

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.**