

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),

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.

(...)

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:

'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)...

(...)

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.'

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 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.

(...)

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.

(...)

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.

(...)