly strengthened those links.

10 The Region Hannover submits that the minimum period of three years laid down in Paragraph 16(3) of the BAföG necessarily corresponds to a continuous period. That law does not infringe European law on freedom of movement and residence in any way since that right does not impose any obligation on Member States to award grants to its own nationals without limits.

11 The national court queries the compatibility with European Union law of a residence condition such as that at issue in the main proceedings. It takes the view that, like the condition applicable before the entry into force of the twenty-second law amending the Federal Law on assistance for education and training, which was the obligation to have attended a German educational establishment for at least one year, the condition at issue in the main proceedings might dissuade a citizen of the European Union from commencing his studies in another Member State, since, after one year, he would no longer receive an education or training grant. According to that court, although it may be legitimate for a Member State to award education or training grants only to students who have shown a certain degree of integration into the society of that State, the criterion based on continuous residence of three years in Germany prior to the start of the residence abroad is not of such a nature as to establish the existence of such integration.

12 In those circumstances, the Verwaltungsgericht Hannover decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Does it constitute a restriction of the right to freedom of movement and residence conferred on citizens of the European Union by Articles 20 and 21 TFEU, which is not justified under [EU] law, if pursuant to the [BAföG], a German

national, who has her permanent residence in Germany and attends an education establishment in a Member State of the European Union, is awarded an education grant for attending that education establishment abroad for only one year because when she commenced her stay abroad she had not already had her permanent residence in Germany for at least three years?'

Case C-585/11

13 Mr Seeberger, who was born in Germany in 1983, lived there until 1994 with his parents who are also German nationals. He attended primary and then secondary school in Munich (Germany) from 1989 to 1994. From 1994 until December 2005 he lived with his parents in Majorca (Spain), where his father worked as a self-employed business consultant.

14 In January 2006, Mr Seeberger's parents settled in Cologne (Germany). Although Mr Seeberger was registered in the Munich population register only from 26 October 2006, he maintains that from January 2006 his permanent residence was in Germany.

15 In September 2009, Mr Seeberger began a course in Economics at the University of the Balearics in Palma de Majorca (Spain) and submitted an application for an educational grant to the Studentenwerk.

16 The Studentenwerk rejected that application on the ground that the fact that Mr Seeberger did not fulfill the residence condition laid down in Paragraph 16(3) of the BAföG precluded him from receiving that grant pursuant to Paragraph 5(2), first sentence, point three thereof.

17 Relying on his rights to freedom of movement as a citizen of the European Union, Mr Seeberger brought an action against that decision which was rejected by the Studentenwerk by decision of 14 June 2010.

18 In an action brought before the Verwaltungsgericht Karlsruhe, Mr Seeberger argued that the residence condition laid down by Paragraph 16(3) of the BAföG infringed his right to freedom of movement, since it obliged him either to give up his permanent residence in another Member State or to transfer in time his permanent residence back to Germany, failing which he would risk the award of the education grant for his studies in Spain. In that connection, he submits that his right to be admitted to higher education is recognised only in Spain and that he wishes to pursue all his studies in that Member State.

19 The Studentenwerk contends that since the residence requirement laid down by the BAföG applies in the same way to all nationals, it may apply to citizens of the European Union from other Member States who have the right to freedom of movement. That obligation merely gives concrete expression to the legitimate interest of the Member State which pays social benefits that those benefits, paid from public funds financed by taxes, are reserved to categories of persons who are able to demonstrate a minimum level of integration into the Member State paying those benefits.

20 In its order for reference, the Verwaltungsgericht Karlsruhe states that the residence requirement at issue in the main proceedings does not apply to a grant for education or training in Germany. It observes that such a residence condition, on account of the personal disadvantages, additional costs and possible delays that it involves, may dissuade citizens of the European Union from leaving Germany in order to study in another Member State. That court expresses doubts as to whether the requirement that the applicant for the grant must have established his residence in Germany for at least three years when he starts the education or training is justified and asks whether a certain degree of integration in the society of that Member State that the latter may legitimately require should not be recognised in the case in the main proceedings on the ground that the applicant, a German national, was raised by his parents in Germany and had completed his schooling until the 'sixth' class when he moved with his family, at 12 years of age, because his father had exercised his rights under Articles 45 TFEU and 49 TFEU. According to that court, a criterion based on a specific date and a period of three years prior to the commencement of education or training abroad appears prima facie inappropriate as a means of demonstrating the required integration.

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

‘Does European Union law preclude national legislation which denies an education or training grant for studies in another Member State solely on the ground that the student, who has exercised the right to freedom of movement, has not, at the commencement of the studies, had his permanent residence in his Member State of origin for at least three years?’

Consideration of the questions referred

22 By these questions, which it is appropriate to examine together, the referring courts ask essentially whether Articles 20 TFEU and 21 TFEU must be interpreted as meaning that they preclude the legislation of a Member State which makes the award of an education grant for studies in another Member State for a period of more than one year subject to a sole condition, such as that laid down in Paragraph 16(3) of the BAföG, that requires the applicant to have a permanent residence, within the meaning of that law, in national territory for at least three years prior to commencing those studies.

23 First of all, it must be recalled that, as German nationals, Ms Prinz and Mr Seeberger enjoy the status of citizens of the Union under Article 20(1) TFEU and may therefore rely on the rights conferred on those having that status, including against their Member State of origin (see, Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, paragraph 19, and Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] ECR I-9161, paragraph 22).

24 As the Court has repeatedly held, Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy within the scope *ratione materiae* of the TFEU the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for (Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31; Case C-224/98 *D’Hoop* [2002] ECR I-6191, paragraph 28; and Case C-46/12 *N.* [2013] ECR, paragraph 27).

25 The situations falling within the scope of European Union law include those involving the exercise of the fundamental freedoms guaranteed by the Treaty, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Article 21 TFEU (*Tas-Hagen and Tas*, paragraph 22; Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I-6849, paragraph 87 and the case-law cited; and *Morgan and Bucher*, paragraph 23).

26 In that connection, it must be recalled, as the German Government and the Commission have observed, that although the Member States are competent, under Article 165(1) TFEU as regards the content of teaching and the organisation of their respective education systems, it is none the less the case that that competence must be exercised in compliance with European Union law and, in particular, in compliance with the Treaty provisions on the freedom to move and reside within the territory of the Member States, as conferred by Article 21(1) TFEU (see, *Morgan and Bucher*, paragraph 24 and the case-law cited).

27 National legislation which places at a disadvantage certain of the nationals of the Member State concerned simply because they have exercised their freedom to move and to reside in another Member State is a restriction on the freedoms conferred by Article 18(1) EC on every citizen of the Union (see Case C-406/04 *De Cuyper* [2006] ECR I-6497, paragraph 39; *Tas-Hagen and Tas*, paragraph 31; and *Morgan and Bucher*, paragraph 25).

28 Indeed, the opportunities offered by the Treaty in relation to freedom of movement for citizens of the Union cannot be fully effective if a national of a Member State can be deterred from availing himself of them by obstacles placed in the way of his stay in another Member State by legislation of his State of origin penalising the mere fact that he has used those opportunities (see, to that effect, *D’Hoop*, paragraph 31; Case C-224/02 *Pusa* [2004] ECR I-5763, paragraph 19; and *Morgan and Bucher*, paragraph 26).

29 That consideration is particularly important in the field of education in view of the aims pursued by Article 6(e) TFEU and the second indent of Article 165(2) TFEU, namely, inter alia, encouraging mobility of students and teachers (see *D'Hoop*, paragraph 32; Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969, paragraph 44; and *Morgan and Bucher*, paragraph 27).

30 Consequently, where a Member State provides for a system of education or training grants which enables students to receive such grants if they pursue studies in another Member State, it must ensure that the detailed rules for the award of those grants do not create an unjustified restriction of the right to move and reside within the territory of the Member States laid down in Article 21 TFEU (see *Morgan and Bucher*, paragraph 28).

31 It must be stated that a condition of uninterrupted residence of three years, like that laid down in Article 16(3) of the BAföG, even though it applies without distinction to German nationals and other citizens of the European Union, constitutes a restriction on the right to freedom of movement and residence enjoyed by all citizens of the Union pursuant to Article 21 TFEU.

32 Such a condition is likely to dissuade nationals, such as the applicants in the main proceedings, from exercising their right to freedom of movement and residence in another Member State, given the impact that exercising that freedom is likely to have on the right to the education or training grant.

33 According to settled case-law, legislation which is likely to restrict a fundamental freedom guaranteed by the Treaty can be justified in the light of European Union law only if it is based on objective considerations of public interest independent of the nationality of the persons concerned and if it is proportionate to the legitimate objective pursued by the provisions of national law (see *De Cuyper*, paragraph 40; *Tas-Hagen and Tas*, paragraph 33; and *Morgan and Bucher*, paragraph 33) It also follows from the case-law that a measure is proportionate when, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to attain it (*De Cuyper*, paragraph 42; *Morgan and Bucher*, paragraph 33; and Case C-379/11 *Caves Krier Frères* [2012] ECR, paragraph 48 and the case-law cited).

34 In the present cases, the German Government contends that the BAföG is based on objective considerations of public interest. Paragraph 16(3) of that law guarantees that an education grant for a full course of studies abroad is paid only to students able to demonstrate a sufficient degree of integration into German society. The requirement of a minimum level of integration thus preserves the national scheme for education grants for studies abroad by protecting the State paying the grant from an unreasonable financial burden.

35 According to that government, it is therefore legitimate to provide financial support for their entire course of studies abroad only to students who demonstrate a sufficient level of integration in Germany, that evidence being invariably produced by a student in a position to fulfill the condition of three years' continuous residence.

36 In that connection, it is true that the Court has recognised that it may be legitimate for a Member State, in order to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State, to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State, and that if a risk exists that a Member State may have to bear such an unreasonable burden, similar considerations may apply as regards the award by that State of education or training grants to students wishing to study in other Member States (*Morgan and Bucher*, paragraphs 43 and 44 and the case-law cited).

37 However, according to settled case-law, the proof required to demonstrate the genuine link must not be too exclusive in nature or unduly favour one element which is not necessarily representative of the real and effective degree of connection between the claimant and this Member State, to the exclusion of all other representative elements (see, to that effect, *D'Hoop*, paragraph 39; Case C-503/09 *Stewart* [2011] ECR I-6497, paragraph 95; and Case C-75/11 *Commission* v *Austria* [2012] ECR, paragraph 62).

38 Although the existence of a certain level of integration may be regarded as established by the finding that a student has resided in the Member State where he may apply for an education or training grant for a certain period, a sole condition of residence, such as that at issue in the main proceedings, risks, as the Advocate General observes in point 95 of her Opinion, excluding from funding students who, despite not having resided for an uninterrupted period of three years in Germany immediately prior to studying abroad, are nevertheless sufficiently connected to German society. That may be the case where the student is a national of the State concerned and was educated there for a significant period or on account of other factors such as, in particular, his family, employment, language skills or the existence of other social and economic factors. Furthermore, other provisions of the legislation at issue in the main proceedings themselves permit factors distinct from the place of residence of the applicant for the grant to be relevant, both in order to establish the centre of family interests of the person concerned and to determine whether the conditions for the award of the grant are fulfilled in the case of home-country nationals who have established their permanent residence abroad.

39 Taking account of the foregoing, it is for the national court to carry out the necessary checks in order to determine whether the persons concerned can prove a sufficient level of connection with German society capable of demonstrating their integration into that society.

40 It follows that a sole condition of uninterrupted residence of three years, such as that at issue in the main proceedings, is too general and exclusive, and goes beyond what is necessary to achieve the objectives pursued and cannot, therefore, be regarded as proportionate.

41 Having regard to all of the foregoing considerations, the answer to the questions referred is that Articles 20 TFEU and 21 TFEU must be interpreted as meaning that they preclude legislation of a Member State which makes the award of an education grant for studies in another Member State for a period of more than one year subject to a sole condition, such as that laid down in Paragraph 16(3) of the BAföG, requiring the applicant to have had a permanent residence, within the meaning of that law, in national territory for at least three years before commencing those studies.

Costs

42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Articles 20 TFEU and 21 TFEU must be interpreted as meaning that they preclude legislation of a Member State which makes the award of an education grant for studies in another Member State for a period of more than one year subject to a sole condition, such as that laid down in Paragraph 16(3) of the Federal Law on assistance for education and training [Bundesgesetz über individuelle Förderung der Ausbildung (Bundesausbildungsförderungsgesetz)], as amended on 1 January 2008, by the twenty-second law amending the Federal Law on assistance for education and training, requiring the applicant to have had a permanent residence, within the meaning of that law, in national territory for at least three years before commencing those studies.

Case C-140/12: Pensionsversicherungsanstalt v Peter Brey

JUDGMENT OF THE COURT (Third Chamber)

19 September 2013 *(1)

(Freedom of movement for persons – Union Citizenship – Directive 2004/38/EC – Right of residence for more than three months – Article 7(1)(b) – Person no longer having worker status – Person in possession of a retirement pension – Having sufficient resources not to become a burden on the 'social assistance system' of the host Member State – Application for a special non-contributory cash benefit – Compensatory supplement intended to augment a retirement pension – Regulation (EC) No 883/2004 – Articles 3(2) and 70 – Competence of the Member State of residence – Conditions for granting – Legal right to reside on the national territory – Compliance with European Union law)

In Case C-140/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Austria), made by decision of 14 February 2012, received at the Court on 19 March 2012, in the proceedings

Pensionsversicherungsanstalt

v

Peter Brey,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, E. Jarašiūnas, A. Ó Caoimh (Rapporteur), C. Toader and C.G. Fernlund, Judges,

Advocate General: N. Wahl,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 7 March 2013,

after considering the observations submitted on behalf of:

– Mr Brey, by C. Rappold, Rechtsanwalt,

– the Austrian Government, by G. Hesse, acting as Agent,

– the German Government, by T. Henze and J. Möller, acting as Agents,

– Ireland, by E. Creedon, acting as Agent, assisted by A. Collins SC, and G. Gilmore BL,

– the Greek Government, by M. Tassopoulou, acting as Agent,

– the Netherlands Government, by M. Noort and C. Wissels, acting as Agents,

– the Swedish Government, by A. Falk and H. Karlsson, acting as Agents,

– the United Kingdom Government, by C. Murrell and J. Coppel, acting as Agents,

– the European Commission, by V. Kreuschitz and C. Tufvesson, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 May 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 7(1)(b) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

2 The request has been made in proceedings between Mr Brey and the Pensionsversicherungsanstalt (Pensions Insurance Institution) (Austria), concerning the latter's refusal to grant him the compensatory supplement (Ausgleichzulage) provided for in Austrian legislation to augment his German retirement pension.

Legal context

European Union law

Directive 2004/38

3 Under recitals 10, 16, 20 and 21 in the preamble to Directive 2004/38:

'(10) Persons exercising their right of residence should not … become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.

…

(16) As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security.

…

(20) In accordance with the prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals in areas covered by the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law.

(21) However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.'

4 Article 7(1)(b) of that directive, entitled 'Right of residence for more than three months', provides as follows:

'1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

…

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State'.

5 Article 8 of Directive 2004/38, entitled 'Administrative formalities for Union citizens', provides:

'1. Without prejudice to Article 5(5), for periods of residence longer than three months, the host Member State may require Union citizens to register with the relevant authorities.

2. The deadline for registration may not be less than three months from the date of arrival. A registration certificate shall be issued immediately, stating the name and address of the person registering and the date of the registration. Failure to comply with the registration requirement may render the person concerned liable to proportionate and non-discriminatory sanctions.

3. For the registration certificate to be issued, Member States may only require that

– …

– Union citizens to whom point (b) of Article 7(1) applies present a valid identity card or passport and provide proof that they satisfy the conditions laid down therein,

– …

4. Member States may not lay down a fixed amount which they regard as "sufficient resources", but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.

…'

6 Article 14 of Directive 2004/38, entitled 'Retention of the right of residence', states:

'…

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.

…'

7 Under Article 24 of that directive, entitled 'Equal treatment':

'1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

…'

Regulation (EC) No 883/2004

8 As of 1 May 2010, Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum, OJ 2004 L 200, p. 1) has replaced Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1).

9 Article 1 of Regulation No 883/2004, as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010 (OJ 2010 L 338, p. 35) ('Regulation No 883/2004'), entitled 'Definitions', provides:

'For the purposes of this Regulation:

…

(j) "residence" means the place where a person habitually resides

…'

10 Article 3 of that regulation, entitled 'Matters covered', is worded as follows:

'1. This Regulation shall apply to all legislation concerning the following branches of social security:

…

(d) old-age benefits;

…

2. Unless otherwise provided for in Annex XI, this Regulation shall apply to general and special social security schemes, whether contributory or non-contributory, and to schemes relating to the obligations of an employer or shipowner.

3. This Regulation shall also apply to the special non-contributory cash benefits covered by Article 70.

…

5. This Regulation shall not apply to:

(a) social and medical assistance

…'

11 Article 4 of that regulation, entitled 'Equality of treatment', provides:

'Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.'

12 Article 70 of that regulation states:

'1. This Article shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in Article 3(1) and of social assistance.

2. For the purposes of this Chapter, "special non-contributory cash benefits" means those which:

(a) are intended to provide either:

(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned;

or

(ii) solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned,

and

(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone,

and

(c) are listed in Annex X.

3. Article 7 and the other chapters of this Title shall not apply to the benefits referred to in paragraph 2 of this Article.

4. The benefits referred to in paragraph 2 shall be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. Such benefits shall be provided by and at the expense of the institution of the place of residence.'

13 Annex X to Regulation No 883/2004, entitled ‘Special non-contributory cash benefits’, includes the following note regarding the Republic of Austria: ‘Compensatory supplement (Federal Act of 9 September 1955 on General Social Insurance – [Allgemeines Sozialversicherungsgesetz, BGBl. 189/1955] …)’.

Austrian law

14 Paragraph 292(1) of the Federal Act on General Social Insurance (Allgemeines Sozialversicherungsgesetz, BGBl. 189/1955), as amended, from 1 January 2011, by the 2011 Budget Act (Budgetbegleitgesetz 2011, BGBl. 111/201) (‘the ASVG’) provides that, where a retirement pension plus net revenue from other sources (plus any other amount which should be taken into account) falls short of a specific reference amount, the individual receiving that pension is to be entitled to a compensatory supplement which is equal to the difference between the reference amount and that individual’s personal income, so long as he is habitually and lawfully resident in Austria.

15 The Settlement and Residence Act (Niederlassungs- und Aufenthaltsgesetz), as amended by the 2011 Budget Act (‘the NAG’), includes the following relevant provisions:

‘Paragraph 51

1. On the basis of the Directive on freedom of movement, [European Economic Area (“EEA”)] citizens are entitled to reside for periods in excess of three months, if they:

…

(2) have comprehensive sickness insurance cover for themselves and the members of their families and have sufficient resources to support themselves and the members of their families so as not to be obliged to have recourse to social assistance benefits or the compensatory supplement during their period of residence;

…

Registration certificate

Paragraph 53

1. EEA citizens who enjoy a right of residence under European Union law (Paragraphs 51 and 52) must, if they are residing in Austria for longer than three months, notify the authority within four months of their entry. If the conditions (Paragraphs 51 or 52) are satisfied, the authority shall, upon request, issue a registration certificate.

2. As proof of the right of residence under European Union law, a valid passport or identity card must be provided in addition to the following evidence:

…

(2) Under Paragraph 51(1)(2): Evidence of sufficient resources and of comprehensive sickness insurance cover;

…’

The dispute in the main proceedings and the question referred for a preliminary ruling

16 Mr Brey and his wife, who are both of German nationality, left Germany and moved to Austria in March 2011. In Germany, Mr Brey receives an invalidity pension of EUR 862.74 per month before tax, and a care allowance of EUR 225 per month. The couple has no other income or assets. Mr Brey’s wife received a basic benefit in Germany;

however, because of her move to Austria, she has not received it since 1 April 2011. The monthly rent payable on the couple's apartment in Austria is EUR 532.29.

17 By decision of 2 March 2011, the Pensionsversicherungsanstalt refused Mr Brey's application for a compensatory supplement to be granted with effect from 1 April 2011 on the ground that, owing to his low retirement pension, Mr Brey does not have sufficient resources to establish his lawful residence in Austria.

18 On 22 March 2011, the Bezirkshauptmannschaft Deutschlandberg (first-level Deutschlandberg administrative authority) (Austria) issued Mr Brey and his wife with an EEA citizen registration certificate in accordance with the NAG.

19 Mr Brey brought an action against the decision of 2 March 2011. By judgment delivered on 6 October 2011, the Oberlandesgericht Graz (Higher Regional Court, Graz), upholding the judgment delivered at first instance by the Landesgericht für Zivilsachen Graz (Regional Court for civil law matters, Graz), reversed that decision, with the result that the Pensionsversicherungsanstalt was obliged to grant Mr Brey a compensatory supplement in the amount of EUR 326.82 per month with effect from 1 April 2011.

20 The Pensionsversicherungsanstalt brought an appeal on a point of law against that judgment before the Oberster Gerichtshof (Austrian Supreme Court).

21 In the order for reference, that court notes that, in Case C-160/02 *Skalka* [2004] ECR I-5613, the Court categorised the compensatory supplement as a 'special non-contributory benefit' within the meaning of Article 4(2a) of Regulation No 1408/71 (now Article 70 of Regulation No 883/2004), because it augments a retirement pension or an invalidity pension and is by nature social assistance in so far as it is intended to ensure a minimum means of subsistence for its recipient where his pension is insufficient.

22 According to the referring court, the issue which thus arises in the proceedings pending before it is that of determining whether the EU legislation on residence uses the same concept of 'social assistance' as the EU legislation on social security.

23 If that concept were to be acknowledged as having an identical meaning in both areas, the referring court is of the view that the compensatory supplement could not be regarded as social assistance within the meaning of Directive 2004/38, since it has some social security aspects and falls within the scope of Regulation No 883/2004. Consequently, the right to a compensatory supplement would have no impact on the right of residence.

24 However, the referring court is also of the view that the concept of 'social assistance' could be given its own particular meaning based on the objectives pursued by Directive 2004/38, which is intended, inter alia, to prevent persons who have not made any contribution to financing the social security schemes of a host Member State from becoming an excessive burden on that State's budget. From that perspective, that concept, in the context of the EU legislation on residence, would have to be understood to mean the basic benefits paid by a State out of general taxation, to which all residents are entitled, whether or not those benefits are based on a right or on a state of need and whether or not there is an associated specific risk in terms of social security. In that situation, the compensatory supplement would have to be regarded as social assistance for the purposes of Directive 2004/38.

25 In those circumstances, the Oberster Gerichtshof decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is a compensatory supplement to be regarded as a "social assistance" benefit within the terms contemplated in Article 7(1)(b) of Directive 2004/38 … ?'

The question referred for a preliminary ruling

Scope of the question referred

26 By its question, the referring court asks whether Article 7(1)(b) of Directive 2004/38 should be interpreted as meaning that, for the purposes of that provision, the concept of 'social assistance' covers a benefit such as the compensatory supplement provided for in Paragraph 292(1) of the ASVG.

27 That question has arisen in a dispute in which the competent Austrian authorities refused to grant that benefit to a national of another Member State (Mr Brey) on the grounds that, despite having been issued with a certificate of residence, he could not be regarded as being 'lawfully' resident in Austria for the purposes of Paragraph 292(1) of the ASVG since, under Paragraph 51 of the NAG, the right to reside in Austria for periods in excess of three months requires the person concerned to have, inter alia, 'sufficient resources to support [himself] and the members of [his family] so as not to be obliged to have recourse to social assistance benefits or the compensatory supplement during [his] period of residence'.

28 It is common ground that Paragraph 51 of the NAG is intended to transpose into Austrian law Article 7(1)(b) of Directive 2004/38, which states that all Union citizens are to have the right of residence on the territory of another Member State for a period of longer than three months if they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence.

29 It follows that, even though Mr Brey's right of residence is not directly at issue in the main proceedings, which concern only the grant of the compensatory supplement, the national law itself establishes a direct link between the conditions for obtaining that benefit and the conditions for obtaining the legal right to reside in Austria for periods in excess of three months; the granting of a compensatory supplement is made conditional upon the person in question meeting the requirements for obtaining that right of residence. In that regard, it emerges from the explanation provided by the referring court that, according to the *travaux préparatoires* relating to the amendment made with effect from 1 January 2011 to Paragraph 51(1)(2) of the NAG, that provision, by making explicit reference to the compensatory supplement, is now intended to prevent a national of another Member State from being able to obtain the right to reside in Austria by virtue of EU law where that national applies, during his period of residence, for the compensatory supplement.

30 In those circumstances, it appears that the outcome of the dispute in the main proceedings is dependent on knowing whether a Member State may refuse to grant the compensatory supplement to nationals of other Member States on the grounds that – like Mr Brey – they do not, despite having been issued with a certificate of residence, meet the necessary requirements for obtaining the legal right to reside on the territory of that Member State for a period of longer than three months, since, in order to obtain that right, the person concerned must have sufficient resources not to apply for, inter alia, the compensatory supplement. The nature of that benefit, which is the subject of the referring court's question, must be examined in the context of analysing this issue.

31 In that regard, it should be borne in mind that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it (see, inter alia, Case C-45/06 *Campina* [2007] ECR I-2089, paragraph 30, and Case C-243/09 *Fuß* [2010] ECR I-9849, paragraph 39).

32 The question referred should therefore be reformulated to the effect that the referring court seeks, in essence, to ascertain whether EU law – in particular, Directive 2004/38 – should be interpreted as precluding national legislation, such as that at issue in the main proceedings, which does not allow the grant of a benefit, such as the compensatory supplement provided for in Paragraph 292(1) of the ASVG, to a national of another Member State who is not economically active, on the grounds that, despite having been issued with a certificate of residence, he does not meet the necessary requirements for obtaining the legal right to reside on the territory of the first Member State for a period

of longer than three months, since such a right of residence is conditional upon that national having sufficient resources not to apply for the benefit.

The right of a Union citizen who is not economically active to receive a benefit, such as the benefit at issue in the main proceedings, in the host Member State

33 As a preliminary point, it should be borne in mind that, in *Skalka*, the Court ruled that the compensatory supplement provided for in Paragraph 292(1) of the ASVG falls within the scope of Regulation No 1408/71 and therefore constitutes a 'special non-contributory benefit' within the meaning of Article 4(2a) of that regulation, read in conjunction with Annex IIa thereto. Under Article 10a(1) of Regulation No 1408/71, that benefit is to be granted solely by, and at the expense of, the competent institutions of the Member State of residence, in accordance with the legislation of that State.

34 In that regard, the Court found in paragraph 26 of *Skalka* that the Austrian compensatory supplement is classifiable as a 'special benefit' as it augments a retirement pension or an invalidity pension, it is by nature social assistance in so far as it is intended to ensure a minimum means of subsistence for its recipient where his pension is insufficient, and entitlement is dependent on objective criteria defined by law.

35 In addition, the Court held in paragraphs 29 and 30 of that judgment that the Austrian compensatory supplement has to be regarded as 'non-contributory', given that the costs are borne by a social institution which then receives reimbursement in full from the relevant Land, which in turn receives from the Federal budget the sums necessary to finance the benefit, and that at no time do the contributions of insured persons form part of this financing arrangement.

36 It is common ground that there is nothing in the corresponding provisions of Regulation No 883/2004 – namely, Articles 3(3) and 70 of that regulation and Annex X thereto, concerning 'special non-contributory cash benefits' – to suggest that those findings should be qualified.

37 According to the European Commission, it follows from those provisions that the requirement that, in order to receive the compensatory supplement, the person concerned must have a legal right to reside in the host Member State for a period of longer than three months is not consistent with EU law. Anyone who – like Mr Brey – falls within the scope of Regulation No 883/2004 as a retired person who has ceased all employed or self-employed activity has the right, pursuant to Article 70(4) of that regulation, to be paid special non-contributory cash benefits in his Member State of residence. Under Article 1(j) of that regulation, a person's residence is the place where he 'habitually resides', an expression which refers to the Member State in which the person concerned habitually resides and where the habitual centre of his interests is to be found. It follows, according to the Commission, that the requirement laid down in Paragraph 292(1) of the ASVG, read in conjunction with Paragraph 51(1) of the NAG, for such residence to be lawful represents indirect discrimination contrary to Article 4 of Regulation No 883/2004, since it affects only non-Austrian citizens of the Union.

38 Accordingly, it is first necessary to examine whether a Member State may make the grant of a benefit covered by Regulation No 883/2004 to a national of another Member State conditional upon that national meeting the requirements for obtaining a legal right of residence for a period exceeding three months. Only if the answer to that first question is in the affirmative will it be necessary to determine whether that right of residence can be made conditional upon the person concerned having sufficient resources not to apply for the benefit.

The need to meet the necessary requirements for obtaining a legal right of residence for a period exceeding three months

39 It should be noted that Article 70(4) of Regulation No 883/2004 – upon which the Commission relies – sets out a 'conflict rule', the aim of which is to determine, in cases involving special non-contributory cash benefits, the applicable legislation and the institution responsible for paying the benefits in question.

40 That provision is intended not only to prevent the concurrent application of a number of national legislative systems and the complications which might ensue, but also to ensure that persons covered by Regulation No 883/2004 are not left without social security cover because there is no legislation which is applicable to them (see, by analogy, Case C-275/96 *Kuusijärvi* [1998] ECR I-3419, paragraph 28, and Case C-619/11 *Dumont de Chassart* [2013] ECR, paragraph 38).

41 On the other hand, that provision is not intended to lay down the conditions creating the right to special non-contributory cash benefits. It is for the legislation of each Member State to lay down those conditions (see, to that effect, *Dumont de Chassart*, paragraph 39 and the case-law cited).

42 It cannot therefore be inferred from Article 70(4) of Regulation No 883/2004, read in conjunction with Article 1(j) thereof, that EU law precludes national legislation, such as that at issue in the main proceedings, under which the right to a special non-contributory cash benefit is conditional upon meeting the necessary requirements for obtaining a legal right of residence in the Member State concerned.

43 Regulation No 883/2004 does not set up a common scheme of social security, but allows different national social security schemes to exist and its sole objective is to ensure the coordination of those schemes. It thus allows different schemes to continue to exist, creating different claims on different institutions against which the claimant possesses direct rights by virtue either of national law alone or of national law supplemented, where necessary, by EU law (Case C-331/06 *Chuck* [2008] ECR I-1957, paragraph 27, and *Dumont de Chassart*, paragraph 40).

44 The Court has consistently held that there is nothing to prevent, in principle, the granting of social security benefits to Union citizens who are not economically active being made conditional upon those citizens meeting the necessary requirements for obtaining a legal right of residence in the host Member State (see, to that effect, Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraphs 61 to 63; Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraphs 32 and 33; Case C-456/02 *Trojani* [2004] ECR I-7573, paragraphs 42 and 43; Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 37; and Case C-158/07 *Förster* [2008] ECR I-8507, paragraph 39).

45 However, it is important that the requirements for obtaining that right of residence – such as, in the case before the referring court, the need to have sufficient resources not to apply for the compensatory supplement – are themselves consistent with EU law.

The requirement to have sufficient resources not to apply for the compensatory supplement

46 It should be borne in mind that the right of nationals of one Member State to reside in the territory of another Member State without being engaged in any activity, whether on an employed or a self-employed basis, is not unconditional. Under Article 21(1) TFEU, the right of every citizen of the Union to reside in the territory of the Member States is recognised subject to the limitations and conditions laid down in the Treaty and by the measures adopted for its implementation (see, to that effect, *Trojani*, paragraphs 31 and 32; Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraph 26; and Case C-291/05 *Eind* [2007] ECR I-10719, paragraph 28).

47 By way of such limitations and conditions, Article 7(1)(b) of Directive 2004/38 provides that a Member State may require nationals of another Member State wishing to have the right of residence on its territory for a period of longer than three months without being economically active to have comprehensive sickness insurance cover in the host Member State and sufficient resources for themselves and their family members not to become a burden on the social assistance system of that Member State during their period of residence (see, to that effect, Case C-480/08 *Teixeira* [2010] ECR I-1107, paragraph 42).

48 By contrast with all the governments which have filed written observations, the Commission submits that, since the compensatory supplement is a special non-contributory cash benefit which falls within the scope of Regulation No 883/2004, it cannot be regarded as ‘social assistance’ for the purposes of Article 7(1)(b) of Directive 2004/38. Furthermore, according to the Commission, it is clear from the explanatory memorandum for that directive (Proposal

for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2001) 257 final)) that the 'social assistance' benefits covered by that provision are those which are not currently covered by Regulation No 883/2004. That interpretation is confirmed, it is claimed, by the fact that, according to that explanatory memorandum, social assistance for the purposes of Directive 2004/38 includes free medical assistance, which is specifically excluded from the scope of Regulation No 883/2004 by virtue of Article 3(5) thereof.

49 In that regard, it should be stressed at the outset that the need for the uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose pursued (see, inter alia, Case C-204/09 *Flachglas Torgau* [2012] ECR, paragraph 37, and Case C-260/11 *Edwards and Pallikaropoulos* [2013] ECR, paragraph 29).

50 As has already been stated in paragraphs 33 to 36 above, a benefit such as the compensatory supplement does indeed fall within the scope of Regulation No 883/2004. However, that fact cannot, in and of itself, be decisive for the purposes of interpreting Directive 2004/38. As all the governments which have filed written observations have submitted, the objectives pursued by Regulation No 883/2004 are different to the objectives pursued by that directive.

51 In that regard, it should be borne in mind that Regulation No 883/2004 seeks to achieve the objective set out in Article 48 TFEU by preventing the possible negative effects that the exercise of the freedom of movement for workers could have on the enjoyment, by workers and their families, of social security benefits (see, to that effect, *Chuck*, paragraph 32).

52 It is in order to achieve that objective that, through the waiver of residence clauses under Article 7 thereof, Regulation No 883/2004 provides, subject to the exceptions set out therein, for the cash benefits falling within its scope to be exportable in the host Member State (see, to that effect, Case C-20/96 *Snares* [1997] ECR I-6057, paragraphs 39 and 40).

53 By contrast, although the aim of Directive 2004/38 is to facilitate and strengthen the exercise of the primary and individual right – conferred directly on all Union citizens by the Treaty – to move and reside freely within the territory of the Member States (see Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraphs 82 and 59; Case C-162/09 *Lassal* [2010] ECR I-9217, paragraph 30; and Case C-434/09 *McCarthy* [2011] ECR I-3375, paragraph 28), it is also intended, as is apparent from Article 1(a) thereof, to set out the conditions governing the exercise of that right (see, to that effect, *McCarthy*, paragraph 33, and Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja* [2011] ECR I-14035, paragraphs 36 and 40), which include, where residence is desired for a period of longer than three months, the condition laid down in Article 7(1)(b) of the directive that Union citizens who do not or no longer have worker status must have sufficient resources.

54 It is apparent from recital 10 in the preamble to Directive 2004/38, in particular, that that condition is intended, inter alia, to prevent such persons becoming an unreasonable burden on the social assistance system of the host Member State (*Ziolkowski and Szeja*, paragraph 40).

55 That condition is based on the idea that the exercise of the right of residence for citizens of the Union can be subordinated to the legitimate interests of the Member States – in the present case, the protection of their public finances (see, by analogy, Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 90; *Zhu and Chen*, paragraph 32; and Case C-408/03 *Commission* v *Belgium* [2006] ECR I-2647, paragraphs 37 and 41).

56 In a similar vein, Article 24(2) of Directive 2004/38 allows a derogation from the principle of equal treatment enjoyed by Union citizens other than workers, self-employed persons, persons who retain such status and members of their families who reside within the territory of the host Member State, by permitting that State not to confer entitlement

to social assistance, in particular for the first three months of residence (see Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585, paragraphs 34 and 35).

57 It follows that, while Regulation No 883/2004 is intended to ensure that Union citizens who have made use of the right to freedom of movement for workers retain the right to certain social security benefits granted by their Member State of origin, Directive 2004/38 allows the host Member State to impose legitimate restrictions in connection with the grant of such benefits to Union citizens who do not or no longer have worker status, so that those citizens do not become an unreasonable burden on the social assistance system of that Member State.

58 In those circumstances, the concept of 'social assistance system' as used in Article 7(1)(b) of Directive 2004/38 cannot, contrary to the Commission's assertions, be confined to those social assistance benefits which, pursuant to Article 3(5)(a) of Regulation No 883/2004, do not fall within the scope of that regulation.

59 As several of the governments which have filed observations have pointed out, the opposite interpretation would lead to unjustifiable differences in treatment between Member States, according to how their national social security systems are organised, given that the 'special' nature of a benefit such as the one at issue in the main proceedings – and, as a consequence, the fact that it falls within the scope of Regulation No 883/2004 – depends, inter alia, on whether the grant of that benefit is based, under national law, on objective criteria or solely on the state of need of the person concerned.

60 It follows that, for the purposes of Article 7(1)(b) of Directive 2004/38, the concept of 'social assistance system' must be defined by reference to the objective pursued by that provision, as recalled in paragraphs 53 to 57 above, and not by reference to formal criteria (see, to that effect, *Vatsouras and Koupatantze*, paragraphs 41 and 42, and Case C-571/10 *Kamberaj* [2012] ECR, paragraphs 90 to 92).

61 Accordingly, that concept must be interpreted as covering all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State (see, to that effect, *Bidar*, paragraph 56; *Eind*, paragraph 29; and *Förster*, paragraph 48; see also, by analogy, Case C-578/08 *Chakroun* [2010] ECR I-1839, paragraph 46, and *Kamberaj*, paragraph 91).

62 As regards the compensatory supplement at issue in the main proceedings, it is clear from paragraphs 33 to 36 above that that benefit may be regarded as coming under the 'social assistance system' of the Member State concerned. As the Court found in paragraphs 29 and 30 of *Skalka*, that benefit, which is intended to ensure a minimum means of subsistence for its recipient where his pension is insufficient, is funded in full by the public authorities, without any contribution being made by insured persons.

63 Consequently, the fact that a national of another Member State who is not economically active may be eligible, in light of his low pension, to receive that benefit could be an indication that that national does not have sufficient resources to avoid becoming an unreasonable burden on the social assistance system of the host Member State for the purposes of Article 7(1)(b) of Directive 2004/38 (see, to that effect, *Trojani*, paragraphs 35 and 36).

64 However, the competent national authorities cannot draw such conclusions without first carrying out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the person concerned.

65 First, it should be pointed out that there is nothing in Directive 2004/38 to preclude nationals of other Member States from receiving social security benefits in the host Member State (see, by analogy, *Grzelczyk*, paragraph 39).

66 On the contrary, several provisions of that directive specifically state that those nationals may receive such benefits. Thus, as the Commission has rightly pointed out, the very wording of Article 24(2) of that directive shows that it is only during the first three months of residence that, by way of derogation from the principle of equal treatment set out in Article 24(1), the host Member State is not to be under an obligation to confer entitlement to social assistance on Union citizens who do not or no longer have worker status. In addition, Article 14(3) of that directive provides that an expulsion measure is not to be the automatic consequence of recourse to the social assistance system of the host Member State by a Union citizen or a member of his family.

67 Second, it should be noted that the first sentence of Article 8(4) of Directive 2004/38 expressly states that Member States may not lay down a fixed amount which they will regard as 'sufficient resources', but must take into account the personal situation of the person concerned. Moreover, under the second sentence of Article 8(4), the amount ultimately regarded as indicating sufficient resources may not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where that criterion is not applicable, higher than the minimum social security pension paid by the host Member State.

68 It follows that, although Member States may indicate a certain sum as a reference amount, they may not impose a minimum income level below which it will be presumed that the person concerned does not have sufficient resources, irrespective of a specific examination of the situation of each person concerned (see, by analogy, *Chakroun*, paragraph 48).

69 Furthermore, it is clear from recital 16 in the preamble to Directive 2004/38 that, in order to determine whether a person receiving social assistance has become an unreasonable burden on its social assistance system, the host Member State should, before adopting an expulsion measure, examine whether the person concerned is experiencing temporary difficulties and take into account the duration of residence of the person concerned, his personal circumstances, and the amount of aid which has been granted to him.

70 Lastly, it should be borne in mind that, since the right to freedom of movement is – as a fundamental principle of EU law – the general rule, the conditions laid down in Article 7(1)(b) of Directive 2004/38 must be construed narrowly (see, by analogy, *Kamberaj*, paragraph 86, and *Chakroun*, paragraph 43) and in compliance with the limits imposed by EU law and the principle of proportionality (see *Baumbast and R*, paragraph 91; *Zhu and Chen*, paragraph 32; and *Commission* v *Belgium*, paragraph 39).

71 In addition, the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would compromise attainment of the objective of Directive 2004/38, which is, inter alia, to facilitate and strengthen the exercise of Union citizens' primary right to move and reside freely within the territory of the Member States, and the practical effectiveness of that directive (see, by analogy, *Chakroun*, paragraphs 43 and 47).

72 By making the right of residence for a period of longer than three months conditional upon the person concerned not becoming an 'unreasonable' burden on the social assistance 'system' of the host Member State, Article 7(1)(b) of Directive 2004/38, interpreted in the light of recital 10 to that directive, means that the competent national authorities have the power to assess, taking into account a range of factors in the light of the principle of proportionality, whether the grant of a social security benefit could place a burden on that Member State's social assistance system as a whole. Directive 2004/38 thus recognises a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary (see, by analogy, *Grzelczyk*, paragraph 44; *Bidar*, paragraph 56; and *Förster*, paragraph 48).

73 It is true, as the Advocate General states in point 74 of his Opinion, that, unlike most of the other language versions, the German version of Article 7(1)(b) of Directive 2004/38 does not appear to refer to any such 'system'.

74 However, it is settled case-law that the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement of the uniform application of EU law. In

the event of divergence between the language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part (see Case C-372/88 *Cricket St Thomas* [1990] ECR I-1345, paragraphs 18 and 19, and Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraph 16).

75 It can be seen from paragraphs 64 to 72 above that the mere fact that a national of a Member State receives social assistance is not sufficient to show that he constitutes an unreasonable burden on the social assistance system of the host Member State.

76 As regards the legislation at issue in the main proceedings, it is clear from the explanation provided by the Austrian Government at the hearing that, although the amount of the compensatory supplement depends on the financial situation of the person concerned as measured against the reference amount fixed for granting that supplement, the mere fact that a national of another Member State who is not economically active has applied for that benefit is sufficient to preclude that national from receiving it, regardless of the duration of residence, the amount of the benefit and the period for which it is available, that is to say, regardless of the burden which that benefit places on the host Member State's social assistance system as a whole.

77 Such a mechanism, whereby nationals of other Member States who are not economically active are automatically barred by the host Member State from receiving a particular social security benefit, even for the period following the first three months of residence referred to in Article 24(2) of Directive 2004/38, does not enable the competent authorities of the host Member State, where the resources of the person concerned fall short of the reference amount for the grant of that benefit, to carry out – in accordance with the requirements under, inter alia, Articles 7(1)(b) and 8(4) of that directive and the principle of proportionality – an overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the individual situation of the person concerned.

78 In particular, in a case such as that before the referring court, it is important that the competent authorities of the host Member State are able, when examining the application of a Union citizen who is not economically active and is in Mr Brey's position, to take into account, inter alia, the following: the amount and the regularity of the income which he receives; the fact that those factors have led those authorities to issue him with a certificate of residence; and the period during which the benefit applied for is likely to be granted to him. In addition, in order to ascertain more precisely the extent of the burden which that grant would place on the national social assistance system, it may be relevant, as the Commission argued at the hearing, to determine the proportion of the beneficiaries of that benefit who are Union citizens in receipt of a retirement pension in another Member State.

79 In the present case, it is for the referring court, which alone has jurisdiction to assess the facts, to decide, in light of those elements in particular, whether granting a benefit such as the compensatory supplement to a person in Mr Brey's situation is likely to place an unreasonable burden on the national social assistance system.

80 In the light of all of the foregoing, the answer to the question referred is that EU law – in particular, as it results from Article 7(1)(b), Article 8(4) and Article 24(1) and (2) of Directive 2004/38 – must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, even as regards the period following the first three months of residence, automatically – whatever the circumstances – bars the grant of a benefit, such as the compensatory supplement provided for in Paragraph 292(1) of the ASVG, to a national of another Member State who is not economically active, on the grounds that, despite having been issued with a certificate of residence, he does not meet the necessary requirements for obtaining the legal right to reside on the territory of the first Member State for a period of longer than three months, since obtaining that right of residence is conditional upon that national having sufficient resources not to apply for the benefit.

Costs

81 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

EU law – in particular, as it results from Article 7(1)(b), Article 8(4) and Article 24(1) and (2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC – must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, even as regards the period following the first three months of residence, automatically – whatever the circumstances – bars the grant of a benefit, such as the compensatory supplement provided for in Paragraph 292(1) of the Federal Act on General Social Insurance (Allgemeines Sozialversicherungsgesetz), as amended, from 1 January 2011, by the 2011 Budget Act (Budgetbegleitgesetzes 2011), to a national of another Member State who is not economically active, on the grounds that, despite having been issued with a certificate of residence, he does not meet the necessary requirements for obtaining the legal right to reside on the territory of the first Member State for a period of longer than three months, since obtaining that right of residence is conditional upon that national having sufficient resources not to apply for the benefit.

Case C-46/12: L.N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte

JUDGMENT OF THE COURT (Third Chamber)

21 February 2013 (*)

(Citizenship of the Union – Freedom of movement for workers – Principle of equal treatment – Article 45(2) TFEU – Regulation (EEC) No 1612/68 – Article 7(2) − Directive 2004/38/EC – Article 24(1) and (2) – Derogation from the principle of equal treatment for maintenance aid for studies consisting in student grants or student loans – European Union citizen studying in a host Member State – Paid employment prior to and subsequent to the start of studies − Principal objective of the person concerned at the time of entry on the territory of the host Member State – Effect on his classification as worker and on his entitlement to student grants)

In Case C-46/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Ankenævnet for Statens Uddannelsesstøtte (Denmark), made by decision of 24 January 2012, received at the Court on 26 January 2012, in the proceedings

L.N.,

v

Styrelsen for Videregående Uddannelser og Uddannelsesstøtte,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, E. Jarašiūnas, A. Ó Caoimh (Rapporteur), C. Toader and C.G. Fernlund, Judges,

Advocate General: Y. Bot,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 28 November 2012,

after considering the observations submitted on behalf of:

– the Danish Government, by V. Pasternak Jørgensen and C. Thorning, acting as Agents,
– the Norwegian Government, by E. Leonhardsen, M. Emberland and B. Gabrielsen, acting as Agents,
– the European Commission, by D. Roussanov and C. Barslev, acting as Agents,

– having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 7(1)(c) and Article 24(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and

their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, corrigenda OJ 2004 L 229, p. 35 and OJ 2005 L 197, p. 34).

2 The request has been made in proceedings between Mr N. and the Styrelsen for Videregående Uddannelser og Uddannelsesstøtte (Danish Agency for Higher Education and Educational Support) ('the VUS') concerning the latter's refusal to grant him education assistance.

Legal context

European Union legislation

Regulation No (EEC) No 1612/68

3 Article 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475) provides:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.

...'

Directive 2004/38

4 Recitals 1, 3, 10, 20 and 21 in the preamble to Directive 2004/38 state:

'(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

…

(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

…

(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.

…

(20) In accordance with the prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment

with nationals in areas covered by the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law.

(21) However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.'

5 Article 3(1) of Directive 2004/38 provides that that directive is to apply to all Union citizens who move to or reside in a Member State other than that of which they are a national.

6 Article 7(1) and (3) of Directive 2004/38 is worded as follows:

'1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) − are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

− have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence ...

…

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

…

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.'

7 Article 24 of Directive 2004/38, entitled 'Equal treatment', is worded as follows:

'1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.'

Danish legislation

8 Paragraph 2a(2) and (4) of Consolidated Law No 661 of 29 June 2009 on the Students' Grants and Loans Scheme (Lovbekendtgørelse nr. 661 af 29. juni 2009 om statens uddannelsesstøtte) (*Folketingstidende* 2005/2006 L 95, Supplement A, p. 2854) is worded as follows:

'…

2. Applicants for courses of study who are EU or EEA [European Economic Area] citizens and their family members may receive education assistance for courses of study in Denmark and abroad under the conditions laid down in EU law and the EEA Agreement. EU citizens and EEA citizens who are not workers or self employed persons in Denmark and their family members shall be entitled to education assistance only after five years' continuous residence in Denmark …

…

4. The Minister for Education may adopt rules governing non-Danish citizens' entitlement to [education assistance] for education in Denmark and abroad.'

9 Paragraph 2a(2) of Consolidated Law No 661 was implemented by paragraph 67 of Regulation No 455 of 8 June 2009 on State education assistance (Bekendtgørelse nr. 455 af 8. juni 2009 om statens uddannelsesstøtte). Paragraph 67 reads as follows:

'An EU citizen who is a worker or self-employed person in Denmark under EU law may be granted assistance for education in Denmark or abroad on the same terms as a Danish citizen. A worker or self-employed person under [European Union] law shall also be deemed to include an EU citizen who was previously a worker or self-employed person in Denmark, where there is a substantive and temporal connection between the education and the previous work in Denmark, or an involuntarily unemployed person who, due to health reasons or structural causes on the labour market requires retraining for the purpose of employment in a field which does not have a substantive and temporal connection with the previous work in Denmark.'

10 Under paragraph 3 of Regulation No 474 of 12 May 2011 on residence in Denmark for non-Danish citizens covered by the European Union rules (EU residence law) (Bekendtgørelse nr. 474 af 12. maj 2011 om ophold i Danmark for udlændinge, der er omfattet af Den Europæiske Unions regler (EU-opholdsbekendtgørelsen)):

'1. An EU citizen who is a worker or self-employed person, including service provider, in Denmark, shall have a right of residence for more than the three months provided for in § 2(1) of the Aliens Act (udlændingeloven);

2. An EU citizen who was previously covered by subparagraph (1) but is no longer in active employment retains his or her status as worker or self-employed person,

(1) if the EU citizen is temporarily unemployed due to illness or accident;

(2) if the EU citizen is involuntarily unemployed after having been in paid employment or a self-employed person for over one year, duly recorded, and has registered at an employment office as a job-seeker;

(3) if the EU citizen is involuntarily unemployed after the expiry of a fixed-term employment contract of less than one year's duration, duly recorded, and has registered at an employment office as a job-seeker;

(4) if the EU citizen, in the course of the first 12 months has lost his or her employment involuntarily or is no longer a self-employed person, duly recorded, and has registered at an employment office as a job-seeker; or

(5) if the EU citizen either commences a course of vocational training connected to that person's previous employment or is involuntarily unemployed and commences any type of vocational training.

3. An EU citizen covered by subparagraph 2(3) or (4) shall retain his or her status as worker or self-employed person for six months.

4. An EU citizen who has entered the country to seek employment shall have a right of residence as a job-seeker for up to six months from the time of entering the country. After that time the person shall have a right of residence as a job-seeker in so far as it can be documented that that person is still seeking employment and has actual employment prospects.

…'

The dispute in the main proceedings and the question referred for a preliminary ruling

11 Mr N., a European Union citizen whose nationality is not indicated by the national court, entered Denmark on 6 June 2009.

12 On 10 June 2009 Mr N. was offered full-time employment in an international wholesale firm.

13 On 29 June 2009, the regional government administration issued a certificate of registration to him as a worker on the basis of paragraph 3 of Regulation No 474.

14 The case-file indicates that Mr N. had applied to the Copenhagen Business School ('CBS') before 15 March 2009, the deadline for applications, that is, before entering Danish territory.

15 On 10 August 2009, Mr N. filed an application for education assistance from September 2009 onwards.

16 On 10 September 2009, Mr N. began his studies at the CBS. Mr N. then resigned from his employment with the international wholesale firm, but then carried on other part-time employment.

17 On 27 October 2009, the VUS informed Mr N. that it had rejected his application for education assistance.

18 On 30 October 2009, Mr N. filed a complaint against that decision with the Ankenævnet for Statens Uddannelsesstøtte (Appeals Tribunal, the Danish Students' Grants and Loans Scheme), arguing that he had the status of 'worker' within the meaning of Article 45 TFEU and was entitled to education assistance.

19 On 7 December 2009, the VUS requested the regional government administration to inform it as to whether Mr N. satisfied the criteria for status as a worker within the meaning of Article 45 TFEU. First, in a letter of 11 December 2009, the government administration stated that Mr N. was deemed to be a worker for the period from 29 June to 10 September 2009. Then, by letter of 12 April 2010, it changed the basis for Mr N.'s residence from that of worker to that of student, on the ground that his principal objective in coming to Denmark was to pursue a course of study.

20 By letter of 28 September 2010, the VUS referred the case to the national court. In that letter, it indicated that, in the examination of the evidence in the case, account had to be taken of the fact that Mr N. had come to Denmark for the purpose of pursuing a course of study, since he had applied to the CBS before coming to Denmark and had commenced his studies shortly thereafter. Consequently, in the VUS's view, Mr N. could not fulfil the requirements to be considered a worker.

21 On 31 August 2011 the national court contacted the VUS, asking for a review as to whether Mr N. came within the concept of 'worker' under EU law. At the same time that court requested the VUS to contact the regional public authorities for clarification on the same question. The VUS indicated that, in its view, there were no grounds to cast doubt on the regional public authorities' earlier decision on the basis for Mr N.'s residence.

22 The national court takes the view that Articles 7(1)(c) and 24(2) of Directive 2004/38 must be interpreted as meaning that a person considered to be a student is not entitled to a study grant even if he can also be classified as a 'worker'. It accords importance to the fact that Article 7(1)(c) of that directive defines a student as a person enrolled at a private or public establishment 'for the principal purpose of following a course of study'.

23 In those circumstances the Ankenævnet for Statens Uddannelsesstøtte (Appeals Tribunal, the Danish Students' Grants and Loans Scheme) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 7(1)(c), read in conjunction with Article 24(2) of the Directive 2004/38, mean that a Member State (host Member State), in the assessment of whether a person must be deemed to be a worker entitled to education assistance, may take account of the fact that the person entered the host Member State for the principal purpose of following a course of study, with the result that the host Member State is not obliged to grant education assistance aid for studies to that person (see aforementioned Article 24(2))?'

The question referred for a preliminary ruling

24 By its question, the national court asks, in essence, whether Articles 7(1)(c) and 24(2) of Directive 2004/38 must be interpreted as meaning that a European Union citizen who pursues a course of studies in a host Member State whilst at the same time being in employment may be refused maintenance aid for studies granted to the nationals of that Member State where he entered the territory of that State with the principal intention of pursuing a course of study.

25 It should be observed as a preliminary point that Article 20(1) TFEU confers on any person holding the nationality of a Member State the status of citizen of the Union.

26 Both students from Member States other than the host Member State who follow a course of study in that State and nationals of Member States having the status of 'worker' within the meaning of Article 45 TFEU have that status, provided that they hold the nationality of a Member State.

27 As the Court has held on numerous occasions, the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to receive, as regards the material scope of the FEU Treaty, the same treatment in law irrespective of their nationality, subject to such exceptions as are provided for in that regard (see, to that effect, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31, and Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 28).

28 Every citizen of the Union may therefore rely on the prohibition of discrimination on grounds of nationality laid down in Article 18 TFEU, provided for in other Treaty provisions and in Article 24 of Directive 2004/38, in all situations falling within the scope *ratione materiae* of European Union law. Those situations include the exercise of the fundamental freedoms conferred by inter alia Article 45 TFEU and those relating to the exercise of the freedom conferred by Article 21 TFEU to move and reside within the territory of the Member States (see, inter alia, Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 63; *Grzelczyk*, paragraphs 32 and 33; Case C-209/03 *Bidar* [2005] ECR I-2119, paragraphs 32 and 33; and Case C-75/11 *Commission* v *Austria* [2012] ECR, paragraph 39).

29 There is no provision of the Treaty to suggest that when students who are citizens of the Union move to another Member State to study there, they lose the rights which the Treaty confers on citizens of the Union, including the rights

conferred on those citizens when they are in employment in the host Member State (see, to that effect, *Grzelczyk*, paragraph 35, and *Bidar*, paragraph 34).

30 It follows that a citizen of the Union who is studying in a host Member State or is in employment in that State and holds the status of 'worker' within the meaning of Article 45 TFEU may rely on the right, enshrined in Articles 18 TFEU, 21 TFEU and/or 45 TFEU, to move and reside freely within the territory of the host Member State, without being subject to direct or indirect discrimination on grounds of his nationality.

31 Both the Danish and the Norwegian Governments contend, however, that Articles 7(1)(c) and 24(2) of Directive 2004/38, read together, must be interpreted as meaning that a citizen of the Union who studies full-time in a host Member State and who entered the territory of that Member State for that purpose may be refused maintenance aid for studies for the first five years he is resident in the country, even if he is in part-time employment alongside his studies.

32 It should be borne in mind in that regard that Article 24(2) of Directive 2004/38 provides that the host Member State is not obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

33 As a derogation from the principle of equal treatment provided for in Article 18 TFEU, of which Article 24(1) of Directive 2004/38 is merely a specific expression, Article 24(2) must, according to the Court's case-law, be interpreted narrowly and in accordance with the provisions of the Treaty, including those relating to citizenship of the Union and the free movement of workers (see, to that effect, Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585, paragraph 44, and Case C-75/11 *Commission* v *Austria*, paragraphs 54 and 56).

34 According to the information provided to the Court, the aid for which Mr N. applied is maintenance aid in the form of a study grant. It may therefore come within the derogation from the principle of equal treatment provided for in Article 24(2) of Directive 2004/38.

35 However, as is readily evident from the wording of that provision, that derogation may not be applied as against persons having acquired a right of permanent residence or to 'workers, self-employed persons, persons who retain such status and members of their families'.

36 Although Article 7(1)(c) of Directive 2004/38 does provide that a Union citizen is to have the right of residence on the territory of another Member State for a period of longer than three months if he is enrolled at a 'private or public establishment' within the meaning of that provision 'for the principal purpose of following a course of study', it does not however follow from that provision that a citizen of the Union who fulfils those conditions is thereby automatically precluded from having the status of 'worker' within the meaning of Article 45 TFEU.

37 The order for reference and the observations submitted to the Court indicate that Mr N. was in full-time employment from the time he arrived in the territory of the host Member State and that, once he began his studies, he was in part-time employment.

38 The case-file also indicates that he was refused maintenance aid for studies on the ground that he entered the territory of Denmark with the principal intention of following a course of study, the purpose of his residence in Denmark being, according to the competent national authorities, such as to preclude him from having the status of 'worker' within the meaning of Article 45 TFEU.

39 It is settled case-law, however, that the concept of 'worker' within the meaning of Article 45 TFEU has an autonomous meaning specific to European Union law and must not be interpreted narrowly (see, to that effect, inter alia Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraph 16; Case 197/86 *Brown* [1988] ECR 3205, paragraph 21; Case C-3/90 *Bernini* [1992] ECR I-1071, paragraph 14; and Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187, paragraph 23).

40 Moreover, that concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration (see *Lawrie-Blum*, paragraph 17; *Ninni-Orasche*, paragraph 24; and also *Vatsouras and Kouptantze*, paragraph 26).

41 The low level of or origin of the resources for that remuneration, the rather low productivity of the person concerned, or the fact that he works only a small number of hours per week do not preclude that person from being recognised as a 'worker' within the meaning of Article 45 TFEU (see, to that effect, *Lawrie-Blum*, paragraph 21; Case 344/87 *Bettray* [1989] ECR 1621, paragraph 15; and *Bernini*, paragraph 16).

42 In order to qualify as a 'worker', the person concerned must nevertheless pursue effective and genuine activities which are not on such a small scale as to be regarded as purely marginal and ancillary (see, inter alia, Case 53/81 *Levin* [1982] ECR 1035, paragraph 17, and *Vatsouras and Kouptantze*, paragraph 26 and the case-law cited).

43 In investigating whether a specific case involves effective and genuine employment, the national court must base itself on objective criteria and make a comprehensive assessment of all the circumstances of the case that have to do with the activities and the employment relationship concerned (*Ninni-Orasche*, paragraph 27).

44 It is for the national court to conduct an analysis of all the aspects which characterise an employment relationship for the purpose of determining whether the employment activities pursued by Mr N. before and after he began his studies were effective and genuine in nature and, therefore, such as to confer the status of worker on him. That court alone has direct knowledge of the facts of the main proceedings and the aspects characterising the employment relationship of the applicant in the main proceedings and is accordingly the best placed to make the necessary findings.

45 As there is nothing in the order for reference to cast doubt on the fact that the employment relationship between Mr N. and his employers had the features of an employment relationship as outlined in paragraph 40 above, it is for the national court to make sure inter alia that the employment activities of the applicant in the main proceedings are not on such a small scale as to be regarded as purely marginal and ancillary.

46 As regards the argument put forward by the Danish and Norwegian Governments to the effect that the intention the applicant in the main proceedings had when he entered Danish territory to follow a course of study precludes him from having the status of 'worker' within the meaning of Article 45 TFEU, it should be remembered that, in order to assess whether employment is capable of conferring the status of worker within the meaning of Article 45 TFEU, factors relating to the conduct of the person concerned before and after the period of employment are not relevant in establishing the status of worker within the meaning of that article. Such factors are not in any way related to the objective criteria referred to in the case-law referred to in paragraph 40 of this judgment (*Ninni-Orasche*, paragraph 28).

47 It should be noted that the definition of the concept of 'worker' within the meaning of Article 45 TFEU expresses the requirement, which is inherent in the very principle of the free movement of workers, that the advantages conferred by European Union law under that freedom may be relied on only by people genuinely pursuing or genuinely wishing to pursue employment activities. It does not mean, however, that the enjoyment of that freedom may be made contingent on which objectives are being pursued by a national of a Member State in applying to enter the territory of a host Member State, provided that he pursues or wishes to pursue effective and genuine employment activities. Once that condition is satisfied, the motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account and must not be taken into consideration (see, to that effect, *Levin*, paragraphs 21 and 22, and Case C-109/01 *Akrich* [2003] ECR I-9607, paragraph 55).

48 Should the national court decide that Mr N. must be considered a 'worker' within the meaning of Article 45 TFEU, it is clear that a refusal to grant that citizen of the Union maintenance aid for studies infringes his right to equal treatment which he enjoys in his capacity as worker.

49 Under Article 7(2) of Regulation No 1612/68, a citizen of the Union who has exercised his right of free movement of workers guaranteed by Article 45 TFEU enjoys, in the host Member State, the same social benefits as national workers.

50 Moreover, the Court has held previously that maintenance aid for studies constitutes a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 (see Case 39/86 *Lair* [1988] ECR 3161, paragraphs 23 and 24, and *Bernini*, paragraph 23).

51 In the light of the foregoing, the answer to the question referred is that Articles 7(1)(c) and 24(2) of Directive 2004/38 must be interpreted as meaning that a European Union citizen who pursues a course of studies in a host Member State whilst at the same time pursuing effective and genuine employment activities such as to confer on him the status of 'worker' within the meaning of Article 45 TFEU may not be refused maintenance aid for studies which is granted to the nationals of that Member State. It is for the national court to make the necessary findings of fact in order to ascertain whether the employment activities of the applicant in the main proceedings are sufficient to confer that status on him. The fact that the person entered the territory of the host Member State with the principal intention of pursuing a course of study is not relevant for determining whether he is a 'worker' within the meaning of Article 45 TFEU and, accordingly, whether he is entitled to that aid under the same terms as a national of the host Member State under Article 7(2) of Regulation No 1612/68.

Costs

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Articles 7(1)(c) and 24(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC must be interpreted as meaning that a European Union citizen who pursues a course of studies in a host Member State whilst at the same time pursuing effective and genuine employment activities such as to confer on him the status of 'worker' within the meaning of Article 45 TFEU may not be refused maintenance aid for studies which is granted to the nationals of that Member State. It is for the national court to make the necessary findings of fact in order to ascertain whether the employment activities of the applicant in the main proceedings are sufficient to confer that status on him. The fact that the person entered the territory of the host Member State with the principal intention of pursuing a course of study is not relevant for determining whether he is a 'worker' within the meaning of Article 45 TFEU and, accordingly, whether he is entitled to that aid under the same terms as a national of the host Member State under Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community

Case E-15/12: Jan Anfinn Wahl v the Icelandic State

JUDGMENT OF THE COURT

of 22 July 2013

in Case E-15/12

Jan Anfinn Wahl v the Icelandic State

(Article 3 EEA — Article 7 EEA — Form and method of implementation of directives — Directive 2004/38/EC — Free movement of EEA nationals — Restrictions on right of entry — Procedural safeguards)

2013/C 309/06

In Case E-15/12,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Hæstiréttur Íslands (the Supreme Court of Iceland), in the case between

Jan Anfinn Wahl

and

the Icelandic State

concerning the interpretation of Article 27 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States,

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Per Christiansen, and Páll Hreinsson, Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- Jan Anfinn Wahl ("the Plaintiff"), represented by Oddgeir Einarsson, Supreme Court Attorney; ∗ Language of the request: Icelandic.

- the Icelandic State ("the Defendant" or "Iceland"), represented by Óskar Thorarensen, Supreme Court Attorney, Office of the Attorney General (Civil Affairs), acting as Agent;

- the Norwegian Government ("Norway"), represented by Pål Wennerås, Advocate, Office of the Attorney General (Civil Affairs), and Janne Tysnes Kaasin, Senior Advisor, Ministry of Foreign Affairs, acting as Agents;

- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, Auður Ýr Steinarsdóttir and Catherine Howdle, Officers, Department of Legal & Executive Affairs, acting as Agents;

- the European Commission ("the Commission"), represented by Christina Tufvesson and Michael Wilderspin, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Plaintiff, represented by Oddgeir Einarsson; the Defendant, represented by Óskar Thorarensen; the Norwegian Government, represented by Pål Wennerås; ESA, represented by Xavier Lewis and Auður Ýr Steinarsdóttir; and the Commission, represented by Michael Wilderspin, at the hearing on 23 May 2013,

gives the following

Judgment

I Legal background

EEA law

1 Article 7 EEA reads as follows:

> *Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:*
>
> > *(a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;*
> >
> > *(b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.*

2 In the fourth recital in the preamble to the EEA Agreement, the Contracting Parties express their consideration for

> *... the objective of establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties;*

3 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC ("the Directive") (OJ 2004 L 158, p. 77) was incorporated into Annex V to the EEA Agreement at point 1 and

Annex VIII at point 3 by Decision of the EEA Joint Committee No 158/2007 ("the Decision") (OJ 2008 L 124, p. 20, and EEA Supplement No 26, 8.5.2008, p. 17). The Decision entered into force on 1 March 2009.

4 Article 5 of the Directive as adapted for the purposes of the EEA Agreement reads as follows:

> *Right of entry*
>
> *1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant nationals of EC Member States and EFTA States leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.*
>
> *No entry visa or equivalent formality may be imposed on nationals of EC Member States and EFTA States. …*

5 Article 27 of the Directive as adapted for the purposes of the EEA Agreement reads as follows:

General principles

> *1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of nationals of EC Member States and EFTA States and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.*
>
> *2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.*
>
> *The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.*

6 Article 31 of the Directive reads as follows:

> *Procedural safeguards*
>
> *1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.*
>
> *2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:*
>
> *where the expulsion decision is based on a previous judicial decision; or*

where the persons concerned have had previous access to judicial review; or

where the expulsion decision is based on imperative grounds of public security under Article 28(3).

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

7 Article 37 of the Directive reads as follows:

The provisions of this Directive shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive.

8 The preamble to the Decision reads as follows:

THE EEA JOINT COMMITTEE, Having regard to the Agreement on the European Economic Area, as amended by the Protocol adjusting the Agreement on the European Economic Area, hereinafter referred to as 'the Agreement', and in particular Article 98 thereof,

Whereas:

(1) Annex V to the Agreement was amended by Decision of the EEA Joint Committee No 43/2005 of 11 March 2005.

(2) Annex VIII to the Agreement was amended by Decision of the EEA Joint Committee No 43/2005 of 11 March 2005.

(3) Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, as corrected by OJ L 229, 29.6.2004, p. 35, OJ L 30, 3.2.2005, p. 27 and OJ L 197, 28.7.2005, p. 34, is to be incorporated into the Agreement.

...

(8) The concept of 'Union Citizenship' is not included in the Agreement. (9) Immigration policy is not part of the Agreement.

...

9 Article 1 of the Decision reads as follows:

Annex VIII to the Agreement shall be amended as follows:

(1) … The provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations:

(a) …

(b) …

(c) The words 'Union citizen(s)' shall be replaced by the words 'national(s) of EC Member States and EFTA States'. …

10 The Joint Declaration by the Contracting Parties to the Decision reads as follows:

The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq. EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals.

The Contracting Parties agree that immigration policy is not covered by the EEA Agreement. Residence rights for third country nationals fall outside the scope of the Agreement with the exception of rights granted by the Directive to third country nationals who are family members of an EEA national exercising his or her right to free movement under the EEA Agreement as these rights are corollary to the right of free movement of EEA nationals. The EFTA States recognise that it is of importance to EEA nationals making use of their right of free movement of persons, that their family members within the meaning of the Directive and possessing third country nationality also enjoy certain derived rights such as foreseen in Articles 12(2), 13(2) and 18. This is without prejudice to Article 118 of the EEA Agreement and the future development of independent rights of third country nationals which do not fall within the scope of the EEA Agreement.

National law

11 Article 22 of the Foreign Nationals Act No 96/2002 reads as follows:

A commissioner of police shall decide on denial of entry as provided for in Article 18, the first paragraph, subparagraphs (a) – (i). The Directorate of Immigration shall take other decisions in accordance with this Article. Police shall prepare the cases to be decided on by the Directorate of Immigration. If the police consider that the conditions for denial of entry or expulsion are fulfilled, they shall send the case file to the Directorate of Immigration for its decision.

12 Article 41 of the Foreign Nationals Act, which implements Article 27 of the Directive, reads as follows:

An EEA or EFTA foreign national may be refused the right to enter Iceland on arrival in the country or for up to seven days after arrival if:

a. …

b. …

c. he conducts himself in a way referred to in the first paragraph of Article 42, or

d. this is necessary in view of the security of the state, urgent national interests or public health.

A police commissioner shall take the decision on refusal of entry under items a and b of the first paragraph; the Directorate of Immigration shall take decisions under items c and d. It shall be sufficient that the processing of the case begin[s] before the end of the seven-day period.

If the processing of a case under the first paragraph does not begin within seven days, the EEA or EFTA foreign national may be expelled from Iceland by a decision of the Directorate of Immigration in accordance with items b, c and d within three months of his arrival in Iceland.

13 Article 42 of the Foreign Nationals Act provides as follows:

(1) An EEA or EFTA foreign national, or a member of his family, may be expelled from Iceland if this is necessary in view of public order or public safety.

(2) Expulsion under the first paragraph of this Article may be effected if the foreign national exhibits conduct, or may be considered likely to 1 Translations of national provisions are unofficial and based on those contained in the documents of the case. engage in conduct, that involves a substantial and sufficiently serious threat to the fundamental attitudes of society. If the foreign national has been sentenced to punishment or special measures have been decided, then an expulsion on these grounds may only be effected if the conduct involved may indicate that the foreign national will again commit a criminal action.

14 The Directive was further implemented by Article 87 of Icelandic Regulation No 53/2003, which reads as follows:

An EEA or EFTA foreigner may be denied entry or expelled if necessary with a view to public order and public safety, cf. Article 42, the first paragraph (c), and Article 43, the first paragraph, of the Foreign Nationals Act. Denial of entry or expulsion as provided for in the first paragraph is, for example, allowed if a foreigner:

a. is dependent upon drugs of abuse or other illicit substances, and has become thus dependent before his first permit to stay was issued, or

b. suffers from a serious psychiatric disturbance, or a psychiatric disturbance characterised by agitation, delirium, hallucinations or thought disorders, provided this condition developed before his first permit to stay was issued.

A decision on denial of entry or expulsion by reference to public order or public safety shall be exclusively based on the personal conduct of the foreigner in question, and may only be carried out if measures are allowed with respect to Icelandic nationals in comparable situations.

15 Article 175a of the General Penal Code No 19/1940, as inserted by Article 5 of Act No 149/2009, provides as follows:

Any person who connives with another person on the commission of an act which is punishable by at least 4 years' imprisonment, the commission of which is part of the activities of a criminal organisation, shall be imprisoned for up to 4 years unless a heavier punishment for his offence is prescribed in other provisions of this Act or in other statutes.

'Criminal organisation' here refers to an association of three or more persons, the principle objective of which is, for motives of gain, directly or indirectly, deliberately to commit a criminal act that is punishable by at least 4 years' imprisonment, or a substantial part of the activities of which involves the commission of such an act.

16 Article 10 of the Administrative Procedure Act No 37/1993 reads as follows:

An authority shall ensure that a case is sufficiently investigated before a decision hereon is reached.

17 Article 12 of the Administrative Procedure Act provides as follows:

A public authority shall reach an adverse decision only when the lawful purpose sought cannot be attained by any less stringent means. Care should then be taken not to go further than necessary.

18 According to Article 3 of Act No 2/1993, "[s]tatutes and regulations shall be interpreted, in so far as appropriate, to accord with the EEA Agreement and the rules based thereon".

II Facts and procedure

19 By a letter of 5 December 2012, registered at the Court on 17 December 2012, the Supreme Court of Iceland made a request under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") in a case pending before it between Jan Anfinn Wahl and the Icelandic State.

20 On 5 February 2010, the Plaintiff, a Norwegian national, having arrived in Iceland by air, was stopped by a customs officer and his luggage was searched. Items marked with the name of the motorcycle club Hells Angels were found.

21 The Plaintiff was held at the airport while he was asked to provide statements about his background and the purpose of his visit to Iceland. He stated that he was a member of the Hells Angels motorcycle club in Drammen, Norway, and that he held a clean criminal record. The Plaintiff indicated that the purpose of his visit was to go sightseeing and engage in social contact with befriended members of an Icelandic motorcycle club – Fáfnir (subsequently renamed MC Iceland). He also said that he had a return flight to Oslo booked for 8 February 2010. He was subsequently denied entry to Iceland by a decision of the Directorate of Immigration which was served to him on the same day. The police informed him that he could exercise his right to be heard. It appears that a paper was enclosed, initialled by the Plaintiff and two policemen, in which it was stated that nationals of EEA States could be denied entry into Iceland on grounds of public policy and public security.

22 The Plaintiff filed an administrative appeal against the decision of the Directorate of Immigration with the Ministry of the Interior. He stated, inter alia, that he was a 36-year old university student from Norway

and a member of a motorcycle club with lawful objectives. The motorcycle club he belonged to had never broken the law, neither in Iceland nor in his home country, and pursued lawful purposes.

23 The Plaintiff and the Directorate of Immigration submitted observations to the Ministry of the Interior. The Directorate of Immigration revealed that it had received a request from the Commissioner of Suðurnes Police on the day of the Plaintiff's arrival requesting a decision on a denial of entry to the country pursuant to item (c) of the first paragraph of Article 41 of the Foreign Nationals Act No 96/2002. The request was accompanied by copies of two police reports, a photocopy of the Plaintiff's passport, photographs of the Plaintiff's luggage and an "Open danger assessment by the Intelligence Department of the Office of the National Commissioner of Police regarding the arrival of a member of Hells Angels in Iceland, dated 5 February 2010" ("the danger assessment").

24 This assessment stated, inter alia, that it had been produced in connection with the arrival of a Norwegian member of the motorcycle club Hells Angels in Iceland. In all likelihood, it was stated that the arrival of the Plaintiff was connected to the planned entry of the said Icelandic motorcycle club into the Hells Angels. The admission process had been directed from Norway and was in its final stage. Following completion of that entry, the Icelandic group would acquire the status of a full and independent charter within Hells Angels. The assessment further stated that everywhere that this association had established itself, an increase in organised crime had followed.

25 MC Iceland acquired full membership of the Hells Angels MC on 4 March 2011. The proposal by the Norwegian charter of Hells Angels was accepted in February 2011 at the "European Officers Meeting" in Manchester, England.

26 On 16 June 2010, the Ministry of the Interior gave reasons for the decision at issue and rejected the appeal. It stated that the decision had been taken on grounds of item (c) of the first paragraph of Article 41 of the Foreign Nationals Act No 96/2002, as amended by Act No 86/2008. The Ministry considered that this provision in conjunction with the first paragraph of Article 42, laying down the circumstances in which it is permissible to refuse EEA or EFTA foreign nationals entry into Iceland, was the correct legal basis for the decision. That legislation was based on Iceland's obligations under the EEA Agreement and Directive 2004/38.

27 The Ministry of the Interior stated that under the EEA Agreement and Directive 2004/38 it is permissible to refuse an EEA national entry into Iceland if he is a member of a society or association that threatens public policy or public security and that it is not necessary for the society or organisation to be prohibited. It explained that its assessment had taken due account of the case law of the Court of Justice of the European Union ("ECJ") and was supported further by a communication from the European Commission to the European Parliament and Council of Ministers of the European Union of 2 July 2009.

28 The Ministry also argued that, when interpreting and applying rules on public order, the authorities have discretion to define their own needs in further detail and to define when circumstances require a restriction on freedom of movement in order to protect such interests. It stressed all the same that this assessment had to be based on relevant considerations and take account of Iceland's obligations under the EEA Agreement.

29 The Ministry indicated that "organised criminal associations of motorcyclists" such as Hells Angels were viewed as a growing threat to the community and that the national police commissioners of the Nordic countries had formulated a policy to fight such activities. Since 2002, the National Commissioner of the Icelandic Police had instructed local police commissioners to implement this policy as a result of which

foreign members of Hells Angels had been repeatedly denied entry on arrival to Iceland by reference to public policy and public security.

30 The Ministry concurred with the view that, in light of the activities and the nature of Hells Angels, individuals belonging to that association constituted a real threat to public order and public security in Iceland. The arrival of members of the association in Iceland was intended to open the way for full membership of MC Iceland. In the view of the Ministry, such membership would strengthen the influence of the association in Iceland and the spread of organised crime.

31 The Ministry considered that it had been sufficiently demonstrated that the Plaintiff's visit was connected to the membership of MC Iceland in the association of Hells Angels. His membership demonstrated that he had aligned himself with the association's aims, intentions and those activities of the association which were regarded as threatening to public order and public security. Thus, according to the Ministry, it was as a result of the Plaintiff's own personal conduct that he had been expelled from Iceland on 5 February 2010. His arrival in Iceland constituted a serious and real threat to the community's fundamental interest in ensuring public policy and public security.

32 The Plaintiff's action before the district court, claiming compensation for nonpecuniary damage and compensation for financial loss, was rejected, with the denial of entry considered to comply with the requirements of administrative law.

33 The Plaintiff then lodged an appeal with the Supreme Court now seeking compensation simply for alleged false imprisonment and the resulting damage to his reputation. His claim was based on the view that the Directorate of Immigration's decision was unlawful. The Plaintiff contends that the danger assessment contained unsubstantiated allegations and pertained to the organisation as a whole, whereas his personal conduct was lawful and extended only to membership of the organisation and owning its uniform. Furthermore, he alleged that the basis for the assertions of the Directorate was never investigated by the Ministry.

34 The Defendant stated that the visits by foreign members were intended to further the full membership of the local motorcycle club in the association, which would strengthen its influence and contribute to organised crime. In its view, it had been sufficiently demonstrated that the visit of the Plaintiff was connected to the intended membership of the club in this association. Furthermore, as a result of his membership, the Plaintiff had demonstrated his alignment with the association's aims, intentions and activities. The latter were considered to constitute a threat to public policy and public security. It was this personal conduct which led to the denial of entry, the conditions of the relevant national provision having been met. In addition to the assessment, a police report was part of the basis for the decision. However, further details could not be divulged.

35 Membership of a motorcycle club such as Hells Angels is not unlawful as such, and the activities of such associations have not been prohibited in Iceland. At the same time, Article 175a of the General Penal Code makes it a punishable offence to connive with another person in the commission of certain acts which form part of the activities of a criminal association.

36 As the Supreme Court considered the Icelandic provisions on refusal of entry inconsistent in that, on the one hand, they permit authorities to deny entry if this proves necessary in view of public policy or public security concerns, but, at the same time, prescribe that EEA and EFTA nationals can only be denied entry if it is possible to take measures against an Icelandic citizen under comparable circumstances, it decided to stay

the proceedings to request an Advisory Opinion from the Court on the interpretation of certain rules of EEA law on which the relevant national provisions are based.

37 At an oral hearing on 5 November 2012, the Supreme Court requested legal counsel of each party to indicate their views on whether there was reason to seek an Advisory Opinion from the Court. Neither party objected to the application.

38 On 17 December 2012, the Supreme Court of Iceland decided to make a request under Article 34 SCA and posed the following questions:

1. Do Member States which are parties to the Agreement on the European Economic Area have, with regard to Article 7 of the Agreement, the choice of form and method of implementation when making the provisions of Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States part of their internal legal order?

2. Should paragraph 1 of Article 27 of Directive 2004/38/EC be interpreted as meaning that the mere fact, by itself, that the competent authorities in an EEA Member State consider, on the basis of a danger assessment, that an organisation to which the individual in question belongs is connected with organised crime and the assessment is based on the view that, where such organisations have managed to establish themselves, increased and organised crime has followed is sufficient to consider a citizen of the Union to constitute a threat to public policy and public security in the state in question?

3. For answering the second question, is it of significance whether the Member State has outlawed the organisation of which the individual in question is a member and membership of such organisation is prohibited in the state?

4. Is it sufficient grounds for considering public policy and public security to be threatened in the sense of paragraph 1 of Article 27 of Directive 2004/38/EC that a EEA Member State, party to the Agreement on the European Economic Area, has in its legislation defined as punishable, conduct that consists of conniving with another person on the commission of an act, the commission of which is part of the activities of a criminal organisation, or is such legislation considered as general prevention in the sense of paragraph 2 of Article 27 of the Directive? This question is based on the fact that 'organised crime' in the sense of domestic law refers to an association of three or more persons, the principle objective of which is, for motives of gain, directly or indirectly, deliberately to commit a criminal act, or when a substantial part of the activities involves the commission of such an act.

5. Should paragraph 2 of Article 27 of Directive 2004/38/EC be understood meaning that a premise for the application of measures under paragraph 1 of Article 27 of the Directive against a specific individual is that the Member State must adduce a probability that the individual in question intends to indulge in activities comprising a certain action or actions, or refraining from a certain action or actions, in order for the individual's conduct to be considered as representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society?

39 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Answers of the Court

The first question

40 By its first question, the referring court seeks to establish whether EEA/EFTA States have, with regard to Article 7 EEA, the choice of form and method of implementation when making the act corresponding to Directive 2004/38/EC part of their internal legal order.

Observations submitted to the Court

41 In the Plaintiff's view, it follows from Article 7 EEA that EEA/EFTA States have the choice of form and method of implementation when transposing a directive. However, the discretion afforded to the EEA States is limited by Article 27 of the Directive. It follows from this provision that legislation based on the discretion of the EEA State must favour the Plaintiff.

42 The Defendant submits that Article 7 EEA leaves the choice of form and method of implementation to the Contracting Parties – whether through primary law or administrative measures – without prejudice to the duty of national courts to interpret national law in conformity with EEA law and in light of the purpose of the EEA rules in accordance with Article 3 EEA.

43 The Norwegian Government contends that it results from Article 7 EEA that the Contracting Parties have the choice of form and method of implementation. It follows from case law that it is not always necessary to formally enact the requirements of a directive in a specific and express legal provision in light of the general legal context and the interpretation given to national provisions by the national court.

44 ESA submits that, pursuant to Article 7 EEA, the authorities of the Contracting Parties have the choice of form and method of implementation when making the provisions of Directive 2004/38/EC part of their internal legal order. In doing so, they must take account of the principle of effectiveness and must ensure that the objectives pursued by the Directive are fulfilled.

45 The Commission contends that it is apparent from Article 7 EEA that EEA/EFTA States have the choice of form and method of implementation when transposing a directive, subject to their obligation to ensure that national law faithfully enacts the terms of the directive and that provision is made in national law to ensure that, in the event of conflict between implemented EEA rules and other statutory provisions, the EEA rules prevail.

Findings of the Court

46 At the outset, it is recalled that there are three main points at which a directive gains effect under the EEA Agreement (see Case E-11/12 Koch and Others, judgment of 13 June 2013, not yet reported, paragraph 118). The first arises where a decision of the EEA Joint Committee has entered into force and becomes binding pursuant to Article 104 EEA and the directive must be implemented (see Case E-2/12 HOB-vín III [2012] EFTA Ct. Rep. 1092, paragraph 128). This must have taken place at the latest on the implementation date in the EU or when the Joint Committee Decision enters into force, whichever is later. Any later date constitutes an infringement of the EEA Agreement (see Case E-6/06 ESA v Liechtenstein [2007] EFTA Ct. Rep. 238, paragraph 19).

47 The second is where a directive is implemented pursuant to Article 7 EEA, in which case it shall prevail over national provisions regardless of the form and method of implementation (see Koch and Others, cited above, paragraph 119, and case law cited).

48 The third is where a decision of the EEA Joint Committee becomes provisionally applicable pursuant to Article 103 EEA, unless a Contracting Party notifies that such a provisional application cannot take place (see Case E-17/11 Aresbank [2012] EFTA Ct. Rep. 916, paragraphs 76 and 77, and Koch and Others, cited above, paragraph 120).

49 As regards the second point, the implementation of a directive, it follows from Article 7 EEA that an act corresponding to an EU directive referred to in the Annexes to the EEA Agreement or in decisions of the EEA Joint Committee shall be binding, as to the result to be achieved, upon the Contracting Parties and be made part of their internal legal order leaving the authorities of the Contracting Parties the choice of form and method of implementation. The Court notes that the implementation of a directive does not necessarily require legislative action in each EEA State, as the existence of statutory provisions and general principles of law may render the implementation by specific legislation superfluous (compare, mutatis mutandis, Case 29/84 Commission v Germany [1985] ECR 1661, paragraph 23).

50 Accordingly, the implementation of a directive into domestic law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient provided it actually ensures the full application of the directive (compare Case C-427/07 Commission v Ireland [2009] ECR I-6277, paragraph 54 and case law cited).

51 However, provisions of directives must be implemented with unquestionable binding force and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty (compare, mutatis mutandis, Case C-159/99 Commission v Italy [2001] ECR I-4007, paragraph 32). EEA States must ensure full application of directives not only in fact but also in law.

52 It is essential that the legal situation resulting from national implementing measures be sufficiently precise and clear and that individuals be made fully aware of their rights so that, where appropriate, they may rely on them before the national courts. The latter condition is of particular importance where the directive in question is intended to confer rights on nationals of other EEA States, as is the case here, as those nationals may not be aware of provisions and principles of national law (compare, mutatis mutandis, Case C-478/99 Commission v Sweden [2002] ECR I-4147, paragraph 18 and case law cited).

53 In that regard, it must also be borne in mind that it is clear from case law with regard to the implementation of directives that mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of an EEA/EFTA State's obligations under the EEA Agreement (see, in particular, Case C-259/01 Commission v France [2002] ECR I-11093, paragraph 17, and case law cited).

54 Moreover, Article 3 EEA requires the EEA States to take all measures necessary, regardless of the form and method of implementation, to ensure that a directive which has been implemented and satisfies the conditions set out above prevails over conflicting national law and to guarantee the application and effectiveness of the directive. The Court has consistently held that it is inherent in the objectives of the EEA Agreement that national courts are bound to interpret national law in conformity with EEA law. Consequently, they must apply the methods of interpretation recognised by national law in order to achieve

the result sought by the relevant EEA rule (see, to that effect, Cases E-1/07 Criminal Proceedings against A [2007] EFTA Ct. Rep. 246, paragraphs 38 and 39, E-13/11 Granville [2012] EFTA Ct. Rep. 400, paragraph 52, and Case E-18/11 Irish Bank Resolution Corporation v Kaupthing Bank [2012] EFTA Ct. Rep. 592, paragraphs 123 and 124). The Court recalls that the EEA States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness (see, mutatis mutandis, to that effect, Case E-4/11 Clauder [2011] EFTA Ct. Rep. 216, paragraph 46).

55 Finally, it must be added that it is inherent in the general objective of the EEA Agreement of establishing a dynamic and homogeneous market, in the ensuing emphasis on the judicial defence and enforcement of the rights of individuals, as well as in the public international law principle of effectiveness, that, when interpreting national law, national courts will consider any relevant element of EEA law, whether implemented or not (Case E-4/01 Karlsson [2002] EFTA Ct. Rep. 240, paragraph 28).

56 The answer to the first question must therefore be that, under Article 7 EEA, an EEA/EFTA State has the choice of form and method when implementing an act corresponding to Directive 2004/38/EC into its legal order. Depending on the legal context, the implementation of a directive does not necessarily require legislative action, as long as it is implemented with unquestionable binding force and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty.

The second question

57 By its second question, the referring court essentially seeks to establish whether it is sufficient to base a decision under Article 27 of the Directive not to grant an individual who is a national of an EEA State leave to enter its territory on grounds of public policy and/or public security only on a danger assessment that concludes that the organisation to which the individual belongs is connected with organised crime and that where such organisations have managed to establish themselves, increased and organised crime has followed.

Observations submitted to the Court

58 The Plaintiff considers that entry can only be denied under Article 27 of the Directive if the person concerned has engaged in conduct that is considered a threat to public policy and public security within the meaning of Article 27(2). Membership of an organisation, regardless of its characteristics, can never by itself lead to a member of such organisation being considered a threat to public policy and public security if a general rule or practice taking action against all individuals who are members of such an organisation is in effect without examining the personal conduct of the individual in question.

59 In order for membership in an organisation to be considered personal conduct within the meaning of Article 27 of the Directive, a certain level of participation going beyond simple membership must be present. Only members in positions of leadership and active participants in the activities considered to constitute a threat to public policy and public security can be regarded as being associated with the organisation.

60 The Plaintiff refers to the ECJ's judgment in Van Duyn (Case 41/74 Van Duyn [1974] ECR 1337) to support the view that membership of an organisation, regardless of the position authorities have towards it and regardless of the manner of participation of an individual in its activities, can never lead to an individual being considered a threat to public security and public policy unless administrative measures have been taken against the organisation and the standpoint of the government regarding this organisation has been defined.

It must, at the very least, be foreseeable to a person entering the country that he could be denied entry to the country on the grounds of his membership of an organisation.

61 The Plaintiff contends that the criterion of a connection of an organisation to organised crime is too broad and elastic to serve as the basis for a refusal of entry. In addition, the correlation between the establishment of an organisation and an increase in organised crime does not imply a causal link between the two, as the latter can be the result of unrelated factors.

62 The Defendant refers to case law regarding the interpretation of Directive 64/221/EEC which must apply in the present case by parity of reasoning. The ECJ's judgment in Van Duyn, cited above, paragraph 18, establishes the area of discretion that States enjoy in determining the circumstances that justify recourse to public policy and public security, for example regarding the nature of an organisation considered to be socially harmful. EEA law does not impose on the Contracting Parties a uniform scale of values as regards the assessment of conduct which may be considered contrary to public policy, and they retain the freedom to determine the requirements of public policy and public security in accordance with their national needs subject to the requirements of EEA law. According to Article 27(2) of the Directive, this requirement is fulfilled by the existence of a genuine, present and sufficiently serious threat to one of the fundamental interests of society.

63 The Defendant submits that the authorities of the Nordic countries have formulated a clear strategy of fighting organised crime by motorcycle gangs and that the national commissioners of police are working jointly towards this goal. National efforts have included a policy of preventing outlaw motorcycle gangs from establishing a foothold in order to carry out crime. The Icelandic authorities established that cooperation existed between the Icelandic motorcycle club and the Hells Angels organisation. Various task forces were created to gather intelligence on these activities and to combat the activities of these groupings.

64 The Defendant considers that, in assessing the threat to public policy and public security posed by groups associated with organised crime, the same criteria must be relevant as those communicated by the Commission in relation to individual cases, that is, the nature of the offence and the damage or harm caused. Consequently, a measure refusing entry to a declared member of a certain organisation in circumstances such as those of the present case may fall within the concepts of public policy and public security.

65 The Defendant contends that when organisations pose a threat to the social order, active membership in such a group suffices to establish personal conduct representing a sufficiently serious threat to the social order, and thus fulfilling the requirement of posing, in addition to the social perturbation of the social order which any infringement of the law involves, a genuine and sufficiently serious threat to a fundamental interest of society.

66 The Norwegian Government considers that the ECJ's judgment in Van Duyn is of particular significance for the interpretation of the relevant provisions, which, although decided on the interpretation of Article 3 of Council Directive 64/221/EEC, must apply to Article 27 of Directive 2004/38 by parity of reasoning. Consequently, according to the Norwegian Government, which refers to Van Duyn, cited above, paragraph 17, it is clear that the "present association, which reflects participation in the activities of the body or of the organisation as well as identification with its aims and its designs, may be considered a voluntary act of the person concerned and, consequently, as part of his personal conduct" within the meaning of Article 3 of Directive 64/221 and, by parity of reasoning, of Article 27(2) of Directive 2004/38.

67 ESA takes the view that the concept of public security includes both internal and external security, whereas public policy is generally interpreted as covering the prevention of the disturbance of social order. In addition, it considers EEA States to enjoy a certain margin of appreciation in determining the requirements of public policy and public security.

68 ESA considers that, in the case before the national court, the decision was taken by the Directorate of Immigration on the basis of information provided by police including an open danger assessment on the date of entry. This action was part of an established and consistent practice of the National Commissioner of Icelandic Police; hence, the denial was not a random act. ESA observes that the organisation in question is considered by authorities in other States to constitute a criminal organisation. At the time the assessment was established, information was obtained showing that the club whose members the individual concerned planned to meet was intending to accede to said organisation. The threat the Icelandic authorities were dealing with at the time was not motorcycle gangs or the Hells Angels in general. Instead, the threat was that MC Iceland would become a full charter member of the Hells Angels. The general practice in accession procedures was for the acceding association to adopt the practices of the one to which it acceded, and to which the individual concerned belonged, likely to lead to an increase in organised crime. ESA contends, therefore, that, in light of the said margin of appreciation, Iceland was entitled to consider that the public policy and public security requirements were fulfilled.

69 The Commission notes that the Plaintiff has been denied entry and was not expelled. As stated in recital 23 in the preamble to the Directive, expulsion is limited by the principle of proportionality and account must be taken of the degree of integration. Conversely, and notwithstanding the wording of Article 27 of the Directive, if a person is not integrated in the host State, the authorities of that State have a wider margin of appreciation to refuse entry than in the case of expulsion.

70 The Commission notes that the Icelandic authorities appear to regard organised motorcycle gangs as a considerable threat and have consistently taken measures against this phenomenon without banning membership as such. There appears to be a regular practice of denying entry to foreign members of the Hells Angels motorcycle clubs. The Commission submits that, a priori, there appear to be adequate grounds to allow the national authorities to deny entry to a person in the position of the Plaintiff.

71 In the Commission's view, the prohibition on taking measures of a general preventive nature does not preclude the authorities of an EEA State from acting pre-emptively to stop a threat from materialising, if they do this on reasonable grounds and in accordance with the principle of proportionality. In this context, the Commission notes that the arrival of the applicant in Iceland was thought to be linked to the preparation for full membership of the association, which would instigate the spread of organised crime.

72 The Commission asserts that, in comparison with the situation in Van Duyn, in which the applicant was only intending to carry out low-level tasks for the Church of Scientology, which was not associated with organised crime albeit considered undesirable, in the present case, the Plaintiff is thought to play a leading role in the activities of an association presumed to be connected to organised crime. There is no evidence that the Plaintiff was coming to Iceland to commit crime on that particular day. However, the link here is more indirect. The Plaintiff was coming to Iceland in order to assist with the systemic organisation of organised crime.

Preliminary remarks concerning the Joint Declaration by the Contracting Parties to Joint Committee Decision No 158/2007

73 At the outset, it is noted that it is for the EEA Joint Committee to incorporate new Union legislation in the EEA by adopting amendments to the Annexes and Protocols to the EEA Agreement (see Case E-3/97 Jæger [1998] EFTA Ct. Rep. 1, paragraph 30).

74 The Directive was incorporated into the EEA Agreement by the adoption of Joint Committee Decision No 158/2007 ("the Decision"). According to the Decision, the concept of 'Union Citizenship' and immigration policy are not included in the Agreement. That is further stipulated in the accompanying Joint Declaration by the Contracting Parties ("the Declaration").

75 However, these exclusions have no material impact on the present case. Nevertheless, the impact of the exclusions must be assessed on a case-by-case basis and may vary accordingly.

76 In this regard, it must be noted that, as is apparent from Article 1(a) and recital 3 in its preamble, the Directive aims in particular to strengthen the right of free movement and residence of EEA nationals (see Clauder, cited above, paragraph 34). To this end, it lays down the conditions governing the exercise of the right of free movement and residence within the territory of the EEA.

77 The impact of the exclusion of the concept of citizenship has to be determined, in particular, in cases concerning Article 24 of the Directive which essentially deals with the equal treatment of family members who are not nationals of a Member State and who have the right of residence or permanent residence. At the oral hearing, the Norwegian Government submitted in this respect that, since the concept of citizenship is not part of the EEA Agreement, a series of complex and controversial questions has to be answered in such cases. ESA and the Commission reserved their position on the interpretation of the exclusions stipulated in the Decision and the Declaration.

Findings of the Court

78 Article 5 of the Directive establishes, inter alia, that EEA States shall grant EEA nationals leave to enter their territory with a valid identity card or passport without prejudice to the provisions on travel documents applicable to national border controls.

79 A situation such as that of the applicant in the main proceedings, who seeks to travel from the EEA State of which he is a national to another EEA State, is covered by the right of nationals of EEA States to move and reside freely in the EEA.

80 Nevertheless, the right of free movement of nationals of EEA States is not unconditional but may be subject to the limitations and conditions imposed by the Agreement and by the measures adopted to give it effect (see, mutatis mutandis, to that effect, Cases C-356/98 Kaba [2000] ECR I-2623, paragraph 30, C-466/00 Kaba [2003] ECR I-2219, paragraph 46, and C-398/06 Commission v Netherlands [2008] ECR I-56, paragraph 27).

81 Those limitations and conditions stem, in particular, from Article 27(1) of the Directive, which provides that EEA States may restrict the freedom of movement of nationals of EEA States and their family members on grounds of public policy, public security or public health. However, those grounds cannot, according to the same provision, be invoked to serve economic ends.

82 Therefore, for a decision such as that at issue in the main proceedings to be permitted under EEA law, it must be shown, inter alia, that the measure was taken on the grounds listed in Article 27(1) of the Directive.

83 While EEA States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one EEA State to another and from one era to another, the fact still remains that, in the EEA context and particularly as regards justification for a derogation from the fundamental principle of free movement of persons, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each EEA State without any control by the EEA institutions (compare, to that effect, Cases 36/75 Rutili [1975] ECR 1219, paragraphs 26 and 27; 30/77 Bouchereau [1977] ECR 1999, paragraphs 33 and 34; C-54/99 Église de scientologie [2000] ECR I-1335, paragraph 17; and C-36/02 Omega [2004] ECR I-9609, paragraphs 30 and 31).

84 It follows from Article 27(2) of the Directive that, in order to be justified, measures taken on grounds of public policy or public security must be based exclusively on the personal conduct of the individual concerned. Justifications that are isolated from the particulars of the case in question or that rely on considerations of general prevention cannot be accepted.

85 Article 27(2) of the Directive requires such personal conduct of the individual in question to represent a genuine, present and sufficiently serious threat to one of the fundamental interests of society (compare, mutatis mutandis, Rutili, paragraph 28, and Bouchereau, paragraph 35, both cited above, and Joined Cases C-482/01 and C-493/01 Orfanopoulos and Oliveri [2004] ECR I-5257, paragraph 66).

86 Moreover, according to Article 27(2) of the Directive, a measure which restricts the right of free movement may be justified only if it respects the principle of proportionality (compare Joined Cases C-259/91, C-331/91 and C-332/91 Allué and Others [1993] ECR I-4309, paragraph 15, Case C-413/99 Baumbast and R [2002] ECR I-7091, paragraph 91, and Case C-100/01 Oteiza Olazabal [2002] ECR I-10981, paragraph 43).

87 It is for the national court to determine on a case-by-case basis whether, on the basis of the relevant matters of fact and of law, those requirements are met and, if not, to draw the necessary conclusions in order to ensure the effectiveness of the Directive (see, by analogy, Koch and Others, cited above, paragraph 121, and case law cited). When making such an assessment, the national court will also have to determine whether that restriction on the right to entry is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it.

88 However, the Court may, where appropriate, provide clarification designed to give the national court guidance in its interpretation. As regards a situation such as that in the main proceedings – where it appears from the reference that the applicant was at the material time a member of an organisation associated with organised crime – it is clear from case law that present association, which reflects participation in the activities of the body of the organisation as well as identification with its aims and its designs, may be considered a voluntary act of the person concerned and, consequently, as part of the applicant's personal conduct within the meaning of Article 27(2) of the Directive (compare Van Duyn, cited above, paragraph 17).

89 For the sake of order, it is noted that present association with an organisation associated with organised crime can only be taken into account in so far as the circumstances of the membership are evidence of personal conduct constituting a genuine, present and sufficiently serious threat to one of the fundamental interests of society (see, to that effect, Bouchereau, cited above, paragraph 28).

90 In the present case, however, it appears from the reference that the personal conduct of the Plaintiff is not limited to mere membership in a particular organisation associated with organised crime. The national

authorities based their decision mainly on the danger assessment of the National Commissioner of Police concerning the Plaintiff's presumed role in the final accession stage of a national motorcycle club becoming a new charter in an international organisation associated with organised crime. In this assessment, the Plaintiff's visit was linked to the said process which would subsequently ferment the spread of organised crime in Iceland. The assessment was also based on the fact that the process in general had been directed from the applicant's home State. It furthermore appears from the reference that the information and evidence was gathered and/or compiled specifically on the Plaintiff's planned entry into Iceland.

91 Consequently, the Plaintiff's conduct appears to constitute a genuine, present and sufficiently serious threat to one of the fundamental interests of society. Nevertheless, it is for the court in the main proceedings to make the necessary findings in the individual case, on the basis of the matters of fact and law as well as the evidence adduced to it, whether the restriction on the Plaintiff's right to be granted leave to enter Iceland is justified.

92 The answer to the second question must therefore be that it is sufficient for an EEA State to base a decision under Article 27 of the Directive not to grant an individual who is a national of another EEA State leave to enter its territory on grounds of public policy and/or public security only upon a danger assessment, which assesses the role of the individual in the accession of a new charter to an organisation of which the individual is a member and which concludes that the organisation is associated with organised crime and that where such an organisation has managed to establish itself, organised crime has increased. It is further required that the assessment is based exclusively on the personal conduct of the individual concerned. Moreover, this personal conduct must represent a genuine, present and sufficiently serious threat to one of the fundamental interests of society, and the restriction on the right to entry must be proportionate. In the light of the relevant matters of fact and law, it is for the national court to determine whether those requirements are met.

The third question

93 By its third question, the referring court essentially seeks to establish whether it is of significance that the EEA State denying leave to enter its territory pursuant to Article 27 of the Directive has outlawed the particular organisation of which the individual in question is a member and membership in such organisation is prohibited in that State.

Observations submitted to the Court

94 The Plaintiff submits that, in order to invoke Article 27 of the Directive, Iceland needs to declare both the operations and the membership of an organisation illegal. If not, an individual cannot be considered a threat to public policy and public security. According to the Plaintiff, the finding in Van Duyn on this point was based on international law which precluded a State from refusing the right of entry or residence to its own nationals. He asserts that, according to recent case law, it is not permissible to discriminate between nationals and EEA citizens who carry out the same conduct and, thus, the reasoning in Van Duyn on this point can no longer be considered relevant. The Plaintiff also relies on the ECJ's finding in Case C-268/99 Jany and Others [2001] ECR I-8615, paragraph 61, that "conduct which a Member State accepts on the part of its own nationals cannot be regarded as constituting a genuine threat to public order".

95 The Defendant submits that, in order to restrict the right to free movement, it is not necessary that an organisation, of which a member is refused entry, is prohibited by national law or otherwise, as long as the State has taken some administrative measures to counteract the activities of that organisation. This is a consequence of the area of discretion that EEA States enjoy in having recourse to public policy, which

presupposes only a clear definition of the authorities' standpoint regarding an organisation the activities of which are considered socially harmful. The criterion is not whether the same measure was adopted in respect of its own nationals, as no authority exists to expel a national, but whether repressive measures or other genuine and effective measures intended to combat the conduct were taken.

96 The Norwegian Government submits that EEA States are not required to outlaw the activities of an organisation in order to restrict the movement of its members, provided that they have taken administrative measures to counteract these activities. A refusal of entry to a citizen of another EEA State is not precluded simply because similar restrictions are not placed on nationals.

97 ESA submits that national authorities are not obliged to outlaw the activities of an organisation as long as administrative measures have been taken to counteract its activities. This follows from the margin of appreciation national authorities enjoy in the choice of measures taken to counteract the activities of criminal organisations. ESA contends that national authorities are best placed to determine the most effective measures and also to assess their potentially damaging effects.

98 Furthermore, ESA notes that, due to the fact that there were no Hells Angels in Iceland at the time, MC Iceland needed a foreign, in this case a Norwegian, organisation to second them and propose them for membership in order to become a Hells Angels organisation. Therefore, the measures of the Icelandic authorities could only target foreigners. ESA argues that there would be a serious loophole in the arsenal of the law enforcement authorities if the authorities of a State could not take such measures against foreigners who intended to propose membership to an international organisation such as the Hells Angels.

99 The Commission contends that EEA law does not require EEA States to outlaw an organisation before it may restrict the free movement of its members that are citizens of other EEA States and before the public policy proviso can be invoked. However, the authorities of that State must take effective measures against that organisation and the threat it and its members represent. It also stresses the ECJ's finding in Van Duyn that a State is not precluded from refusing, on grounds of public policy, an individual's entry to the territory of the State and to taking up residence and working there simply because the host State does not place such a restriction on its own nationals. The Commission adds, however, that recourse to the public policy exception may not be used to permit covert discrimination.

Findings of the Court

100 Given its margin of appreciation to define the requirements for public policy and public security in accordance with its national needs (see paragraph 83 of this judgment), an EEA State cannot be obliged to declare the organisation in question and membership therein unlawful before it can deny a member of that organisation who is a national of another EEA State leave to enter its territory pursuant to Article 27 of the Directive, if recourse to such a declaration is not thought appropriate in the circumstances. In many circumstances, an outright prohibition could drive that organisation underground, thus making it difficult for the authorities to monitor its conduct.

101 However, given the limitations of said margin of appreciation, the competent authorities of an EEA State must have clearly defined their standpoint as regards the activities of the particular organisation in question and, considering the activities to be a threat to public policy and/or public security, they must have taken administrative measures to counteract these activities (compare Van Duyn, cited above, paragraph 17).

102 It is a matter for the national court to determine whether those requirements are met in the present case. However, it would appear to be common ground that the motorcycle organisation in question is viewed as a threat by the competent national authorities in the Nordic countries in general. Accordingly, a policy to resist the activities of such organisations was formulated by the national authorities of the Nordic countries. Moreover, it appears from the reference that since 2002 the head of the national Police of Iceland has instructed local police commissioners to implement this policy. In other words, the national authorities have been taking measures over a considerable period to prevent the national motorcycle club in question from becoming a charter of the Hells Angels, inter alia, by repeatedly denying foreign members of Hells Angels entry on arrival to Iceland by reference to public policy and public security.

103 The third question also raises the issue whether measures against nationals of the host State in a similar position to the individual in question are also required in order not to preclude recourse to the public policy and public security exceptions under Article 27 of the Directive.

104 The reservations contained in Article 27 of the Directive permit EEA States to adopt, with respect to the nationals of other EEA States and on the grounds specified in those provisions, in particular grounds justified by the requirements of public policy, measures which they cannot apply to their own nationals, inasmuch as they have no authority to expel the latter from the national territory or to deny them access thereto. Although that difference of treatment, which bears upon the nature of the measures available, must therefore be allowed, it must be emphasized that the national authority of an EEA State empowered to adopt such measures must not base the exercise of its powers on assessments of certain conduct which would have the effect of applying an arbitrary distinction to the detriment of nationals of other EEA States (compare, mutatis mutandis, Joined Cases 115/81 and 116/81 Adoui and Cornuaille [1982] ECR 1665, paragraphs 7 to 9).

105 For the sake of order it is also recalled that the reservations contained in Article 27 of the Directive do not entitle EEA States to restrict the right of EEA nationals to move and reside freely on the basis of conduct unless such conduct on the part of its own nationals gives rise to repressive or other genuine and effective measures (compare, mutatis mutandis, Adoui and Cornuaille, cited above, paragraphs 7 to 9, and Joined Cases C-65/95 and C-111/95 Shingara and Radiom [1997] ECR I-3343, paragraph 28).

106 In the present case, however, the threat the national authorities were facing was the final stage in the process of a national motorcycle club acceding to become a full charter member of an international motorcycle club associated with organised crime. Moreover, based on the authorities' assessment, it was considered very likely that accession would lead to an increase in serious crime.

107 Furthermore, it appears from the reference that the national motorcycle club needed the support of an established charter of Hells Angels in order to become a full charter itself and, for that reason, the measures in question could only target foreigners. Since there was no such charter in Iceland, the support of a foreign member was a prerequisite. Thus, prima facie, it appears that in the particular situation of the present case only a foreigner could represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

108 The answer to the third question must therefore be that an EEA State cannot be obliged to declare an organisation and membership therein unlawful before it can deny a member of that organisation who is a national of another EEA State leave to enter its territory pursuant to Article 27 of the Directive if recourse to such a declaration is not thought appropriate in the circumstances. However, the EEA State must have clearly defined its standpoint as regards the activities of that organisation and, considering the activities to be a threat

to public policy and/or public security, it must have taken administrative measures to counteract those activities.

The fourth question

109 By its fourth question, the referring court essentially seeks to establish whether for the purposes of considering public policy and/or public security threatened within the meaning of Article 27(1) of the Directive it suffices under EEA law that, in its legislation, an EEA State has defined as punishable, conduct that consists of conniving with another person in the commission of an act, the commission of which is part of the activities of a criminal organisation, or whether such legislation must be considered general prevention within the meaning of Article 27(2) of the Directive.

Observations submitted to the Court

110 The Plaintiff submits that the provision of the Icelandic Penal Code was enacted to fulfil Iceland's obligation to implement the United Nations Convention against Transnational Organized Crime of 2000 and is not connected to rules of national law on the refusal of entry on grounds of public policy and public security. Consequently, it is not foreseeable to an individual concerned that he could be denied entry into the State on the grounds of his membership of an organisation. The Plaintiff notes that the provision does not make it illegal to establish a criminal organisation, but increases the mandatory sentence. As the provision does not pertain to the conduct of the Plaintiff, it cannot be relevant in deciding whether the requirements of Article 27 of the Directive have been fulfilled. According to the Plaintiff, for a provision to justify a restriction on the right to free movement, it would have to refer to particular organisations. As it is, the content of the provision constitutes simply general prevention within the meaning of Article 27. As case law has established, expulsion or refusal of entry cannot be justified on grounds of general prevention.

111 The Defendant submits that, as follows from its answers to the second and third questions, for the purposes of imposing a restriction on free movement it is not relevant whether the conduct against which measures are taken on grounds of public policy and public security is criminalised. However, the enactment of criminal sanctions against particular conduct can be relevant in assessing whether conduct is of a sufficiently serious nature to justify restrictions on the entry of nationals of other EEA States.

112 ESA notes that the Icelandic authorities did not base their decision to deny entry on the provision of national law specified in the question. Nonetheless, a national provision such as that at issue can constitute proof of an established practice to counteract organised crime. ESA submits, however, that a general reference to provisions of national law defining organised crime as punishable cannot, as such, constitute sufficient grounds for denying entry. In accordance with Article 27(2) of the Directive, national authorities are obliged to undertake a specific assessment as to whether the personal conduct of the individual concerned can be considered to represent a threat.

113 The Commission underlines the role of the procedural safeguards contained in the Directive, in particular Article 31. This guarantee of judicial redress procedures provides for the possibility of review before a court within the procedural autonomy of the State concerned, subject to compliance with the principles of equivalence and effectiveness. It is for the national court to determine whether the administrative authorities have discharged the burden of showing that sufficient evidence exists to entitle them to come to the conclusion that the applicant was likely to engage in such activities. It must also determine whether the decision taken complies with the principle of proportionality in that it must be appropriate for securing the attainment of the objective which it pursues and must not go beyond what is necessary to achieve it.

Findings of the Court

114 At the outset, the Court notes that the national authorities did not base their decision to deny entry on the provision specified in the fourth question.

115 Pursuant to Article 27(2) of the Directive, “measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned” and “justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted”. Moreover, “previous criminal convictions shall not in themselves constitute grounds for the taking of such measures”.

116 As departures from the rules concerning the free movement of persons constitute exceptions which must be strictly construed, the concept of “personal conduct” expresses the requirement that a decision denying leave to enter the territory may only be made for breaches of public policy and public security which might be committed by the individual affected.

117 A criminal sanction, such as the one in question, can be relevant in demonstrating whether conduct is of a sufficiently serious nature to justify restrictions on the entry of nationals of other EEA States where the individual in question is convicted of that crime and that particular conviction is part of the assessment on which the national authorities base their decision. However, the derogations from the free movement of persons must be interpreted restrictively, with the result that a previous conviction can justify denying entry only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy and/or public security (compare, to that effect, Case C-348/96 Calfa [1999] ECR I-11, paragraphs 22 to 24). It is clear that this has to be assessed by the national court on a case-by-case basis.

118 The Court therefore concludes that in order to invoke a public policy and/or public security threat under Article 27(1) of the Directive it does not suffice that an EEA State has defined as punishable, conduct that consists of conniving with another person in the commission of an act, the commission of which is part of the activities of a criminal organisation.

The fifth question

119 By its fifth question, the referring court essentially seeks to establish whether Article 27(2) of the Directive should be understood as meaning that a premise for the application of measures under Article 27(1) of the Directive against a specific individual is that national authorities of an EEA State must adduce a probability that the individual in question intends to indulge in certain activities in order for the individual’s conduct to be considered a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

Observations submitted to the Court

120 The Plaintiff asserts that the burden of proof in relation to Article 27 lies with the EEA States. According to the ECJ’s judgment in Bouchereau, cited above, in particular paragraph 35, recourse to the concept of public policy and public security presupposes conduct that poses a genuine, imminent and sufficiently serious threat affecting one of the fundamental interests of society. It is for the national court to determine whether the administrative authorities have discharged the burden of proof in this regard.

121 The Defendant submits that, pursuant to the provisions of the Directive, citizens of the Union, even long-term residents, may be expelled on the basis of a criminal conviction for a particular criminal activity. It follows from the ECJ's judgments in Orfanopoulos and Oliveri, cited above, and Case C-50/06 Commission v Netherlands [2007] ECR I-4383 that only expulsion which is an automatic consequence of an imposed prison sentence without any individual assessment infringes the requirements of Article 27 of the Directive.

122 Restrictions on free movement can be imposed if an individual assessment has been undertaken. The Defendant argues that a general assessment, based on past conduct and predictions of future conduct, is sufficient to establish a threat resulting from individual conduct. Therefore, in order to take restrictive measures on grounds of public policy and public security, there is no requirement on the public authorities to demonstrate the probability that the individual in question intends to indulge in certain activities.

123 ESA contends that in order to demonstrate that personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, it suffices that the individual in question is a member of an organisation that is assumed to practise activities that are considered harmful to society, as the person in question has by his participation identified with the aims of the organisation in question. That an individual has a clean criminal record does not preclude the national authorities from concluding that he represents a threat.

124 The Commission underlines the role of the procedural safeguards contained in the Directive, in particular Article 31. This guarantee of judicial redress procedures provides for the possibility of review before a court within the procedural autonomy of the State concerned, subject to compliance with the principles of equivalence and effectiveness. It is a matter for the national court to determine whether the administrative authorities have discharged the burden of showing that sufficient evidence exists to entitle them to come to the conclusion that the applicant was likely to engage in activities considered to represent a genuine, present and sufficiently serious threat. The national court must also determine whether the decision taken complies with the principle of proportionality in that it must be appropriate for securing the attainment of the objective which it pursues and must not go beyond what is necessary to achieve it.

Findings of the Court

125 In order to restrict rights of an EEA national under Article 27 of the Directive, the national authorities are required to demonstrate the existence of a genuine and sufficiently serious threat to one of the fundamental interests of society (compare Rutili, paragraph 28; Bouchereau, paragraph 35; Orfanopoulos and Oliveri, paragraph 66, and Commission v Germany, paragraph 35, all cited above).

126 As has been rightly emphasised by the Commission, Article 31 of the Directive obliges the EEA States to lay down, in domestic law, the measures necessary to enable EEA nationals and members of their families to have access to judicial and, where appropriate, administrative redress procedures to appeal against or seek review of any decision restricting their right to move and reside freely in the EEA States on the grounds of public policy, public security or public health (compare, to this effect, Case C-249/11 Byankov, judgment of 4 October 2012, not yet reported, paragraph 53).

127 In accordance with Article 31(3) of the Directive, the redress procedures must include an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based (compare, to that effect, Case C-300/11 ZZ, judgment of 4 June 2013, not yet reported, paragraph 47).

128 In the context of the judicial review of the legality of the decision taken under Article 27 of the Directive, it is incumbent upon the EEA States to lay down rules enabling the court entrusted with such review to examine both all the grounds and the related evidence on the basis of which the decision was taken (compare, to that effect, ZZ, cited above, paragraph 59).

129 Thus, subject to compliance with the principles of equivalence and effectiveness (see Koch and Others, cited above, paragraph 118), it is a matter for the national court to determine whether the administrative authorities have discharged the burden of showing that there is sufficient evidence to conclude that the individual in question engages or is likely to engage in personal conduct, such as actual membership in a motorcycle club associated with organised crime, that represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

130 The Court therefore holds that the national administrative authorities must ensure that there is sufficient evidence to conclude under Article 27(2) of the Directive that the individual concerned was likely to engage in personal conduct that represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. It is for the national court to determine, in compliance with the principles of equivalence and effectiveness, whether this is the case.

IV Costs

131 The costs incurred by the Norwegian Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before Hæstiréttur Íslands, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by Hæstiréttur Íslands hereby gives the following Advisory Opinion:

1. Under Article 7 EEA, an EEA/EFTA State has the choice of form and method when implementing an act corresponding to Directive 2004/38/EC into its legal order. Depending on the legal context, the implementation of a directive does not necessarily require legislative action, as long as it is implemented with unquestionable binding force and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty. – 31 –

2. It is sufficient for an EEA State to base a decision under Article 27 of the Directive not to grant an individual who is a national of another EEA State leave to enter its territory on grounds of public policy and/or public security only upon a danger assessment, which assesses the role of the individual in the accession of a new charter to an organisation of which the individual is a member and which concludes that the organisation is associated with organised crime and that where such an organisation has managed to establish itself, organised crime has increased. It is further required that the assessment is based exclusively on the personal conduct of the individual concerned. Moreover, this personal conduct must represent a genuine, present and sufficiently serious threat to one of the fundamental interests of society, and the restriction on the right to entry must be proportionate. In the light of the relevant matters of fact and law, it is for the national court to determine whether those requirements are met.

3. An EEA State cannot be obliged to declare an organisation and membership therein unlawful before it can deny a member of that organisation who is a national of another EEA State leave to enter its territory pursuant to Article 27 of the Directive if recourse to such a declaration is not thought appropriate in the circumstances. However, the EEA State must have clearly defined its standpoint as regards the activities of that organisation and, considering the activities to be a threat to public policy and/or public security, it must have taken administrative measures to counteract those activities.

4. In order to invoke a public policy and/or public security threat under Article 27(1) of the Directive it does not suffice that an EEA State has defined as punishable, conduct that consists of conniving with another person in the commission of an act, the commission of which is part of the activities of a criminal organisation. – 32 –

5. The national administrative authorities must ensure that there is sufficient evidence to conclude under Article 27(2) of the Directive that the individual concerned was likely to engage in personal conduct that represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. It is for the national court to determine, in compliance with the principles of equivalence and effectiveness, whether this is the case.

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

Delivered in open court in Luxembourg on 22 July 2013.

Michael-James Clifton Acting Registrar

Carl Baudenbacher President

Joined Cases: Case C-456/12 Minister voor Immigratie, Integratie en Asiel v O and Case C-457/12 Minister voor Immigratie, Integratie en Asiel v S

OPINION OF ADVOCATE GENERAL

Sharpston

delivered on 12 December 2013 (1)

Case C-456/12

Minister voor Immigratie, Integratie en Asiel

v

O

Case C-457/12

Minister voor Immigratie, Integratie en Asiel

v

S

(Requests for a preliminary ruling from the Raad van State (Netherlands))

(Right of non-EU citizens to reside in the Member State of nationality and residence of the EU citizen with whom they share family ties)

1. Four third country nationals ('O', 'B', 'S' and 'G') each have family ties to a different Netherlands national (and thus EU citizen) who is their sponsor. They all seek lawful residence in the Netherlands where their respective sponsors reside. In each case, the sponsor has moved across borders with other Member States, for work or other reasons. The Raad van State (Council of State) (Netherlands) in essence asks the Court whether such movement suffices to establish that EU law applies and to generate a derived right of residence in the Netherlands for those third country nationals.

2. O, B and G are married to, respectively, 'sponsor O', 'sponsor B' and 'sponsor G'. Sponsor O and sponsor B have previously spent time in other Member States but did not work there. Sponsor G is employed by a Belgian employer and travels daily to work in Belgium. G and sponsor G have children. S has a son-in-law ('sponsor S') who is employed by a Netherlands employer but spends approximately 30% of his time on preparing and making business visits in Belgium. S cares for sponsor S's son in the Netherlands.

Legal background

EU law

Treaty on the Functioning of the European Union

3. Article 20(1) TFEU establishes EU citizenship and provides that '[e]very person holding the nationality of a Member State' is an EU citizen. In accordance with Article 20(2)(a), EU citizens have 'the right to move and reside

freely within the territory of the Member States'.

4. Article 21(1) TFEU adds that that right is 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'.

5. Article 45 TFEU guarantees freedom of movement for workers, which entails 'the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'.

6. According to Article 56(1) TFEU, '… restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended'.

Charter of Fundamental Rights of the European Union

7. Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter') is entitled 'Respect for private and family life' and states that '[e]veryone has the right to respect for his or her private and family life …'.

8. Article 51 defines the field of application of the Charter:

'1. The provisions of this Charter are addressed … to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

…'

Directive 2004/38/EC (2)

9. Recital 1 in the preamble to Directive 2004/38 mimics the terms of Article 21(1) TFEU. Recital 3 states that, when nationals of Member States exercise their right of free movement and residence, 'Union citizenship should be [their] fundamental status …'.

10. According to recital 5, '[t]he right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality …'.

11. Article 1(a) states that Directive 2004/38 lays down, inter alia, 'the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members'.

12. For the purposes of Directive 2004/38, a 'Union citizen' is 'any person having the nationality of a Member State' (Article 2(1)), and a 'family member' includes 'the spouse' (Article 2(2)(a)) and 'the dependent direct relatives in the ascending line and those of the spouse …' (Article 2(2)(d)) of the Union citizen. The 'host Member State' is 'the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence' (Article 2(3)).

13. Article 3(1) provides that Directive 2004/38 is to apply to 'all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them'.

14. With regard to other family members who satisfy the conditions in Article 3(2)(a) and a partner with whom an

EU citizen has a durable relationship, duly attested, Article 3(2) states that '… the host Member State shall … facilitate entry and residence …' of these persons.

15. Article 6(1) states that EU citizens must have the right to reside in another Member State for up to three months. They need only hold a valid identity card or passport and no other conditions or formalities may apply. According to Article 6(2), the same rules apply '… to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen'.

16. An EU citizen and his family members (who are not nationals of a Member State) also enjoy a right of residence for more than three months in the host Member State if that EU citizen satisfies the conditions set out in Article 7(1)(a), (b) or (c) namely: (a) he must be a worker or self-employed person in the host Member State, or (b) he must have sufficient resources for himself and his family members and comprehensive sickness insurance cover in the host Member State, or (c) he must be a student and have sufficient resources and comprehensive sickness insurance cover.

17. According to Article 16(1), eligibility for the right of permanent residence requires lawful residence for a continuous period of five years in the host Member State.

18. Under Article 35, Member States may refuse, terminate or withdraw any right conferred under Directive 2004/38 in the case of abuse of rights or fraud. Any measure necessary for that purpose must be proportionate and respect the procedural safeguards in Articles 30 and 31.

Netherlands law

19. The Vreemdelingenwet 2000 (Law on Foreign Nationals of 2000, hereafter 'Vw 2000') defines 'Community nationals' as nationals of the Member States and third country national family members who are entitled to enter and reside in the territory of another Member State on the basis of (what is now) the TFEU (with respect to the former) or a decision taken in application of that Treaty (with respect to the latter). Such third country nationals can obtain from the Minister voor Immigratie, Integratie and Asiel ('the Minister for Immigration, Integration and Asylum' or 'the Minister') a document or written statement certifying lawful residence. If the Minister has declared a third country national to be 'undesirable', he may, at the request of the person concerned, lift that declaration. The relevant conditions are set out in the Vreemdelingenbesluit (Decree on Foreign Nationals), which implements the Vw 2000.

20. A fixed-term residence permit is granted subject to restrictions relating to the purpose for which residence is authorised. Other conditions may also attach to the permit.

Facts

***Case C-456/12* O**

The case of O

21. In October 2006, O, a Nigerian national, married sponsor O in France. He took up residence in Spain in 2007. Since August 2009, O and sponsor O have been registered as residing there together. A residence document valid until September 2014 attests that O resides in Spain in his capacity as a family member of an EU citizen.

22. However, two months after arriving in Spain, sponsor O in fact returned to the Netherlands because she could not find work in Spain. From 2007 to April 2010, she none the less repeatedly spent time, mostly weekends, in Spain with O and, during those visits, enjoyed services there. Since 1 July 2010, O has been registered as residing with sponsor O in the Netherlands.

23. It would appear that there is no evidence that, during all of this time, sponsor O cancelled her residence registration in the Netherlands.

24. O applied for a document showing lawful residence. The Minister rejected that request and declared unfounded O's challenge to that decision. O appealed to the rechtbank 's-Gravenhage (District Court, the Hague; 'the rechtbank') which, on 7 July 2011, rejected the appeal. O then appealed against that judgment to the referring court.

The case of B

25. B is a Moroccan national. From December 2002, he lived together with sponsor B in the Netherlands for several years. At the time they were not married. It seems that they met whilst B was awaiting a decision on his asylum request. That request was rejected.

26. After B was sentenced to two months' imprisonment for using a false passport, the Minister declared, on 15 October 2005, B to be an undesirable alien. B then moved in January 2006 to Retie (Belgium) and lived there in an apartment rented by sponsor B. It seems that sponsor B initially resided there alone and that B joined her after his release from prison. Sponsor B was registered as residing in Retie with a residence permit valid until 18 May 2011. However, she was unable to find work in Belgium. She therefore kept her house in the Netherlands and stayed there during the week when working in the Netherlands, whilst spending weekends with B in Belgium. During those weekends, she enjoyed services in Belgium. Although they had intended to marry in Belgium, in fact they only got married later, in Morocco.

27. In April 2007, B moved to Morocco because he could no longer reside in Belgium after the Belgian authorities discovered that he was the subject of a declaration of undesirability in the Netherlands. On 31 July 2007, B and sponsor B were married in Morocco.

28. At B's request, the Minister lifted the declaration of undesirability in March 2009. In June 2009, B returned to the Netherlands to reside there with sponsor B.

29. On 30 October 2009, B's request for a document showing lawful residence was refused. In March 2010, the Minister declared unfounded both his challenge to that refusal and his objection to the placing of a sticker in his passport stating that he did not have permission to work.

30. B appealed against both decisions to the rechtbank, which set them aside and ordered the Minister to decide afresh on the challenge. In December 2010, the Minister issued a new decision to the same effect as his previous decision and appealed to the referring court against the decision of the rechtbank.

***Case C-457/12* S**

The case of S

31. S is a Ukrainian national. Her son-in-law, sponsor S, has worked since 2002 for an employer established in the Netherlands who has declared that sponsor S spends 30% of his time on preparing and making business trips to Belgium. Sponsor S goes there at least one day a week and also visits clients and attends conferences in other Member States. S further declared that she takes care of sponsor S's son (her grandson).

32. S applied for a document certifying lawful residence. In August 2009, her application was rejected. The Minister dismissed her challenge to that decision. In June 2010, the rechtbank rejected her appeal. S then appealed against that judgment to the referring court.

The case of G

33. G is a Peruvian national. She married sponsor G in Peru in 2009. Sponsor G lives in the Netherlands but has worked for a Belgian employer since 2003. He travels daily to and from Belgium for his work.

34. G's application for a document certifying lawful residence was rejected in December 2009. Her challenge was dismissed by the Minister. In June 2011, the rechtbank upheld G's appeal, ordering the Minister to decide anew on the challenge. The Minister appealed against that judgment to the referring court. Before that court, G stated that she and her spouse have a child (who is a Netherlands national) and that a child she had before marrying Sponsor G also forms part of their new family.

Procedure and questions referred

35. In Case C-456/12 *O*, the referring court asks:

'In [the] cases [involving B] and [involving O]:

(1) Should Directive 2004/38 …, as regards the conditions governing the right of residence of members of the family of a Union citizen who have third-country nationality, be applied by analogy, as in the judgments of the Court of Justice of the European Communities in Case C-370/90 *Singh* [(3)] … and in Case C-291/05 *Eind* [(4)] …, where a Union citizen returns to the Member State of which he is a national after having resided in another Member State in the context of Article 21(1) [TFEU], and as the recipient of services within the meaning of Article 56 [TFEU]?

(2) If so, is there a requirement that the residence of the Union citizen in another Member State must have been of a certain minimum duration if, after the return of the Union citizen to the Member State of which he is a national, the member of his family who is a third-country national wishes to gain a right of residence in that Member State?

(3) If so, can that requirement then also be met if there was no question of continuous residence, but rather of a certain frequency of residence, such as during weekly residence at weekends or during regular visits?

In [the] case [involving B]:

(4) As a result of the time which elapsed between the return of the Union citizen to the Member State of which he is a national and the arrival of the family member from a third country in that Member State, in circumstances such as those of the present case, has there been a lapse of possible entitlement of the family member with third-country nationality to a right of residence derived from Union law?'

36. In Case C-457/12 *S*, the referring court asks:

'(1) In [the] case [involving G]:

Can a member, having third-country nationality, of the family of a Union citizen who lives in the Member State of which he is a national but who works in another Member State for an employer established in that other Member State derive, in circumstances such as those of the present case, a right of residence from Union law?

(2) In [the] case [involving S]:

Can a member, having third-country nationality, of the family of a Union citizen who lives in the Member State of which he is a national but who, in the course of his work for an employer established in that same Member State, travels to and from another Member State derive, in circumstances such as those of the present case, a right of residence from Union law?'

37. Written observations have been submitted by O, B, G, the Governments of Belgium, the Czech Republic, Denmark, Estonia, Germany, the Netherlands and the United Kingdom, and the European Commission. At the joint hearing, held on 25 June 2013, the same parties, with the exceptions of G and the Governments of Belgium and Estonia, and S presented oral argument.

Assessment

Preliminary remarks

38. Immigration law is, in principle, a matter of Member State competence. Unless the situation is one in which a national of a Member State (who, through his nationality, is also an EU citizen) has crossed a border with another Member State or there is a real prospect of him doing so, EU rights of free movement and residence are not in principle triggered and national law alone applies. (5)

39. However, in the present cases, each of the EU sponsors, although resident in the Netherlands, has indeed crossed such a border. They have done so for work or for leisure; they have (presumably) exercised the 'passive' right to receive services there; they have, in some cases, been registered formally as residing in another Member State whilst retaining some form of residence in the Member State of nationality (the 'home Member State'). Does it follow that EU law then precludes their home Member State from refusing to grant a right of residence to their family members (O, B, S and G)? And does it matter if sponsor and family member do not return together to the sponsor's home Member State?

40. It is clear that the sponsors themselves enjoy an unconditional right of residence in their home Member State by virtue of national law. (6) A Member State is precluded 'from expelling its own nationals from its territory or refusing their right to reside in that territory or making such right conditional'. (7) However, nationals' entry and residence in their home Member State are also subject to EU law in so far as this is necessary to ensure the full effectiveness of their fundamental freedoms of movement and residence under EU law. (8)

41. Any derived right of residence that O, B, S and G may enjoy under EU law would not be absolute, but would be governed by the conditions and limitations set out in EU law. For that reason, I shall consider separately the right of residence and then the conditions and limitations governing its exercise.

42. There is no material before the Court to indicate whether O, B, S and G might be able to claim a right of residence under national law, including national law protecting fundamental rights, or under the European Convention on Human Rights ('the ECHR'). On the facts, there is no suggestion that any of the marriages were marriages of convenience or that there has been fraud or abuse of rights. In other circumstances, a finding of such abuse might well make it unnecessary to consider further whether a derived right of residence could legitimately be refused. However, the mere fact that at some point both O and sponsor O and B and sponsor B have moved to another Member State where more favourable treatment was guaranteed is not an abuse of rights. (9)

43. My focus in this Opinion is on whether denying lawful residence to third country nationals such as O, B, S and G is a restriction of the right of their sponsors to move and reside freely within the territory of the Member States. Any such restriction might, in theory, be justified. However, the Court has no information which would enable it to assess such a justification.

44. Finally, I shall try in this Opinion to develop a coherent explanation of the parameters within which derived residence rights for third country national family members arise in the home Member State of an EU citizen who has exercised free movement rights without necessarily exercising (full) residence rights in another Member State. An ad hoc solution that does not clearly identify the relevant parameters, whilst it might assist the national court to dispose of these four individual cases, would risk adding to the present uncertainty amongst practitioners and national administrations as to whether EU law can (or cannot) be invoked; with the concomitant risk that there may be significant 'repeat business' as national courts seek further clarification through further references.

Why derived rights of residence exist

45. Articles 20(2)(a) and 21(1) TFEU grant EU citizens the right to move and reside freely within the territory of the Member States. The essence of that right is the freedom to choose whether or not to move to another Member State

and/or to reside there. Measures that restrict that choice are, unless justified, contrary to those provisions.

46. The concept that family members of such EU citizens should enjoy derived rights of residence was developed in the context of the economic freedoms of movement, in particular those of migrant workers. Workers are human beings, not automata. They should not have to leave behind their spouse or other family members, in particular those who are dependent on them, in order to become migrant workers in another Member State. (10) If they cannot bring their family with them when they move, they might be discouraged from exercising those rights of free movement. Moreover, the family's presence can help a worker to integrate in the host State and therefore contribute to successful free movement. (11)

47. With the introduction of EU citizenship in the Maastricht Treaty, nationals of a Member State acquired the right to move and reside freely within the territory of other Member States independently from the economic freedoms of movement and thus the pursuit of economic activity. (12) Just as with migrant workers, the effectiveness of EU citizens' freedoms of movement and residence can depend on whether certain family members have the right, as a matter of EU law, to join or accompany them in the territory to where they moved or where they reside. As the Court put it recently, '[t]he purpose and justification of those derived rights are based on the fact that a refusal to allow them would be such as to interfere with the Union citizen's freedom of movement by discouraging him from exercising his rights of entry into and residence in the host Member State'. (13)

48. Under Directive 2004/38, the existence of a derived right of residence no longer depends on showing the possible effect on the EU citizen of denying family members residence. (14) The rationale for granting derived rights of residence is however reflected in the fact that such rights are available automatically only to a select group of family members whose ability to join or accompany EU citizens is presumed by the legislature to affect his choice, and thus the exercise of his right, to move. Directive 2004/38 therefore distinguishes between the nuclear family and other family members. The nuclear family comprises the EU citizen, his or her spouse or registered partner and their direct descendants under the age of 21. These family members have automatic derived rights of residence. Direct descendants over the age of 21 and direct ascendants of EU citizens (or of their spouses or registered partners), however, need to satisfy the condition of dependency in order to claim a derived right of residence. In the context of Directive 2004/38, it seems to me that dependency has been interpreted narrowly so as to focus on whether an EU citizen materially supports these family members. (15) Whilst such dependency undoubtedly can be highly indicative of the extent to which denying residence interferes with the exercise of rights of free movement and residence, the Court has indicated – *outside* the context of Directive 2004/38 – that dependency can also be measured using indicators of legal or emotional ties or that it can be relevant that an EU citizen is dependent on a third country national family member ('reverse dependency'). (16)

What generates derived rights of residence

49. In the current state of EU law, derived rights of residence in principle only exist where these are necessary to ensure that EU citizens can exercise their free movement and residence rights effectively. The first question is therefore whether a particular EU citizen has exercised or is exercising such rights. If so, the second question is whether denying their family members residence will restrict the exercise of those rights (if there is no restriction, there is no reason to grant derived rights of residence). The referring court therefore asks in essence whether it is necessary to consider the type and intensity of an EU citizen's exercise of his rights of free movement and residence before turning to that second question.

50. The Court has consistently held that the rules governing freedom of movement cannot be applied to cases which show no actual connection with situations governed by EU law. (17) A purely hypothetical prospect of exercising such rights or of their being obstructed is not sufficient to establish the necessary connection. (18)

51. Here, sponsors O, B, S and G have all exercised rights of free movement and/or residence within the meaning of Article 21 TFEU. These cases do not therefore concern wholly internal situations which fall outwith the scope of EU law. That is sufficient to render EU law applicable; but does not automatically lead to the conclusion that O, B, S

and G have a claim under EU law to lawful residence in the Netherlands.

52. Precisely because there has been movement across borders, the facts underlying these cases distinguish them from cases such as *Ruiz Zambrano*, *McCarthy* or *Dereci*, where the Court held that, exceptionally, a connection with EU law and a basis for derived rights of residence under Article 20 TFEU can exist without any exercise of the rights of free movement to, or residence in, another (host) Member State, if a national measure would oblige EU citizens (including a Member State's own nationals) to leave the territory of the European Union. (19) In *Iida*, which involved two German nationals who had moved to Austria and a Japanese national seeking residence in Germany, the Court then made it clear that this test was not limited to situations that otherwise would be classified as purely internal. (20)

53. In *Ruiz Zambrano* the Court accepted that denying the father residence would deprive his minor children of 'the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'. (21) In particular, it would cause them to leave the territory of the European Union. (22)

54. The opposite conclusion was reached in *McCarthy* with regard to Mrs McCarthy's Jamaican husband. Mrs McCarthy was a dual national of the United Kingdom and Ireland who had always lived in the United Kingdom. She had never visited Ireland or exercised rights of free movement elsewhere in the European Union, and had applied for the Irish passport to which she was legally entitled only after marrying a Jamaican national in the United Kingdom. Nor did she claim to be a worker, self-employed person or self-sufficient person. Her husband was refused residence in the United Kingdom as the spouse of an EU citizen with a nationality other than that of the United Kingdom. (23)

55. In *Dereci*, the Court clarified that denial of the genuine enjoyment of the substance of EU citizenship rights corresponded to the situation 'in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole'. (24) That situation was described by the Court as exceptional. (25) The Court did not elaborate on what circumstances might oblige an EU citizen to leave the territory of the European Union, though it held that 'the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union' for residence rights to be granted was insufficient in itself to conclude that denial of residence would cause such departure. (26) Such factors thus do not show that denying residence will result in the loss of an EU citizenship right, that is, the right to reside in the territory of the European Union.

56. However, the Court did not exclude the possibility, leaving aside Articles 20 and 21 TFEU, that a national court might require residence to be granted on the basis of Article 7 of the Charter (for situations falling within the scope of EU law) or Article 8(1) of the ECHR (for other situations). (27) Thus, when a third country national with family ties to an EU citizen cannot derive a right of residence from EU law, a national court might nevertheless conclude that, where a situation is covered by EU law, the right to respect for family life requires him to be granted a residence right.

57. I find that passage puzzling inasmuch as it might be read as suggesting that there the Court recognised three separate bases under EU law: the right to respect for private and family life (Article 7 of the Charter); the right of free movement and residence (Article 21(1) TFEU) and the denial of the genuine enjoyment of the substance of the rights conferred on an EU citizen (Article 20 TFEU). For situations not falling within the scope of EU law, the right to respect for private and family life under Article 8 of the ECHR might form another basis for establishing a right of residence.

58. If that is what the Court intended, the Court has yet to resolve whether one applies the same test in order to determine both whether EU law (and thus also the Charter) applies and whether a measure denying residence is contrary to Article 20 or 21 TFEU. (28)

59. However, I believe that there is a different way of approaching the matter.

60. The Charter applies only if EU law applies. (29) Thus, the Charter does not apply to an internal situation, such as that of Mrs McCarthy, in which an EU citizen is neither impeded in exercising rights of free movement and residence under EU law nor deprived of the separate core citizenship right to reside on the territory of the Union by the national

measure. In such situations, it is clear that, at present at least, the Charter does not grant 'free-standing' fundamental rights – that is, rights that have no point of attachment to what lies within the competence of the Union – which can then be used in order to require a national court to disapply a national measure which operates to the EU citizen's disadvantage in arranging his family life as he would wish.

61. Thus, if it is not possible to identify a pertinent provision of EU law, the Charter does not bite. To put the same point slightly differently, it is necessary to look at a legal situation through the prism of the Charter if, *but only if*, a provision of EU law imposes a positive or negative obligation on the Member State (whether that obligation arises through the Treaties or EU secondary legislation). (30)

62. If and to the extent that a given situation concerning EU citizens falls within the scope of EU law, the interpretation given to any provision of EU law that grants rights to those citizens (and which thus imposes an obligation on Member States to respect those rights) must be consistent with any pertinent Charter rights, (31) including the right to respect for private and family life guaranteed by Article 7 of the Charter. That means that a provision such as Article 20 or 21 TFEU is not simply a basis for residence status separate from Article 7 of the Charter. Rather, considerations regarding the exercise of the right to a family life permeate the substance of EU citizenship rights. Citizenship rights under Article 20 or 21 TFEU must thus be interpreted in a way that ensures that their substantive content is 'Charter-compliant'. That process is separate from the question of whether a justification advanced for a restriction of EU citizenship rights, *where these are triggered*, is consistent with the Charter. (32)

63. Such an approach does not 'extend' the scope of EU law and thus violate the separation of competences between the Union and its constituent Member States. It merely respects the overarching principle that, in a Union founded on the rule of law, all the relevant law (including, naturally, relevant primary law in the shape of the Charter) is taken into account when interpreting a provision of that legal order. When viewed in that light, taking due account of the Charter is no more 'intrusive', or 'disrespectful of Member State competence', than interpreting free movement of goods correctly.

64. Moreover, if the Charter applies and where rights laid down in the Charter correspond to rights already covered by the ECHR, EU law must be interpreted taking into account the case-law of the European Court of Human Rights ('the Strasbourg court'). (33) Article 7 of the Charter, protecting the right to a family life, is such an article; and there is abundant case-law of the Strasbourg court that clarifies the meaning to be attributed to its ECHR counterpart (Article 8 ECHR).

65. It follows that it should be immaterial whether one considers whether application of a particular national measure would breach Article 7 of the Charter or Article 8 ECHR. The standard being applied (whether by the national court, by this Court or by the Strasbourg court) is, by definition, the same. It should therefore be impossible to arrive at a different conclusion depending on which is invoked. (For present purposes I leave aside the third component in the trilogy of sources of protection of fundamental rights, namely national constitutional law, which may also of course be pertinent.)

66. In the context of a reference for a preliminary ruling, it is obviously necessary for this Court to give clear guidance to the national court as to the circumstances in which an EU right, read in a Charter-compliant way, is triggered. By the same token, it will be for the national court – which alone is competent to assess the facts – to make the necessary detailed assessment of those facts and to determine, on the basis of that guidance, whether the EU right as so interpreted precludes application of the national measure. In so doing, the national court will be performing the same exercise in respect of the claim that 'otherwise my fundamental rights will be breached' as it is accustomed to carry out when evaluating a similar claim under the ECHR in the light of the case-law of the Strasbourg court.

Applicability of Directive 2004/38

67. Directive 2004/38 implements Article 21(1) TFEU. It is aimed at facilitating and strengthening the exercise of that primary and individual right to move and reside. (34) According to settled case-law, such secondary legislation

cannot be interpreted restrictively (35) and its provisions 'must not in any event be deprived of their effectiveness'. (36)

68. Only a beneficiary within the meaning of Article 3 of Directive 2004/38 can derive rights of free movement and residence under that directive. Such a beneficiary may be an EU citizen or a family member as defined in Article 2(2). (37)

69. However, whilst Directive 2004/38 applies to defined categories of family members of an EU citizen and irrespective of whether they have already resided lawfully in another Member State (38) or have resided at all in a Member State, (39) their rights are acquired through their status as family members of the EU citizen concerned. (40) In that sense, they are automatic. (41) Thus, the EU citizen with whom they share a family connection must first fall within the scope of that directive.

70. It is not contested that O, B, S and G are family members within the meaning of Article 2(2)(a) and (d) of Directive 2004/38. That fact is sufficient: it is not necessary to show that there would otherwise be a restrictive effect on EU citizenship rights of free movement and residence in order to establish that, if Directive 2004/38 applies, they would have a derived right of residence. (42) The problem lies elsewhere.

71. Article 3(1) applies to all EU citizens 'who move to *or* reside in' a Member State other than that of their nationality. (43) In order to reside in a Member State, an EU citizen who was not born there must normally move there. (44) By contrast, movement to a Member State is possible without residing there. In that case, an EU citizen exercises only his right of free movement and not that of residence. Only those provisions of Directive 2004/38 regarding exit and entry will then apply. In principle, third country nationals cannot derive from EU law a right of residence in a Member State if their family member who is an EU citizen does not himself claim a right of residence and does not reside there. (45) There is thus an element of parallelism between an EU citizen's rights and the derived rights of his family members.

72. Third country nationals can claim such a right in the host Member State only when they accompany or join the EU citizen who exercises the right to reside on that territory in accordance with the conditions set out in Articles 6(1), 7(1) or 16(1) of Directive 2004/38. (46)

73. Article 3(1) makes no distinction according to the purpose of the exercise of the rights of free movement and residence, though the conditions under which rights of residence of longer than three months can be exercised differ depending on whether the EU citizen is, or is not, a migrant worker or self-employed person. (47) Indeed, the very purpose of Directive 2004/38 was to remedy the previous piecemeal approach to those rights whilst maintaining certain advantages for those EU citizens who pursue economic activities in another Member State. (48)

74. None the less, the wording of Article 3(1) circumscribes the scope of Directive 2004/38 by the direction in which EU citizens move: to a Member State other than that of which they are nationals. (49)

75. Thus, in principle, EU citizens who have always resided in their home Member State and have never exercised rights of free movement cannot be beneficiaries within the meaning of Article 3(1) of Directive 2004/38. (50) As a result, nor can their family members.

76. None of the sponsors in the present cases are in that situation. They all have exercised at least some form of the right of free movement.

77. In general, EU citizens can move in three directions within the European Union: (i) between two Member States of which they are not nationals; (ii) from their home Member State to another Member State and (iii) from another Member State back to their home Member State. They may of course move several times and in different directions. (51)

78. It is clear that Directive 2004/38 applies to movements (i) and (ii). In those circumstances, a third country

national who is a family member of the EU citizen (who has moved in either direction) has the right to accompany or join that EU citizen. (52)

79. However, it does not apply to movement (iii). Although I am firmly of the view that an EU citizen (and any third country national family members) having benefited from protection under Directive 2004/38 should not lose that protection when moving a second time, (53) concluding otherwise in respect of the scope of application of Directive 2004/38 itself would mean striking out the phrase 'other than that of which they are a national' from Article 3(1).

80. I add that, if the legislature had intended to cover movement (iii), it would have needed to write in detailed provisions to address that situation. There are none.

81. In *McCarthy*, the Court almost said as much when it held that 'Directive 2004/38 … cannot apply to a Union citizen who enjoys an unconditional right of residence due to the fact that he resides in the Member State of which he is a national'. (54) In *Iida*, Advocate General Trstenjak took the view that Directive 2004/38 did 'not at all cover the present case of the right of residence of the third country national in the Member State of origin of the Union citizen', (55) though she appears not to exclude outright the possibility that the answer might be different in different circumstances. (56)

82. It is true that the Court in *Singh* (57) accepted derived rights of residence for family members of a returning migrant worker on the basis of Article 52 of the EEC Treaty (now Article 59 TFEU) and Directive 73/148 (58) (repealed and replaced by Directive 2004/38 (59)). Directive 73/148, like Directive 2004/38, did not deal with the circumstance of a person returning to his Member State; and the Court's reasoning appears to be based exclusively on the Treaty provisions rather than on that directive. I consider this decision to be of particular significance to the analysis of Article 21 TFEU. (60)

83. Since Directive 2004/38 does not apply, the position of O, B, S and G and their sponsors must be considered under the Treaties. If the result of that analysis is that derived rights for third country national family members are required in order to enable EU citizens to enjoy the effective exercise of their free movement rights under Article 21 TFEU, it will then be appropriate to apply in the home Member State the minimum treatment guaranteed by Directive 2004/38 in host Member States. (61)

Article 21 TFEU

Derived rights of residence in the home Member State

84. Under Article 21(1) TFEU (and subject to its implementing measures), Member States must allow EU citizens who are not their nationals to move to, and reside on, their territory with their spouses and possibly certain other family members who are not EU citizens.

85. In the present cases, the Netherlands in essence *refuses* to grant, as a matter of EU law, residence rights to third country national family members of *its own nationals* in circumstances where, as a matter of EU law, it is in principle *required* to give such rights to third country national family members of *EU citizens who are nationals of other Member States*.

86. Why a Member State would wish thus to treat its own nationals less favourably than other EU citizens (who, except for their nationality, might very well be in identical or similar circumstances) is curious. So is the fact that, by denying residence, that Member State might be at risk of de facto 'expelling' its own nationals, forcing them either to move to another Member State where EU law will guarantee that they can reside with their family members or perhaps to leave the European Union altogether. Such a measure sits oddly with the solidarity that is presumed to underlie the relationship between a Member State and its own nationals. It is also difficult to reconcile with the principle of sincere cooperation that, in my view, applies between Member States just as it does between Member States and the Union. (62)

87. Yet the written observations and the oral submissions in the present cases show that a considerable number of Member States consider that EU law does not preclude them from doing exactly that.

88. A simple reaction to this argument would be that, pursuant to Article 21(1) TFEU, Member States may not restrict the right of EU citizens to move and reside freely within the territory of the European Union. Or, as Advocate General Jacobs put it, 'subject to the limits set out in [that article] itself, no unjustified burden may be imposed'. (63)

89. That same principle applies to EU citizens seeking to exercise the right to freedom of movement who marry a third country national. Such a couple will often (perhaps, normally) wish to exercise their right to a family life in physical proximity to each other. If they are precluded from living together in the Member State of which the EU citizen is a national (to which he returns after presence in the territory of another Member State or from which he exercises rights of free movement), they either do not live together or are obliged to move elsewhere. They might move to a country outside the European Union which allows them lawfully to reside together; or they might move to another EU Member State and rely on Directive 2004/38. In the first case, an EU citizen is effectively stripped of his EU citizenship because that status has only limited importance outside the European Union. (64) In the second case, it might be said that such a measure results in more movement. However, whilst facilitating free movement may well be an objective of Article 21(1) TFEU, imposing free movement is not. Rather, EU citizens are guaranteed the right to move and reside *freely* within the European Union. If a measure is likely to affect the EU citizen's free choice to exercise that right, then it is a restriction which, unless justified, is contrary to Article 21(1) TFEU.

90. In my opinion, the same reasoning applies where other close family members are concerned (such as parents-in-law, as in the case of S), provided that it is established that the EU citizen will otherwise move elsewhere with his family (including such other family members) in order to live together with them, or will cease to exercise rights of free movement.

91. The Court has already applied this test where an EU citizen who has exercised rights of free movement and residence returns to reside in his home Member State (*Singh* and *Eind*), or has exercised rights of free movement while continuing to reside in his home Member State (*Carpenter*, (65) decided after *Singh* (66) but before *Eind* (67)). In essence, those first two decisions show (68) that, where an EU citizen has moved to *and* resided in another Member State, family members may then accompany him to, or join him in, his home Member State under conditions no less favourable than those applicable, under EU law, in the host Member State.

92. Mr Singh and Mr Eind had both, as migrant workers, moved to and then resided in a Member State other than that of their nationality. Each then returned to his own Member State. Mr Singh became self-employed; Mr Eind did not work. Each had a third country national family member who had lived with him in the host Member State and who sought to live with him in the home Member State.

93. The Court held that Mr Singh, upon returning to his home Member State, should be treated in a manner at least equivalent to that which he would have enjoyed in the host Member State from which he had moved. (69) A family member could thus accompany him to the home Member State under the conditions set out in the European Community legislation which was the precursor of Directive 2004/38. (70)

94. In *Singh*, the Court gave little express consideration to the right to respect for family life, though its reasoning was that if an EU citizen was prevented from exercising that right by living together with his spouse and children on returning to his own Member State, he might be discouraged from exercising the fundamental freedoms to enter and reside in the territory of another Member State (the so-called 'chilling effect'). (71) In *Eind*, the Court was more explicit in its acceptance that barriers to family reunification are liable to result in barriers to the right of free movement of EU citizens. (72) Unlike *Singh* (which was decided in 1992), *Eind* dates from 2007, after the introduction of EU citizenship.

95. Thus, an EU citizen acquires the right to be accompanied or joined by a defined group of family members when exercising rights of free movement and residence. Knowing that that right will be lost upon returning to the home Member State is likely either to discourage him from moving in the first place or place limitations on what he can do

after making that first move. In that regard, it makes no difference that a family member did not, prior to the first move, enjoy a right of residence in the home Member State: Directive 2004/38 guarantees that EU citizens may reside, after the second move, with family members who lived with them prior to the first move, who join them from outside the European Union or who become family members after the first move. (73) For that reason, the home Member State cannot treat its own nationals returning to reside on its territory less favourably than the treatment they enjoyed as EU citizens in the host Member State. What matters is the treatment to which an EU citizen was *entitled* in the host Member State. What treatment an EU citizen actually *enjoyed* is of no importance. (74) Because, after the first move, the rights under EU law are 'passported' and remain with the EU citizen on his return to his home Member State, the conditions and limitations set out in Directive 2004/38 also indirectly apply to EU citizens returning to their home Member State.

Defining residence

96. If the EU citizen did not take up residence in another Member State, it is less evident that denying family members a right of residence under EU law in the home Member State will adversely affect the EU citizen's rights of free movement. But what does it mean to reside in another Member State? This question underlies the second and third questions in Case C-456/12.

97. Directive 2004/38 sets out the conditions under which an EU citizen may reside in another Member State without defining what 'residence' means. Nor do the Treaties contain a general definition. Certain secondary law instruments define 'residence' for the purpose of that particular legislation, referring to notions like 'normal residence' (75) or 'habitual residence'. (76)

98. Residence has different functions in EU law. In certain contexts, it might be used as a criterion for determining the applicable law (for example, in tax law and private international law) and to avoid so-called benefits tourism. (77) Elsewhere, it might be the substance of a right (78) or an element whose absence excludes access to a benefit. (79) In certain contexts, it is expressly defined. In others, it is not. Thus, residence is not a uniform concept in EU law.

99. In the context of EU citizenship law, residence in another Member State is, apart from being a right, sometimes a condition for exercising ancillary rights attached to that status (for example, the right to vote and to stand as a candidate in elections to the European Parliament and in municipal elections (80)), but it can also be a requirement that restricts other freedoms guaranteed under EU law.

100. In *Swaddling*, the Court held that the definition of residence in Article 1(h) of Regulation No 1408/71 (81) meant 'habitual residence' and suggested that it therefore had an EU-wide meaning. (82) The Court interpreted the phrase 'the Member State in which they reside' as being the place 'where the habitual centre of their interests is to be found', which should be determined taking into account 'the employed person's family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where it is the case) that he is in stable employment; and his intention as it appears from all the circumstances'. (83) In so saying, the Court has indicated that a proper understanding of whether a person is resident or not must be based, not on a single factor, but on a collection of elements that together enable the individual's situation to be assessed and categorised as residence or non-residence.

101. In other areas of EU law, the Court has articulated a similar understanding of residence: it is where a person has his habitual or usual centre of interests and it must be determined in light of the facts at issue, which include both objective and subjective elements. (84)

102. I do not think that residence requires constant physical presence in the territory of a single Member State (the third question asked in Case C-456/12). Otherwise, one could be found to be resident in a Member State only if one had not exercised the right to freedom of movement (by definition, prior to moving, one would have lived somewhere else). (85) It might reasonably, however, require a preponderance of presence.

103. Nor do I think that whether an EU citizen has taken up residence in another Member State turns on whether that is his sole place of residence. In many cases, exercise of the right to reside freely in the European Union will involve

moving residence from one Member State to another, without keeping any meaningful connection with the former place of residence. In other cases, however, it will be expedient for various reasons to maintain significant ties.

104. Provided that EU citizens satisfy the test for establishing residence in a Member State, it should not matter that they might keep some form of residence elsewhere. (86) There is no general rule of EU law whereby residence in one Member State precludes concurrent residence in another Member State. (87) That appears to be implied also by the provisions of Directive 2004/38 which make residence of longer than three months dependent on the condition that an EU citizen either is a worker or a self-employed person or has sufficient resources available in order to avoid becoming a burden on the social assistance system of the host Member State. By contrast, full solidarity (when the 'sufficient resources' condition no longer applies) must be shown to permanent residents. (88)

105. Whilst EU citizens who are not migrant workers or self-employed persons in the host Member State might need to show that they have sufficient resources, Directive 2004/38 is neutral as to the source(s) of those resources, which may thus originate from activities or interests elsewhere in or outside the European Union. If that were not so, there would be a blatant restriction of fundamental freedoms.

106. Does it matter whether an EU citizen initially moved to the host Member State to exercise an economic freedom and whether he returned to his home Member State in order to be economically active there?

107. I do not think so.

108. Mr Eind moved from the Netherlands to the United Kingdom to be economically active there; when he returned to the Netherlands, he did not work. His daughter nevertheless had the right to settle with him in the Netherlands, though subject to the conditions in Regulation No 1612/68 regarding residence of descendants of a migrant worker. (89) That was the treatment to which Mr Eind was entitled in the United Kingdom and, upon returning to the Netherlands, he could not lose it.

109. Thus, an EU citizen can claim in his home Member State treatment no less favourable than that to which he was entitled as a worker or self-employed person in the host Member State. No longer being economically active does not alter that entitlement. Nor does the fact that an EU citizen did not have worker or self-employed status in the host Member State, because the EU citizen's rights of free movement and residence are now no longer dependent on the exercise of an economic activity. However, the conditions under which his family members can reside in the host Member State may differ. (90)

110. I am not persuaded by the argument that an EU citizen (whether he is, or is not, a migrant worker or a self-employed person) must have resided in another Member State for a continuous period of at least three months or some other 'substantial' period of time before his third country national family members can derive rights of residence from EU law in the home Member State (the subject-matter of the second question in Case C-456/12). That argument presupposes that enforced separation from a family member, such as a spouse, will not deter an EU citizen who wishes to move to settle temporarily in another Member State from exercising his rights of free movement and residence. I see no basis for saying that, in such circumstances, the EU citizen should be required temporarily to sacrifice his right to a family life (or, put slightly differently, that he should be prepared to pay that price in order subsequently to be able to rely on EU law as against his own Member State of nationality). Indeed, under Directive 2004/38, family members are entitled to accompany the EU citizen immediately to the host Member State. Directive 2004/38 does not make their entitlement to that derived right conditional on a minimum residence requirement for the EU citizen. Rather, the conditions applicable to the dependents vary with length of residence in the territory.

111. The length of an EU citizen's stay in another Member State is (obviously) a relevant quantitative criterion. However, I consider that it cannot be applied as an absolute threshold for deciding who has, or has not, exercised rights of residence and can therefore be joined or accompanied (91) by their family members. It is one criterion amongst those which must be taken into account.

Free movement without residence

112. What if an EU citizen moves to a Member State other than that of his nationality but does not take up residence there? Are his third country national family members then entitled to join him in his Member State of nationality and residence? This is the essence of the first and second questions in Case C-457/12.

113. The reasoning in *Singh* (92) and *Eind* (93) does not cover this situation. However, *Carpenter* (94) already shows that derived rights of residence in the Member State of nationality and residence may be available to third country national family members of EU citizens who exercise single market freedoms (for example, to provide services) but do *not* move their place of residence to another Member State.

114. In *Carpenter*, the national court had found that the childcare and homemaking performed by Mrs Carpenter might indirectly assist and facilitate her spouse's right to provide services in another Member State. That meant that Mr Carpenter could spend more time on his business, a considerable part of which was conducted in other Member States. (95) The Court held that denying Mrs Carpenter residence and thus separating the two spouses would be 'detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom'. (96) Applying the rationale of *Singh*, the Court found that full effectiveness of that freedom might be undermined if there were obstacles in Mr Carpenter's Member State of origin to the entry and residence of his spouse. (97)

115. In examining whether that restriction could be justified, the Court then considered that the decision to deport Mrs Carpenter constituted an interference with Mr Carpenter's exercise of his right to respect for his family life within the meaning of Article 8 of the European Convention on Human Rights. (98)

116. Let us look at the decision in *Carpenter* a little more closely.

117. The Court's reasoning is necessarily based on the premiss that there was a causal connection between Mr Carpenter's exercise of economic free movement and his Filipino wife's residence in Mr Carpenter's Member State of nationality and residence. The economic activity provided support for his third country national wife. Conversely, Mr Carpenter was dependent on his wife in so far as she looked after his children, did the homemaking and thereby indirectly contributed to his success. (99) The conditions under which the right to a family life was exercised were therefore liable to affect the exercise of rights of free movement. Denial of a right of residence for Mrs Carpenter in Mr Carpenter's Member State of nationality and residence was likely to oblige him either (i) to move to another Member State in order to enable his wife to join him there (subject to the conditions set out in Directive 2004/38) or (ii) to accept the limitation on his right to a family life and lose his wife's presence with him in his home Member State, which would affect the conditions under which he exercised his freedom to provide services in another Member State (without residing there). Whether it would in fact have caused him to cease his activities abroad is unclear and does not form part of the Court's reasoning.

118. What is the relevance of that analysis, first, to the active exercise of rights of movement without residence as a worker and second, to the 'passive' exercise of the right to receive services?

Moving across borders as a worker without moving residence

119. EU citizens who, without moving residence, exercise the right of free movement in connection with an activity which helps to support, or which makes them dependent on, family members might for that reason need to be joined by certain family members in their home Member State. The connection between residence and the exercise of rights of free movement in such cases can be quite visible and easy to establish. For example, if the family members of a frontier worker are denied residence, the latter might be dissuaded from working in another Member State or forced to change his residence and move with his family to another Member State. The same applies to EU citizens who are dependent on a family member because the latter facilitates or enables their exercise of the right of free movement. This flows directly from what the Court has already held in *Carpenter* in relation to the 'active' provision of services

to clients resident in another Member State.

120. Is there an essential difference between living in Member State A but working for an employer in Member State B (the position of sponsor G), and living in Member State A, working for an employer who is also resident in Member State A but doing work that requires the worker to go to another Member State (the position of sponsor S)? This issue stems from the substance of the two questions referred in Case C-457/12.

121. I do not think so. In both cases, the worker's employment requires him to cross borders in order to fulfil his contract of employment. He cannot both keep his job and stay put in his home Member State. The question then becomes, is a restriction on the presence of the third country national family member in the home Member State going either to prevent the worker from crossing the border to perform his contract of employment or make it appreciably more difficult for him to do so? The circumstances may be such that, on the facts, it makes no difference to the exercise of the right to free movement. If, however, the worker's ability to fulfil his contract would be appreciably impaired if he cannot draw on the support afforded by the third country national family member (or if, indeed, cross-border work would become impossible), the effective exercise of free movement rights by the EU citizen dictates that derived rights of residence in the home Member State must be granted under EU law to his third country national family member.

122. Whether the third country national family member can claim such a right in the EU citizen's home Member State depends on the same three variables that initially formed the basis for establishing derived rights for third country nationals under EU law. These are:

– the family connection with the EU citizen;
– the EU citizen's exercise of rights of free movement and
– the causal link between the residence of the third country national and the EU citizen's exercise of rights of free movement.

123. Assessment of those criteria does not automatically lead to a simple 'yes' or 'no' answer. The magnitude of any restriction on the right of free movement may vary considerably depending on, for example, the closeness of the family connection. At the same time, the relevance of that connection and dependency to the EU citizen's choice as to whether or not to exercise the right of free movement can similarly vary greatly. A restriction of that choice exists if it is shown that denying the third country national family member residence may plausibly cause the EU citizen to move, to cease to move or to abandon the real prospect of moving.

Enjoying the 'passive' freedom to receive services in another Member State without moving there

124. This is the focus of the first question in Case C-456/12.

125. Within the scope of application of EU law, every EU citizen is guaranteed the same level of protection of his fundamental freedoms and right to a family life. An EU citizen who moves to another Member State in order to enjoy a service there, whatever that service might be, falls within the scope of application of EU law. (100) However, it does not follow that every exercise of the right of free movement to receive services will necessarily generate derived rights of residence for third country national family members of the EU citizen in the home Member State. That is because not every denial of residence constitutes a barrier to family reunification such as to restrict an EU citizen's fundamental right to move. (101)

126. A society or economy without services has become unimaginable. (102) Increasingly, EU citizens cross borders to enjoy services. For many, that might be the only type of right of free movement that they will ever exercise: they go on holidays, make day trips, order books online, and so forth.

127. Yet not all of these forms of exercise by an EU citizen of the passive freedom of services are dependent on whether third country national family members are also resident in the Member State where that EU citizen resides.

128. Whilst moving to another Member State in order to enjoy a service is undoubtedly an exercise of an economic freedom, it is usually not the type of activity which enables EU citizens to support, or makes them dependent on, their family members (possibly because of the opportunity cost of exercising the right of free movement). For those reasons, barriers to family unification are less likely to affect the considerations that cause an EU citizen to move and/or reside elsewhere.

129. In most circumstances, derived rights of residence for family members (which might lead to permanent residence) are *not* necessary for an EU citizen to enjoy a service which is essentially temporary 'in the light, not only of the duration of the provision of the service but also of its regularity, periodicity or continuity', (103) and which is often a consumer service for which an EU citizen pays rather than a revenue-generating activity.

130. The fact that the service might be more pleasurable when enjoyed with a family member is of itself insufficient to establish a restriction on the right of free movement, because that consideration is not inherent in the reasons which prompt EU citizens to cross borders in order to enjoy a service (for example, a meal in a particularly nice restaurant) instead of remaining in their Member State of nationality and residence to do so.

131. However, I do not rule out the possibility that, exceptionally, derived rights of residence for the third country national family member may be necessary. That would, in particular, be the case where an EU citizen becomes dependent on a family member due to the very circumstances that cause him to cross borders in order to enjoy services in another Member State. For example, suppose a German national residing in Germany and married to a Chinese national who has not been authorised to reside there becomes ill and requires long-term treatment. He decides, for medical reasons, to receive that treatment in Belgium. He has no intention of changing his residence and settling there. He does however require assistance to travel regularly to Belgium. He also needs help to take care of other things that he can no longer do for himself. He becomes dependent on a carer. Understandably, he would like that carer to be his Chinese wife. That decision belongs to the sphere of his private and family life; but at the same time it is connected to the conditions in which he exercises rights of free movement.

Moving between Member States in order to enjoy the right to a family life

132. What if an EU citizen moves solely in order to exercise his right to a family life with a family member residing elsewhere in the European Union? Can he subsequently claim a restriction on the exercise of his freedom of movement if that family member is not allowed, as a matter of EU law, to take up lawful residence in his Member State of nationality and residence? Those questions are relevant to the position of B and O (Case C-456/12), both of whom appear to have crossed borders in order to be with their partner or spouse.

133. It might be argued that, if such a restrictive national measure results in an EU citizen taking up residence in another Member State, that is the very function of EU citizenship and illustrates how free movement rights can enhance the exercise of the right to a family life.

134. However, the issue is not whether such a national measure results in (or allows) free movement to take place. What matters is the *freedom to choose whether to move or not to move*. A measure that imposes movement restricts that choice. It is therefore contrary to Article 21(1) TFEU. (104)

What conditions govern the exercise of derived rights of residence

135. Whilst the referring court's questions focus on the existence of derived rights of residence, such rights are not unconditional. Their exercise can be governed by the Treaties or by implementing legislation.

136. Article 21(1) TFEU states that the right of EU citizens to move and reside freely within the territory of the Member States is 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'.

137. An EU citizen who moves to a Member State other than that of his nationality has the right to enter its territory and reside there under the conditions set out in Directive 2004/38. For residence of up to three months, for example, he needs only to hold a valid identity card or passport. (105) The same applies to third country national family members accompanying or joining him there. (106) Other conditions apply for residence longer than three months and permanent residence. When the EU citizen then returns to his home Member State, he should enjoy the right to be accompanied or joined there by his third country national family members under conditions no less favourable than those applicable, as a matter of EU law, in the host Member State.

138. Suppose an EU citizen resided for two months in the host Member State and was joined there by his third country national spouse. Circumstances (perhaps, a parent's serious illness) cause him to return to his home Member State where he intends to reside with his spouse for the foreseeable future. He can do so provided that his spouse satisfies the relevant conditions in Directive 2004/38. The fact that she only lived with him for two months in the host Member State does not imply that the duration of her residence in the EU citizen's home Member State must be limited in the same manner. If it were, the EU citizen might be forced either to refrain from moving back to his own Member State in order to continue to reside elsewhere in the European Union with his spouse, or to leave her behind when returning to his Member State because she could derive rights of residence only for two months and he needs to stay home for longer. Had they stayed in the host Member State, and provided that the relevant conditions were satisfied, his wife would have been able to stay for more than three months and possibly obtain permanent residence there.

139. Finally, does the derived right of residence expire if there is some (undefined) gap between the return of the EU citizen to his home Member State and the family member's arrival there? This is the issue raised by the fourth question in Case C-456/12 (concerning B).

140. The answer depends, in my view, on why the EU citizen and his family member(s) were not moving together.

141. Under Directive 2004/38, the host Member State cannot deny residence to a third country national on the basis of elapsed time. Their right is to 'accompany or join' the EU citizen with whom they share relevant family links. (107) That wording means that a lapse of time after the EU citizen has entered and taken up residence cannot preclude a third country national from 'joining' him later. Indeed, the Court has held that Directive 2004/38 does not require family members of EU citizens to enter the host Member State at the same time as the EU citizen from whose status they derive rights. (108)

142. I do not consider that the reason for the delay is relevant. What matters is that the decision to move in order to reside with an EU citizen is taken in the exercise of the right to a family life. EU citizens enjoy the freedom to decide themselves how to exercise the right to a family life (if they did not, the right would be of little worth). Many will prefer to live with their family members; others might, at a particular moment, have other priorities (which might also change over time) or there might be practical obstacles to them living together immediately. By contrast, if a third country national family member and an EU citizen have decided that they no longer wished to live together as a couple and exercise their right to a family life, there would be no derived right of residence for the third country national.

143. Against this background, I turn now to consider briefly how the referring court should analyse the situations of O, B, S and G.

What determines the derived rights of residence of O, B, S and G

– O

144. Sponsor O moved from the Netherlands, married O in France and then moved with her husband to Spain. If O lawfully resided in Spain with sponsor O as a third country national family member of an EU citizen under Directive 2004/38, then sponsor O should not, when she returns to work and live in the Netherlands, be treated less favourably than when she moved to Spain to take up residence there. It follows, if those facts are confirmed (which is of course a matter for the national court), that O would have under EU law a right to lawful residence in the Netherlands. That

right is neither unconditional nor absolute. It is subject to the conditions and limitations set out in Directive 2004/38 in the same way as his earlier right to residence in Spain.

– **B**

145. Sponsor B exercised rights of free movement and possibly took up residence in Belgium in order to live there with (at that time) her partner B. (Whether or not sponsor B was a job-seeker in Belgium is unclear and is a matter to be verified by the national court.) As a mere partner, however, B did not fall within the scope of Article 2(2) of Directive 2004/38 and could not, therefore, derive a right of residence in Belgium from EU law by virtue of sponsor B's presence there. Whether or not sponsor B took up residence in Belgium is therefore not decisive for B's claim to residence in the Netherlands.

146. Nor is it relevant for the purposes of Article 21(1) TFEU that sponsor B lived with or visited B in Morocco after they were married, because that provision guarantees only rights of free movement and residence in the European Union.

147. Nor does there appear to be a connection between denial of residence in the Netherlands to B and the exercise by sponsor B of rights guaranteed under Article 21(1) TFEU. Any form of exercise of such rights was completed at a point in time when there was not yet a family connection between B and sponsor B.

148. However, the mere lapse of a period of time between sponsor B's return to the Netherlands and B's arrival would not affect any claim that the latter had to a derived right of residence, provided that the decision to join sponsor B in the Netherlands was taken in the exercise of their right to a family life. (109)

– **S**

149. Sponsor S is not a 'national of a Member State who, irrespective of his place of residence and of his nationality, has exercised the right to freedom of movement for workers and has been employed in a Member State other than that of his residence'. (110) He is employed in his Member State of residence and nationality and, when moving to Belgium and other Member States, he does not enter the labour market there. (111) He is not a posted worker (112) nor does he cross borders in order to provide services in Belgium within the meaning of Article 56 TFEU. Instead, it is presumably his employer who provides services in other Member States through sponsor S's intervention.

150. However, the fact remains that sponsor S exercises his right of free movement in connection with an economic activity (his employment in the Netherlands), the results of which (subject to verification by the national court) contribute to the welfare of his family. The opportunity cost of taking up this type of employment is his need to seek child care for his son. (It is for the national court to examine whether he would need to seek such care (and, if so, to the same extent) if he were simply working in the Netherlands.)

151. What about the two other variables, identified above, (113) namely family connection and causal link?

152. As regards the family connection between S and sponsor S, the referring court has held that S is a dependent family member in the ascending line within the meaning of Article 2(2)(d) of Directive 2004/38. That finding implies that the national court considers that sponsor S materially supports S (against the background of the Court's narrow conception of dependency under Directive 2004/38). In turn, sponsor S would appear to depend on S in so far as the latter cares for his son while he exercises rights of free movement in connection with his employment.

153. The rechtbank, which initially reviewed the Minister's decision, appears to have considered this fact not to be pertinent on the basis that either sponsor S's wife (also resident in the Netherlands) or professional child care services could look after his son.

154. On that basis, the referring court has taken the preliminary view that, if S were not allowed to reside in the

Netherlands, sponsor S would not be in a worse position as regards the exercise of rights of free movement. In order to establish whether there is indeed no reasonable causal link between those two factors, the referring court will need to examine whether denying residence to S would cause sponsor S to seek alternative employment that would not involve the exercise of rights of free movement or cause him to move with his family, including S, to another Member State.

– G

155. Sponsor G is a frontier worker and continued to be so after his marriage in Peru to G, with whom he has children. As spouses, G and sponsor G must be presumed to be dependent on each other in material, legal and emotional terms. Sponsor G's employment in another Member State would appear to be material to that family connection.

156. Denying G residence in the Netherlands might plausibly cause sponsor G, who wishes to live with G, to take up residence in Belgium (in order to reside together on the basis of Directive 2004/38) and thus to become a migrant worker resident in another Member State. That would be a restriction of his choice to be a frontier worker – an economic freedom that is, however, guaranteed under Article 45 TFEU.

157. Whether it would cause him to cease working abroad is less certain. Leaving aside the fact that such a decision would result in the loss of the means through which he supports his family, including G, it would not enhance the residence position of G in the Netherlands.

Postscript

158. Whether or not the Court agrees with the analysis that I have here set out, I would urge it to take the opportunity afforded by these two references to give clear and structured guidance as to the circumstances in which the third country national family member of an EU citizen who is residing in his home Member State but who *is* exercising his rights of free movement can claim a derived right of residence in the home Member State under EU law.

Conclusion

159. In the light of the foregoing considerations, I am of the opinion that the Court should answer the questions raised by the Raad van State to the following effect:

In Case C-456/12 *O*:

(1) Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States does not apply directly to EU citizens returning to their Member State of nationality. However, the Member State of nationality may not give such EU citizens less favourable treatment than that owed to them as a matter of EU law in the Member State from which they moved to their Member State of nationality. As a result, Directive 2004/38 indirectly sets out the minimum standard of treatment that a returning EU citizen and his family members must enjoy in the EU citizen's Member State of nationality.

(2) EU law does not require an EU citizen to have resided for any minimum period of time in another Member State in order for his third country national family members to claim a derived right of residence in the Member State of nationality to which the EU citizen then returns.

(3) An EU citizen exercises his right of residence in another Member State if he makes that Member State the place where the habitual centre of his interests lies. Provided that, when all relevant facts are taken into account, that test is satisfied, it is irrelevant in this context whether that EU citizen keeps another form of residence elsewhere or whether his physical presence in the Member State of residence is regularly or irregularly interrupted.

(4) Where time elapses between the return of the EU citizen to the Member State of which he is a national and the arrival of the third country national family member in that Member State, the family member's entitlement to a derived right of residence in that Member State does not lapse provided that the decision to join the EU citizen is taken in the exercise of their right to a family life.

In Case C-457/12 *S*:

Where an EU citizen residing in his Member State of nationality exercises rights of free movement in connection with his employment, the right of his third country national family members to reside in that State depends on the closeness of their family connection with the EU citizen and on the causal connection between the family's place of residence and the EU citizen's exercise of rights of free movement. In particular, the family member must enjoy a right of residence if denying that right would cause the EU citizen to seek alternative employment that would not involve the exercise of rights of free movement or would cause him to move to another Member State. It is irrelevant in that regard whether the EU citizen is a frontier worker or exercises his right of free movement in order to fulfil his contract of employment concluded with an employer based in his Member State of nationality and residence.

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1 – Original language: English.

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2 – Directive of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, OJ 2005 L 197, p. 34, and OJ 2007 L 204, p. 28 – only the first cited correction is relevant to the provisions at issue in the present cases).

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3 – [1992] ECR I-4265.

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4 – [2007] ECR I-10719.

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5 – Of course, not all citizenship rights depend on whether an EU citizen has crossed borders. See, for example, Article 20(2)(d) TFEU. There are, furthermore, exceptional situations in which, even though no borders between Member States have been crossed, an EU citizen would be deprived of the 'genuine enjoyment of the substance of the rights conferred' by his EU citizenship in the absence of derived rights of residence for third country national family members: see the *Ruiz Zambrano*, *McCarthy* and *Dereci* line of case-law, discussed at points 52 to 66 below.

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6 – Case C-434/09 *McCarthy* [2011] ECR I-3375, paragraphs 29 and 34 and the case-law cited.

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7 – *McCarthy*, cited in footnote 6 above, paragraph 29 and the case-law cited.

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8 – See, for example, *Singh*, cited in footnote 3 above, paragraph 23, and *Eind*, cited in footnote 4 above, paragraph 32.

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9 – See, for example, Case C-109/01 *Akrich* [2003] ECR I-9607, paragraphs 55 and 56.

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10 – See, for example, recital 5 in the preamble to Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968(II), p. 475) and recital 6 in the preamble to Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1).

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11 – See, for example, Case 59/85 *Reed* [1986] ECR 1283, paragraph 28 (where the Court made that point regarding the presence of an unmarried companion).

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12 – See, for example, Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 83.

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13 – Case C-87/12 *Ymeraga and Others* [2013] ECR I-0000, paragraph 35; also Case C-86/12 *Alokpa and Others* [2013] ECR I-0000, paragraph 22.

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14 – See, for example, recital 6 in the preamble to Directive 2004/38.

15 – Case C-1/05 *Jia* [2007] ECR I-1, paragraphs 35 and 37 and the case-law cited. See also, for example, Case C-83/11 *Rahman and Others* [2012] ECR I-0000, paragraphs 32, 33 and 35, and *Alokpa and Others*, cited in footnote 13 above, paragraph 25 and the case-law cited.

16 – See Joined Cases C-356/11 and C-357/11 *O and S* [2012] ECR I-0000, paragraph 56. In Case C-60/00 *Carpenter* [2002] ECR I-6279, the Court appeared to consider it relevant that Mr Carpenter depended on his wife in so far as she took care of his children. See further points 113 to 117 below.

17 – See, for example, Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, paragraph 16 and the case-law cited.

18 – Case C-40/11 *Iida* [2012] ECR I-0000, paragraph 77 and the case-law cited.

19 – This appears to be the cumulative effect of the judgments in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177, paragraphs 43 and 44; *McCarthy*, cited in footnote 6 above, paragraphs 46 and 47 and the case-law cited and Case C-256/11 *Dereci* [2011] ECR I-11315, paragraph 66.

20 – *Iida*, cited in footnote 18 above, paragraph 76. In reaching that conclusion, the Court had noted that Mr Iida was not seeking a right of residence with his spouse and daughter in the host Member State (Austria) but in their home Member State (Germany), that the two EU citizens had not been discouraged from exercising their free movement rights and that Mr Iida himself had certain residence rights anyway under both national law and EU law (see paragraphs 73 to 75).

21 – *Ruiz Zambrano*, cited in footnote 19 above, paragraph 42 and the case-law cited. The Court thus accepted that Mr Ruiz Zambrano, a Colombian national, could reside in the Member State of nationality and residence of his minor children, who were EU citizens (but had never left the Member State in which they were born) and were dependent on him.

22 – *Ruiz Zambrano*, cited in footnote 19 above, paragraph 44. In that regard, no mention was made of fundamental rights. Nor was the rationale for the conclusion explained.

23 – *McCarthy*, cited in footnote 6 above. Whilst it is indeed clear that Mrs McCarthy could stay in the United Kingdom on her own by virtue of her nationality and that she was not being deprived of a right to move under EU law by denying her husband derived rights as a third country national family member, it is less clear whether the Court considered the detailed implications. Perhaps the short answer was simply 'EU law can't help: try the ECHR'.

24 – *Dereci*, cited in footnote 19 above, paragraph 66. Mr Dereci was a Turkish national whose wife and children were Austrian and had always resided in Austria, where he wished to live with them.

25 – *Dereci*, cited in footnote 19 above, paragraph 67. See also *Iida*, cited in footnote 18 above, paragraph 71.

26 – *Dereci*, cited in footnote 19 above, paragraph 68.

27 – *Dereci*, cited in footnote 19 above, paragraph 72.

28 – In *Iida* (cited in footnote 18 above, paragraph 80), the Court appears to have applied a slightly different test (namely, whether Mr Iida was entitled to a particular benefit under EU law (a residence card)) in order to decide whether the application of a national law implementing EU law could be brought within the scope of EU law.

29 – Article 51 of the Charter. See also Case C-617/10 *Åkerberg Fransson* [2013] ECR I-0000, paragraphs 20 and 21, as recently confirmed in Case C-418/11 *TEXDATA Software* [2013] ECR I-0000, paragraph 73.

30 – See, in that regard, my Opinion in Case C-390/12 *Pfleger*, pending before the Court, points 35 to 47, which draws on the material contained in the Explanations Relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17). Under Article 52(7) of the Charter, the latter are to be 'given due regard' by the courts of the Union and of the Member States. In the context of EU citizenship, an example of a negative obligation would be where a Member State sought to invoke public policy reasons to exclude an EU citizen who was a national of another Member State from its territory. The Member State's freedom of action is here constrained by the requirements of EU law, which it may not breach. For a more wide-ranging discussion, see paragraphs 151 to

177 of my Opinion in *Ruiz Zambrano*, cited in footnote 19 above.

31 – See, for example, *Iida*, cited in footnote 18 above, paragraph 77 and the case-law cited.

32 – See, for example, *Carpenter*, cited in footnote 16 above, paragraph 40 and the case-law cited.

33 – Article 52(3) of the Charter states that: 'In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the [ECHR]'. However, Article 52(3) 'shall not prevent Union law providing more extensive protection'.

34 – *McCarthy*, cited in footnote 6 above, paragraph 28 and the case-law cited.

35 – *Eind*, cited in footnote 4 above, paragraph 43 and the case-law cited.

36 – Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraph 84 (citing *Eind*, cited in footnote 4 above, paragraph 43).

37 – Article 3(1) of Directive 2004/38.

38 – *Metock and Others*, cited in footnote 36 above, paragraphs 54, 58, 70 and 80. In *Metock and Others*, the Court reconsidered its position in *Akrich*, cited in footnote 9 above (see paragraph 58). The judgment in *Metock and Others* was subsequent to B's decision to move to Morocco but, in any event, B and sponsor B were not yet married at the time. See point 27 above.

39 – *Metock and Others*, cited in footnote 36 above, paragraph 49.

40 – *Dereci*, cited in footnote 19 above, paragraph 55, and, with respect to spouses, *McCarthy*, cited in footnote 6 above, paragraph 42 and the case-law cited.

41 – See also point 48 above.

42 – *Iida*, cited in footnote 18 above, paragraph 57. See also point 48 above.

43 – Emphasis added.

44 – It is also possible to be born in Member State A and never leave it but never have any nationality other than that of Member State B (see, for example, Catherine Zhu in Case C-200/02 *Zhu and Chen* [2004] ECR I-9925), but that is not a common situation.

45 – Compare with, for example, *Iida*, cited in footnote 18 above, paragraph 64.

46 – *Iida*, cited in footnote 18 above, paragraph 64 and the case-law cited. At paragraph 51 (and in the case-law cited there), the Court held that derived rights of entry *and* residence depend on whether an EU citizen 'has exercised the right of freedom of movement by *becoming established* in a Member State other than the Member State of which he is a national'.

47 – See Articles 7(1) and 16(1) of Directive 2004/38.

48 – See recitals 4 and 19 in the preamble to Directive 2004/38.

49 – I see no basis for concluding that, despite the wording of Article 3(1), the drafters intended to widen the scope of Directive 2004/38 by referring in other provisions to 'the host Member State' or 'another Member State'.

50 – See *McCarthy*, cited in footnote 6 above, paragraph 39, and *Dereci*, cited in footnote 19 above, paragraph 54.

51 – More specific circumstances might involve, for example, EU citizens who are dual nationals and move between their Member States of nationality.

52 – *Iida*, cited in footnote 18 above, paragraph 64 and the case-law cited.

53 – See point 95 below.

54 – *McCarthy*, cited in footnote 6 above, paragraph 34, also paragraph 37. See also points 28 and 29 of the Opinion of Advocate General Kokott.

55 – Opinion of Advocate General Trstenjak in *Iida*, cited in footnote 18 above, especially points 48 and 54.

56 – See, for example, point 47 of her Opinion in *Iida*, cited in footnote 18 above.

57 – Cited in footnote 3 above.

58 – Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14).

59 – See Article 38(2) of Directive 2004/38.

60 – See points 91 to 96 below.

61 – See points 91 to 97, and 110 and 111 below.

62 – Article 4(3) TEU according to which '[p]ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'.

63 – Case C-224/02 *Pusa* [2004] ECR I-5763, point 22 of the Opinion.

64 – Such extreme deprivation of a core citizenship right is covered by the *Dereci* reformulation of the *Ruiz Zambrano* principle (both cases are cited in footnote 19 above). For the sake of accuracy, I recall that certain provisions, such as Article 20(2)(c) TFEU (diplomatic protection in a third country) do confer rights on EU citizens that can be enjoyed outside the territory of the European Union.

65 – Cited in footnote 16 above.

66 – Cited in footnote 3 above.

67 – Cited in footnote 4 above.

68 – I consider *Carpenter*, cited in footnote 16 above, later, at point 113 et seq.

69 – *Singh*, cited in footnote 3 above, paragraphs 19 and 23.

70 – See *Singh*, cited in footnote 3 above, paragraph 21; see also *Eind*, cited in footnote 4 above, paragraph 39, and Case C-162/09 *Lassal* [2010] ECR I-9217, paragraph 59 and the case-law cited.

71 – *Singh*, cited in footnote 3 above, paragraph 20.

72 – *Eind*, cited in footnote 4 above, paragraphs 37 and 44 and case-law cited (which includes a reference to *Carpenter*, cited in footnote 16 above); see also *Iida*, cited in footnote 18 above, paragraph 70.

73 – See, for example, *Metock*, cited in footnote 36 above, paragraphs 88, 89 and 92 (with regard to founding of a family after exercising the right of free movement).

74 – This follows from the way in which the Court phrased paragraphs 19 and 23 of its judgment in *Singh*, cited in footnote 3 above. See also the passages from *Metock* cited in the preceding footnote.

75 – See, for example, Article 7 of Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another (OJ 1983 L 105, p. 59), as amended.

76 – See, for example, Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1), as repeatedly amended; Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177,

p. 6); Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ 2007 L 199, p. 40) and Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ 2009 L 335, p. 1).

77 – See, for example, Case C-589/10 *Wencel* [2013] ECR I-0000, paragraphs 48 to 51, regarding the possibility of having two habitual residences under Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971(II), p. 416), repealed by Regulation (EC) No 883/2004.

78 – See, for example, Directive 2004/38.

79 – See, for example, Case 188/83 *Witte* v *Parliament* [1984] ECR 3465, paragraphs 8 to 11, regarding the award of an expatriation allowance.

80 – See Article 22 TFEU.

81 – Cited in footnote 77 above.

82 – Case C-90/97 *Swaddling* [1999] ECR I-1075, paragraph 28.

83 – *Swaddling*, cited in footnote 82 above, paragraph 29 and the case-law cited.

84 – See, for example, Case 76/76 *Di Paolo* [1977] ECR 315; Case C-102/91 *Knoch* [1992] ECR I-4341; see also Advocate General Saggio's Opinion in *Swaddling*, cited in footnote 82 above, point 17. See also, for example, Case C-297/89 *Ryborg* [1991] ECR I-1943, paragraphs 24 and 25, and Case C-262/99 *Louloudakis* [2001] ECR I-5547, paragraph 55.

85 – In order to avoid this logical conundrum, most legal residence tests specify a fixed (and hence necessarily arbitrary) 'qualifying' period of presence before residence is achieved. There is no objective difference, however, between presence the day before and presence the day after the magic figure is attained.

86 – See, for example, *Di Paolo*, cited in footnote 84 above, paragraphs 17 and 21.

87 – For example, Member States never consider that a person cannot be tax-resident in their territory simply because he is (also) tax-resident in another territory.

88 – See Article 16(1) of Directive 2004/38.

89 – *Eind*, cited in footnote 4 above, paragraphs 38 and 39. Regulation No 1612/68 was amended by Directive 2004/38. It has now been repealed by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1).

90 – See points 135 to 142 below.

91 – Indeed, if the EU citizen had to reside continuously for x months before he was entitled to have his family with him, he could only be 'accompanied' by them by leaving the territory after satisfying the magic period and then re-entering bringing his family with him, which would scarcely facilitate the exercise of his free movement rights.

92 – Cited in footnote 3 above.

93 – Cited in footnote 4 above.

94 – Cited in footnote 16 above.

95 – *Carpenter*, cited in footnote 16 above, paragraphs 14 and 19.

96 – *Carpenter*, cited in footnote 16 above, paragraph 39.

97 – *Carpenter*, cited in footnote 16 above, paragraph 39.

98 – See *Carpenter*, cited in footnote 16 above, paragraph 41.

99 – The Immigration Adjudicator found as a fact that Mrs Carpenter indirectly contributed in this manner to her husband's business' increased success: *Carpenter*, cited in footnote 16 above, paragraph 18. Advocate General Stix-Hackl considered that that fact was not relevant to the right of residence under EU law (see points 103 to 105 of her Opinion). I read the Court's explicit reliance on that fact as indicating that it disagreed with the Advocate General on this point.

100 – See, in that regard, Case C-221/11 *Demirkan* [2013] ECR I-0000, paragraphs 35 and 36.

101 – See also, in that regard, point 5 of the Opinion of Advocate General Tesauro in *Singh*, cited in footnote 3 above.

102 – See also, for example, Opinion of Advocate General Cruz Villalón in *Demirkan*, cited in footnote 100 above, especially points 49 and 50.

103 – Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 27.

104 – See also point 89 above. I recall that, on the facts, there is no suggestion of marriages of convenience, fraud or abuse of rights (see point 42 above).

105 – Article 6(1) of Directive 2004/38.

106 – Article 6(2) of Directive 2004/38. Of course, upon entering the territory of the Member State, such third country nationals also need to satisfy any relevant entry visa requirements. See Article 5(2) of Directive 2004/38.

107 – See, for example, Articles 6(2), 7(2) and 16(2) of Directive 2004/38. See also *Eind*, cited in footnote 4 above, paragraph 38.

108 – See, for example, *Metock*, cited in footnote 36 above, paragraph 90; the order in Case C-551/07 *Sahin* [2008] ECR I-10453, paragraph 28, and *O* and *S*, cited in footnote 16 above, paragraph 54.

109 – See points 141 to 142 above.

110 – Case C-379/11 *Caves Krier Frères* [2012] ECR I-0000, paragraph 25 and the case-law cited.

111 – See, in that regard, Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 21 and the case-law cited.

112 – See Article 1(3) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1).

113 – At point 122 above.

Case C-456/12: O. v Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v B.

JUDGMENT OF THE COURT (Grand Chamber)
12 March 2014 (*)

(Directive 2004/38/EC – Article 21(1) TFEU – Right to move and reside freely within the territory of the Member States – Beneficiaries – Right of residence of a third-country national who is a family member of a Union citizen in the Member State of which that citizen is a national – Return of the Union citizen to that Member State after short periods of residence spent in another Member State)

In Case C-456/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Netherlands), made by decision of 5 October 2012, received at the Court on 10 October 2012, in the proceedings

O.
v
Minister voor Immigratie, Integratie en Asiel,
and
Minister voor Immigratie, Integratie en Asiel
v
B.,

THE COURT (Grand Chamber),
composed of V. Skouris, President, K. Lenaerts (Rapporteur), Vice-President, R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen, A. Borg Barthet and C.G. Fernlund, Presidents of Chambers, G. Arestis, J. Malenovský, E. Levits, A. Ó Caoimh, D. Šváby, M. Berger, A. Prechal and E. Jarašiūnas, Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,
having regard to the written procedure and further to the hearing on 25 June 2013,

after considering the observations submitted on behalf of:
– Mr O., by J. Canales and J. van Bennekom, advocaten,
– Mr B., by C. Chen, F. Verbaas and M. van Zantvoort, advocaten,
– the Netherlands Government, by M. de Ree, C. Schillemans and C. Wissels, acting as Agents,
– the Belgian Government, by T. Materne and C. Pochet, acting as Agents,
– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,
– the Danish Government, by V. Pasternak Jørgensen and M. Wolff, acting as Agents,
– the German Government, by T. Henze and A. Wiedmann, acting as Agents,
– the Estonian Government, by M. Linntam and N. Grünberg, acting as Agents,
– the Polish Government, by K. Pawłowska, M. Szpunar, B. Majczyna and M. Arciszewski, acting as Agents,
– the United Kingdom Government, by L. Christie, acting as Agent, and by G. Facenna, Barrister,
– the European Commission, by C. Tufvesson and G. Wils, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 12 December 2013,
gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move

and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda at OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34), and Article 21(1) TFEU.

2 The request has been made in proceedings between Mr O. and the Minister voor Immigratie, Integratie en Asiel (Minister for Immigration, Integration and Asylum) ('the Minister'), on the one hand, and between the Minister and Mr B., on the other, concerning the decisions refusing to grant them a certificate of lawful residence as a family member of a European Union citizen in the Netherlands.

Legal context

Directive 2004/38

3 Article 1 of Directive 2004/38, which is entitled 'Subject', provides:

'This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

…'

4 Under the heading 'Definitions', Article 2 of that directive provides:

'For the purposes of this Directive:

1. "Union citizen" means any person having the nationality of a Member State;

2. "family member" means:

(a) the spouse;

…

3. "host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.'

5 Article 3 of that directive, which is entitled 'Beneficiaries', provides in paragraph 1 thereof:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in [Article 2(2)] who accompany or join them.'

6 Article 6 of Directive 2004/38 states:

'1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months … .

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.'

7 Article 7(1) and (2) of that directive is worded as follows:

‘1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).’

8 Article 10(1) of that directive provides:

‘The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called “Residence card of a family member of a Union citizen” no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.’

9 Under Article 16(1), first sentence, of Directive 2004/38, ‘Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there’. Article 16(2) provides that ‘[p]aragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years’.

Netherlands law

10 The Law on Foreign Nationals (Vreemdelingenwet) of 23 November 2000 (Stb. 2000, No 495) and the Decree on Foreign Nationals of 2000 (Vreemdelingenbesluit 2000, Stb. 2000, No 497) implemented Directive 2004/38 into Netherlands law.

11 Article 1 of the Law on Foreign Nationals provides:

‘Within the meaning of the present Law and of the provisions adopted on the basis thereof:

…

(e) Community nationals shall mean:

1. nationals of the Member States of the European Union who, under the Treaty establishing the European Community, have the right to enter and reside on the territory of another Member State;

2. the family members of those persons referred to in paragraph 1 who are nationals of a third State and who, on the basis of a decision taken in application of the EC Treaty, are entitled to enter and reside on the territory of a Member State;

…'

12 Article 8 of that law provides:

'Foreign nationals are not lawfully resident in the Netherlands:

…

(e) as Community nationals, except where their residence in the Netherlands is based on a rule adopted under the EC Treaty or the Treaty on the European Economic Area;

…'

13 Under Article 9(1) of that law, the Minister is required to provide the foreign national who is lawfully resident on the territory of the Netherlands on the basis of Union law with a document or written statement evidencing the lawful residence ('the residence document').

The disputes in the main proceedings and the questions referred for a preliminary ruling

Mr O.'s situation

14 In 2006, Mr O., a Nigerian national, married a Netherlands national ('sponsor O'). Mr O. stated that from 2007 to April 2010 he lived in Spain. According to the documents submitted by the Spanish municipality of Malaga, Mr O. and sponsor O have been registered at the same address in that municipality since 7 August 2009. Mr O. also submitted a residence document, valid until 20 September 2014, from which it appears that he resided in Spain as a family member of a Union citizen.

15 According to sponsor O, she resided for two months with Mr O. in Spain between 2007 and April 2010 but she returned to the Netherlands because she could not find work in Spain. During that time, however, sponsor O regularly spent time with Mr O. in the form of holidays in Spain.

16 Since 1 July 2010, Mr O. has been registered in the Netherlands Personal Records Database as residing at the same address as sponsor O.

17 By decision of 15 November 2010, the Minister rejected Mr O.'s request for the residence document referred to in Article 9(1) of the Law on Foreign Nationals. By decision of 21 March 2011, the Minister rejected Mr O.'s objection to that decision as unfounded.

18 By judgment of 7 July 2011, the Rechtbank 's-Gravenhage (District Court, The Hague) rejected the action brought by Mr O. against the decision of 21 March 2011 as unfounded.

19 Mr O. lodged an appeal against that judgment before the referring court.

Mr B.'s situation

20 Mr B., a Moroccan national, stated that from December 2002 he had lived for several years in the Netherlands with his partner ('sponsor B') who has Netherlands nationality.

21 By decision of 14 October 2005, the Minister declared Mr B. to be undesirable within the territory of the Netherlands as a result of a prison sentence of two months for using a false passport. Mr B. then moved to Retie (Belgium) and lived in an apartment rented by sponsor B from October 2005 to May 2007. Sponsor B stated that, during that period, she resided there every weekend.

22 In April 2007, Mr B. returned to Morocco because he was denied residence in Belgium on the basis of the decision of 14 October 2005.

23 On 31 July 2007, Mr B. and sponsor B were married. On 30 December 2008, Mr B. applied to have his declaration of undesirability lifted. By decision of 16 March 2009, the Minister lifted that declaration.

24 In June 2009, Mr B. moved to the Netherlands to reside there with sponsor B.

25 By decision of 30 October 2009, the Staatssecretaris van Justitie (State Secretary for Justice) rejected Mr B.'s application for a residence document. By decision of 19 March 2010, the Minister held Mr B.'s challenge to the decision rejecting his application to be unfounded.

26 By judgment of 11 November 2010, the Rechtbank 's-Gravenhage upheld the action brought by Mr B. against the decision of 19 March 2010, annulled that decision and ordered the Minister to adopt a new decision taking into account the considerations set out in that judgment.

27 The Minister lodged an appeal against that judgment before the referring court.

The questions referred for a preliminary ruling

28 As Mr O. and Mr B. were family members of Union citizens, within the meaning of Article 2(2) of Directive 2004/38, on the dates on which the decisions rejecting their respective applications for a residence document were taken, the referring court is unsure, first of all, whether that directive grants them a right of residence in the Member State of which those citizens are nationals.

29 According to the referring court, it is conceivable that the term 'move to' within the meaning of Article 3(1) of Directive 2004/38 means travelling to and from, without moving to, a Member State other than the Member State of which those citizens are nationals. Likewise, it is conceivable that the term 'join them' within the meaning of Article 3(1) of that directive could be construed to mean joining the Union citizens in the Member State of which they are nationals. However, the referring court states that other provisions of that directive, in particular Article 6(1) and Article 7(1) and (2), seem to rule out such an interpretation, in so far as they expressly mention 'another Member State' and 'the host Member State' as the Member State to which the right of residence applies. The judgment in Case C-434/09 *McCarthy* [2011] ECR I-3375 confirms that Articles 6 and 7 govern the legal situation of a Union citizen in a Member State of which he is not a national.

30 Next, the referring court points out that it is apparent from Case C-370/90 *Singh* [1992] ECR I-4265 and Case C-291/05 *Eind* [2007] ECR I-10719 that when a national of a Member State who has availed himself or herself of the right to freedom of movement returns to his or her State of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Union law if the Union citizen chose to enter and reside in another Member State. However, the referring court expresses doubts as to whether that case-law may be applied to situations such as those at issue in the main proceedings. It states in that regard that, unlike in the cases which gave rise to the judgments in *Singh* and *Eind*, the Union citizens in question in the main proceedings resided in the host Member State not as workers but as Union citizens pursuant to Article 21(1) TFEU, and as recipients of services within the meaning of Article 56 TFEU.

31 Lastly, if the case-law in *Singh* and *Eind* were to apply to situations such as those at issue in the main proceedings, the referring court asks to what extent it is a requirement that the residence of the Union citizen in a

Member State other than that of which he is a national must have been of a certain minimum duration if, after the return of the Union citizen to the Member State of which he is a national, the member of his family who is a third-country national wishes to gain a right of residence in that Member State. In the case concerning Mr B. the referring court is also uncertain whether Mr B.'s right of residence in the Netherlands under Directive 2004/38 is affected by the fact that he only joined sponsor B in the Member State of which she is a national more than two years after her return to that Member State.

32 In those circumstances the Raad van State decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling, the first three of which are formulated in the same terms in the cases of Mr O. and Mr B., with only the fourth question specific to the case of Mr B.:

'(1) Should Directive 2004/38 …, as regards the conditions governing the right of residence of members of the family of a Union citizen who have third-country nationality, be applied by analogy, as in the judgments of the Court of Justice of the European Communities in [*Singh* and in *Eind*], where a Union citizen returns to the Member State of which he is a national after having resided in another Member State in the context of Article 21(1) [TFEU], and as the recipient of services within the meaning of Article 56 [TFEU]?

(2) [If the first question is answered in the affirmative], is there a requirement that the residence of the Union citizen in another Member State must have been of a certain minimum duration if, after the return of the Union citizen to the Member State of which he is a national, the member of his family who is a third-country national wishes to gain a right of residence in that Member State?

(3) [If the second question is answered in the affirmative], can that requirement then also be met if there was no question of continuous residence, but rather of a certain frequency of residence, such as during weekly residence at weekends or during regular visits?

(4) As a result of the time which elapsed between the return of the Union citizen to the Member State of which he is a national and the arrival of the family member from a third country in that Member State, in circumstances such as those of the … case [concerning Mr B.], has there been a lapse of possible entitlement of the family member with third-country nationality to a right of residence derived from Union law?'

Consideration of the questions referred

The first, second and third questions

33 By its first, second and third questions, which should be examined together, the referring court asks, in essence, whether Directive 2004/38 and Article 21(1) TFEU must be interpreted as precluding a Member State from refusing a right of residence to a third-country national who is the family member of a Union citizen holding the nationality of that Member State, following the return of that citizen to that Member State, in circumstances where that citizen, before his return, had exercised his right of freedom of movement under Article 21(1) TFEU by residing in another Member State with the family member in question, solely by virtue of his being a Union citizen, and, if that question is answered in the affirmative, what are the conditions under which such a right of residence is granted?

34 In that regard, it should be borne in mind that under Article 21(1) TFEU, '[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'.

35 The Court has already had occasion to point out that Directive 2004/38 aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by Article 21(1) TFEU and that it aims in particular to strengthen that right (see, to that effect, Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraphs 59 and 82; Case C-162/09 *Lassal* [2010] ECR I-9217, paragraph 30; and *McCarthy*, paragraph 28).

36 Article 21(1) TFEU and Directive 2004/38 do not confer any autonomous right on third-country nationals (see, to that effect, Case C-40/11 *Iida* [2012] ECR, paragraph 66, and Case C-87/12 *Ymeraga and Ymeraga-Tafarshiku* [2013] ECR, paragraph 34). Any rights conferred on third-country nationals by provisions of EU law on Union citizenship are rights derived from the exercise of freedom of movement by a Union citizen (see *Iida*, paragraph 67; *Ymeraga and Ymeraga-Tafarshiku*, paragraph 35; and Case C-86/12 *Alokpa and Others* [2013] ECR, paragraph 22).

37 It follows from a literal, systematic and teleological interpretation of Directive 2004/38 that it does not establish a derived right of residence for third-country nationals who are family members of a Union citizen in the Member State of which that citizen is a national.

38 Article 3(1) of Directive 2004/38, defines the 'beneficiaries' of the rights conferred by it as 'all Union citizens who move to or reside in a Member State other than that of which they are a national, and … their family members as defined in [Article 2(2)] who accompany or join them'.

39 Accordingly, Directive 2004/38 establishes a derived right of residence for third-country nationals who are family members of a Union citizen, within the meaning of Article 2(2) of that directive, only where that citizen has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national (see, to that effect, *Metock and Others*, paragraph 73; Case C-256/11 *Dereci and Others* [2011] ECR I-11315, paragraph 56; *Iida*, paragraph 51; and Joined Cases C-356/11 and C-357/11 *O. and Others* [2012] ECR, paragraph 41).

40 Other provisions of Directive 2004/38, in particular Article 6, Article 7(1) and (2) and Article 16(1) and (2), refer to the right of residence of a Union citizen and to the derived right of residence conferred on the family members of that citizen either in 'another Member State' or in 'the host Member State' and thus confirm that a third-country national who is a family member of a Union citizen cannot invoke, on the basis of that directive, a derived right of residence in the Member State of which that citizen is a national (see *McCarthy*, paragraph 37, and *Iida*, paragraph 64).

41 As regards the teleological interpretation of Directive 2004/38, it should be borne in mind that whilst it is true that Directive 2004/38 aims to facilitate and strengthen the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on each citizen of the Union, the fact remains that the subject of the directive concerns, as is apparent from Article 1(a), the conditions governing the exercise of that right (*McCarthy*, paragraph 33).

42 Since, under a principle of international law, a State cannot refuse its own nationals the right to enter its territory and remain there, Directive 2004/38 is intended only to govern the conditions of entry and residence of a Union citizen in a Member State other than the Member State of which he is a national (see *McCarthy*, paragraph 29).

43 In those circumstances and having regard to what is said in paragraph 36 above, Directive 2004/38 is therefore also not intended to confer a derived right of residence on third-country nationals who are family members of a Union citizen residing in the Member State of which the latter is a national.

44 Since third-country nationals in situations such as those of Mr O. and Mr B. are not entitled, on the basis of Directive 2004/38, to a derived right of residence in the Member State of which their sponsors are nationals, it must be examined whether a derived right of residence may, in some circumstances, be based on Article 21(1) TFEU.

45 In that regard, it should be borne in mind that the purpose and justification of that derived right of residence is based on the fact that a refusal to allow such a right would be such as to interfere with the Union citizen's freedom of movement by discouraging him from exercising his rights of entry into and residence in the host Member State (see *Iida*, paragraph 68; *Ymeraga and Ymeraga-Tafarshiku*, paragraph 35; and *Alokpa and Others*, paragraph 22).

46 The Court has accordingly held that where a Union citizen has resided with a family member who is a third-country national in a Member State other than the Member State of which he is a national for a period exceeding two and a half years and one and half years respectively, and was employed there, that third-country national must, when the Union citizen returns to the Member State of which he is a national, be entitled, under Union law, to a derived right of residence in the latter State (see *Singh*, paragraph 25, and *Eind*, paragraph 45). If that third-country national did not have such a right, a worker who is a Union citizen could be discouraged from leaving the Member State of which he is a national in order to pursue gainful employment in another Member State simply because of the prospect for that worker of not being able to continue, on returning to his Member State of origin, a way of family life which may have come into being in the host Member State as a result of marriage or family reunification (see *Eind*, paragraphs 35 and 36, and *Iida*, paragraph 70).

47 Therefore, an obstacle to leaving the Member State of which the worker is a national, as mentioned in *Singh* and *Eind*, is created by the refusal to confer, when that worker returns to his Member State of origin, a derived right of residence on the family members of that worker who are third-country nationals, where that worker resided with his family members in the host Member State pursuant to, and in conformity with, Union law.

48 It is therefore necessary to determine whether the case-law resulting from *Singh* and *Eind* is capable of being applied generally to family members of Union citizens who, having availed themselves of the rights conferred on them by Article 21(1) TFEU, resided in a Member State other than that of which they are nationals, before returning to the Member State of origin.

49 That is indeed the case. The grant, when a Union citizen returns to the Member State of which he is a national, of a derived right of residence to a third-country national who is a family member of that Union citizen and with whom that citizen has resided, solely by virtue of his being a Union citizen, pursuant to and in conformity with Union law in the host Member State, seeks to remove the same type of obstacle on leaving the Member State of origin as that referred to in paragraph 47 above, by guaranteeing that that citizen will be able, in his Member State of origin, to continue the family life which he created or strengthened in the host Member State.

50 So far as concerns the conditions for granting, when a Union citizen returns to the Member State of which he is a national, a derived right of residence, based on Article 21(1) TFEU, to a third-country national who is a family member of that Union citizen with whom that citizen has resided, solely by virtue of his being a Union citizen, in the host Member State, those conditions should not, in principle, be more strict than those provided for by Directive 2004/38 for the grant of such a right of residence to a third-country national who is a family member of a Union citizen in a case where that citizen has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national. Even though Directive 2004/38 does not cover such a return, it should be applied by analogy to the conditions for the residence of a Union citizen in a Member State other than that of which he is a national, given that in both cases it is the Union citizen who is the sponsor for the grant of a derived right of residence to a third-country national who is a member of his family.

51 An obstacle such as that referred to in paragraph 47 above will arise only where the residence of the Union citizen in the host Member State has been sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State. Article 21(1) TFEU does not therefore require that every residence in the host Member State by a Union citizen accompanied by a family member who is a third-country national necessarily confers a derived right of residence on that family member in the Member State of which that citizen is a national upon the citizen's return to that Member State.

52 In that regard, it should be observed that a Union citizen who exercises his rights under Article 6(1) of Directive 2004/38 does not intend to settle in the host Member State in a way which would be such as to create or strengthen family life in that Member State. Accordingly, the refusal to confer, when that citizen returns to his Member State of origin, a derived right of residence on members of his family who are third-country nationals will not deter such a citizen from exercising his rights under Article 6.

53 On the other hand, an obstacle such as that referred to in paragraph 47 above may be created where the Union citizen intends to exercise his rights under Article 7(1) of Directive 2004/38. Residence in the host Member State pursuant to and in conformity with the conditions set out in Article 7(1) of that directive is, in principle, evidence of settling there and therefore of the Union citizen's genuine residence in the host Member State and goes hand in hand with creating and strengthening family life in that Member State.

54 Where, during the genuine residence of the Union citizen in the host Member State, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) of Directive 2004/38, family life is created or strengthened in that Member State, the effectiveness of the rights conferred on the Union citizen by Article 21(1) TFEU requires that the citizen's family life in the host Member State may continue on returning to the Member of State of which he is a national, through the grant of a derived right of residence to the family member who is a third-country national. If no such derived right of residence were granted, that Union citizen could be discouraged from leaving the Member State of which he is a national in order to exercise his right of residence under Article 21(1) TFEU in another Member State because he is uncertain whether he will be able to continue in his Member State of origin a family life with his immediate family members which has been created or strengthened in the host Member State (see, to that effect, *Eind*, paragraphs 35 and 36, and *Iida*, paragraph 70).

55 *A fortiori*, the effectiveness of Article 21(1) TFEU requires that the Union citizen may continue, on returning to the Member State of which he is a national, the family life which he led in the host Member State, if he and the family member concerned who is a third-country national have been granted a permanent right of residence in the host Member State pursuant to Article 16(1) and (2) of Directive 2004/38 respectively.

56 Accordingly, it is genuine residence in the host Member State of the Union citizen and of the family member who is a third-country national, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of Directive 2004/38 respectively, which creates, on the Union citizen's return to his Member State of origin, a derived right of residence, on the basis of Article 21(1) TFEU, for the third-country national with whom that citizen lived as a family in the host Member State.

57 It is for the referring court to determine whether sponsor O and sponsor B, who are both Union citizens, settled and, therefore, genuinely resided in the host Member State and whether, on account of living as a family during that period of genuine residence, Mr O. and Mr B. enjoyed a derived right of residence in the host Member State pursuant to and in conformity with Article 7(2) or Article 16(2) of Directive 2004/38.

58 It should be added that the scope of Union law cannot be extended to cover abuses (see, to that effect, Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, paragraph 51, and Case C-303/08 *Bozkurt* [2010] ECR I-13445, paragraph 47). Proof of such an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved, and, secondly, a subjective element consisting in the intention to obtain an advantage from the European Union rules by artificially creating the conditions laid down for obtaining it (Case C-364/10 *Hungary* v *Slovakia* [2012] ECR, paragraph 58).

59 As regards the question whether the cumulative effect of various short periods of residence in the host Member State may create a derived right of residence for a family member of a Union citizen who is a third-country national on the citizen's return to the Member State of which he is a national, it should be borne in mind that only a period of residence satisfying the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of Directive 2004/38 will give rise to such a right of residence. In that regard, short periods of residence such as weekends or holidays spent in a Member State other than that of which the citizen in question is a national, even when considered together, fall within the scope of Article 6 of Directive 2004/38 and do not satisfy those conditions.

60 So far as concerns Mr O., who, according to the order for reference, holds a residence card as a family member of a Union citizen pursuant to Article 10 of Directive 2004/38, it should be borne in mind that Union law does not require the authorities of the Member State of which the Union citizen in question is a national to grant a derived right

of residence to a third-country national who is a member of that citizen's family because of the mere fact that, in the host Member State, that third-country national held a valid residence permit (see *Eind*, paragraph 26). A residence card issued on the basis of Article 10 of Directive 2004/38 has a declaratory, as opposed to a constitutive, character (see Case C-325/09 *Dias* [2011] ECR I-6387, paragraph 49).

61 In the light of all the foregoing considerations, the answer to the first, second and third questions is that Article 21(1) TFEU must be interpreted as meaning that where a Union citizen has created or strengthened a family life with a third-country national during genuine residence, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of Directive 2004/38, in a Member State other than that of which he is a national, the provisions of that directive apply by analogy where that Union citizen returns, with the family member in question, to his Member State of origin. Therefore, the conditions for granting a derived right of residence to a third-country national who is a family member of that Union citizen, in the latter's Member State of origin, should not, in principle, be more strict than those provided for by that directive for the grant of a derived right of residence to a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national.

The fourth question

62 As is apparent from paragraphs 21 to 23 above, Mr B. acquired the status of family member, within the meaning of Article 2(2) of Directive 2004/38, of a Union citizen after sponsor B's residence in the host Member State.

63 A third-country national, who has not had, at least during part of his residence in the host Member State, the status of family member, within the meaning of Article 2(2) of Directive 2004/38, is not entitled to a derived right of residence in that Member State pursuant to Article 7(2) or Article 16(2) of Directive 2004/38. Accordingly, that third-country national is also unable to rely on Article 21(1) TFEU for the grant of a derived right of residence on the return of the Union citizen in question to the Member State of which he is a national.

64 There is therefore no need to answer the fourth question.

Costs

65 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 21(1) TFEU must be interpreted as meaning that where a Union citizen has created or strengthened a family life with a third-country national during genuine residence, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, in a Member State other than that of which he is a national, the provisions of that directive apply by analogy where that Union citizen returns, with the family member in question, to his Member State of origin. Therefore, the conditions for granting a derived right of residence to a third-country national who is a family member of that Union citizen, in the latter's Member State of origin, should not, in principle, be more strict than those provided for by that directive for the grant of a derived right of residence to a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national.

C-457/12: S. v Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v G.

JUDGMENT OF THE COURT (Grand Chamber)

12 March 2014 (*)

(Articles 20 TFEU, 21(1) TFEU and 45 TFEU – Directive 2004/38/EC – Right to move and reside freely within the territory of the Member States – Beneficiaries – Right of residence of a third-country national who is a family member of a Union citizen in the Member State of which that citizen is a national – Union citizen residing in the Member State of which he is a national – Professional activities – Regular travel to another Member State)

In Case C-457/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Netherlands), made by decision of 5 October 2012, received at the Court on 10 October 2012, in the proceedings

S.

v

Minister voor Immigratie, Integratie en Asiel,

and

Minister voor Immigratie, Integratie en Asiel

v

G.,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts (Rapporteur), Vice-President, R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen, A. Borg Barthet and C.G. Fernlund, Presidents of Chambers, G. Arestis, J. Malenovský, E. Levits, A. Ó Caoimh, D. Šváby, M. Berger, A. Prechal and E. Jarašiūnas, Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 June 2013,

after considering the observations submitted on behalf of:

– Ms S., by G. G. A. J. Adang, acting as Agent,

– Ms G., by E. T. P. Scheers, advocaat,

– the Netherlands Government, by C. S. Schillemans and C. Wissels, acting as Agents,

– the Belgian Government, by T. Materne and C. Pochet, acting as Agents,

– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the Danish Government, by V. Pasternak Jørgensen and C. Thorning, acting as Agents,

– the German Government, by T. Henze, N. Graf Vitzthum and A. Wiedmann, acting as Agents,

– the Estonian Government, by M. Linntam and N. Grünberg, acting as Agents,

– the Polish Government, by K. Pawłowska, acting as Agent,

– the United Kingdom Government, by L. Christie, acting as Agent, and by G. Facenna, Barrister,

– the European Commission, by C. Tufvesson and G. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 December 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 20 TFEU, 21(1) TFEU and 45 TFEU and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda at OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).

2 The request has been made in two sets of proceedings between the Minister voor Immigratie, Integratie en Asiel (Minister for Immigration, Integration and Asylum) ('the Minister'), on the one hand, and, respectively, Ms S. and Ms G., third-country nationals and family members of a European Union citizen of Netherlands nationality, on the other, concerning the Minister's refusal to grant them a certificate of lawful residence as a family member of a Union citizen in the Netherlands.

Legal context

Directive 2004/38

3 Article 2 of Directive 2004/38, which is entitled 'Definitions', provides:

'For the purpose of this Directive:

1. "Union citizen" means any person having the nationality of a Member State;

2. "family member" means:

(a) the spouse;

…

(d) the dependent direct relatives in the ascending line and those of the spouse …;

3. "host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.'

4 Article 3 of that directive, which is entitled 'Beneficiaries', provides in paragraph 1 thereof:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in [Article 2(2)] who accompany or join them.'

5 Article 6 of that directive provides:

'1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months …

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.'

6 Article 7(1) and (2) of Directive 2004/38 provides:

'1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).'

7 Under Article 10(1) of that directive, '[t]he right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called "Residence card of a family member of a Union citizen" no later than six months from the date on which they submit the application. …'

8 Under Article 16(1) and (2) of that directive:

‘1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. …

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.’

Netherlands law

9 The Law on Foreign Nationals (Vreemdelingenwet) of 23 November 2000 (Stb. 2000, No 495) and the Decree on Foreign Nationals of 2000 (Vreemdelingenbesluit 2000, Stb. 2000, No 497) implemented Directive 2004/38 into Netherlands law.

10 Article 1 of the Law on Foreign Nationals provides:

‘Within the meaning of the present Law and of the provisions adopted on the basis thereof:

…

(e) Community nationals shall mean:

1. nationals of the Member States of the European Union who, under the Treaty establishing the European Community, have the right to enter and reside on the territory of another Member State;

2. the family members of those persons referred to in paragraph 1 who are nationals of a third State and who, on the basis of a decision taken in application of the EC Treaty, are entitled to enter and reside on the territory of a Member State;

…’

11 Article 8 of that law provides:

‘Foreign nationals are not lawfully resident in the Netherlands:

…

(e) as Community nationals, except where their residence in the Netherlands is based on a rule adopted under the EC Treaty or the Treaty on the European Economic Area;

…’

12 Under Article 9(1) of that law, the Minister is required to provide the foreign national who is lawfully resident on the territory of the Netherlands on the basis of Union law with a document or written statement evidencing the lawful residence (‘the residence document’).

The disputes in the main proceedings and the questions referred for a preliminary ruling

Ms S.’s situation

13 Ms S. is a Ukranian national. She claims to be entitled, under Union law, to a right of residence with her son-in-law (‘sponsor S’), who is a Netherlands national. Ms S. stated, in the main proceedings, that she takes care of her grandson, the son of sponsor S.

14 Sponsor S resides in the Netherlands and, since 1 June 2002, has worked for an employer established in the Netherlands and spends 30% of his weekly working time on preparing and making business trips to Belgium. Sponsor S therefore travels to Belgium at least once a week.

15 By decision of 26 August 2009, the Staatssecretaris van Justitie (State Secretary of Justice) rejected Ms S.'s application for a residence document.

16 By decision of 16 November 2009, the Minister rejected Ms S.'s objection to that decision as unfounded.

17 By judgment of 25 June 2010, the Rechtbank 's-Gravenhage rejected the action brought by Ms S. against the decision of 16 November 2009 as unfounded.

18 Ms S. lodged an appeal against that judgment before the Raad van State.

Ms G.'s situation

19 Ms G., a Peruvian national, married a Netherlands national ('sponsor G') on 6 March 2009. Ms G. stated, in the main proceedings, that she and sponsor G have a daughter and that she is also the mother of a son who has been received into her and sponsor G's family.

20 Sponsor G lives in the Netherlands and, since 2003, has worked for an undertaking established in Belgium. He travels daily between the Netherlands and Belgium for his work.

21 By decision of 1 December 2009, the Staatssecretaris van Justitie rejected Ms G.'s application for a residence document. By decision of 12 July 2010, the Minister rejected Ms G.'s objection to that decision as unfounded.

22 By judgment of 28 June 2011, the Rechtbank 's-Gravenhage upheld the action brought by Ms G. against the decision of 12 July 2010, annulled that decision and ordered the Minister to adopt a new decision taking into account the considerations set out in that judgment.

23 The Minister lodged an appeal against that judgment before the referring court.

The questions referred for a preliminary ruling

24 As Ms S. and Ms G. are family members of a Union citizen within the meaning of Article 2(2) of Directive 2004/38, the referring court is unsure whether that directive grants them a right of residence in the Member State of which the citizen is a national.

25 According to the referring court, it is conceivable that the term 'move to' within the meaning of Article 3(1) of Directive 2004/38 means travelling to and from, without moving to, a Member State other than the Member State of which the citizen is a national. Likewise, it is conceivable that the term 'join them' within the meaning of Article 3(1) of that directive could be construed to mean joining the Union citizen in the Member State of which he is a national.

26 However, the referring court states that other provisions of Directive 2004/38, in particular Article 6(1) and Article 7(1)(a) and (2), seem to rule out such an interpretation, in so far as they expressly mention 'another Member State' and 'the host Member State' as the Member State to which the right of residence applies. The judgment in Case C-434/09 *McCarthy* [2011] ECR I-3375 confirms that Articles 6 and 7 of that directive govern the legal situation of a Union citizen in a Member State of which he is not a national.

27 Next, the referring court points out that it is apparent from Case C-370/90 *Singh* [1992] ECR I-4265 and Case C-291/05 *Eind* [2007] ECR I-10719 that when a national of a Member State who has availed himself or herself of the right to freedom of movement returns to his or her State of origin, his or her spouse must enjoy at least the same rights

of entry and residence as would be granted to him or her under Union law if the Union citizen chose to enter and reside in another Member State. However, the referring court expresses doubts as to whether that case-law may be applied to situations such as those at issue in the main proceedings. It states, in that regard, that the third-country nationals in question have not previously resided, on the basis of Union law, with their respective sponsors in a Member State other than the Member State of which those sponsors are nationals.

28 The referring court also refers to the judgment in Case C-60/00 *Carpenter* [2002] ECR I-6279 in which the Court held that Article 56 TFEU, read in the light of the fundamental right to respect for family life, may preclude a refusal, by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory for that provider's spouse, who is a national of a third country. It also points out, however, that unlike the case which gave rise to the judgment in *Carpenter*, there is no question in the main proceedings of Union citizens providing cross-border services from the Member State of which they are nationals, but rather of workers who move to another Member State in the course of their professional activities.

29 Lastly, the referring court, with reference to Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177, and Case C-256/11 *Dereci and Others* [2011] ECR I-11315, asks whether, on the basis of Articles 20 TFEU and 21(1) TFEU, a right of residence could be granted to third-country nationals such as those in question in the main proceedings.

30 In those circumstances the Raad van State decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Can a member, having third-country nationality, of the family of a Union citizen who lives in the Member State of which he is a national but who, in the course of his work for an employer established in that same Member State, travels to and from another Member State derive, in circumstances such as those of the present case [concerning Ms S.], a right of residence from Union law?

(2) Can a member, having third-country nationality, of the family of a Union citizen who lives in the Member State of which he is a national but who works in another Member State for an employer established in that other Member State derive, in circumstances such as those of the present case [concerning Ms G.], a right of residence from Union law?'

Consideration of the questions referred

Preliminary observations

31 The questions asked in the order for reference do not specify any particular provision that requires interpretation in order to enable the referring court to give judgment in the main proceedings. The questions just refer generally to Union law.

32 However, having regard to the information contained in the order for reference, as set out in paragraphs 24 to 29 above, the questions must be understood as asking, in essence, whether Directive 2004/38 and Articles 20 TFEU, 21(1) TFEU and 45 TFEU must be interpreted as precluding a refusal by a Member State to grant a right of residence to a third-country national who is a family member of a Union citizen within the meaning of Article 2(2) of Directive 2004/38 where that citizen is a national of and resides in that Member State but regularly travels to another Member State in the course of his professional activities.

Interpretation of Directive 2004/38

33 In accordance with settled case-law, the rights conferred by Directive 2004/38 on third-country nationals are not autonomous rights of those third-country nationals, but derived rights, acquired through their status as family members,

as defined in Article 2(2) of that directive, of a Union citizen (see *McCarthy*, paragraph 42; *Dereci and Others*, paragraph 55; and Case C-87/12 *Ymeraga and Ymeraga-Tafarshiku* [2013] ECR, paragraph 31).

34 However, as is apparent from paragraphs 37 to 43 of the judgment delivered today in Case C-456/12 *O. and B.* [2014] ECR, Directive 2004/38 grants an autonomous right of residence to a Union citizen and a derived right of residence to his family members only where that citizen exercises his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national. Directive 2004/38 does not therefore confer a derived right of residence on third-country nationals who are family members of a Union citizen in the Member State of which that citizen is a national.

35 It follows from the foregoing that Directive 2004/38 must be interpreted as not precluding the refusal by a Member State, in circumstances such as those in the main proceedings, to grant a derived right of residence to a third-country national who is a family member of a Union citizen residing in the Member State of which he is a national.

Interpretation of Article 45 TFEU

36 Next, the referring court asks whether the third-country national in each of the actions in the main proceedings may invoke a right of residence on the basis of Article 45 TFEU. The referring court cites, for that purpose, the judgment in *Carpenter*.

37 In that regard, it should be borne in mind that, in paragraph 46 of the judgment in *Carpenter*, the Court held that Article 56 TFEU, read in the light of the fundamental right to respect for family life, precludes, in circumstances such as those in the case which gave rise to that judgment, a refusal, by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country.

38 With regard to the situations at issue in the main proceedings, it should be noted that the Union citizen, in the action concerning Ms G., works for a company established in a Member State other than the Member State in which he resides. The Union citizen, in the action concerning Ms S., regularly travels, in the course of his professional activities, to a Member State other than the Member State in which he resides even though the company employing him is established in the Member State in which he resides.

39 Union citizens in comparable situations to sponsor S and sponsor G fall within the scope of Article 45 TFEU. Any Union citizen who, under an employment contract, works in a Member State other than that of their place of residence falls within the scope of Article 45 TFEU (see, to that effect, Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711, paragraph 31; Case C-212/05 *Hartmann* [2007] ECR I-6303, paragraph 17; and Case C-202/11 *Las* [2013] ECR, paragraph 17).

40 Admittedly, the Court's interpretation of Article 56 TFEU in *Carpenter* is transposable to Article 45 TFEU. The effectiveness of the right to freedom of movement of workers may require that a derived right of residence be granted to a third-country national who is a family member of the worker – a Union citizen – in the Member State of which the latter is a national.

41 However, the purpose and justification of such a derived right of residence is based on the fact that a refusal to allow it would be such as to interfere with the exercise of fundamental freedoms guaranteed by the FEU Treaty (see, to that effect, C-40/11 *Iida* [2012] ECR, paragraph 68; *Ymeraga and Ymeraga-Tafarshiku*, paragraph 35; and Case C-86/12 *Alokpa and Others* [2013] ECR, paragraph 22).

42 It is therefore for the referring court to determine whether, in each of the situations at issue in the main proceedings, the grant of a derived right of residence to the third-country national in question who is a family member

of a Union citizen is necessary to guarantee the citizen's effective exercise of the fundamental freedom guaranteed by Article 45 TFEU.

43 In that regard, the fact noted by the referring court that the third-country national in question takes care of the Union citizens' child may, as is apparent from the judgment in *Carpenter*, be a relevant factor to be taken into account by the referring court when examining whether the refusal to grant a right of residence to that third-country national may discourage the Union citizen from effectively exercising his rights under Article 45 TFEU. However, it must be noted that, although in the judgment in *Carpenter* the fact that the child in question was being taken care of by the third-country national who is a family member of a Union citizen was considered to be decisive, that child was, in that case, taken care of by the Union citizen's spouse. The mere fact that it might appear desirable that the child be cared for by the third-country national who is the direct relative in the ascending line of the Union citizen's spouse is not therefore sufficient in itself to constitute such a dissuasive effect.

44 In the light of the foregoing, Article 45 TFEU must be interpreted as conferring on a third-country national who is the family member of a Union citizen a derived right of residence in the Member State of which that citizen is a national, where the citizen resides in that Member State but regularly travels to another Member State as a worker within the meaning of that provision, if the refusal to grant such a right of residence discourages the worker from effectively exercising his rights under Article 45 TFEU, which it is for the referring court to determine.

45 In those circumstances, it is no longer necessary to interpret Articles 20 TFEU and 21(1) TFEU. Those provisions, which set out generally the right of every citizen of the Union to move and reside freely within the territory of the Member States, find specific expression in Article 45 TFEU in relation to freedom of movement for workers (see Case C-233/12 *Gardella* [2013] ECR, paragraph 38 and the case-law cited).

46 In the light of all the foregoing, the answer to the questions referred is as follows:

– Directive 2004/38 must be interpreted as not precluding a refusal by a Member State to grant a right of residence to a third-country national who is a family member of a Union citizen where that citizen is a national of and resides in that Member State but regularly travels to another Member State in the course of his professional activities;

– Article 45 TFEU must be interpreted as conferring on a third-country national who is the family member of a Union citizen a derived right of residence in the Member State of which that citizen is a national, where the citizen resides in that Member State but regularly travels to another Member State as a worker within the meaning of that provision, if the refusal to grant such a right of residence discourages the worker from effectively exercising his rights under Article 45 TFEU, which it is for the referring court to determine.

Costs

47 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC must be interpreted as not precluding a refusal by a Member State to grant a right of residence to a third-country national who is a family

member of a Union citizen where that citizen is a national of and resides in that Member State but regularly travels to another Member State in the course of his professional activities.

Article 45 TFEU must be interpreted as conferring on a third-country national who is the family member of a Union citizen a derived right of residence in the Member State of which that citizen is a national, where the citizen resides in that Member State but regularly travels to another Member State as a worker within the meaning of that provision, if the refusal to grant such a right of residence discourages the worker from effectively exercising his rights under Article 45 TFEU, which it is for the referring court to determine.

JUDGMENT OF THE COURT
of 27 June 2014
in Case E-26/13
The Icelandic State v Atli Gunnarsson

(Free movement of persons — Article 28 EEA — *Directive 2004*/38/EC — *Directive 90*/365/EEC — Right of residence — Right to move from the home State — Less favourable tax treatment)
(2015/C 68/03)

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice from the Supreme Court of Iceland (Hæstiréttur Íslands), in the case between

The Icelandic State

and

Atli Gunnarsson

concerning the interpretation of Article 28 of the EEA Agreement and Article 7 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States,

THE COURT,
composed of: Carl Baudenbacher, President, Per Christiansen (Judge-Rapporteur), and Páll Hreinsson, Judges,
Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:
- the Attorney, Office of the Attorney General (Civil Affairs), acting as Agent;
- Atli Gunnarsson, represented by Stefán Geir Þórisson, Supreme Court Attorney;
- the EFTA Surveillance A ("ESA"), represented by Xavier Lewis, Director, and Gjermund Mathisen and Maria Moustakali, Officers, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission ("the Commission") R Lyal and Wim Roels, Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Icelandic State, represented by Óskar Thorarensen; Atli Gunnarsson, represented by Stefán Geir Þórisson and Sigrún Ingibjörg Gísladóttir; the Icelandic Government, represented by Matthías Geir Pálsson; the Norwegian Government, represented by Pål Wennerås; ESA, represented by Gjermund Mathisen; and the Commission, represented by Richard Lyal, at the hearing on 10 April 2014,

gives the following

Judgment

I Legal background

European law

1 Article 28 EEA reads:

1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
(a) to accept offers of employment actually made;
(b) to move freely within the territory of EC Member States and EFTA States for this purpose;
(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.
...

2 Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational v ("D v 90/365") (OJ 1990 L 180 . 28) w f 7 of Annex VIII to the EEA Agreement.

3 Recitals 1, 2, 3 and 8 of the preamble to Directive 90/365 read:

Whereas Article 3 (c) of the Treaty provides that the activities of the Community shall include, as provided in the Treaty, the abolition, as between Member States, of obstacles to freedom of movement for persons;
Whereas Article 8a of the Treaty provides that the internal market must be established by 31 December 1992; whereas the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty;
Whereas Articles 48 and 52 of the Treaty provide for freedom of movement for workers and self-employed persons, which entails the right of residence in the Member States in which they pursue their occupational activity; whereas it is desirable that this right of residence also be granted to persons who have ceased their occupational activity even if they have not exercised their right to freedom of movement during their working life;
...
Whereas the Treaty does not provide, for the action concerned, powers other than those of Article 235.

4 Article 1 of Directive 90/365 reads:

1. Member States shall grant the right of residence to nationals of Member States who have pursued an activity as an employee or self-employed person and to members of their families as defined in paragraph 2, provided that they are recipients of an invalidity or early retirement pension, or old age benefits, or of a pension in respect of an industrial accident or disease of an amount sufficient to avoid becoming a burden on the social security system of the host Member State during their period of residence and provided they are covered by sickness insurance in respect of all risks in the host Member State.
The resources of the applicant shall be deemed sufficient where they are higher than the level of resources below which the host Member State may grant social assistance to its nationals, taking into account the personal circumstances of persons admitted pursuant to paragraph 2.
Where the second subparagraph cannot be applied in a Member State, the resources of the applicant shall be deemed sufficient if they are higher than the level of the minimum social security pension paid by the host Member State.
2. The following shall, irrespective of their nationality, have the right to install themselves in another Member State with the holder of the right of residence:
(a) his or her spouse and their descendants who are dependants;
...

5 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC 93/96/EE ("D v 2004/38") (OJ 2004 L 158 . 77) was incorporated into Annex V to the EEA Agreement at point 1 and Annex VIII at point 3 by D f EEA J N 158/2007 f 7 D 2007 ("Joint Committee D ") (OJ 2008 L 124 . 20 EEA N 26 8.5.2008, p. 17).

6 All three EEA/EFTA States indicated constitutional requirements for the purposes of Article 103 EEA. As the last of the three, Norway gave notification on 9 January 2009 that the constitutional requirements had been fulfilled. Consequently, the Joint Committee Decision entered into force on 1 March 2009.

7 Recital 8 of the preamble to the Joint Committee Decision reads:

The concept of 'Union Citizenship' is not included in the Agreement.

8 Article 1 of the Joint Committee Decision reads:

Annex VIII to the Agreement shall be amended as follows:
(1) ...
The provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations:
...
(c) The words 'Union citizen(s)' shall be replaced by the words 'national(s) of EC Member States and EFTA States'.
...

9 The Joint Declaration by the Contracting Parties to the Joint Committee Decision reads:

The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq. EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals.
…

10 Recital 3 of the preamble to Directive 2004/38 reads:

Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

11 Article 3 of Directive 2004/38, as adapted for the purposes of the EEA Agreement, reads:

Beneficiaries
1. This Directive shall apply to all nationals of EC Member States and EFTA States who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.
...

12 Article 4 of Directive 2004/38, as adapted for the purposes of the EEA Agreement, reads:

Right of exit

1. Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.
2. No exit visa or equivalent formality may be imposed on the persons to whom paragraph 1 applies.
3. Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality.
4. The passport shall be valid at least for all Member States and for countries through which the holder must pass when travelling between Member States. Where the law of a Member State does not provide for identity cards to be issued, the period of validity of any passport on being issued or renewed shall be not less than five years.

13 Article 7 of Directive 2004/38, as adapted for the purposes of the EEA Agreement, reads:

Right of residence for more than three months
1. All nationals of EC Member States and EFTA States shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
(a) are workers or self-employed persons in the host Member State; or
(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State;
…

14 Article 21 on the Treaty on the Functioning of the European Union ("TFEU") reads:

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.
2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.
3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament

National law

15 Article 1 of Act No 90/2003 ("the Income Tax Act") domiciled in Iceland, or who spend more than 183 days there during each twelve-month period, are obliged to pay tax to Iceland on all their income, irrespective of where it is earned.

16 Articles 61 and 66 of the Income Tax Act contain provisions on the calculation of income tax for these taxpayers. After income tax has been calculated, a personal tax credit specified in the first paragraph of part A of Article 67 of the Income Tax Act is deducted. If a taxpayer in this category is married and the spouse cannot utilise the tax credit in full, the part of the tax credit that the spouse does not utilse is added to the taxpayer's tax credit. This follows from the second paragraph of part A of Article 67 of the Income Tax Act.

17 Article 62 of the Income Tax Act permits the transfer of unused credits between spouses.

18 On the other hand, Article 3 of the Income Tax Act contains an exhaustive list of persons who are subject to limited tax liability in Iceland. This category includes everyone who spends 183 days or less in Iceland each year and who either receives wages or other payments in Iceland, including an old-age pension, other pension benefits or comparable payments. Income tax is payable on such income in Iceland.

19 Article 70 of the Income Tax Act contains a special rule that applies to old-age pensioners and recipients of other pension benefits who are subject to limited tax liability in Iceland under Article 3 of the Act. For such taxpayers, a personal tax credit may not be transferred between spouses unless they are both old-age pensioners or recipients of other pension benefits from Iceland.

20 Act No 165/2010 added Article 70a to the Income Tax Act, entitling individuals resident in other EEA States, and who are subject to limited tax liability in Iceland, to the same rights as individuals who are resident in Iceland and subject to full tax liability there. This includes the unconditional transfer of tax credits between spouses, unless they receive less than 90% of their total annual income from Iceland.

II Facts and procedure before the national court

21 Mr Gunnarsson and his wife are both Icelandic citizens who were resident in Denmark from 24 January 2004 to 3 September 2009. During that period, the couple's total income consisted of unemployment benefit that Mr Gunnarsson's wife received in Iceland until 1 May 2004 and of Mr Gunnarsson's own disability pension from the Icelandic Social Insurance Administration, together with benefit payments he received from two Icelandic pension funds.

22 Mr Gunnarsson paid tax on his income in Iceland. He claims that he was overcharged in the period from 1 May 2004 to 1 October 2009 because he was prevented from utilising his wife's personal tax credit while they resided in Denmark. Under the Icelandic tax legislation applicable at the time, the couple had to reside in Iceland for Mr Gunnarsson to be entitled to utilise his wife's personal tax credit in addition to his own.

23 On 22 December 2006, Mr Gunnarsson and his wife applied to the Icelandic Directorate of Internal Revenue asking that they be allowed to utilise his wife's tax credit in respect of his income in Iceland. On 9 January 2007, the Directorate turned down the request. It was denied on the grounds that such transfer was only possible between taxpayers with unlimited tax liability in Iceland (essentially resident taxpayers) or where both spouses were in receipt of an Icelandic pension. As Mr Gunnarsson and his wife were neither resident in Iceland nor both in receipt of a pension pursuant to Icelandic law during the relevant period, the Directorate concluded that the conditions authorising the transfer of unused personal tax credits between spouses were not fulfilled.

24 In a letter dated 8 February 2008, Mr Gunnarsson complained to ESA. On 7 July 2010, ESA issued a letter of formal notice to Iceland, stating that Iceland had failed to fulfil its obligations under Article 28 EEA and Article 7 of the Directive by refusing to allow pensioners who were resident in another EEA State to utilise ' ax credit, as they would have been able to do if they had been resident in Iceland.

25 The Income Tax Act was amended on 28 December 2010 to allow spouses who receive at least 90% of their total annual joint income in Iceland to request the transfer tax credits between spouses. Had this provision been in force at the time in question, Mr Gunnarsson would, under such conditions, have been able to make use of his wife's unused tax credits.

26 On 22 July 2010, Mr Gunnarsson demanded repayment of the income tax he had paid on his income during the relevant period that would not have been payable had he been able to use his wife's tax credits. In support of the claim, Mr Gunnarsson referred to ESA's letter of formal notice. On 10 August 2010, the Directorate of Internal Revenue refused to adopt a position on the claim. It considered that the time had not yet come to do so, because the formal notice did not constitute a final conclusion on the matter.

27 On 9 November 2010, Mr Gunnarsson brought the present action before the District Court. He claims annulment of the decision of the Directorate of Internal Revenue, and repayment of the alleged excess taxes paid. In the alternative, he claims gdamages for the Icelandic State's failure to fulfil its obligations under the EEA Agreement. The District Court upheld Mr Gunnarsson's claim for annulment and the repayment of taxes, except for the part of his claim that related to taxes due prior to 9 November 2006, which had lapsed because of expiry of the period of

prescription. The District Court held that the decision by the Directorate of Internal Revenue was incompatible with the obligations imposed by the EEA Agreement.

28 Both Mr Gunnarsson and the Icelandic State appealed to the Supreme Court of Iceland. In the view of the Supreme Court, there was doubt about whether Mr Gunnarsson's position should be assessed pursuant to Article 28 EEA and/or Article 7 of the Directive, individually or together, or to other EEA rules. Accordingly, the Supreme Court decided to seek an Advisory Opinion from the Court.

29 The Supreme Court referred the following questions to the Court:

1. Is it compatible with Article 28 of the Agreement on the European Economic Area and/or Article 7 of Directive 2004/38/EC that a State (A), which is party to the Agreement, does not give spouses the option of pooling their personal tax credits in connection with the assessment of income tax in circumstances in which both spouses move from State (A) and live in another State (B) in the European Economic Area and one of them receives a pension from State (A) while the other has no income, if the tax position of the couple would be different if both lived in State (A), including the fact that they would be entitled to pool their personal tax credits?
2. When Question 1 is answered, is it of significance that the Agreement on the European Economic Area does not contain any provision corresponding to Article 21 of the Treaty on the Functioning of the European Union?

30 As mentioned, Directive 2004/38 was incorporated into the EEA Agreement subject to the fulfilment of constitutional requirements by all three EEA/EFTA States, cf. Article 103(1) EEA. Upon the expiry of the six-month period provided for in Article 103(2) EEA, that is 7 June 2008, Liechtenstein notified such fulfilment, whereas Iceland and Norway did not submit such notification until 29 August 2008 and 9 January 2009, respectively. However, through the written observations submitted to the Court, it became clear that on 2 June 2008 Norway had notified that provisional application could not take place pursuant to Article 103(2) EEA, whereas it appeared as if Iceland had not submitted such notification.

31 Against this background, in a letter of 11 March 2014, the Court asked the parties to the main proceedings, the EEA States, ESA and the Commission a series of questions. The first two questions concern Article 103 EEA:

1. Does a notification from one EFTA/EEA State pursuant to Article 103(2) EEA that provisional application cannot take place, take effect for that State only, or does it take effect for all three EFTA/EEA States?
2. What obligations, if any, fall on an EFTA/EEA State when a decision of the EEA Joint Committee is to be applied provisionally?

32 The remaining questions posed are as follows:

3. Were the disability benefits received by Mr Gunnarsson from Icelandic pension funds dependent on the prior existence of an employment relationship which has come to an end? In that case, how do these circumstances affect the applicability of Article 28 EEA for the purposes of the case pending before the national court?

4. Was Mr Gunnarsson's wife actively seeking employment in Denmark when she and Mr Gunnarsson originally moved there? If so, what effect does that have on her status under Article 28 EEA?

33 Subsequently, the Court became aware that, contrary to its earlier assumption, on 3 June 2008, Iceland had also given notification pursuant to Article 103(2) EEA that provisional application could not take place. Therefore, the questions raised in the Court's letter of 11 March 2014 concerning Article 103 EEA became redundant in the context of the present case.

34 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III The questions

Observations submitted to the Court

35 The Icelandic State submits that there is nothing to suggest that, at the time they moved to Denmark, Mr Gunnarsson or his wife had the status of a worker for the purposes of Article 28 EEA. Persons who have carried out all their occupational activity in the EEA State of which they are nationals and who have only exercised the right to reside in another EEA State after their retirement, without any intention of working in that other State, cannot rely on the free movement of workers. As for Mr Gunarsson's wife, she never intended to seek work in Denmark when they moved there.

36 Article 7(1)(b) of Directive 2004/38 does not impose obligations on the home State. Under the case law of the Court of Justice of the European Union ("ECJ"), the obligation on the EU Member States to remove obstacles to the right of free movement and residence by their own nationals as Union citizens is based on Article 21(1) TFEU. Article 21(1) TFEU and the concept of Union Citizenship are not included in the EEA Agreement, however. The EEA Agreement cannot be interpreted in conformity with the case law of the ECJ concerning EU Citizenship.

37 In the alternative, the Icelandic State submits that, if Article 7 of the Directive precludes the provisions of the Tax Act at issue in the case, those obligations could not be binding before the Directive entered into force in the EEA on 1 March 2009.

38 Moreover, according to the Icelandic State, any inequality of treatment deemed to flow from such an interpretation may be justified on the grounds of fiscal cohesion and the effectiveness of fiscal supervision in Iceland.

39 Mr Gunnarsson submits that it is clear from the case law of the ECJ that any EU national who has exercised the right to free movement of workers and has been employed in another EEA State falls within the scope of Article 45 TFEU, which corresponds to Article 28 EEA, irrespective of his residence or nationality. A worker residing in another EEA State can invoke the rights inherent in that provision against the EEA State of which he is a national.

40 A person who has lost the status of worker in the strictest sense may still enjoy the protection of the Article 45 TFEU concerning the free movement of workers, which in substance corresponds to Article 28 EEA.

41 Mr Gunnarsson contends that a pensioner like himself, who has Icelandic nationality but who resides in Denmark with his wife, must not be precluded from receiving tax credits when pensioners in the same or a similar situation residing in Iceland receive such tax credits.

42 Mr Gunnarsson submits that his wife was actively seeking employment in Denmark throughout their stay, but without success. They both attended a language school to study Danish in order to increase the job opportunities. It is long established that job seekers enjoy the status of workers under Article 28 EEA.

43 In Mr Gunnarsson' view, the entry into force of Directive 2004/38 in the EEA has in no way affected his legal status. Article 28 EEA provides for all the necessary legal protection in his case. Initially, the free movement of persons established by the EEA Agreement only applied to persons moving to another EEA State in order to pursue economic activity. Directive 90/365 extended the right of residence to persons who had ceased being economically active. Directive 90/365 was part of the EEA Agreement until repealed by Directive 2004/38.

44 The Norwegian Government submits that, since Mr Gunnarsson never exercised his rights of free movement as a worker in another Member State, the application of Article 7(1)(a) of Directive 2004/38 and of Article 28 EEA is excluded.

45 As for Mr Gunnarsson's wife, the assertion – which has not been pleaded before the national court – that she was a genuine jobseeker in Denmark has not been supported by any element put before the Court. In any event, when new assertions based on more or less loose factual claims are presented to the Court, thereby raising new questions of law, this is liable to undermine effective cooperation between national courts and the Court. It could lead to a circumvention of the system pursuant to which it is for the national court to pose questions to the Court in light of the facts of the case established in the national proceedings.

46 It follows from a literal, contextual and teleological interpretation that Article 7 of Directive 2004/38 does not impose obligations on the home Member State, which is Iceland in this case. The wording refers to "residence in another Member State". As regards the context, it is clear that Chapter II of Directive 2004/38 regulates the right of exit and entry, whereas Chapter III, of which Article 7 forms part, does not contain any provision directed at the home State.

47 This conclusion is further supported by the fact that the ECJ has not applied that provision in analogous cases, but has instead assessed those cases on the basis of Article 21(1) TFEU. If a case falls within the scope of a directive, it must first be assessed with regard to the directive, read in light of the relevant provision of the main part of the EEA Agreement and, thereafter, if appropriate, with regard to the latter provision itself. This means by implication that the ECJ considered that Directive 2004/38 was not applicable.

48 In the alternative, the Norwegian Government argues that, if Article 7 of Directive 2004/38 entails rights in relation to the home State, it clearly follows from the Incorporation Decision of the EEA Joint Committee that only economically active persons are included. Directive 2004/38 also promotes free movement in the context of Union citizens regardless of economic activity. However, the legal basis for this is Article 21(1) TFEU, which has no equivalent in the EEA Agreement. Furthermore, the procedure in Article 102 EEA effectively prevents the possibility of fully incorporating Directive 2004/38 since Union Citizenship falls outside the material scope of the Annexes to the EEA Agreement.

49 At the oral hearing, the Norwegian Government argued that this is the case despite the fact that a similar provision as that in Article 7(1)(b) of Directive 2004/38 was included in the EEA Agreement from the outset. The reason is that Article 7(1)(b) of Directive 2004/38 is based on the fundamental right conferred directly by virtue of Article 21(1) TFEU.

50 Therefore, if Article 7 of Directive 2004/38 can be invoked against the home State, Mr Gunnarsson could in principle rely on Article 7(1)(a) if he were an economically active person. However, Mr Gunnarsson cannot, as an economically inactive person, avail himself of Article 7(1)(b), since this provision is based on Union Citizenship.

51 ESA submits that persons who have carried out all their occupational activity in the EEA State of which they are nationals and who have gone on to reside in another EEA State only after their retirement, without any intention of working in that State, cannot rely on the freedom of movement guaranteed by Article 28 EEA. Mr Gunnarsson does not seem to have previously made any use of his right to free movement of workers. At least, he received no form of pension from any other EEA State, which would be indicative of his previously having moved within the EEA as a worker. It is therefore of no consequence whether the benefit payments Mr Gunnarsson received from two Icelandic pension funds were dependent on the prior existence of an employment relationship that has come to an end.

52 If Mr Gunnarsson's wife was a job seeker in Denmark, it can be asked whether she may invoke Article 28 EEA not only for herself, but also for her husband. There is no clear case law on this question. Any right would, in any event, be limited in time to the period of her job search.

53 Turning to Directive 2004/38, ESA submits that, assuming that Mr Gunnarsson and his wife had sufficient resou D ' social assistance system during their period of residence, and assuming that they had comprehensive sickness insurance cover in Denmark, the couple would enjoy rights under Article 7 of Directive 2004/38. However, those rights cannot be invoked against the home State.

54 Article 7 – indeed the whole of Chapter III of Directive 2004/38 – is drafted with the host State in mind. In contrast, Article 4, for example, is drafted so as to apply in relation to Member States in general, including the home State. Interpreting Article 7 of Directive 2004/38 such that it could also be invoked against the home State would indeed be an extensive interpretation.

55 Importantly, there are indications in case law that the ECJ has not envisaged such an extensive interpretation of Directive 2004/38. Similar cases that are analogous to the present case in the sense that they concern complaints against the home State from non-economically active persons resident in a host Member State seem to fall directly under Article 21(1) TFEU, not under the Directive.

56 Accordingly, ESA submits that the application of the more specific provision of Article 7 must be excluded in the present case. If this provision of secondary law were applicable, the ECJ would have had to apply it in cases analogous to the present case. The fact that the ECJ instead applied Article 21(1) TFEU directly means, by implication, that a case such as the present one falls outside the scope of Article 7.

57 Turning to the second question, ESA observes that there is no provision corresponding to Article 21 TFEU on Union Citizenship in the EEA Agreement. There is no basis for reading into Article 7 of the Directive obligations that, in the EU, flow only from Article 21 TFEU. On the contrary, homogeneity must be ensured. Homogeneity requires that the interpretation of Article 7 of the Directive be the same as in the EU.

58 According to ESA, the present case is analogous to Case E-15/12 *Wahl* [2013] EFTA Ct. Rep. 534, where the Court found that the exclusion of the concept of Union Citizenship could have no material impact on the interpretation of the provisions of Directive 2004/38 at issue in that case. This means that neither a narrower nor a more extensive interpretation of Article 7 of Directive 2004/38 can follow from the non-inclusion of the concept of Union Citizenship in the EEA Agreement.

59 For the sake of completeness, ESA adds that nor can the principle of homogeneity be overridden by considerations of reciprocity. There is no basis in the EEA Agreement for concluding that, as EEA law, Article 7 of the Directive gives rise to different sets of obligations for the EU States and the EFTA States. This would also raise an issue of legal certainty.

60 The Commission submits that insofar as Mr Gunnarsson is entitled to exercise a right of free movement or residence under EEA law, he must be allowed the benefit of his wife's unused tax credits in the same way as a resident of Iceland. There appears to be no dispute between the parties on that point.

61 Article 28 EEA creates a right of free movement for workers. The benefit of that provision and the corresponding provision of the TFEU have been extended to economically inactive persons only in very limited circumstances. Persons who have not exercised freedom of movement during their working life and who move to another State only after they stop working, without any intention of working in the latter State, may not rely on the freedom of movement granted by Article 28 EEA. Accordingly, Mr Gunnarsson is not able to rely on Article 28 EEA in order to demonstrate a right of free movement.

62 If Mr Gunnarsson' w f moved to Denmark to look for work, she should be regarded, at least in some respects, as a worker for the purposes of Article 28 EEA. Moreover, the rights enjoyed by a worker under this provision may have consequences for family members. More specifically, the equal treatment requirement under Article 28 EEA means that one spouse cannot be placed at a tax disadvantage in the State of origin by reason of the fact that the other spouse moves to another EEA country in search of work, at least where that tax disadvantage relates to the joint taxation of the spouses. However, there must come a point where it is no longer plausible to regard someone as a job seeker. It follows from case law that someone may be regarded as a job seeker for more than six months. It would seem difficult to maintain that someone retained the status of job seeker for a period of almost six years.

63 At the hearing, the Commission noted that the ECJ has found that the joint taxation of spouses, or the consequences for one spouse of the tax position of the other, is a matter that falls within the scope of the rules on free movement. A relatively extreme example of this is C-403/03 *Schempp* [2005] I-6421 paragraphs 21 to 25: in principle, an ex-husband was held to be entitled to rely on the free movement rights of his ex-wife regarding the taxation in his hands of the maintenance payments he was obliged to pay to her. The Commission also referred to Case C-303/12 *Imfeld and Garcet*, judgment of 12 December 2013, concerning the joint tax treatment of spouses and the tax consequences for the spouse who did not move. In the Commission's view, there is no reason to suppose that the outcome of that case would have been any different if Mr Imfeld had not been a party to the case along with his wife.

64 Article 7 of Directive 2004/38 applies without distinction to workers, persons who establish themselves in another State in order to pursue an economic activity and persons who have no economic activity. The result of the incorporation of Directive 2004/38 is that economically inactive persons have quite extensive rights of movement and residence. That is quite independent of the notion of "citizenship". The question in the present case is whether those rights can be asserted against the State of origin. Mr Gunnarsson therefore had a right of free movement and residence on the basis of that provision from the moment at which it came into force, namely 8 June 2008.

65 The Commission acknowledges that it can be objected that Article 7 may be interpreted as only creating obligations for the host State, that is to say, the EEA State in which the person concerned wishes to take up residence. However, if regard were had merely to the wording, the same could be said of Article 28 itself, of Article 31 EEA or of Article 27 TFEU. As the ECJ held in relation to the freedom of establishment, those provisions also prohibit the home Member State from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation. The ECJ took the same approach in relation to what is now Article 45 TFEU, as well as to what is now Article 21 TFEU.

66 Similarly, the rights of free movement and residence envisaged by Article 7 of Directive 2004/38 would be set at nought if the home State could obstruct persons wishing to avail themselves of those rights. It can be observed, moreover, that Article 4 of the Directive expressly provides for a right to leave the territory of the home State.

67 The Commission therefore concludes that Mr Gunnarsson is entitled to rely on Article 7 of Directive 2004/38 in order to claim equal treatment with residents of Iceland in relation to the pooling of personal tax credits with his spouse.

68 Concerning the second question, the Commission does not consider that the absence of a provision equivalent to Article 21 TFEU in the EEA Agreement is relevant to the outcome of the present case. Directive 2004/38 has been incorporated in Annexes V and VIII of the EEA Agreement by Decision No 158/2007 of the EEA Joint Committee, including the provisions that apply to economically inactive persons like Mr Gunnarsson. In recital 8 of its preamble, the Joint Committee Decision notes that the concept of Union Citizenship is not included in the EEA Agreement. Moreover, the Joint Declaration of the Contracting Parties states that the EEA Agreement does not provide a legal basis for political rights of EEA nationals. This qualification does not affect the application of Article 7(1)(b) as regards persons who do not pursue an economic activity.

69 At the hearing, the Commission asserted that the ECJ does not generally look at secondary law when the right being asserted flows from primary law. The ECJ has not been called upon to determine the precise content of Article 7 of the Directive because that is not necessary in the Union legal order. Only in the EEA context is that provision an independent source of rights, and that is why it is necessary to determine what precise rights it confers.

70 The Commission therefore concludes that, notwithstanding the absence of a provision in the EEA Agreement equivalent to Article 21 TFEU, Mr Gunnarsson is entitled to rely on Article 7 of the Directive.

Findings of the Court

71 By its questions, the Supreme Court of Iceland wishes to know, first, whether it is compatible with Article 28 EEA and/or Article 7 of Directive 2004/38 if an EEA State does not give spouses who have moved to another EEA State the option of pooling their personal tax credits in connection with the assessment of income tax, whereas they would be entitled to do so if they lived in the home State, in a situation where one of them receives a pension from the home State, while the other has no income; and, second, whether the absence in the EEA Agreement of a provision corresponding to Article 21(1) TFEU is of any significance in this regard. The Court finds it appropriate to consider the questions jointly.

72 According to the observations received from Mr Gunnarsson on the third of the ' q in its letter of 11 March 2014, the pension received by him is linked to a relationship of employment. When answering the questions referred by the Supreme Court, the Court therefore presupposes that, when one of the spouses is in receipt of a pension from the home State, that pension is dependent on the prior existence of a relationship of employment.

73 The incorporation of Directive 2004/38 into the EEA Agreement became effective on 1 March 2009. At the same time, Directive 90/365 was repealed with respect to the EEA/EFTA States. As the period relevant to the case before the national court is 24 January 2004 to 3 September 2009, the Court finds that the questions must therefore also be assessed in the light of Directive 90/365.

74 Article 28 EEA gives workers the right to move and reside freely within all EEA States. However, persons who have carried out all their occupational activity in the EEA State of which they are nationals and who have not exercised the right to reside in another Member State before their retirement cannot rely on the freedom guaranteed by Article 28 EEA (see, for comparison, Case C-520/04 *Turpeinen* [2006] ECR I-10685, paragraph 16).

75 As is clear in particular from recital 3 of its preamble, Directive 90/365 extends the right to reside in another EEA State to persons who have ceased their occupational activity, including those who have not carried on any economic activity in another EEA State during their working life. Directive 90/365, as well as Directives 90/366/EEC, which gave a right of residence to students, and Directive 90/364/EEC, which conferred that right on other economically inactive persons, were referred to in Annex VIII to the EEA Agreement on freedom of establishment. Therefore, those directives conferred rights on economically inactive individuals from when the EEA Agreement entered into force in 1994.

76 Pursuant to Article 1(1) of Directive 90/365, residence shall be granted to a formerly economically active person provided that he receives a pension or benefits of an amount sufficient for him not to become a burden on the social security system of the host State. It follows from Article 1(2) of that Directive that the spouse of such a person has a derived right of residence.

77 According to its wording, Article 1 of Directive 90/365 is intended in particular to create a right of residence in an EEA State other than the home State of the person concerned. However, taking up residence in another State presupposes a move from the EEA State of origin. Therefore, Article 1 of Directive 90/365 must be understood such that it also prohibits the home State from hindering the person concerned from moving to another EEA State (see, by analogy, as regards Article 31 EEA and the right of establishment, Case E-15/11 *Arcade Drilling* [2012] EFTA Ct. Rep. 676, paragraph 59, and case law cited). Were it otherwise, the objective of the Directive to further the free movement of employees and self-employed persons who have ceased their occupational activity could be undermined and the right to reside in another EEA State be rendered ineffective.

78 The substance of Article 1 of Directive 90/365 has been maintained in Article 7(1)(b) of Directive 2004/38. The Court finds that there is nothing to suggest that the latter provision must be interpreted more narrowly than the former with regard to a right to move within the EEA from the home State. On the contrary, recital 3 of the preamble to Directive 2004/38 states that it aims in particular to strengthen the right of free movement and residence. The fact that Article 7 is placed in Chapter III of Directive 2004/38 entitled 'Right of residence', and not in Chapter II on 'Right of exit and entry', cannot be decisive. The provisions of Chapter II concern mere formalities regarding border controls.

79 Moreover, it is of no consequence that the rights of economically inactive persons in Directive 2004/38 were adopted by the Union legislature on the basis of Article 21 TFEU on Union Citizenship. That concept was introduced in the EU pillar through the Maastricht Treaty, which entered into force on 1 November 1993. However, the rights of economically inactive persons in Directive 90/365, and also Directives 90/366/EEC (students) and 90/364/EEC (other economically inactive persons), were adopted on the basis of Article 235 EEC prior to the introduction of the concept of Union citizenship. This provision conferred on the EU legislature a general power to take the appropriate measures necessary for the operation of the common market where no specific legal basis existed in the Treaty. When Directive 90/365 as well as Directives 90/364/EEC and 90/366/EEC were made part of the EEA Agreement in 1994, these directives conferred rights on economically inactive persons.

80 According to the Joint Committee Decision and the accompanying Joint Declaration by the Contracting Parties, the concept of Union Citizenship has no equivalence in the EEA Agreement, and the EEA Agreement does not provide a legal basis for political rights of EEA nationals. Therefore, the incorporation of Directive 2004/38 cannot introduce rights into the EEA Agreement based on the concept of Union Citizenship. However, individuals cannot be deprived of rights that they have already acquired under the EEA Agreement before the introduction of Union Citizenship in the EU. These established rights have been maintained in Directive 2004/38.

81 Nor can it be decisive that, in the EU pillar, the ECJ has based the right of an economically inactive person to move from his home State directly on the Treaty provision on Union Citizenship, now Article 21 TFEU, instead of on Article 1 of Directive 90/365 or Article 7 of Directive 2004/38. As the ECJ was called upon to rule on the matter only after a right to move and reside freely was expressly introduced in primary law, there was no need to interpret secondary law in that regard (compare, in particular, *Turpeinen*, cited above, paragraph 40).

82 The Court therefore concludes that Article 1(1) of Directive 90/365 and Article 7(1)(b) of Directive 2004/38 must be interpreted such that they confer on a pensioner who receives a pension due to a former employment relationship, but who has not carried out any economic activity in another EEA State during his working life, not only a right of residence in relation to the host EEA State, but also a right to move freely from the home EEA State. The latter right prohibits the home State from hindering such a person from moving to another EEA State. A less favourable treatment of persons exercising the right to move than those who remain resident amounts to such a hindrance. Furthermore, a spouse of such a pensioner has similar derived rights, cf. Article 1(2) of Directive 90/365 and Article 7(1)(d) of Directive 2004/38, respectively.

83 The Court notes that the provisions of Directive 90/365 and Directive 2004/38 form part of the EEA Agreement, and must, as far as possible, be given an interpretation that renders them consistent with the provisions of the EEA Agreement and general principles of EEA law.

84 The prohibition on discrimination in EEA law requires that comparable situations must not be treated differently and that different situations must not be treated in the same manner.

85 The national legislation at issue in the main proceedings concerns tax. It is settled case law that, v g x f w EEA ' competence, the EEA State must nonetheless exercise that competence consistently with EEA law (see, most recently, Case E-14/13 *ESA* v *Iceland* [2013] EFTA Ct. Rep. 924, paragraph 25, and case law cited).

86 In relation to direct taxes, the situations of residents and of non-residents are not, as a rule, comparable (see, for comparison, Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 31).
87 However, a non-resident taxpayer, whether employed or self-employed, who receives all or almost all of his income in the State where he works, is objectively in the same situation as regards income tax as a resident of that State who does the same work there. Both are taxed in that State alone and their taxable income is the same (compare Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 20). That reasoning also applies in a situation where a retirement pension constitutes the taxable income (compare *Turpeinen*, cited above, paragraph 29).

88 Consequently, it must be held that, insofar as the pension paid in the home State constitutes all or almost all of his income, a non-resident retired person such as Mr Gunnarsson is in the same situation as regards income tax as retired persons resident in the home State who receive the same pension.

89 It is undisputed that, in the period relevant to the proceedings before the national court, Icelandic law provided that spouses resident in Iceland, one being a pensioner receiving benefits as a consequence of the prior existence of an employment relationship, and one being without income, may pool personal tax credits in connection with the assessment of income tax, whereas spouses resident in another EEA State were not entitled to such pooling.

90 Such less favourable tax treatment of a pensioner and his wife who have exercised the right to move freely within the EEA is not compatible with Article 1(1) and (2) of Directive 90/365 and Article 7(1)(b) and (d) of Directive 2004/38, where the pension received by the pensioner constitutes all or nearly all of that person's income, unless objectively justified.

91 The Icelandic State has argued that such differential treatment is justified on the grounds of fiscal cohesion and the effectiveness of fiscal supervision in Iceland. However, such grounds are permitted neither under Directive 90/365 nor under Directive 2004/38. Pursuant to subparagraph 3 of Article 2(2) of Directive 90/365, EEA States shall not derogate from the provisions of the treaty save on grounds of public policy, public security or public health. Moreover, it is stated in Article 27(1) of Directive 2004/38 that EEA States may restrict the freedom of movement and residence of EEA citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. Under Article 27(1), these grounds shall not be invoked to serve economic ends.

92 The reply to the questions from the Supreme Court must therefore be that it is not compatible with Article 1 of Directive 90/365/EEC and Article 7(1)(b) and (d) of Directive 2004/38/EC that an EEA State does not give spouses who have moved to another EEA State the option of pooling their personal tax credits in connection with the assessment of income tax, whereas they would be entitled to pool their personal tax credits if they lived in the home State, in a situation where one of them receives a pension from the home State, and that pension constitutes all or nearly all of that income, while the other spouse has no income.

93 In these circumstances, there is no need to rule on the applicability of Article 28 EEA.

IV Costs

94 The costs incurred by the Icelandic, Norwegian and Liechtenstein Governments, ESA and the Commission, which have submitted observations to the Court, and/or replied to the written questions of the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the Supreme Court of Iceland, any decision on costs concerning those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Hæstiréttur Íslands, hereby gives the following
Advisory Opinion:

It is not compatible with Article 1 of Directive 90/365/EEC and Article 7(1)(b) and (d) of Directive 2004/38/EC that an EEA State does not give spouses who have moved to another EEA State the option of pooling their personal tax credits in connection with the assessment of income tax, whereas they would be entitled to pool their personal tax credits if they lived in the home State, in a situation where one of them receives a pension from the home State, and that pension constitutes all or nearly all of that person's income, while the other spouse has no income.

Carl Baudenbacher
Per Christiansen
Páll Hreinsson

Delivered in open court in Luxembourg on 27 June 2014.

Gunnar Selvik Registrar
Carl Baudenbacher President

Case C-333/13: Elisabeta Dano, Florin Dano v Jobcenter Leipzig

JUDGMENT OF THE COURT (Grand Chamber)

11 November 2014 (*)

(Free movement of persons — Citizenship of the Union — Equal treatment — Economically inactive nationals of a Member State residing in the territory of another Member State — Exclusion of those persons from special non-contributory cash benefits under Regulation (EC) No 883/2004 — Directive 2004/38/EC — Right of residence for more than three months — Articles 7(1)(b) and 24 — Condition requiring sufficient resources)

In Case C-333/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sozialgericht Leipzig (Germany), made by decision of 3 June 2013, received at the Court on 19 June 2013, in the proceedings

Elisabeta Dano,

Florin Dano

v

Jobcenter Leipzig,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, L. Bay Larsen, T. von Danwitz, C. Vajda, S. Rodin, Presidents of Chambers, E. Juhász, A. Borg Barthet, J. Malenovský, E. Levits, M. Berger (Rapporteur) and J.L. da Cruz Vilaça, Judges,

Advocate General: M. Wathelet,

Registrar: A. Impellizeri, Administrator,

having regard to the written procedure and further to the hearing on 18 March 2014,

after considering the observations submitted on behalf of:

– Ms Dano, by E. Steffen, Rechtsanwältin,

– the German Government, by T. Henze and J. Möller, acting as Agents,

– the Danish Government, by C. Thorning, acting as Agent,

– Ireland, by M. Heneghan, T. Joyce and E. Creedon, acting as Agents, and C. Toland, Barrister-at-Law,

– the French Government, by D. Colas and C. Candat, acting as Agents,

– the Austrian Government, by G. Hesse, acting as Agent,

– the United Kingdom Government, by S. Behzadi-Spencer, acting as Agent, and J. Coppel QC,

– the European Commission, by F. Schatz, D. Martin, M. Kellerbauer and C. Tufvesson, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 May 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 18 TFEU, of point (a) of the first subparagraph, and the second subparagraph, of Article 20(2) TFEU, of Articles 1, 20 and 51 of the Charter of Fundamental Rights of the European Union ('the Charter'), of Articles 4 and 70 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum at OJ 2004 L 200, p. 1), as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010 (OJ 2010 L 338, p. 35) ('Regulation No 883/2004), and of Article 24(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

2 The request has been made in proceedings brought by Ms Dano and her son Florin against Jobcenter Leipzig concerning the latter's refusal to grant them benefits by way of basic provision ('Grundsicherung') that are envisaged by German legislation, namely, for Ms Dano, subsistence benefit ('existenzsichernde Regelleistung') and, for her son, social allowance ('Sozialgeld'), as well as a contribution to accommodation and heating costs.

Legal context

EU law

Regulation No 1247/92

3 The first to eighth recitals in the preamble to Council Regulation (EEC) No 1247/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ 1992 L 136, p. 1) state as follows:

'… it is necessary to amend Regulation (EEC) No 1408/71 …, as updated by Regulation (EEC) No 2001/83 …, as last amended by Regulation (EEC) No 2195/91 …;

… it is necessary to extend the definition of "member of the family" in Regulation (EEC) No 1408/71 to conform with the case-law of the Court of Justice concerning the interpretation of that expression;

… it is also necessary to take account of the case-law of the Court of Justice stating that certain benefits provided under national laws may fall simultaneously within the categories of both social security and social assistance because of the class of persons to whom such laws apply, their objectives and their manner of application;

… the Court of Justice has stated that, in some of its features, legislation under which such benefits are granted is akin to social assistance in that need is an essential criterion in its implementation and the conditions of entitlement are not based upon the aggregation of periods of employment or contributions, whilst in other features it is close to social

security to the extent that there is an absence of discretion in the manner in which such benefits as are provided thereunder are awarded and in that it confers a legally defined position upon beneficiaries;

… Regulation (EEC) No 1408/71 excludes from its scope, by virtue of Article 4(4) thereof, social assistance schemes;

… the conditions referred to and their methods of application are such that a system of coordination which differs from that currently provided for in Regulation (EEC) No 1408/71 and which takes account of the special characteristics of the benefits concerned should be included in that Regulation in order to protect the interests of migrant workers in accordance with the provisions of Article 51 of the Treaty;

… such benefits should be granted, in respect of persons falling within the scope of Regulation (EEC) No 1408/71, solely in accordance with the legislation of the country of residence of the person concerned or of the members of his or her family, with such aggregation of periods of residence completed in any other Member State as is necessary and without discrimination on grounds of nationality;

… it is necessary nevertheless to ensure that the existing system of coordination in Regulation (EEC) No 1408/71 continues to apply to benefits which either do not fall within the special category of benefits referred to or are not expressly included in an Annex to that Regulation; … a new Annex is needed for this purpose'.

Regulation (EC) No 883/2004

4 Regulation No 883/2004 replaced Regulation No 1408/71 from 1 May 2010.

5 Recitals 1, 16 and 37 in the preamble to Regulation No 883/2004 state:

'(1) The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment.

…

(16) Within the Community there is in principle no justification for making social security rights dependent on the place of residence of the person concerned; nevertheless, in specific cases, in particular as regards special benefits linked to the economic and social context of the person involved, the place of residence could be taken into account.

…

(37) As the Court of Justice has repeatedly stated, provisions which derogate from the principle of the exportability of social security benefits must be interpreted strictly. This means that they can apply only to benefits which satisfy the specified conditions. It follows that Chapter 9 of Title III of this Regulation can apply only to benefits which are both special and non-contributory and listed in Annex X to this Regulation.'

6 Article 1 of Regulation No 883/2004, headed 'Definitions', provides:

'For the purposes of this Regulation:

…

(l) "legislation" means, in respect of each Member State, laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches covered by Article 3(1);

…'

7 Article 2(1) of Regulation No 883/2004, relating to the persons covered by the regulation, provides:

‘This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.’

8 Article 3 of Regulation No 883/2004, headed ‘Matters covered’, states:

‘1. This Regulation shall apply to all legislation concerning the following branches of social security:

…

(b) maternity and equivalent paternity benefits;

…

(h) unemployment benefits;

…

2. Unless otherwise provided for in Annex XI, this Regulation shall apply to general and special social security schemes, whether contributory or non-contributory, and to schemes relating to the obligations of an employer or shipowner.

3. This Regulation shall also apply to the special non-contributory cash benefits covered by Article 70.

…

5. This Regulation shall not apply to:

(a) social and medical assistance …’

9 Article 4 of Regulation No 883/2004, headed ‘Equality of treatment’, provides:

‘Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.’

10 Chapter 9 of Title III of Regulation No 883/2004, relating to ‘Special non-contributory cash benefits’, contains Article 70, which is headed ‘General provision’ and provides:

‘1. This Article shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in Article 3(1) and of social assistance.

2. For the purposes of this Chapter, “special non-contributory cash benefits” means those which:

(a) are intended to provide either:

(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned;

or

(ii) solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned,

and

(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone,

and

(c) are listed in Annex X.

3. Article 7 and the other chapters of this Title shall not apply to the benefits referred to in paragraph 2 of this Article.

4. The benefits referred to in paragraph 2 shall be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. Such benefits shall be provided by and at the expense of the institution of the place of residence.'

11 Annex X to Regulation No 883/2004, which is entitled 'Special non-contributory cash benefits', specifies the following benefits as regards the Federal Republic of Germany:

'…

(b) Benefits to cover subsistence costs under the basic provision for jobseekers unless, with respect to these benefits, the eligibility requirements for a temporary supplement following receipt of unemployment benefit ([Paragraph] 24(1) of Book II of the Social Code) are fulfilled.'

Directive 2004/38

12 Recitals 10, 16 and 21 in the preamble to Directive 2004/38 state:

'(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.

…

(16) As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or jobseekers as defined by the Court of Justice save on grounds of public policy or public security.

…

(21) However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of jobseekers, to Union citizens other than those who

are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.'

13 Article 6 of Directive 2004/38, headed 'Right of residence for up to three months', provides in paragraph 1:

'Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.'

14 Article 7(1) of Directive 2004/38 provides:

'All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; …'

15 Article 8 of Directive 2004/38, headed 'Administrative formalities for Union citizens', provides in paragraph 4:

'Member States may not lay down a fixed amount which they regard as "sufficient resources", but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.'

16 Article 14 of Directive 2004/38, headed 'Retention of the right of residence', provides:

'1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.

4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

(a) the Union citizens are workers or self-employed persons, or

(b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.'

17 Article 24 of Directive 2004/38, headed 'Equal treatment', provides:

‘1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.’

German law

Social Code

18 Paragraph 19a(1) of Book I of the Social Code (Sozialgesetzbuch Erstes Buch; ‘SGB I’) sets out the two main types of benefit granted by way of basic provision for jobseekers:

‘(1) Under the entitlement to basic provision for jobseekers, the following may be claimed:

1. benefits for integration into the labour market,

2. benefits to cover subsistence costs.’

19 In Book II of the Social Code (Sozialgesetzbuch Zweites Buch; ‘SGB II’), Paragraph 1, headed ‘Function and objective of basic provision for jobseekers’, provides in subparagraphs 1 to 3:

‘(1) Basic provision for jobseekers is intended to enable its beneficiaries to lead a life in keeping with human dignity.

…

(3) Basic provision for jobseekers encompasses benefits:

1. intended to bring to an end or reduce need, in particular by integration into the labour market, and

2. intended to cover subsistence costs.’

20 Paragraph 7 of SGB II, headed ‘Beneficiaries’, provides:

‘(1) Benefits under this Book shall be received by persons who:

1. have attained the age of 15 and have not yet reached the age limit referred to in Paragraph 7a,

2. are fit for work,

3. are in need of assistance and

4. whose ordinary place of residence is in the Federal Republic of Germany (beneficiaries fit for work). The following are excluded:

1. foreign nationals who are not workers or self-employed persons in the Federal Republic of Germany and do not enjoy the right of freedom of movement under Paragraph 2(3) of the Law on freedom of movement of Union citizens [Freizügigkeitsgesetz/EU; “the FreizügG/EU”], and their family members, for the first three months of their residence,

2. foreign nationals whose right of residence arises solely out of the search for employment and their family members,

…

Point 1 of the second sentence shall not apply to foreign nationals residing in the Federal Republic of Germany who have been granted a residence permit under Chapter 2, Section 5, of the Law on residence. Provisions of law governing residence shall be unaffected.

…'

21 Paragraph 8 of SGB II, headed 'Fitness for work', states in subparagraph 1:

'All persons who are not incapable for the foreseeable future, because of an illness or handicap, of working for at least three hours per day under normal labour market conditions are fit for work.

…'

22 Paragraph 9(1) of SGB II provides:

'All persons who cannot, or cannot sufficiently, cover their subsistence costs on the basis of the income or assets to be taken into consideration and who do not receive the necessary assistance from other persons, in particular from family members or providers of other social security benefits, are in need of assistance.'

23 Paragraph 20 of SGB II sets out additional provisions on basic subsistence needs. Paragraph 21 of SGB II lays down rules on additional needs and Paragraph 22 lays down rules on accommodation and heating needs. Finally, Paragraphs 28 to 30 deal with education and participation benefits.

24 In Book XII of the Social Code (Sozialgesetzbuch Zwölftes Buch; 'SGB XII'), Paragraph 1, which relates to social assistance, provides:

'The function of social assistance is to enable the beneficiaries to lead a life in keeping with human dignity. …'

25 Paragraph 21 of SGB XII provides:

'Subsistence benefits shall not be paid to persons who are in principle entitled to benefits under Book II because they are fit for work or because of their family ties. …'

26 Paragraph 23 of SGB XII, headed 'Social assistance for foreign nationals', reads as follows:

'(1) Subsistence assistance, assistance for sick persons, assistance for pregnant women, maternity assistance and care assistance under this Book must be given to foreign nationals who are actually resident in national territory. The provisions of the fourth Chapter shall not be affected. Otherwise, social assistance may be granted in so far as it is justified in a particular case. The restrictions of the first sentence shall not apply to foreign nationals holding a permanent residence permit ("Niederlassungserlaubnis") or a residence permit of limited duration ("befristeter Aufenthaltstitel") who anticipate taking up permanent residence in federal territory. Legal provisions under which social assistance other than the benefits referred to in the first sentence must or should be granted shall not be affected.

…

(3) Foreign nationals who have entered national territory in order to obtain social assistance or whose right of residence arises solely out of the search for employment, and their family members, have no right to social assistance. If they have entered national territory for the purpose of treatment or alleviation of illness, assistance for sick persons

may be granted only to remedy a critical, life-threatening condition or for urgent and essential treatment of a serious or contagious disease.

(4) Foreign nationals in receipt of social assistance must be informed of the return and resettlement programmes applicable to them; in appropriate cases recourse to such programmes is to be promoted.'

Law on freedom of movement of Union citizens

27 The scope of the FreizügG/EU is specified in Paragraph 1 of that law:

'This Law shall govern the entry and residence of nationals of other Member States of the European Union (Union citizens) and their family members.'

28 Paragraph 2 of the FreizügG/EU provides, on the right of entry and residence:

'(1) Union citizens who are entitled to freedom of movement and their family members shall have the right to enter and reside in federal territory, subject to the provisions of this Law.

(2) The following are entitled to freedom of movement under Community law:

1. Union citizens who wish to reside in federal territory as workers or for the purpose of seeking employment or pursuing vocational training,

…

5. Union citizens who are not working, subject to the conditions laid down in Paragraph 4,

6. family members, subject to the conditions laid down in Paragraphs 3 and 4,

…

(4) Union citizens shall not require a visa in order to enter federal territory or a residence permit in order to reside there. …

(5) In order for Union citizens to reside in federal territory for a period of up to three months, it is sufficient that they hold a valid identity card or passport. Family members who are not Union citizens have the same right if they hold an approved or otherwise accepted passport (or document in lieu of a passport) and they are accompanying or joining the Union citizen.

…

(7) The right under subparagraph 1 may be found not to exist if it is established that the person concerned has pretended that a condition for that right is fulfilled by using counterfeit or falsified documents or by misrepresentation of the facts. In the case of a family member who is not a Union citizen, the right under subparagraph 1 may also be found not to exist if it is established that he is not joining the Union citizen in order to establish or preserve family life or is not accompanying the Union citizen for that purpose. In these cases a family member who is not a Union citizen may be refused issue of the residence card or visa or his residence card may be withdrawn. Decisions under sentences 1 to 3 shall be in writing.'

29 Paragraph 3 of the FreizügG/EU, relating to family members, states:

‘(1) Family members of the Union citizens specified in Paragraph 2(2), points 1 to 5, shall enjoy the right under Paragraph 2(1) if they are accompanying or joining the Union citizen. For family members of the Union citizens specified in Paragraph 2(2), point 5, this shall apply subject to Paragraph 4.

(2) The following are family members:

1. the spouse, the partner and the descendants of the persons specified in Paragraph 2(2), points 1 to 5 and 7, or of their spouses or partners, who are not yet 21 years old,

2. the relatives in the ascending line and descendants of the persons specified in Paragraph 2(2), points 1 to 5 and 7, or of their spouses or partners, whom those persons or their spouses or partners maintain.

…’

30 Paragraph 4 of the FreizügG/EU provides, in relation to persons who are entitled to freedom of movement and are not working:

‘Union citizens who are not working and the family members accompanying or joining them shall enjoy the right provided for in Paragraph 2(1) if they have sufficient sickness insurance cover and sufficient means of subsistence. If the Union citizen is resident in federal territory as a student, this right shall extend only to his spouse, partner and children who are maintained.’

31 Paragraph 5 of the FreizügG/EU, headed ‘Residence cards and certificate concerning the right of permanent residence’, provides:

‘…

(2) The competent aliens office may require that the conditions for the right under Paragraph 2(1) be substantiated within three months following entry into federal territory. Information and evidence necessary for substantiation may be received by the competent registration authority at the time of registration with it. That authority shall forward the information and evidence to the competent aliens office. The registration authority shall not use or process that data for any other purpose.

(3) A check to establish whether the conditions for the right under Paragraph 2(1) are fulfilled or continue to be fulfilled may be carried out where this is justified by a particular reason.

…’

32 Paragraph 5a of the FreizügG/EU states:

‘(1) The competent authority may request a Union citizen to produce to it a valid identity card or passport in the circumstances referred to in Paragraph 5(2) and, in the circumstances referred to in

…

3. Paragraph 2(2), point 5, proof of sufficient sickness insurance cover and sufficient means of subsistence.’

33 Paragraph 6 of the FreizügG/EU, relating to loss of the right of entry and residence, states:

‘(1) Without prejudice to Paragraph 2(7) and Paragraph 5(4), loss of the right under Paragraph 2(1) may be determined, and the certificate concerning the right of permanent residence, the residence card or the permanent residence card may be withdrawn, only on grounds of public policy, public security or public health (Articles 45(3)

and 52(1) of the Treaty on the Functioning of the European Union). Entry may also be refused on the grounds referred to in the first sentence. …

(2) The existence of a criminal conviction shall not in itself constitute a sufficient ground for the adoption of the decisions or measures referred to in subparagraph 1. Only criminal convictions which have not yet been deleted from the federal central register may be taken into account, and only in so far as the circumstances on which they are based disclose personal conduct that constitutes a present threat to the requirements of public policy. There must be a genuine and sufficiently serious threat affecting a fundamental interest of society.

(3) When a decision under subparagraph 1 is made, account must be taken in particular of how long the person concerned has resided in Germany, his age, his state of health, his family and economic situation, his social and cultural integration in Germany and the extent of his ties to his State of origin.

…

(6) Decisions or measures relating to loss of the right of residence or the right of permanent residence may not be adopted on economic grounds.

…'

34 As regards the obligation to leave the territory, Paragraph 7 of the FreizügG/EU states:

'(1) Union citizens and their family members shall be obliged to leave federal territory if the aliens office has established that there is no right of entry and residence. The decision shall contain a warning of removal from federal territory and set a time-limit for leaving it. Except in urgent cases the period set must be at least a month. …

Union citizens and their family members who have lost their right to freedom of movement pursuant to Paragraph 6(1) may not re-enter federal territory and reside there. The prohibition under the first sentence shall, upon application, be for a fixed term. That term shall begin to run when federal territory is left. An application to have the prohibition lifted that is made after a reasonable period or after three years shall be determined within six months.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

35 Ms Dano, who was born in 1989, and her son Florin, who was born on 2 July 2009 in Sarrbrücken (Germany), are both Romanian nationals. According to the findings of the referring court, Ms Dano last entered Germany on 10 November 2010.

36 On 19 July 2011, the city of Leipzig issued Ms Dano with a residence certificate of unlimited duration ('unbefristete Freizügigkeitsbescheinigung') for EU nationals, establishing 27 June 2011 as the date of entry into German territory. On 28 January 2013 it also issued her with a duplicate certificate.

37 Since their arrival in Leipzig, Ms Dano and her son have been living in the apartment of Ms Dano's sister, who provides for them materially.

38 Ms Dano receives child benefit ('Kindergeld') for her son Florin, which is paid by the Leipzig family benefits office on behalf of the Federal Employment Agency and amounts to EUR 184 per month. The Leipzig social assistance service for children and young people also pays an advance on maintenance payments of EUR 133 per month for that child, whose father's identity is not known.

39 Ms Dano attended school for three years in Romania, but did not obtain any leaving certificate. She understands German orally and can express herself simply in German. On the other hand, she cannot write in German and her ability to read texts in that language is only limited. She has not been trained in a profession and, to date, has not

worked in Germany or Romania. Although her ability to work is not in dispute, there is nothing to indicate that she has looked for a job.

40 The first application that Ms Dano and her son submitted for the grant of benefits by way of basic provision under SGB II was refused by Jobcenter Leipzig by decision of 28 September 2011, on the basis of point 2 of the second sentence of Paragraph 7(1) of SGB II. Since that decision was not contested, it became final.

41 A fresh application for the same benefits, submitted on 25 January 2012, was also refused, by decision of Jobcenter Leipzig of 23 February 2012. Ms Dano and her son lodged an administrative objection against that refusal, relying on Articles 18 TFEU and 45 TFEU and on the judgment in *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344). That objection was dismissed by decision of 1 June 2012.

42 On 1 July 2012, Ms Dano and her son brought an action challenging that decision before the Sozialgericht Leipzig (Social Court, Leipzig), by which they again sought the grant of benefits by way of basic provision for jobseekers under SGB II in respect of the period commencing on 25 January 2012.

43 The Sozialgericht Leipzig considers that, by virtue of point 2 of the second sentence of Paragraph 7(1) of SGB II and Paragraph 23(3) of SGB XII, Ms Dano and her son are not entitled to benefits granted by way of basic provision. However, it expresses doubts as to whether provisions of EU law, in particular Article 4 of Regulation No 883/2004, the general principle of non-discrimination resulting from Article 18 TFEU and the general right of residence resulting from Article 20 TFEU, preclude those provisions of German law.

44 According to the findings of the referring court, the main proceedings concern persons who cannot claim a right of residence in the host State by virtue of Directive 2004/38.

45 In those circumstances, the Sozialgericht Leipzig decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Do persons who do not wish to claim payment of any benefits of social security law or family benefits under Article 3(1) of Regulation No 883/2004 but rather special non-contributory benefits under Article 3(3) and Article 70 of the regulation fall within the scope *ratione personae* of Article 4 of the regulation?

(2) If Question 1 is answered in the affirmative: are the Member States precluded by Article 4 of Regulation No 883/2004, in order to prevent an unreasonable recourse to non-contributory social security benefits under Article 70 of the regulation which guarantee a level of subsistence, from excluding in full or in part Union citizens in need from accessing those benefits, which are provided to their own nationals who are in the same situation?

(3) If Question 1 or Question 2 is answered in the negative: are the Member States precluded by (a) Article 18 TFEU and/or (b) [point (a) of the first subparagraph of Article 20(2)] TFEU in conjunction with the [second subparagraph] of Article 20(2) TFEU and Article 24(2) of Directive 2004/38/EC, in order to prevent an unreasonable recourse to non-contributory social security benefits under Article 70 of Regulation No 883/2004 which guarantee a level of subsistence, from excluding in full or in part Union citizens in need from accessing those benefits, which are provided to their own nationals who are in the same situation?

(4) If, according to the answers to the abovementioned questions, the partial exclusion of benefits which guarantee a level of subsistence complies with EU law: may the provision of non-contributory benefits which guarantee a level of subsistence for Union citizens, outside acute emergencies, be limited to the provision of the necessary funds for return to the home State or do Articles 1, 20 and 51 of the Charter … require more extensive payments which enable permanent residence?’

Consideration of the questions referred

Question 1

46 By its first question, the referring court asks, in essence, whether Article 4 of Regulation No 883/2004 must be interpreted as meaning that 'special non-contributory benefits' for the purposes of Articles 3(3) and 70 of the regulation fall within its scope.

47 A preliminary point to note is that the referring court has classified the benefits at issue in the main proceedings as 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004.

48 It must be pointed out, first, that Article 3 of Regulation No 883/2004 defines the matters covered by the regulation, expressly stating in Article 3(3) that the regulation 'shall also apply to the special non-contributory cash benefits covered by Article 70 [of the regulation]'.

49 Accordingly, it is clear from the wording of Article 3 of Regulation No 883/2004 that the regulation applies to special non-contributory cash benefits.

50 Second, Article 70(3) of Regulation No 883/2004 provides that Article 7 of the regulation, which governs the waiving of residence rules, and the other chapters of Title III thereof, which is devoted to the various categories of benefits, are not to apply to special non-contributory cash benefits.

51 Whilst Article 70(3) of Regulation No 883/2004 therefore, by way of exception, renders certain of the regulation's provisions inapplicable to special non-contributory cash benefits, Article 4 is not among those provisions.

52 Finally, the interpretation that Article 4 of Regulation No 883/2004 applies to special non-contributory cash benefits corresponds to the intention of the EU legislature, as is apparent from the third recital in the preamble to Regulation No 1247/92 which amended Regulation No 1408/71, inserting provisions relating to benefits of this type in order to take account of the case-law in that regard.

53 In accordance with the seventh recital, such benefits should be granted solely in accordance with the legislation of the Member State of residence of the person concerned or of the members of his or her family, with such aggregation of periods of residence completed in any other Member State as is necessary and without discrimination on grounds of nationality.

54 The specific provision which the EU legislature thus inserted into Regulation No 1408/71 by means of Regulation No 1247/92 is thus characterised by non-exportability of special non-contributory cash benefits as the counterpart of equal treatment in the State of residence.

55 In the light of all the foregoing considerations, the answer to the first question is that Regulation No 883/2004 must be interpreted as meaning that 'special non-contributory cash benefits' as referred to in Articles 3(3) and 70 of the regulation fall within the scope of Article 4 of the regulation.

Questions 2 and 3

56 By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 18 TFEU, Article 20(2) TFEU, Article 24(2) of Directive 2004/38 and Article 4 of Regulation No 883/2004 must be interpreted as precluding legislation of a Member State under which nationals of other Member States who are not economically active are excluded, in full or in part, from entitlement to certain 'special non-contributory cash benefits' within the meaning of Regulation No 883/2004 although those benefits are granted to nationals of the Member State concerned who are in the same situation.

57 It should be observed first of all that Article 20(1) TFEU confers on any person holding the nationality of a Member State the status of citizen of the Union (judgment in *N.*, C-46/12, EU:C:2013:9725, paragraph 25).

58 As the Court has held on numerous occasions, the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to enjoy within the scope *ratione materiae* of the FEU Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for in that regard (judgments in *Grzelczyk*, C-184/99, EU:C:2001:458, paragraph 31; *D'Hoop*, C-224/98, EU:C:2002:432, paragraph 28; and *N.*, EU:C:2013:9725, paragraph 27).

59 Every Union citizen may therefore rely on the prohibition of discrimination on grounds of nationality laid down in Article 18 TFEU in all situations falling within the scope *ratione materiae* of EU law. These situations include those relating to the exercise of the right to move and reside within the territory of the Member States conferred by point (a) of the first subparagraph of Article 20(2) TFEU and Article 21 TFEU (see judgment in *N.*, EU:C:2013:97, paragraph 28 and the case-law cited).

60 In this connection, it is to be noted that Article 18(1) TFEU prohibits any discrimination on grounds of nationality '[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein'. The second subparagraph of Article 20(2) TFEU expressly states that the rights conferred on Union citizens by that article are to be exercised 'in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder'. Furthermore, under Article 21(1) TFEU too the right of Union citizens to move and reside freely within the territory of the Member States is subject to compliance with the 'limitations and conditions laid down in the Treaties and by the measures adopted to give them effect' (see judgment in *Brey*, C-140/12, EU:C:2013:565, paragraph 46 and the case-law cited).

61 Thus, the principle of non-discrimination, laid down generally in Article 18 TFEU, is given more specific expression in Article 24 of Directive 2004/38 in relation to Union citizens who, like the applicants in the main proceedings, exercise their right to move and reside within the territory of the Member States. That principle is also given more specific expression in Article 4 of Regulation No 883/2004 in relation to Union citizens, such as the applicants in the main proceedings, who invoke in the host Member State the benefits referred to in Article 70(2) of the regulation.

62 Accordingly, the Court should interpret Article 24 of Directive 2004/38 and Article 4 of Regulation No 883/2004.

63 It must be stated first of all that 'special non-contributory cash benefits' as referred to in Article 70(2) of Regulation No 883/2004 do fall within the concept of 'social assistance' within the meaning of Article 24(2) of Directive 2004/38. That concept refers to all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who by reason of that fact may, during his period of residence, become a burden on the public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State (judgment in *Brey*, EU:C:2013:565, paragraph 61).

64 That having been said, it must be pointed out that, whilst Article 24(1) of Directive 2004/38 and Article 4 of Regulation No 883/2004 reiterate the prohibition of discrimination on grounds of nationality, Article 24(2) of that directive contains a derogation from the principle of non-discrimination.

65 Under Article 24(2) of Directive 2004/38, the host Member State is not obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the period of seeking employment, referred to in Article 14(4)(b) of the directive, that extends beyond that first period, nor is it obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies to persons other than workers, self-employed persons, persons who retain such status and members of their families.

66 It is apparent from the documents before the Court that Ms Dano has been residing in Germany for more than three months, that she is not seeking employment and that she did not enter Germany in order to work. She therefore does not fall within the scope *ratione personae* of Article 24(2) of Directive 2004/38.

67 In those circumstances, it must be established whether Article 24(1) of Directive 2004/38 and Article 4 of Regulation No 883/2004 preclude refusal to grant social benefits in a situation such as that at issue in the main proceedings.

68 Article 24(1) of Directive 2004/38 provides that all Union citizens residing on the basis of the directive in the territory of the host Member State are to enjoy equal treatment with the nationals of that Member State within the scope of the Treaty.

69 It follows that, so far as concerns access to social benefits, such as those at issue in the main proceedings, a Union citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38.

70 First, in the case of periods of residence of up to three months, Article 6 of Directive 2004/38 limits the conditions and formalities for the right of residence to the requirement to hold a valid identity card or passport and, under Article 14(1) of the directive, that right is retained as long as the Union citizen and his family members do not become an unreasonable burden on the social assistance system of the host Member State (judgment in *Ziolkowski and Szeja*, C-424/10 and C-425/10, EU:C:2011:866, paragraph 39). In accordance with Article 24(2) of Directive 2004/38, the host Member State is thus not obliged to confer entitlement to social benefits to a national of another Member State or his family members during that period.

71 Second, for periods of residence longer than three months, the right of residence is subject to the conditions set out in Article 7(1) of Directive 2004/38 and, under Article 14(2), that right is retained only if the Union citizen and his family members satisfy those conditions. It is apparent from recital 10 in the preamble to the directive in particular that those conditions are intended, inter alia, to prevent such persons from becoming an unreasonable burden on the social assistance system of the host Member State (judgment in *Ziolkowski and Szeja*, EU:C:2011:866, paragraph 40).

72 Third, it is apparent from Article 16(1) of Directive 2004/38 that Union citizens acquire the right of permanent residence after residing legally for a continuous period of five years in the host Member State and that that right is not subject to the conditions referred to in the preceding paragraph. As stated in recital 18 in the preamble to the directive, once obtained, the right of permanent residence is not to be subject to any conditions, with the aim of it being a genuine vehicle for integration into the society of that State (judgment in *Ziolkowski and Szeja*, EU:C:2011:866, paragraph 41).

73 In order to determine whether economically inactive Union citizens, in the situation of the applicants in the main proceedings, whose period of residence in the host Member State has been longer than three months but shorter than five years, can claim equal treatment with nationals of that Member State so far as concerns entitlement to social benefits, it must therefore be examined whether the residence of those citizens complies with the conditions in Article 7(1)(b) of Directive 2004/38. Those conditions include the requirement that the economically inactive Union citizen must have sufficient resources for himself and his family members.

74 To accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State.

75 It should be added that, as regards the condition requiring possession of sufficient resources, Directive 2004/38 distinguishes between (i) persons who are working and (ii) those who are not. Under Article 7(1)(a) of Directive 2004/38, the first group of Union citizens in the host Member State have the right of residence without having to fulfil

any other condition. On the other hand, persons who are economically inactive are required by Article 7(1)(b) of the directive to meet the condition that they have sufficient resources of their own.

76 Therefore, Article 7(1)(b) of Directive 2004/38 seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence.

77 As the Advocate General has observed in points 93 and 96 of his Opinion, any unequal treatment between Union citizens who have made use of their freedom of movement and residence and nationals of the host Member State with regard to the grant of social benefits is an inevitable consequence of Directive 2004/38. Such potential unequal treatment is founded on the link established by the Union legislature in Article 7 of the directive between the requirement to have sufficient resources as a condition for residence and the concern not to create a burden on the social assistance systems of the Member States.

78 A Member State must therefore have the possibility, pursuant to Article 7 of Directive 2004/38, of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence.

79 To deny the Member State concerned that possibility would, as the Advocate General has stated in point 106 of his Opinion, thus have the consequence that persons who, upon arriving in the territory of another Member State, do not have sufficient resources to provide for themselves would have them automatically, through the grant of a special non-contributory cash benefit which is intended to cover the beneficiary's subsistence costs.

80 Therefore, the financial situation of each person concerned should be examined specifically, without taking account of the social benefits claimed, in order to determine whether he meets the condition of having sufficient resources to qualify for a right of residence under Article 7(1)(b) of Directive 2004/38.

81 In the main proceedings, according to the findings of the referring court the applicants do not have sufficient resources and thus cannot claim a right of residence in the host Member State under Directive 2004/38. Therefore, as has been stated in paragraph 69 of the present judgment, they cannot invoke the principle of non-discrimination in Article 24(1) of the directive.

82 Accordingly, Article 24(1) of Directive 2004/38, read in conjunction with Article 7(1)(b) thereof, does not preclude national legislation such as that at issue in the main proceedings in so far as it excludes nationals of other Member States who do not have a right of residence under Directive 2004/38 in the host Member State from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004.

83 The same conclusion must be reached in respect of the interpretation of Article 4 of Regulation No 883/2004. The benefits at issue in the main proceedings, which constitute 'special non-contributory cash benefits' within the meaning of Article 70(2) of the regulation, are, under Article 70(4), to be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. It follows that there is nothing to prevent the grant of such benefits to Union citizens who are not economically active from being made subject to the requirement that those citizens fulfil the conditions for obtaining a right of residence under Directive 2004/38 in the host Member State (see, to this effect, judgment in *Brey*, EU:C:2013:965, paragraph 44).

84 In the light of the foregoing, the answer to the second and third questions is that Article 24(1) of Directive 2004/38, read in conjunction with Article 7(1)(b) thereof, and Article 4 of Regulation No 883/2004 must be interpreted as not precluding legislation of a Member State under which nationals of other Member States are excluded from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004, although those benefits are granted to nationals of the host Member State who are in the same situation, in so far as those nationals of other Member States do not have a right of residence under Directive 2004/38 in the host Member State.

Question 4

85 By its fourth question, the referring court asks, in essence, whether Articles 1, 20 and 51 of the Charter must be interpreted as requiring the Member States to grant Union citizens non-contributory cash benefits by way of basic provision such as to enable permanent residence or whether those States may limit their grant to the provision of funds necessary for return to the home State.

86 It should be recalled that, in the context of a reference for a preliminary ruling under Article 267 TFEU, the Court is called upon to interpret EU law only within the limits of the powers conferred on the European Union (see, inter alia, judgment in *Betriu Montull*, C-5/12, EU:C:2013:571, paragraph 68 and the case-law cited).

87 Article 51(1) of the Charter states that the provisions of the Charter are addressed 'to the Member States only when they are implementing Union law'.

88 According to Article 6(1) TEU, the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of EU law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties (see judgment in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 17 and 23, and order in *Nagy and Others*, C-488/12 to C-491/12 and C-526/12, EU:C:2013:703, paragraph 15).

89 In paragraph 41 of the judgment in *Brey* (EU:C:2013:565), the Court confirmed that Article 70 of Regulation No 883/2004, which defines the term 'special non-contributory cash benefits', is not intended to lay down the conditions creating the right to those benefits. It is thus for the legislature of each Member State to lay down those conditions.

90 Accordingly, since those conditions result neither from Regulation No 883/2004 nor from Directive 2004/38 or other secondary EU legislation, and the Member States thus have competence to determine the conditions for the grant of such benefits, they also have competence, as the Advocate General has observed in point 146 of his Opinion, to define the extent of the social cover provided by that type of benefit.

91 Consequently, when the Member States lay down the conditions for the grant of special non-contributory cash benefits and the extent of such benefits, they are not implementing EU law.

92 It follows that the Court does not have jurisdiction to answer the fourth question.

Costs

93 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010, must be interpreted as meaning that 'special non-contributory cash benefits' as referred to in Articles 3(3) and 70 of the regulation fall within the scope of Article 4 of the regulation.**

2. **Article 24(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, read in conjunction with Article 7(1)(b) thereof, and Article 4 of Regulation No 883/2004, as amended by Regulation No 1244/2010, must be interpreted as not precluding legislation of a Member State under which nationals of other Member States are excluded from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004, although those benefits are granted to nationals of the host Member State who are in the same situation, in so far as those nationals of other Member States do not have a right of residence under Directive 2004/38 in the host Member State.**

3. **The Court of Justice of the European Union does not have jurisdiction to answer the fourth question.**

Case C-359/13: B. Martens v Minister van Onderwijs, Cultuur en Wetenschap

OPINION OF ADVOCATE GENERAL

SHARPSTON

delivered on 24 September 2014 (1)

Case C-359/13

B. Martens

v

Minister van Onderwijs, Cultuur en Wetenschap

(Request for a preliminary ruling from the Centrale Raad van Beroep (Netherlands))

(Funding of higher education in overseas territories — Residence condition — 'Three out of six years rule' — Former frontier worker)

1. The request for a preliminary ruling in the present case again concerns eligibility for funding provided by the Netherlands for higher education outside the Netherlands itself — what is termed *meeneembare studie financiering* ('MNSF' or 'portable study finance'). In its judgment in Case C-542/09 *Commission* v *Netherlands*, (2) the Court held that the Netherlands rule under which any applicant for such finance had, in addition to being eligible for funding to study in the Netherlands, also to have resided lawfully in the Netherlands during at least three out of the last six years prior to enrolment (the 'three out of six years rule') fell foul of Article 45 TFEU and Article 7(2) of Regulation (EEC) No 1612/68 (3) because it was indirectly discriminatory.

2. The three out of six years rule was nevertheless applied to Miss Babette Martens, a Netherlands national resident in Belgium for nearly all her schooling, who applied to the Netherlands authorities for portable study finance to go to Curaçao to pursue higher education there. Her father (also a Netherlands national resident in Belgium) worked part-time in the Netherlands for a while; and Miss Martens has been granted MNSF for her university studies in respect of that period. However, she was denied study finance for the remainder of her studies once her father ceased to be a frontier worker, because the three out of six years rule was then applied to her situation and she did not satisfy it.

3. The Centrale Raad van Beroep (Netherlands) (Central Appeals Court) ('the referring court') asks in essence whether (i) the freedom of movement for workers or (ii) European Union ('EU') citizenship rights preclude the Netherlands from applying the three out of six years rule in such a situation. In particular, it asks whether Mr Martens can rely, as against the Netherlands, on rights derived from free movement of workers after ceasing to be a frontier worker in that Member State. If he cannot, the referring court seeks guidance on whether Miss Martens can rely on her own rights as an EU citizen.

EU law

Treaty on the Functioning of the European Union

4. Article 20(1) TFEU establishes EU citizenship. Pursuant to Article 20(2), EU citizens are to 'enjoy the rights and be subject to the duties provided for in the Treaties'. In particular, Article 20(2)(a) confers on EU citizens 'the right to move and reside freely within the territory of the Member States'. Article 21 confirms that right, adding that it is 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'.

5. Article 45 TFEU states:

'1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

…'

6. Whilst Article 52(1) TEU provides that the Treaties apply, inter alia, to 'the Kingdom of the Netherlands', of which Curaçao forms part, (4) Article 52(2) TEU cross-refers to Article 355 TFEU for the definition of the territorial scope of the Treaties. In accordance with Article 355(2) TFEU, the special arrangements for association in Part Four of the TFEU are to apply to the overseas countries and territories ('OCTs') listed in Annex II to that Treaty. (5) The list in Annex II contains the Netherlands Antilles, which include Curaçao. These countries and territories are described in Article 198(1) TFEU (the first provision of Part Four) as 'non-European countries and territories which have special relations with Denmark, France, the Netherlands and the United Kingdom' which the Member States 'agree to associate with the Union'.

7. Part Four of the TFEU concerns 'Association of the Overseas Countries and Territories'. Article 202 TFEU states that '[s]ubject to the provisions relating to public health, public security or public policy, freedom of movement within Member States for workers from the countries and territories, and within the countries and territories for workers from Member States, shall be regulated by acts adopted in accordance with Article 203'. (6)

Regulation No 1612/68

8. Regulation No 1612/68 provides supplementary rules to secure the freedom of nationals of one Member State to work in another Member State and thereby implements the Treaty provisions on freedom of movement for workers. The first recital in the preamble to that regulation describes its overall objective as being to achieve 'the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment, as well as the right of such workers to move freely within the [Union] in order to pursue activities as employed persons subject to any limitations justified on grounds of public policy, public security or public health'.

9. The third and fourth recitals state, respectively, that 'freedom of movement constitutes a fundamental right of workers and their families' and that that right is to be enjoyed 'by permanent, seasonal and frontier workers and by those who pursue their activities for the purpose of providing services'.

10. According to the fifth recital, the exercise of this fundamental freedom, 'by objective standards, in freedom and dignity, requires that equality of treatment shall be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country'.

11. Article 7(2) of Regulation No 1612/68 provides that a worker who is a national of a Member State 'shall enjoy the same social and tax advantages as national workers' in the territory of another Member State.

12. Article 12 of Regulation No 1612/68 reads:

‘The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State’s general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

...’

Directive 2004/38

13. Article 24 of Directive 2004/38/EC (7) provides:

‘1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged … prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.’

Netherlands law

Charter for the Kingdom of the Netherlands

14. The Statuut voor het Koninkrijk der Nederlanden (‘Charter for the Kingdom of the Netherlands’), as amended in 2010, provides that the Kingdom of the Netherlands consists of the Netherlands, Aruba, Curaçao and Saint Maarten. (8) The Netherlands and the other entities forming part of the Kingdom of the Netherlands share a single nationality, head of State, foreign policy and defense. However, areas such as education and study finance remain autonomous, although cooperation is possible.

Law on study finance

15. The Wet Studiefinanciering (Law on Study Finance, ‘the Wsf 2000’) sets out the conditions for funding of study in the Netherlands and abroad. Funding for higher education in the Netherlands is available to students who are between 18 and 29 years old, study at a designated or approved educational establishment and satisfy a nationality condition. Article 2.2 defines the nationality condition. Those eligible include Netherlands nationals and non-Netherlands nationals who are treated, in the area of funding for studies, as Netherlands nationals based on a treaty or a decision of an international organisation.

16. EU citizens who are economically active in the Netherlands and their family members need not have resided in the Netherlands to qualify for this type of funding. Thus, cross-border workers, (9) who work in the Netherlands but reside elsewhere, and their family members are covered. By contrast, EU citizens who are not economically active in the Netherlands qualify for funding after five years of lawful residence in the Netherlands.

17. In accordance with Article 2.13(1)(d) of the Wsf 2000, as of 1 September 2007, a student is not entitled to study finance if, for the funding period concerned, he is eligible for an allowance towards meeting the costs of access to education or for maintenance provided by the authorities responsible for the provision of such allowances in a country other than the Netherlands.

18. Pursuant to Article 2.14(2)(c) of the Wsf 2000, students (irrespective of their nationality) who apply for portable study finance must, in addition to being eligible for funding for higher education in the Netherlands, satisfy the three out of six years rule. That provision applies only to students who were enrolled after 31 August 2007 on a higher

education course outside the Netherlands.

19. In accordance with Article 3.21, second paragraph, of the Wsf 2000, no study finance is granted with respect to a period of study prior to applying for funding. However, certain transitional arrangements apply. Thus, for example, Article 12.1ba states: 'The articles … as they read on 31 August 2007 remain applicable to a student who prior to 1 September 2007 received study finance for the purposes of pursuing higher education outside the Netherlands, as long as he or she receives the study finance without interruption.'

20. Pursuant to Article 11.5 of the Wsf 2000, the Minister van Onderwijs, Cultuur en Wetenschap (Minister of Education, Culture and Science; 'the Minister') need not apply the three out of six years rule in so far as the application of that requirement, having regard to the interests which the Wsf 2000 seeks to safeguard, might lead to a manifest case of grave injustice (the 'hardship clause').

21. Prior to 1 January 2014, the three out of six years rule did not apply to students (irrespective of their nationality) who asked for MNSF in order to pursue higher education in the 'border areas' of the Netherlands. (10)

22. According to the national court, MNSF consists of: a basic grant, the level of which depends on whether the student lives at home (that is, at the address of one or both of his parents) or independently; an allowance for travel costs ('OV vergoeding'); an additional loan, subject to a maximum limit; an additional grant of which the amount depends on the income of the parents; and a loan to cover fees limited in principle to the maximum fee chargeable by Netherlands educational institutions for an equivalent course.

Factual background, procedure and questions referred

23. Miss Martens was born in the Netherlands on 2 October 1987. She lived there until she moved, in June 1993 (when she was a little under six years old), with her parents (also Netherlands nationals) to Belgium where she was brought up and completed her schooling. Her father worked in Belgium and continues to do so. However, between 1 October 2006 and 31 October 2008, he also worked part-time in the Netherlands. It appears from the request for a preliminary ruling that after October 2008 he did not look for employment in the Netherlands and was not otherwise available for its employment market. Instead, he was in full-time employment in Belgium.

24. On 15 August 2006, Miss Martens registered to begin a bachelor degree at the University of the Netherlands Antilles in Curaçao in the academic year 2006/2007. During her studies there, her parents provided significant financial support (living expenses and costs of education) and received a child allowance in Belgium for their daughter. The referring court has explained that that child allowance is distinct from study grants for adult students; and that the Flemish Community does not typically award the latter for education or training pursued at educational institutions outside the so-called European Higher Education Area.

25. On 24 June 2008, Miss Martens applied to the Netherlands authorities for study finance (a basic grant and an allowance for travel costs). She declared that she did not receive study finance from another country and that, during the six years prior to her registration at the University of the Netherlands Antilles (that is, from 2000 to 2006), she had resided in the Netherlands for at least three years. It appears that the referring court does not doubt the good faith of Miss Martens' declaration and considers that there might have been a misunderstanding at the time as regards the three out of six years rule.

26. By decision of 22 August 2008, Miss Martens was granted study finance for the period starting on September 2007, which means that she received funding starting from the second year of her studies. That grant was renewed on a periodic basis and was based on the assumption that Miss Martens satisfied the three out of six years rule.

27. On 1 February 2009, Miss Martens requested an additional loan which she also obtained.

28. Then, as a result of a check, on 28 May 2010 the Minister established that, during the period from August 2000

to July 2006, Miss Martens had *not* resided three years in the Netherlands and decided that the grants already paid out (EUR 19 481.64) should be cancelled. Miss Martens was asked to refund the sums already received.

29. Miss Martens' complaint against those decisions was declared unfounded, as was her further appeal before the rechtbank 's-Gravenhage ('the rechtbank'). She then appealed against the judgment of the rechtbank before the referring court. Miss Martens argued that the decisions breached the principle of legitimate expectations and that the alleged lack of a sufficient connection with the Netherlands could not justify the Minister's decision.

30. On 1 July 2011, Miss Martens obtained her bachelor degree and went to live in the Netherlands.

31. The referring court deferred deciding the appeal until the Court had delivered its judgment in *Commission* v *Netherlands*, which it did on 14 June 2012. (11)

32. The Minister then accepted that Miss Martens' father was a frontier worker in the Netherlands from 1 October 2006 till 31 October 2008 and that Miss Martens was therefore entitled to portable study finance for the period from September 2007 to October 2008. (12) That was because, as a result of the judgment in *Commission* v *Netherlands*, the three out of six years rule could not be applied in such circumstances. However, the Minister maintained the decision to cancel the grant from the time that Miss Martens' father ceased to be a frontier worker in the Netherlands (that is, November 2008).

33. According to the referring court, the Minister did not base his decision on the fact that Miss Martens may have had access to financial support from Belgium (though, according to the referring court, Belgium does not appear to grant study finance for studies at educational institutions established outside the European Union) and therefore the referring court did not consider that matter further. (13)

34. Against that background, the referring court has stayed the proceedings and requested a preliminary ruling on these questions:

'1A. Must [EU] law, in particular Article 45 TFEU and Article 7(2) of Regulation No 1612/68, be interpreted as precluding … the Netherlands from terminating the right to receive study finance for education or training outside the EU of an adult dependent child of a frontier worker with Netherlands nationality who lives in Belgium and works partly in the Netherlands and partly in Belgium, at the point in time at which the frontier work ceases and work is then performed exclusively in Belgium, on the ground that the child does not meet the requirement that she must have lived in the Netherlands for at least three of the six years preceding her enrolment at the educational institution concerned?

1B. If Question 1A must be answered in the affirmative: does [EU] law preclude the granting of study finance for a period shorter than the duration of the education or training for which study finance was granted, it being assumed that the other requirements governing eligibility for study finance have been satisfied?

If, in answering Questions 1A and 1B, the Court of Justice should conclude that the legislation governing the right of freedom of movement for workers does not preclude a decision not to grant Ms Martens any study finance during the period from November 2008 to June 2011 or for part of that period:

2. Must Articles 20 TFEU and 21 TFEU be interpreted as precluding the EU Member State — the Netherlands — from not extending the study finance for education or training at an educational institution which is established in the Overseas Countries and Territories ["OCTs"] (Curaçao), to which there was an entitlement because the father of the person concerned worked in the Netherlands as a frontier worker, on the ground that the person concerned does not meet the requirement, applicable to all [EU] citizens, including its own nationals, that she must have lived in the Netherlands for at least three of the six years preceding her enrolment for that education or training?'

35. Written submissions were filed by the Danish and Netherlands Governments and by the European Commission. These parties also made oral submissions at the hearing on 2 July 2014.

Assessment

Preliminary remarks

36. Education involves costs for at least the Member State providing the education, the student himself (if he is financially autonomous) or those on whom the student is financially dependent and other (public and private) sponsors of education. As a matter of EU law, Member States remain competent to decide whether or not to fund higher education and, if so, to what extent. EU law does not in principle interfere with a Member State's decision to make funding available for studies pursued at higher education institutions established outside its territory and possibly outside the European Union and the conditions it attaches to such finance.

37. However, the situation of certain applicants for that funding may be covered by EU law. Such applicants may therefore derive rights from EU law, including in relation to their Member State of origin. Thus, in the exercise of their (undoubted) competence, Member States must comply with EU law. (14) Specifically, they must ensure that, for example, the conditions for the award of such funding neither create unjustified restrictions of the right to move and reside within the territory of the Member States nor discriminate on the basis of nationality. (15)

38. What is at stake in the present case is therefore not the Netherlands' decision to fund higher education outside the Netherlands; but rather a condition (that is, the three out of six years rule) applied in deciding whether or not to grant that funding to a particular applicant.

39. Initial cases regarding residence conditions and study finance often involved workers who became students; and who were no longer supported by others. (16) It is not uncommon, however, for students to remain dependent on family members (typically on one or both parent(s)) during all or part of the period during which they study. In that case, obtaining study finance may alleviate the financial burden otherwise borne by those family members. It is settled law that assistance granted for maintenance and education in order to pursue university studies evidenced by a professional qualification, including for children of migrant workers, is a social advantage within the meaning of Article 7(2) of Regulation No 1612/68, (17) but only in so far as the migrant worker continues to support his or her child. (18)

40. In the present case, it is not disputed that Miss Martens' father supported her during her studies in Curaçao. Therefore the portable study finance sought by Miss Martens is a social advantage for her father within the meaning of Regulation No 1612/68. It is now accepted that Miss Martens was entitled to MNSF for the period from October 2007 to October 2008 whilst her father was a frontier worker in the Netherlands. What is at issue is whether she had any entitlement thereafter.

41. By the first question referred, the Court is asked to focus on Miss Martens' position as a dependent child of a former frontier worker. If Miss Martens can rely on her father's status as a former frontier worker in the Netherlands and derive rights therefrom so as to continue to access study finance for the remaining part of her studies in Curaçao, there is no need to consider the second question referred, which focuses on Miss Martens' own rights as an EU citizen. (19) (Only in the latter context did the Netherlands take a clear position on the possible justification for a restriction of rights.)

42. For the sake of completeness, I shall answer both questions. Before doing so, however, I shall look at whether Miss Martens' place of study (Curaçao) raises questions as regards the territorial application of both freedom of movement for workers and EU citizenship rights.

Territorial scope of application of EU law

43. Curaçao forms part of the Kingdom of the Netherlands but is also characterised as an overseas territory. The application of the three out of six years rule to Miss Martens suggests that the Minister took the view that Miss Martens was not studying 'in the Netherlands'. (20) At the hearing, the Netherlands Government confirmed that to be the position.

44. Does Miss Martens' place of study raise questions as regards the territorial application of freedom of movement for workers and/or EU citizenship rights?

45. It is true that, where special arrangements exist between the European Union and OCTs, provisions of the Treaties other than those referred to in Part Four TFEU apply only where they are expressly made applicable. (21) Thus, unless the Treaties expressly state that a particular article also applies to territories outside the European Union or to third States, (22) that article does not apply to OCTs. (23)

46. As I see it, these issues do not arise in the present case.

47. The question here is not whether EU law applies because an EU citizen (economically active or inactive) has moved from a Member State to an OCT. Rather, what matters is whether rights can be derived from an EU citizen's movement between two Member States (the Netherlands and Belgium) and subsequent residence in a Member State (Belgium) that is not the Member State of nationality in the context of study finance that is made available by one of those Member States (the Netherlands) for studies pursued abroad.

48. Specifically, a condition (that is, the three out of six years rule) was here applied to an EU citizen (Miss Martens) who has exercised rights of free movement and residence when moving from the Netherlands to Belgium and who continued to reside in Belgium at least until she moved to Curaçao to study there. (24) She was therefore exercising rights under EU law continuously at least up to the point at which she seeks to rely upon those rights in order to access MNSF. (25) Miss Martens is also the dependent child of an EU citizen who has exercised rights as a worker in moving from his home Member State (the Netherlands) to a host Member State (Belgium) to live and work there, who subsequently worked part-time in the Netherlands whilst continuing to reside in Belgium, before resuming full-time employment in the host Member State in which he resides (Belgium).

49. In such circumstances, the situations of both Miss Martens and her father fall within the scope of EU law.

Question 1: freedom of movement for workers

Introduction

50. The referring court in essence asks whether Mr Martens, who is a former frontier worker, and his dependent daughter seeking MNSF can assert rights by virtue of his worker's status in the Netherlands where he no longer works because he has taken up full-time employment in Belgium.

51. All parties who have filed observations and appeared at the hearing agree that Article 45 TFEU and Article 7(2) of Regulation No 1612/68 preclude the Netherlands from imposing the three out of six years rule as a condition for granting MNSF to migrant workers and frontier workers in the Netherlands. That was also the conclusion of the Court in Case C-542/09 *Commission* v *Netherlands*. (26) So long as Mr Martens worked in the Netherlands (they say), Miss Martens could get her portable study finance. However, they argue that, once a worker is no longer a frontier worker, both provisions no longer apply.

52. It seems to me that what someone can (or cannot) claim as a former frontier worker is beside the point. The simple fact is that Mr Martens continues to be a migrant worker. The parties, in focussing on the effects of the loss of Mr Martens' frontier worker status, have overlooked the consequences attached to that fact.

Restriction of Mr Martens' right under Article 45 TFEU

53. Article 45 TFEU entails both the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment and the right to move freely within the territory of Member States for the purpose of accepting offers of employment.

54. The purpose of the Treaty provisions on the freedom of movement for persons is to enable EU citizens to pursue occupational activities of all kinds throughout the Union. In parallel with that objective, they also therefore preclude arrangements that might place EU citizens at a disadvantage for wishing to pursue an economic activity in the territory of another Member State (and thus leave their State of origin). (27) Thus, these provisions preclude measures which are capable of hindering or rendering less attractive the exercise of those freedoms by EU citizens. (28) Measures which have the effect of causing workers to lose, as a consequence of the exercise of their freedom of movement for workers, social advantages guaranteed them by the legislation of a Member State can be characterised as obstacles to that freedom. (29) That applies also where national law, without regard to the nationality of the worker concerned, precludes or deters a national from leaving his country of origin in order to exercise his right to freedom of movement. (30)

55. In the present case, the three out of six years rule is applied to Miss Martens because her father's employment as a frontier worker in the *Netherlands* ended. The facts described by the referring court do not suggest that he retained the status of worker in the Netherlands (for example, that he was seeking work there, or was otherwise available on the Netherlands employment market). (31) However, Mr Martens did not become economically inactive or unavailable for the employment market. Rather, he exercised his freedom of movement rights as a worker to take up full-time employment in *Belgium*, where he continues to reside and work. (32) He can thus rely on Article 45 TFEU to protect him against measures that put him at a disadvantage for having chosen to work in another Member State.

56. The application of the three out of six years rule in essence forces Mr Martens either not to exercise freedom of movement as a worker and merely to seek further employment in the Netherlands (so as to retain MNSF for his daughter) or to exercise that freedom but accept the financial loss of the study finance and the possible risk that no other alternative funding can be found.

57. Such a measure restricts the rights of Miss Martens' father under Article 45 TFEU. Unless objectively justified, it is prohibited under that provision. (33)

58. Should the Court disagree with that analysis, it is necessary to turn to the scope of the ruling in Case C-542/09 *Commission* v *Netherlands*, the standard of protection under Article 7(2) of Regulation No 1612/68 (and/or Article 12 of that regulation) and finally to examine the circumstances in which former worker status may continue to produce effects.

Scope of the Court's judgment in Case C-542/09 *Commission* v *Netherlands*

59. The starting point of the parties in the present case is the judgment of the Court in Case C-542/09. The findings in that infringement proceeding were made under Article 45 TFEU and Article 7(2) of Regulation No 1612/68 and concerned indirect discrimination on the basis of nationality against migrant workers and frontier workers as compared to national workers.

60. As I read the Court's judgment in that case, it did *not* also expressly cover the situation of a Netherlands national resident outside his home Member State but exercising his rights of free movement under EU law so as to work in the Netherlands (I shall refer to this category, for convenience, as 'Netherlands frontier workers').

61. The Court ruled in *Commission* v *Netherlands* that the Netherlands had failed to fulfil its obligations under Article 45 TFEU and Article 7(2) of Regulation No 1612/68 by requiring migrant workers and frontier workers and their dependent family members to comply with the three out of six years rule (set out in Article 2.14(2) of the Wsf 2000) in order to be eligible for funding for higher educational studies pursued outside the Netherlands. The Court confirmed that Article 7(2) guarantees that migrant workers residing in a host Member State and frontier workers employed in that Member State while residing in another Member State enjoy the same social and tax advantages as national workers. (34)

62. The Court held that a measure such as the three out of six years rule 'primarily operates to the detriment of

migrant workers and frontier workers who are nationals of *other* Member States, in so far as non-residents are usually non-nationals'. (35) The Court said that, for the purposes of establishing indirect discrimination, 'it is not necessary for [the measure] to have the effect of placing all the nationals of the Member State in question at an advantage or of placing at a disadvantage only nationals of other Member States, but not nationals of the State in question'. (36) The Court then identified the situations to be compared, for the purposes of access to portable funding, as being the situation of (i) on the one hand, migrant workers employed in the Netherlands but residing in another Member State and migrant workers employed and residing in the Netherlands but not satisfying the three out of six years rule and (ii) on the other hand, Netherlands workers employed and residing in the Netherlands. (37)

63. The Court did not consider separately the position of Netherlands frontier workers. Its focus, in identifying the two categories to be compared with each other, was discrimination on the basis of nationality.

64. A Netherlands frontier worker like Miss Martens' father is in essence treated differently from national workers because he has exercised rights of free movement and residence, *not* because of his nationality, which is the same as theirs. As a result, without further elaboration, it seems to me that he cannot rely on the finding of indirect discrimination in Case C-542/09.

65. It is therefore necessary to explore Article 7(2) of Regulation No 1612/68 in greater depth.

Equal treatment under Article 7(2) of Regulation No 1612/68

66. The rules set out in Article 7 (and those in Article 12) of Regulation No 1612/68 are further expressions of the freedom of movement for workers within the European Union guaranteed by Article 45 TFEU. (38) Pursuant to the fourth recital in the preamble to that regulation, that right must also be enjoyed without discrimination by frontier workers. Thus, Article 7(2) of Regulation No 1612/68 guarantees that migrant workers and frontier workers are to be treated equally with national workers. It protects against direct or indirect discrimination on the basis of nationality. (39)

67. For a worker to be able to claim the right to equal treatment to obtain a grant for funding of studies as a social advantage under Article 7(2), the worker needs to continue to support his family member. (40) That appears to be the case here. It is not necessary for the child to reside in the Member State where the worker resides and works (or the frontier worker works). (41)

68. In the present case, Mr Martens is treated less favourably because he has exercised free movement rights as a worker and *not* because of his Netherlands nationality.

69. In the text of Article 7(2), which reads '[h]e shall enjoy the same social and tax advantages as national workers', the pronoun refers to the worker described immediately before in Article 7(1) — that is, the worker who is a national of a Member State and employed in another Member State. Other provisions of Regulation No 1612/68, in particular those which form part of Title II on 'Employment and equality of treatment', also refer to a worker who is a national of a Member State and who is employed in the territory of another Member State.

70. However, the Court's case-law shows that the equal treatment standard in Article 7(2) of Regulation No 1612/68 is wider than the principle of non-discrimination based on nationality. (42)

71. Thus, in *Hartmann* the Court confirmed that the scope of the Treaty provisions on the freedom of movement for workers includes 'any national of a Member State, *irrespective of his place of residence and his nationality*, who has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of residence'. (43) Such a person also fell within the scope of Regulation No 1612/68. (44) Thus, Mr Hartmann, who resided in another Member State but worked in his Member State of nationality, was deemed to fall within the scope of the provisions of the Treaty on freedom of movement for workers and therefore also those of Regulation No 1612/68. (45) He could claim the status of migrant worker for the purposes of Regulation No 1612/68 and rely on

Article 7 on the same basis as any other worker to whom that provision applies. (46) The Court compared the treatment of a person in his situation (a worker having exercised the freedom of movement) with the treatment of national workers (that is, national workers who had *not* exercised rights of free movement and residence).

72. In that context, the Court has also referred to the fourth recital in the preamble to Regulation No 1612/68 which states that the right of freedom of movement is to be enjoyed 'without discrimination by permanent, seasonal and frontier workers …'. (47) A worker can likewise invoke Article 7 of Regulation No 1612/68 against his Member State of nationality where he has resided and been employed in another Member State. (48)

73. It thus appears that the concept of 'the national worker' in Article 7(2) of Regulation No 1612/68 should be understood to mean the national worker who has *not* exercised rights of free movement and residence, and that the standard of protection under that provision is equal treatment irrespective of nationality so as to promote the exercise of freedoms of movement and residence under EU law.

74. It follows that both Article 45 TFEU and Article 7(2) of Regulation No 1612/68 preclude a Member State from putting at a disadvantage workers (be they permanent, seasonal or frontier workers) (49) who have exercised rights of free movement and residence. Despite the literal text of Article 7(2) of Regulation No 1612/68, that provision and Article 45 TFEU thus preclude the Netherlands from denying study finance to the dependent child of a frontier worker holding Netherlands nationality on the basis of the three out of six years rule as long as he is a frontier worker. That is because the three out of six years rule puts a frontier worker at a disadvantage as compared to a national worker in similar circumstances.

Loss of worker status

75. I have already explained why I consider that the Court is *not* here required to decide whether (and, if so, to what extent) a person may continue to rely on (certain) provisions regarding the freedom of movement for workers after losing the status of migrant worker or frontier worker. (50) For the sake of completeness, I shall nevertheless address that question in the abstract.

76. As I see it, the question arises only where a person no longer exercises that freedom by working, genuinely seeking to work, (51) or otherwise remaining available for the job market in the host Member State. (52) That would be the case, for example, if a person in the situation of Mr Martens had ended his working life and retired (in Belgium or elsewhere).

77. In principle, such a person can no longer derive rights from his former worker status. (53) The loss of that status means the loss of the protection afforded by it under EU law. However, a mere change in employment may not end that protection. (54)

78. Where such an EU citizen continues to reside in the territory of the host Member State he can, in any event, rely on the principle of equal treatment in Article 24(1) of Directive 2004/38 which protects him by virtue of his EU citizenship. (55) In that context, the very fact that he was previously a worker and/or retained that status may be the basis for the right to residence. (56) In addition, EU legislation may itself provide that rights result from or are attached to former worker status. (57)

79. The Court has also accepted that the status of former migrant or frontier worker may produce effects after the employment relationship itself has ended. (58) That (greater) protection may still apply notwithstanding that such a person may be protected by EU citizenship rights once he is no longer economically active. Freedom of movement for workers offers greater protection. Specifically, as regards study finance, the Court has held that, for as long as the parent enjoys the status of a migrant worker or frontier worker, a Member State cannot apply a residence condition and rely on the objective of avoiding an unreasonable financial burden as an overriding reason relating to the public interest which is capable of justifying unequal treatment of national workers and frontier and migrant workers. (59) Thus, it cannot adopt a measure such as a residence condition in order to limit the financial solidarity that is to be

shown to migrant workers and frontier workers as compared to national workers. As a result, unlike the justification of such a measure on the basis of the *same objective* in the context of EU citizenship rights, questions regarding the proportionality of such a condition do not arise. (60)

80. In what circumstances should a former frontier worker or former migrant worker continue to be protected by rights of free movement for workers (that is, to enjoy protection other than that explicitly conferred by legislation)?

81. It is clear why the effects of certain social advantages must continue irrespective of the place of residence. That is, most obviously, so where the advantage is intrinsically linked with the termination of an employment relationship or the working life of a worker. (61) Thus, compensation upon termination of an employment contract is by definition available only to a person who was previously, but is no longer, employed. In those circumstances, it must be possible to rely on the former worker status. Secondary legislation confirms that position. (62)

82. Where the event or situation with respect to which a social advantage is granted occurs after the end of the employment relationship and is *not* connected with that fact or with the worker's former occupation, it is in principle not possible to continue to rely on, for example, Article 7(2) of Regulation No 1612/68 or Article 45 TFEU. (63) Thus, where the former worker himself subsequently studies in the host Member State, the Court has held that he retains his worker status and therefore can, in seeking access to maintenance and training grants, rely on Article 7(2) of Regulation No 1612/68 provided that there is a connection between the previous occupational activity and the studies pursued. (64) By contrast, where the previous employment relationship is merely ancillary to the studies to be financed by the grant, he does not retain his worker status and such reliance is not possible. (65) Exceptionally, where a worker has become involuntarily unemployed and is obliged by the conditions on the labour market to undertake vocational retraining in a different field of activity, no connection with former employment is required. (66)

83. What if the event or situation triggering the need to access the social advantage occurred prior to the loss of the frontier worker or migrant worker status, but then continues after the loss of that status?

84. That will depend again, I think, on the scope of the advantage and the reason why it is granted.

85. In this context, several parties have relied on the judgment in *Fahmi and Esmoris Cerdeiro-Pinedo Amado*. I shall therefore examine that case in some detail.

86. The Court there found that no special circumstance justified departing from the principle that loss of frontier worker status or migrant worker status means loss of protection associated with that status in circumstances where a former worker (who was no longer resident in the host Member State) tried to rely on the freedom of movement for workers in order to obtain from the latter study finance under the same conditions as those applied by that State to its own nationals. (67)

87. On its facts, that case concerned a former worker who had enjoyed a child allowance, stopped working, obtained an invalidity allowance and then, as a result of a legislative reform whereby the right to receive a child allowance was transformed into an entitlement to receive a study grant, (68) lost that allowance because her daughter finished her secondary education and therefore no longer satisfied the condition of the transitional arrangement that children must continue to follow the same type of education as they were following on 1 October 1995.

88. The Court said that it could not be claimed that conditions for accessing study finance are capable of impeding rights under Article 45 TFEU in circumstances where a migrant worker has ceased to work and returned to his Member State of origin where his children also live. (69) In reaching that conclusion, the Court confirmed that (i) Article 7(2) of Regulation No 1612/68 should not be read as meaning that former workers can rely on it in order to seek access without discrimination to the social benefits granted by the host Member States; (70) but that (ii) effects could continue where the advantage is intrinsically linked with the termination of an employment relationship or working life of a worker (71) and where legislation expressly provides for them. (72)

89. Shortly thereafter, in *Leclere and Deaconescu*, the Court accepted that, where a worker has ceased to pursue his occupation, 'he continues to be entitled to *certain* advantages acquired by virtue of his employment relationship'. (73) In that case, Advocate General Jacobs took the view that what matters is whether a former national worker (who did not exercise rights of free movement) is granted the advantage because of his status as a former worker *irrespective* of his residence. If the answer is 'no', then the former migrant worker or frontier worker can no longer rely on the protection afforded to that status. (74)

90. I conclude — and I emphasise again that I am dealing with this issue in the abstract — that a former worker is not entitled to continue to enjoy all advantages acquired during his employment relationship. The concept of 'social advantage' in Article 7(2) of Regulation No 1612/68 is very wide and covers benefits that may or may not be linked to the contract of employment and which are granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory. (75) A former worker can continue to invoke free movement rights for workers in respect of those social advantages that are linked to his former employment relationship. However, portable study finance such as MNSF is generally not given to workers (or their dependent children) because of their employment relationship. It is a social advantage which the Netherlands has made available to all EU citizens who wish to study outside the Netherlands and who are sufficiently integrated in the Netherlands. EU law therefore precludes the Netherlands from denying such an advantage to EU citizens who have exercised freedom of movement for workers (because their objective status as workers is evidence of integration from the outset).

91. This also means, as Advocate General Jacobs pointed out, (76) that where a Member State continues to provide a social advantage to former workers despite the end of their employment relationship and irrespective of residence, it cannot discriminate against former workers who are nationals of other Member States or who have exercised the freedom of movement for workers. In that context, a former frontier worker or former migrant worker may continue to rely on the protection guaranteed by Article 7(2) of Regulation No 1612/68 with respect to advantages acquired before the end of his frontier worker status or migrant worker status.

92. Thus, it is for a Member State to decide whether (national) former workers continue to enjoy a social advantage such as study finance after the end of the employment relationship because of their former employment. If that is the case, a Member State cannot treat less favourably those workers who are nationals of another Member State and/or have exercised their freedom of movement for workers.

Article 12 of Regulation No 1612/68

93. Despite the fact that the referring court only seeks guidance on Article 45 TFEU and Article 7 of Regulation No 1612/68, all the parties have also discussed Article 12 of that regulation in the context of their answer to the first question (including whether it can apply at all to the child of a frontier worker). For the sake of completeness, I shall conclude this part of my Opinion by dealing with that provision.

94. Article 12 gives a separate, distinct entitlement to children of workers who work or have worked in the territory of another Member State. (77) It guarantees them access to, inter alia, the general educational courses in the Member State where their parent is or was employed (thus, is or was a migrant worker) under the same conditions as nationals of that State, provided that they are residing in the territory of the host Member State. (78) Thus, children in that situation can undertake and, where appropriate, complete their education in the host Member State. (79) They may also rely on Article 12 where the host Member State offers its nationals the opportunity to obtain a grant in respect of education or training provided abroad. (80) To rely on Article 12, a claimant does not have to be the dependent child of a migrant worker, to show that his parents both have a right of residence in the host Member State or to prove that his parents continue to be migrant workers. (81) Nor do his parents have to remain married or both be EU citizens. (82) What matters is that the child lived with his parents (or with either parent) in the host Member State while at least one of the parents resided there as a worker. (83) In that manner, Article 12 contributes to the overall aim of Regulation No 1612/68 to bring about the best possible conditions for the integration of the migrant worker's family in the society of the host Member State. (84) A child of a migrant worker must have the possibility of going to school and continuing his or her education in the host Member State in order to be able to complete that education successfully. (85) For that

reason, the right of access to education and the associated right of residence continue until the child has completed his or her education. (86)

95. However, by definition a frontier worker does *not* reside *and* work in the host Member State.

96. Thus, the literal text of Article 12 indicates that it does not apply to children of frontier workers. However, such a reading appears difficult to reconcile with the principle that migrant and frontier workers are to be treated in the same manner, which follows from the fourth recital in the preamble to Regulation No 1612/68 as well as well-established case-law on the freedom of movement for workers. (87)

97. In any event, even if the (frontier worker) parent does not have to reside in the host Member State in order to trigger Article 12 of Regulation No 1612/68 (a point that I expressly leave open), the child does — it seems to me — have to have shown some attachment to or integration in the host Member State through residence or studies there. I do not here express a concluded view on precisely how this boundary should be delineated. In the present case, Miss Martens has not resided in the Netherlands while her father was a frontier worker there and she applied for funding to study at an educational institution outside the Netherlands.

98. I conclude that Article 12 of Regulation No 1612/68 is not of relevance to the present case.

Question 2: rights of free movement and residence of EU citizens

99. I do not think that it is necessary for the Court to answer the second question regarding EU citizenship. Articles 20 and 21(1) TFEU find specific expression in Article 45 TFEU as regards the freedom of movement for workers; (88) and Mr Martens may continue to rely on the latter provision. Should the Court disagree and decide to answer the second question, I consider that existing case-law provides the necessary elements for offering guidance to the referring court.

100. The judgment in Case C-542/09 did not examine the application of the three out of six years rule to dependent children of Netherlands nationals who are neither economically active in the Netherlands nor resident there. However, the Court has considered similar measures on subsequent occasions within the context of EU citizenship rights, particularly in references involving German nationals living outside Germany who have applied for study finance in Germany. (89)

101. In essence, the Court has held that Member States which make available education or training grants for studies in another Member State must ensure that the detailed rules for the award of those grants do not create an unjustified restriction of the right to move and reside within the territory of the Member States laid down in Article 21 TFEU. (90) A condition requiring uninterrupted residence during a defined period has been held to be such a restriction: it is likely to dissuade nationals from exercising their right to freedom of movement and residence in another Member State, because if they do so they are likely to lose the right to the education or training grant. (91)

102. In examining whether such a restriction can be justified on the basis of objective considerations of public interest (irrespective of nationality) and the proportionality of the measure at issue in relation to the legitimate objective it pursues, the Court has explained that it is legitimate for Member States to make financial support for the entire course of studies abroad dependent on the condition that students demonstrate a sufficient level of integration in the Member State providing the funding. (92) That objective has been described by the Court as a means to another end, namely avoiding placing an unreasonable burden on the financing Member State which could have consequences for the overall level of assistance which may be granted by that State. (93) However, a sole condition of uninterrupted residence during a defined period has been held to be too general and exclusive and to go beyond what is necessary to achieve the objective pursued; it was therefore not regarded as proportionate. (94) Other factors could also demonstrate the existence of a sufficient degree of connection to the financing Member State, such as nationality, education, family, employment, language skills or the existence of other social and economic factors. (95)

103. Thus, even where an EU citizen is not (or is no longer) economically active, employment and family can

demonstrate a connection to a Member State from which funding is requested. That covers in particular the (past) employment of the student concerned but potentially also the current or past employment of the family members on whom the student depends (typically parents). (96) Since the degree of connection is merely a condition used to limit the group of beneficiaries in order to avoid the risk of creating an unreasonable financial burden on the financing Member State, I consider that the fact that the parent has contributed in the past to the public purse cannot be ignored.

104. In certain circumstances, it is possible that the place and type of study can also be instructive in assessing whether an EU citizen shows a sufficient degree of connection with the financing Member State; but I regard that as an additional, rather than a mandatory, element.

105. In the present case, Miss Martens is, through her nationality, a citizen of the Union who exercised her freedom to move and reside within the territory of the Member States when she moved as a young child with her parents from the Netherlands to Belgium. She can accordingly rely on Articles 20 and 21 TFEU, even against her Member State of nationality (the Netherlands).

106. The mere fact that some considerable time has elapsed since she exercised those free movement rights cannot in itself affect the question whether rights can be derived from Articles 20 and 21 TFEU in circumstances where there has been a continuing exercise of the right to reside in another Member State. (97)

107. Whilst it might be true that MNSF did not yet exist at the time when Miss Martens and her family moved to Belgium (and for that reason did not restrict the exercise of their free movement rights at that time), the application of the three out of six years rule none the less puts her at a disadvantage because of her continuing residence outside the Netherlands.

108. The Netherlands must give the same treatment in law irrespective of applicants' nationality in deciding who obtains the funding which it makes available for studies, whether that be in other Member States or outside the European Union. And, in making that decision, it must not put at a disadvantage applicants who have exercised their rights to move to and reside in another Member State. In *D'Hoop*, the Court explained unequivocally that 'it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement'. (98) In such circumstances, the Member State would in fact penalise its national for having exercised his right to freedom of movement. (99)

109. The application of the three out of six years rule to Miss Martens has exactly that effect. Miss Martens cannot satisfy that rule because, having moved to Belgium from the Netherlands as a young child, she continued to reside in Belgium at least up to the point when she enrolled at the University of the Netherlands Antilles.

110. In order to justify the three out of six years rule, the Netherlands relies on the Court's recognition that Member States may grant that assistance only to students who have demonstrated a certain degree of integration into the society of that State. (100)

111. Whilst the Court has indeed recognised that objective, it has also made clear that the use of only residence as a criterion is too exclusive and general. In my opinion, it makes no difference in that regard that, unlike the German residence condition at issue in cases such as *Prinz* and *Thiele Meneses*, the Wsf 2000 does not require a student to have resided in the Netherlands for an uninterrupted period of three years immediately prior to starting education abroad. That distinction does not alter the absolute and exclusive character of the residence condition.

112. For the sake of completeness I note that the three out of six years rule is not an absolute rule (because it is possible for the Minister to override it by applying the hardship clause). (101) However, the Court has little or no information as to the scope and operation of that clause. In any event, the fact that ministerial discretion can be exercised so as not to apply an unjustified restriction of EU citizenship rights in certain circumstances does not alter the analysis. What is precluded by EU law is precluded. (The same applies in respect of the exception for (the children of) frontier workers

and persons with Netherlands nationality who live in a border region and want to study at an educational institution there.)

Conclusion

113. In the light of all the above considerations, I am of the opinion that the Court should answer the questions raised by the Centrale Raad van Beroep to the following effect:

Article 45 TFEU and Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community preclude the Netherlands from denying study finance to the dependent child of a frontier worker holding Netherlands nationality on the basis of the three out of six years rule as long as he is a frontier worker. Where that frontier worker ends his employment in the Netherlands and exercises his freedom of movement for workers in order to take up full-time employment in another Member State, and irrespective of his place of residence, Article 45 TFEU precludes the Netherlands from applying measures which, unless they can be objectively justified, have the effect of discouraging such a worker from exercising his rights under Article 45 TFEU and causing him to lose, as a consequence of the exercise of his free movement rights, social advantages guaranteed them by Netherlands legislation, such as portable study finance for his dependent child.

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1 – Original language: English.

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2 – EU:C:2012:346.

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3 – Regulation of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475). Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1) repealed Regulation No 1612/68 with effect from 16 June 2011 (and thus after the relevant facts at issue in the present case). In any event, the texts of Articles 7(2) and 12 of Regulation No 1612/68 remain unchanged in Regulation No 492/2011 and therefore I refer to both provisions in the present tense.

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4 – See Article 1 of the Statuut voor het Koninkrijk der Nederlanden (point 14 below).

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5 – Annex II, Overseas countries and territories to which the provisions of Part Four of the Treaty on the Functioning of the European Union apply (OJ 2012 C 326, p. 336).

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6 – The legislation adopted under Article 203 TFEU does not provide guidance on whether Mr Martens and his daughter can rely on EU law in the present case.

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7 – Directive of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, OJ 2005 L 197, p. 34 and OJ 2007 L 204, p. 28).

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8 – The other components of the Netherlands Antilles listed in Annex II to the TFEU (namely Bonaire, Saint Eustatius and Saba) appear to have a slightly different status under the Charter.

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9 – This category is wider than that of frontier workers. The latter work in one Member State and reside in a border region of a neighbouring Member State. By contrast, the former also covers those workers who work in one Member State and reside in another Member State but not just in a border region of a neighbouring Member State. See also, for example, judgment in *S*, C-457/12, EU:C:2014:136, paragraphs 38 and 39.

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10 – Those regions are Flanders and the Brussels-Capital Region in Belgium, and North-Rhine Westphalia, Lower Saxony and Bremen in Germany.

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11 – EU:C:2012:346.

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12 – See also points 19 and 20 above.

13 – See points 17 and 24 above.

14 – See, for example, judgment in *Prinz*, C-523/11 and C-585/11, EU:C:2013:524, paragraph 26 and case-law cited.

15 – See, for example, judgment in *Morgan and Bucher*, C-11/06 and C-12/06, EU:C:2007:626, paragraph 28 and case-law cited; judgment in *Prinz*, EU:C:2013:524, paragraph 30 and case-law cited; and judgment in *Elrick*, C-275/12, EU:C:2013:684, paragraph 25.

16 – See, for example, the judgment in *Förster*, C-158/07, EU:C:2008:630.

17 – See also point 90 below.

18 – Judgment in *Commission* v *Netherlands*, EU:C:2012:346, paragraphs 34, 35 and 48 and case-law cited.

19 – On the relation between Articles 21 and 45 TFEU, see, for example, the judgment in *Caves Krier Frères*, C-379/11, EU:C:2012:798, paragraph 30 and case-law cited.

20 – See point 15 above. Had the Minister considered that Miss Martens' course of study was 'in the Netherlands' rather than elsewhere (so that she required portable study finance), she would automatically, as a Netherlands national, have been eligible for funding.

21 – See, for example, judgment in *X and TBG*, C-24/12 and C-27/12, EU:C:2014:1385, paragraph 45 and case-law cited.

22 – Thus, for example, there is no express provision on movements of capital between Member States and OCTs. However, the free movement of capital is expressed in a provision (Article 63 TFEU) which has an unlimited territorial scope and therefore necessarily applies to movements of capital to and from OCTs in their capacity as non-Member States. See, for example, judgment in *Prunus*, C-384/09, EU:C:2011:276, paragraphs 20 and 31.

23 – See judgment in *Prunus*, EU:C:2011:276, paragraph 29 and case-law cited.

24 – It is not clear from the order for reference whether she became resident in Curaçao when she started her studies there; or whether she remained legally resident in Belgium.

25 – See also point 106 below.

26 – See judgment in *Commission* v *Netherlands*, EU:C:2012:346, paragraph 64.

27 – See, for example, judgment in *Gouvernement de la Communauté française and Gouvernement wallon*, C-212/06, EU:C:2008:178, paragraph 44 and case-law cited.

28 – See, for example, judgment in *Gouvernement de la Communauté française and Gouvernement wallon*, EU:C:2008:178, paragraph 45 and case-law cited.

29 – See, for example, judgment in *Gouvernement de la Communauté française and Gouvernement wallon*, EU:C:2008:178, paragraph 46 and case-law cited.

30 – See, for example, judgment in *Terhoeve*, C-18/95, EU:C:1999:22, paragraphs 38 and 39 and case-law cited.

31 – Article 7(3) of Directive 2004/38 sets out the circumstances in which an EU citizen retains the status of worker or self-employed person for the purposes of Article 7(1), namely with regard to their being able to claim the right of residence on the territory of the host Member State for a period of longer than three months.

32 – Mr Martens is thus *not* in the same position as Mrs Esmoris Cerdeiro-Pinedo Amado. In the judgment in *Fahmi and Esmoris Cerdeiro-Pinedo Amado*, C-33/99, EU:C:2001:176, the Court held that that lady could not rely on Article 7(2) of Regulation No 1612/68 in order to claim maintenance of a social advantage such as study finance because she has ceased to exercise an activity in the host Member State and returned to her Member State of origin (paragraphs 46 and 47). However, unlike Mr Martens,

Mrs Esmoris Cerdeiro-Pinedo Amado did not exercise the freedom of movement for workers in moving (back to) to her Member State of origin.

33 – An obstacle to the freedom of movement for workers can be accepted if it pursues a legitimate aim compatible with the Treaties and is justified by overriding reasons in the public interest. The measure must also be appropriate for achieving the objective in question and not go beyond what is necessary for that purpose. See, for example, judgment in *Olympique Lyonnais*, C-325/08, EU:C:2010:143, paragraph 38 and case-law cited. However, no material in support of an objective justification under Article 45 TFEU for such an obstacle has been put before the Court in the present case.

34 – Judgment in *Commission* v *Netherlands*, EU:C:2012:346, paragraphs 32 and 33 and case-law cited.

35 – Judgment in *Commission* v *Netherlands*, EU:C:2012:346, paragraph 38 and case-law cited (emphasis added). See also, for example, judgment in *Giersch and Others*, C-20/12, EU:C:2013:411, paragraph 44.

36 – Judgment in *Commission* v *Netherlands*, EU:C:2012:346, paragraph 38 and case-law cited. See also, for example, judgment in *Giersch and Others*, EU:C:2013:411, paragraph 45.

37 – Judgment in *Commission* v *Netherlands*, EU:C:2012:346, paragraph 44.

38 – See, for example, the first and second recitals in the preamble to Regulation No 1612/68. As regards Article 7(2) of Regulation No 1612/68, see, for example, judgment in *Hendrix*, C-287/05, EU:C:2007:494, paragraph 53.

39 – See, for example, judgment in *Giersch and Others*, EU:C:2013:411, paragraph 37 and case-law cited.

40 – See judgment in *Commission* v *Netherlands*, EU:C:2012:346, paragraph 48 and case-law cited.

41 – See, for example, judgment in *Meeusen*, C-337/97, EU:C:1999:284, paragraph 25.

42 – Advocate General Kokott has remarked that, despite the fact that (the text of) Article 7(2) of Regulation No 1612/68 seems to fall short of the guarantee provided by Article 45 TFEU, the Court applies Article 7(2) and Article 45 in parallel and interprets Article 7 in the same manner as Article 45: see Opinion in *Hendrix*, C-287/05, EU:C:2007:196, point 31.

43 – See judgment in *Hartmann*, C-212/05, EU:C:2007:437, paragraph 17 (emphasis added) where the Court summarised its position in judgment in *Ritter-Coulais*, C-152/03, EU:C:2006:123, paragraphs 31 and 32. There, Mr Hartmann had merely transferred his residence to another Member State. In the present case, Mr Martens first moved both his residence and employment to another Member State and then moved again by going to the Netherlands to carry on a part-time occupation there whilst remaining resident in Belgium. See also, for example, judgment in *Hendrix*, EU:C:2007:494, paragraph 46: Mr Hendrix, a Netherlands national, worked and resided in the Netherlands; he then changed his residence to another Member State and then changed employment in the Netherlands. See likewise, for example, judgment in *Gouvernement de la Communauté française and Gouvernement wallon*, EU:C:2008:178, paragraph 34 and case-law cited; judgment in *Caves Krier Frères*, EU:C:2012:798, paragraph 25 and case-law cited; and judgment in *Saint Prix*, C-507/12, EU:C:2014:2007, paragraph 34 and case-law cited.

44 – Judgment in *Hartmann*, EU:C:2007:437, paragraph 19.

45 – Judgment in *Hartmann*, EU:C:2007:437, paragraph 19 and case-law cited.

46 – Judgment in *Hartmann*, EU:C:2007:437, paragraph 24 and case-law cited.

47 – Judgment in *Hartmann*, EU:C:2007:437, paragraph 24 and case-law cited; see also, for example, judgment in *Hendrix*, EU:C:2007:494, paragraph 47.

48 – See, for example, judgment in *Terhoeve*, EU:C:1999:22, paragraphs 28 and 29. In that case, however, the Court found that the measure at issue constituted an obstacle to freedom of movement for workers under (what is now) Article 45 TFEU, and therefore it was unnecessary to consider whether there was also indirect discrimination on grounds of nationality under (what is now) Articles 18 and 45 TFEU and under Article 7(2) of Regulation No 1612/68 (see paragraph 41).

49 – See the fourth recital in the preamble to Regulation No 1612/68.

50 – See points 52 to 57 above.

51 – The Court has repeatedly said that a person who is genuinely seeking work is a worker: see, for example, judgment in *Martínez Sala*, C-85/96, EU:C:1998:217, paragraph 32 and case-law cited. Thus, the situation of such a person is different from a frontier or migrant worker who has lost that status and who is *not* seeking work.

52 – See, for example, judgment in *Saint Prix*, EU:C:2014:2007, paragraph 41 and case-law cited.

53 – Thus (for example), a worker residing in his Member State of nationality who, after retirement, changes residence to another Member State without any intention of working in that other State cannot rely on the right of freedom of movement for workers: see judgment in *van Delft and Others* C-345/09, EU:C:2010:610, paragraph 90 and case-law cited.

54 – For an illustration, see points 53 to 58 above.

55 – See Article 24(1) of Directive 2004/38.

56 – See, for example, Articles 7(3), 17 and 24(2) of Directive 2004/38.

57 – See, for example, Article 12 of Regulation No 1612/68.

58 – See, for example, judgment in *Saint Prix*, EU:C:2014:2007, paragraph 35 and case-law cited, and judgment in *Caves Krier Frères*, EU:C:2012:798, paragraph 26 and case-law cited.

59 – See judgment in *Commission* v *Netherlands*, EU:C:2012:346, paragraph 69.

60 – See also point 102 below.

61 – See, for example, judgment in *Leclere and Deaconescu*, C-43/99, EU:C:2001:303, paragraphs 56 and 57 and case-law cited.

62 – See, for example, Article 7(1) of Regulation No 1612/68 which provides for an equal treatment standard as regards '… any conditions of employment and work, in particular as regards remuneration, dismissal, and should [the worker who is a national of a Member State] become unemployed, reinstatement and re-employment'.

63 – See, for example, judgment in *Leclere and Deaconescu*, EU:C:2001:303, paragraphs 58 and 59 and case-law cited.

64 – See, for example, judgment in *Lair*, 39/86, EU:C:1988:322, paragraph 39.

65 – See, for example, judgment in *Brown*, 197/86, EU:C:1988:323, paragraphs 27 and 28.

66 – See, for example, judgment in *Raulin*, C-357/89, EU:C:1992:87, paragraph 21. That principle is also reflected in Article 7(3) of Directive 2004/38.

67 – Judgment in *Fahmi and Esmoris Cerdeiro-Pinedo Amado*, EU:C:2001:176, paragraph 51.

68 – What was at issue in that case was also MNSF, albeit at an earlier stage of its evolution.

69 – Judgment in *Fahmi and Esmoris Cerdeiro-Pinedo Amado*, EU:C:2001:176, paragraph 43.

70 – Judgment in *Fahmi and Esmoris Cerdeiro-Pinedo Amado*, EU:C:2001:176, paragraphs 46 and 47.

71 – Judgment in *Fahmi and Esmoris Cerdeiro-Pinedo Amado*, EU:C:2001:176, paragraph 47. See also point 81 above.

72 – Judgment in *Fahmi and Esmoris Cerdeiro-Pinedo Amado*, EU:C:2001:176, paragraph 49.

73 – See judgment in *Leclere and Deaconescu*, EU:C:2001:303, paragraph 58 (emphasis added). I do not consider, however, that the mere fact that a person continues to receive the advantage necessarily means that he must be regarded as still having the status of worker within the meaning of Regulation No 1612/68 (see, in that regard, paragraph 59 of the judgment).

74 – Opinion in *Leclere and Deaconescu*, C-43/99, EU:C:2001:97, point 98.

75 – See, for example, judgment in *Even and ONPTS*, 207/78, EU:C:1979:144, paragraph 22.

76 – Opinion in *Leclere and Deaconescu*, EU:C:2001:97, point 98.

77 – See point 36 of my Opinion in *Commission* v *Netherlands*, C-542/09, EU:C:2012:79; see also paragraph 49 of the judgment in that case, EU:C:2012:346.

78 – See, for example, judgment in *Teixeira*, C-480/08, EU:C:2010:83, paragraphs 44 and 45.

79 – See, for example, judgment in *Baumbast and R*, C-413/99, EU:C:2002:493, paragraph 69.

80 – See, for example, judgment in *di Leo*, C-308/89, EU:C:1990:400, paragraphs 12 and 15.

81 – See judgment in *Commission* v *Netherlands*, EU:C:2012:346, paragraph 49 and case-law cited.

82 – See also, for example, judgment in *Ibrahim*, C-310/08, EU:C:2010:80, paragraph 29 and case-law cited.

83 – See judgment in *Commission* v *Netherlands*, EU:C:2012:346, paragraph 50 and case-law cited. See also, for example, judgment in *Ibrahim*, EU:C:2010:80, paragraph 29 and case-law cited; judgment in *Czop and Punakova*, C-147/11 and C-148/11, EU:C:2012:538, paragraph 26.

84 – See, for example, judgment in *Hadj Ahmed*, C-45/12, EU:C:2013:390, paragraphs 44 and 45 and case-law cited.

85 – See, for example, judgment in *Hadj Ahmed*, EU:C:2013:390, paragraph 45 and case-law cited.

86 – See, for example, judgment in *Alarape and Tijani*, C-529/11, EU:C:2013:290, paragraph 24 and case-law cited.

87 – See, for example, judgment in *Giersch and Others*, EU:C:2013:411, paragraph 37 and case-law cited. I do not explore further here on whether or not the Court's analysis of the possible justification of the discriminatory treatment in that case undermines the principle of equal treatment of migrant workers and frontier workers.

88 – See, for example, judgment in *S*, EU:C:2014:136, paragraph 45 and case-law cited.

89 – See, for example, judgment in *Thiele Meneses*, C-220/12, EU:C:2013:683; judgment in *Elrick*, EU:C:2013:684; and judgment in *Prinz*, EU:C:2013:524.

90 – See, for example, judgment in *Thiele Meneses*, EU:C:2013:683, paragraph 25; judgment in *Elrick*, EU:C:2013:684, paragraph 25; and judgment in *Prinz*, EU:C:2013:524, paragraph 30 and case-law cited.

91 – See, for example, judgment in *Thiele Meneses*, EU:C:2013:683, paragraphs 27 and 28; and judgment in *Prinz*, EU:C:2013:524, paragraphs 31 and 32.

92 – See, for example, judgment in *Thiele Meneses*, EU:C:2013:683, paragraph 35; judgment in *Prinz*, EU:C:2013:524, paragraph 36 and case-law cited. This justification is not available where the claim to funding is made through Article 45 TFEU and/or Article 7(2) of Regulation No 1612/68: see point 79 above and case-law cited there.

93 – See, for example, judgment in *Thiele Meneses*, EU:C:2013:683, paragraph 35; judgment in *Prinz*, EU:C:2013:524, paragraph 36 and case-law cited. See also, on the description of that objective, points 65 to 72 of my Opinion in *Prinz*, C-523/11 and C-585/11, EU:C:2013:90.

94 – See, for example, judgment in *Thiele Meneses*, EU:C:2013:683, paragraph 38; judgment in *Prinz*, EU:C:2013:524, paragraph 40.

95 – See, for example, judgment in *Thiele Meneses*, EU:C:2013:683, paragraph 38; judgment in *Prinz*, EU:C:2013:524, paragraph 38.

96 – See also, for example, judgment in *Giersch and Others*, EU:C:2013:411, paragraph 78, and judgment in *Stewart*, C-503/09, EU:C:2011:500, paragraph 100. As I have already observed in my Opinion in *Prinz*, EU:C:2013:90, footnote 30, *Stewart* involved a different type of social advantage. None the less, with regard to the legitimate objective of ensuring that there is a genuine link between a claimant to a benefit and the competent Member State, the Court accepted that family circumstances (including where a claimant's parents had worked and received incapacity benefits and retirement pensions) could show elements capable of demonstrating the existence of such a genuine link.

97 – Thus, for example, Ms Nerkowska, a Polish national, left Poland in 1985 (after having studied and worked there for more than 20 years) in order to settle permanently in Germany. The Court accepted in Case C-499/06 that she could derive rights from her EU citizenship as regards a benefit for which she applied to the Polish authorities in 2000: see judgment in *Nerkowska*, C-499/06, EU:C:2008:300, paragraphs 11 and 12 (on the facts) and paragraph 47.

98 – Judgment in *D'Hoop*, C-224/98, EU:C:2002:432, paragraph 30.

99 – Judgment in *D'Hoop*, EU:C:2002:432, paragraph 31 and case-law cited. See also, for example, judgment in *Morgan and Bucher*, EU:C:2007:626, paragraph 26 and case-law cited; judgment in *Prinz*, EU:C:2013:524, paragraph 28.

100 – See point 102 above.

101 – See point 20 above.

B. Martens v Minister van Onderwijs, Cultuur en Wetenschap

JUDGMENT OF THE COURT (Third Chamber)

26 February 2015 (*)

(Reference for a preliminary ruling — Freedom of movement for persons — Articles 20 TFEU and 21 TFEU — National of a Member State — Residence in another Member State — Studies pursued in an overseas country or territory — Maintenance of the grant of funding for higher education — 'Three-out-of-six-years' residence rule — Restriction — Justification)

In Case C‑359/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Centrale Raad van Beroep (Netherlands), made by decision of 24 June 2013, received at the Court on 27 June 2013, in the proceedings

B. Martens

v

Minister van Onderwijs, Cultuur en Wetenschap,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, A. Ó Caoimh (Rapporteur), C. Toader, E. Jarašiūnas and C.G. Fernlund, Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 2 July 2014,

after considering the observations submitted on behalf of:

– the Netherlands Government, by M. Bulterman, B. Koopman and J. Langer, acting as Agents,

– the Danish Government, by C. Thorning and M. Søndhal Wolff, acting as Agents,

– the European Commission, by J. Enegren and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 September 2014

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 20 TFEU, 21 TFEU and 45 TFEU and Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

2 The request has been made in proceedings between Ms Martens and the Minister van Onderwijs, Cultuur en Wetenschap (Minister for Education, Culture and Science) ('the Minister') concerning a request by the latter for repayment of the funding for higher education ('the study finance') that had been granted to Ms Martens, on the ground that she did not satisfy the requirement laid down by the national legislation according to which she should have been resident in the Netherlands for a period of three out of the six years preceding her enrolment on a course outside the Netherlands ('the "three-out-of-six-years" rule').

Legal context

EU law

3 Article 7(1) and (2) of Regulation No 1612/68 provides:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment;

2. He shall enjoy the same social and tax advantages as national workers.'

Netherlands law

4 Article 2.2(1) of the Law on the financing of studies of 2000 (Wet studiefinanciering 2000), as amended on 11 October 2006, ('the WSF 2000'), is worded as follows:

'Study finance may be granted to the following:

(a) students who are Netherlands nationals;

(b) students who are non-Netherlands nationals but who, in the area of funding for studies, are treated as Netherlands nationals pursuant to a treaty or a decision of an international organisation, …

…'

5 Article 2.14 of the WSF 2000, as most recently amended by the Law of 15 December 2010 (Stb. 2010, No 807), provides:

'1. This article applies exclusively to students who were enrolled after 31 August 2007 on a higher education course at an institution outside the Netherlands …

2. Study finance may be granted to the following:

(a) students who have been enrolled on a course outside the Netherlands, provided that study finance is granted in the Netherlands for a similar category of course, that the level and quality of the course are comparable to those of corresponding courses … and that the final examination for the course is comparable to that of corresponding courses …

(b) students who have been enrolled on a course outside the Netherlands who, without prejudice to what is laid down in (a), otherwise meet the criteria laid down by ministerial order, and

(c) students who have resided in the Netherlands during at least three out of the six years preceding their enrolment on that course and who during that period were lawfully resident there. The period during which a student is enrolled on a course outside the Netherlands, as referred to in (a), does not count towards the calculation of the six years referred to in the previous sentence.

…'

6 Under Article 11.5 of the WSF 2000, the Minister may derogate from the three-out-of-six-years rule provided for in Article 2.14(2)(c) of that law, in so far as the application of that rule would lead to a grave injustice.

7 Article 12.3 of the WSF 2000, which contains a transitional provision on the basis of Article 2.14 of that law, as amended as of 1 September 2007, provides:

'By derogation from Article 3.21(2) of the WSF 2000, students who, prior to 1 September 2007, were already enrolled on a higher education course outside the Netherlands and did not apply for study finance may …, with retroactive effect to 1 September 2007 at the latest, apply for study finance for a higher education course outside the Netherlands, if they submit an application to that effect by 31 August 2008 at the latest.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 The appellant in the main proceedings, a Netherlands national who was born on 2 October 1987, moved with her parents, in June 1993, to Belgium, a Member State in which her father was employed, in which she attended Flemish primary and secondary schools and in which her family still resides.

9 On 15 August 2006, the appellant in the main proceedings enrolled at the University of the Netherlands Antilles in Willemstad (Curaçao) to study for a full-time degree.

10 During the period of October 2006 to October 2008, the father of the appellant in the main proceedings worked on a part-time basis in the Netherlands as a cross-border worker. As of November 2008 he began working full-time in Belgium again.

11 On 24 June 2008, the appellant in the main proceedings applied to the Minister for study finance. On the form which had to be filled out for that purpose, she confirmed, inter alia, that she had resided lawfully in the Netherlands for at least three of the six years preceding the beginning of her studies in Curaçao.

12 By decision of 22 August 2008, in accordance with the rule which applies to students who no longer live with their parents, the Minister granted the appellant in the main proceedings study finance as from September 2007, the deadline for the grant of retroactive funding laid down in Article 12.3 of the WSF 2000, in the form of a basic grant and a public transport allowance. That grant was periodically extended by the Minister. On 1 February 2009, the appellant in the main proceedings applied for and was granted an additional student loan.

13 By decisions of 28 May 2010, following a check relating to study finance, the Minister found that the appellant in the main proceedings had not resided in the Netherlands for at least three years in the period from August 2000 to July 2006 and that she did not, therefore, satisfy the three-out-of-six-years rule. Consequently, the Minister revoked the study finance previously granted to the appellant in the main proceedings, refused any further extensions of that funding and requested repayment of the funding which had been paid to her, that is to say the sum of EUR 19 481.64.

14 By decision of 27 August 2010, the Minister declared groundless the claims made in the administrative appeal which the appellant in the main proceedings had lodged against the decisions of 28 May 2010, by which Ms Martens maintained that the lack of a connection with the Netherlands could not sufficiently justify the fact that the study finance was not granted to her on account of non-compliance with the three-out-of-six-years rule. According to Ms Martens, students who satisfy that rule and who can therefore claim Dutch funding for education or training outside the Netherlands may have a significantly weaker link with that Member State than that which she had and still has.

15 The Rechtbank's-Gravenhage (District Court, The Hague) declared Ms Martens' appeal against the decision of 27 August 2010 to be unfounded.

16 In the course of the appeal proceedings, which the appellant in the main proceedings brought before the referring court against the judgment of the Rechtbank's-Gravenhage, the Minister stated that he would not apply the three-out-of-six-years rule with regard to Ms Martens in respect of the period from September 2007 to October 2008 on the ground that her father had worked part-time in the Netherlands during that period and that the requirements for entitlement to study finance were therefore satisfied. By contrast, he declared that the three-out-of-six-years rule remained applicable in respect of the period from November 2008 to June 2011 because her father was no longer, during that period, regarded as a cross-border worker in the Netherlands inasmuch as he had, as from November 2008, been working exclusively in Belgium.

17 It is apparent from the case-file submitted to the Court that, apart from the application for study finance, the parents of the appellant in the main proceedings bore the largest part of her maintenance and tuition costs during her course at the University of the Netherlands Antilles, a course which came to an end on 1 July 2011.

18 In those circumstances, the Centrale Raad van Beroep (Higher Social Security Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'(1) (a) Must EU law, in particular Article 45 TFEU and Article 7(2) of Regulation No 1612/68, be interpreted as precluding the Member State of the European Union (namely, the Kingdom of the Netherlands) from terminating the right to receive study finance for education or training outside the European Union of an adult dependent child of a frontier worker with Netherlands nationality who lives in Belgium and works partly in the Netherlands and partly in Belgium, at the point in time at which the frontier work ceases and work is then performed exclusively in Belgium, on the ground that the child does not meet the requirement that she must have lived in the Netherlands for at least three of the six years preceding her enrolment at the educational institution concerned?

(b) If Question (1)(a) must be answered in the affirmative: does EU law preclude the granting of study finance for a period shorter than the duration of the education or training for which study finance was granted, it being assumed that the other requirements governing eligibility for study finance have been satisfied?

If, in answering Questions (1)(a) and (b), the Court of Justice should conclude that the legislation governing the right of freedom of movement for workers does not preclude a decision not to grant Ms Martens any study finance during the period from November 2008 to June 2011 or for part of that period:

(2) Must Articles 20 TFEU and 21 TFEU be interpreted as precluding the Member State of the European Union (namely, the Kingdom of the Netherlands) from not extending the study finance for education or training at an educational institution which is established in the Overseas Countries and Territories (OCTs) (in the present case, in Curaçao), to which there was an entitlement because the father of the person concerned worked in the Netherlands as a frontier worker, on the ground that the person concerned does not meet the requirement, applicable to all European Union citizens, including its own nationals, that she must have lived in the Netherlands for at least three of the six years preceding her enrolment for that education or training?'

Consideration of the questions referred

19 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether EU law must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which makes the continued grant of funding for higher education outside that State subject to the rule that the student applying for such funding has resided in that Member State for a period of at least three out of the six years preceding his enrolment.

20 It must, first of all, be borne in mind that, as a Netherlands national, Ms Martens enjoys the status of citizen of the Union under Article 20(1) TFEU and may therefore rely on the rights conferred on those having that status, including against their Member State of origin (see judgments in Morgan and Bucher, C‑11/06 and C‑12/06, EU:C:2007:626, paragraph 22, and Prinz and Seeberger, C‑523/11 and C‑585/11, EU:C:2013:524, paragraph 23 and the case-law cited).

21 As the Court has held on numerous occasions, the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to enjoy, within the scope ratione materiae of the FEU Treaty, the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for in that regard (judgments in D'Hoop, C‑224/98, EU:C:2002:432, paragraph 28, and Prinz and Seeberger, EU:C:2013:524, paragraph 24 and the case-law cited).

22 The situations falling within the scope of EU law include those involving the exercise of the fundamental freedoms guaranteed by the Treaty, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Article 21 TFEU (judgments in Morgan and Bucher, EU:C:2007:626, paragraph 23, and Prinz and Seeberger, EU:C:2013:524, paragraph 25 and the case-law cited).

23 In that respect, it must be stated that, although the Member States are competent, under Article 165(1) TFEU, as regards the content of teaching and the organisation of their respective education systems, they must exercise that competence in compliance with EU law and, in particular, in compliance with the Treaty provisions on the freedom to move and reside within the territory of the Member States, as conferred by Article 21(1) TFEU on every citizen of the Union (judgments in Morgan and Bucher, EU:C:2007:626, paragraph 24, and Prinz and Seeberger, EU:C:2013:524, paragraph 26 and the case-law cited).

24 Moreover, EU law does not impose any obligation on Member States to provide a system of funding for higher education pursued in a Member State or abroad. However, where a Member State provides for such a system which enables students to receive such grants, it must ensure that the detailed rules for the award of that funding do not create an unjustified restriction of the right to move and reside within the territory of the Member States (see, to that effect, judgments in Morgan and Bucher, EU:C:2007:626, paragraph 28; Prinz and Seeberger, EU:C:2013:524, paragraph 30; and Thiele Meneses, C‑220/12, EU:C:2013:683, paragraph 25).

25 In that regard, it is apparent from settled case-law that national legislation which places certain nationals at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State constitutes a restriction on the freedoms conferred by Article 21(1) TFEU on every citizen of the Union (judgments in Morgan and Bucher, EU:C:2007:626, paragraph 25, and Prinz and Seeberger, EU:C:2013:524, paragraph 27).

26 Indeed, the opportunities offered by the Treaty in relation to freedom of movement for citizens of the Union cannot be fully effective if a national of a Member State could be dissuaded from using them by obstacles resulting from his stay in another Member State because of legislation of his State of origin penalising the mere fact that he has used those opportunities (see, to that effect, judgments in Morgan and Bucher, EU:C:2007:626, paragraph 26, and Prinz and Seeberger, EU:C:2013:524, paragraph 28).

27 That consideration is particularly important in the field of education in view of the aims pursued by Article 6(e) TFEU and the second indent of Article 165(2) TFEU, namely, inter alia, encouraging mobility of students and teachers (see judgments in D'Hoop, EU:C:2002:432, paragraph 32; Morgan and Bucher, EU:C:2007:626, paragraph 27; and Prinz and Seeberger, EU:C:2013:524, paragraph 29).

28 In the present case, it is common ground that the appellant in the main proceedings moved to Belgium where her father was working and that she subsequently attended Flemish primary and secondary schools. In August 2006, at the age of 18, she began her studies at the University of the Netherlands Antilles in Willemstad, a course which she completed on 1 July 2011. As was confirmed by the Netherlands Government at the hearing, Ms Martens was entitled

to funding to study in Curaçao by reason of the option provided for by the WSF 2000 which enabled any student who satisfied the three-out-of-six-years rule to obtain such funding in order to study abroad. Ms Martens herself informed the Netherlands authorities, when she submitted her application for funding in May 2008, that she satisfied that rule. Ms Martens has been working in the Netherlands since finishing her studies.

29 According to the Netherlands Government, there is no restriction on the rights of free movement of the appellant in the main proceedings because she did not, by moving from Belgium to Curaçao, exercise the right granted to her by Article 20(2)(a) TFEU to move and reside freely within the territory of the Member States.

30 That argument cannot succeed as it fails to take account of the fact that the appellant in the main proceedings exercised her rights to move freely by moving from the Netherlands to Belgium with her family in 1993 and continued to exercise those rights throughout the period during which she lived in Belgium.

31 By making the continued grant of funding for studies abroad subject to the three-out-of-six-years rule, the legislation at issue in the main proceedings is liable to penalise an applicant merely because he has exercised his right to freedom of movement and residence in another Member State, given the effect that exercising that freedom is likely to have on the possibility of receiving funding for higher education (see, to that effect, judgments in D'Hoop, EU:C:2002:432, paragraph 30; Prinz and Seeberger, EU:C:2013:524, paragraph 32; and Thiele Meneses, EU:C:2013:683, paragraph 28).

32 As the Advocate General stated at point 106 of her Opinion, it is, in that regard, irrelevant that considerable time has elapsed since the appellant in the main proceedings exercised her free movement rights (see, by analogy, judgment in Nerkowska, C‑499/06, EU:C:2008:300, paragraph 47).

33 It must therefore be held that the three-out-of-six-years rule, as laid down in Article 2.14(2) of the WSF 2000, even though it applies without distinction to Netherlands nationals and other European Union citizens, constitutes a restriction on the right to freedom of movement and residence enjoyed by all citizens of the Union pursuant to Article 21 TFEU (see, to that effect, judgment in Prinz and Seeberger, EU:C:2013:524, paragraph 31).

34 The restriction resulting from the legislation at issue in the main proceedings can be justified in the light of EU law only if it is based on objective considerations of public interest independent of the nationality of the persons concerned and if it is proportionate to a legitimate objective pursued by the provisions of national law. It follows from the case-law of the Court that a measure is proportionate if, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to attain that objective (judgments in De Cuyper, C‑406/04, EU:C:2006:491, paragraphs 40 and 42; Morgan and Bucher, EU:C:2007:626, paragraph 33; and Prinz and Seeberger, EU:C:2013:524, paragraph 33).

35 The Netherlands Government maintains that, to the extent that a restriction on the freedom of movement and residence exists, the provisions of the WSF 2000 are justified by objective considerations of public interest, namely the objective seeking to ensure a minimum level of integration of an applicant for the funding in the awarding State. It submits that it is therefore justified to reserve funding for full courses of study abroad to students who show that they are sufficiently integrated in the Netherlands. In its view, a student who has lived in the Netherlands for a period of at least three out of the six years preceding his education or training abroad shows that level of integration. In its submission, that requirement does not, moreover, go beyond what is necessary to attain the objectives pursued for two reasons. First, under Article 11.5 of the WSF 2000, the competent Minister may refrain from applying the three-out-of-six-years rule if the application of that rule would lead to a situation of grave injustice, which precludes that rule

from being regarded as being too general. Secondly, that residence rule does not require a student to have resided in the Netherlands for three consecutive years before beginning his studies and is not therefore too exclusive.

36 In that regard, it must be noted that both the integration of students and the desire to verify the existence of a connecting link between the society of the Member State providing a benefit and the recipient of a benefit such as that at issue in the main proceedings can constitute objective considerations of public interest which are capable of justifying the fact that the conditions for the grant of the benefit may affect the freedom of movement of citizens of the Union (see, to that effect, judgment in Thiele Meneses, EU:C:2013:683, paragraph 34 and the case-law cited).

37 However, according to settled case-law, the proof required to demonstrate the genuine link must not be too exclusive in nature or unduly favour one element which is not necessarily representative of the real and effective degree of connection between the claimant and the Member State, to the exclusion of all other representative elements (see judgments in D'Hoop, EU:C:2002:432, paragraph 39; Prinz and Seeberger, EU:C:2013:524, paragraph 37; and Thiele Meneses, EU:C:2013:683, paragraph 36).

38 As regards the extent of the connection between the recipient of a benefit and the Member State concerned, the Court has held that, with regard to benefits that are not governed by EU law, such as that at issue in the main proceedings, Member States enjoy a broad discretion in deciding which criteria are to be used when assessing the extent of that connection (see, to that effect, judgments in Gottwald, C‑103/08, EU:C:2009:597, paragraph 34, and Thiele Meneses, EU:C:2013:683, paragraph 37).

39 A requirement based solely on residence, such as that at issue in the case in the main proceedings, risks excluding from the funding for higher education in question students who, despite not having resided in the Netherlands for the required period of three out of the six years prior to beginning their studies abroad, nevertheless have genuine links with that Member State.

40 In that regard, it must be pointed out that the Court has already held, as regards the legislation at issue in the main proceedings, that the application of the three-out-of-six-years rule established an unjustified inequality of treatment as between Netherlands workers and migrant workers residing in the Netherlands because, by requiring specific periods of residence in the territory of the Member State concerned, the rule prioritised an element which is not necessarily the sole element representative of the actual degree of attachment between the party concerned and that Member State and was therefore too exclusive (see judgment in Commission v Netherlands, C‑542/09, EU:C:2012:346, paragraphs 86 and 88).

41 The legislation at issue in the main proceedings, inasmuch as it constitutes a restriction on the freedom of movement and residence of a citizen of the Union, such as the appellant in the main proceedings, is also too exclusive because it does not make it possible to take account of other factors which may connect such a student to the Member State providing the benefit, such as the nationality of the student, his schooling, family, employment, language skills or the existence of other social and economic factors (see, to that effect, judgment in Prinz and Seeberger, EU:C:2013:524, paragraph 38). Likewise, as the Advocate General stated at point 103 of her Opinion, the employment of the family members on whom the student depends in the Member State providing the benefit may also be one of the factors to be taken into account in assessing those links.

42 Furthermore, the potential application of Article 11.5 of the WSF 2000 by the competent Minister, which allows that minister to derogate from the three-out-of-six-years rule if the application of that rule would lead to a situation of grave injustice, does not change the overly exclusive nature of the rule in the circumstances of the case at issue in the

main proceedings. In effect, it appears that that provision does not guarantee that the other factors which may link the appellant in the main proceedings with the Member State providing the benefit are taken into account, and it does not therefore make it possible to achieve the objective of integration which is, according to the Netherlands Government, the objective of the legislation at issue in the main proceedings.

43 Accordingly, the three-out-of-six-years rule at issue in the main proceedings remains both too exclusive and too arbitrary in that it unduly favours an element which is not necessarily representative of the degree of integration of the applicant in the Member State concerned. Consequently, the national legislation at issue in the main proceedings cannot be considered to be proportionate to the objective of integration.

44 It is therefore for the referring court, which has sole jurisdiction to rule on the facts, to consider the possible factors connecting the appellant in the main proceedings and the Kingdom of the Netherlands, inasmuch as Ms Martens, a Netherlands national born in the Netherlands, stated in her application for funding that she had resided in that Member State for a period of three out of the six years preceding her enrolment on a course abroad, whereas, in actual fact, she has resided in Belgium since the age of six, her father worked in the Netherlands from 2006 to 2008 and she is currently working in the Netherlands.

45 Accordingly, the answer to the questions referred is that Articles 20 TFEU and 21 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which makes the continued grant of funding for higher education outside that State subject to the rule that the student applying for such funding has resided in that Member State for a period of at least three out of the six years preceding his enrolment.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Articles 20 TFEU and 21 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which makes the continued grant of funding for higher education outside that State subject to the rule that the student applying for such funding has resided in that Member State for a period of at least three out of the six years preceding his enrolment.

Case C-67/14: Jobcenter Berlin Neukölln v Alimanovic

JUDGMENT OF THE COURT (Grand Chamber)

15 September 2015

(Reference for a preliminary ruling — Freedom of movement for persons — Citizenship of the Union — Equal treatment — Directive 2004/38/EC — Article 24(2) — Social assistance — Regulation (EC) No 883/2004 — Articles 4 and 70 — Special non-contributory cash benefits — Member State nationals who are job-seekers and resident in a different Member State — Excluded — Retention of the status of 'worker')

In Case C‑67/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundessozialgericht (Germany), made by decision of 12 December 2013, received at the Court on 10 February 2014, in the proceedings

Jobcenter Berlin Neukölln

v

Nazifa Alimanovic,

Sonita Alimanovic,

Valentina Alimanovic,

Valentino Alimanovic,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, L. Bay Larsen, T. von Danwitz, A. Ó Caoimh, J.-C. Bonichot and C. Vajda, Presidents of Chambers, E. Levits, A. Arabadjiev, C. Toader, M. Berger (Rapporteur), E. Jarašiūnas, C.G. Fernlund and J.L. da Cruz Vilaça, Judges,

Advocate General: M. Wathelet,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 3 February 2015,

after considering the observations submitted on behalf of:

– Nazifa Alimanovic, Sonita Alimanovic, Valentina Alimanovic and Valentino Alimanovic by D. Mende and E. Steffen, Rechtsanwälte,

– the German Government, by T. Henze and J. Möller, acting as Agents,

– the Danish Government, by M. Wolff, acting as Agent,

– Ireland, by E. Creedon, A. Joyce and E. McPhillips, acting as Agents, and G. Gilmore, Barrister-at-Law,

– the French Government, by G. de Bergues and R. Coesme, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and F. Varrone, avvocato dello Stato,

– the Swedish Government, by A. Falk, K. Sparrman, C. Meyer-Seitz, U. Persson, N. Otte Widgren, L. Swedenborg, E. Karlsson and F. Sjövall, acting as Agents,

– the United Kingdom Government, by J. Beeko, acting as Agent, and J. Coppel QC,

– the European Commission, by M. Kellerbauer and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 March 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 18 TFEU and 45(2) TFEU, of Articles 4 and 70 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum at OJ 2004 L 200, p. 1), as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010 (OJ 2010 L 338, p. 35) ('Regulation No 883/2004'), and of Article 24(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

2 The request has been made in proceedings between, on one hand, Jobcenter Berlin Neukölln (the Employment Centre, Berlin Neukölln) ('the Job Centre') and, on the other hand, Nazifa Alimanovic and her three children, Sonita, Valentina and Valentino Alimanovic (together 'the Alimanovic family'), concerning the withdrawal by that agency of benefits by the way of basic provision ('Grundsicherung') provided for under German law.

Legal context

International law

3 Article 1 of the European Convention on Social and Medical Assistance, signed in Paris on 11 December 1953 by the members of the Council of Europe and in force since 1956 in the Federal Republic of Germany ('the Assistance Convention'), lays down a principle of equal treatment in the following terms:

'Each of the Contracting Parties undertakes to ensure that nationals of the other Contracting Parties who are lawfully present in any part of its territory to which this Convention applies, and who are without sufficient resources, shall be entitled equally with its own nationals and on the same conditions to social and medical assistance … provided by the legislation in force from time to time in that part of its territory.'

4 Pursuant to Article 16(b) of the Assistance Convention, '[e]ach Contracting Party shall notify to the Secretary General of the Council of Europe any new law or regulation not already included in Annex I. At the time of making such notification a Contracting Party may make a reservation in respect of the application of this new law or regulation to the nationals of other Contracting Parties'. The reservation issued by the German Government on 19 December 2011 under that provision is worded as follows:

'[t]he Government of the Federal Republic of Germany does not undertake to grant to the nationals of the other Contracting Parties, equally and under the same conditions as its own nationals, the benefits provided for in Book Two of the Social Code [(Sozialgesetzbuch Zweites Buch, "Book II")] — Basic Income Support for Job-seekers — in the latest applicable version.'

5 That reservation was notified to the other parties to the Assistance Convention in accordance with Article 16(c) of that convention.

EU law

Regulation No 883/2004

6 Article 4 of Regulation No 883/2004, headed ‘Equality of treatment’, provides as follows:

‘Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.’

7 Article 70 of that Regulation, entitled ‘General provision’, is included under Title III, Chapter 9, thereof, on ‘[s]pecial non-contributory cash benefits’. That article provides as follows:

‘1. This Article shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in Article 3(1) and of social assistance.

2. For the purposes of this Chapter, “special non-contributory cash benefits” means those which:

(a) are intended to provide either:

(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned;

or

(ii) solely specific protection for the disabled, closely linked to the said person’s social environment in the Member State concerned,

and

(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone,

and

(c) are listed in Annex X.

3. Article 7 and the other Chapters of this Title shall not apply to the benefits referred to in paragraph 2 of this Article.

4. The benefits referred to in paragraph 2 shall be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. Such benefits shall be provided by and at the expense of the institution of the place of residence.’

8 Annex X to Regulation No 883/2004, which is entitled ‘Special non-contributory cash benefits’, specifies the following benefits as regards the Federal Republic of Germany:

‘...

(b) Benefits to cover subsistence costs under the basic provision for jobseekers unless, with respect to these benefits, the eligibility requirements for a temporary supplement following receipt of unemployment benefit (Article [Paragraph] 24(1) of Book II of the Social Code) are fulfilled.’

Directive 2004/38

9 Recitals 10, 16 and 21 in the preamble to Directive 2004/38 state:

‘(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.

...

(16) As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security.

...

(21) However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.’

10 Article 7(1) and (3) of that directive provides as follows:

‘1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; …

…

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first 12 months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than 6 months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.'

11 Under Article 14 of that directive, entitled 'Retention of the right of residence':

'1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.

4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

(a) the Union citizens are workers or self-employed persons, or

(b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.'

12 Article 24 of that directive, entitled 'Equal treatment', provides as follows:

'1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.'

German law

The Social Code

13 Paragraph 19a(1) of Book I of the Social Code sets out the two types of benefit granted by way of basic provision for job-seekers as follows:

'Under the entitlement to basic provision for job-seekers, the following may be claimed:

1. benefits for integration into the labour market,

2. benefits to cover subsistence costs.'

14 Paragraph 1 of Book II, entitled 'Function and objective of basic provision for job-seekers', provides as follows, in subparagraphs 1 and 3:

'(1) Basic provision for job-seekers is intended to enable its beneficiaries to lead a life in keeping with human dignity.

…

(3) Basic provision for job-seekers encompasses benefits:

1. intended to bring to an end or reduce the need for assistance, in particular by integration into the labour market, and

2. intended to cover subsistence costs.'

15 Paragraph 7 of Book II, entitled 'Beneficiaries', provides as follows:

'(1) Benefits under this Book shall be received by persons:

1. who have attained the age of 15 years and have not yet reached the age limit referred to in Paragraph 7a,

2. who are fit for work,

3. who are in need of assistance, and

4. whose ordinary place of residence is in the Federal Republic of Germany (beneficiaries fit for work). The following are excluded:

1. foreign nationals who are not workers or self-employed persons in the Federal Republic of Germany and do not enjoy the right of freedom of movement under Paragraph 2(3) of the Law on freedom of movement of Union citizens [(Freizügigkeitsgesetz/EU, "the Law on freedom of movement")], and their family members, for the first three months of their residence,

2. foreign nationals whose right of residence arises solely out of the search for employment, and their family members,

...

Point 1 of the second sentence shall not apply to foreign nationals residing in the Federal Republic of Germany who have been granted a residence permit under Chapter 2, Section 5, of the Law on residence [(Aufenthaltgesetz)]. Provisions of the law governing residence shall be unaffected.

...'

16 Paragraph 8, entitled 'Fitness for work', of Book II provides as follows, in subparagraph 1 thereof:

'All persons who are not incapable for the foreseeable future, because of an illness or disability, of working for at least three hours per day under normal labour market conditions are fit for work.'

17 Paragraph 9(1) of Book II provides as follows:

‘All persons who cannot, or cannot sufficiently, cover their subsistence costs on the basis of the income or assets to be taken into consideration and who do not receive the necessary assistance from other persons, in particular from family members or providers of other social security benefits, are in need of assistance.’

18 Paragraph 20 of Book II sets out additional provisions on basic subsistence needs. Paragraph 21 of Book II lays down rules on additional needs and Paragraph 22 of Book II concerns accommodation and heating needs. Finally, Paragraphs 28 to 30 of Book II deal with education and participation benefits.

19 In Book XII of the Social Code (‘Book XII’), Paragraph 1, which relates to social assistance, is worded in the following terms:

‘The function of social assistance is to enable the beneficiaries to lead a life in keeping with human dignity. …’

20 Paragraph 21 of Book XII provides as follows:

‘Subsistence benefits shall not be paid to persons who are in principle entitled to benefits under [Book II] because they are fit for work or because of their family ties. …’

The Law on freedom of movement

21 The scope of the Law on freedom of movement, as applicable to the facts of the main proceedings, is laid down in Paragraph 1 of that law:

‘This Law shall govern the entry and residence of nationals of other Member States of the European Union (Union citizens) and their family members.’

22 Paragraph 2 of the Law on freedom of movement provides as follows, on the right of entry and residence:

‘(1) Union citizens who are entitled to freedom of movement and their family members shall have the right to enter and reside in federal territory, subject to the provisions of this Law.

(2) The following are entitled to freedom of movement under EU law:

1. Union citizens who wish to reside in federal territory as workers or for the purpose of seeking employment or pursuing vocational training,

…

5. Union citizens who are not working, subject to the conditions laid down in Paragraph 4,

6. family members, subject to the conditions laid down in Paragraphs 3 and 4,

…

(3) For workers and self-employed persons, the right provided for in subparagraph 1 is without prejudice:

1. to temporary incapacity for work as the result of an illness or accident,

2. to involuntary unemployment confirmed by the relevant employment office or termination of self-employment owing to circumstances beyond the control of the self-employed person, after more than one year of work,

3. to vocational training where that training is linked to the previous employment; the two need not be linked where the Union citizen is involuntarily unemployed.

The right derived from subparagraph 1 shall be retained for a period of six months in the event of involuntary unemployment confirmed by the relevant employment office after a period of employment of less than one year.

…'

23 Paragraph 3 of the Law on freedom of movement, relating to family members, states:

'(1) Family members of the Union citizens specified in Paragraph 2(2), points 1 to 5, shall enjoy the right under Paragraph 2(1) if they are accompanying or joining the Union citizen. For family members of the Union citizens specified in Paragraph 2(2), point 5, this shall apply subject to Paragraph 4.

(2) The following are family members:

1. the spouse and the descendants of the persons specified in Paragraph 2(2), points 1 to 5 and 7, or of their spouses, who are not yet 21 years old,

2. the relatives in the ascending line and descendants of the persons specified in Paragraph 2(2), points 1 to 5 and 7, or of their spouses, whom those persons or their spouses maintain.

...'

24 Paragraph 5 of the Law on freedom of movement, on residence permits and the certificate concerning the right of permanent residence, provides as follows:

'(1) A certificate attesting the right of residence shall be issued automatically and immediately to Union citizens and to their family members holding the nationality of a Member State of the European Union and authorised to move freely within the territory of the Member States.

...

(3) The competent aliens office may require that the conditions for the right under Paragraph 2(1) be substantiated within three months following entry into federal territory. Information and evidence necessary for substantiation may be received by the competent registration authority at the time of registration with it. That authority shall forward the information and evidence to the competent aliens office. ...

...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

25 Nazifa Alimanovic, born in 1966, and her children, Sonita, Valentina and Valentino, born in 1994, 1998 and 1999 respectively, are all Swedish nationals. Ms Alimanovic was born in Bosnia whereas her children were all born in Germany.

26 The request for a preliminary ruling states that the Alimanovic family left Germany in 1999 for Sweden and returned to Germany in June 2010, although neither their exact departure date nor the reason for that absence are stated.

27 On 1 July 2010, the members of the Alimanovic family were issued with a certificate attesting the right of permanent residence in accordance with Paragraph 5 of the Law on freedom of movement. After her return to Germany, Ms Alimanovic and her daughter Sonita, who were fit for work within the meaning of the German legislation, worked between June 2010 and May 2011 in temporary jobs lasting less than a year.

28 During the period from 1 December 2011 to 31 May 2012, Ms Alimanovic was paid family allowances for her children Valentina and Valentino and, like her daughter Sonita, basic provision under Book II, namely subsistence allowances for the long-term unemployed (known as 'Arbeitslosengeld II'), plus social allowances for beneficiaries unfit to work, those latter beneficiaries being her other two children, Valentina and Valentino (together, 'the benefits at issue').

29 For the purpose of granting the benefits at issue during that period, the Job Centre took the view that the exclusion applying to Union citizens seeking employment, set out in the second sentence of Paragraph 7(1), point 2, of Book II, was not applicable to the Alimanovic family in so far as, since the members of that family were Swedish nationals, that rule had to be disregarded under the principle of non-discrimination provided for in Article 1 of the Assistance Convention. In a judgment of 19 October 2010, the Federal Social Court had held that the obligation imposed on the Federal Republic of Germany under that provision, namely to grant, in the same way as to its own nationals, social assistance to the nationals of the other contracting parties who are lawfully present in any part of its territory and without sufficient resources, also covered the grant of a minimum subsistence income under Paragraph 19 et seq of Book II.

30 However, under the first sentence of Paragraph 48(1) of Book X of the Social Code, an administrative measure must be annulled with prospective effect when a significant change has occurred in the legal and factual circumstances which existed when that measure was adopted. In respect of the grant of benefits on the basis of Article 1 of the Assistance Convention, a change occurred in May 2012, as a result of the reservation issued by the German Government on 19 December 2011 with regard to that convention. The Job Centre withdrew the decision on the grant of all the benefits at issue in respect of May 2012 on that basis.

31 On application by the Alimanovic family, the Social Court, Berlin, (Sozialgericht Berlin) annulled that decision and held, inter alia, that Ms Alimanovic and her daughter Sonita were entitled to the benefits at issue which applied to them, under, inter alia, Article 4 of Regulation No 883/2004, which prohibits any discrimination against Union citizens in relation to the nationals of the Member State concerned, read in conjunction with Article 70 of that regulation, which concerns special non-contributory cash benefits such as those at issue in the case before it.

32 In its appeal brought before the referring court, the Job Centre submits, in particular, that the benefits to cover subsistence costs under Book II constitute 'social assistance' within the meaning of Article 24(2) of Directive 2004/38 and, therefore, job-seekers may be refused the grant of such benefits.

33 The referring court states in particular that, according to the findings of the Social Court, Berlin, by which it is bound, Ms Alimanovic and her daughter Sonita could no longer rely on a right of residence as workers under Paragraph 2 of the Law on freedom of movement. Since June 2010, they had worked only in temporary jobs lasting less than a year and, since May 2011, they had been neither workers nor self-employed.

34 With reference to the judgment in Vatsouras and Koupatantze (C‑22/08 and C‑23/08, EU:C:2009:344), the referring court states that it follows from the second sentence of Paragraph 2(3) of the Law on freedom of movement, read in the light of Article 7(3)(c) of Directive 2004/38, that neither Ms Alimanovic nor her daughter Sonita still have the status of an employee or self-employed worker and that they must therefore be regarded as seeking employment within the meaning of Paragraph 2(2), point 1, of the Law on freedom of movement.

35 Ms Alimanovic and her daughter Sonita, among others, were thus precluded from claiming subsistence allowances for the long-term unemployed on the basis of Paragraph 7(1), second sentence, point 2, of Book II, which excludes both persons whose right of residence arises solely out of the search for employment and their family members from entitlement to the benefits provided for by that legislation.

36 The referring court therefore, first, raises the issue of whether that provision of Book II breaches the principle of equal treatment laid down in Article 4 of Regulation No 883/2004.

37 Secondly, that court raises the issue of whether that provision of Book II may be regarded as a valid transposition of Article 24(2) of Directive 2004/38 into domestic law or, should that latter provision be held inapplicable, whether it infringes Article 45(2) TFEU, read in conjunction with Article 18 TFEU.

38 In those circumstances, the Bundessozialgericht (Federal Social Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does the principle of equal treatment under Article 4 of Regulation [No 883/2004] — with the exception of the clause in Article 70(4) [thereof] excluding the provision of benefits outside the Member State of residence — apply also to the special non-contributory cash benefits referred to in Article 70(1) and (2) of Regulation [No 883/2004]?

(2) If the first question is answered in the affirmative: may the principle of equal treatment laid down in Article 4 of Regulation [No 883/2004] be limited by provisions of national legislation implementing Article 24(2) of Directive 2004/38 that do not in any circumstances allow access to those benefits in the case in which the right of residence of the citizen of the Union in another Member State arises solely out of the search for employment and, if so, to what extent may that principle be so limited?

(3) Does Article 45(2) TFEU, [read] in conjunction with Article 18 TFEU, preclude a provision of national law that does not in any circumstances allow the grant of a social benefit, intended to ensure subsistence and to facilitate access to the labour market, to citizens of the Union who, as job-seekers, may invoke the exercise of their right of free movement when they enjoy a right of residence arising solely out of the search for employment, irrespective of a link to the host Member State?’

39 By letter of 26 November 2014, the Court Registry sent the referring court the judgment in Dano (C‑333/13, EU:C:2014:2358), requesting it to inform it whether, in the light of the first point in the operative part of that judgment, it still wished to refer the first question in the order for reference. By order of 11 February 2015, received at the Court Registry on 19 February 2015, the Federal Social Court decided that it would withdraw the first question referred.

Consideration of the questions referred

The classification of the benefits at issue

40 The file submitted to the Court states that the referring court is of the view that the rights of residence held by Ms Alimanovic and her daughter Sonita arise solely out of their status as job-seekers and that it is bound by the findings of fact made by the court of first instance in that regard.

41 By its second and third questions, the referring court asks the Court as to, in essence, the compatibility, first, with Article 24(2) of Directive 2004/38 and, secondly, with Articles 18 TFEU and 45(2) TFEU, of national legislation which excludes from entitlement to certain benefits nationals of other Member States who have the status of job-seekers, whereas those benefits are guaranteed to the nationals of the Member State concerned who are in the same situation.

42 Since the issue of whether the benefits at issue constitute ‘social assistance’ or measures intended to facilitate access to the labour market is determinative for the purposes of identifying the EU rule under which that compatibility falls to be assessed, it is necessary to classify them.

43 In this connection, it is sufficient to note that the referring court has itself characterised the benefits at issue as ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004. It states in that regard that those benefits are intended to cover subsistence costs for persons who cannot cover those costs themselves and that they are not financed through contributions, but through tax revenue. Since those benefits are moreover mentioned in Annex X to Regulation No 883/2004, they meet the conditions in Article 70(2) thereof, even if they form part of a scheme which also provides for benefits to facilitate the search for employment.

44 That said, it should be added that, as is apparent from the Court's case-law, such benefits are also covered by the concept of 'social assistance' within the meaning of Article 24(2) of Directive 2004/38. That concept refers to all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family and who by reason of that fact may, during his period of residence, become a burden on the public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State (judgment in Dano, C‑333/13, EU:C:2014:2358, paragraph 63).

45 However, in the present case it must be found that, as the Advocate General observed in point 72 of his Opinion, the predominant function of the benefits at issue in the main proceedings is in fact to cover the minimum subsistence costs necessary to lead a life in keeping with human dignity.

46 It follows from those considerations that those benefits cannot be characterised as benefits of a financial nature which are intended to facilitate access to the labour market of a Member State (see, to that effect, judgment in Vatsouras and Koupatantze, C‑22/08 and C‑23/08, EU:C:2009:344, paragraph 45) but, as the Advocate General observed in points 66 to 71 of his Opinion, must be regarded as 'social assistance' within the meaning of Article 24(2) of Directive 2004/38.

47 Consequently, there is no need to answer the third question referred.

The second question

48 By its second question, the referring court asks, in essence, whether Article 24 of Directive 2004/38 and Article 4 of Regulation No 883/2004 must be interpreted as precluding legislation of a Member State under which nationals of other Member States who are job-seekers in the host Member State are excluded from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004, which also constitute 'social assistance' within the meaning of Article 24(2) of Directive 2004/38, although those benefits are granted to nationals of the Member State concerned who are in the same situation.

49 It must first be recalled in this connection that, so far as concerns access to social assistance, such as that at issue in the main proceedings, a Union citizen can claim equal treatment with nationals of the host Member State under Article 24(1) of Directive 2004/38 only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38 (judgment in Dano, C‑333/13, EU:C:2014:2358, paragraph 69).

50 To accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social assistance under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State (judgment in Dano, C‑333/13, EU:C:2014:2358, paragraph 74).

51 In order to determine whether social assistance, such as the benefits at issue in the main proceedings, may be refused on the basis of the derogation laid down in Article 24(2) of Directive 2004/38, it is therefore necessary to determine beforehand whether the principle of equal treatment referred to in Article 24(1) of that directive is applicable and, accordingly, whether the Union citizen concerned is lawfully resident on the territory of the host Member State.

52 Only two provisions of Directive 2004/38 may confer on job-seekers in the situation of Ms Alimanovic and her daughter Sonita a right of residence in the host Member State under that directive, namely Article 7(3)(c) and Article 14(4)(b) thereof.

53 In this connection, Article 7(3)(c) of Directive 2004/38 provides that if the worker is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first 12 months and has registered as a jobseeker with the relevant employment

office, he retains the status of worker for no less than six months. During that period, the Union citizen concerned retains his right of residence in the host Member State under Article 7 of Directive 2004/38 and may, consequently, rely on the principle of equal treatment, laid down in Article 24(1) of that directive.

54 The Court thus held, in the judgment in Vatsouras and Koupatantze (C‑22/08 and C‑23/08, EU:C:2009:344, paragraph 32), that Union citizens who have retained the status of workers on the basis of Article 7(3)(c) of Directive 2004/38 have the right to social assistance, such as the benefits at issue, during that period of at least six months.

55 However, as the Advocate General observes in point 41 of his Opinion, it is not disputed that Ms Alimanovic and her daughter Sonita, who retained the status of workers for at least six months after their last employment had ended, no longer enjoyed that status when they were refused entitlement to the benefits at issue.

56 As regards the question whether a right of residence under Directive 2004/38 might be established on the basis of Article 14(4)(b) thereof for Union citizens in the situation of Ms Alimanovic and her daughter Sonita, that provision stipulates that Union citizens who have entered the territory of the host Member State in order to seek employment may not be expelled for as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

57 Although, according to the referring court, Ms Alimanovic and her daughter Sonita may rely on that provision to establish a right of residence even after the expiry of the period referred to in Article 7(3)(c) of Directive 2004/38, for a period, covered by Article 14(4)(b) thereof, which entitles them to equal treatment with the nationals of the host Member State so far as access to social assistance is concerned, it must nevertheless be observed that, in such a case, the host Member State may rely on the derogation in Article 24(2) of that directive in order not to grant that citizen the social assistance sought.

58 It follows from the express reference in Article 24(2) of Directive 2004/38 to Article 14(4)(b) thereof that the host Member State may refuse to grant any social assistance to a Union citizen whose right of residence is based solely on that latter provision.

59 It must be stated in this connection that, although the Court has held that Directive 2004/38 requires a Member State to take account of the individual situation of the person concerned before it adopts an expulsion measure or finds that the residence of that person is placing an unreasonable burden on its social assistance system (judgment in Brey, C‑140/12, EU:C:2013:565, paragraphs 64, 69 and 78), no such individual assessment is necessary in circumstances such as those at issue in the main proceedings.

60 Directive 2004/38, establishing a gradual system as regards the retention of the status of ‘worker’ which seeks to safeguard the right of residence and access to social assistance, itself takes into consideration various factors characterising the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity.

61 By enabling those concerned to know, without any ambiguity, what their rights and obligations are, the criterion referred to both in Paragraph 7(1) of Book II, read in conjunction with Paragraph 2(3) of the Law on freedom of movement, and in Article 7(3)(c) of Directive 2004/38, namely a period of six months after the cessation of employment during which the right to social assistance is retained, is consequently such as to guarantee a significant level of legal certainty and transparency in the context of the award of social assistance by way of basic provision, while complying with the principle of proportionality.

62 Moreover, as regards the individual assessment for the purposes of making an overall appraisal of the burden which the grant of a specific benefit would place on the national system of social assistance at issue in the main proceedings as a whole, it must be observed that the assistance awarded to a single applicant can scarcely be described as an ‘unreasonable burden’ for a Member State, within the meaning of Article 14(1) of Directive 2004/38. However, while an individual claim might not place the Member State concerned under an unreasonable burden, the accumulation of all the individual claims which would be submitted to it would be bound to do so.

63 Having regard to all the foregoing considerations, the answer to the second question is that Article 24 of Directive 2004/38 and Article 4 of Regulation No 883/2004 must be interpreted as not precluding legislation of a Member State under which nationals of other Member States who are in a situation such as that referred to in Article 14(4)(b) of that directive are excluded from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004, which also constitute 'social assistance' within the meaning of Article 24(2) of Directive 2004/38, although those benefits are granted to nationals of the Member State concerned who are in the same situation.

Costs

64 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 24 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC and Article 4 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010, must be interpreted as not precluding legislation of a Member State under which nationals of other Member States who are in a situation such as that referred to in Article 14(4)(b) of that directive are excluded from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004, which also constitute 'social assistance' within the meaning of Article 24(2) of Directive 2004/38, although those benefits are granted to nationals of the Member State concerned who are in the same situation.

Case C-308/14: Commission v United Kingdom

JUDGMENT OF THE COURT (First Chamber)

14 June 2016

(Failure of a Member State to fulfil obligations — Coordination of social security systems — Regulation (EC) No 883/2004 — Article 4 — Equal treatment as regards access to social security benefits — Right of residence — Directive 2004/38/EC — National legislation under which child benefit and child tax credit are not granted to nationals of other Member States who do not have a right of lawful residence)

In Case C‑308/14,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 27 June 2014,

European Commission, represented by D. Martin and M. Wilderspin, acting as Agents,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented by M. Holt and J. Beeko, acting as Agents, and J. Coppel QC,

defendant,

THE COURT (First Chamber),

composed of A. Tizzano, Vice-President of the Court, acting as President of the First Chamber, F. Biltgen, E. Levits, M. Berger (Rapporteur) and S. Rodin, Judges,

Advocate General: P. Cruz Villalón,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 June 2015,

after hearing the Opinion of the Advocate General at the sitting on 6 October 2015,

gives the following

Judgment

1 By its application, the European Commission requests the Court to declare that, by the requirement that a claimant for child benefit or child tax credit must have a right to reside in the United Kingdom of Great Britain and Northern Ireland, that Member State has failed to comply with its obligations under Article 4 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum at OJ 2004 L 200, p. 1).

Legal context

EU law

Regulation No 883/2004

2 Article 1(j) and (z) of Regulation No 883/2004 contains the following definitions:

‘For the purposes of this Regulation:

...

(j) “residence” means the place where a person habitually resides;

...

(z) “family benefit” means all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances mentioned in Annex I.’

3 Article 3(1)(j) of Regulation No 883/2004 provides:

‘This Regulation shall apply to all legislation concerning the following branches of social security:

...

(j) family benefits.’

4 Article 4 of Regulation No 883/2004, headed ‘Equality of treatment’, provides:

‘Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.’

5 Article 11(1) and (3) of Regulation No 883/2004 states:

‘1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.

...

3. Subject to Articles 12 to 16:

...

(e) any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him/her benefits under the legislation of one or more other Member States.’

6 Article 67 of Regulation No 883/2004 provides:

‘A person shall be entitled to family benefits in accordance with the legislation of the competent Member State, including for his/her family members residing in another Member State, as if they were residing in the former Member State. …’

Regulation (EC) No 987/2009

7 Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1) provides in Article 11, headed ‘Elements for determining residence’:

‘1. Where there is a difference of views between the institutions of two or more Member States about the determination of the residence of a person to whom the basic Regulation applies, these institutions shall establish by common agreement the centre of interests of the person concerned, based on an overall assessment of all available information relating to relevant facts, which may include, as appropriate:

(a) the duration and continuity of presence on the territory of the Member States concerned;

(b) the person’s situation, including:

(i) the nature and the specific characteristics of any activity pursued, in particular the place where such activity is habitually pursued, the stability of the activity, and the duration of any work contract;

(ii) his family status and family ties;

(iii) the exercise of any non-remunerated activity;

(iv) in the case of students, the source of their income;

(v) his housing situation, in particular how permanent it is;

(vi) the Member State in which the person is deemed to reside for taxation purposes.

2. Where the consideration of the various criteria based on relevant facts as set out in paragraph 1 does not lead to agreement between the institutions concerned, the person's intention, as it appears from such facts and circumstances, especially the reasons that led the person to move, shall be considered to be decisive for establishing that person's actual place of residence.'

Directive 2004/38/EC

8 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda at OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34) provides in Article 7, headed 'Right of residence for more than three months':

'1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

...

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

...'

9 By virtue of Article 14(1) to (3) of Directive 2004/38:

'1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.'

10 Article 15(1) of Directive 2004/38 states:

'The procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health.'

11 Article 24 of Directive 2004/38, headed 'Equal treatment', provides:

'1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.'

United Kingdom law

Legislation relating to child benefit

12 Section 141 of the Social Security Contributions and Benefits Act 1992 ('the 1992 Act') provides:

‘A person who is responsible for one or more children or qualifying young persons in any week shall be entitled, subject to the provisions of this Part of this Act, to a benefit … for that week in respect of the child or qualifying young person, or each of the children or qualifying young persons, for whom he is responsible.’

13 The benefit referred to in section 141 of the 1992 Act (‘child benefit’) is a benefit intended, in particular, to meet some of the costs borne by a person responsible for one or more children. A payment can be made for each child, a higher payment being made for the first child than for subsequent children. Child benefit is a universal non-contributory benefit the cost of which is met out of general taxation. However, higher-income child-benefit claimants are subject to a tax charge whereby they must pay back an amount up to the benefit received.

14 Section 146 of the 1992 Act provides:

‘(1) No child benefit shall be payable in respect of a child or qualifying young person for a week unless he is in Great Britain in that week.

(2) No person shall be entitled to child benefit for a week unless he is in Great Britain in that week.

(3) Circumstances may be prescribed in which any person is to be treated for the purposes of subsection (1) or (2) above as being, or as not being, in Great Britain.’

15 Regulation 23 of the Child Benefit (General) Regulations 2006 (SI 2006/223) provides:

‘(1) A person shall be treated as not being in Great Britain for the purposes of section 146(2) of [the 1992 Act] if he is not ordinarily resident in the United Kingdom.

(2) Paragraph (1) does not apply to a Crown servant posted overseas or his partner.

(3) A person who is in Great Britain as a result of his deportation, expulsion or other removal by compulsion of law from another country to Great Britain shall be treated as being ordinarily resident in the United Kingdom.

(4) A person shall be treated as not being in Great Britain for the purposes of section 146(2) of [the 1992 Act] where he makes a claim for child benefit on or after 1st May 2004 and does not have a right to reside in the United Kingdom.’

16 Equivalent provisions exist in respect of claims for child benefit that are made in Northern Ireland. They are, first, section 142 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992, a provision which requires the claimant to be ‘in Northern Ireland’ in the week in question, and secondly, regulation 27 of the Child Benefit (General) Regulations 2006, which sets out conditions similar to those laid down by regulation 23 thereof as regards claims made in Great Britain.

Legislation relating to tax credits

17 The Tax Credits Act 2002 lays down a child tax credit regime. According to the explanation provided by the United Kingdom in its defence, that regime was introduced in order to consolidate support provided for families under the tax and benefit system, including several pre-existing forms of income-related support for children, within a single social benefit. The objective pursued by the enactment of the Tax Credits Act 2002 is said to be the combating of child poverty. Child tax credit is paid to a person or persons who are responsible for one or more children (section 8 of the Tax Credits Act 2002). It is a means-tested benefit, the amount of which decreases on a sliding scale once family income exceeds a threshold amount and which depends on the number of children in the family. This tax credit regime replaced various payments that were made to recipients of means-tested benefits on the basis of their being responsible for children. Child tax credit is a benefit the cost of which is met out of general taxation.

18 Section 3 of the Tax Credits Act 2002, headed ‘Claims’, provides:

‘...

(3) A claim for a tax credit may be made—

(a) jointly by the members of a married couple or unmarried couple both of whom are aged at least sixteen and are in the United Kingdom, or

(b) by a person who is aged at least sixteen and is in the United Kingdom but is not entitled to make a claim under paragraph (a) (jointly with another).

...

(7) Circumstances may be prescribed in which a person is to be treated for the purposes of this Part as being, or as not being, in the United Kingdom.’

19 Regulation 3 of the Tax Credits (Residence) Regulations 2003 (SI 2003/654) states:

‘(1) A person shall be treated as not being in the United Kingdom for the purposes of Part 1 of the [Tax Credits Act 2002] if he is not ordinarily resident in the United Kingdom.

...

(4) For the purposes of working tax credit, a person shall be treated as being ordinarily resident if he is exercising in the United Kingdom his rights as a worker pursuant to Council Regulation (EEC) No 1612/68 [of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475),] as amended by [Directive 2004/38], or Commission Regulation (EEC) No 1251/70 [of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State (OJ, English Special Edition 1970 (II), p. 402)] or he is a person with a right to reside in the United Kingdom pursuant to [Directive 2004/38].

(5) A person shall be treated as not being in the United Kingdom for the purposes of Part 1 of the [Tax Credits Act 2002] where he—

(a) makes a claim for child tax credit … on or after 1st May 2004; and

(b) does not have a right to reside in the United Kingdom.’

Immigration Act 1971

20 Section 2 of the Immigration Act 1971 provides:

‘Statement of right of abode in the United Kingdom

(1) A person is under this Act to have the right of abode in the United Kingdom if—

(a) he is a British citizen; or

(b) he is a Commonwealth citizen who—

(i) immediately before the commencement of the British Nationality Act 1981 was a Commonwealth citizen having the right of abode in the United Kingdom by virtue of section 2(1)(d) or section 2(2) of this Act as then in force; and

(ii) has not ceased to be a Commonwealth citizen in the meanwhile.

…’

Pre-litigation procedure

21 After receiving numerous complaints from nationals of other Member States resident in the United Kingdom that the competent United Kingdom authorities had refused to grant them certain social benefits on the ground that they did not have a right to reside in that Member State, the Commission sent a request for clarification to the United Kingdom in 2008.

22 The United Kingdom confirmed, by two letters dated 1 October 2008 and 20 January 2009, that, under national legislation, whilst the right to reside in the United Kingdom is conferred on all United Kingdom nationals, in certain circumstances nationals of other Member States are not considered to have a right to reside. According to the United Kingdom, that restriction is based on the concept of ‘right of residence’ within the meaning of Directive 2004/38 and on the limitations upon that right which were established by the directive, in particular the requirement that an economically inactive person must have sufficient financial resources to avoid becoming an unreasonable burden on the social assistance system of the host Member State.

23 On 4 June 2010 the Commission sent the United Kingdom a letter of formal notice regarding the provisions of its legislation under which, if claimants are to qualify for certain benefits, they must, as a precondition to their being considered habitually resident in the United Kingdom, have the right to reside there (‘the right to reside test’).

24 By letter of 30 July 2010, the United Kingdom replied to the letter of formal notice, stating that its national system was not discriminatory and that the right to reside test was justified as a proportionate measure to ensure that benefits were paid to persons sufficiently integrated in the United Kingdom.

25 On 29 September 2011 the Commission issued a reasoned opinion, to which the United Kingdom replied by letter dated 29 November 2011.

26 As the Commission was not satisfied with that reply, it brought the present action.

The action

Scope of the action

27 In the light of the judgment of 19 September 2013 in Brey (C‑140/12, EU:C:2013:565), the Commission decided to confine its action to child benefit and child tax credit (‘the social benefits at issue’), to the exclusion of the ‘special non-contributory cash benefits’ that were also the subject of the reasoned opinion and which, in accordance with that judgment of the Court, can be classified as ‘social assistance’ within the meaning of Article 7(1)(b) of Directive 2004/38.

Substance

Arguments of the parties

28 The main complaint put forward by the Commission against the United Kingdom is that, by requiring a person claiming the social benefits at issue to satisfy the right to reside test in order to be treated as habitually resident in that Member State, the United Kingdom has added a condition that does not appear in Regulation No 883/2004. That condition deprives persons who do not meet it of cover under the social security legislation of one of the Member States, cover which that regulation is intended to ensure.

29 According to the Commission, by virtue of Article 11(3)(e) of Regulation No 883/2004 an economically inactive person is, in principle, subject to the legislation of the Member State of residence. Article 1(j) defines ‘residence’, for

the purposes of the regulation, as the place where a person habitually resides, the term 'habitual residence' having an autonomous meaning in EU law.

30 In the Commission's submission, under the Court's settled case-law, in particular paragraph 29 of the judgment of 25 February 1999 in Swaddling (C‑90/97, EU:C:1999:96), that term designates the place where the habitual centre of interests of the person concerned is to be found. In order to determine that centre of interests, account should be taken in particular of the worker's family situation, the reasons which have led him to move, the length and continuity of his residence, whether he is in stable employment and his intention as it appears from all the relevant circumstances.

31 More specifically, that place is to be determined in the light of the factual circumstances and the situation of the persons concerned regardless of their legal status in the host Member State and of whether they have a right to reside in its territory on the basis, for example, of Directive 2004/38. Therefore, Regulation No 883/2004 confers on the concept of 'residence' a specific meaning which is independent of the meaning attributed to it in other measures of EU law or in national law and is not subject to any legal pre-conditions.

32 The purpose of Article 11 of Regulation No 883/2004 is not to harmonise Member States' substantive law but, rather, to provide a system of conflict rules the effect of which is to divest the national legislature of the power to determine the ambit and the conditions for the application of its own national legislation on the matter. That system therefore has the aim, on the one hand, of ensuring that only one national system of social security is applicable and, on the other hand, of guaranteeing that persons covered by Regulation No 883/2004 are not left without social security cover because there is no legislation which is applicable to them.

33 In the alternative, the Commission submits that, by imposing a condition for entitlement to certain social security benefits which its own nationals automatically meet, such as the right to reside test, the United Kingdom has created a situation involving direct discrimination against nationals of other Member States and has therefore infringed Article 4 of Regulation No 883/2004.

34 According to the Commission, in the course of the pre-litigation procedure the United Kingdom changed position, contending initially that the right to reside test is merely one of the matters to be checked in order to determine whether a person is habitually resident in the United Kingdom and subsequently that it is a condition distinct from habitual residence, which, though discriminatory, is justified.

35 The Commission, relying on the Advocate General's Opinion in the case which gave rise to the judgment of 13 April 2010 in Bressol and Others (C‑73/08, EU:C:2010:181), submits that the right to reside test constitutes direct discrimination based on nationality, given that it involves a condition that applies only to foreign nationals because United Kingdom nationals who are resident in the United Kingdom satisfy it automatically.

36 Furthermore, even if it were to be accepted that the right to reside test results in indirect discrimination only, as the United Kingdom asserts, the latter, according to the Commission, has not put forward any argument to show that the unequal treatment in question is appropriate and proportionate to the aim pursued by the national legislation concerned of ensuring that there is a genuine link between the benefit claimant and the host Member State.

37 In addition, the Commission contests the argument put forward by the United Kingdom that economically inactive persons should not become a burden on the welfare system of the host Member State unless they have a sufficient degree of connection to that State. The Commission accepts that a host Member State may wish to ensure that the link between the benefit claimant and that State exists, but, in the case of social security benefits, it is the EU legislature itself, through Regulation No 883/2004, which has established the means of testing whether that link exists — that is to say, in this instance, by means of the habitual residence criterion — and the Member States may make no changes to the provisions of that regulation or couple them with additional requirements.

38 In its defence, the United Kingdom contests the main complaint put forward by the Commission by relying, in particular, on the judgment of 19 September 2013 in Brey (C‑140/12, EU:C:2013:565, point 44), in which the Court, after rejecting arguments identical to those which the Commission puts forward in the present instance, held that 'there

is nothing to prevent, in principle, the granting of social security benefits to Union citizens who are not economically active being made conditional upon those citizens meeting the necessary requirements for obtaining a legal right of residence in the host Member State'.

39 The United Kingdom explains that the Court also held that Article 70(4) of Regulation No 883/2004, which, like Article 11 thereof, lays down a 'conflict rule' the aim of which is to prevent the concurrent application of a number of national legislative systems to the same situation and to ensure that persons covered by the regulation are not left without social security cover because there is no legislation that is applicable to them, is not intended to lay down the conditions creating the right to the social benefits in question, namely special non-contributory cash benefits, so that it is in principle for the legislation of each Member State to lay down those conditions. In the United Kingdom's submission, the same reasoning applies to the conflict rule in Article 11 of Regulation No 883/2004, which performs the same function as Article 70(4) thereof — which relates specifically to special non-contributory cash benefits — for the purpose of determining the legislation to which the claimant is subject.

40 As regards the complaint relied on by the Commission in the alternative alleging direct discrimination, referred to in paragraph 33 of the present judgment, the United Kingdom maintains that this complaint is not set out in the reasoned opinion which the Commission sent to it during the pre-litigation procedure and appears for the first time in the application, so that the Court should declare it inadmissible.

41 Furthermore, the United Kingdom submits that the Court has already held on numerous occasions that it is lawful to require economically inactive EU nationals to demonstrate that they have a right of residence as a condition for qualifying for social security benefits and that in Directive 2004/38 the EU legislature expressly authorises host Member States to make their intervention subject to such a condition, in order that those nationals do not become an unreasonable burden on the social assistance system of those States. The principle of equal treatment referred to in Article 4 of Regulation No 883/2004 must be read in the light of that requirement.

42 Finally, the United Kingdom observes that the right to reside test is only one of the three cumulative conditions which must be satisfied in order to demonstrate that the claimant 'is in' the United Kingdom, for the purposes of the national legislation. The other two conditions, namely presence in the territory and ordinary residence, may or may not be satisfied regardless of the claimant's nationality, so that a United Kingdom national will not automatically satisfy the condition of 'being in' the United Kingdom, which confers entitlement to the social benefits at issue.

43 The United Kingdom acknowledges that those conditions are more easily satisfied by its own nationals than by nationals of other Member States and that the measure at issue is indirectly discriminatory. However, relying on the grounds set out by the Court in paragraph 44 of the judgment of 19 September 2013 in Brey (C‑140/12, EU:C:2013:565), which fall within a similar context, the United Kingdom submits that the measure is objectively justified by the need to protect public finances, given that the social benefits at issue are funded not from recipients' contributions but from taxation. Nor is there any indication that the measure is disproportionate for the purpose of attaining the objective pursued, in accordance with the guidance set out in paragraphs 71 to 78 of that judgment of the Court.

44 The Commission submits in its reply, as regards the main complaint, that the judgment of 19 September 2013 in Brey (C‑140/12, EU:C:2013:565) concerned only the application of Directive 2004/38 to special non-contributory cash benefits, which have characteristics of both social security and social assistance, whereas the present case relates to two family benefits within the meaning of Article 3(1)(j) of Regulation No 883/2004, that is to say, pure social security benefits, to which Directive 2004/38 does not apply. In this connection, the Commission notes that, in paragraph 44 of that judgment, there is a problem of divergent translation between the English and German versions, as the former uses the words 'social security benefits' whereas in the latter, which is the authentic version, it is the wider concept of 'Sozialleistungen' ('social benefits') that is used.

45 In addition, the Commission contends that the United Kingdom legislation, instead of encouraging the free movement of Union citizens, which is the underlying purpose of the EU legislation on the coordination of social security systems, impedes it by introducing a barrier to that freedom, which takes the form of discrimination on the

basis of nationality. That has the consequence that a person may not be entitled to the social benefits at issue either in his State of origin, in which he is no longer habitually resident, or in the host State if he has no right of residence there.

46 Finally, so far as concerns the complaint relied upon in the alternative, the Commission contests the United Kingdom's interpretation of the conflict rule laid down in Article 11 of Regulation No 883/2004, because it follows from the judgment of 19 September 2013 in Brey (C‑140/12, EU:C:2013:565) that the principle that Member States may legitimately impose restrictions in order to prevent a Union citizen hosted by them becoming an unreasonable burden on their social assistance system is restricted to social assistance and does not extend to social security benefits.

47 Furthermore, as regards any justification of the condition under the right to reside test, the Commission maintains that the United Kingdom does not put forward any matter relating to the condition's proportionality in the light of the objective pursued by the national legislation. The right to reside test is an automatic mechanism that systematically and ineluctably bars claimants who do not satisfy it from being paid benefits, regardless of their personal situation and of the extent to which they have paid tax and social security contributions in the United Kingdom. That mechanism therefore does not permit the complex individual assessment which the Court requires of host Member States according to the judgment of 19 September 2013 in Brey (C‑140/12, EU:C:2013:565).

48 In its rejoinder, the United Kingdom emphasises that its national law is applicable under the conflict rule laid down by Regulation No 883/2004 and that a person habitually resident in its territory may, despite everything, not be entitled to the social benefits at issue.

49 As regards a divergence between the language versions of the judgment of 19 September 2013 in Brey (C‑140/12, EU:C:2013:565), the United Kingdom submits that the term 'social benefits' is broader than 'social security benefits' and that, whilst, in that judgment, the Court used the first term instead of the second in the German and French versions, that broadens the scope of the principle laid down in paragraph 44 of the judgment, which also covers social security benefits. According to the United Kingdom, that judgment does not in any way indicate that the reasoning set out by the Court is confined exclusively to special non-contributory cash benefits, a point which was indeed confirmed by the judgment of 11 November 2014 in Dano (C‑333/13, EU:C:2014:2358).

50 The United Kingdom further submits that it is difficult to conceive that Member States are not required to pay special non-contributory cash benefits, which guarantee a basic, minimum level of income, to Union citizens with no right of residence, but would, on the other hand, be required to pay them benefits such as the social benefits at issue and which go beyond the guarantee of a basic, minimum level of income, given that the latter benefits, being funded from taxation, also have the potential to impose an unreasonable burden on the public finances of the host Member State, within the meaning of the judgment of 19 September 2013 in Brey (C‑140/12, EU:C:2013:565).

51 The United Kingdom adds that the social benefits at issue display in any event some characteristics of social assistance, even though this is not a condition that must be satisfied in order for the principle established in the judgment of 19 September 2013 in Brey (C‑140/12, EU:C:2013:565), which concerns 'social benefits' generally, to be applicable also to the social benefits at issue. In the United Kingdom's submission, the Court confirmed in the judgment of 11 November 2014 in Dano (C‑333/13, EU:C:2014:2358) that only economically inactive Union citizens whose residence complies with the conditions in Article 7(1)(b) of Directive 2004/38 can claim a right of equal treatment with nationals so far as concerns access to social benefits.

52 Finally, the United Kingdom submits that, in contending for the first time in its reply that the right to reside test is 'an automatic mechanism' which does not permit the circumstances of the particular case to be assessed as required by the Court in the judgment of 19 September 2013 in Brey (C‑140/12, EU:C:2013:565), the Commission puts forward a new complaint, which must on that basis, in accordance with Article 127 of the Rules of Procedure of the Court of Justice, be declared inadmissible.

53 The United Kingdom also submits that the view of how the right to reside test operates, as set out by the Commission in this new complaint, is incorrect. In practice, the administrative department responsible for the social

benefits at issue takes into account, amongst other data, information provided by the Department for Work and Pensions in order to determine whether a person has claimed social assistance. That information enables the administrative department to decide whether the claimant has a right of residence in the United Kingdom and whether he is therefore eligible for the social benefits at issue. When it is not possible to decide whether the claimant has a right of residence in the United Kingdom, an individual assessment of his personal circumstances is carried out, including in relation to the social security contributions which he has paid and to whether he is actively seeking work and has a genuine chance of being engaged.

Findings of the Court

– Classification of the social benefits at issue

54 In order to examine the merits of the present action for failure to fulfil obligations, it is necessary to determine, as a preliminary point, whether the social benefits at issue must be classified as 'social assistance' or as 'social security benefits'.

55 It should be recalled that this action for failure to fulfil obligations concerns child benefit and child tax credit, that is to say, two cash benefits which have the objective of helping to cover family expenses and are funded not from recipients' contributions but from compulsory taxation.

56 Neither of those benefits has been entered by the United Kingdom in Annex X to Regulation No 883/2004 and it is not in dispute between the parties that they are not special non-contributory cash benefits within the meaning of Article 70 of that regulation.

57 As regards child benefit, under section 141 of the 1992 Act a person who is responsible for at least one child is entitled, subject to the provisions of that Act, to a weekly benefit for each child.

58 It is undisputed that child benefit is a social benefit intended, in particular, to meet some of the costs that must be borne by a person responsible for one or more children. In principle, it is a universal benefit which is granted to any person claiming it. However, claimants having a high income must repay, in the context of their tax obligations, an amount up to the benefit received.

59 As regards child tax credit, it is also undisputed that it is a cash benefit paid to any person responsible for one or more children, the amount of which varies according to family income, the number of such children and other factors concerning the individual situation of the family concerned. Despite its name, child tax credit is a sum which the competent authority pays periodically to the recipients and which seems to be associated with their status as taxpayers. This benefit replaced a range of additional payments which were made to persons claiming various income-linked maintenance allowances in respect of children for whom they were responsible, and the overall aim of which was to combat child poverty.

60 According to the Court's case-law, benefits which are granted automatically to families that meet certain objective criteria relating in particular to their size, income and capital resources, without any individual and discretionary assessment of personal needs, and which are intended to meet family expenses must be regarded as social security benefits (see to this effect, in particular, judgments of 16 July 1992 in Hughes, C‑78/91, EU:C:1992:331, paragraph 22, and of 10 October 1996 in Hoever and Zachow, C‑245/94 and C‑312/94, EU:C:1996:379, paragraph 27).

61 The result of applying the criteria referred to in the previous paragraph of the present judgment to the social benefits at issue is that the latter must be classified as 'social security benefits', as referred to in Article 3(1)(j) of Regulation No 883/2004, read in conjunction with Article 1(z) thereof.

– The main complaint

62 By the main complaint relied upon by it in support of the present action, the Commission criticises the United Kingdom for making grant of the social benefits at issue conditional on the claimant meeting the right to reside test in addition to the test, laid down in Article 11(3)(e) of Regulation No 883/2004, read in conjunction with Article 1(j) thereof, that he 'habitually resides' in the territory of the host Member State. According to the Commission, examination of the right to reside test thus gives rise to an additional condition for which no provision is made.

63 Article 11(3)(e) of Regulation No 883/2004, upon which the Commission relies, sets out a 'conflict rule' for determining the national legislation applicable to payment of the social security benefits listed in Article 3(1) of the regulation — which include family benefits — that may be claimed by persons other than those to whom Article 11(3)(a) to (d) applies, that is to say, in particular, economically inactive persons.

64 Article 11(3)(e) of Regulation No 883/2004 is intended not only to prevent the concurrent application of a number of national legislative systems to a given situation and the complications which may ensue, but also to ensure that persons covered by that regulation are not left without social security cover because there is no legislation which is applicable to them (see, in particular, judgment of 19 September 2013 in Brey, C‑140/12, EU:C:2013:565, paragraph 40 and the case-law cited).

65 On the other hand, that provision as such is not intended to lay down the conditions creating the right to social security benefits. It is in principle for the legislation of each Member State to lay down those conditions (see, to this effect, judgments of 19 September 2013 in Brey, C‑140/12, EU:C:2013:565, paragraph 41 and the case-law cited, and of 11 November 2014 in Dano, C‑333/13, EU:C:2014:2358, paragraph 89).

66 It cannot therefore be inferred from Article 11(3)(e) of Regulation No 883/2004, read in conjunction with Article 1(j) thereof, that EU law precludes a national provision under which entitlement to social benefits, such as the social benefits at issue, is conditional upon the claimant having a right to reside lawfully in the Member State concerned.

67 Regulation No 883/2004 does not set up a common scheme of social security, but allows different national social security schemes to exist and its sole objective is to ensure the coordination of those schemes in order to guarantee effective exercise of freedom of movement for persons. It thus allows different schemes to continue to exist, creating different claims on different institutions against which the claimant possesses direct rights by virtue either of national law alone or of national law supplemented, where necessary, by EU law (judgment of 19 September 2013 in Brey, C‑140/12, EU:C:2013:565, paragraph 43).

68 It is clear from the Court's case-law that there is nothing to prevent, in principle, the grant of social benefits to Union citizens who are not economically active being made subject to the requirement that those citizens fulfil the conditions for possessing a right to reside lawfully in the host Member State (see to this effect, in particular, judgments of 19 September 2013 in Brey, C‑140/12, EU:C:2013:565, paragraph 44, and of 11 November 2014 in Dano, C‑333/13, EU:C:2014:2358, paragraph 83).

69 The conflict rule laid down in Article 11(3)(e) of Regulation No 883/2004 is accordingly, contrary to the Commission's submissions, not distorted by the right to reside test, as that test forms an integral part of the conditions for grant of the social benefits at issue.

70 That being so, the argument relied upon by the Commission that a person who does not satisfy the conditions that must be met in order to be eligible for the social benefits at issue is in a situation in which neither United Kingdom law nor any other law is applicable to him cannot succeed.

71 Such a situation is not different from the situation of a claimant who does not satisfy for any other reason one of the conditions that must be met in order to be eligible for a family benefit and who, on that basis, is not in fact entitled to such a benefit in any Member State. That would be due not to the fact that no law of a Member State is applicable to him, but to the fact that he does not satisfy the substantive conditions laid down by the Member State whose legislation is applicable to him by virtue of the conflict rules.

72 In this connection, it should also be noted that, from its reply to the reasoned opinion onwards, the United Kingdom has consistently disputed that it has sought to make verification that the claimant is habitually resident in its territory subject to the condition in particular that he has a right to reside lawfully there. As the Advocate General has observed, in essence, in point 54 of his Opinion, there is nothing in the documents before the Court showing that the United Kingdom intended to link the right to reside test to the checking of habitual residence for the purposes of Article 11(3)(e) of Regulation No 883/2004. As the United Kingdom submitted at the hearing, legality of the claimant's residence in its territory is a substantive condition which economically inactive persons must meet in order to be eligible for the social benefits at issue.

73 In the light of the foregoing considerations, since the Commission has not shown that the right to reside test introduced by the United Kingdom legislation affects, in itself, Article 11(3)(e) of Regulation No 883/2004, read in conjunction with Article 1(j) thereof, the main complaint put forward by the Commission must be dismissed.

– The complaint in the alternative

74 In the alternative, if it were to be held that verification of whether the right to reside test is met is not, as such, incorporated into verification of whether the person claiming the social benefits at issue is habitually resident in the United Kingdom and that the checking of whether that test is met is carried out autonomously, the Commission contends that the introduction of the right to reside test in the national legislation inevitably results in direct, or at least indirect, discrimination, prohibited by Article 4 of Regulation No 883/2004.

75 As stated in paragraph 68 of the present judgment, there is nothing to prevent, in principle, the grant of social benefits to Union citizens who are not economically active being made subject to the substantive condition that those citizens meet the necessary requirements for possessing a right to reside lawfully in the host Member State.

76 Nevertheless, a host Member State which, for the purpose of granting social benefits, such as the social benefits at issue, requires a national of another Member State to be residing in its territory lawfully commits indirect discrimination.

77 Indeed, it is clear from settled case-law of the Court that a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect nationals of other Member States more than nationals of the host State and there is a consequent risk that it will place the former at a particular disadvantage (see, to this effect, judgment of 13 April 2010 in Bressol and Others, C‑73/08, EU:C:2010:181, paragraph 41).

78 In the present action, the national legislation requires persons claiming the benefits at issue to possess a right to reside in the United Kingdom. Thus, that legislation gives rise to unequal treatment between United Kingdom nationals and nationals of the other Member States as such a residence condition is more easily satisfied by United Kingdom nationals, who more often than not are habitually resident in the United Kingdom, than by nationals of other Member States, whose residence, by contrast, is generally in a Member State other than the United Kingdom (see, by analogy, judgment of 13 April 2010 in Bressol and Others, C‑73/08, EU:C:2010:181, paragraph 45).

79 In order to be justified, such indirect discrimination must be appropriate for securing the attainment of a legitimate objective and cannot go beyond what is necessary to attain that objective (see to this effect, in particular, judgment of 20 June 2013 in Giersch and Others, C‑20/12, EU:C:2013:411, paragraph 46).

80 In that regard, it is clear from the Court's case-law that the need to protect the finances of the host Member State justifies in principle the possibility of checking whether residence is lawful when a social benefit is granted in particular to persons from other Member States who are not economically active, as such grant could have consequences for the overall level of assistance which may be accorded by that State (see to this effect, in particular, judgments of 20 September 2001 in Grzelczyk, C‑184/99, EU:C:2001:458, paragraph 44; of 15 March 2005 in Bidar, C‑209/03,

EU:C:2005:169, paragraph 56; of 19 September 2013 in Brey, C‑140/12, EU:C:2013:565, paragraph 61; and of 11 November 2014 in Dano, C‑333/13, EU:C:2014:2358, paragraph 63).

81 So far as concerns the proportionality of the right to reside test, as the Advocate General has observed in point 92 of his Opinion, verification by the national authorities, in connection with the grant of the social benefits at issue, that the claimant is not unlawfully present in their territory must be regarded as a situation involving checks on the lawfulness of the residence of Union citizens, under the second subparagraph of Article 14(2) of Directive 2004/38, and must therefore comply with the requirements set out in the directive.

82 It should be recalled that, under Article 14(2) of Directive 2004/38, Union citizens and their family members are to enjoy the right of residence referred to in Articles 7, 12 and 13 of the directive as long as they meet the conditions set out therein. In specific cases, where there is a reasonable doubt as to whether a Union citizen or his family members satisfy the conditions set out in those articles, Member States may verify if those conditions are fulfilled. Article 14(2) provides that this verification is not to be carried out systematically.

83 It is apparent from the observations made by the United Kingdom at the hearing before the Court that, for each of the social benefits at issue, the claimant must provide, on the claim form, a set of data which reveal whether or not there is a right to reside in the United Kingdom, those data being checked subsequently by the authorities responsible for granting the benefit concerned. It is only in specific cases that claimants are required to prove that they in fact enjoy a right to reside lawfully in United Kingdom territory, as declared by them in the claim form.

84 It is thus evident from the information available to the Court that, contrary to the Commission's submissions, the checking of compliance with the conditions laid down by Directive 2004/38 for existence of a right of residence is not carried out systematically and consequently is not contrary to the requirements of Article 14(2) of the directive. It is only in the event of doubt that the United Kingdom authorities effect the verification necessary to determine whether the claimant satisfies the conditions laid down by Directive 2004/38, in particular those set out in Article 7, and, therefore, whether he has a right to reside lawfully in United Kingdom territory, for the purposes of the directive.

85 In this context, the Commission, which has the task of proving the existence of the alleged infringement and of providing the Court with the evidence necessary for it to determine whether the infringement is made out (see, in particular, judgment of 23 December 2015 in Commission v Greece, C‑180/14, EU:C:2015:840, paragraph 60 and the case-law cited), has not provided evidence or arguments showing that such checking does not satisfy the conditions of proportionality, that it is not appropriate for securing the attainment of the objective of protecting public finances or that it goes beyond what is necessary to attain that objective.

86 It follows from the foregoing that the fact that, under the national legislation at issue in the present action, for the purpose of granting the social benefits at issue the competent United Kingdom authorities are to require that the residence in their territory of nationals of other Member States who claim such benefits must be lawful does not amount to discrimination prohibited under Article 4 of Regulation No 883/2004.

87 Consequently, the action must be dismissed in its entirety.

Costs

88 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the United Kingdom has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the action;

2. Orders the European Commission to pay the costs.

C-202/13: McCarthy and Others

JUDGMENT OF THE COURT (Grand Chamber)

18 December 2014 (*)

(Citizenship of the European Union — Directive 2004/38/EC — Right of citizens of the Union and their family members to move and reside freely within the territory of a Member State — Right of entry — Third-country national who is a family member of a Union citizen and in possession of a residence card issued by a Member State — National legislation requiring an entry permit to be obtained prior to entry into national territory — Article 35 of Directive 2004/38/EC — Article 1 of the Protocol (No 20) on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland)

In Case C‑202/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), made by decision of 25 January 2013, received at the Court on 17 April 2013, in the proceedings

The Queen, on the application of:

Sean Ambrose McCarthy,

Helena Patricia McCarthy Rodriguez,

Natasha Caley McCarthy Rodriguez

v

Secretary of State for the Home Department,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, R. Silva de Lapuerta, M. Ilešič, T. von Danwitz (Rapporteur), S. Rodin, K. Jürimäe, Presidents of Chambers, A. Rosas, E. Juhász, A. Arabadjiev, C. Toader, M. Safjan, D. Šváby, M. Berger and F. Biltgen, Judges,

Advocate General: M. Szpunar,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 March 2014,

after considering the observations submitted on behalf of:

– Mr McCarthy, Ms McCarthy Rodriguez and their child Natasha Caley McCarthy Rodriguez, by M. Henderson and D. Lemer, Barristers, instructed by K. O'Rourke, Solicitor,

– the United Kingdom Government, by S. Brighouse and J. Beeko, acting as Agents, T. Ward QC, D. Grieve QC and G. Facenna, Barrister,

– the Greek Government, by T. Papadopoulou, acting as Agent,

– the Spanish Government, by A. Rubio González, acting as Agent,

– the Polish Government, by B. Majczyna, acting as Agent,

– the Slovak Government, by B. Ricziová, acting as Agent,

– the European Commission, by M. Wilderspin and C. Tufvesson, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 May 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 35 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda at OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34) and of Article 1 of the Protocol (No 20) on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland ('Protocol No 20').

2 The request has been made in proceedings brought by Mr McCarthy, Ms McCarthy Rodriguez and their child Natasha Caley McCarthy Rodriguez against the Secretary of State for the Home Department ('the Secretary of State') relating to the refusal to grant Ms McCarthy Rodriguez the right to enter the United Kingdom without a visa.

Legal context

EU law

Protocol No 20

3 Article 1 of Protocol No 20 provides:

‘The United Kingdom shall be entitled, notwithstanding Articles 26 and 77 of the Treaty on the Functioning of the European Union, any other provision of that Treaty or of the Treaty on European Union, any measure adopted under those Treaties, or any international agreement concluded by the Union or by the Union and its Member States with one or more third States, to exercise at its frontiers with other Member States such controls on persons seeking to enter the United Kingdom as it may consider necessary for the purpose:

(a) of verifying the right to enter the United Kingdom of citizens of Member States and of their dependants exercising rights conferred by Union law, as well as citizens of other States on whom such rights have been conferred by an agreement by which the United Kingdom is bound; and

(b) of determining whether or not to grant other persons permission to enter the United Kingdom.

Nothing in Articles 26 and 77 of the Treaty on the Functioning of the European Union or in any other provision of that Treaty or of the Treaty on European Union or in any measure adopted under them shall prejudice the right of the United Kingdom to adopt or exercise any such controls. References to the United Kingdom in this Article shall include territories for whose external relations the United Kingdom is responsible.’

Directive 2004/38

4 In accordance with recital 5 in the preamble to Directive 2004/38, ‘[t]he right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality’.

5 Recital 8 in the preamble to that directive states:

‘With a view to facilitating the free movement of family members who are not nationals of a Member State, those who have already obtained a residence card should be exempted from the requirement to obtain an entry visa within the meaning of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [OJ 2001 L 81, p. 1] or, where appropriate, of the applicable national legislation.’

6 Recitals 25 and 26 in its preamble state:

‘(25) Procedural safeguards should also be specified in detail in order to ensure a high level of protection of the rights of Union citizens and their family members in the event of their being denied leave to enter or reside in another Member State, as well as to uphold the principle that any action taken by the authorities must be properly justified.

(26) In all events, judicial redress procedures should be available to Union citizens and their family members who have been refused leave to enter or reside in another Member State.’

7 Article 1 of Directive 2004/38, headed ‘Subject’, provides:

‘This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

...'

8 The beneficiaries of Directive 2004/38 are defined in Article 3 as follows:

'1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

…'

9 Article 5 of Directive 2004/38, headed 'Right of entry', states:

'1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

No entry visa or equivalent formality may be imposed on Union citizens.

2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.

Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.

3. The host Member State shall not place an entry or exit stamp in the passport of family members who are not nationals of a Member State provided that they present the residence card provided for in Article 10.

4. Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence.

5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.'

10 As regards the right of residence, Articles 6 and 7(1) and (2) of Directive 2004/38 provide:

'Article 6

Right of residence for up to three months

1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.

Article 7

Right of residence for more than three months

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).'

11 So far as concerns issue of a residence card, Article 10 of Directive 2004/38 provides:

'1. The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called "Residence card of a family member of a Union citizen" no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.

2. For the residence card to be issued, Member States shall require presentation of the following documents:

(a) a valid passport;

(b) a document attesting to the existence of a family relationship or of a registered partnership;

(c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;

(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;

(e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;

(f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.'

12 Chapter VI of Directive 2004/38, headed 'Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health', provides in Articles 27, 30 and 31:

'Article 27

General principles

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

...

Article 30

Notification of decisions

1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.

2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.

3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time‑limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.

Article 31

Procedural safeguards

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

– where the expulsion decision is based on a previous judicial decision; or

– where the persons concerned have had previous access to judicial review; or

– where the expulsion decision is based on imperative grounds of public security under Article 28(3).

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.'

13 Article 35 of Directive 2004/38, which is in Chapter VII headed 'Final provisions', provides, in respect of the measures that the Member States may adopt in the case of abuse of rights or fraud:

'Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.'

Regulation No 539/2001

14 Recital 4 in the preamble to Regulation No 539/2001 states:

'Pursuant to Article 1 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland and the United Kingdom are not participating in the adoption of this Regulation. Consequently and without prejudice to Article 4 of the aforementioned Protocol, the provisions of this Regulation apply neither to Ireland nor to the United Kingdom.'

Regulation (EC) No 562/2006

15 Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1) provides for the absence of border control of persons crossing the internal borders between the Member States of the European Union and establishes rules governing border control of persons crossing the external borders of the Member States of the European Union.

16 As stated in recital 27 in its preamble, that regulation 'constitutes a development of provisions of the Schengen acquis in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis [(OJ 2000 L 131, p. 43)]. The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application'.

United Kingdom law

17 As regards the right of entry of third-country nationals who are family members of an EU national, regulation 11(2) to (4) of the Immigration (European Economic Area) Regulations 2006 ('the 2006 Regulations') provides:

'(2) A person who is not [a European Economic Area (EEA)] national must be admitted to the United Kingdom if he is a family member of an EEA national, a family member who has retained the right of residence or a person with a permanent right of residence under regulation 15 and produces on arrival—

(a) a valid passport; and

(b) an EEA family permit, a residence card or a permanent residence card.

(3) An immigration officer may not place a stamp in the passport of a person admitted to the United Kingdom under this regulation who is not an EEA national if the person produces a residence card or permanent residence card.

(4) Before an immigration officer refuses admission to the United Kingdom to a person under this regulation because the person does not produce on arrival a document mentioned in paragraph (1) or (2), the immigration officer must give the person every reasonable opportunity to obtain the document or have it brought to him within a reasonable period of time or to prove by other means that he is—

(a) an EEA national;

(b) a family member of an EEA national with a right to accompany that national or join him in the United Kingdom; or

(c) a family member who has retained the right of residence or a person with a permanent right of residence ...'

18 As regards issue of an 'EEA family permit' referred to in regulation 11 of the 2006 Regulations, regulation 12(1), (4) and (5) provides:

'(1) An entry clearance officer must issue an EEA family permit to a person who applies for one if the person is a family member of an EEA national and—

(a) the EEA national—

(i) is residing in the UK in accordance with these Regulations; or

(ii) will be travelling to the United Kingdom within six months of the date of the application and will be an EEA national residing in the United Kingdom in accordance with these Regulations on arrival in the United Kingdom; and

(b) the family member will be accompanying the EEA national to the United Kingdom or joining him there and—

(i) is lawfully resident in an EEA State; or

(ii) would meet the requirements in the immigration rules (other than those relating to entry clearance) for leave to enter the United Kingdom as the family member of the EEA national or, in the case of direct descendants or dependent direct relatives in the ascending line of his spouse or his civil partner, as the family member of his spouse or his civil partner, were the EEA national or the spouse or civil partner a person present and settled in the United Kingdom.

…

(4) An EEA family permit issued under this regulation shall be issued free of charge and as soon as possible.

(5) But an EEA family permit shall not be issued under this regulation if the applicant or the EEA national concerned falls to be excluded from the United Kingdom on grounds of public policy, public security or public health in accordance with regulation 21.'

19 Section 40 of the Immigration and Asylum Act 1999 provides:

'Charge in respect of passenger without proper documents

(1) This section applies if an individual requiring leave to enter the United Kingdom arrives in the United Kingdom by ship or aircraft and, on being required to do so by an immigration officer, fails to produce—

(a) an immigration document which is in force and which satisfactorily establishes his identity and his nationality or citizenship, and

(b) if the individual requires a visa, a visa of the required kind.

(2) The Secretary of State may charge the owner of the ship or aircraft, in respect of the individual, the sum of [GBP 2 000].

(3) The charge shall be payable to the Secretary of State on demand.

(4) No charge shall be payable in respect of any individual who is shown by the owner to have produced the required document or documents to the owner or his employee or agent when embarking on the ship or aircraft for the voyage or flight to the United Kingdom.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

20 Mr McCarthy is married to Ms McCarthy Rodriguez. Natasha Caley McCarthy Rodriguez is that couple's child. The three of them have been resident in Marbella (Spain) since 2010 and travel regularly to the United Kingdom, where they have a house.

21 Mr McCarthy has British and Irish nationality. Ms McCarthy Rodriguez, a Colombian national, holds a residence card which was issued in 2010 by the Spanish authorities on the basis of Article 10 of Directive 2004/38 and expires in 2015.

22 In order to be able to enter the United Kingdom, Ms McCarthy Rodriguez is required under the United Kingdom legislation, namely regulation 11 of the 2006 Regulations, to apply beforehand for an EEA family permit. Such a family permit is valid for six months and can be renewed provided that the applicant goes in person to a United Kingdom diplomatic mission abroad and fills in a form containing questions relating to the applicant's finances and employment. Thus, whenever Ms McCarthy Rodriguez wishes to renew the family permit she must travel from Marbella to the United Kingdom diplomatic mission in Madrid (Spain).

23 Certain airlines have denied Ms McCarthy Rodriguez permission to board flights to the United Kingdom when she has presented only her residence card and not the EEA family permit required by the United Kingdom legislation. That practice results from the guidance, laid down by the Secretary of State for carriers transporting persons to the United Kingdom, relating to the application of section 40 of the Immigration and Asylum Act 1999. The guidance is intended to encourage carriers not to transport passengers where they are third-country nationals who do not hold a residence card issued by the United Kingdom authorities or a valid travel document, such as the EEA family permit.

24 In 2012 the claimants in the main proceedings brought an action against the United Kingdom before the referring court seeking a declaration that the United Kingdom had failed to fulfil its obligation to transpose Article 5(2) of Directive 2004/38 into national law properly. Within the framework of that case Ms McCarthy Rodriguez obtained interim relief providing for the renewal of her EEA family permit upon written application without her having to attend in person the United Kingdom diplomatic mission in Madrid.

25 Before the referring court, the Secretary of State observed that the United Kingdom legislation at issue in the main proceedings is not intended to implement Article 5(2) of Directive 2004/38. She submitted that that legislation, like the lack of transposition of Article 5(2), is justified as a necessary measure under Article 35 of the directive and as a control within the meaning of Article 1 of Protocol No 20.

26 In this connection, the Secretary of State pleaded that there is a 'systemic problem' of abuse of rights and fraud by third-country nationals. The residence cards referred to in Article 10 of Directive 2004/38 are susceptible to forgery. In particular, there is no uniform format for those cards. However, according to the Secretary of State, the residence cards issued by the Federal Republic of Germany and the Republic of Estonia meet appropriate security standards, in

particular those laid down by the International Civil Aviation Organisation, so that the national legislation at issue in the main proceedings should be amended so far as concerns persons holding a residence card issued by one of those two Member States.

27 After examining the evidence adduced by the Secretary of State, the referring court concluded that her concerns as to a 'systemic' abuse of rights appeared to it to be justified. According to the referring court, residence cards are ripe for exploitation in the context of illegal immigration into the United Kingdom. There is a palpable risk that a significant proportion of those engaged in the 'business of sham marriages' will use fake residence cards for the purpose of gaining illegal access to the United Kingdom. Thus, the refusal of that Member State to exempt holders of residence cards from the obligation to obtain an entry visa is sensible, necessary and objectively justified.

28 In those circumstances, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does Article 35 of [Directive 2004/38] entitle a Member State to adopt a measure of general application to refuse, terminate, or withdraw the right conferred by Article 5(2) of the directive exempting [non-EU national] family members who are holders of residence cards issued pursuant to Article 10 of the directive ("residence card holders") from visa requirements?

(2) Can Article 1 of Protocol No 20 … entitle the United Kingdom to require residence card holders to have an entry visa which must be obtained prior to arrival at the frontier?

(3) If the answer to question 1 or question 2 is yes, is the United Kingdom's approach to residence card holders in the present case justifiable, having regard to the evidence summarised in the referring court's judgment?'

Consideration of the questions referred

Questions 1 and 2

29 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 35 of Directive 2004/38 and Article 1 of Protocol No 20 must be interpreted as permitting a Member State to require, in pursuit of an objective of general prevention, family members of a Union citizen who are not nationals of a Member State and who hold a valid residence card issued under Article 10 of Directive 2004/38 by the authorities of another Member State to be in possession, pursuant to national law, of an entry permit, such as the EEA family permit, in order to be able to enter its territory.

Interpretation of Directive 2004/38

30 As the referring court has asked the question relating to the interpretation of Article 35 of Directive 2004/38 on the basis of the premiss that that directive is applicable to the dispute in the main proceedings, it should be established at the outset whether the directive confers on Ms McCarthy Rodriguez the right to enter the United Kingdom when she is coming from another Member State.

– Applicability of Directive 2004/38

31 As is apparent from settled case-law, Directive 2004/38 aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by Article 21(1) TFEU and to strengthen that right (judgment in O. and B., C‑456/12, EU:C:2014:135, paragraph 35 and the case-law cited).

32 Having regard to the context and objectives of Directive 2004/38, the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness (judgment in Metock and Others, C‑127/08, EU:C:2008:449, paragraph 84).

33 As regards, first, any rights of family members of a Union citizen who are not nationals of a Member State, recital 5 in the preamble to Directive 2004/38 points out that the right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of dignity, be also granted to their family members, irrespective of nationality (judgment in Metock and Others, EU:C:2008:449, paragraph 83).

34 Whilst the provisions of Directive 2004/38 do not confer any autonomous right on family members of a Union citizen who are not nationals of a Member State, any rights conferred on them by provisions of EU law on Union citizenship are rights derived from the exercise by a Union citizen of his freedom of movement (see, to this effect, judgment in O. and B., EU:C:2014:135, paragraph 36 and the case-law cited).

35 Indeed, Article 3(1) of Directive 2004/38 defines as 'beneficiaries' of the rights conferred by the directive 'all Union citizens who move to or reside in a Member State other than that of which they are a national, and … their family members as defined in point 2 of Article 2 who accompany or join them'.

36 Thus, the Court has held that not all family members of a Union citizen who are not nationals of a Member State derive rights of entry into and residence in a Member State from Directive 2004/38, but only those who are family members, within the meaning of point 2 of Article 2 of that directive, of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national (judgments in Metock and Others, EU:C:2008:449, paragraph 73; Dereci and Others, C‑256/11, EU:C:2011:734, paragraph 56; Iida, C‑40/11, EU:C:2012:691, paragraph 51; and O. and B., EU:C:2014:135, paragraph 39).

37 In the case in point, it is common ground that Mr McCarthy has exercised his right of freedom of movement by becoming established in Spain. Furthermore, it is likewise common ground that his wife, Ms McCarthy Rodriguez, resides in that Member State with him and the child born of their union and that she is in possession of a valid residence card issued by the Spanish authorities under Article 10 of Directive 2004/38 that permits her to reside lawfully in Spanish territory.

38 It follows that Mr McCarthy and Ms McCarthy Rodriguez are 'beneficiaries' of that directive, within the meaning of Article 3(1) thereof.

39 So far as concerns, second, the issue whether Ms McCarthy Rodriguez derives a right of entry into the United Kingdom from Directive 2004/38 when she is coming from another Member State, it is to be noted that Article 5 of that directive governs the right of entry and conditions for entry into the territory of the Member States. As set out in Article 5(1), 'Member States shall grant Union citizens leave to enter their territory … and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport'.

40 In addition, the first subparagraph of Article 5(2) of Directive 2004/38 provides that '[f]or the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement'. As is apparent from recital 8 in the preamble to the directive, that exemption is intended to facilitate the free movement of third-country nationals who are family members of a Union citizen.

41 Article 5 of Directive 2004/38 refers to 'Member States' and does not draw a distinction on the basis of the Member State of entry, in particular in so far as it provides that possession of a valid residence card as referred to in Article 10 of the directive is to exempt family members of a Union citizen who are not nationals of a Member State from the requirement to obtain an entry visa. Thus, there is nothing at all in Article 5 indicating that the right of entry of family members of the Union citizen who are not nationals of a Member State is limited to Member States other than the Member State of origin of the Union citizen.

42 Accordingly, it must be held that, pursuant to Article 5 of Directive 2004/38, a person who is a family member of a Union citizen and is in a situation such as that of Ms McCarthy Rodriguez is not subject to the requirement to

obtain a visa or an equivalent requirement in order to be able to enter the territory of that Union citizen's Member State of origin.

– Interpretation of Article 35 of Directive 2004/38

43 The national legislation at issue in the main proceedings requires any family member of a Union citizen who is not a national of a Member State to obtain an entry permit in advance. That legislation is founded on the existence of a general risk of abuse of rights or fraud, described by the Secretary of State as 'systemic', thereby excluding any specific assessment by the competent national authorities of the conduct of the person concerned himself as regards any abuse of rights or fraud.

44 That legislation requires an entry permit to be obtained prior to entry into United Kingdom territory, even where, as in the case in point, the national authorities do not consider that the family member of a Union citizen may be involved in an abuse of rights or fraud. Thus, the legislation imposes that requirement even though the authenticity of the residence card issued under Article 10 of Directive 2004/38 and the correctness of the data appearing on it are not called into question by the United Kingdom authorities. Effectively, therefore, the legislation denies family members of a Union citizen who are not nationals of a Member State — absolutely and automatically — the right conferred on them in Article 5(2) of Directive 2004/38 to enter the territory of the Member States without a visa, although they are in possession of a valid residence card, issued on the basis of Article 10 of Directive 2004/38 by the Member State of residence.

45 It is true that, in accordance with the Court's case-law, Directive 2004/38 does not deprive the Member States of all possibility of controlling the entry into their territory of family members of Union citizens. However, where the family member of a Union citizen who is not a national of a Member State derives rights of entry into and residence in the host Member State from Directive 2004/38, that State may restrict that right only in compliance with Articles 27 and 35 of the directive (see judgment in Metock and Others, EU:C:2008:449, paragraphs 74 and 95).

46 By virtue of Article 27 of Directive 2004/38, Member States may, where this is justified, refuse entry and residence on grounds of public policy, public security or public health. Such a refusal must be based on an individual examination of the particular case (judgment in Metock and Others, EU:C:2008:449, paragraph 74). Thus, justifications that are isolated from the particulars of the case in question or that rely on considerations of general prevention are not to be accepted (judgments in Jipa, C‑33/07, EU:C:2008:396, paragraph 24, and Aladzhov, C‑434/10, EU:C:2011:750, paragraph 42).

47 Furthermore, in accordance with Article 35 of Directive 2004/38, Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by that directive in the case of abuse of rights or fraud, such as marriages of convenience; however, any such measure must be proportionate and subject to the procedural safeguards provided for in the directive (judgment in Metock and Others, EU:C:2008:449, paragraph 75).

48 As regards the question whether Article 35 of Directive 2004/38 allows the Member States to adopt measures such as the measure at issue in the main proceedings, it is to be noted that the right of entry and the right of residence are conferred on Union citizens and their family members in the light of their individual position.

49 Indeed, decisions or measures adopted by the competent national authorities relating to a possible right of entry or residence, on the basis of Directive 2004/38, are intended to establish the individual position of a national of a Member State or of his family members with regard to that directive (see, to this effect, with regard to issue of a residence permit on the basis of secondary legislation, judgments in Collins, C‑138/02, EU:C:2004:172, paragraph 40; Commission v Belgium, C‑408/03, EU:C:2006:192, paragraphs 62 and 63; and Dias, C‑325/09, EU:C:2011:498, paragraph 48).

50 Furthermore, as Article 35 of Directive 2004/38 expressly states, measures adopted on the basis of that article are subject to the procedural safeguards provided for in Articles 30 and 31 of the directive. As is clear from recital 25

in the preamble to the directive, those procedural safeguards are intended, in particular, to ensure a high level of protection of the rights of Union citizens and their family members in the event of their being denied leave to enter or reside in another Member State.

51 In the light of the fact that Directive 2004/38 confers rights on an individual basis, the redress procedures are designed to enable the person concerned to put forward circumstances and considerations relating to his individual position, so as to be able to obtain from the competent national authorities and/or courts recognition of the individual right to which he may lay claim.

52 It follows from the foregoing considerations that measures adopted by the national authorities, on the basis of Article 35 of Directive 2004/38, in order to refuse, terminate or withdraw a right conferred by that directive must be based on an individual examination of the particular case.

53 Thus, the Member States cannot refuse family members of a Union citizen who are not nationals of a Member State and who hold a valid residence card, issued under Article 10 of Directive 2004/38, the right, as provided for in Article 5(2) of the directive, to enter their territory without a visa where the competent national authorities have not carried out an individual examination of the particular case. The Member States are therefore required to recognise such a residence card for the purposes of entry into their territory without a visa, unless doubt is cast on the authenticity of that card and the correctness of the data appearing on it by concrete evidence that relates to the individual case in question and justifies the conclusion that there is an abuse of rights or fraud (see, by analogy, judgment in Dafeki, C‑336/94, EU:C:1997:579, paragraphs 19 and 21).

54 In this connection, the Court has stated that proof of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved, and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it (judgments in Hungary v Slovakia, C‑364/10, EU:C:2012:630, paragraph 58 and the case-law cited, and O. and B., EU:C:2014:135, paragraph 58).

55 In the absence of an express provision in Directive 2004/38, the fact that a Member State is faced, as the United Kingdom considers itself to be, with a high number of cases of abuse of rights or fraud committed by third-country nationals resorting to sham marriages or using falsified residence cards cannot justify the adoption of a measure, such as that at issue in the main proceedings, founded on considerations of general prevention, to the exclusion of any specific assessment of the conduct of the person concerned himself.

56 Indeed, the adoption of measures pursuing an objective of general prevention in respect of widespread cases of abuse of rights or fraud would mean, as in the case in point, that the mere fact of belonging to a particular group of persons would allow the Member States to refuse to recognise a right expressly conferred by Directive 2004/38 on family members of a Union citizen who are not nationals of a Member State, although they in fact fulfil the conditions laid down by that directive. The same would be true if recognition of that right were limited to persons who are in possession of residence cards issued by certain Member States, as the United Kingdom has envisaged.

57 Such measures, being automatic in nature, would allow Member States to leave the provisions of Directive 2004/38 unapplied and would disregard the very substance of the primary and individual right of Union citizens to move and reside freely within the territory of the Member States and of the derived rights enjoyed by those citizens' family members who are not nationals of a Member State.

58 In the light of the foregoing considerations, Article 35 of Directive 2004/38 must be interpreted as not permitting a Member State to require, in pursuit of an objective of general prevention, family members of a Union citizen who are not nationals of a Member State and who hold a valid residence card, issued under Article 10 of that directive by the authorities of another Member State, to be in possession, pursuant to national law, of an entry permit, such as the EEA family permit, in order to be able to enter its territory.

Interpretation of Protocol No 20

59 It should be recalled that Article 77(1)(a) TFEU states that the European Union is to develop a policy with a view to ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders of the European Union. The abolition of internal border controls forms part of the European Union's objective, stated in Article 26 TFEU, of establishing an area without internal frontiers in which the free movement of persons is ensured. That aspect of the absence of internal border controls was implemented by the EU legislature by adopting, on the basis of Article 62 EC (now Article 77 TFEU), Regulation No 562/2006 which seeks to build on the Schengen acquis (see, to this effect, judgment in Adil, C‑278/12 PPU, EU:C:2012:508, paragraphs 48 to 50).

60 However, as the United Kingdom does not take part in the provisions of the Schengen acquis concerning the abolition of border controls and the movement of persons, including the common visa policy, Article 1 of Protocol No 20 provides that the United Kingdom is to be entitled to exercise at its frontiers with other Member States such controls on persons seeking to enter the United Kingdom as it may consider necessary for the purpose of verifying, in particular, the right to enter the United Kingdom of Union citizens and of their dependants exercising rights conferred by EU law and of determining whether or not to grant other persons permission to enter the United Kingdom.

61 Those controls are carried out 'at frontiers' and are intended to verify whether persons seeking to enter the United Kingdom have a right of entry under provisions of EU law or, in the absence of such a right, whether they should be granted permission to enter the United Kingdom. The controls therefore have the objective in particular of preventing the United Kingdom's borders with other Member States from being crossed unlawfully.

62 Thus, in the case of family members of a Union citizen who are not nationals of a Member State and who seek to enter the United Kingdom in reliance upon a right of entry provided for by Directive 2004/38, verification, for the purposes of Article 1 of Protocol No 20, consists, in particular, in checking whether the person concerned is in possession of the documents prescribed in Article 5 of that directive. In this regard, even though the Court has held that residence permits issued on the basis of EU law, by nature, declare and do not create rights (judgments in Dias, EU:C:2011:498, paragraph 49, and O. and B., EU:C:2014:135, paragraph 60), the fact remains that, as has been established in paragraph 53 of the present judgment, the Member States are, in principle, required to recognise a residence card issued under Article 10 of Directive 2004/38, for the purposes of entry into their territory without a visa.

63 In accordance with its objective of preventing borders from being crossed unlawfully, verification, for the purposes of Article 1 of Protocol No 20, may include examination of the authenticity of those documents and of the correctness of the data appearing on them as well as examination of concrete evidence that justifies the conclusion that there is an abuse of rights or fraud.

64 It follows that Article 1 of Protocol No 20 authorises the United Kingdom to verify whether a person seeking to enter its territory in fact fulfils the conditions for entry, including those provided for by EU law. On the other hand, it does not permit the United Kingdom to determine the conditions for entry of persons who have a right of entry under EU law and, in particular, to impose upon them extra conditions for entry or conditions other than those provided for by EU law.

65 This is precisely the case here. By requiring an EEA family permit to be obtained in advance, the national legislation at issue in the main proceedings prescribes, for family members of a Union citizen who are not nationals of a Member State and who are in possession of a valid residence card issued under Article 10 of Directive 2004/38, a condition for entry which is additional to the conditions for entry provided for in Article 5 of the directive, and not simply verification of those conditions 'at frontiers'.

66 In the light of all the foregoing considerations, the answer to the first and second questions is that both Article 35 of Directive 2004/38 and Article 1 of Protocol No 20 must be interpreted as not permitting a Member State to require, in pursuit of an objective of general prevention, family members of a Union citizen who are not nationals of a Member State and who hold a valid residence card, issued under Article 10 of Directive 2004/38 by the authorities of another Member State, to be in possession, pursuant to national law, of an entry permit, such as the EEA family permit, in order to be able to enter its territory.

Question 3

67 In view of the answer to the first and second questions, there is no need to reply to the third question.

Costs

68 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Both Article 35 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC and Article 1 of the Protocol (No 20) on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland must be interpreted as not permitting a Member State to require, in pursuit of an objective of general prevention, family members of a citizen of the European Union who are not nationals of a Member State and who hold a valid residence card, issued under Article 10 of Directive 2004/38 by the authorities of another Member State, to be in possession, pursuant to national law, of an entry permit, such as the EEA (European Economic Area) family permit, in order to be able to enter its territory.

E-28/15 Jabbi

JUDGMENT OF THE COURT
26 July 2016
(Directive 2004/38/EC – Right of residence – Derived rights for third country nationals)

In Case E-28/15,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Oslo District Court (Oslo tingrett), in the case between

Yankuba Jabbi

and

The Norwegian Government, represented by the Immigration Appeals Board

concerning the interpretation of Article 7(1)(b) in conjunction with Article 7(2) of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States,

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen and Páll Hreinsson (Judge-Rapporteur), Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:
- Yankuba Jabbi ("the plaintiff"), represented by Elise Nygård, advokatfullmektig;
- the Norwegian Government, represented by the Immigration Appeals Board ("the defendant"), represented by Pål Wennerås, advokat, Office of the Attorney General (Civil Affairs), acting as Agent;
- the Government of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, and Thomas Bischof, Deputy Director, EEA Coordination Unit, acting as Agents;
- the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler, Maria Moustakali and Marlene Lie Hakkebo, members of its Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission ("the Commission"), represented by Elisabetta Montaguti and Michael Wilderspin, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the defendant, represented by Pål Wennerås; the Liechtenstein Government, represented by Dr Andrea Entner-Koch and Thomas Bischof; ESA, represented by Maria Moustakali and Marlene Lie Hakkebo; and the Commission, represented by Elisabetta Montaguti and Michael Wilderspin, at the hearing on 19 April 2016,
gives the following

Judgment

I Legal background

EU law

1 Article 20 of the Treaty on the Functioning of the European Union ("TFEU") reads:

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
(a) the right to move and reside freely within the territory of the Member States;
(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.
These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

2 Article 21(1) and (2) TFEU reads:

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.
2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

EEA law

3 Article 28 of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") provides as follows:

1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
(a) to accept offers of employment actually made;
(b) to move freely within the territory of EC Member States and EFTA States for this purpose;
(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.
...

4 Council Directive 90/364/EEC of 28 June 1990 on the right of residence ("Directive 90/364") was referred to at point 6 of Annex VIII to the EEA Agreement.

5 Recitals 1, 2, 3, 4 and 5 of Directive 90/364 read:

Whereas Article 3 (c) of the Treaty provides that the activities of the Community shall include, as provided in the Treaty, the abolition, as between Member States, of obstacles to freedom of movement for persons;
Whereas Article 8a of the Treaty provides that the internal market must be established by 31 December 1992; whereas the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty;
Whereas national provisions on the right of nationals of the Member States to reside in a Member State other than their own must be harmonized to ensure such freedom of movement;

Whereas beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State;

Whereas this right can only be genuinely exercised if it is also granted to members of the family;

6 Article 1 of Directive 90/364 reads:

1. Member States shall grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law and to members of their families as defined in paragraph 2, provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.

The resources referred to in the first subparagraph shall be deemed sufficient where they are higher than the level of resources below which the host Member State may grant social assistance to its nationals, taking into account the personal circumstances of the applicant and, where appropriate, the personal circumstances of persons admitted pursuant to paragraph 2.

Where the second subparagraph cannot be applied in a Member State, the resources of the applicant shall be deemed sufficient if they are higher than the level of the minimum social security pension paid by the host Member State.

2. The following shall, irrespective of their nationality, have the right to install themselves in another Member State with the holder of the right of residence:

(a) his or her spouse and their descendants who are dependants;

(b) dependent relatives in the ascending line of the holder of the right of residence and his or her spouse.

7 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/36/EEC (OJ 2004 L 158, p. 77, as corrected by OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34, and Norwegian EEA Supplement 2012 No 5, p. 243) ("the Directive") was incorporated into the EEA Agreement at point 1 of Annex V and point 3 of Annex VIII to the Agreement by EEA Joint Committee Decision No 158/2007 of 7 December 2007 (OJ 2008 L 124, p. 20, and EEA Supplement 2008 No 26, p. 17) ("the Joint Committee Decision"), which entered into force on 1 March 2009.

8 Recitals 8 and 9 of the Joint Committee Decision read as follows:

(8) The concept of 'Union Citizenship' is not included in the Agreement.

(9) Immigration policy is not part of the Agreement.

9 Article 1 of the Joint Committee Decision reads:

...

The provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations:

...

(b) The Agreement applies to nationals of the Contracting Parties. However, members of their family within the meaning of the Directive possessing third country nationality shall derive certain rights according to the Directive.

(c) The words "Union citizen(s)" shall be replaced by the words "national(s) of EC Member States and EFTA States".

...

10 Attached to the Joint Committee Decision was a Joint Declaration by the Contracting Parties to the decision. That declaration reads:

The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq. EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future

case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals.

The Contracting Parties agree that immigration policy is not covered by the EEA Agreement. Residence rights for third country nationals fall outside the scope of the Agreement with the exception of rights granted by the Directive to third country nationals who are family members of an EEA national exercising his or her right to free movement under the EEA Agreement as these rights are corollary to the right of free movement of EEA nationals. The EFTA States recognise that it is of importance to EEA nationals making use of their right of free movement of persons, that their family members within the meaning of the Directive and possessing third country nationality also enjoy certain derived rights such as foreseen in Articles 12(2), 13(2) and 18. This is without prejudice to Article 118 of the EEA Agreement and the future development of independent rights of third country nationals which do not fall within the scope of the EEA Agreement.

11 Recital 1 in the preamble to the Directive reads as follows:

Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

12 Recital 3 in the preamble to the Directive reads as follows:

Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

13 Recital 5 in the preamble to the Directive reads as follows:

The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of "family member" should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.

14 Article 1 of the Directive reads as follows:

This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by nationals of EC Member States and EFTA States and their family members;

...

15 Article 2 of the Directive provides:

For the purposes of this Directive:

...

2. "family member" means:

(a) the spouse;

...

3. "host Member State" means the Member State to which a national of EC Member States and EFTA States moves in order to exercise his/her right of free movement and residence.

16 Article 3(1) of the Directive reads:

This Directive shall apply to all nationals of EC Member States and EFTA States who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

17 Article 6 of the Directive, which addresses the right of residence for up to three months, states:

1. Nationals of EC Member States and EFTA States shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the national of EC Member States and EFTA States.

18 Article 7 of the Directive, which addresses the right of residence for more than three months, provides as follows:

1. All nationals of EC Member States and EFTA States shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a national of EC Member States and EFTA States who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the national of EC Member States and EFTA States in the host Member State, provided that such national of EC Member States and EFTA States satisfies the conditions referred to in paragraph 1(a), (b) or (c).

...

National law

19 In Norway, the Directive has been implemented by the Act of 15 May 2008 No 35 on the entry of foreign nationals into the Kingdom of Norway and their stay in the realm (lov 15. mai 2008 nr. 35 om utlendingers adgang til riket og deres opphold her) ("the Immigration Act").

20 Chapter 13 of the Immigration Act (Sections 109 to 125) contains special rules relating to foreign nationals covered by the EEA Agreement. Paragraph 2 of Section 110 of the Immigration Act reads:

Family members of an EEA national are subject to the provisions of this chapter as long as they accompany or are reunited with an EEA national. Family members of a Norwegian national are subject to the provisions of this chapter if they accompany or are reunited with a Norwegian national who returns to the realm after having exercised the right to free movement under the EEA Agreement or the EFTA Convention in another EEA country or EFTA country.

21 Section 112 of the Immigration Act, which concerns the right of residence for more than three months for EEA nationals, reads:

An EEA national has a right of residence for more than three months as long as the person in question:

(a) is employed or self-employed,

(b) is to provide services,

(c) is self-supporting and can provide for any accompanying family member and is covered by a health insurance policy that covers all risks during the stay, or

...

II Facts and procedure

22 The plaintiff is a Gambian national. On 1 February 2012, he married Inger Johanne Martinsen Amoh (the sponsor), a Norwegian national, in Spain. They stayed together in Spain from September 2011 to October 2012. According to the referring court, Ms Amoh did not engage in economic activity during her stay in Spain, but the plaintiff claims that she had her own funds for the stay. It is disputed whether Ms Amoh met the conditions for receiving a work assessment allowance during her stay in Spain, but it is undisputed that she was entitled to receive a disability pension there.

23 The parties differ on the documentation submitted concerning Ms Amoh's stay in Spain and her connection to Norway during the stay.

24 On 20 November 2012, the plaintiff applied for residence in Norway as the spouse of an EEA national, that is of Ms Amoh. The Directorate of Immigration decided on 19 February 2014 that the plaintiff did not meet the conditions for residence in Norway under Chapter 13 of the Immigration Act and expelled him from Norway. Upon appeal, that decision was upheld by the Immigration Appeals Board decision of 13 May 2014. The plaintiff subsequently requested a reversal of the decision, but his request was rejected by the Appeals Board decisions of 8 July 2014 and 15 January 2015.

25 Following those decisions, the plaintiff instigated proceedings before Oslo District Court, claiming that he has a derived right of residence in Norway as a result of his wife's stay in Spain and subsequent return to Norway.

26 By a letter of 9 November 2015, registered on 18 November 2015, the District Court referred the following question to the Court:
Does Article 7(1)(b), cf. Article 7(2), of Directive 2004/38/EC confer derived rights of residence to a third country national who is a family member of an EEA national who, upon returning from another EEA State, is residing in the EEA State in which the EEA national is a citizen?

27 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Answer of the Court

Observations submitted to the Court

28 The plaintiff argues that he has a derived right of residence in Norway following his wife's stay in Spain and her subsequent return to Norway, based on Article 7(1)(b) and Article 7(2) of the Directive.

29 According to the plaintiff, Article 7(1)(b) regulates the right of residence in another EEA State for EEA nationals who are not economically active. That person's family members, who are not EEA nationals, derive their right of residence from Article 7(2).

30 The main objective of the EEA Agreement, according to the plaintiff, was to expand the European Union's internal market to the EFTA States, by establishing a dynamic and homogeneous European Economic Area, based on common rules. The plaintiff concludes that the objective of homogeneity must be decisive when it comes to the interpretation of Article 7(1)(b) of the Directive.

31 The plaintiff notes that, under EU law, derived rights in situations such as in the present case, may be based on the concept of Union citizenship laid down in Articles 20 and 21 TFEU, following the judgment of the Court of Justice of the European Union ("ECJ") in O. and B. (C-456/12, EU:C:2014:135). The plaintiff acknowledges that the concept of Union citizenship is without parallel in EEA law. He nevertheless claims that the right of free movement must be uniform throughout the EEA.

32 The plaintiff argues that the judgment in O. and B. provides reasons for interpreting and applying the Directive in accordance with Article 21 TFEU and thereby in accordance with the principle of homogeneity. Without such an

interpretation, the right to free movement by EEA nationals would be hindered. In further support of this, the plaintiff refers to the case law of the Court (Case E-26/13 Gunnarsson [2014] EFTA Ct. Rep. 254).

33 For those reasons, the plaintiff proposes that the Court should answer the question referred in the affirmative.

34 The defendant, supported by Liechtenstein, argues that the question referred has already been answered in O. and B. There, the ECJ held that the Directive does not confer derived rights of residence for third country nationals in the Member State of which their sponsors are nationals, and that such a derived right could only be established on the basis of Article 21(1) TFEU.

35 The defendant points out that the EEA Agreement does not contain a provision corresponding to Article 21 TFEU. Furthermore, the defendant stresses that in Gunnarsson the Court observed that the Directive cannot introduce rights into the EEA Agreement based on the concept of Union citizenship in Article 21(1) TFEU.

36 The defendant states that, since it is common ground that Ms Amoh did not pursue an economic activity in Spain, the provisions on the free movement of persons in the main part of the EEA Agreement, Articles 28, 31 and 36, do not apply. Ms Amoh's residence in Spain could therefore only have been based on Article 7(1)(b) of the Directive, subject to the conditions of that provision. It is disputed whether Ms Amoh fulfilled all of those conditions.

37 The defendant acknowledges that the homogeneous interpretation and application of common rules is essential for the effective functioning of the internal market within the EEA. The principle of homogeneity therefore leads to a presumption that provisions framed in the same way in the EEA Agreement and in EU law are to be construed in the same way (reference is made to Case E-2/06 ESA v Norway [2007] EFTA Ct. Rep. 164, paragraph 59). Conversely, the Court has repeatedly dismissed invitations to rely upon, by way of analogy or interpretation, provisions of EU law which have not been made part of EEA law. The defendant maintains that, accordingly, the principle of homogeneity dictates that the provisions of the Directive, which are rules common to the EEA and the EU, are interpreted uniformly and in conformity with the judgment in O. and B. In contrast, the rights established in that judgment on the basis of Article 21(1) TFEU may not be transposed by analogy when interpreting the Directive.

38 ESA, supported by the Commission, submits that the purpose of establishing a derived right of residence for family members of EEA nationals is to ensure that the right to free movement within the EEA is real and effective.

39 ESA acknowledges that the purely hypothetical prospect of exercising the right to freedom of movement does not establish a sufficient connection with EEA law to justify the application of that law's provisions. Consequently, derived rights of residence of third country national family members in principle only exist where these are necessary to ensure that the EEA national can exercise his or her free movement and residence rights effectively.

40 ESA argues that the parties seem to differ on the documentation concerning Ms Amoh's stay in Spain and her connection to Norway during that stay. ESA acknowledges that, on the basis of the information provided in the request for an advisory opinion, it appears that Ms Amoh did not exercise her right to free movement as a worker. However, ESA states that, if she was a worker, which the referring court must assess, then the plaintiff would have a derived right of residence in the host State pursuant to Article 7 of the Directive, as well as in the home State on the basis of Article 28 EEA.

41 Proceeding on the basis that Ms Amoh was not economically active during her stay in Spain, ESA states that Article 7(1)(b) only requires that she must have sufficient resources not to become a burden on the Spanish social assistance system during her period of residence, and that she must have comprehensive sickness insurance cover in Spain during that time. According to ESA, this establishes that the rights guaranteed by Article 7 of the Directive are also applicable in circumstances where the EEA national is non-economically active.

42 Turning to the applicability of Article 7 of the Directive to the home State of an EEA national, ESA submits that the Court found in Gunnarsson that Article 7(1)(b) can be invoked by non-economically active EEA nationals who have exercised their free movement rights against their EEA State of nationality. ESA maintains that the same principle

is at stake in this case. For any residence right to be truly effective, the home State must also be prohibited from hindering the exercise of the right. Similarly, the opportunities offered by the Directive could not be fully effective if a national of an EEA State could be deterred from availing himself of them by obstacles raised on his return to his country of origin by legislation penalising the fact that he has used them.

43 Despite the fact that Union citizenship does not exist under the EEA Agreement, ESA argues for a result that ensures homogeneity. The scope of free movement rights granted to EFTA nationals should be the same as for EU nationals. The lack of a citizenship concept in the EEA Agreement entails that the Directive should be accorded a more important role in the EEA context. Its scope must therefore be broadened on the basis of the principle of effectiveness.

44 ESA submits that the derived rights of third country family members of returning Norwegian nationals must be examined under EEA law on the premise that non-economically active nationals can invoke Article 7(1)(b) of the Directive against their own EEA State and that economically active EEA nationals derive their corresponding rights from Articles 28, 31 and 36 EEA. In both instances, the substance of the rights should be the same. ESA concludes that the plaintiff should thus be able to invoke Article 7(2) of the Directive.

45 The Commission submits that, although the question referred only mentions an interpretation of the Directive, it should be expanded to encompass the issue of whether, where the third country national spouse of an EEA national has acquired a derived right of residence in another EEA State on the basis of Article 7(1)(b) in conjunction with Article 7(2) of the Directive, the EEA Agreement equally confers such a derived right of residence on that family member when he accompanies the EEA national to reside in the EEA State of which she is a national.

46 The Commission provides three reasons why the result in the case of O. and B. does not apply to the present case. First, the conclusion in that case, which purports to be based on McCarthy I (C-434/09, EU:C:2011:277), fails to take account of the fact that the latter case concerned a wholly internal situation. Second, the ECJ's holding in O. and B. concerning the applicability of the Directive must be read in conjunction with the ECJ's conclusion in the same judgment on the possibility of applying the Directive by analogy. Third, O. and B. cannot be regarded as the last word on this issue. More precisely, in McCarthy II (C-202/13, EU:C:2014:2450), the ECJ indicated that the Directive may indeed be applicable to situations such as that of the present case. The Commission contends that the Court should apply the same methodology to the present case and adds that such a result would be consistent with Gunnarsson.

47 Should the Court not agree with the preceding arguments, the Commission claims that the reference to a right under Article 21(1) TFEU in O. and B. has to be seen in the context of the case law on which that statement was based, in particular the judgments in Singh (C-370/90, EU:C:1992:296) and Eind (C-291/05, EU:C:2007:771). Hence, the reference in O. and B. to Article 21 TFEU does not mean that the principles laid down in Singh and Eind, which are based on free movement rather than citizenship, no longer apply. This case law, which concerned circumstances before the Directive entered into force, still applies to the interpretation of EEA law where an EEA national has previously exercised the right of free movement as a worker. However, in the present case, the question is based upon the premise that the EEA national had acquired a right of residence in Spain as a non-economically active person. Such situations have been dealt with by the Court in Gunnarsson, and the logic of the Court in that case can therefore be adopted in the present case.

Findings of the Court

48 The referring court asks, in essence, whether a third-country national who is a family member of an EEA national who, upon returning from another EEA State resides in the EEA State in which the EEA national is a citizen, has a derived right of residence under EEA law in that EEA State.

General remarks

49 The free movement of persons is one of the fundamental freedoms of the EU internal market. A shared and well-functioning labour market was considered important to the realisation of the goals of economic development and integration in the incipient EU cooperation. Therefore, at that time, the States of the European Coal and Steel

Community agreed to remove any restriction based on nationality upon employment in the coal and steel industries on workers who were their nationals.

50 A shared labour market would not function adequately if migrant workers were prevented from maintaining established family life. Such a limitation would have acted as a deterrent to labour market mobility. Therefore, from an early stage of integration, a worker and his family members were enabled to maintain their family life when the worker was employed outside of his State of origin, that is his home State.

51 Subsequently, the free movement of persons was broadened. Thus, legislation extended the concept of free movement. In particular, the concept came to include students and other economically inactive persons. Students are seeking education with a view to entering the labour market and other economically inactive persons have, in the majority of cases, participated in the labour market.

52 The exercise of free movement of persons is conditional. In particular, EU law requires that economically inactive persons have sufficient resources for themselves and their family members so as not to become a burden on the social security system of the host State. That condition is intended to protect the host State's fiscal interests by placing a person's own resources on a like footing with the financial contributions to the social security system made as a result of employment in the labour market. A condition of comprehensive sickness insurance cover also applies.

53 The scope of free movement of persons was specified by case law. In Singh, cited above, the ECJ set out the right of a worker to return to his home EU State with family members. The ECJ observed that a worker could be deterred from exercising his right to free movement if his family members were not permitted to enter and reside with him when he returned to his home EU State. That effect should be seen as an obstacle to leaving his home State in the first place. Therefore, an EU national who has exercised his right to free movement in order to work in another EU State can rely on EU law when returning to his home State with a spouse from a third country. According to Eind, cited above, an EU national may also rely on EU law upon returning as an economically inactive person to his home State with a family member from a third country, provided he exercised his EU rights.

54 The Single European Act was adopted in 1986. Its goal was, inter alia, to achieve an internal market without borders. This was built upon by the Maastricht Treaty of 1992. The Maastricht Treaty introduced the concept of Union citizenship. This concept is now expressed in Part II of the TFEU. Every person holding the nationality of an EU State is a Union citizen. Union citizenship is additional to national citizenship of an EU State and entails certain rights under EU law. According to Article 21(1) TFEU, a Union citizen shall have a right to move and reside freely within the territory of the EU States, subject to the limitations and conditions laid down in EU law. Other provisions of Part II of the TFEU entitle Union citizens to political rights including certain electoral rights and a right of petition to the European Parliament including access to the European Ombudsman.

55 Union citizenship comprises the free movement of persons. The ECJ has stated that Union citizenship is destined to be the fundamental status of nationals of the Member States (see, for example, the judgment in Grzelczyk, C-184/99, EU:C:2001:458, paragraph 31).

56 The Directive was adopted in 2004. It repealed and replaced a number of EU legal acts including the following: Directive 64/221/EEC on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, Directive 72/194/EEC on extending to workers exercising the right to remain in the territory of a Member State after having been employed in that State, Directive 90/364/EEC on the right of residence, Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity, Directive 93/96/EEC on the right of residence for students, and Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community.

57 Recitals 3 and 5 in the preamble to the Directive express the need to codify and review existing legal instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons, in order to

simplify and strengthen the right of free movement and residence of all Union citizens. Furthermore, it is stated that if the right of all Union citizens to move and reside freely within the territory of the EU States is to be exercised under objective conditions of freedom and dignity, it should also be granted to their family members, irrespective of nationality.

58 The Directive is based on Articles 12, 18, 40, 44 and 52 of the Treaty establishing the European Community. The corresponding provisions in the TFEU are Article 18 on non-discrimination on grounds of nationality, Article 21 on Union citizens' right to free movement and residence, Article 46 on measures to bring about freedom of movement for workers, Article 50 on the issue of directives to attain the freedom of establishment and Article 59 on the issue of directives to achieve the liberalisation of a specific service.

59 The legal development described above was reflected in the EEA Agreement, when it entered into force on 1 January 1994. According to the fifth recital of the Preamble to the EEA Agreement, the Contracting Parties are determined to provide for the fullest possible realisation of the four freedoms, including the free movement of persons, within the whole EEA. The objective of abolition of obstacles to the free movement of persons is also reflected in Article 1(2) EEA and the then Article 3(c) of the Treaty Establishing the European Economic Community ("EEC").
60 Article 28 of the EEA Agreement, in Part III on Free Movement of Persons, Services and Capital, corresponds to Article 48 EEC, now Article 45 TFEU. Article 28 EEA gives workers the right of freedom of movement. The freedom entails the abolition of any discrimination based on nationality between workers of EU and EFTA States as regards employment, remuneration and other conditions of work and employment in the EEA market. The freedom forms part of the core of the EEA Agreement. The consideration of homogeneity therefore carries substantial weight.

61 Directives 90/364/EEC, 90/365/EEC and 93/96/EEC were part of the EEA Agreement at the time of its entry into force and were referred to in Annex VIII to the EEA Agreement on freedom of establishment. Therefore, EEA law included the freedom of movement of persons as workers and as economically inactive EEA nationals, in both cases including their family members.

62 The Court notes that a gap between the two EEA pillars has emerged since the signing of the EEA Agreement in 1992. This gap has widened over the years. The EU treaties have been amended four times since then, while the EEA Main Agreement has remained substantially unchanged. This development has created certain discrepancies at the level of primary law. Depending on the circumstances, this fact may have an impact on the interpretation of the EEA Agreement.

63 The EEA Joint Committee Decision incorporating the Directive into the EEA Agreement defines the term Union citizens, for the purposes of the EEA Agreement, as nationals of EU States and EFTA States. Accordingly, EEA nationals may avail themselves of the freedom of movement of persons under EEA law and thus move freely within the internal market on conditions established by EEA law.

64 The Contracting Parties stated in a joint declaration attached to that decision that Union citizenship has no equivalent in the EEA Agreement and that the EEA Agreement does not provide a legal basis for political rights. However, the Contracting Parties also agreed that rights granted by the Directive to third country nationals who are family members of an EEA national, exercising the right to free movement under the EEA Agreement, must be included since these rights are corollary to the right of free movement of nationals of EU States and EFTA States. It cannot be assumed that the Contracting Parties intended the introduction of Union citizenship in EU law to restrict further evolution of the free movement of persons in the EEA.

65 In O. and B., cited above, the ECJ held that Article 21(1) TFEU must be interpreted as meaning that where a Union citizen has created or strengthened family life with a third country national during genuine residence, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of the Directive, in a Member State other than that of which he is a national, the provisions of the Directive apply by analogy where that Union citizen returns, with the family member in question, to his Member State of origin. Therefore, the conditions for granting a derived right of residence to a third‑country national who is a family member of that Union citizen, in the latter's Member State of origin, should not, in principle, be more strict than those provided for by that directive for the grant

of a derived right of residence to a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national (see O. and B., cited above, paragraph 61).

66 In the judgment, the ECJ reached its conclusion on a legal basis not existing in the EEA, whereas application of the Directive appears, for the most part, to have been rejected. Consequently, an unequal level of protection of the right to free movement of persons within the EEA could ensue. However, if the Court ensures the same level of protection in the EEA, it must explain why the ECJ's statement in O. and B. regarding the Directive cannot decide the matter.

67 In order to assess the impact of the legal findings in O. and B. for the interpretation of EEA law, that judgment must be read in its proper legal context. That context encompasses the concept of Union citizenship. The ECJ did not base its main conclusion on the Directive. Furthermore, the case law resulting from Singh and Eind was considered applicable under Article 21(1) TFEU to family members of Union citizens upon a return to the home State. The ECJ held that such a derived right seeks to remove obstacles for leaving the home State by guaranteeing that that citizen upon return to the home State will be able to continue the family life created or strengthened in the host State (see O. and B., cited above, paragraphs 48 and 49).

Answer to the question referred

68 In the Court's further analysis, emphasis must be placed on the fact that the free movement of persons forms part of the core of the EEA Agreement. The case at hand must be distinguished from O. and B. to the extent that that judgment is based on Union citizenship. Therefore, it must be examined if homogeneity in the EEA can be achieved based on an authority included in the EEA Agreement. Such an examination must be based on the EEA Agreement, legal acts incorporated into it and case law.

69 The case before the Court concerns a Norwegian national who has resided in Spain, where she married a third country national. Later she returned to Norway, where the third country national applied for family reunification.

70 In the fifteenth recital of the Preamble to the EEA Agreement, the Contracting Parties state that their objective is to reach and maintain a uniform interpretation and application of the EEA Agreement and those provisions of EU legislation substantially reproduced in its main part and annexes and, furthermore, to arrive at an equal treatment of individuals and economic operators as regards the four freedoms. However, the same recital also states that a uniform interpretation and application of the EEA Agreement shall be achieved in full deference to the independence of the courts.

71 Without independence in its adjudication no court could claim legitimacy. Every court must exercise its jurisdiction based upon the relevant legal sources. An essential legal source for the Court is the case law of the ECJ and the General Court. That case law must nevertheless be read in its context. Normally, this does not pose particular problems because the context is the same. However, when it comes to the legal sources in this case, the ECJ has partly ruled out the application of the Directive and instead applied the concept of Union citizenship in evolution of the free movement of persons in the EU.

72 In the EEA context, Article 7(1) of the Directive provides that all EEA nationals shall have the right of residence on the territory of another EEA State for more than three months if they fulfil one of the conditions set out in points (a) to (d). At issue in the present case is Article 7(1)(b). That provision grants a right of residence provided that (i) the EEA national has sufficient resources for himself and his family members not to become a burden on the social assistance system of the host State during the period of residence and (ii) has comprehensive sickness insurance cover in the host State. Pursuant to Article 7(2), that right of residence shall extend to family members who are not nationals of an EEA State, accompanying or joining the EEA national in the host State.

73 The Court assumes that the sponsor stayed legally in Spain for more than three months. If this is not the case, the sponsor cannot be said to have acted under EEA law for the purpose of creating a derived right as a family member for a third country national. It is for the referring court to establish the respective facts.

74 The conditional right of residence pursuant to Article 7 of the Directive applies "on the territory of another Member State". That wording reflects the fact that an EEA national has a right of residence under EEA law in other EEA States. This right of residence can only be exercised if the EEA national actually moves from the home State.

75 Since Article 7(1)(b) confers on an EEA national the right to move freely from the home EEA State and take up residence in another EEA State, an EEA State may not deter its nationals from moving to another EEA State in the exercise of the freedom of movement under EEA law (see Gunnarsson, cited above, paragraph 82).

76 In the present case, the referring court has established that a Norwegian citizen has married a third country national and lived together with him in Spain and that the sponsor did not engage in economic activity during her stay there. At issue is whether a refusal of a derived right of residence in Norway for the third country national, upon the Norwegian citizen's return to Norway, constitutes an obstacle to the Norwegian citizen's freedom of movement under EEA law.

77 When a EEA national makes use of his right to free movement, he may not be deterred from exercising that right by an obstacle to the entry and residence of a spouse in the EEA national's home State. Accordingly, when an EEA national who has availed himself of the right to free movement returns to his home State, EEA law requires that his spouse is granted a derived right of residence in that State (see, for comparison, Eind, cited above, paragraphs 35 and 36). Consequently, the possibility for individuals exercising their right of free movement to invoke this right against their home State has been recognised in the case law of the ECJ.

78 This case law concerns EEA nationals having pursued an economic activity in another EEA State. However, economically inactive EEA nationals may enjoy their right under Article 7(1)(b) to reside in another EEA State provided that they have sufficient resources for themselves and their family members, so as to not become a burden on the social security assistance system of the host State, and possess comprehensive sickness insurance cover.

79 The reasoning in the ECJ's Eind judgment is equally relevant when an inactive person, who has exercised the right to free movement under Article 7(1)(b) of the Directive, returns to his home EEA State with a spouse who is a third country national. A right to move freely from the home EEA State to another EEA State cannot be fully achieved if that person may be deterred from exercising the freedom by obstacles raised by the home State to the right of residence for a spouse (see, for comparison, Gunnarsson, cited above, paragraph 82).

80 However, a derived right of residence for a third country national in the spouse's home State is conditional. In addition to the requirements of sufficient resources and health insurance, the following conditions must be fulfilled. First, the residence of the EEA national in the host State must have been genuine such as to enable family life in that State. The duration of residence in the host State must exceed a continuous period of three months. Second, pursuant to Article 35 of the Directive, EEA States may, subject to the principle of proportionality and procedural safeguards provided for in the Directive, adopt the necessary measures to refuse, terminate or withdraw any right conferred by the Directive in the case of abuse of rights or fraud, such as marriages of convenience. Upon a question from the bench, the Agent for the defendant stated that no abuse of rights has been alleged so far in the national proceedings. Third, restrictions on rights granted by the Directive may be justified by reasons of public policy, public security or public health pursuant to Article 27(1) of the Directive.

81 The Court adds that all the EEA States are parties to the European Convention on Human Rights, which enshrines in Article 8(1) the right to respect for private and family life. According to established case law, provisions of the EEA Agreement are to be interpreted in the light of fundamental rights (see Case E-4/11 Arnulf Clauder [2011] EFTA Ct. Rep. 216, paragraph 49 and case law cited).

82 The answer to the question referred must therefore be that where an EEA national, pursuant to Article 7(1)(b) and Article 7(2) of the Directive, has created or strengthened a family life with a third country national during genuine residence in an EEA State other than that of which he is a national, the provisions of that directive will apply by analogy where that EEA national returns with the family member to his home State.

IV Costs

83 The costs incurred by the Liechtenstein Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by Oslo District Court hereby gives the following Advisory Opinion:

> **Where an EEA national, pursuant to Article 7(1)(b) and Article 7(2) of Directive 2004/38/EC, has created or strengthened a family life with a third country national during genuine residence in an EEA State other than that of which he is a national, the provisions of that directive will apply by analogy where that EEA national returns with the family member to his home State.**

Carl Baudenbacher
Per Christiansen
Páll Hreinsson

Delivered in open court in Luxembourg on 26 July 2016.

Theresa Haas - Acting Registrar
Carl Baudenbacher - President

Case C-267/06: Tadao Maruko v Versorgungsanstalt der deutschen Bühnen

JUDGMENT OF THE COURT (Grand Chamber)

1 April 2008 (*)

(Equal treatment in employment and occupation – Directive 2000/78/EC – Survivors' benefits under a compulsory occupational pensions scheme – Concept of 'pay' – Refusal because the persons concerned were not married – Same-sex partners – Discrimination based on sexual orientation)

In Case C‑267/06,

REFERENCE for a preliminary ruling under Article 234 EC, by the Bayerisches Verwaltungsgericht München (Germany), made by decision of 1 June 2006, received at the Court on 20 June 2006, in the proceedings

Tadao Maruko

v

Versorgungsanstalt der deutschen Bühnen,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and L. Bay Larsen, Presidents of Chambers, K. Schiemann, J. Makarczyk, P. Kūris, J. Klučka (Rapporteur), A. Ó Caoimh, P. Lindh and J.-C. Bonichot, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 19 June 2007,

after considering the observations submitted on behalf of:

– Mr Maruko, by H. Graupner, R. Wintemute and M. Bruns, Rechtsanwälte,

– the Versorgungsanstalt der deutschen Bühnen, by C. Draws and P. Rammert, acting as Agents, assisted by A. Bartosch and T. Grupp, Rechtsanwälte,

– the Netherlands Government, by C. Wissels, acting as Agent,

– the United Kingdom Government, by V. Jackson, acting as Agent, and by T. Ward, barrister,

– the Commission of the European Communities, by J. Enegren and I. Kaufmann-Bühler, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 September 2007,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 1, Article 2(2)(a) and (b)(i), and Article 3(1)(c) and (3) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16; 'Directive 2000/78' or 'the Directive').

2 The reference was made in proceedings between Mr Maruko and the Versorgungsanstalt der deutschen Bühnen (the German Theatre Pension Institution, the 'VddB') relating to the refusal by the latter to recognise Mr Maruko's entitlement to a widower's pension as part of the survivor's benefits provided for under the compulsory occupational pension scheme of which his deceased life partner had been a member.

Legal context

Community law

3 Recitals 13 and 22 of the preamble to Directive 2000/78 state:

'(13) This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment.

…

(22) This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.'

4 Article 1 of Directive 2000/78 provides:

'The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'

5 Under Article 2 of the Directive:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, …

…'

6 Article 3 of the Directive is worded as follows:

'1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

…

(c) employment and working conditions, including dismissals and pay;

…

3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.

…’

7 Under the first paragraph of Article 18 of Directive 2000/78, Member States were to adopt the laws, regulations and administrative provisions necessary to comply with the directive by 2 December 2003 at the latest or, so far as provisions concerning collective agreements were concerned, they could entrust implementation of the Directive to the social partners. However, in that event, Member States were to ensure that, no later than 2 December 2003, the social partners had introduced the necessary measures by agreement, the Member States concerned being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by the Directive. In addition, they were forthwith to inform the Commission of the European Communities of those measures.

National law

The Law on registered life partnerships

8 Paragraph 1 of the Law on registered life partnerships (Gesetz über die Eingetragene Lebenspartnerschaft) of 16 February 2001 (BGBl. 2001 I, p. 266), as amended by the Law of 15 December 2004 (BGBl. 2004 I, p. 3396, the ‘LPartG’), provides:

‘(1) Two persons of the same sex establish a partnership when they each declare, in person and in the presence of the other, that they wish to live together in partnership for life (as life partners). The declarations cannot be made conditionally or for a fixed period. Declarations are effective when they are made before the competent authority.

(2) A partnership cannot be validly established:

1. with a person who is a minor or who is married or who already lives in partnership with a third person;

2. between relatives in the ascending and descending lines;

3. between brothers or sisters with the same mother and father, the same mother or the same father;

4. when, at the time of establishment of the partnership, the partners refuse to accept the duties under Paragraph 2.

…’

9 Paragraph 2 of the LPartG provides:

‘The life partners must support and care for one another and commit themselves mutually to a lifetime union. They shall each accept responsibilities with regard to the other.’

10 Under Paragraph 5 of that Law:

‘The life partners are each required to contribute adequately to the common needs of the partnership by their work and from their property. The second sentence of Paragraph 1360, Paragraph 1360a and Paragraph 1360b of the Civil Code, and the second subparagraph of Paragraph 16, apply by analogy.’

11 Paragraph 11(1) of that Law provides:

‘Save provision to the contrary, a life partner shall be regarded as a member of the family of the other life partner.’

Legislation relating to widow’s or widower’s pensions

12 By the LPartG, the German legislature introduced amendments to Book VI of the Social Security Code – statutory old age pension schemes (Sozialgesetzbuch VI – Gesetzliche Rentenversicherung).

13 Paragraph 46 of Book VI, in the version in force since 1 January 2005 (‘the Social Security Code’), provides:

‘(1) Widows or widowers who have not married again shall be entitled, after the death of the insured spouse, to a small widow’s or widower’s pension, provided that the insured spouse has been insured for the general qualifying period. This entitlement shall be restricted to a maximum period of 24 calendar months dating from the month following that of the insured’s death.

…

(4) For the purposes of determining entitlement to a widow’s or widower’s pension, the establishment of a life partnership shall be treated as equivalent to a wedding, a life partnership as equivalent to a marriage, a surviving partner as equivalent to a widow or a widower, and a life partner as equivalent to a spouse. The termination or dissolution of a new partnership shall be regarded as equivalent, respectively, to the dissolution or annulment of a new marriage.’

14 Book VI contains other similar provisions on the treating of life partnership as equivalent to marriage, in particular Paragraph 47(4), Paragraph 90(3), Paragraph 107(3), and Paragraph 120e(1).

The Collective Agreement for Germany’s theatres

15 Paragraph 1 of the Collective Agreement for Germany’s theatres (Tarifordnung für die deutschen Theater) of 27 October 1937 (Reichsarbeitsblatt 1937 VI, p. 1080; ‘the Collective Agreement’) provides:

‘(1) Any legal person who operates a theatre (theatre operator) within the Reich must take out on behalf of the theatrical professionals employed in his theatre premises insurance for old age and survivors’ pensions, in accordance with the following provisions, and give written notice of the insurance taken out to every theatrical professional on his staff.

(2) In agreement with the Reich Ministers concerned, the Minister for Popular Enlightenment and Propaganda shall appoint the insuring institution and set out the insurance conditions (regulations). He shall also determine the date from which the insurance required under this Agreement must be taken out.

(3) For the purposes of this Agreement, theatrical professionals are persons who, under the Law on the Reich Chamber of Culture and the relevant implementing legislation, are compulsorily members of the Reich Theatre Chamber (stage section), in particular: producers, actors, orchestra leaders, directors, scriptwriters, choral directors, coaches, stage managers, prompters and persons in similar positions, technical staff (such as leading stagehands, the persons in charge of scenery and costumes and those occupying a similar position, in so far as they are responsible in their departments), together with artistic directors, chorus members, dancers and hairdressers.’

16 Paragraph 4 of the Collective Agreement provides:

‘The theatre operator and the theatrical professional shall each bear one half of the insurance premiums. The theatre operator must remit the insurance premiums to the insurance institution.’

The VddB Regulations

17 Paragraphs 27, 32 and 34 of the VddB Regulations provide:

‘Paragraph 27 – Nature of pension and general conditions

(1) Occurrence of the following events shall give rise to entitlement to benefits: incapacity to work or invalidity, early retirement, reaching the normal retirement age, and death.

(2) On application, the institution shall pay … by way of survivor’s benefits … a widow’s pension (Paragraphs 32 and 33), a widower’s pension (Paragraph 34) … if, immediately before occurrence of the event giving rise to the entitlement to benefit, the insured person was compulsorily insured, voluntarily insured, or re-insured, and if the qualifying period is satisfied … .

…

Paragraph 32 – Widow’s pension

(1) The spouse of the insured man or retired man, if the marriage subsists on the day of the latter’s death, shall be entitled to a widow’s pension.

…

Paragraph 34 – Widower’s pension

(1) The spouse of the insured woman or retired woman, if the marriage subsists on the day of the latter’s death, shall be entitled to a widower’s pension.

…’

18 Paragraph 30(5) of the VddB Regulations sets out the procedure for determining the amount of the retirement pension by reference to which the survivor’s pension is to be calculated.

The main proceedings and the questions referred for a preliminary ruling

19 On 8 November 2001, under Paragraph 1 of the LPartG in its initial version, Mr Maruko entered into a life partnership with a designer of theatrical costumes.

20 Mr Maruko’s life partner had been a member of the VddB since 1 September 1959 and had continued to contribute voluntarily to that institution during the periods when he was not obliged to be a member.

21 Mr Maruko’s life partner died on 12 January 2005.

22 By letter dated 17 February 2005, Mr Maruko applied to the VddB for a widower’s pension. By decision of 28 February 2005, the VddB rejected his application on the ground that its regulations did not provide for such an entitlement for surviving life partners.

23 Mr Maruko brought an action before the Bayerisches Verwaltungsgericht München (Bavarian Administrative Court, Munich), the referring court. According to Mr Maruko, the VddB’s refusal infringes the principle of equal treatment, given that, since 1 January 2005, the German legislature has placed life partnership and marriage on an equal footing, in particular by introducing Paragraph 46(4) into the Social Security Code. To deny that a person whose life partner has died is entitled to survivor’s benefits on the same conditions as a surviving spouse is discrimination on grounds of that person’s sexual orientation. In the opinion of M. Maruko, life partners are treated less favourably than

spouses, even though, like spouses, they must support and care for one another, they are mutually committed to a lifetime union and they each accept responsibilities with regard to the other. The rules relating to the property of life partners in Germany are the same as those relating to the property of spouses.

24 The referring court seeks to know, first, whether the pension scheme managed by the VddB can be regarded as equivalent to a state social security scheme within the meaning of Article 3(3) of Directive 2000/78 and whether that scheme is outside the scope of that directive. It states that the fact that membership of the VddB is a statutory obligation and that it is out of the question for such membership to be the subject of negotiation within any of the theatre companies is indicative of such equivalence. However, the referring court goes on to note that, outside periods of work, theatrical professionals have the possibility of voluntarily continuing membership of the pension scheme; that the scheme is based on the principle of capitalisation; that the theatre company and the insured person each pay one half of the contributions; and that the VddB manages and regulates its activities autonomously, without any involvement on the part of the federal legislature.

25 The referring court states that, in view of the structure of the VddB and the decisive influence exercised by the theatre companies and insured persons over its operation, it is inclined to think that the VddB does not manage a scheme equivalent to a state social security scheme, within the meaning of Article 3(3) of Directive 2000/78.

26 The referring court seeks to know, secondly, whether the survivor's benefit at issue can be regarded as 'pay', within the meaning of Article 3(1)(c) of Directive 2000/78, which would justify the application of the Directive. The referring court states that, as a general rule, in the light of the case law of the Court, benefits payable to survivors come within the scope of that concept of 'pay'. According to the referring court, that interpretation is not affected by the fact that the survivor's benefit at issue is paid not to the worker, but to his surviving partner, because the entitlement to such a benefit is an advantage which derives from the worker's membership of the pension scheme managed by the VddB, so that the benefit accrues to the worker's surviving partner by virtue of the employment relationship between the employer and the worker concerned.

27 The referring court seeks, thirdly, to know whether the combined provisions of Article 1 and Article 2(2)(a) of Directive 2000/78 preclude provisions in regulations such as those of the VddB, under which a person whose life partner has died does not receive survivor's benefits equivalent to those offered to a surviving spouse, even though, like spouses, the life partners have been living in a union of mutual support and assistance which was formally constituted for life.

28 According to the referring court, since the present case falls within the scope of Directive 2000/78 and there is discrimination, Mr Maruko can rely on the provisions of the Directive.

29 The referring court adds that, unlike heterosexual couples who can enter into marriage and, should the case arise, be entitled to survivor's benefits, it was impossible for the insured person and the applicant in the main proceedings, because of their sexual orientation, to satisfy the condition relating to marriage on which entitlement to such benefits is dependent under the pension scheme managed by the VddB. In the opinion of the referring court, it is possible that the combined provisions of Articles 1 and 2(2)(a) of Directive 2000/78 preclude provisions such as those of the VddB Regulations under which entitlement to those benefits is restricted to surviving spouses.

30 If the combined provisions of Articles 1 and 2(2)(a) of Directive 2000/78 preclude provisions of that nature in regulations such as those of the VddB, the referring court seeks to know, fourthly, whether discrimination on grounds of sexual orientation is permitted in the light of Recital 22 in the preamble to that directive.

31 The referring court notes that the content of that recital is not reflected in the enacting terms of Directive 2000/78. It wonders whether such a recital can restrict the scope of the Directive. The referring court considers that, in view of the importance of the Community law principle of equal treatment, it is not appropriate to interpret the recitals to the Directive broadly. In that connection, the referring court seeks to know whether, in the case before it, the VddB's refusal to pay survivor's benefits to a person whose life partner has died constitutes discrimination which is permissible even though it is based on sexual orientation.

32 Fifthly, the referring court seeks to know whether, pursuant to Case C‑262/88 Barber ([1990] ECR I‑1889), entitlement to survivors' benefits is limited to periods subsequent to 17 May 1990. The referring court states that the provisions of national law at issue in the main proceedings fall under Article 141 EC and that the direct effect of that Article can be relied on only in respect of benefits payable for periods of employment subsequent to 17 May 1990. The referring court refers in that regard to Case C‑200/91 Coloroll Pension Trustees ([1994] ECR I‑4389).

33 In those circumstances, the Bayerisches Verwaltungsgericht München decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is a compulsory occupational pension scheme, such as the scheme at issue in this case administered by the [VddB], a scheme similar to state schemes as referred to in Article 3(3) of Council Directive 2000/78 …?

2. Are benefits paid by a compulsory occupational pension institution to survivors in the form of widow's/widower's pensions to be construed as pay within the meaning of Article 3(1)(c) of Directive 2000/78 …?

3. Does Article 1 in conjunction with Article 2(2)(a) of Directive 2000/78 … preclude regulations governing a supplementary pension scheme under which a registered partner does not after the death of his partner receive survivor's benefits equivalent to those available to spouses, even though, like spouses, registered partners live in a union of mutual support and assistance formally entered into for life?

4. If the preceding questions are answered in the affirmative: Is discrimination on grounds of sexual orientation permissible by virtue of Recital 22 in the preamble to Directive 2000/78 …?

5. Would entitlement to the survivor's benefits be restricted to periods from 17 May 1990 in the light of the case-law in Barber [cited above]?'

The questions referred for a preliminary ruling

The first, second and fourth questions

34 By its first, second and fourth questions, which it is appropriate to answer together, the referring court seeks to know, in essence, whether a survivor's benefit paid under an occupational pension scheme such as that managed by the VddB falls within the scope of Directive 2000/78.

Observations submitted to the Court

35 As regards the first and second questions referred, the VddB considers that the scheme managed by it is a statutory social security scheme and that the survivor's benefit at issue in the main proceedings cannot be regarded as 'pay' within the meaning of Article 3(1)(c) of Directive 2000/78. That benefit is therefore outside the scope of that directive.

36 In support of that position, the VddB states, inter alia, that it is a body governed by public law and is part of the federal State administration and that the pension scheme at issue in the main proceedings is a compulsory scheme, based on statute. The VddB adds that the Collective Agreement has statutory force and was integrated, together with the VddB Regulations, in the unification treaty of 31 August 1990 and that compulsory membership applies to categories of workers defined in general terms. The survivor's benefit at issue in the main proceedings is not linked directly to specific employment, but to general considerations of social policy. It does not directly depend on completion of periods of employment and the amount is not determined by reference to the last salary.

37 The Commission considers, on the other hand, that the survivor's benefit at issue in the main proceedings falls within the scope of Directive 2000/78, since it is paid by virtue of the employment relationship between a person and

his employer, a consequence of which is the employee's compulsory membership of the VddB. The amount of the benefit is determined by reference to the period of insurance and the contributions paid.

38 As regards the fourth question referred, both Mr Maruko and the Commission note that the content of Recital 22 in the preamble to Directive 2000/78 is not reflected in any of the enacting terms of the Directive. According to Mr Maruko, if the Community legislature had wanted to exclude all benefits bound up with civil status from the scope of Directive 2000/78, the content of that recital would have been the subject of a particular provision among the enacting terms of the Directive. According to the Commission, that recital does no more than state that the European Union lacks competence in matters regarding civil status.

39 The VddB and the United Kingdom Government consider, inter alia, that Recital 22 in the preamble to Directive 2000/78 contains a clear and general exclusion and that it determines the scope of the Directive. The Directive does not apply to provisions of national law relating to civil status or to benefits dependent on that status, such as the survivor's benefit at issue in the main proceedings.

The Court's reply

40 It is clear from Article 3(1)(c) and (3) of Directive 2000/78 that the Directive applies to all persons, as regards both the public and private sectors, including public bodies, inter alia, in relation to conditions of pay and that it does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.

41 The scope of Directive 2000/78 must be understood – in the light of those provisions read in conjunction with Recital 13 of the preamble to the Directive – as excluding social security or social protection schemes, the benefits of which are not equivalent to 'pay', within the meaning given to that term for the application of Article 141 EC, or to payments of any kind made by the State with the aim of providing access to employment or maintaining employment.

42 It must therefore be determined whether a survivor's benefit granted under an occupational pension scheme such as that managed by the VddB can be treated as equivalent to 'pay' within the meaning of Article 141 EC.

43 Article 141 EC provides that 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

44 As the Court has already ruled (see Case C‑109/91 Ten Oever [1993] ECR I‑4879, paragraph 8, and Case C‑7/93 Beune [1994] ECR I‑4471, paragraph 21), the fact that certain benefits are paid after the termination of the employment relationship does not prevent them from being 'pay' within the meaning of Article 141 EC.

45 The Court has thereby recognised that a survivor's pension provided for under an occupational pension scheme, set up under a collective agreement, falls within the scope of Article 141 EC. The Court has stated that the fact that such a pension, by definition, is paid not to the worker but to his survivor, cannot affect that interpretation, since, such a pension being a benefit deriving from the survivor's spouse's membership of the scheme, the pension accrues to the survivor by reason of the employment relationship between the employer and the survivor's spouse and is paid to the survivor by reason of the spouse's employment (see Ten Oever, paragraphs 12 and 13; Coloroll Pension Trustees, paragraph 18; Case C‑147/95 Evrenopoulos [1997] ECR I‑2057, paragraph 22; and Case C‑379/99 Menauer [2001] ECR I‑7275, paragraph 18).

46 Moreover, for the purposes of assessing whether a retirement pension – by reference to which, should the case arise, as in the present case, the survivor's pension is calculated – falls within the scope of Article 141 EC, the Court has stated that, of the criteria for identifying a pension scheme which it has adopted on the basis of the situations brought before it, the one criterion which may prove decisive is whether the retirement pension is paid to the worker by reason of the employment relationship between him and his former employer, that is to say, the criterion of

employment, based on the wording of that article (see, to that effect, Beune, paragraph 43; Evrenopoulos, paragraph 19; Case C‑366/99 Griesmar [2001] ECR I‑9383, paragraph 28; Case C‑351/00 Niemi [2002] ECR I‑7007, paragraphs 44 and 45; and Joined Cases C‑4/02 and C‑5/02 Schönheit and Becker [2003] ECR I‑12575, paragraph 56).

47 Admittedly, that criterion cannot be regarded as exclusive, inasmuch as pensions paid under statutory social security schemes may reflect, wholly or in part, pay in respect of work (Beune, paragraph 44; Evrenopoulos, paragraph 20; Griesmar, paragraph 29; Niemi, paragraph 46; and Schönheit and Becker, paragraph 57).

48 However, considerations of social policy, of State organisation, of ethics, or even the budgetary concerns which influenced or may have influenced the establishment by the national legislature of a scheme cannot prevail if the pension concerns only a particular category of workers, if it is directly related to the period of service completed and if its amount is calculated by reference to the last salary (Beune, paragraph 45; Evrenopoulos, paragraph 21; Griesmar, paragraph 30; Niemi, paragraph 47; and Schönheit and Becker, paragraph 58).

49 As regards the compulsory occupational pension scheme managed by the VddB, it must be observed, first, that it originates in the Collective Agreement which, according to the information provided by the referring court, was designed to supplement the social security benefits payable under national legislation of general scope.

50 Secondly, it is common ground that that scheme is financed exclusively by the workers and employers of the sector concerned, without any financial involvement by the State.

51 Thirdly, it is clear from the documents submitted to the Court that the scheme is aimed, according to Paragraph 1 of the Collective Agreement, at theatrical professionals employed in theatres operated in Germany.

52 As the Advocate General has stated in point 70 of his Opinion, recognition of entitlement to the survivor's benefit requires the spouse of the person who is to receive the pension to have been a member of the VddB before dying. That membership is compulsory for theatrical professionals employed by the German theatres. That membership is also held by a number of persons who decide voluntarily to become members of the VddB, such membership being possible provided that the persons concerned can demonstrate that they were previously employed by a theatre in Germany for a certain number of months.

53 Those compulsory and voluntary members therefore form a particular category of workers.

54 Further, as regards the criterion that the pension must be directly related to the period of service completed, it must be observed that, under Paragraph 30(5) of the VddB regulations, the amount of the retirement pension, by reference to which the survivor's benefits are calculated, is determined by reference to the period of the worker's membership, that being the logical consequence of the structure of the occupational pension scheme at issue which covers two types of membership, as has been stated in paragraphs 52 and 53 of this judgment.

55 Nor is the amount of that retirement pension fixed by statute; rather, pursuant to Paragraph 30(5) of the VddB Regulations, it is calculated by reference to the total amount of the contributions paid throughout the worker's membership, to which an indexing factor is applied.

56 It follows that, as the Advocate General has pointed out in point 72 of his Opinion, the survivor's pension in the main proceedings is derived from the employment relationship of Mr Maruko's life partner and must therefore be classified as 'pay' within the meaning of Article 141 EC.

57 That conclusion is not affected by the fact that the VddB is a public body (see, to that effect, Evrenopoulos, paragraphs 16 and 23) or by the fact that membership in the scheme giving entitlement to the survivor's benefits at issue in the main proceedings is compulsory (see, to that effect, Case C‑50/99 Podesta [2000] ECR I‑4039, paragraph 32).

58 As regards the significance of Recital 22 of the preamble to Directive 2000/78, that recital states that the Directive is without prejudice to national laws on marital status and the benefits dependent thereon.

59 Admittedly, civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence. However, it must be recalled that in the exercise of that competence the Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination (see, by analogy, Case C‑372/04 Watts [2006] ECR I‑4325, paragraph 92, and Case C‑444/05 Stamatelaki [2007] ECR I‑3185, paragraph 23).

60 Since survivor's benefit such as that at issue in the main proceedings has been identified as 'pay' within the meaning of Article 141 EC and falls within the scope of Directive 2000/78, for the reasons set out in paragraphs 49 to 57 of this judgment, Recital 22 of the preamble to Directive 2000/78 cannot affect the application of the Directive.

61 In those circumstances, the answer to the first, second and fourth questions must be that a survivor's benefit granted under an occupational pension scheme such as that managed by the VddB falls within the scope of Directive 2000/78.

The third question

62 By its third question, the referring court seeks to know whether the combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation such as that at issue in the main proceedings under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though, like spouses, the life partners have been living in a union of mutual support and assistance which had been formally constituted for life.

Observations submitted to the Court

63 Mr Maruko and the Commission maintain that refusal to grant the survivor's benefit at issue in the main proceedings to surviving life partners constitutes indirect discrimination within the meaning of Directive 2000/78, since two persons of the same sex cannot marry in Germany and, consequently, cannot qualify for that benefit, entitlement to which is reserved to surviving spouses. In their opinion, spouses and life partners are in a comparable legal situation which justifies the granting of that benefit to surviving life partners.

64 According to the VddB, there is no constitutional obligation to treat marriage and life partnership identically, so far as concerns the law of social security or pensions. Life partnership is an institution sui generis and represents a new form of civil status. It cannot be inferred from the German legislation that there is any obligation to grant equal treatment to life partners, on the one hand, and spouses, on the other.

The Court's reply

65 In accordance with Article 1 thereof, the purpose of Directive 2000/78 is to combat, as regards employment and occupation, certain forms of discrimination including that on grounds of sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment.

66 Under Article 2 of Directive 2000/78, the 'principle of equal treatment' means that there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of the Directive. According to Article 2(2)(a) of Directive 2000/78, direct discrimination occurs where one person is treated less favourably than another person who is in a comparable situation, on any of the grounds referred to in Article 1 of the Directive. Article 2(2)(b)(i) states that indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

67 It is clear from the information provided in the order of reference that, from 2001 – the year when the LPartG, in its initial version, entered into force – the Federal Republic of Germany altered its legal system to allow persons of the same sex to live in a union of mutual support and assistance which is formally constituted for life. Having chosen not to permit those persons to enter into marriage, which remains reserved solely to persons of different sex, that Member State created for persons of the same sex a separate regime, the life partnership, the conditions of which have been gradually made equivalent to those applicable to marriage.

68 The referring court observes that the Law of 15 December 2004 contributed to the gradual harmonisation of the regime put in place for the life partnership with that applicable to marriage. By that law, the German legislature introduced amendments to Book VI of the Social Security Code – statutory old age pension scheme, by adding inter alia a fourth paragraph to Paragraph 46 of that Book, from which it is clear that life partnership is to be treated as equivalent to marriage as regards the widow's or widower's pension referred to in that provision. Analogous amendments were made to other provisions of Book VI.

69 The referring court considers that, in view of the harmonisation between marriage and life partnership, which it regards as a gradual movement towards recognising equivalence, as a consequence of the rules introduced by the LPartG and, in particular, of the amendments made by the Law of 15 December 2004, a life partnership, while not identical to marriage, places persons of the same sex in a situation comparable to that of spouses so far as concerns the survivor's benefit at issue in the main proceedings.

70 However, the referring court finds that entitlement to that survivor's benefit is restricted, under the provisions of the VddB Regulations, to surviving spouses and is denied to surviving life partners.

71 That being the case, those life partners are treated less favourably than surviving spouses as regards entitlement to that survivor's benefit.

72 If the referring court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor's benefit, legislation such as that at issue in the main proceedings must, as a consequence, be considered to constitute direct discrimination on grounds of sexual orientation, within the meaning of Articles 1 and 2(2)(a) of Directive 2000/78.

73 It follows from the foregoing that the answer to the third question must be that the combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation such as that at issue in the main proceedings under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit. It is for the referring court to determine whether a surviving life partner is in a situation comparable to that of a spouse who is entitled to the survivor's benefit provided for under the occupational pension scheme managed by the VddB.

The fifth question

74 By its fifth question, the referring court seeks to know whether, in the event that the Court were to rule that Directive 2000/78 precludes legislation such as that at issue in the main proceedings, entitlement to the survivor's benefit at issue in the main proceedings must be restricted in time and in particular to periods subsequent to 17 May 1990 on the basis of the case‑law in Barber.

Observations submitted to the Court

75 The VddB considers that the case which led to the judgment in Barber differs, on its facts and in law, from the case in the main proceedings and that Directive 2000/78 cannot be given retroactive effect by means of a decision that the Directive applied at a date prior to the date of expiry of the period allowed to Member States for its transposition.

76 The Commission maintains that there is no need to answer the fifth question. It considers that the case which led to the judgment in Barber differs, on its facts and in law, from the case in the main proceedings and notes that Directive 2000/78 contains no provision which derogates from the principle of non-discrimination on grounds of sexual orientation. The Commission states that, as distinct from the present case, in the case which led to the judgment in Barber attention was drawn to the financial consequences of a fresh interpretation of Article 141 EC. The Commission states that, in so far as the LPartG did not come into force until 1 August 2001 and since the German legislature introduced, from 1 January 2005, equal treatment as between life partnership and marriage, as regards the social security rules, occupational pension schemes are not placed in financial difficulty through having to take such equality into account.

The Court's reply

77 It is clear from the case-law that the Court may, exceptionally, taking account of the serious difficulties which its judgment may create as regards events in the past, be moved to restrict the possibility for all persons concerned of relying on the interpretation which the Court gives to a provision in response to a reference for a preliminary ruling,. A restriction of that kind may be permitted only by the Court, in the actual judgment ruling upon the interpretation sought (see inter alia Barber, paragraph 41, and Case C‑292/04 Meilicke and Others [2007] ECR I‑000, paragraph 36).

78 There is nothing in the documents before the Court to suggest that the financial balance of the scheme managed by VddB is likely to be retroactively disturbed if the effects of this judgment are not restricted in time.

79 It follows from the foregoing that the answer to the fifth question must be that there is no need to restrict the effects of this judgment in time.

Costs

80 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. A survivor's benefit granted under an occupational pension scheme such as that managed by the Versorgungsanstalt der deutschen Bühnen falls within the scope of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

2. The combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation such as that at issue in the main proceedings under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit. It is for the referring court to determine whether a surviving life partner is in a situation comparable to that of a spouse who is entitled to the survivor's benefit provided for under the occupational pension scheme managed by the Versorgungsanstalt der deutschen Bühnen.

Case C-147/08: Jürgen Römer v Freie und Hansestadt Hamburg

JUDGMENT OF THE COURT (Grand Chamber)

10 May 2011 (*)

(Equal treatment in employment and occupation – General principles of European Union law – Article 157 TFEU – Directive 2000/78/EC – Scope – Concept of 'pay' – Exclusions – Occupational pension scheme in the form of a supplementary retirement pension for former employees of a local authority and their survivors – Method of calculating that pension favouring married recipients over those living in a registered life partnership – Discrimination based on sexual orientation)

In Case C‑147/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Arbeitsgericht Hamburg (Germany), made by decisions of 4 April 2008 and 23 January 2009, received at the Court on 10 April 2008 and 28 January 2009, in the proceedings

Jürgen Römer

v

Freie und Hansestadt Hamburg,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, A. Arabadjiev, D. Šváby (Rapporteur), Presidents of Chambers, E. Juhász, G. Arestis, A. Borg Barthet and T. von Danwitz, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

– Mr Römer, by H. Graupner, Rechtsanwalt,

– the Freie und Hansestadt Hamburg, by Mr Härtel, acting as Agent,

– the Commission of the European Communities, by V. Kreuschitz and J. Enegren, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 July 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16), and of the general principles of European Union law and Article 141 EC (the corresponding article now being Article 157 TFEU) relating to discrimination on grounds of sexual orientation in employment and occupation.

2 The reference has been made in the course of proceedings between Mr Römer and the Freie und Hansestadt Hamburg in relation to the amount of supplementary retirement pension to which he is entitled.

Legal context

European Union law

3 Recitals 13 and 22 in the preamble to Directive 2000/78 state:

‘(13) This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141[EC] …

…

(22) This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.’

4 Article 1 of Directive 2000/78 provides:

‘The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.’

5 Under Article 2 of the Directive:

‘1. For the purposes of this Directive, the “principle of equal treatment” shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary …

…’

6 Article 3 of the Directive is worded as follows:

‘1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

…

(c) employment and working conditions, including dismissals and pay;

…

3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.

…'

7 Under the first paragraph of Article 18 of Directive 2000/78, Member States were, in principle, to have adopted the laws, regulations and administrative provisions necessary to comply with the Directive by 2 December 2003 at the latest or could entrust the social partners with the implementation of that directive as regards provisions concerning collective agreements, ensuring that those agreements were implemented by the same date.

National law

The Basic Law

8 Article 6(1) of the Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland, 'the Basic Law') provides that '[m]arriage and family shall enjoy the special protection of the State'.

Law on registered life partnerships

9 Paragraph 1(1) of the Law on registered life partnerships (Gesetz über die Eingetragene Lebenspartnerschaft) of 16 February 2001 ('the LPartG') provides, as regards the form and the conditions of establishment of such a partnership:

'Two persons of the same sex establish a partnership when they each declare, in person and in the presence of the other, that they wish to live together in partnership for life (as life partners). The declarations cannot be made conditionally or for a fixed period. Declarations are effective when they are made before the competent authority. …'

10 Paragraph 2 of the LPartG provides:

'The life partners must support and care for one another and commit themselves mutually to a lifetime union. They shall each accept responsibilities with regard to the other.'

11 Under Paragraph 5 of that Law:

'The life partners are each required to contribute adequately to the common needs of the partnership. Paragraph 1360a and Paragraph 1360b of the Civil Code [Bürgerliches Gesetzbuch, "the BGB"] apply by analogy.'

12 Paragraph 11(1) of that Law, concerning the other effects of registered life partnership, provides:

'Save provision to the contrary, a life partner shall be regarded as a member of the family of the other life partner.'

13 The Law revising life partnership law (Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts) of 15 December 2004 ('the Law of 15 December 2004'), which entered into force on 1 January 2005, amended the LPartG and brought the status of registered life partnership yet more closely into line with that of marriage. In particular, provision was made for the apportionment of pension rights between partners in the event of the dissolution of a life partnership (Paragraph 20 of the LPartG), as is the case between spouses in the event of divorce. In addition, the legislative old-age pension scheme was amended to ensure that registered partners receive, in the same way as spouses, a survivor's pension, even where the partner died before 1 January 2005 (Paragraph 46(4) of Book VI of the Social Security Code (Sozialgesetzbuch)).

– Provisions applicable in the Land of Hamburg concerning social security

14 Paragraph 1 of the Law of the Land of Hamburg on supplementary pensions (Hamburgisches Zusatzversorgungsgesetz) of 7 March 1995 ('the HmbZVG') states that the Law applies to persons employed by the Freie und Hansestadt Hamburg and to any person to whom that city must pay a pension within the meaning of Paragraph 2 of that law (pension holders). According to Paragraph 2, the pension is granted in the form of a retirement pension, governed by Paragraphs 3 to 10 of that law, or a survivor's pension, governed by Paragraphs 11 to 19 thereof. According to Paragraphs 2a and 2c of the HmbZVG, the employees of the City of Hamburg share pension costs by paying a contribution at the initial rate of 1.25% of taxable pay, by means of a deduction from pay. According to Paragraph 2b of the HmbZVG, the contribution obligation begins on the date when the employment relationship commences and ends on the date on which it ceases.

15 Paragraph 6 of the HmbZVG provides that the monthly amount of the pension corresponds, for each full year of employment giving entitlement to a pension, to 0.5% of the pay included in the calculation of the pension.

16 The pay included in the calculation of the pension is detailed in Paragraph 7 of the HmbZVG, while the periods of employment giving entitlement to the pension, and also those which do not, are set out in Paragraph 8 thereof.

17 Paragraph 29 of the HmbZVG contains the transitional provisions concerning pension holders who were covered by the legislation formerly in force, who are referred to in the second sentence of Paragraph 1(1) of the HmbZVG. Paragraph 29(1)(1), in conjunction with Paragraph 29(1)(5), states that those pension holders continue to receive, by derogation inter alia from Paragraph 6(1) and (2), a pension equal to that which they received for July 2003 or that to which they would have been entitled, under points 2 and 4 of Paragraph 29(1), for the month of December 2003.

18 The matter was previously governed by the Law of the Land of Hamburg on supplementary retirement and survivors' pensions for employees of the Freie und Hansestadt Hamburg (Erstes Ruhegeldgesetz der Freien und Hansestadt Hamburg, 'the First RGG'). Paragraph 10(6) of that law provides;

'The notional net income to be taken into account for the purposes of calculating the pension shall be determined by deducting from the income included in the calculation of the pension (Paragraph 8)

1. the amount of income tax which would have had to be paid (less the amount paid to the Church (Kirchenlohnsteuer)) on the basis of tax category III/0 in the case of a married pensioner not permanently separated at the date on which the retirement pension is first paid (Paragraph 12(1)), or a pensioner who, on that day, is entitled to claim child benefit or the equivalent, [or]

2. the amount of income tax which would have had to be paid (less the amount paid to the Church) on the basis of tax category I at the date on which the retirement pension is first paid in the case of all other pensioners. …'

19 According to the final sentence of Paragraph 8(10) of the First RGG, if the conditions laid down in Paragraph 10(6)(1) of that law are not satisfied until after payment of the retirement pension has commenced, the latter provision has to be applied from that date if the party concerned so requests.

20 The amount to be deducted from the income tax payable under tax category III/0 is significantly lower than that to be deducted from the income tax payable under tax category I.

The dispute in the main proceedings and the questions referred for a preliminary ruling

21 The parties dispute the amount of the pension which the applicant in the main proceedings, Mr Römer, may claim from November 2001.

22 From 1950 until he ceased work on 31 May 1990, on grounds of incapacity, Mr Römer worked for the Freie und Hansestadt Hamburg, as an administrative employee. Since 1969, he has lived continuously with Mr U. On 15 October 2001, the applicant in the main proceedings and his companion entered into a registered life partnership, in accordance with the LPartG. Mr Römer informed his former employer of this by letter of 16 October 2001. By a subsequent letter, dated 28 November 2001, he requested that the amount of his supplementary retirement pension be recalculated on the basis of the more favourable deduction under tax category III/0, with effect from 1 August 2001, according to the information given by the referring court. The applicant in the main proceedings states in his observations, however, that he had asked for that amendment to his pension only from 1 November 2001.

23 By letter of 10 December 2001, the Freie und Hansestadt Hamburg informed Mr Römer of its refusal to amend the calculation of the said pension, on the ground that, in accordance with Paragraph 10(6)(1) of the First RGG, only married, not permanently separated, pensioners and pensioners entitled to claim child benefit or an equivalent benefit are entitled to have their retirement pension calculated on the basis of tax category III/0.

24 In accordance with the 'statement of pension rights' drawn up by the Freie und Hansestadt Hamburg on 2 September 2001, Mr Römer's monthly retirement pension, from September 2001, on the basis of a salary reduced by the amount which would have had to be paid as income tax on the basis of tax category I, amounted to DEM 1 204.55 (EUR 615.88). According to Mr Römer's calculations, which are not disputed by his former employer, the amount of that monthly retirement pension would have been, in September 2001, DEM 590.87 (EUR 302.11) higher if tax category III/0 had been taken into consideration in order to determine the amount of the pension.

25 The case was brought before the referring court. Mr Römer considers that, for the calculation of his pension under Paragraph 10(6)(1) of the First RGG, he is entitled to be treated in the same manner as a married, not permanently separated, pensioner. He claims that the criterion of 'married pensioner not permanently separated', contained in that provision, must be interpreted as including pensioners who have entered into a registered life partnership in accordance with the LPartG.

26 Mr Römer considers that his right to equal treatment with married, not permanently separated, pensioners results, in any event, from Directive 2000/78. He also argues that, since that directive was not transposed into national law within the period prescribed in Article 18 thereof, that is, by 2 December 2003 at the latest, it applies directly to the defendant in the main proceedings.

27 The Freie und Hansestadt Hamburg contends that the term 'married', within the meaning of Paragraph 10(6)(1) of the First RGG, cannot be interpreted as argued by Mr Römer. It submits, in essence, that Article 6(1) of the Basic Law places marriage and family under the special protection of the State. The Freie und Hansestadt Hamburg also submits that there is a parallel between the issue of joint taxation and the possibility of making a notional application of tax category III/0 when calculating supplementary retirement pensions paid under the First RGG. It contends that the financial resources available monthly to the parties concerned to cover their daily needs are determined by joint taxation during the period of professional activity and, thereafter, by the notional application of tax category III/0 for calculating pensions. The advantage granted to persons who have created a family, or who could have done so, is designed to compensate for the extra financial burden involved.

28 In those circumstances, the Arbeitsgericht Hamburg (Labour Court, Hamburg) decided, by decision of 4 April 2008, supplemented by a decision of 28 January 2009, to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Are supplementary pension payments to former employees of the Freie und Hansestadt Hamburg and their survivors, governed by [the First RGG], "payments of any kind made by State schemes or similar, including State social security or social protection schemes" within the meaning of Article 3(3) of [Directive 2000/78] with the consequence that the matters governed by the First RGG fall outside the scope of that directive?

2. [(a)] If the above question is answered in the negative, [a]re the provisions of the First RGG which differentiate, in calculating the amount of pension payable, between married pensioners and all other pensioners, that is, which treat

married pensioners more favourably than, specifically, persons who have entered into a life partnership with a person of the same sex in accordance with [the LPartG], "laws on marital status and the benefits dependent thereon" within the meaning of recital 22 in the preamble to Directive 2000/78?

[(b)] [If the answer is in the affirmative, d]oes it follow that the Directive does not apply to those provisions of the First RGG, even though the Directive itself contains no limitation of its scope corresponding to recital 22 in the preamble?

3. If Question 2(a) or Question 2(b) is answered in the negative, [i]n relation to a person who has a entered into a life partnership with a person of the same sex and who is not permanently separated from the latter, does Paragraph 10(6) of the First RGG, under which the pension entitlements of married, not permanently separated, pensioners are calculated on the basis of the notional application of tax category III/0 (more favourable to a taxable person) but the pension entitlements of all other pensioners are calculated on the basis of the notional application of tax category I (less favourable to a taxable person), constitute an infringement of Article 1 in conjunction with Article 2 and with Article 3(1)(c) of Directive 2000/78?

4. If Question 1 or Question 2(b) is answered in the affirmative or Question 3 is answered in the negative, [d]oes Paragraph 10(6) of the First RGG infringe Article 141 EC or a general principle of Community law by reason of the provision or legal effect described in Question 3?

5. [a] If Question 3 or Question 4 is answered in the affirmative, [d]oes it follow that – until such time as Paragraph 10(6) of the First RGG is amended to remove the unequal treatment complained of – in relation to the calculation of his [supplementary] pension entitlement a pensioner who has entered into a life partnership and is not permanently separated from his partner is entitled to insist that the defendant treat him in the same manner as it does a married, not permanently separated, pensioner?

[b] If so – if Directive 2000/78 is applicable and Question 3 is answered in the affirmative – does this entitlement apply even before the expiry of the transposition period prescribed in Article 18(1) of Directive 2000/78?

6. If Question 5 is answered in the affirmative, [i]s that subject to the qualification – in accordance with the grounds of the … judgment in Case C‑262/88 Barber [[1990] ECR I‑1889] – that in the calculation of [supplementary] pension entitlement the principle of equal treatment is to be applied only in respect of that proportion of pension entitlement earned by the pensioner for the period from 17 May 1990?

7. In so far as the Court concludes that there is direct discrimination:

(a) What significance should, in this regard, be attached to the particular fact that, on the one hand, under the Basic Law … as well as under European law, the principle of equal treatment must be observed, while, on the other hand, under the law of the Federal Republic of Germany, marriage and the family enjoy the special protection of the State, as expressly decreed in constitutional-law terms in Article 6(1) of the Basic Law?

(b) Can a directly discriminatory legislative provision be justified –notwithstanding the wording of Directive [2000/78] – because it has a different aim, where that aim is a component of the national legal order of the Member State [concerned], but not of European law? In that case, does that other aim pursued by [that] Member State's national legal order simply take precedence over the principle of equal treatment?

(c) If the above question is answered in the negative, [w]hat legal criterion should be applied in order to determine in such cases how to weigh up the principle of equal treatment under European law and that other legal aim of the Member State's national legal order? Is it perhaps the case here too that, as with the criteria for the legal acceptance of indirect discrimination adopted under Article 2(2)(b)(i) of Directive 2000/78, (i) the discriminatory provision must be objectively justified by a legitimate aim; and (ii) the means of achieving that aim must be appropriate and necessary?

(d) Does a provision such as Paragraph 10(6) of the First RGG fulfil the requirements for legitimacy under European law in accordance with the answers to be given to the above questions? Does it fulfil these purely on account of the special national-law provision which has no equivalent in European law, in other words, on account of Article 6(1) of the Basic Law?'

Considerations of the questions referred

The first two questions

29 By its first two questions, which should be answered together, the referring court is asking in essence whether supplementary retirement pensions such as those paid on the basis of the First RGG to former employees of the Freie und Hansestadt Hamburg and their survivors fall outside the material scope of Directive 2000/78 on account of Article 3(3) of the Directive or recital 22 in the preamble thereto.

30 According to the order for reference, such benefits constitute pay within the meaning of Article 157 TFEU.

31 With regard, first, to Article 3(3) of Directive 2000/78, the referring court asks, more specifically, whether the fact that, under that provision, the Directive 'does not apply to payments of any kind made by State schemes' means that the scheme at issue, as a State scheme, must be regarded as falling outside the scope of the Directive.

32 In that respect, it is sufficient to point out that the Court has held that the scope of Directive 2000/78 must be understood, in the light of Article 3(1)(c) and Article 3(3) read in conjunction with recital 13 in the preamble to the Directive, as excluding social security or social protection schemes, the benefits of which are not equivalent to 'pay' within the meaning given to that term for the application of Article 157 TFEU, and payments of any kind made by the State with the aim of providing access to employment or maintaining employment (Case C‑267/06 Maruko [2008] ECR I‑1757, paragraph 41).

33 Accordingly, Article 3(3) of Directive 2000/78 cannot be interpreted as meaning that a supplementary retirement pension paid by a public scheme and constituting pay within the meaning of Article 157 TFEU falls outside the scope of the Directive.

34 As regards, next, recital 22 in the preamble to Directive 2000/78, under which '[the] Directive is without prejudice to national laws on marital status and the benefits dependent thereon', it need only be recalled that the Court has already ruled on the scope of that recital, at paragraphs 58 to 60 of its judgment in Maruko.

35 According to that judgment, since a supplementary retirement pension such as that at issue in the main proceedings has been identified as 'pay', within the meaning of Article 157 TFEU, and it falls within the scope of Directive 2000/78, recital 22 cannot affect the application of the Directive (see, to that effect, Maruko, paragraph 60).

36 It follows from the foregoing that the answer to Questions 1 and 2 is that Directive 2000/78 is to be interpreted as meaning that supplementary retirement pensions such as those paid to former employees of the Freie und Hansestadt Hamburg and their survivors on the basis of the First RGG, which constitute pay within the meaning of Article 157 TFEU, do not fall outside the material scope of the Directive either on account of Article 3(3) thereof or on account of recital 22 in the preamble thereto.

Questions 3 and 7

37 By Questions 3 and 7, which should be examined together, the referring court is asking in essence, first, whether Article 1 in conjunction with Articles 2 and 3(1)(c) of Directive 2000/78 preclude a provision such as Paragraph 10(6) of the First RGG, under which the supplementary pension paid to a married pensioner is more favourable than that paid to a pensioner who has entered into a registered life partnership with a person of the same sex, in so far as such a provision constitutes direct or indirect discrimination on the ground of sexual orientation. Second, it seeks to ascertain

whether, and under what conditions, an objective pursued by a Member State such as the protection of marriage, contained in Article 6(1) of the Basic Law, could justify direct discrimination on the ground of sexual orientation.

38 As a preliminary point, it should be observed that, as European Union law stands at present, legislation on the marital status of persons falls within the competence of the Member States. However, in accordance with Article 1 thereof, the purpose of Directive 2000/78 is to combat, as regards employment and occupation, certain types of discrimination, including discrimination on the ground of sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment.

39 Under Article 2 of the Directive, the 'principle of equal treatment' is to mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of that directive.

40 According to Article 2(2)(a) of Directive 2000/78, direct discrimination is to be taken to occur where one person is treated less favourably than another person who is in a comparable situation, on any of the grounds referred to in Article 1 of the Directive.

41 Accordingly, the existence of direct discrimination, within the meaning of the Directive, presupposes, first, that the situations being weighed up are comparable.

42 In that regard, it should be pointed out that, as is apparent from the judgment in Maruko (paragraphs 67 to 73), first, it is required not that the situations be identical, but only that they be comparable and, second, the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned. In that judgment, concerning the refusal to grant a survivor's pension to the life partner of a deceased member of an occupational pension scheme, the Court did not carry out an overall comparison between marriage and registered life partnership under German law, but, on the basis of the analysis of German law carried out by the court which made the reference for a preliminary ruling, according to which there was a gradual harmonisation in German law of the regime put in place for registered life partnerships with that applicable to marriage, it made it clear that registered life partnership is to be treated as equivalent to marriage as regards the widow's or widower's pension.

43 Thus, the comparison of the situations must be based on an analysis focusing on the rights and obligations of the spouses and registered life partners as they result from the applicable domestic provisions, which are relevant taking account of the purpose and the conditions for granting the benefit at issue in the main proceedings, and must not consist in examining whether national law generally and comprehensively treats registered life partnership as legally equivalent to marriage.

44 In that regard, it is apparent from the information in the order for reference that, from 2001, the year when the LPartG entered into force, the Federal Republic of Germany adapted its legal system to allow persons of the same sex to live in a union of mutual support and assistance which is formally constituted for life. Having chosen not to permit those persons to enter into marriage, which remains reserved solely to persons of different gender, that Member State created for persons of the same gender a separate regime, the registered life partnership, the regime of which has been gradually made equivalent to that of marriage.

45 In this context, the referring court observes that the amendment of the LPartG by the Law of 15 December 2004 contributed to the gradual harmonisation of the regime of registered life partnership with that of marriage. According to that court, there is no significant legal difference between those two types of status of persons as understood in German law. The main remaining difference is the fact that marriage presupposes that the spouses are of different gender, whereas registered life partnership presupposes that the partners are of the same gender.

46 Unlike the benefit at issue in Maruko, which was a survivor's pension, the benefit at issue in the present case in the main proceedings is the supplementary retirement pension paid by the Freie und Hansestadt Hamburg to one of its former employees. In addition, it is not disputed that the application of the rules of the Land of Hamburg at issue in the main proceedings presupposes not only that the pensioner is married, but also that he is not permanently separated

from his spouse. It aims to provide, on retirement, a replacement income which is deemed to benefit the recipient, but also, indirectly, the persons who live with him.

47 In that regard, it is apparent from the information in the order for reference that, although the Law of 15 December 2004 did indeed strengthen, on a number of specific points such as the entitlement to a survivor's pension, the alignment of the legal status of registered life partnership to that of marriage, the fact remains that, in its original version, the LPartG already provided, in Paragraphs 2 and 5, that life partners have duties towards each other, to support and care for one another and to contribute adequately to the common needs of the partnership by their work and from their property, as is the case between spouses during their life together.

48 It follows that, since the entry into force of the LPartG, those obligations are incumbent both on life partners and on married spouses.

49 As regards, second, the criterion of less favourable treatment on the ground of sexual orientation, it is apparent from the documents before the Court that Mr Römer's supplementary retirement pension would have been increased, under the last sentence of Paragraph 8(10) of the First RGG, if, in October 2001, he had married instead of entering into a registered life partnership with a man.

50 However, as the Advocate General observed in point 99 of his Opinion, that more favourable treatment would not have been linked to the income of the parties to the union, to the existence of children or to other factors such as those relating to the spouse's financial needs.

51 Furthermore, it appears that, during his working life, the contributions payable by Mr Römer in relation to the benefit at issue in the main proceedings were not in any way based on his marital status, since he was required to contribute to the pension costs by paying a contribution equal to that of his married colleagues.

52 Accordingly, the answer to Questions 3 and 7 is that Article 1 in conjunction with Articles 2 and 3(1)(c) of Directive 2000/78 preclude a provision of national law such as Paragraph 10(6) of the First RGG, under which a pensioner who has entered into a registered life partnership receives a supplementary retirement pension lower than that granted to a married, not permanently separated, pensioner, if

– in the Member State concerned, marriage is reserved to persons of different gender and exists alongside a registered life partnership such as that provided for by the LPartG, which is reserved to persons of the same gender, and

– there is direct discrimination on the ground of sexual orientation because, under national law, that life partner is in a legal and factual situation comparable to that of a married person as regards that pension. It is for the referring court to assess the comparability, focusing on the respective rights and obligations of spouses and persons in a registered life partnership, as they are governed within the corresponding institutions, which are relevant taking account of the purpose of and the conditions for the grant of the benefit in question.

Question 5

53 By that question, the referring court asks first whether, if the Court of Justice should accept that the disadvantage suffered by a pensioner such as the applicant in the main proceedings constitutes a breach of European Union law, the party concerned could require treatment equal to that of married, not permanently separated, pensioners, even in respect of a period prior to the amendment of Paragraph 10(6) of the First RGG in order to make it compatible with that law, since the Freie und Hansestadt Hamburg is not a private-law employer but a local public authority which is both an employer and a legislator as regards that provision.

54 In accordance with settled case-law, a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not

necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means (Case C‑314/08 Filipiak [2009] ECR I‑11049, paragraph 81 and the case-law cited).

55 In addition, where the necessary conditions for the provisions of a directive to be relied on by individuals before the national courts against the State are satisfied, they may do so regardless of the capacity in which the State is acting, whether as employer or as public authority (Joined Cases C‑250/09 and C‑268/09 Georgiev [2010] ECR I‑0000, paragraph 70).

56 Accordingly, if a provision such as Paragraph 10(6) of the First RGG constituted discrimination within the meaning of Article 2 of Directive 2000/78, the right to equal treatment could be claimed by an individual against a local authority, and it would not be necessary to wait for that provision to be made consistent with European Union law by the national legislature, taking account of the primacy of that law (see, to that effect, Case C‑341/08 Petersen [2010] ECR I‑0000, paragraph 81, and Georgiev, paragraph 73).

57 Secondly, the referring court asks from which date equal treatment should be ensured. In that regard, it should be observed, first of all, that, if there were discrimination within the meaning of Directive 2000/78, the applicant in the main proceedings would not be entitled under that directive, before the expiry of the period allowed to Member States to transpose it, to the same rights as married pensioners in respect of the supplementary pension at issue in the main proceedings.

58 As regards that period, although, as stated in particular in Case C‑144/04 Mangold [2005] ECR I‑9981, paragraph 13, the Federal Republic of Germany requested, under the second paragraph of Article 18 of Directive 2000/78, an additional period of three years from 2 December 2003 in order to transpose the Directive, that possibility, as is clear from that provision, concerned only age and disability discrimination. Accordingly, the period prescribed for the transposition of the provisions of Directive 2000/78 concerning discrimination on the ground of sexual orientation expired, for the Federal Republic of Germany as for the other Member States, on 2 December 2003.

59 Lastly, as regards the period between the registration of the life partnership of the applicant in the main proceedings, on 15 October 2001, and the expiry of the period for transposition of Directive 2000/78, it should be recalled that the Council of the European Union adopted Directive 2000/78 on the basis of Article 13 EC, and the Court has held that the Directive does not itself lay down the principle of equal treatment in the field of employment and occupation, which derives from various international instruments and from the constitutional traditions common to the Member States, but has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds (see Mangold, paragraph 74, and Case C‑555/07 Kücükdeveci [2010] ECR I‑0000, paragraph 20), including sexual orientation.

60 Nonetheless, for the principle of non-discrimination on the ground of sexual orientation to apply in a case such as that at issue in the main proceedings, that case must fall within the scope of European Union law (see Kücükdeveci, paragraph 23).

61 However, neither Article 13 EC nor Directive 2000/78 enables a situation such as that at issue in the main proceedings to be brought within the scope of European Union law in respect of the period prior to the time-limit for transposing that directive (see, by analogy, Case C‑427/06 Bartsch [2008] ECR I‑7245, paragraphs 16 and 18, and Kücükdeveci, paragraph 25).

62 Article 13 EC, which permitted the Council, within the limits of the powers conferred upon it by the EC Treaty, to take appropriate action to combat discrimination based on sexual orientation, could not, as such, bring within the scope of European Union law, for the purposes of prohibiting any discrimination of that nature, situations which, as in the main proceedings, did not fall within the framework of the measures adopted on the basis of that article, specifically, as regards Directive 2000/78, before the time-limit prescribed therein for its transposition (see, by analogy, Bartsch, paragraph 18).

63 Moreover, Paragraph 10(6) of the First RGG is not a measure implementing Directive 2000/78 or other provisions of European Union law, with the result that it is only from the expiry of the period for transposition of the Directive that it had the effect of bringing within the scope of European Union law the national legislation at issue in the main proceedings, which concerns a matter governed by that directive, namely the conditions of pay within the meaning of Article 157 TFEU (see, by analogy, Bartsch, paragraphs 17, 24 and 25).

64 In view of the foregoing considerations, the answer to Question 5 is that, should Paragraph 10(6) of the First RGG constitute discrimination within the meaning of Article 2 of Directive 2000/78, the right to equal treatment could be claimed by an individual such as the applicant in the main proceedings at the earliest after the expiry of the period for transposing the Directive, namely from 3 December 2003, and it would not be necessary to wait for that provision to be made consistent with European Union law by the national legislature.

Questions 4 and 6

65 In view of the answers to Questions 3 and 5, there is no need to answer Question 4.

66 As regards Question 6, it is sufficient to state that the dispute in the main proceedings relates to entitlement to a supplementary retirement pension paid from 1 November 2001, on which the limitation of the effects in time of the judgment in Case C‑262/88 Barber [1990] ECR I‑1889 to the period after 17 May 1990 cannot have any bearing, notwithstanding the fact that the contributions underpinning the entitlement had been paid before the date of that judgment. Furthermore, neither the Federal Republic of Germany nor the Freie und Hansestadt Hamburg suggested any limitation in time of the effects of the present judgment and no evidence submitted to the Court indicates that they should be so limited.

Costs

67 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation is to be interpreted as meaning that supplementary retirement pensions such as those paid to former employees of the Freie und Hansestadt Hamburg and their survivors on the basis of the Law of the Land of Hamburg on supplementary retirement and survivors' pensions for employees of the Freie und Hansestadt Hamburg (Erstes Ruhegeldgesetz der Freien und Hansestadt Hamburg), as amended on 30 May 1995, which constitute pay within the meaning of Article 157 TFEU, do not fall outside the material scope of the Directive either on account of Article 3(3) thereof or on account of recital 22 in the preamble thereto.

2. Article 1 in conjunction with Articles 2 and 3(1)(c) of Directive 2000/78 preclude a provision of national law such as Paragraph 10(6) of that Law of the Land of Hamburg, under which a pensioner who has entered into a registered life partnership receives a supplementary retirement pension lower than that granted to a married, not permanently separated, pensioner, if

– in the Member State concerned, marriage is reserved to persons of different gender and exists alongside a registered life partnership such as that provided for by the Law on registered life partnerships (Gesetz über die Eingetragene Lebenspartnerschaft) of 16 February 2001, which is reserved to persons of the same gender, and

– there is direct discrimination on the ground of sexual orientation because, under national law, that life partner is in a legal and factual situation comparable to that of a married person as regards that pension. It is for the referring court to assess the comparability, focusing on the respective rights and obligations of spouses and persons in a

registered life partnership, as governed within the corresponding institutions, which are relevant taking account of the purpose of and the conditions for the grant of the benefit in question.

3. Should Paragraph 10(6) of the Law of the Land of Hamburg on supplementary retirement and survivors' pensions for employees of the Freie und Hansestadt Hamburg, as amended on 30 May 1995, constitute discrimination within the meaning of Article 2 of Directive 2000/78, the right to equal treatment could be claimed by an individual such as the applicant in the main proceedings at the earliest after the expiry of the period for transposing the Directive, namely from 3 December 2003, and it would not be necessary to wait for that provision to be made consistent with European Union law by the national legislature.

Case C-267/12: Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres

JUDGMENT OF THE COURT (Fifth Chamber)

12 December 2013 (*)

(Directive 2000/78/EC – Equal treatment – Collective agreement which restricts a benefit in respect of pay and working conditions to employees who marry – Exclusion of partners entering into a civil solidarity pact – Discrimination based on sexual orientation)

In Case C‑267/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (France), made by decision of 23 May 2012, received at the Court on 30 May 2012, in the proceedings

Frédéric Hay

v

Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász, A. Rosas, D. Šváby (Rapporteur) and C. Vajda, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Mr Hay, by A. Lamamra, avocat,

– Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres, by J.-J. Gatineau, avocat,

– the French Government, by G. de Bergues, D. Colas and J. Rossi, acting as Agents,

– the Belgian Government, by M. Jacobs, acting as Agent,

– the European Commission, by J. Enegren and D. Martin, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

2 The request has been made in proceedings between Mr Hay and Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres ('Crédit agricole'), his employer, concerning the latter's refusal to award him days of special leave and a bonus granted to staff who marry following the conclusion by Mr Hay of a civil solidarity pact (PACS).

Legal context

EU law

3 Recital 22 in the preamble to Directive 2000/78 states:

'This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.'

4 Article 1 of Directive 2000/78 provides:

'The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'

5 According to Article 2 of that directive:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, …

...

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.'

6 Article 3(1) of the directive is worded as follows:

'Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

...

(c) employment and working conditions, including dismissals and pay;

...'

French law

The Civil Code

7 Article 144 of the French Civil Code (Code civil), as amended by Law No 99-944 of 15 November 1999 ('the Civil Code'), provides:

'A male and a female may not contract marriage before they have completed their 18th year.'

8 Article 515-1 of the Civil Code provides:

'A civil solidarity pact is a contract entered into by two natural persons of age, of different sexes or of the same sex, to organise their life together.'

9 Article 515-4 of the Civil Code states:

'Partners bound by a civil solidarity pact commit to a life together and to providing mutual material aid and assistance to each other. If the partners do not provide otherwise, the material aid shall be proportionate to their respective means.

Partners shall be jointly and severally liable with regard to third parties for debts incurred by one of them for the needs of everyday life. ...'

The Labour Code

10 Article L.122-45 of the French Labour Code (Code du travail), in the version thereof in force at the time of the facts in the main proceedings ('the Labour Code'), prohibits direct or indirect discrimination based on, inter alia, sexual orientation in relation to pay and working conditions.

11 Article L.226-1 of the Labour Code provides:

'All employees shall be granted special leave on the occasion of certain family events, subject to proof being provided, as follows:

1. four days for the employee's marriage;

...'

Crédit agricole's national collective agreement

12 Article 20 of Crédit agricole's national collective agreement, entitled 'Special leave', provides:

'Paid leave, with full pay, shall be granted in the following circumstances:

...

3. Permanent employees

Marriage:

– of the employee: 10 working days;

– of a child of the employee: three working days;

– of a sister or brother of the employee: one working day.

...’

13 Article 34 of Crédit agricole’s national collective agreement, entitled ‘Miscellaneous bonuses and allowances’, provides:

‘Marriage bonus

All employees shall, at the time of their marriage, receive a bonus equal, per month of employment, to 1/36th of their monthly salary of the month preceding the marriage.

...’

14 By agreement of 10 July 2008 amending Articles 20, 22 and 34 of Crédit agricole’s national collective agreement, those benefits were extended in the event of conclusion of a PACS. The French Association of Banks and Unions (Association française des banques et les fédérations syndicales) also concluded, on 27 September 2010, an addendum to the bank’s national collective agreement of 10 January 2000, extending leave for family events to employees in a PACS arrangement. The provisions of that addendum were extended throughout the banking sector by order of 23 December 2010 of the Minister for Labour, Employment and Health.

The dispute in the main proceedings and the question referred

15 Mr Hay has been an employee with Crédit agricole since 1998.

16 On 11 July 2007, Mr Hay concluded a PACS with a person of the same sex. On that occasion, Mr Hay applied for the days of special leave and the marriage bonus granted to employees who marry, in accordance with Crédit agricole’s national collective agreement. Crédit agricole refused him those benefits, however, on the ground that, under that collective agreement, they were granted only upon marriage.

17 On 17 March 2008, Mr Hay brought an action before the Conseil de prud’hommes de Saintes (Labour Tribunal, Saintes) seeking to obtain payment of the marriage bonus, amounting to EUR 2 637.85, and compensation for the days of special leave which he had been refused, in the amount of EUR 879.29. By judgment of 13 October 2008, the Conseil de prud’hommes de Saintes dismissed his action, holding that the bonus granted in the event of marriage is not linked to employment but to marital status and the Civil Code differentiates between marriage and the PACS. It observed, however, that Crédit agricole’s national collective agreement had been amended on 10 July 2008 to extend the benefits under that agreement relating to the bonus and leave for marriage to people in a PACS arrangement, but that that extension could not be given retroactive effect.

18 By judgment of 30 March 2010, the Cour d’appel de Poitiers (Court of Appeal, Poitiers) upheld that judgment on the ground that the PACS differs from marriage in respect of the formalities governing its celebration, the possibility that it may be entered into by two individuals of full age of different sexes or of the same sex, the manner in which it may be broken, and in respect of the reciprocal obligations under property law, succession law and law relating to parenthood. That court further held that the difference in treatment between spouses, on the one hand, and partners in a PACS, on the other, in relation to benefits paid for family events does not follow from their family situation or from their sexual orientation but from a difference in status resulting from their marital status, which does not place them in an identical situation.

19 On 28 May 2010, Mr Hay brought an appeal against that judgment before the Cour de cassation (Court of Cassation). In Mr Hay’s submission, Crédit agricole’s refusal to grant him the days of special leave and the marriage

bonus provided for under Crédit agricole's national collective agreement constitutes discrimination based on his sexual orientation, contrary to Article L.122-45 of the Labour Code, Articles 1 to 3 of Directive 2000/78 and Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

20 Mr Hay observes that, under Article 144 of the Civil Code, only persons of different sexes may marry, whereas, under Article 515-1 of the Civil Code, persons of the same sex only have the possibility of concluding a PACS. That provision, read in conjunction with Crédit agricole's national collective agreement, gives rise to a situation where persons of the same sex in a PACS arrangement do not have access to the days of leave and marriage bonus granted to married employees of the company.

21 In those circumstances, the Cour de cassation decided to stay proceedings and to refer the following question to the Court:

'Must Article 2(2)(b) of [Directive 2000/78] … be interpreted as meaning that the choice of the national legislature to allow only persons of different sexes to marry can constitute a legitimate, appropriate and necessary aim such as to justify indirect discrimination resulting from the fact that a collective agreement which restricts an advantage in respect of pay and working conditions to employees who marry, thereby necessarily excluding from the benefit of that advantage same-sex partners who have entered into a [PACS]?'

The question referred for a preliminary ruling

22 The question referred is based on the premiss that Crédit agricole's national collective agreement gives rise to indirect discrimination based on sexual orientation within the meaning of Article 2(2)(b) of Directive 2000/78 and concerns the issue of whether such discrimination can be justified.

23 In that regard, it must be borne in mind that according to settled case-law even though, formally, the national court has limited its questions to the interpretation of a specific provision of EU law, that does not prevent the Court from providing the national court with all the elements of interpretation of EU law which may be of assistance in adjudicating on the case before it, whether or not that court has specifically referred to them in the questions (see, to that effect, Case C‑229/08 Wolf [2010] ECR I‑1, paragraph 32 and the case-law cited).

24 Given the situation in the main proceedings, as set out in the order for reference, it is appropriate to consider the issue whether a national collective agreement like Crédit agricole's gives rise to direct or indirect discrimination within the meaning of Article 2(2) of Directive 2000/78.

25 Accordingly, the question referred by the national court must be viewed, in essence, as asking whether Article 2(2)(a) and (b) of Directive 2000/78 must be interpreted as precluding a provision in a collective agreement, such as the one at issue in the main proceedings, under which an employee who concludes a civil solidarity pact with a person of the same sex is not allowed to obtain the same benefits, such as days of special leave and a salary bonus, as those granted to employees on the occasion of their marriage, where the national rules of the Member State concerned do not allow persons of the same sex to marry.

26 As a preliminary point, it should be observed that, as indicated in recital 22 in the preamble to Directive 2000/78, legislation on the marital status of persons falls within the competence of the Member States. However, in accordance with Article 1 thereof, the purpose of Directive 2000/78 is to combat, as regards employment and occupation, certain types of discrimination, including discrimination on the ground of sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment (see Case C‑147/08 Römer [2011] ECR I‑3591, paragraph 38).

27 As regards the application of Directive 2000/78 to the provisions of a collective agreement such as the one at issue in the main proceedings, it is clear from the Court's case-law that, where they adopt measures which fall within the scope of Directive 2000/78, management and labour must respect that directive (see Case C‑447/09 Prigge and

Others [2011] ECR I‑8003, paragraph 48, and Case C‑132/11 Tyrolean Airways Tiroler Luftfahrt [2012] ECR, paragraph 22).

28 In providing for the grant of paid days of leave and a marriage bonus on the occasion of a company employee's marriage, Articles 20 and 34 of Crédit agricole's national collective agreement lay down rules relating to employment and working conditions including, in particular, pay conditions within the meaning of Article 3(1)(c) of Directive 2000/78. The concept of 'pay' within the meaning of that provision must be interpreted broadly. It covers, in particular, any consideration, whether in cash or in kind, whether immediate or future, provided that the employee receives it, albeit indirectly, in respect of his or her employment from his or her employer, and irrespective of whether it is received under a contract of employment, by virtue of legislative provisions or on a voluntary basis (see Joined Cases C‑124/11, C‑125/11 and C‑143/11 Dittrich and Others [2012] ECR, paragraph 35).

29 Accordingly, it must be held that Directive 2000/78 is applicable to a situation such as that which gave rise to the main proceedings.

30 Under Article 2 of the directive, the 'principle of equal treatment' is to mean that there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of that directive.

31 As to whether there is direct discrimination, Article 2(2)(a) of Directive 2000/78 provides that direct discrimination is to be taken to occur when a person is treated in a less favourable manner than another person in a comparable situation, on one of the grounds listed in Article 1 thereof, including sexual orientation.

32 Accordingly, the existence of direct discrimination presupposes that the situations being weighed up are comparable (see, inter alia, Römer, paragraph 41).

33 In that regard, it should be pointed out that, on the one hand, it is required not that the situations be identical, but only that they be comparable and, on the other hand, the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned (see Case C‑267/06 Maruko [2008] ECR I‑1757, paragraphs 67 to 69, and Römer, paragraph 42).

34 Thus, the Court has held, in respect of registered life partnerships, as provided for under the German Law on registered life partnerships (Gesetz über die Eingetrangene Lebenspartnerschaft), that the comparison of the situations must be based on an analysis focusing on the rights and obligations of the spouses and registered life partners as they result from the applicable domestic provisions, which are relevant taking account of the purpose and the conditions for granting the benefit at issue in the main proceedings, and must not consist in examining whether national law generally and comprehensively treats registered life partnership as legally equivalent to marriage (see Römer, paragraph 43).

35 As regards the days of paid leave and the bonus which the provisions at issue in the main proceedings grant to employees on the occasion of their marriage, it is necessary to examine whether persons who enter into a marriage and persons who, being unable to marry a person of their own sex, enter into a PACS, are in comparable situations.

36 It is apparent from the order for reference and the file submitted to the Court that persons of the same sex may conclude a PACS in order to organise their life together by committing, in the context of that life together, to providing material aid and assistance to each other. The PACS, which must be the subject of a joint declaration and registration with the Registry of the court within whose jurisdiction the persons concerned establish their common residence, constitutes, like marriage, a form of civil union under French law which places the couple within a specific legal framework entailing rights and obligations in respect of each other and vis-à-vis third parties. Although the PACS may also be concluded by persons of different sexes, and although there may be general differences between the systems governing marriage and the PACS arrangement, the latter was, at the time of the facts in the main proceedings, the only possibility under French law for same-sex couples to procure legal status for their relationship which could be certain and effective against third parties.

37 Thus, as regards benefits in terms of pay or working conditions, such as days of special leave and a bonus like those at issue in the main proceedings, granted at the time of an employee's marriage – which is a form of civil union – persons of the same sex who cannot enter into marriage and therefore conclude a PACS are in a situation which is comparable to that of couples who marry.

38 It should be noted in that regard that, in keeping with the case-law referred to in paragraph 33 of this judgment, the fact that the French Conseil constitutionnel (Constitutional Council) held, in its Decision No 2011-155, Ms Laurence L., that married couples and couples in a PACS arrangement were not in a comparable situation for the purposes of a survivor's pension, does not rule out the comparability of the situation of married employees and homosexual employees in a PACS arrangement for the purposes of the grant of days of leave and bonuses at the time of marriage.

39 Similarly, the differences between marriage and the PACS, noted by the Cour d'appel de Poitiers in the dispute in the main proceedings, in respect of the formalities governing its celebration, the possibility that it may be entered into by two individuals of different sexes or of the same sex, the manner in which it may be broken, and in respect of the reciprocal obligations under property law, succession law and law relating to parenthood, are irrelevant to the assessment of an employee's right to benefits in terms of pay or working conditions such as those at issue in the main proceedings.

40 In that context, it should be noted that Crédit agricole's national collective agreement grants those benefits on the occasion of marriage, irrespective of the rights and obligations arising from marriage. This is confirmed by the fact that Article 20 of that collective agreement grants special leave not only on the occasion of a permanent employee's marriage but also on the occasion of the marriage of that employee's children, brother or sister.

41 As regards the very existence of discrimination, it is apparent from the Court's case-law that a Member State's rules which restrict benefits in terms of conditions of pay or working conditions to married employees, whereas marriage is legally possible in that Member State only between persons of different sexes, give rise to direct discrimination based on sexual orientation against homosexual permanent employees in a PACS arrangement who are in a comparable situation (see, to that effect, Maruko, paragraph 73, and Römer, paragraph 52).

42 Articles 20 and 34 of Crédit agricole's national collective agreement grant paid leave and a bonus to employees who enter into marriage. Since marriage is not, according to the information provided by the referring court, accessible to persons of the same sex, they cannot receive those benefits.

43 The fact that the PACS, unlike the registered life partnership at issue in the cases which gave rise to the judgments in Maruko and Römer, is not restricted only to homosexual couples is irrelevant and, in particular, does not change the nature of the discrimination against homosexual couples who, unlike heterosexual couples, could not, on the date of the facts in the main proceedings, legally enter into marriage.

44 The difference in treatment based on the employees' marital status and not expressly on their sexual orientation is still direct discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed.

45 Moreover, as the discrimination is direct, it may be upheld, not on the basis of a 'legitimate aim' within the meaning of Article 2(2)(b) of Directive 2000/78, as that provision covers only indirect discrimination, but only on one of the grounds referred to in Article 2(5) of that directive, namely public security, the maintenance of public order and the prevention of criminal offences, the protection of health and the protection of the rights and freedoms of others.

46 It should be observed in that regard that none of those grounds have been relied on in the dispute in the main proceedings. Moreover, as Article 2(5) establishes an exception to the principle of the prohibition of discrimination, it must be interpreted strictly (see Prigge and Others, paragraph 56).

47 In the light of the foregoing considerations, the answer to the question referred is that Article 2(2)(a) of Directive 2000/78 must be interpreted as precluding a provision in a collective agreement, such as the one at issue in the main proceedings, under which an employee who concludes a PACS with a person of the same sex is not allowed to obtain the same benefits, such as days of special leave and a salary bonus, as those granted to employees on the occasion of their marriage, where the national rules of the Member State concerned do not allow persons of the same sex to marry, in so far as, in the light of the objective of and the conditions relating to the grant of those benefits, that employee is in a comparable situation to an employee who marries.

Costs

48 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding a provision in a collective agreement, such as the one at issue in the main proceedings, under which an employee who concludes a civil solidarity pact with a person of the same sex is not allowed to obtain the same benefits, such as days of special leave and a salary bonus, as those granted to employees on the occasion of their marriage, where the national rules of the Member State concerned do not allow persons of the same sex to marry, in so far as, in the light of the objective of and the conditions relating to the grant of those benefits, that employee is in a comparable situation to an employee who marries.

Case C-249/96 : Lisa Jacqueline Grant v South-West Trains Ltd

JUDGMENT OF THE COURT

17 February 1998
(1)

(Equal treatment of men and women - Refusal of travel concessions tocohabitees of the same sex)

In Case C-249/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the IndustrialTribunal, Southampton, for a preliminary ruling in the proceedings pending beforethat tribunal between

Lisa Jacqueline Grant

and

South-West Trains Ltd

on the interpretation of Article 119 of the EC Treaty, Council Directive75/117/EEC of 10 February 1975 on the approximation of the laws of the MemberStates relating to the application of the principle of equal pay for men and women(OJ 1975 L 45, p. 19), and Council Directive 76/207/EEC of 9 February 1976 onthe implementation of the principle of equal treatment for men and women asregards access to employment, vocational training and promotion, and workingconditions (OJ 1976 L 39, p. 40),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm,M. Wathelet (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida,P.J.G. Kapteyn, J.L. Murray, D.A.O. Edward, J.-P. Puissochet (Rapporteur),G. Hirsch, P. Jann and L. Sevón, Judges,

Advocate General: M.B. Elmer,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Ms Grant, by Cherie Booth QC, and by Peter Duffy and Marie Demetriou,Barristers,

— South-West Trains Ltd, by Nicholas Underhill QC and Murray Shanks,Barrister,

— the United Kingdom Government, by John E. Collins, of the TreasurySolicitor's Department, acting as Agent, and Stephen Richards and DavidAnderson, Barristers,

— the French Government, by Catherine de Salins, Deputy Director in theLegal Affairs Department of the Ministry of Foreign Affairs, and Anne deBourgoing, Chargé de Mission in that department, acting as Agents,

— the Commission of the European Communities, by Christopher Docksey,Marie Wolfcarius and Carmel O'Reilly, of its Legal Service, acting asAgents,

having regard to the Report for the Hearing,

after hearing the oral observations of Ms Grant, represented by Cherie Booth QC,Peter Duffy QC and Marie Demetriou; South-West Trains Ltd, represented byNicholas Underhill QC and Murray Shanks; the United Kingdom Government,represented by John E. Collins, David Anderson and Patrick Elias QC; and theCommission, represented by Carmel O'Reilly and Marie Wolfcarius, at the hearingon 9 July 1997,

after hearing the Opinion of the Advocate General at the sitting on 30 September1997,

gives the following

Judgment

1. By decision of 19 July 1996, received at the Court on 22 July 1996, the IndustrialTribunal, Southampton, referred to the Court for a preliminary ruling under Article177 of the EC Treaty six questions on the interpretation of Article 119 of thatTreaty, Council Directive 75/117/EEC of 10 February 1975 on the approximationof the laws of the Member States relating to the application of the principle ofequal pay for men and women (OJ 1975 L 45, p. 19), and Council Directive76/207/EEC of 9 February 1976 on the implementation of the principle of equaltreatment for men and women as regards access to employment, vocational trainingand promotion, and working conditions (OJ 1976 L 39, p. 40).

2. Those questions were raised in proceedings between Ms Grant and her employerSouth-West Trains Ltd (hereinafter 'SWT') concerning the refusal by SWT oftravel concessions for Ms Grant's female partner.

3. Ms Grant is employed by SWT, a company which operates railways in theSouthampton region.

4. Clause 18 of her contract of employment, entitled 'Travel facilities', states:

'You will be granted such free and reduced rate travel concessions as areapplicable to a member of your grade. Your spouse and depend[a]nts will also begranted travel concessions. Travel concessions are granted at the discretion of [theemployer] and will be withdrawn in the event of their misuse.'

5. At the material time, the regulations adopted by the employer for the applicationof those provisions, the Staff Travel Facilities Privilege Ticket Regulations, providedin Clause 8 ('Spouses') that:

'Privilege tickets are granted to a married member of staff ... for one legal spousebut not for a spouse legally separated from the employee ...

...

Privilege tickets are granted for one common law opposite sex spouse of staff ...subject to a statutory declaration being made that a meaningful relationship hasexisted for a period of two years or more ...'.

6. The regulations also defined the conditions under which travel concessions couldbe granted to current employees (Clauses 1 to 4), employees having provisionallyor definitively ceased working

(Clauses 5 to 7), surviving spouses of employees(Clause 9), children of employees (Clauses 10 and 11) and dependent members ofemployees' families (Clause 12).

7. On the basis of those provisions Ms Grant applied on 9 January 1995 for travelconcessions for her female partner, with whom she declared she had had a'meaningful relationship‘ for over two years.

8. SWT refused to allow the benefit sought, on the ground that for unmarried personstravel concessions could be granted only for a partner of the opposite sex.

9. Ms Grant thereupon made an application against SWT to the Industrial Tribunal,Southampton, arguing that that refusal constituted discrimination based on sex,contrary to the Equal Pay Act 1970, Article 119 of the Treaty and/or Directive76/207. She submitted in particular that her predecessor in the post, a man whohad declared that he had had a meaningful relationship with a woman for over twoyears, had enjoyed the benefit which had been refused her.

10. The Industrial Tribunal considered that the problem facing it was whether refusalof the benefit at issue on the ground of the employee's sexual orientation was'discrimination based on sex‘ within the meaning of Article 119 of the Treaty andthe directives on equal treatment of men and women. It observed that while someUnited Kingdom courts had held that that was not the case, the judgment of theCourt of Justice in Case C-13/94 *P* v *S and Cornwall County Council* [1996] ECRI-2143 was, on the other hand, 'persuasive authority for the proposition thatdiscrimination on the ground of sexual orientation [was] unlawful‘.

11. For those reasons the Industrial Tribunal referred the following questions to theCourt for a preliminary ruling:

'1. Is it (subject to (6) below) contrary to the principle of equal pay for menand women established by Article 119 of the Treaty establishing theEuropean Community and by Article 1 of Council Directive 75/117 for anemployee to be refused travel concessions for an unmarried cohabitingsame-sex partner where such concessions are available for spouses orunmarried opposite-sex cohabiting partners of such an employee?

2. For the purposes of Article 119 does ”discrimination based on sex” includediscrimination based on the employee's sexual orientation?

3. For the purposes of Article 119, does ”discrimination based on sex” includediscrimination based on the sex of that employee's partner?

4. If the answer to Question (1) is yes, does an employee, to whom suchconcessions are refused, enjoy a directly enforceable Community rightagainst his employer?

5. Is such a refusal contrary to the provisions of Council Directive 76/207?

6. Is it open to an employer to justify such refusal if he can show (a) that thepurpose of the concessions in question is to confer benefits on marriedpartners or partners in an equivalent position to married partners and (b)that relationships between same-sex cohabiting partners have nottraditionally been, and are not generally, regarded by society as equivalentto marriage; rather than on the basis of an economic or organisationalreason relating to the employment in question?‘

12. In view of the close links between the questions, they should be consideredtogether.

13.

As a preliminary point, it should be observed that the Court has already held thattravel concessions granted by an employer to former employees, their spouses ordependants, in respect of their employment are pay within the meaning of Article119 of the Treaty (see to that effect Case 12/81 *Garland* v *British Rail Engineering*[1982] ECR 359, paragraph 9).

14.

In the present case it is common ground that a travel concession granted by anemployer, on the basis of the contract of employment, to the employee's spouse orthe person of the opposite sex with whom the employee has a stable relationshipoutside marriage falls within Article 119 of the Treaty. Such a benefit is thereforenot covered by Directive 76/207, referred to in the national tribunal's Question 5(see Case C-342/93 *Gillespie and Others* v *Northern Health and Social Services Boardand Others* [1996] ECR I-475, paragraph 24).

15.

In view of the wording of the other questions and the grounds of the decisionmaking the reference, the essential point raised by the national tribunal is whetheran employer's refusal to grant travel concessions to the person of the same sex withwhom an employee has a stable relationship constitutes discrimination prohibitedby Article 119 of the Treaty and Directive 75/117, where such concessions aregranted to an employee's spouse or the person of the opposite sex with whom anemployee has a stable relationship outside marriage.

16.

Ms Grant submits, first, that such a refusal constitutes discrimination directly basedon sex. She submits that her employer's decision would have been different if thebenefits in issue in the main proceedings had been claimed by a man living with awoman, and not by a woman living with a woman.

17.

Ms Grant argues that the mere fact that the male worker who previously occupiedher post had obtained travel concessions for his female partner, without beingmarried to her, is enough to identify direct discrimination based on sex. In hersubmission, if a female worker does not receive the same benefits as a maleworker, all other things being equal, she is the victim of discrimination based on sex(the 'but for‘ test).

18.

Ms Grant contends, next, that such a refusal constitutes discrimination based onsexual orientation, which is included in the concept of 'discrimination based onsex‘ in Article 119 of the Treaty. In her opinion, differences in treatment based onsexual orientation originate in prejudices regarding the sexual and emotionalbehaviour of persons of a particular sex, and are in fact based on those persons'sex. She submits that such an interpretation follows from the judgment in *P* v *S* andcorresponds both to the resolutions and recommendations adopted by theCommunity institutions and to the development of international human rightsstandards and national rules on equal treatment.

19.

Ms Grant claims, finally, that the refusal to allow her the benefit is not objectivelyjustified.

20.

SWT and the United Kingdom and French Governments consider that the refusalof a benefit such as that in issue in the main proceedings is not contrary to Article119 of the Treaty. They submit, first, that the judgment in *P* v *S*, which is limitedto cases of gender reassignment, does no more than treat discrimination based ona person's change of sex as equivalent to discrimination based on a person'sbelonging to a particular sex.

21.

They submit, next, that the difference in treatment of which Ms Grant complainsis based not on

her sexual orientation or preference but on the fact that she doesnot satisfy the conditions laid down in the undertaking's regulations.

22. Finally, in their opinion, discrimination based on sexual orientation is not'discrimination based on sex‘ within the meaning of Article 119 of the Treaty orDirective 75/117. They refer on this point in particular to the wording andobjectives of Article 119, the lack of consensus among Member States as towhether stable relationships between persons of the same sex may be regarded asequivalent to stable relationships between persons of opposite sex, the fact thatthose relationships are not protected by Articles 8 or 12 of the Convention for theProtection of Human Rights and Fundamental Freedoms of 4 November 1950(hereinafter 'the Convention‘), and the consequent absence of discriminationwithin the meaning of Article 14 of the Convention.

23. The Commission likewise considers that the refusal of the benefits to Ms Grant isnot contrary to Article 119 of the Treaty or Directive 75/117. In its opinion,discrimination based on the sexual orientation of workers may be regarded as'discrimination based on sex‘ for the purposes of Article 119. It submits, however,that the discrimination of which Ms Grant complains is based not on her sexualorientation but on the fact that she is not living as a 'couple‘ or with a 'spouse‘,as those terms are understood in the laws of most of the Member States, inCommunity law and in the law of the Convention. It considers that in thosecircumstances the difference of treatment applied by the regulations in force in theundertaking in which Ms Grant works is not contrary to Article 119.

24. In the light of all the material in the case, the first question to answer is whethera condition in the regulations of an undertaking such as that in issue in the mainproceedings constitutes discrimination based directly on the sex of the worker. Ifit does not, the next point to examine will be whether Community law requires thatstable relationships between two persons of the same sex should be regarded by allemployers as equivalent to marriages or stable relationships outside marriagebetween two persons of opposite sex. Finally, it will have to be considered whetherdiscrimination based on sexual orientation constitutes discrimination based on thesex of the worker.

25. First, it should be observed that the regulations of the undertaking in which MsGrant works provide for travel concessions for the worker, for the worker's'spouse‘, that is, the person to whom he or she is married and from whom he orshe is not legally separated, or the person of the opposite sex with whom he or shehas had a 'meaningful‘ relationship for at least two years, and for the children,dependent members of the family, and surviving spouse of the worker.

26. The refusal to allow Ms Grant the concessions is based on the fact that she doesnot satisfy the conditions prescribed in those regulations, more particularly on thefact that she does not live with a 'spouse‘ or a person of the opposite sex withwhom she has had a 'meaningful‘ relationship for at least two years.

27. That condition, the effect of which is that the worker must live in a stablerelationship with a person of the opposite sex in order to benefit from the travelconcessions, is, like the other alternative conditions prescribed in the undertaking'sregulations, applied regardless of the sex of the worker concerned. Thus travelconcessions are refused to a male worker if he is living with a person of the samesex, just as they are to a female worker if she is living with a person of the samesex.

28. Since the condition imposed by the undertaking's regulations applies in the sameway to female and male workers, it cannot be regarded as constitutingdiscrimination directly based on sex.

29.

Second, the Court must consider whether, with respect to the application of acondition such as that in issue in the main proceedings, persons who have a stablerelationship with a partner of the same sex are in the same situation as those whoare married or have a stable relationship outside marriage with a partner of theopposite sex.

30. Ms Grant submits in particular that the laws of the Member States, as well as thoseof the Community and other international organisations, increasingly treat the twosituations as equivalent.

31. While the European Parliament, as Ms Grant observes, has indeed declared thatit deplores all forms of discrimination based on an individual's sexual orientation,it is nevertheless the case that the Community has not as yet adopted rulesproviding for such equivalence.

32. As for the laws of the Member States, while in some of them cohabitation by twopersons of the same sex is treated as equivalent to marriage, although notcompletely, in most of them it is treated as equivalent to a stable heterosexualrelationship outside marriage only with respect to a limited number of rights, orelse is not recognised in any particular way.

33. The European Commission of Human Rights for its part considers that despite themodern evolution of attitudes towards homosexuality, stable homosexualrelationships do not fall within the scope of the right to respect for family life underArticle 8 of the Convention (see in particular the decisions in application No9369/81, *X. and Y.* v *the United Kingdom*, 3 May 1983, *Decisions and Reports* 32, p.220; application No 11716/85, *S.* v *the United Kingdom*, 14 May 1986, D.R. 47, p.274, paragraph 2; and application No 15666/89, *Kerkhoven and Hinke* v *theNetherlands*, 19 May 1992, unpublished, paragraph 1), and that national provisionswhich, for the purpose of protecting the family, accord more favourable treatmentto married persons and persons of opposite sex living together as man and wifethan to persons of the same sex in a stable relationship are not contrary to Article14 of the Convention, which prohibits *inter alia* discrimination on the ground of sex(see the decisions in *S.* v *the United Kingdom*, paragraph 7; application No14753/89, *C. and L.M.* v *the United Kingdom*, 9 October 1989, unpublished,paragraph 2; and application No 16106/90, *B.* v *the United Kingdom*, 10 February1990, D.R. 64, p. 278, paragraph 2).

34. In another context, the European Court of Human Rights has interpreted Article12 of the Convention as applying only to the traditional marriage between twopersons of opposite biological sex (see the*Rees* judgment of 17 October 1986,Series A no. 106, p. 19, § 49, and the *Cossey* judgment of 27 September 1990,Series A no. 184, p. 17, § 43).

35. It follows that, in the present state of the law within the Community, stablerelationships between two persons of the same sex are not regarded as equivalentto marriages or stable relationships outside marriage between persons of oppositesex. Consequently, an employer is not required by Community law to treat thesituation of a person who has a stable relationship with a partner of the same sexas equivalent to that of a person who is married to or has a stable relationshipoutside marriage with a partner of the opposite sex.

36. In those circumstances, it is for the legislature alone to adopt, if appropriate,measures which may affect that position.

37. Finally, Ms Grant submits that it follows from *P* v *S* that differences of treatmentbased on sexual orientation are included in the 'discrimination based on sex‘prohibited by Article 119 of the Treaty.

38.

In *P* v *S* the Court was asked whether a dismissal based on the change of sex of theworker concerned was to be regarded as 'discrimination on grounds of sex‘ withinthe meaning of Directive 76/207.

39. The national court was uncertain whether the scope of that directive was widerthan that of the Sex Discrimination Act 1975, which it had to apply and which inits view applied only to discrimination based on the worker's belonging to one orother of the sexes.

40. In their observations to the Court the United Kingdom Government and theCommission submitted that the directive prohibited only discrimination based onthe fact that the worker concerned belonged to one sex or the other, notdiscrimination based on the worker's gender reassignment.

41. In reply to that argument, the Court stated that the provisions of the directiveprohibiting discrimination between men and women were simply the expression, intheir limited field of application, of the principle of equality, which is one of thefundamental principles of Community law. It considered that that circumstanceargued against a restrictive interpretation of the scope of those provisions and infavour of applying them to discrimination based on the worker's genderreassignment.

42. The Court considered that such discrimination was in fact based, essentially if notexclusively, on the sex of the person concerned. That reasoning, which leads to theconclusion that such discrimination is to be prohibited just as is discriminationbased on the fact that a person belongs to a particular sex, is limited to the caseof a worker's gender reassignment and does not therefore apply to differences oftreatment based on a person's sexual orientation.

43. Ms Grant submits, however, that, like certain provisions of national law or ofinternational conventions, the Community provisions on equal treatment of menand women should be interpreted as covering discrimination based on sexualorientation. She refers in particular to the International Covenant on Civil andPolitical Rights of 19 December 1966 (*United Nations Treaty Series*, Vol. 999, p.171), in which, in the view of the Human Rights Committee established underArticle 28 of the Covenant, the term 'sex‘ is to be taken as including sexualorientation (communication No 488/1992, *Toonen* v*Australia*, views adopted on 31March 1994, 50th session, point 8.7).

44. The Covenant is one of the international instruments relating to the protection ofhuman rights of which the Court takes account in applying the fundamental

principles of Community law (see, for example, Case 374/87 *Orkem* v *Commission*[1989] ECR 3283, paragraph 31, and Joined Cases C-297/88 and C-197/89 *Dzodzi*v *Belgian State* [1990] ECR I-3763, paragraph 68).

45. However, although respect for the fundamental rights which form an integral partof those general principles of law is a condition of the legality of Community acts,those rights cannot in themselves have the effect of extending the scope of theTreaty provisions beyond the competences of the Community (see, *inter alia*, on thescope of Article 235 of the EC Treaty as regards respect for human rights, Opinion2/94 [1996] ECR I-1759, paragraphs 34 and 35).

46. Furthermore, in the communication referred to by Ms Grant, the Human RightsCommittee, which is not a judicial institution and whose findings have no bindingforce in law, confined itself, as it stated

itself without giving specific reasons, to'noting ... that in its view the reference to ”sex” in Articles 2, paragraph 1, and 26is to be taken as including sexual orientation‘.

47. Such an observation, which does not in any event appear to reflect theinterpretation so far generally accepted of the concept of discrimination based onsex which appears in various international instruments concerning the protectionof fundamental rights, cannot in any case constitute a basis for the Court to extendthe scope of Article 119 of the Treaty. That being so, the scope of that article, asof any provision of Community law, is to be determined only by having regard toits wording and purpose, its place in the scheme of the Treaty and its legal context.It follows from the considerations set out above that Community law as it standsat present does not cover discrimination based on sexual orientation, such as thatin issue in the main proceedings.

48. It should be observed, however, that the Treaty of Amsterdam amending theTreaty on European Union, the Treaties establishing the European Communitiesand certain related acts, signed on 2 October 1997, provides for the insertion in theEC Treaty of an Article 6a which, once the Treaty of Amsterdam has entered intoforce, will allow the Council under certain conditions (a unanimous vote on aproposal from the Commission after consulting the European Parliament) to takeappropriate action to eliminate various forms of discrimination, includingdiscrimination based on sexual orientation.

49. Finally, in the light of the foregoing, there is no need to consider Ms Grant'sargument that a refusal such as that which she encountered is not objectivelyjustified.

50. Accordingly, the answer to the national tribunal must be that the refusal by anemployer to allow travel concessions to the person of the same sex with whom aworker has a stable relationship, where such concessions are allowed to a worker'sspouse or to the person of the opposite sex with whom a worker has a stable

relationship outside marriage, does not constitute discrimination prohibited byArticle 119 of the Treaty or Directive 75/117.

Costs

51. The costs incurred by the United Kingdom and French Governments and by theCommission of the European Communities, which have submitted observations tothe Court, are not recoverable. Since these proceedings are, for the parties to themain proceedings, a step in the action pending before the national tribunal, thedecision on costs is a matter for that tribunal.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Industrial Tribunal, Southampton,by decision of 19 July 1996, hereby rules:

The refusal by an employer to allow travel concessions to the person of the samesex with whom a worker has a stable relationship, where such concessions areallowed to a worker's spouse or to the person of the opposite sex with whom aworker has a stable relationship outside marriage, does not constitutediscrimination prohibited by Article 119 of the EC Treaty or Council Directive75/117/EEC of 10 February 1975 on the approximation of the

laws of the MemberStates relating to the application of the principle of equal pay for men and women.

Delivered in open court in Luxembourg on 17 February 1998.

R. Grass G.C. Rodríguez Iglesias

Registrar

Case C-249/96 : Lisa Jacqueline Grant v South-West Trains Ltd (Opinion of Advocate General Elmer)

OPINION OF ADVOCATE GENERAL ELMER

delivered on 30 September 1997

1 Does a provision in an employer's pay regulations according to which the employee is to be granted a pay benefit in the form of travel concessions for a cohabitee of the opposite gender to the employee, but is denied such concessions for a cohabitee of the same gender as the employee, constitute gender discrimination in breach of Article 119 of the EC Treaty?

The case before the national court and the questions referred for a preliminary ruling

2 On 4 June 1993 Lisa Grant was engaged as a clerical officer by the British Railways Board. On 31 March 1995 the employment relationship was transferred to South-West Trains, a wholly-owned subsidiary, which was privatised on 4 February 1996. Clause 18 of her contract of employment, entitled `Travel facilities', states:

`You will be granted such free and reduced rate travel concessions as are applicable to a member of your grade. Your spouse and dependents will also be granted travel concessions. Travel concessions are granted at the discretion of [the employer] and will be withdrawn in the event of their misuse.'

3 Those travel concessions are further regulated in the Staff Travel Facilities Privilege Ticket Regulations (hereinafter `the Ticket Regulations'), issued by the British Railways Board and adopted by South-West Trains after privatisation. Clause 8 of the Ticket Regulations, entitled `Spouses', provides inter alia:

`Privilege tickets are granted for one common law opposite sex spouse of staff ... subject to a statutory declaration being made that a meaningful relationship has existed for a period of two years or more ...'

4 Under Clauses 10 and 11 of the Ticket Regulations, the employee is also entitled to concessions for unmarried children living at home. Under Clause 12 it is further stated that `Privilege tickets may be issued ... for a relative acting as a bona fide permanent resident housekeeper to and entirely dependent upon the applicant ...' if the employee is either living alone or with an invalid spouse. Under that clause `relative' is defined as a mother, father, brother, sister, daughter or son.

5 Mr Potter, who was Lisa Grant's predecessor in post, had in his time made a statutory declaration that a meaningful relationship had existed between him and his female cohabitee for a period of two years or more, and on that basis had obtained travel concessions for her.

6 On 9 January 1995 Lisa Grant similarly applied for travel concessions for her female cohabitee, Jillian Percey, at the same time making a declaration that she lived together with `the individual described as my common law spouse on my application for concessionary travel facilities in a "Common law relationship" and that I have so lived for a continuous period of two years or more ...'. Lisa Grant's application was rejected on the ground that, under Clause 8 of the Ticket Regulations, travel concessions were not granted for cohabitees of the same sex.

7 Lisa Grant then brought a case against South-West Trains before the Industrial Tribunal, Southampton, United Kingdom, claiming that Article 119 of the EC Treaty precluded her being denied part of her pay consisting in obtaining travel concessions for her female cohabitee, when a male employee in the same circumstances would obtain travel concessions for his female cohabitee.

8 By order registered at the Court of Justice on 22 July 1996 the Industrial Tribunal stayed the proceedings and referred the following questions to the Court:

`1. Is it (subject to (6) below) contrary to the principle of equal pay for men and women established by Article 119 of the Treaty establishing the European Community and by Article 1 of Council Directive 75/117 for an employee to be refused travel concessions for an unmarried cohabiting same-sex partner where such concessions are available for spouses or unmarried opposite-sex cohabiting partners of such an employee?

2. For the purposes of Article 119 does "discrimination based on sex" include discrimination based on the employee's sexual orientation?

3. For the purposes of Article 119, does "discrimination based on sex" include discrimination based on the sex of that employee's partner?

4. If the answer to Question (1) is yes, does an employee, to whom such concessions are refused, enjoy a directly enforceable Community right against his employer?

5. Is such a refusal contrary to the provisions of Council Directive 76/207?

6. Is it open to an employer to justify such refusal if he can show (a) that the purpose of the concessions in question is to confer benefits on married partners or partners in an equivalent position to married partners and (b) that relationships between same-sex cohabiting partners have not traditionally been, and are not generally, regarded by society as equivalent to marriage; rather than on the basis of an economic or organisational reason relating to the employment in question?'

Which rules are relevant?

9 In the Garland case (1) the Court held that travel concessions for employees and members of their family should be treated as pay within the meaning of Article 119 of the EC Treaty.

10 Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, (2) which on certain points clarifies the content of Article 119 of the Treaty, (3) has no independent significance where a pay benefit falling within the scope of Article 119 is involved. Directive 75/117 is therefore not relevant to this case. (4)

11 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (5) does not cover pay benefits, and is therefore also irrelevant to the present case.

12 The questions referred to the Court must therefore be answered on the basis of Article 119 of the Treaty alone. Since the above Directives supplement and develop the basic principle of equal treatment contained in Article 119 of the Treaty, the Court's case-law concerning those Directives is nevertheless of great importance in this case.

General remarks concerning gender discrimination

13 In its judgment of 30 April 1996 in Case C-13/94 P v S and Cornwall County Council (6) (hereinafter `P v S'), the Court had an opportunity to give a ruling that dealt more fundamentally with the scope of the Community rules prohibiting discrimination based on sex. The case concerned an employee who was dismissed after informing his employer that he intended to undergo gender reassignment. The Court held that the dismissal constituted discrimination based on sex that was contrary to Directive 76/207. In paragraph 21 the Court attributed great weight to the fact that such discrimination was `based, essentially if not exclusively, on the sex of the person concerned'. It was therefore irrelevant as far as the Court was concerned that there was discrimination because of P's transsexuality.

14 I would in particular refer to paragraphs 19 to 22 of the judgment, where the Court stated as follows:

`Moreover, as the Court has repeatedly held, the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure (paragraph 19).

Accordingly, the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned (paragraph 20).

Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment (paragraph 21).

To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard (paragraph 22).'

15 In that judgment the Court, in my view, took a decisive step away from an interpretation of the principle of equal treatment based on the traditional comparison between a female and a male employee. The Court thus held that it did not matter that there was no reason to think that a woman who wished to undergo gender reassignment would have been treated more favourably than a man who wished to do so. I would refer in particular to paragraph 20 of the judgment, where the Court refused to confine the principle of equal treatment simply to discrimination based on the fact that a person is of one or other sex. The essential point was that the discrimination was based exclusively, or essentially, on gender. The Court thereby, in my view, interpreted the Community principle of equal treatment in a way that renders the principle appropriate for dealing with the cases of gender discrimination that come before the courts in present-day society.

16 The Court's judgment in P v S technically concerned Directive 76/207, but because of its general character it has corresponding significance for Article 119 of the EC Treaty which sets out the basic principle prohibiting discrimination based on sex. In order to give full effect to that principle, in my view it is, in the same way as in the P v S case, appropriate to construe Article 119 of the Treaty as precluding forms of discrimination against employees based exclusively, or essentially, on gender. The provision must further, in order to be effective, be understood as prohibiting discrimination against employees not solely on the basis of the employee's own gender but also on the basis of the gender of the employee's child, parent or other dependent. The provision must therefore also be regarded as precluding an employer from, for instance, denying a household allowance to an employee for sons under 18 living at home when such an allowance in otherwise equivalent circumstances was given for daughters living at home. Such a construction, which generally attaches weight to the fact that gender is the factor giving rise to discrimination, would also appear to accord with the formulation of Article 119, which in its first paragraph does indeed refer to the principle that men and women should receive equal pay for equal work, but in its third paragraph expands on that principle by speaking more generally of `equal pay without discrimination based on sex'. Article 119 of the Treaty must therefore be construed as covering all cases where gender is objectively the factor causing an employee to be paid less.

17 It is important to bear in mind that, in examining whether there is gender discrimination, a purely objective assessment must be made. The decisive point is whether de jure or de facto there is objective gender discrimination, not, however, what the subjective motivation of the employer's discriminatory conduct may be. The delimitation of the scope of Article 119 must be kept free of conceptions of morality which may vary from Member State to Member State and change with time. Only a purely objective assessment will ensure the clarity and foreseeability which are of crucial significance for legal certainty. In P v S, conceptions of morality in connection with transsexuality were thus irrelevant to the Court's decision. The Court has thus confirmed that the Treaty cannot be interpreted on the basis of the moral conceptions of a Member State (in this respect see also Case C-159/90 Society for the Protection of Unborn Children v Grogan). (7)

18 In summary, I therefore consider that Article 119 of the Treaty covers all cases where, on an objective assessment, there is de jure or de facto discrimination based exclusively or essentially on gender.

Is there gender discrimination in this case?

19 South-West Trains, the French Government and the United Kingdom contend that in this case there is discrimination based, not on sex, but rather on sexual orientation.

20 Examination of the question whether, in this case, there is de jure gender discrimination must start with a more detailed analysis of Clause 8 of the Ticket Regulations. Under that clause, an employee is entitled to travel concessions for a cohabitee of the opposite sex, but not for a cohabitee of the same sex. The issue is therefore whether the different treatment of the two cases, viewed objectively, is exclusively or essentially gender-based.

21 I would point out more generally that the travel concessions under the Ticket Regulations are in reality household benefits. Under Clauses 10 to 12 of the Ticket Regulations employees are entitled to travel concessions for children and close relatives maintained by the employee and under those clauses the sexual orientation of the employees or their relatives is irrelevant. If, therefore, Lisa Grant was maintaining a child or a mother or father, she would, regardless of her sexual orientation, have received travel concessions for them.

22 Where, under Clause 8 of the Ticket Regulations, an employee is also entitled to travel concessions for a cohabitee, under the wording of the provision the same applies as for the concessions under Clauses 10 to 12. The concessions are in fact a household benefit. Clause 8, like Clauses 10 to 12, makes no mention of the sexual orientation of the employee or cohabitee, and the question of sexual orientation is thus, under the objective content of that clause, irrelevant as far as entitlement to the concessions is concerned. Nor does South-West Trains investigate the question of the employee's sexual orientation either by requiring the employee to provide such information in the declaration to be produced or by inspecting the joint home.

23 Clause 8 of the Ticket Regulations makes the concessions conditional, however, on the cohabitee's being of the `opposite sex' to the employee. The discrimination is therefore, under the objective content of the provision, exclusively gender-based. Gender is simply the only decisive criterion in the provision. If the rule had been gender-neutral so that the concessions were given, without discrimination, to all employees who submitted a declaration that for at least the last two years they had been living in a permanent relationship, Lisa Grant would have obtained the pay benefit in question which, according to her undisputed evidence, is worth UK £1 000 per annum (corresponding to ECU 1 500). Gender is thus, objectively, the factor that leads to discrimination relating to pay against a particular group of employees.

24 Thus Clause 8 of the Ticket Regulations makes the grant of the pay benefit in question dependent on the gender of the employee, inasmuch as employees must be of the opposite sex to their cohabitees. At the same time the clause contains a requirement that the cohabitee must be of the opposite sex to the employee. Whether the requirement for obtaining the concessions is satisfied accordingly depends on the gender both of the employee and of the cohabitee. Travel concessions for a male cohabitee may only be obtained if the employee is a woman. Travel concessions for a female cohabitee may only be obtained if the employee is a man.

25 The fact that Clause 8 of the Ticket Regulations does not refer to a specific sex as the criterion for discrimination, but lays down a more abstract criterion (`opposite sex') can, in my view, make no difference, since the decisive point, as laid down in P v S is whether discrimination is exclusively or essentially based on sex, whereas the fact that the discrimination is, de jure or de facto, on the basis of a specific sex cannot be decisive.

26 In the light of the foregoing, it is my view that a provision in an employer's pay regulations under which the employee is granted travel concessions for a cohabitee of the opposite sex to the employee but refused such concessions for a cohabitee of the same sex as the employee constitutes discrimination on the basis of gender which falls within the scope of Article 119 of the Treaty.

Does the case concern a family law issue falling outside the EC Treaty?

27 A further question that must, however, be examined is whether that discrimination is a consequence of the family law legislation in the Member State in question. The Commission has thus stated that the case concerns the definition of a `common law spouse' and is thus a family law issue which does not fall under the EC Treaty.

28 Had Clause 8 of the Ticket Regulations specified, as the determinant criterion, that the employee and the cohabitee must have contracted marriage, that would, in my opinion, have been a restriction on the travel concessions which was not contrary to Community law, because it would be by reference to a family law concept, the content of which is laid down by the Member States.

29 There would, nevertheless, have been a precondition that male and female employees and their spouses be treated in the same way. If an employer, on the basis of his private moral views, wished to combat the breaking-down of the traditional sex roles by giving employees whose wives stayed at home a special benefit but refusing to give employees whose husbands stayed at home a corresponding benefit, such a rule would be contrary to Article 119 of the Treaty, since that would involve discrimination based on both the employees' gender and the gender of their spouses, and would not simply refer to family law status.

30 Clause 8 of the Ticket Regulations does not, however, refer to a concept which in English law confers a family law status, but rather uses the expression `common law spouse'. However, neither in statute law nor common law does that expression have any legal significance in England. English law has put unmarried cohabitees on the same footing as married couples only in limited circumstances, for example under rent legislation, and here a more precise formulation is used such as, for example `a man and a woman who lived with each other as husband and wife'. Such provisions are assumed in general to require that the couple in question have shared finances, share a social life and have sexual relations, although the absence of the last is not decisive. (8)

31 The term `common law spouse' and similar terms are thus not used in English family law legislation and, in a case in the social law area, (9) the members of the House of Lords expressed a certain reluctance to employ the term in a legal context when stating inter alia that the case in question concerned `an unmarried woman commonly but not very appropriately referred to as "a common law wife"'. The expression `common law spouse' or similar expressions must therefore be regarded simply as an expression used in everyday language with no specifically defined content which is liable to change in accordance with changes in the general view, so that in principle there is nothing to prevent the expression `common law spouse' extending to cohabitees of the same gender. (10)

32 The fact that two persons of the same sex may, in the United Kingdom, be regarded as `common law spouses' would also appear to be the case on an a contrario construction of Clause 8 of South-West Trains' own Ticket Regulations. If the expression `common law spouses' referred exclusively to persons of different sexes, there would be no reason to refer to a `common law opposite sex spouse'.

33 It was South-West Trains itself which introduced that restriction, leading to gender discrimination, into the term.

34 Gender discrimination is accordingly, in this case, not the result of family law legislation in the Member State in question and for that reason outside the scope of Community law.

May gender discrimination be justified by reference to an employer's conception of morality?

35 South-West Trains' reason for restricting employees' entitlement to travel concessions for cohabitees to entitlement for persons of the opposite sex is, according to the evidence, its intention to benefit only persons who are married or living in a heterosexual relationship, but not persons living in a homosexual relationship, since cohabitation with a person of the same sex is not traditionally regarded as equivalent to a heterosexual relationship. As the national court implies in its sixth question, consideration must be given to the question of whether gender discrimination can be justified on the basis of conceptions of morality.

36 Lisa Grant submits that discrimination under Article 119 of the Treaty may only be justified if it is on essential economic or business grounds or is required by law. On the other hand, an employer cannot justify gender discrimination which is prohibited under the Treaty by reference to his private conception of morality, regardless of the fact that it might correspond to the prevalent conception of morality in the Member State in question.

37 I would begin my examination of that question by pointing out that in its assessment of whether discrimination based on sex might be justified, the Court has traditionally drawn a distinction between direct and indirect discrimination. (11) Whether discrimination is direct or indirect depends on whether it follows directly from the legal criteria applied (direct discrimination) or whether, without being evident under the legal criteria, in practice it proves detrimental to one sex (indirect discrimination). Only where discrimination is indirect does the Court appear to accept the possibility that it might be justified by reference to objective circumstances. (12)

38 In the present case gender discrimination results directly from the legal criterion laid down in Clause 8 of the Ticket Regulations, and according to the Court's case-law such direct discrimination cannot be justified by reference to objective circumstances.

39 Even were it assumed, however, that this was a case of indirect discrimination that might be justified by reference to objective circumstances, I find it difficult to see how discrimination such as this could be so justified. An employee's household's expenses in travelling by train must, all things being equal, be just as high regardless of whether the household consists of cohabitees of different sexes or of the same sex. South-West Trains' justification consists in reality simply in a reference to the purely subjective circumstance that its intention is to treat homosexuals differently from heterosexuals. That constitutes therefore, in my view, a purely subjective reason as opposed to objective circumstances such as, for instance, actuarial calculations relating to the value of contributions paid in under certain forms of pension arrangements in relation to average life expectancy for men and women. (13)

40 South-West Train's justification amounts, in reality, to nothing more than saying that on the basis of its own private conceptions of morality that employer wishes to set aside a fundamental principle of Community law in relation to some people because it does not care for their life style.

41 Whether the private conceptions of morality held by the employer in question correspond to those prevalent in the United Kingdom or not must be irrelevant in this connection. Under the Treaty it is the rule of law in the Community that the Court must safeguard; it is not its task to watch over questions of morality either in the individual Member States or in the Community, nor does it have any practical possibility of or political mandate for doing so. If a choice should have to be made in the Community between various views of morality that must be a task for the Community's political institutions, and hence it is for the legislature to make such choices by way of treaty or Community legislation.

42 There is nothing in either the EU Treaty or the EC Treaty to indicate that the rights and duties which result from the EC Treaty, including the right not to be discriminated against on the basis of gender, should not apply to homosexuals, to the handicapped, to persons of a particular ethnic origin or to persons holding particular religious views. Equality before the law is a fundamental principle in every community governed by the rule of law and accordingly in the Community as well. The rights and duties which result from Community law apply to all without discrimination and therefore also to the approximately 35 million citizens of the Community, depending on the method of calculation used, who are homosexual. (14)

43 To summarise, I consider that the answer to that part of the questions referred should therefore be that the said gender discrimination cannot be justified by reference to the fact that the employer's intention is to confer benefits on heterosexual couples as opposed to homosexual couples.

Direct applicability

44 By its fourth question, the national court wishes to ascertain whether Article 119 of the Treaty is directly applicable and therefore, in a case such as this, may be enforced directly before national courts.

45 The Court held in the Defrenne judgment (15) that Article 119 of the Treaty is directly applicable if direct discrimination is involved, in other words discrimination that can be ascertained by applying the criteria laid down in the provision. As an example, the Court mentions discrimination which has its origin in legislative provisions or in collective labour agreements, as well as discrimination in relation to pay, operating in one and the same private or public undertaking or service, inasmuch as such discrimination can be detected on the basis of a purely legal analysis of the situation.

46 In this case discrimination against employees whose cohabitees are of the same sex in relation to employees whose cohabitees are of the opposite sex can be detected in one and the same undertaking and one and the same set of regulations, namely South-West Trains and Clause 8 of the Ticket Regulations. The precondition for Article 119 having direct effect must, therefore, be satisfied.

47 The national court is accordingly required to ensure that the disadvantaged group is treated in the same way as the favoured group, (16) and thereby to ensure that employees of South-West Trains Ltd who have a cohabitee of the same gender are put on the same footing as employees who have a cohabitee of the opposite gender and accordingly receive travel concessions for their cohabitee.

48 The answer to that question must therefore, in my opinion, be that Article 119 of the Treaty is directly applicable and it is for the national courts to ensure that the disadvantaged group of employees is treated in the same way as the favoured group.

Temporal effect

49 In its observations the United Kingdom requested the Court to limit the temporal effect of the judgment if the questions referred to it are answered in the affirmative. The United Kingdom did not repeat that request at the hearing and has not produced evidence to show that in this case there is a need for temporal effect to be restricted. In my view a judgment that followed my Opinion would not depart from the Court's case-law hitherto and would also be founded on its facts. I do not see any reason for laying down any temporal restriction on the effect of the judgment.

Conclusion

50 In the light of the foregoing, I would suggest that the Court reply to the questions referred by the Industrial Tribunal, Southampton, as follows:

(1) A provision in an employer's pay regulations under which the employee is granted a pay benefit in the form of travel concessions for a cohabitee of the opposite gender to the employee, but refused such concessions for a cohabitee of the same gender as the employee, constitutes discrimination on the basis of gender, which is contrary to Article 119 of the EC Treaty.

(2) Such discrimination on the basis of gender cannot be justified by reference to the fact that the employer's intention is to confer benefits on heterosexual couples as opposed to homosexual couples.

(3) Article 119 of the EC Treaty is directly applicable and it is for the national courts to ensure that the disadvantaged group of employees is treated in the same way as the favoured group.

(1) - Case 12/81 Garland [1982] ECR 359.

(2) - OJ 1975 L 45, p. 19.

(3) - See Case 43/75 Defrenne (II) [1976] ECR 455, paragraph 54.

(4) - See paragraph 12 of Garland, cited in footnote 1.

(5) - OJ 1976 L 39, p. 40.

(6) - [1996] ECR I-2143.

(7) - [1991] ECR I-4685.

(8) - See, further, P.M. Bromley and N.V. Lowe, Family Law, 8th ed., p. 5 et seq.

(9) - Davis v Johnson [1979] AC 264, [1978] 1 All ER 1132, HL.

(10) - In English contract law the expression `agency of cohabitation' is, moreover, used to mean that in certain circumstances cohabitation entitles a person to enter into certain legal transactions which will bind his or her cohabitee (See Cheshire, Fifoot & Furmston's Law of Contract, 13th ed., p. 491 et seq.). Such entitlement is based on society's view of the permanency and character of the cohabitation, and therefore there does not seem to be anything, in principle, to prevent cohabitees of the same sex from satisfying the conditions for an `agency of cohabitation'.

(11) - See Case C-177/88 Dekker [1990] ECR I-3941, paragraph 13; Case C-184/89 Nimz [1991] ECR I-297, paragraph 15; and Case C-127/92 Enderby [1993] ECR I-5535, paragraph 14.

(12) - See paragraph 13 of Dekker, cited in footnote 11, as compared with paragraph 14 of Enderby, also cited in footnote 11.

(13) - See Case C-200/91 Coloroll Pension Trustees [1994] ECR I-4389, paragraph 76 et seq. and Case C-152/91 Neath [1993] ECR I-6935, paragraphs 28 to 33.

(14) - See in this respect paragraph 22 of P v S, cited in point 14 above.

(15) - Cited in footnote 3. See paragraphs 18 and 22.

(16) - See Case C-200/91 Coloroll Pension Trustees, cited in footnote 13, paragraph 32; Case C-154/92 Van Cant [1993] ECR I-3811, paragraph 22; and Case 286/95 McDermott and Cotter [1987] ECR 1453, paragraph 19

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF SCHALK AND KOPF v. AUSTRIA

(Application no. 30141/04)

JUDGMENT

STRASBOURG

24 June 2010

FINAL

22/11/2010

This judgment has become final under Article 44 § 2 of the Convention.

In the case of Schalk and Kopf v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:
Christos Rozakis, *President*,
Anatoly Kovler,

Elisabeth Steiner,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni,
George Nicolaou, *judges*,
and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 25 February and 3 June 2010,

Delivers the following judgment, which was adopted on the last- mentioned date:

PROCEDURE

1. The case originated in an application (no. 30141/04) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Austrian nationals, Mr Horst Michael Schalk and Mr Johan Franz Kopf ("the applicants"), on 5 August 2004.

2. The applicants were represented by Mr K. Mayer, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicants alleged in particular that they were discriminated against as, being a same-sex couple, they were denied the possibility to marry or to have their relationship otherwise recognised by law.

4. On 8 January 2007 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3 of the Convention).

5. The applicants and the Government each filed observations on the admissibility and merits of the application. The Government also filed further observations. In addition, third-party comments were received from the United Kingdom Government, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court). A joint third-party comment was received from four non-governmental organisations which had also been given leave by the President to intervene, namely the International Federation for Human Rights (Fédération internationale des ligues des droits de l'Homme – FIDH), the International Commission of Jurists (ICJ), the AIRE Centre and the European Region of the International Lesbian and Gay Association (ILGA-Europe). The four non-governmental organisations were also given leave by the President to intervene at the hearing.

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 25 February 2010 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
MsB. OHMS, Federal Chancellery,*Deputy Agent*,
MsG. PASCHINGER, Federal Ministry for European and
International Affairs,
MrM. STORMANN, Federal Ministry of Justice,*Advisers*;

(b) *for the applicants*
MrK. MAYER,*Counsel*,
MrH. SCHALK,*Applicant*;

(c) *for the non-governmental organisations, third-party interveners*
MrR. WINTEMUTE, King's College London,*Counsel*,
MsA. JERNOW, International Commission of Jurists,*Adviser*.

The Court heard addresses by Ms Ohms, Mr Mayer and Mr Wintemute.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicants were born in 1962 and 1960 respectively. They are a same-sex couple living in Vienna.

8. On 10 September 2002 the applicants requested the Office for Matters of Personal Status (*Standesamt*) to proceed with the formalities to enable them to contract marriage.

9. By a decision of 20 December 2002, the Vienna Municipal Office (*Magistrat*) refused the applicants' request. Referring to Article 44 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*), it held that marriage could only be contracted between two persons of opposite sex. According to constant case-law, a marriage concluded by two persons of the same sex was null and void. Since the applicants were two men, they lacked the capacity to contract marriage.

10. The applicants lodged an appeal with the Vienna Regional Governor (*Landeshauptmann*), but to no avail. In his decision of 11 April 2003, the Governor confirmed the Municipal Office's legal view. In addition, he referred to the Administrative Court's case-law according to which it constituted an impediment to marriage if the two persons concerned were of the same sex. Moreover, Article 12 of the Convention reserved the right to contract marriage to persons of different sex.

11. In a constitutional complaint, the applicants alleged that the legal impossibility for them to marry constituted a violation of their right to respect for private and family life and of the principle of non-discrimination. They argued that the notion of marriage had evolved since the entry into force of the Civil Code in 1812. In particular, the procreation and education of children no longer formed an integral part of marriage. According to present-day perceptions, marriage was rather a permanent union encompassing all aspects of life. There was no objective justification for excluding same-sex couples from concluding marriage, all the more so since the European Court of Human Rights had acknowledged that differences based on sexual orientation required particularly weighty reasons by way of justification. Other European countries either allowed homosexual marriage or had otherwise amended their legislation in order to give equal status to same-sex partnerships.

12. Lastly, the applicants alleged a breach of their right to the peaceful enjoyment of their possessions. They argued that in the event that one partner in a homosexual couple died, the other was discriminated against since he would be in a much less favourable position under tax law than the surviving partner in a married couple.

13. On 12 December 2003 the Constitutional Court (*Verfassungsgerichtshof*) dismissed the applicants' complaint. The relevant parts of its judgment read as follows:

> "The administrative proceedings that resulted in the impugned decision were exclusively concerned with the issue of the legitimacy of the marriage. Accordingly, the complainants' sole applicable grievance is that Article 44 of the Civil Code only recognises and provides for marriage between 'persons of opposite sex'. The allegation of a breach of the right of property is simply a further means of seeking to show that this state of affairs is unjustified.
>
> With regard to marriage, Article 12 of the [Convention], which ranks as constitutional law, provides:

‘Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.’

Neither the principle of equality set forth in the Austrian Federal Constitution nor the European Convention on Human Rights (as evidenced by [the terms] ‘men and women’ in Article 12) require that the concept of marriage, as being geared to the fundamental possibility of parenthood, should be extended to relationships of a different kind. The essence of marriage is, moreover, not affected in any way by the fact that divorce (or separation) is possible and that it is a matter for the spouses whether in fact they are able or wish to have children. The European Court of Human Rights found in its *Cossey* [*v. the United Kingdom*] judgment of 27 September 1990 (no. 10843/84, [Series A no. 184], concerning the particular position of transsexual persons) that the restriction of marriage to this ‘traditional’ concept was objectively justified, observing:

‘... that attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person’s sex for the purposes of marriage ...’

[The subsequent change in the case-law concerning the particular issue of transsexuals (*Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI) does not permit the conclusion that there should be any change in the assessment of the general question at issue here.]

The fact that same-sex relationships fall within the concept of private life and as such enjoy the protection of Article 8 of the [Convention] – which also prohibits discrimination on non-objective grounds (Article 14 of the [Convention]) – does not give rise to an obligation to change the law of marriage.

It is unnecessary in the instant case to examine whether, and in which areas, the law unjustifiably discriminates against same-sex relationships by providing for special rules for married couples. Nor is it the task of this court to advise the legislature on constitutional issues or even matters of legal policy.

Instead, the complaint must be dismissed as ill-founded.”

14. The Constitutional Court’s judgment was served on the applicants’ counsel on 25 February 2004.

II. RELEVANT DOMESTIC AND COMPARATIVE LAW

A. Austrian law

1. The Civil Code

15. Article 44 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) provides:

“The marriage contract shall form the basis for family relationships. Under the marriage contract two persons of opposite sex declare their lawful intention to live together in indissoluble matrimony, to beget and raise children and to support each other.”

This provision has been unchanged since its entry into force on 1 January 1812.

2. The Registered Partnership Act

16. The purpose of the Registered Partnership Act (*Eingetragene Partnerschaft-Gesetz*) was to provide same-sex couples with a formal mechanism for recognising and giving legal effect to their relationships. In introducing the said Act, the legislator had particular regard to developments in other European States (see the explanatory report on the draft law – *Erläuterungen zur Regierungsvorlage*, 485 *der Beilagen* XXIV GP).

17. The Registered Partnership Act, *Federal Law Gazette* (*Bundesgesetzblatt*) vol. I, no. 135/2009, came into force on 1 January 2010. Section 2 of the Act provides as follows:

> "A registered partnership may be formed only by two persons of the same sex (registered partners). They thereby commit themselves to a lasting relationship with mutual rights and obligations."

18. The rules on the establishment of a registered partnership, its effects and its dissolution resemble the rules governing marriage.

19. Registered partnership involves cohabitation on a permanent basis and may be entered into between two persons of the same sex having legal capacity and having reached the age of majority (section 3). A registered partnership must not be established between close relatives or with a person who is already married or has established a still valid registered partnership with another person (section 5).

20. Like married couples, registered partners are expected to live together like spouses in every respect, to share a common home, to treat each other with respect and to provide mutual assistance (section 8(2) and (3)). As in the case of spouses, the partner who is in charge of the common household and has no income has legal authority to represent the other partner in everyday legal transactions (section 10). Registered partners have the same obligations regarding maintenance as spouses (section 12).

21. The grounds for dissolution of a registered partnership are the same as for dissolution of marriage or divorce. Dissolution of a registered partnership occurs in the event of the death of one partner (section 13). It may also be pronounced by a judicial decision on various other grounds, such as lack of intent to establish a registered partnership (section 14), fault of one or both partners, or breakdown of the partnership due to irreconcilable differences (section 15).

22. The Registered Partnership Act also contains a comprehensive range of amendments to existing legislation in order to provide registered partners with the same status as spouses in various other fields of law, such as inheritance law, labour, social and social insurance law, tax law, the law on administrative procedure, the law on data protection and public service, passport and registration issues, as well as legislation regarding foreigners.

23. However, some differences between marriage and registered partnership remain, apart from the fact that only two persons of the same sex can enter into a registered partnership. The following differences were the subject of some public debate prior to the adoption of the Registered Partnership Act: firstly, while marriage is contracted before the Office for Matters of Personal Status, registered partnerships are concluded before the district administrative authority; and secondly, the rules on the choice of name differ from those for married couples: for instance, the law uses the term "last name" where a registered couple chooses a common name, but the term "family name" is used in reference to a married couple's common name. The most important differences, however, concern parental rights: unlike married couples, registered partners are not allowed to adopt a child; nor is the adoption of stepchildren permitted, that is to say, the adoption of one partner's child by the other partner (section 8(4)). Artificial insemination is also excluded (section 2(1) of the Artificial Procreation Act –*Fortpflanzungsmedizingesetz*).

B. Comparative law

1. European Union law

24. Article 9 of the Charter of Fundamental Rights of the European Union, which was signed on 7 December 2000 and came into force on 1 December 2009, reads as follows:

> "The right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights."

25. The relevant parts of the Commentary of the Charter read as follows:

"Modern trends and developments in the domestic laws in a number of countries toward greater openness and acceptance of same-sex couples notwithstanding, a few States still have public policies and/or regulations that explicitly forbid the notion that same-sex couples have the right to marry. At present there is very limited legal recognition of same-sex relationships in the sense that marriage is not available to same-sex couples. The domestic laws of the majority of States presuppose, in other words, that the intending spouses are of different sexes. Nevertheless, in a few countries, e.g. in the Netherlands and in Belgium, marriage between people of the same sex is legally recognised. Others, like the Nordic countries, have endorsed a registered partnership legislation, which implies, among other things, that most provisions concerning marriage, i.e. its legal consequences such as property distribution, rights of inheritance, etc., are also applicable to these unions. At the same time it is important to point out that the name 'registered partnership' has intentionally been chosen not to confuse it with marriage and it has been established as an alternative method of recognising personal relationships. This new institution is, consequently, as a rule only accessible to couples who cannot marry, and the same-sex partnership does not have the same status and the same benefits as marriage.

In order to take into account the diversity of domestic regulations on marriage, Article 9 of the Charter refers to domestic legislation. As it appears from its formulation, the provision is broader in its scope than the corresponding Articles in other international instruments. Since there is no explicit reference to 'men and women' as the case is in other human rights instruments, it may be argued that there is no obstacle to recognise same-sex relationships in the context of marriage. There is, however, no explicit requirement that domestic laws should facilitate such marriages. International courts and committees have so far hesitated to extend the application of the right to marry to same-sex couples."

26. A number of directives are also of interest in the present case. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification determines the conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of the member States.

Article 4, entitled "Family members", provides:

"3. The member States may, by law or regulation, authorise the entry and residence, pursuant to this directive und subject to compliance with the conditions laid down in Chapter IV, of the unmarried partner, being a third-country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third-country national who is bound to the sponsor by a registered partnership in accordance with Article 5 § 2, ..."

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 concerns the right of citizens of the Union and their family members to move and reside freely within the territory of the member States.

Article 2 thereof contains the following definition:

"For the purposes of this Directive:

...

2. 'Family member' means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a member State, if the legislation of the host member State treats registered partnerships as equivalent to marriage in accordance with the conditions laid down in the relevant legislation of the host member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependant direct relative in the ascending line and those of the spouse or partner as defined in point (b);

...”

2. The state of relevant legislation in Council of Europe member States

27. Currently, six out of forty-seven member States grant same-sex couples equal access to marriage, namely Belgium, the Netherlands, Norway, Portugal, Spain and Sweden.

28. In addition, the following thirteen member States do not grant same-sex couples access to marriage, but have passed some kind of legislation permitting same-sex couples to register their relationships: Andorra, Austria, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Luxembourg, Slovenia, Switzerland and the United Kingdom. In sum, there are nineteen member States in which same-sex couples either have the possibility to marry or to enter into a registered partnership (see also the overview provided in *Burden v. the United Kingdom* [GC], no. 13378/05, § 26, ECHR 2008).

29. In two States, namely Ireland and Liechtenstein, reforms intending to give same-sex couples access to some form of registered partnership are pending or planned. In addition, Croatia has a Law on same-sex civil unions which recognises cohabiting same-sex couples for limited purposes, but does not offer them the possibility of registration.

30. According to the information available to the Court, the vast majority of the States concerned have introduced the relevant legislation in the last decade.

31. The legal consequences of registered partnerships vary from being almost equivalent to marriage to giving relatively limited rights. Among the legal consequences of registered partnerships, three main categories can be distinguished: material consequences, parental consequences and other consequences.

32. Material consequences cover the impact of registered partnerships on different kinds of tax, health insurance, social security payments and pensions. In most of the States concerned, registered partners obtain a status similar to marriage. This also applies to other material consequences, such as regulations on joint property and debt, the application of rules of alimony upon break-up, entitlement to compensation following the wrongful death of the partner and inheritance rights.

33. With regard to parental consequences, however, the possibilities for registered partners to undergo medically assisted insemination or to foster or adopt children vary greatly from one country to another.

34. Other consequences include the use of the partner’s surname, the impact on a foreign partner’s ability to obtain a residence permit and citizenship, refusal to testify, next of kin status for medical purposes, the right to succeed to the deceased partner’s tenancy, and lawful organ donation.

THE LAW

I. THE GOVERNMENT’S REQUEST TO STRIKE THE APPLICATION OUT OF THE COURT’S LIST

35. In their oral pleadings, the Government argued that the Registered Partnership Act allowed same-sex couples to obtain a legal status adjusted as far as possible to the status conferred by marriage on different-sex couples. They submitted that the matter might be regarded as being resolved and that it was justified to strike the application out of the Court’s list. They relied on Article 37 § 1 of the Convention, the relevant parts of which read as follows:

“1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

...

(b) the matter has been resolved; ...

...

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

36. To conclude that Article 37 § 1 (b) of the Convention applies to the instant case, the Court must answer two questions in turn: firstly, it must ask whether the circumstances complained of directly by the applicants still obtain and, secondly, whether the effects of a possible violation of the Convention on account of those circumstances have also been redressed (see*Shevanova v. Latvia* (striking out) [GC], no. 58822/00, § 45, 7 December 2007).

37. The Court observes that the crux of the applicants' complaint is that, being a same-sex couple, they do not have access to marriage. This situation still obtains following the entry into force of the Registered Partnership Act. As the Government themselves pointed out, the said Act allows same-sex couples to obtain only a status similar or comparable to marriage, but does not grant them access to marriage, which remains reserved for different-sex couples.

38. The Court concludes that the conditions for striking the case out of its list are not met and therefore dismisses the Government's request.

II. ALLEGED VIOLATION OF ARTICLE 12 OF THE CONVENTION

39. The applicants complained that the authorities' refusal to allow them to contract marriage violated Article 12 of the Convention, which provides as follows:

"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

The Government contested that argument.

A. Admissibility

40. The Court observes that the Government raised the question whether the applicants' complaint fell within the scope of Article 12, given that they were two men claiming the right to marry. The Government did not argue, however, that the complaint was inadmissible as being incompatible *ratione materiae*. The Court agrees that the issue is sufficiently complex not to be susceptible of being resolved at the admissibility stage.

41. The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and of law under the Convention, the determination of which requires an examination of the merits. The Court concludes, therefore, that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

B. Merits

1. The parties' submissions

42. The Government referred to the Constitutional Court's ruling in the present case, noting that the latter had had regard to the Court's case-law and had not found a violation of the applicants' Convention rights.

43. In their oral pleadings before the Court, the Government maintained that both the clear wording of Article 12 and the Court's case-law as it stood indicated that the right to marry was by its very nature limited to different-sex couples. They conceded that there had been major social changes in the institution of

marriage since the adoption of the Convention, but there was not yet any European consensus on granting same-sex couples the right to marry, nor could such a right be inferred from Article 9 of the Charter of Fundamental Rights of the European Union ("the Charter"). Despite the difference in wording, the latter referred the issue of same-sex marriage to national legislation.

44. The applicants argued that in today's society civil marriage was a union of two persons which encompassed all aspects of their lives, while the procreation and education of children was no longer a decisive element. As the institution of marriage had undergone considerable changes there was no longer any reason to refuse same-sex couples access to marriage. The wording of Article 12 did not necessarily have to be read in the sense that men and women only had the right to marry a person of the opposite sex. Furthermore, the applicants considered that the reference in Article 12 to the relevant "national laws" could not mean that States were given unlimited discretion in regulating the right to marry.

2. The third-party interveners' submissions

45. The United Kingdom Government asserted that the Court's case-law as it stood considered Article 12 to refer to the "traditional marriage between persons of the opposite biological sex" (see *Sheffield and Horsham v. the United Kingdom*, 30 July 1998, § 66, *Reports of Judgments and Decisions* 1998-V). In their view, there were no reasons to depart from that position.

46. While the Court had often underlined that the Convention was a living instrument which had to be interpreted in the light of present-day conditions, it had only used that approach to develop its jurisprudence where it had perceived a convergence of standards among member States. In *Christine Goodwin v. the United Kingdom* ([GC], no. 28957/95, ECHR 2002-VI), for instance, the Court had reviewed its position regarding the possibility of post-operative transsexuals to marry a person of the sex opposite to their acquired gender, having regard to the fact that a majority of Contracting States permitted such marriages. In contrast, there was no convergence of standards as regards same-sex marriage. At the time when the third-party Government filed their observations only three member States permitted same-sex marriage, and in two others proposals to this effect were under consideration. The issue of same-sex marriage concerned a sensitive area of social, political and religious controversy. In the absence of consensus, the State enjoyed a particularly wide margin of appreciation.

47. The four non-governmental organisations called on the Court to use the opportunity to extend access to civil marriage to same-sex couples. The fact that different-sex couples were able to marry, while same-sex couples were not, constituted a difference in treatment based on sexual orientation. Referring to *Karner v. Austria* (no. 40016/98, § 37, ECHR 2003-IX), they argued that such a difference could only be justified by "particularly serious reasons". In their contention, no such reasons existed: the exclusion of same-sex couples from entering into marriage did not serve to protect marriage or the family in the traditional sense. Nor would giving same-sex couples access to marriage devalue marriage in the traditional sense. Moreover, the institution of marriage had undergone considerable changes and, as the Court had held in *Christine Goodwin* (cited above, § 98), the inability to procreate could not be regarded as *per se* removing the right to marry. The four non-governmental organisations conceded that the difference between the *Christine Goodwin* case and the present case lay in the state of European consensus. However, they argued that in the absence of any objective and rational justification for the difference in treatment, considerably less weight should be attached to European consensus.

48. Finally, the four non-governmental organisations referred to judgments from the Constitutional Court of South Africa, the Courts of Appeal of Ontario and British Columbia in Canada, and the Supreme Courts of California, Connecticut, Iowa and Massachusetts in the United States of America, which had found that denying same-sex couples access to civil marriage was discriminatory.

3. The Court's assessment

(a) General principles

49. According to the Court's established case-law, Article 12 secures the fundamental right of a man and woman to marry and to found a family. The exercise of this right gives rise to personal, social and legal consequences. It is "subject to the national laws of the Contracting States", but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired (see *B. and L. v. the United Kingdom*, no. 36536/02, § 34, 13 September 2005, and *F. v. Switzerland*, 18 December 1987, § 32, Series A no. 128).

50. The Court observes at the outset that it has not yet had an opportunity to examine whether two persons who are of the same sex can claim to have a right to marry. However, certain principles might be derived from the Court's case-law relating to transsexuals.

51. In a number of cases the question arose whether refusal to allow a post-operative transsexual to marry a person of the opposite sex to his or her assigned gender violated Article 12. In its earlier case-law the Court found that the attachment to the traditional concept of marriage which underpins Article 12 provided sufficient reason for the continued adoption by the respondent State of biological criteria for determining a person's sex for the purposes of marriage. Consequently, this was considered a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry (see *Sheffield and Horsham*, cited above, § 67; *Cossey v. the United Kingdom*, 27 September 1990, § 46, Series A no. 184; and *Rees v. the United Kingdom*, 17 October 1986, §§ 49-50, Series A no. 106).

52. In *Christine Goodwin* (cited above, §§ 100-04) the Court departed from that case-law: it considered that the terms used by Article 12 which referred to the right of a man and woman to marry no longer had to be understood as determining gender by purely biological criteria. In that context, the Court noted that there had been major social changes in the institution of marriage since the adoption of the Convention. Furthermore, it referred to Article 9 of the Charter, which departed from the wording of Article 12. Finally, the Court noted that there was widespread acceptance of the marriage of transsexuals in their assigned gender. In conclusion, the Court found that the impossibility for a post-operative transsexual to marry in her assigned gender violated Article 12 of the Convention.

53. Two further cases are of interest in the present context: *Parry v. the United Kingdom* (dec.), no. 42971/05, ECHR 2006-XV, and *R. and F. v. the United Kingdom* (dec.), no. 35748/05, 28 November 2006. In both cases the applicants were a married couple, consisting of a woman and a male-to-female post-operative transsexual. They complained, *inter alia*, under Article 12 of the Convention that they were required to end their marriage if the second applicant wished to obtain full legal recognition of her change of gender. The Court dismissed that complaint as being manifestly ill-founded. It noted that domestic law only permitted marriage between persons of opposite gender, whether such gender derived from attribution at birth or from a gender recognition procedure, while same-sex marriages were not permitted. Similarly, Article 12 enshrined the traditional concept of marriage as being between a man and a woman. The Court acknowledged that a number of Contracting States had extended marriage to same-sex partners, but went on to say that this reflected their own vision of the role of marriage in their societies and did not flow from an interpretation of the fundamental right as laid down by the Contracting States in the Convention in 1950. The Court concluded that it fell within the State's margin of appreciation as to how to regulate the effects of the change of gender on pre-existing marriages. In addition, it considered that, should they choose to divorce in order to allow the transsexual partner to obtain full gender recognition, the fact that the applicants had the possibility to enter into a civil partnership contributed to the proportionality of the gender recognition regime complained of.

(b) Application of the above principles to the present case

54. The Court notes that Article 12 grants the right to marry to "men and women". The French version provides that "*l'homme et la femme ont le droit de se marier*". Furthermore, Article 12 grants the right to found a family.

55. The applicants argued that the wording did not necessarily imply that a man could only marry a woman and vice versa. The Court observes that, looked at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women. However, in contrast, all other substantive Articles of the Convention grant rights and freedoms to "everyone" or state that "no one" is to be subjected to certain types of prohibited treatment. The choice of wording in Article 12 must thus be regarded as deliberate. Moreover, regard must be had to the historical context in which the Convention was adopted. In the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex.

56. As regards the connection between the right to marry and the right to found a family, the Court has already held that the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing the right to marry (see *Christine Goodwin*, cited above, § 98). However, this finding does not allow any conclusion regarding the issue of same-sex marriage.

57. In any case, the applicants did not rely mainly on the textual interpretation of Article 12. In essence they relied on the Court's case-law according to which the Convention is a living instrument which is to be interpreted in the light of present-day conditions (see *E.B. v. France* [GC], no. 43546/02, § 92, 22 January 2008, and *Christine Goodwin*, cited above, §§ 74-75). In the applicants' contention, Article 12 should, in the light of present-day conditions, be read as granting same-sex couples access to marriage or, in other words, as obliging member States to provide for such access in their national laws.

58. The Court is not persuaded by the applicants' argument. Although, as it noted in *Christine Goodwin* (cited above), the institution of marriage has undergone major social changes since the adoption of the Convention, the Court notes that there is no European consensus regarding same-sex marriage. At present no more than six out of forty-seven Convention States allow same-sex marriage (see paragraph 27 above).

59. As the respondent Government, as well as the third-party Government, have rightly pointed out, the present case has to be distinguished from *Christine Goodwin*. In that case (cited above, § 103) the Court perceived a convergence of standards regarding marriage of transsexuals in their assigned gender. Moreover, *Christine Goodwin* is concerned with the marriage of partners who are of different gender, if gender is defined not by purely biological criteria but by taking other factors including gender reassignment of one of the partners into account.

60. Turning to the comparison between Article 12 of the Convention and Article 9 of the Charter, the Court has already noted that the latter has deliberately dropped the reference to "men and women" (see *Christine Goodwin*, cited above, § 100). The Commentary of the Charter, which became legally binding in December 2009, confirms that Article 9 is meant to be broader in scope than the corresponding Articles in other human rights instruments (see paragraph 25 above). At the same time, the reference to domestic law reflects the diversity of national regulations, which range from allowing same-sex marriage to explicitly forbidding it. By referring to national law, Article 9 of the Charter leaves the decision whether or not to allow same-sex marriage to the States. In the words of the Commentary:

> "... it may be argued that there is no obstacle to recognise same-sex relationships in the context of marriage. There is, however, no explicit requirement that domestic laws should facilitate such marriages."

61. Regard being had to Article 9 of the Charter, therefore, the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants' complaint. However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State.

62. In that connection, the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute

its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society (see *B. and L. v. the United Kingdom*, cited above, § 36).

63. In conclusion, the Court finds that Article 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple such as the applicants access to marriage.

64. Consequently, there has been no violation of Article 12 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

65. The applicants complained under Article 14 taken in conjunction with Article 8 of the Convention that they were discriminated against on account of their sexual orientation, since they were denied the right to marry and did not have any other possibility to have their relationship recognised by law before the entry into force of the Registered Partnership Act.

The relevant parts of Article 8 read as follows:

> "1. Everyone has the right to respect for his private and family life, ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14 provides as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. Admissibility

1. Exhaustion of domestic remedies

66. The Government argued in their written observations that, before the domestic authorities, the applicants had complained exclusively about the impossibility to marry. Any other points raised explicitly or implicitly in their application to the Court, such as the question of any alternative legal recognition of their relationship, were to be declared inadmissible on the grounds of non-exhaustion. However, the Government did not explicitly pursue that argument in their oral pleadings before the Court. On the contrary, they stated that the issue of registered partnership could be regarded as being inherent in the present application.

67. The applicants contested the Government's non-exhaustion argument, asserting in particular that the aspect of being discriminated against as a same-sex couple formed part of their complaint and that they had also relied on the Court's case-law under Article 14 taken in conjunction with Article 8 in their constitutional complaint.

68. The Court reiterates that Article 35 § 1 of the Convention requires that complaints intended to be made subsequently at Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports*1996-IV).

69. The domestic proceedings in the present case related to the authorities' refusal to permit the applicants' marriage. As the possibility to enter into a registered partnership did not exist at the material time, it is difficult to see how the applicants could have raised the question of legal recognition of their partnership except by trying to conclude marriage. Consequently, their constitutional complaint also focused on the lack of access to marriage. However, they also complained, at least in substance, about the lack of any other

means to have their relationship recognised by law. Thus, the Constitutional Court was in a position to deal with the issue and, indeed, addressed it briefly, albeit only by stating that it was for the legislator to examine in which areas the law possibly discriminated against same-sex couples by restricting certain rights to married couples. In these circumstances, the Court is satisfied that the applicants complied with the requirement of exhausting domestic remedies.

70. In any event, the Court agrees with the Government that the issue of alternative legal recognition is so closely connected to the issue of lack of access to marriage that it has to be considered as being inherent in the present application.

71. In conclusion, the Court dismisses the Government's argument that the applicants failed to exhaust domestic remedies in respect of their complaint under Article 14 taken in conjunction with Article 8.

2. The applicants' victim status

72. In their oral pleadings before the Court, the Government also raised the question whether the applicants could still claim to be victims of the alleged violation following the entry into force of the Registered Partnership Act.

73. The Court reiterates that an applicant's status as a victim may depend on compensation being awarded at domestic level on the basis of the facts about which he or she complains before the Court and on whether the domestic authorities have acknowledged, either expressly or in substance, the breach of the Convention. Only when those two conditions are satisfied does the subsidiary nature of the Convention preclude examination of an application (see, for instance, *Scordino v. Italy* (dec.), no. 36813/97, ECHR 2003-IV).

74. In the present case, the Court does not have to examine whether the first condition has been fulfilled, as the second condition has not been met. The Government have made it clear that the Registered Partnership Act was introduced as a matter of policy choice and not in order to fulfil an obligation under the Convention (see paragraph 80 below). Therefore, the introduction of the said Act cannot be regarded as an acknowledgement of the breach of the Convention alleged by the applicants. Consequently, the Court dismisses the Government's argument that the applicants can no longer claim to be victims of the alleged violation of Article 14 taken in conjunction with Article 8.

3. Conclusion

75. The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

B. Merits

1. The parties' submissions

76. The applicants maintained that the heart of their complaint was that they were discriminated against as a same-sex couple. Agreeing with the Government on the applicability of Article 14 taken in conjunction with Article 8, they asserted that just like differences based on sex, differences based on sexual orientation required particularly serious reasons by way of justification. In the applicants' contention, the Government had failed to submit any such reasons for excluding them from access to marriage.

77. It followed from the Court's *Karner* judgment (cited above, § 40) that the protection of the traditional family was a weighty and legitimate reason, but it had to be shown that a given difference was also necessary to achieve that aim. In the applicants' assertion, nothing showed that the exclusion of same-sex couples from marriage was necessary to protect the traditional family.

78. In their oral pleadings, reacting to the introduction of the Registered Partnership Act, the applicants argued that the remaining differences between marriage on the one hand and registered partnership on the other were still discriminatory. They mentioned in particular that the Registered Partnership Act did not provide the possibility of entering into an engagement; that, unlike marriages, registered partnerships were not concluded at the Office for Matters of Personal Status but before the district administrative authority; that there was no entitlement to compensation in the event of the wrongful death of the partner; and that it was unclear whether certain benefits which were granted to "families" would also be granted to registered partners and the children of one of them living in the common household. Although differences based on sexual orientation required particularly weighty reasons by way of justification, no such reasons had been given by the Government.

79. The Government accepted that Article 14 taken in conjunction with Article 8 of the Convention applied to the present case. Thus far, the Court's case-law had considered homosexual relationships to fall within the notion of "private life", but there might be good reasons to include the relationship of a same-sex couple living together within the scope of "family life".

80. With regard to compliance with the requirements of Article 14 taken in conjunction with Article 8, the Government maintained that it was within the legislator's margin of appreciation to decide whether or not same-sex couples were given a possibility to have their relationship recognised by law in any other form than marriage. The Austrian legislator had made the policy choice to give same-sex couples such a possibility. Under the Registered Partnership Act, which had come into force on 1 January 2010, same-sex partners were able to enter into a registered partnership which provided them with a status very similar to marriage. The new Law covered such diverse fields as civil and criminal law, labour, social and social insurance law, tax law, the law on administrative procedure, the law on data protection and public service, passport and registration issues, as well as legislation regarding foreigners.

2. The third-party interveners' submissions

81. As to the applicability of Article 8, the United Kingdom Government submitted that although the Court's case-law as it stood did not consider same-sex relationships to fall within the notion of "family life", this should not be excluded in the future. Nonetheless, Article 8 read in conjunction with Article 14 should not be interpreted so as to require either access to marriage or the creation of alternative forms of legal recognition for same-sex partnerships.

82. As regards the justification for that difference in treatment, the United Kingdom Government contested the applicants' argument drawn from the Court's *Karner* judgment. In that case, the Court had found that excluding same-sex couples from the protection provided to different-sex couples under the Rent Act was not necessary for achieving the legitimate aim of protecting the family in the traditional sense. The issue in the present case was different: what was at stake was the question of access to marriage or alternative legal recognition. The justification for that particular difference in treatment between different-sex and same-sex couples was laid down in Article 12 of the Convention itself.

83. Lastly, the United Kingdom Government submitted that in the United Kingdom the Civil Partnership Act 2004 which had come into force in December 2005 had introduced a system of partnership registration for same-sex couples. However, the said Act was introduced as a policy choice in order to promote social justice and equality, while it was not considered that the Convention imposed a positive obligation to provide such a possibility. In the United Kingdom Government's view, this position was supported by the Court's decision in *Courten v. the United Kingdom* ((dec.), no. 4479/06, 4 November 2008).

84. The four non-governmental organisations pleaded in their joint comments that the Court should rule on the question whether a same-sex relationship of cohabiting partners fell under the notion of "family life" within the meaning of Article 8 of the Convention. They noted that the question had been left open in *Karner* (cited above, § 33). They argued that by now it was generally accepted that same-sex couples had

the same capacity to establish a long-term emotional and sexual relationship as different-sex couples and, thus, had the same needs as different-sex couples to have their relationship recognised by law.

85. Were the Court not to find that Article 12 required Contracting States to grant same-sex couples access to marriage, it should address the question whether there was an obligation under Article 14 taken in conjunction with Article 8 to provide alternative means of legal recognition of a same-sex partnership.

86. The non-governmental organisations answered that question in the affirmative: firstly, excluding same-sex couples from particular rights and benefits attached to marriage (such as, for instance, the right to a survivor's pension) without giving them access to any alternative means to qualify would amount to indirect discrimination (see *Thlimmenos v. Greece* [GC], no.34369/97, § 44, ECHR 2000-IV). Secondly, they agreed with the applicants' argument drawn from *Karner* (cited above). Thirdly, they asserted that the state of European consensus increasingly supported the idea that member States were under an obligation to provide, if not access to marriage, alternative means of legal recognition. Currently, almost 40% had legislation allowing same-sex couples to register their relationships as marriages or under an alternative name (see paragraphs 27-28 above).

3. The Court's assessment

(a) Applicability of Article 14 taken in conjunction with Article 8

87. The Court has dealt with a number of cases concerning discrimination on account of sexual orientation. Some were examined under Article 8 alone, namely cases concerning the prohibition under criminal law of homosexual relations between adults (see *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45; *Norris v. Ireland*, 26 October 1988, Series A no. 142; and *Modinos v. Cyprus*, 22 April 1993, Series A no. 259) and the discharge of homosexuals from the armed forces (see *Smith and Grady v. the United Kingdom*, nos. 33985/96 and33986/96, ECHR 1999-VI). Others were examined under Article 14 taken in conjunction with Article 8. These included, *inter alia*, a different age of consent under criminal law for homosexual relations (see *L. and V. v. Austria*, nos. 39392/98 and 39829/98, ECHR 2003-I), the attribution of parental rights (see *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, ECHR 1999-IX), permission to adopt a child (see *Fretté v. France*, no. 36515/97, ECHR 2002-I, and *E.B. v. France*, cited above) and the right to succeed to the deceased partner's tenancy (see *Karner*, cited above).

88. In the present case, the applicants have formulated their complaint under Article 14 taken in conjunction with Article 8. The Court finds it appropriate to follow this approach.

89. As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous –, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, for instance, *E.B. v. France*, cited above, § 47; *Karner*, cited above, § 32; and *Petrovic v. Austria*, 27 March 1998, § 22, *Reports* 1998-II).

90. It is undisputed in the present case that the relationship of a same-sex couple like the applicants' falls within the notion of "private life" within the meaning of Article 8. However, in the light of the parties' comments the Court finds it appropriate to address the issue whether their relationship also constitutes "family life".

91. The Courts reiterates its established case-law in respect of different-sex couples, namely that the notion of "family" under this provision is not confined to marriage-based relationships and may encompass other *de facto* "family" ties where the parties are living together out of wedlock. A child born out of such a relationship is *ipso jure* part of that "family" unit from the moment and by the very fact of his birth (see *Elsholz v. Germany* [GC], no. 25735/94, § 43, ECHR 2000-VIII; *Keegan v. Ireland*, 26 May 1994, § 44, Series A no. 290; and *Johnston and Others v. Ireland*, 18 December 1986, § 56, Series A no. 112).

92. In contrast, the Court's case-law has only accepted that the emotional and sexual relationship of a same-sex couple constitutes "private life" but has not found that it constitutes "family life", even where a long-term relationship of cohabiting partners was at stake. In coming to that conclusion, the Court observed that despite the growing tendency in a number of European States towards the legal and judicial recognition of stable *de facto* partnerships between homosexuals, given the existence of little common ground between the Contracting States, this was an area in which they still enjoyed a wide margin of appreciation (see *Mata Estevez v. Spain* (dec.), no. 56501/00, ECHR 2001-VI, with further references). In *Karner* (cited above, § 33), concerning the succession of a same-sex couple's surviving partner to the deceased's tenancy rights, which fell under the notion of "home", the Court explicitly left open the question whether the case also concerned the applicant's "private and family life".

93. The Court notes that since 2001, when the decision in *Mata Estevez* was given, a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then, a considerable number of member States have afforded legal recognition to same-sex couples (see paragraphs 27-30 above). Certain provisions of European Union law also reflect a growing tendency to include same-sex couples in the notion of "family" (see paragraph 26 above).

94. In view of this evolution, the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would.

95. The Court therefore concludes that the facts of the present case fall within the notion of "private life" as well as "family life" within the meaning of Article 8. Consequently, Article 14 taken in conjunction with Article 8 of the Convention applies.

(b) Compliance with Article 14 taken in conjunction with Article 8

96. The Court has established in its case-law that in order for an issue to arise under Article 14 there must be a difference in treatment of persons in relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008).

97. On the one hand, the Court has held repeatedly that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification (see *Karner*, cited above, § 37; *L. and V. v. Austria*, cited above, § 45; and *Smith and Grady*, cited above, § 90). On the other hand, a wide margin of appreciation is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy (see, for instance, *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and65900/01, § 52, ECHR 2006-VI).

98. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see *Petrovic*, cited above, § 38).

99. While the parties have not explicitly addressed the issue whether the applicants were in a relevantly similar situation to different-sex couples, the Court would start from the premise that same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship.

100. The applicants argued that they were discriminated against as a same-sex couple, firstly, in that they still did not have access to marriage and, secondly, in that no alternative means of legal recognition were available to them until the entry into force of the Registered Partnership Act.

101. In so far as the applicants appear to contend that, if not included in Article 12, the right to marry might be derived from Article 14 taken in conjunction with Article 8, the Court is unable to share their view. It reiterates that the Convention is to be read as a whole and its Articles should therefore be construed in harmony with one another (see *Johnston and Others*, cited above, § 57). Having regard to the conclusion reached above, namely that Article 12 does not impose an obligation on Contracting States to grant same-sex couples access to marriage, Article 14 taken in conjunction with Article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either.

102. Turning to the second limb of the applicants' complaint, namely the lack of alternative legal recognition, the Court notes that at the time when the applicants lodged their application they did not have any possibility to have their relationship recognised under Austrian law. That situation obtained until 1 January 2010, when the Registered Partnership Act came into force.

103. The Court reiterates in this connection that in proceedings originating in an individual application it has to confine itself, as far as possible, to an examination of the concrete case before it (see *F. v. Switzerland*, cited above, § 31). Given that at present it is open to the applicants to enter into a registered partnership, the Court is not called upon to examine whether the lack of any means of legal recognition for same-sex couples would constitute a violation of Article 14 taken in conjunction with Article 8 if it still obtained today.

104. What remains to be examined in the circumstances of the present case is whether the respondent State should have provided the applicants with an alternative means of legal recognition of their partnership any earlier than it did.

105. The Court cannot but note that there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes (see *Courten*, cited above, and *M.W. v. the United Kingdom* (dec.), no. 11313/02, 23 June 2009, both relating to the introduction of the Civil Partnership Act in the United Kingdom).

106. The Austrian Registered Partnership Act, which came into force on 1 January 2010, reflects the evolution described above and is thus part of the emerging European consensus. Though not in the vanguard, the Austrian legislator cannot be reproached for not having introduced the Registered Partnership Act any earlier (see, *mutatis mutandis*, *Petrovic*, cited above, § 41).

107. Finally, the Court will examine the applicants' argument that they are still discriminated against as a same sex-couple on account of certain differences conferred by the status of marriage on the one hand and registered partnership on the other.

108. The Court starts from its findings above, that States are still free, under Article 12 of the Convention as well as under Article 14 taken in conjunction with Article 8, to restrict access to marriage to different-sex couples. Nevertheless, the applicants appear to argue that if a State chooses to provide same-sex couples with an alternative means of recognition, it is obliged to confer a status on them which – though carrying a different name – corresponds to marriage in each and every respect. The Court is not convinced by that argument. It considers on the contrary that States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition.

109. The Court observes that the Registered Partnership Act gives the applicants a possibility to obtain a legal status equal or similar to marriage in many respects (see paragraphs 18-23 above). While there are only slight differences in respect of material consequences, some substantial differences remain in respect of parental rights. However, this corresponds on the whole to the trend in other member States (see paragraphs 32-33 above). Moreover, the Court is not called upon in the present case to examine each and every one of these differences in detail. For instance, as the applicants have not claimed that they are directly affected by

the remaining restrictions concerning artificial insemination or adoption, it would go beyond the scope of the present application to examine whether these differences are justified. On the whole, the Court does not see any indication that the respondent State exceeded its margin of appreciation in its choice of rights and obligations conferred by registered partnership.

110. In conclusion, the Court finds there has been no violation of Article 14 of the Convention taken in conjunction with Article 8.

IV. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

111. The applicants complained that, compared with married couples they suffered disadvantages in the financial sphere, in particular under tax law. They relied on Article 1 of Protocol No. 1, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Admissibility

112. In their written observations, the Government argued that the applicants' complaint about possible discrimination in the financial sphere was to be declared inadmissible on the ground of non-exhaustion. They did not, however, explicitly pursue that argument in their oral pleadings before the Court.

113. The Court notes that the applicants touched upon the issue of discrimination in the financial sphere, in particular in tax law, in their complaint before the Constitutional Court in order to illustrate their main complaint, namely that they were discriminated against as a same-sex couple in that they did not have access to marriage.

114. In the circumstances of the present case, the Court is not called upon to resolve the question whether or not the applicants exhausted domestic remedies. It notes that in their application to the Court the applicants did not give any details in respect of the alleged violation of Article 1 of Protocol No. 1. The Court therefore considers that this complaint has not been substantiated.

115. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's request to strike the application out of the Court's list;

2. *Declares* by six votes to one the applicants' complaint under Article 12 of the Convention admissible;

3. *Declares* unanimously the applicants' complaint under Article 14 of the Convention taken in conjunction with Article 8 admissible;

4. *Declares* unanimously the remainder of the application inadmissible;

5. *Holds* unanimously that there has been no violation of Article 12 of the Convention;

6. *Holds* by four votes to three that there has been no violation of Article 14 of the Convention taken in conjunction with Article 8.

Done in English, and notified in writing on 24 June 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach Christos Rozakis
Deputy Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) joint dissenting opinion of Judges Rozakis, Spielmann and Jebens;
(b) concurring opinion of Judge Malinverni joined by Judge Kovler.

C.L.R.
A.M.W.

JOINT DISSENTING OPINION OF JUDGES ROZAKIS, SPIELMANN AND JEBENS

1. We have voted against point 6 of the operative part of the judgment. We cannot agree with the majority that there has been no violation of Article 14 of the Convention taken in conjunction with Article 8, for the following reasons.

2. In this very important case, the Court, after a careful examination of previous case-law, has taken a major step forward in its jurisprudence by extending the notion of "family life" to same-sex couples. Relying in particular on developments in European Union law (see Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 concerning the right of citizens of the Union and their family members to move and reside freely within the territory of the member States), the Court identified in paragraph 93 of the judgment "a growing tendency to include same-sex couples in the notion of 'family'".

3. The Court solemnly affirmed this in paragraph 94 of the judgment:

> "In view of this evolution, the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would."

4. The lack of any legal framework prior to the entry into force of the Registered Partnership Act ("the Act") raises a serious problem. In this respect we note a contradiction in the Court's reasoning. Having decided in paragraph 94 that "the relationship of the applicants ... falls within the notion of 'family life'", the Court should have drawn inferences from this finding. However, by deciding that there has been no violation, the Court at the same time endorses the legal vacuum at stake, without imposing on the respondent State any positive obligation to provide a satisfactory framework, offering the applicants, at least to a certain extent, the protection any family should enjoy.

5. In paragraph 99, the Court also decided of its own motion the following:

> "... same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship."

6. The applicants complained not only that they were discriminated against in that they were denied the right to marry, but also – and this is important – that they did not have any other possibility of having their relationship recognised by law prior to the entry into force of the Act.

7. We do not want to dwell on the impact of the Act, which came into force only in 2010, and in particular on the question whether the particular features of this Act, as identified by the Court in paragraphs 18 to 23 of the judgment, comply with Article 14 of the Convention taken in conjunction with Article 8, since in our view the violation of the combination of these provisions occurred in any event prior to the entry into force of the Act.

8. Having identified a "relevantly similar situation" (see paragraph 99 of the judgment), and emphasised that "differences based on sexual orientation require particularly serious reasons by way of justification" (see paragraph 97), the Court should have found a violation of Article 14 of the Convention taken in conjunction with Article 8 because the respondent Government did not advance any argument to justify the difference of treatment, relying in this connection mainly on their margin of appreciation (see paragraph 80). However, in the absence of any cogent reasons offered by the respondent Government to justify the difference of treatment, there should be no room to apply the margin of appreciation. Consequently, the "existence or non-existence of common ground between the laws of the Contracting States" (see paragraph 98) is irrelevant as such considerations are only a *subordinate* basis for the application of the concept of the margin of appreciation. Indeed, it is only in the event that the national authorities offer grounds for justification that the Court can be satisfied, taking into account the presence or the absence of a common approach, that they are better placed than it is to deal effectively with the matter.

9. Today it is widely recognised and also accepted by society that same-sex couples enter into stable relationships. Any absence of a legal framework offering them, at least to a certain extent, the same rights or benefits attached to marriage (see paragraph 4 of this dissenting opinion) would need robust justification, especially taking into account the growing trend in Europe to offer some means of qualifying for such rights or benefits.

10. Consequently, in our view, there has been a violation of Article 14 of the Convention taken in conjunction with Article 8.

CONCURRING OPINION OF JUDGE MALINVERNI JOINED BY JUDGE KOVLER

(Translation)

I voted together with my colleagues in favour of finding no violation of Article 12 of the Convention. However, I cannot subscribe to some of the arguments set out in the judgment in reaching that conclusion.

1. Thus, I am unable to share the view that "looked at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women" (see paragraph 55 of the judgment).

By Article 31 § 1 of the Vienna Convention on the Law of Treaties of 23 May 1969 ("the Vienna Convention"), which lays down the general rule on interpretation of international treaties, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

In my view, "the ordinary meaning to be given to the terms of the treaty" in the case of Article 12 cannot be anything other than that of recognising that a man and a woman, that is, persons of opposite sex, have the right to marry. That is also the conclusion I reach on reading Article 12 "in the light of its object and purpose". Indeed, Article 12 associates the right to marry with the right to found a family.

Article 31 § 3 (b) of the Vienna Convention provides that, as well as the context, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" must be taken into account.

I do not consider that this provision of the Vienna Convention can be relied on in support of the conclusion set out in paragraph 55 of the judgment. The fact that a number of States, currently six, provide for the possibility for homosexual couples to marry cannot in my opinion be regarded as a "subsequent practice in the application of the treaty" within the meaning of the provision in question.

Literal interpretation, which, according to the Vienna Convention, represents the "general rule of interpretation", thus precludes Article 12 from being construed as conferring the right to marry on persons of the same sex.

I come to the same conclusion if I interpret Article 12 by reference to other rules of interpretation, although such rules, as is rightly noted in the title of Article 32 of the Vienna Convention, are merely supplementary means of interpretation, and literal interpretation remains the general rule (Article 31 of the Vienna Convention).

In accordance with Article 32 of the Vienna Convention, recourse may be had to supplementary means of interpretation, particularly in order to "determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable".

Bearing in mind that supplementary means of interpretation include, as stated in Article 32 of the Vienna Convention, "the preparatory work of the treaty and the circumstances of its conclusion", I consider that the so-called historical interpretation to which Article 32 of the Vienna Convention refers can only serve to "confirm the meaning resulting from the application of Article 31" (Article 32).

There is therefore no doubt in my mind that Article 12 of the Convention cannot be construed in any other way than as being applicable solely to persons of different sex.

Admittedly, the Convention is a living instrument which must be interpreted in a "contemporary" manner, in the light of present-day conditions (see *E.B. v. France* [GC], no. 43546/02, § 92, 22 January 2008, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, §§ 74-75, ECHR 2002-VI). It is also true that there have been major social changes in the institution of marriage since the adoption of the Convention (see *Christine Goodwin*, cited above, § 100). However, as the Court held in *Johnston and Others v. Ireland* (18 December 1986, § 53, Series A no. 112), while the Convention must be interpreted in the light of present-day conditions, the Court cannot, by means of an evolutive interpretation, "derive from [it] a right that was not included therein at the outset".

2. Nor can I accept the following statement:

> "[r]egard being had to Article 9 of the Charter ... the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants' complaint." (paragraph 61 of the judgment)

On the contrary, I consider that Article 12 is inapplicable to persons of the same sex.

Admittedly, in guaranteeing the right to marry, Article 9 of the Charter of Fundamental Rights of the European Union ("the Charter") deliberately omitted any reference to men and women, since it provides that "[t]he right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights".

In my opinion, however, no inferences can be drawn from this as regards the interpretation of Article 12 of the Convention.

The Commentary of the Charter does indeed confirm that the drafters of Article 9 intended it to be broader in scope than the corresponding Articles in other international treaties. However, it should not be forgotten that Article 9 of the Charter guarantees the right to marry and to found a family "in accordance with the national laws governing the exercise of these rights".

By referring in this way to the relevant domestic legislation, Article 9 of the Charter simply leaves it to States to decide whether they wish to afford homosexual couples the right to marry. However, as the Commentary quite rightly points out, "there is no obstacle to recognise same-sex relationships in the context of marriage. There is, however, no explicit requirement that domestic laws should facilitate such marriages".

In my view, Article 9 of the Charter should therefore have no bearing on the interpretation of Article 12 of the Convention as conferring a right to marry only on persons of different sex.

It is true that the Court has already referred to Article 9 of the Charter in its *Christine Goodwin* judgment (cited above, § 100). However, in that case the Court considered whether the fact that domestic law took into account, for the purposes of eligibility for marriage, the sex registered at birth, and not the sex acquired following gender reassignment surgery, was a limitation impairing the very essence of the right to marry. After her operation, the applicant lived as a woman and wished to marry a man. The case did not therefore concern marriage between persons of the same sex.

Suggested reading list of relevant academic materials

- The Substantive Law of the EU: The Four Freedoms (4th Edition 2013), Chapter 9: Free Movement of Workers – written by Prof C.Barnard, published by Oxford University Press.
- The Substantive Law of the EU: The Four Freedoms (4th Edition 2013), Chapter 12: Union Citizenship – written by Prof C.Barnard, published by Oxford University Press.
- EU Law: Text, Cases, and Materials (Sixth Edition 2015), Chapter 21: Free Movement of Workers – written by Prof. P. Craig and Prof. Gráinne de Búrca published by Oxford University Press.
- EU Law: Text, Cases, and Materials (Sixth Edition 2015), Chapter 23: Citizenship of the European Union – written by Prof. P. Craig and Prof. Gráinne de Búrca published by Oxford University Press.
- European Union Law (2014) C Barnard and S Peers (eds), published by Oxford University Press; Chapter 9: Free Movement of Natural Persons – written by Prof C.Barnard
- 'Family rights for circular migrants and frontier workers: O and B, and S and G', Eleanor Spaventa, Common Market Law Review, Issue 3, pp. 753–777
- 'Citizenship by the back door? Gunnarsson' Ciarán Burke, Ólafur Ísberg Hannesson, (2015) 52 Common Market Law Review, Issue 4, pp. 1111–1133
- The Elusive Limits Of Solidarity: Residence Rights Of And Social Benefits For Economically Inactive Union Citizens (Prof. D.Thym), Common Market Law Review 2015, Vol 52, pps 17-50.
- "Free Movement Law and the Cross-Border Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition" Alina Tryfonidou, UACES 44th Annual Conference, 2014 (link)
- "Same-Sex Marriage: The EU is Lagging Behind" Alina Tryfonidou (link)

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