OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 25 November 2010[1]

I — Introduction

1. Can a person who is a national of two Member States of the European Union but has always lived in only one of those two States rely upon European Union law ('EU law') against that State in order to obtain there a right of residence for him or herself and in particular for his or her spouse? That is, in essence, the question that the Court is called upon to decide in the present case.

2. Mrs McCarthy is a British and Irish national but has only ever lived in England.[2] She herself can naturally reside in England. That is not true, however, of her husband, a Jamaican national: under the United Kingdom's domestic provisions on immigration, he has no right to reside in England. In order to enable her husband and herself to live together, Mrs McCarthy is now seeking, on the basis of her Irish nationality and as a Union citizen, to obtain for herself a right to reside in England; this would indirectly also benefit her husband, who could then, by virtue of EU law, claim a derived right of residence.

3. In this context, the Court will have to determine how the concept of 'beneficiary' in Directive 2004/38/EC on residence[3] is to be understood. In addition, the Court is asked what requirements are to be placed on 'legal residence', which is the basic precondition for acquiring a right of permanent residence within the meaning of that directive.

II — Legal framework

4. The framework for this case in EU law is provided by Article 21 TFEU and Directive 2004/38. The directive's scope *ratione personae* is defined in Chapter I ('General

1 — Original language: German.

2 — In using the terms 'British nationality' and residence 'in England', I am following here and below the like wording of the order for reference.

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 (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).

provisions') — to be more precise, in Article 3 under the heading 'Beneficiaries' — 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.

…'

5. In Chapter IV of Directive 2004/38, Article 16 sets out general rules on acquisition of the right of permanent residence:

'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. …

…'

6. Recital 17 in the preamble to Directive 2004/38, which complements Article 16, should be noted:

'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.'

7. Lastly, attention should be drawn, among the final provisions in Chapter VII of Directive 2004/38, to Article 37, which states as follows under the heading '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.'

III — Facts and main proceedings

8. Shirley McCarthy is a British citizen by virtue of her birth in the United Kingdom. She has always lived in England and her residence there has, throughout, been lawful under domestic law.

9. Mrs McCarthy is in receipt of State benefits in England. She does not argue that she is or has been a worker, a self-employed person

or economically self-sufficient for the purposes of EU law.

10. On 15 November 2002 Mrs McCarthy married a Jamaican national, George McCarthy. Mr McCarthy lacks leave to remain in the United Kingdom under its Immigration Rules, even as the spouse of a person settled there. [4]

11. Mrs McCarthy has not only British but also Irish nationality. Following her marriage she applied — for the first time ever — for an Irish passport. Her application succeeded on the basis that her mother had been born in Ireland.

12. On 23 July 2004 Mrs McCarthy applied to the Secretary of State for the Home Department [5] for residence documents under EU law as a Union citizen. Mr McCarthy made a corresponding application as spouse of that Union citizen. Both applications were refused by decision of 6 December 2004. The grounds given were that Mrs McCarthy was not a person meeting the statutory requirements ('a qualified person' — essentially, a worker, self-employed person or self-sufficient person). Nor, accordingly, could Mr McCarthy be considered to be the spouse of a qualified person.

13. On 13 December 2004 Mrs McCarthy appealed against the decision of 6 December 2004 refusing her application. On 7 September 2006 her appeal was referred to the Asylum and Immigration Tribunal. [6]

14. Whilst Mr McCarthy did not appeal against the refusal of 6 December 2004 in his regard, he did, however, make a further application for a residence card as the spouse of Mrs McCarthy on 16 October 2006. This second application was also refused, by a decision of 20 April 2007, against which Mr McCarthy appealed to the Asylum and Immigration Tribunal on 4 May 2007.

15. The Asylum and Immigration Tribunal adjourned Mr McCarthy's appeal to await the final outcome of Mrs McCarthy's appeal.

16. On 17 October 2006 a single judge of the Asylum and Immigration Tribunal dismissed Mrs McCarthy's appeal. However, on 13 February 2007 the High Court of Justice of England and Wales ordered the Tribunal to reconsider Mrs McCarthy's appeal. The

4 — According to information provided by counsel for Mrs McCarthy at the hearing before the Court of Justice, this would be because Mr McCarthy originally entered the United Kingdom as a 'visitor'.

5 — This footnote is not relevant for the English version of this Opinion.

6 — This footnote is not relevant for the English version of this Opinion.

appeal was therefore the subject of reconsideration by the Tribunal on 16 August 2007, but the Tribunal upheld the decision to dismiss it. Mrs McCarthy's subsequent appeal to the Court of Appeal of England and Wales (Civil Division) [7] was also unsuccessful, being dismissed on 11 June 2008.

17. Following a further appeal by Mrs McCarthy, the case is now pending before the Supreme Court of the United Kingdom (formerly the House of Lords), the referring court. [8]

IV — Reference for a preliminary ruling and procedure before the Court of Justice

18. By letter of 2 November 2009, received at the Court on 5 November 2009, the referring court submitted the following questions to the Court of Justice for a preliminary ruling: [9]

(1) Is a person of dual Irish and United Kingdom nationality who has resided in the United Kingdom for her entire life a 'beneficiary' within the meaning of Article 3 of Directive 2004/38/EC?

(2) Has such a person 'resided legally' within the host Member State for the purpose of Article 16 of Directive 2004/38 in circumstances where she was unable to satisfy the requirements of Article 7 of that directive?

19. Mrs McCarthy, Denmark, Ireland, Estonia, the Netherlands, the United Kingdom and the European Commission submitted written observations in the proceedings before the Court. Mrs McCarthy, Denmark, Ireland and the Commission took part in the hearing on 28 October 2010.

V — Assessment

20. It may at first sight seem strange that a Union citizen is relying upon EU law against the authorities of her home Member State in order to obtain a right of residence there, since there is no doubt that, by virtue of her nationality, that Union citizen already has in

7 — This footnote is not relevant for the English version of this Opinion.

8 — Leave to appeal was granted on 13 November 2008 by the then House of Lords. However, in October 2009 the judicial powers of the House of Lords devolved, pursuant to the Constitutional Reform Act 2005, upon the newly created Supreme Court of the United Kingdom.

9 — It was the House of Lords that decided to refer these questions. They were forwarded, however, by the Registrar of the Supreme Court of the United Kingdom. Also, the fact that the order for reference is headed 'Draft Reference' does not affect the reference's admissibility. As is clear from the covering letter of 2 November 2009, the order for reference was officially lodged by the Supreme Court at the Court of Justice.

the State of which she is a national a right of residence that cannot be restricted. [10]

21. On closer examination, however, the present case involves not so much Mrs McCarthy's right to live in England herself as the right of residence obtained through her that may be enjoyed by her husband, who is a national of a non-member country. The case therefore ultimately concerns family unification which is intended to be achieved circuitously via EU law because domestic law in the United Kingdom does not permit it. [11] This was also alluded to repeatedly at the hearing before the Court.

22. It is nevertheless open to question whether EU law can apply *ratione materiae* to the present case since Mrs McCarthy has never exercised her right of free movement as resulting from Article 21 (1) TFEU, Article 45 TFEU, Article 49 TFEU and Article 56 TFEU [12] and reaffirmed in Articles 15 (2) and 45 (1) of the Charter of Fundamental Rights of the European Union. [13] The only possible connecting factor with EU law here is Mrs McCarthy's status as a person with dual nationality, since she is not only a British but also an Irish national.

23. Whilst Mrs McCarthy contends that her dual nationality suffices as a connecting factor with EU law, all the governments that have participated in the proceedings and the Commission are of the opposite view.

A — *Concept of 'beneficiary' within the meaning of Directive 2004/38 (the first question referred)*

24. By its first question, the referring court seeks guidance on the interpretation of the concept of 'beneficiary' within the meaning of Article 3 of Directive 2004/38. The issue requiring discussion is essentially whether a person who is a national of two Member States of the European Union but has always lived in only one of those two States can rely upon Directive 2004/38 against that State in order to obtain in its territory a right of residence for him or herself and indirectly also for his or her spouse.

10 — As the Court stated in Case 41/74 *van Duyn* [1974] ECR 1337, paragraph 22, it is a principle of international law 'that a State is precluded from refusing its own nationals the right of entry or residence'; see, in addition, Case C-370/90 *Singh* [1992] ECR I-4265, paragraph 22, Case C-291/05 *Eind* [2007] ECR I-10719, paragraph 31, and Article 3 of Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which was opened for signature on 16 September 1963 in Strasbourg and entered into force on 2 May 1968 (*ETS* No 46).

11 — That is also why a decision on Mr McCarthy's appeal concerning his right of residence was deferred (see above, point 15).

12 — Formerly Article 18(1) EC, Article 39 EC, Article 43 EC and Article 49 EC.

13 — The Charter of Fundamental Rights of the European Union was solemnly proclaimed initially on 7 December 2000 in Nice (OJ 2000 C 364, p. 1) and then for a second time on 12 December 2007 in Strasbourg (OJ 2007 C 303, p. 1).

25. On the basis of the wording of Article 3(1) of Directive 2004/38 this question is to be answered in the negative. According to that provision, all Union citizens who move to or reside in a Member State other than that of which they are a national are beneficiaries within the meaning of the directive. It can be inferred *a contrario* from Article 3(1) that Directive 2004/38 does *not* apply to the relationship of Union citizens with the Member State of which they are a national and in which they have always resided.

26. This interpretation is confirmed when the legislative context of Article 3(1) of Directive 2004/38 is looked at and the directive's objective is taken into account.

27. The aim of Directive 2004/38 is to facilitate free movement within the territory of the Member States for Union citizens. Accordingly, the directive often refers to free movement and residence in the same breath; [14] the directive is designed 'to simplify and strengthen the right of free movement and residence of all Union citizens'. [15]

28. As regards the legislative context of Article 3 (1), it is to be noted that numerous provisions of Directive 2004/38 refer to a Union citizen's entry or arrival, [16] to his residence 'on the territory of another Member State' [17] or to the 'host Member State'. [18] The host Member State for the purposes of the directive is 'the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence'. [19] As all these provisions show, Directive 2004/38 governs the legal position of a Union citizen in a Member State in which he resides — perhaps since birth [20] — *in exercise of his right of free movement* and of which he is not a national.

29. This, of course, does not prevent Directive 2004/38 from also being applicable vis-à-vis the home country of a Union citizen if there is a connection with EU law. It is thus settled case-law that a Union citizen who has exercised his right of free movement and wants to return to his home Member State

14 — Articles 1(a), 3(2) and 5(4) of Directive 2004/38 and recitals 3 and 22 in its preamble.

15 — Recital 3 in the preamble to Directive 2004/38; similarly, the directive's title and recital 5 in its preamble, which refer to the right of Union citizens 'to move and reside freely within the territory of the Member States'. See also Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraph 59; Case C-310/08 *Ibrahim* [2010] ECR I-1065, paragraph 49; Case C-480/08 *Teixeira* [2010] ECR I-1107, paragraph 60; and Case C-162/09 *Lassal* [2010] ECR I-9217, paragraph 30.

16 — See, for example, Articles 3(2), 5, 8(2), 15(2), 27(3), 29(2) and (3) and 31(4) of Directive 2004/38 and recitals 6 and 22 in its preamble.

17 — Articles 6(1) and 7(1) of Directive 2004/38; similarly, recital 11 in its preamble, which refers to the 'fundamental and personal right of residence in another Member State'.

18 — Articles 2, 3(2), 5(3), 7, 8, 14 to 18, 22, 24, 28, 29, 31 and 33 of Directive 2004/38 and recitals 5, 6, 9, 10, 15, 16, 17, 18, 19, 21, 23 and 24 in its preamble.

19 — Article 2(3) of Directive 2004/38.

20 — See Article 3(1) of Directive 2004/38 and recital 24 in its preamble; see also, to the same effect, Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraph 19, and *Teixeira* (cited in footnote 15), paragraph 45.

can rely upon EU law against that State. [21] The same applies, moreover, where a Union citizen wants to leave his home Member State in order to move to another Member State in exercise of the rights of free movement in EU law. [22]

30. A Union citizen like Mrs McCarthy, who has always resided in a Member State of which she is a national and has also never exercised her right of free movement guaranteed by EU law, does not fall within the scope of Directive 2004/38, either according to the wording of Article 3 (1) or according to the objective and the legislative context of that provision. The same is true of members of Mrs McCarthy's family, [23] since their rights of entry and residence — as well as, more generally, the possibility of family unification — are not founded on an autonomous right of free movement, but are derived from the right of free movement of the Union citizen and serve to give effect to that right. [24]

31. The right of free movement of Union citizens which is enshrined in primary law (Article 21 (1) TFEU and Article 45 (1) of the Charter of Fundamental Rights) does not alter this in my view. It is true that provisions of secondary law are to be interpreted and applied consistently with primary law, for example the fundamental freedoms in the Treaty. [25] I consider, however, that Directive 2004/38 is consistent with the requirements of primary law. In particular, I am not of the view that Union citizens can derive from Article 21 (1) TFEU a right of residence vis-à-vis the Member State of which they are a national even where — as in the case of Mrs McCarthy — there is no cross-border element. [26]

32. It remains to be examined whether the outcome reached so far can be altered in any way by the fact that Mrs McCarthy is a national of two Member States of the European Union — a British national and an Irish national.

33. In this regard, it should be pointed out first of all that Union citizens in Mrs McCarthy's position cannot be prevented from relying upon their second nationality — here Irish nationality — from the outset by simply

21 — *Singh* (cited in footnote 10), paragraphs 19 to 23, and *Eind* (cited in footnote 10), paragraphs 32 to 36; similarly, Case C-60/00 *Carpenter* [2002] ECR I-6279, in particular paragraph 46.

22 — Case C-33/07 *Jipa* [2008] ECR I-5157, in particular paragraphs 17 and 18.

23 — See to this effect back in Joined Cases 35/82 and 36/82 *Morson and Jhanjan* [1982] ECR 3723, paragraphs 11 to 18.

24 — To this effect, *Eind* (cited in footnote 10), paragraph 23.

25 — See, for example, Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 28, and Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-10923, paragraph 48.

26 — A contrary view is taken by Advocate General Sharpston in her Opinion of 30 September 2010 in Case C-34/09 *Ruiz Zambrano*, in particular points 91 to 97 and the first sentence of point 122.

stating that that nationality is not real and effective. It is true that in the present case everything points to Mrs McCarthy's British nationality being the one that is far more real and effective, as she has always lived in England and applied for her Irish passport solely in the run-up to her request for a residence permit under EU law. As the Court has emphasised, however, within the European Union '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.' [27] Under the case-law, the existence of dual nationality can therefore in principle be entirely relevant when assessing the legal position of Union citizens vis-à-vis their Member States of origin. [28]

34. Thus, the dual nationality of a Union citizen can make it necessary, when determining his name, to depart from the domestic rules in one of his Member States of origin governing a person's name. [29] A person's name is an essential element of his identity. Every Union citizen must therefore be able to count on the name which he lawfully goes under in one Member State being recognised in all other Member States. [30] Should doubts arise as to the identity of a Union citizen because his name is different or is written differently from one Member State to another, he might suffer serious inconvenience at a private or a professional level. [31]

35. The position that may obtain in relation to fields such as that of the rules governing a person's name cannot, however, necessarily be transposed to the right of residence at issue here and the related possibility of family unification. Rather, the issue is whether, in this context too, the position of Union citizens differs, in view of their dual nationality, in a legally relevant way from the situation of other Union citizens who are nationals of the host Member State only.

36. The elements which characterise situations, and their comparability, must in particular be determined and assessed in the light of the subject-matter and purpose of the legislation which makes the distinction in

27 — Case C-369/90 *Micheletti and Others* [1992] ECR I-4239, paragraph 10; Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 28; and *Zhu and Chen* (cited in footnote 20), paragraph 39.

28 — *Garcia Avello* (cited in footnote 27), in particular paragraphs 32 to 37. *Micheletti and Others* (cited in footnote 27) also explains the relevance of dual nationality in EU law, but vis-à-vis a Member State of which the Union citizen concerned is *not* a national.

29 — *Garcia Avello* (cited in footnote 27), in particular paragraphs 36, 37 and 45.

30 — To this effect, Case C-353/06 *Grunkin and Paul* [2008] ECR I-7639, in particular paragraphs 23 and 31.

31 — *Garcia Avello* (cited in footnote 27), paragraph 36, and *Grunkin and Paul* (cited in footnote 30), paragraphs 23 to 28 and 32; similarly, the earlier judgment in Case C-168/91 *Konstantinidis* [1993] ECR I-1191, paragraph 16.

question. The principles and objectives of the field to which the legislation relates must also be taken into account. [32]

37. The right at issue here, namely the right of residence of Union citizens, for themselves and their family members, serves to facilitate free movement of Union citizens within the territory of the Member States. [33] In this connection, no particular factors arise from the dual nationality of a Union citizen in Mrs McCarthy's position. From the point of view of the law on residence, she is in the same situation as all other British nationals who have always lived in England and never left their country of origin: she does not exercise her right of free movement. [34]

38. Union citizens such as Mrs McCarthy neither suffer prejudice to their right of free movement [35] nor are discriminated against compared with other British nationals who are in a comparable situation. The mere fact that she has not only British but also Irish nationality does not make it necessary to apply to her and her family members the EU law provisions on the right of entry and of residence.

39. Admittedly, the situation can arise in this way that Union citizens who have made use of their right of free movement may — by virtue of EU law — rely on, for their family members originating from non-member countries, more generous rules on the right of entry and of residence than nationals of the host Member State who have always resided in its territory. [36] Generally this problem is referred to as *discrimination against one's own nationals* or called *reverse discrimination*.

40. In accordance with settled case-law, however, EU law provides no means of dealing with this problem. Any difference in treatment between Union citizens as regards the entry and residence of their family members from non-member countries according to whether those Union citizens have previously exercised their right of freedom of movement does not fall within the scope of EU law. [37]

32 — Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 26.

33 — *Metock and Others* (cited in footnote 15), paragraph 82; see also point 27 above.

34 — That makes the present case different from that of *Zhu and Chen* (cited in footnote 20), where the Union citizen concerned, Catherine Zhu, was *not* a national of the host Member State, but only of another Member State, so that she had been living in the host Member State from birth *in exercise of her right of free movement* under Article 21(1) TFEU (formerly Article 18(1) EC). The present case also differs from that in *Eind* (cited in footnote 10), where the Union citizen concerned was a national of the host Member State (the Netherlands), but returned there *after exercising his right of free movement*.

35 — As Ireland correctly points out, Mrs McCarthy is not in any way prevented from exercising her right of free movement and settling in another Member State, for example in Ireland, accompanied by her spouse as a family member.

36 — See in this regard *Metock and Others* (cited in footnote 15), paragraphs 76 to 78.

37 — *Metock and Others* (cited in footnote 15), paragraphs 77 and 78; the settled case-law on the fundamental freedoms in the Treaty is to the same effect — see for example Case C-216/06 *Gouvernement de la Communauté française and Gouvernement wallon* [2008] ECR I-1683, paragraph 33.

41. It is true that in the legal literature consideration is given from time to time to inferring a prohibition on discrimination against one's own nationals from citizenship of the Union. [38] Advocate General Sharpston too has recently adopted a position to this effect. [39] However, as the Court has stated on a number of occasions, citizenship of the Union is not intended to extend the scope *ratione materiae* of EU law to internal situations which have no link with EU law. [40]

42. It cannot of course be ruled out that the Court will review its case-law when the occasion arises and be led from then on to derive a prohibition on discrimination against one's own nationals from citizenship of the Union. Citizenship of the Union is after all destined to be 'the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for'. [41]

43. The present case nevertheless does not appear to me to provide the right context for detailed examination of the issue of discrimination against one's own nationals. Here, a 'static' Union citizen such as Mrs McCarthy is not discriminated against at all compared with 'mobile' Union citizens: [42] even if it were to be disregarded that Mrs McCarthy has not exercised her right of free movement, and she were in principle allowed to rely on the provisions of Directive 2004/38, she would nevertheless not fulfil the remaining conditions for the acquisition of longer-term rights of residence that are to be met by Union citizens.

44. Mrs McCarthy is not in work, nor does she have sufficient resources for herself and her family; she is not 'economically self-sufficient' but in receipt of State benefits in the

38 — Borchardt, K.-D., 'Der sozialrechtliche Gehalt der Unionsbürgerschaft', *Neue Juristische Wochenschrift* 2000, p. 2057 (2059); Edward, D., 'Unionsbürgerschaft — Mythos, Hoffnung oder Realität?', in: 'Grundrechte in Europa' — *Münsterische Juristische Vorträge*, Münster 2002, p. 35 (41); Edward, D., 'European Citizenship — Myth, Hope or Reality?', in: 'Problèmes d'interprétation' — *À la mémoire de Constantinos N. Kakouris*, Athens/Brussels 2004, p. 123 (131-133); Spaventa, E., 'Seeing the Wood despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects', *Common Market Law Review* 45 (2008), p. 13 (in particular 30-39).

39 — Opinion in *Ruiz Zambrano* (cited in footnote 26), in particular points 139 to 150.

40 — Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, paragraph 23; *Garcia Avello* (cited in footnote 27), paragraph 26; Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 20; *Gouvernement de la Communauté française and Gouvernement wallon* (cited in footnote 37), paragraph 39; and Case C-499/06 *Nerkowska* [2008] ECR I-3993, paragraph 25.

41 — Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31, and Case C-524/06 *Huber* [2008] ECR I-9705, paragraph 69; similarly, Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, in particular paragraphs 57, 58 and 61. See also, in relation to citizenship of the Union as 'the fundamental status', Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 82; *Garcia Avello* (cited in footnote 27), paragraph 22; and Case C-135/08 *Rottmann* [2010] ECR I-1449, paragraph 43.

42 — See to this effect also the Opinion of Advocate General Sharpston in *Ruiz Zambrano* (cited in footnote 26), point 146, according to which the situations of 'static' and 'mobile' Union citizens must be comparable.

United Kingdom. [43] She therefore does not fulfil the substantive requirements which EU law imposes on Union citizens who want to reside for more than three months in the host Member State. [44] Nor are there any indications that for an uninterrupted period of five years in the past Mrs McCarthy worked in the United Kingdom or had sufficient resources for herself and her family, which would be the basic precondition for acquisition of a right of permanent residence. [45] Consequently, Mrs McCarthy would be unable, even as a 'mobile' Union citizen, to derive a right of residence from EU law.

45. Overall I remain, in the circumstances, of the view that the referring court's first question should be answered in the negative. The answer should be to the effect that, where a Union citizen is a national of two Member States of the European Union but has always lived in only one of those two States, she cannot claim a right of residence under Directive 2004/38 in that State.

46. Were the Court in the present case none the less to consider further developing the status of Union citizen, [46] I would consider it appropriate to reopen the oral procedure. The parties involved in the present proceedings have hitherto been given occasion to set out their arguments on this issue entirely in passing only, towards the end of the hearing. They should in my view still have the opportunity to deal with it in greater depth. Also, further Member States would then in all probability be prompted to present oral argument before the Court.

B — *Concept of 'legal residence' for the purposes of Article 16(1) of Directive 2004/38 (the second question referred)*

47. By its second question, the referring court seeks guidance on the concept of 'legal residence' for the purposes of Article 16 (1) of Directive 2004/38. [47] In essence, it needs to be decided whether this concept also covers residence of a Union citizen who has always lived only in the host Member State and whose right of residence there has resulted for the entire period of her residence solely

43 — See point 9 above.

44 — Article 7(1) of Directive 2004/38.

45 — Article 16(1) of Directive 2004/38; see in this regard my observations on the second question referred (points 47 to 57 of this Opinion).

46 — To this effect, the Opinion of Advocate General Sharpston in *Ruiz Zambrano* (cited in footnote 26).

47 — Various questions on the interpretation of Article 16 of Directive 2004/38 and in particular on the concept of 'legal residence' are also raised by Case C-325/09 *Dias*, Case C-424/10 *Ziolkowski* and Case C-425/10 *Szeja*, which are pending. As far as can be seen, however, they do not concern the case of a Union citizen who is a national of the host Member State.

from the fact that she is a national of that very State.

48. This question is dependent logically upon the first question. If, as proposed by me, the first question has already been answered in the negative, [48] the Union citizen does not fall within the scope of Directive 2004/38 at all and the second question does not have to be answered. Accordingly, I discuss the second question below purely in the alternative.

49. The concept of legal residence, which Article 16(1) of Directive 2004/38 makes a precondition for acquisition of a right of permanent residence, is not defined more precisely in the directive.

50. Also, in the judgment delivered recently in *Lassal*, the Court in my view did not definitively resolve this problem, but merely made it clear that periods of residence 'completed … in accordance with … earlier EU law instruments … must be taken into account.' [49] This does not in any way preclude other periods of residence, completed solely under national law on foreign nationals, from also being taken into account.

51. It is true that the preamble to Directive 2004/38 indicates that legal residence means, above all, residence 'in compliance with the conditions laid down in this Directive', that is to say, residence to which the person concerned was entitled by virtue of EU law. [50] However, having regard to the context and objectives of Directive 2004/38, its provisions are not to be interpreted restrictively. [51]

52. In providing for the right of permanent residence pursuant to Article 16 of Directive 2004/38, the European Union legislature had the aim of 'promoting social cohesion, which is one of the fundamental objectives of the Union' [52] and of creating a 'genuine vehicle for integration into the society of the host Member State'. [53] It is consistent with this objective for the group of persons entitled to permanent residence to be extended to those Union citizens whose residence entitlement in the host Member State results solely from the latter's domestic law on foreign nationals [54] since, when assessing the degree of integration of a Union citizen in the host Member State, it is of secondary importance where his right of residence originates from.

48 — See above, in particular points 25 and 45.

49 — *Lassal* (cited in footnote 15), paragraph 40.

50 — Recital 17 in the preamble to Directive 2004/38.

51 — *Metock* (cited in footnote 15), paragraphs 84 and 93, and *Lassal* (cited in footnote 15), paragraph 31.

52 — Recital 17 in the preamble to Directive 2004/38.

53 — Recital 18 in the preamble to Directive 2004/38; see also *Lassal* (cited in footnote 15), paragraph 32, and, in relation to the idea of integration, paragraph 37 too.

54 — See to this effect my earlier Opinion in *Teixeira* (cited in footnote 15), point 119; Advocate General Trstenjak appears to incline to a different view (Opinion in *Lassal* (cited in footnote 15), final sentence of point 88).

53. The fact that there can be instances where a right of residence results solely from the host Member State's national law on foreign nationals is shown by Article 37 of Directive 2004/38, under which laws, regulations or administrative provisions laid down by a Member State which would be more favourable are expressly left unaffected. There are also clearly instances in the case-law where residence of Union citizens in the relevant host Member State could not be based on EU law, but only on domestic law on foreign nationals. [55] The Court has not in any way found such residence to be irrelevant, but on the contrary has linked conclusions under EU law to it. [56]

54. 'Legal residence' for the purposes of Article 16 (1) of Directive 2004/38 can nevertheless only mean residence which is founded on *legal provisions on foreign nationals* and not, by contrast, residence which is legal merely because the person concerned is a national of the host Member State. As already stated, [57] Directive 2004/38 serves to give effect to and facilitate the right of free movement of Union citizens. It is not intended to promote for example integration into the society of the host Member State of nationals of that State who have never exercised their right of free movement.

55. Fundamental qualitative differences exist between a right of residence which results from law on foreign nationals and a right of residence which results from the nationality of the person concerned in the host Member State. Whilst under principles of international law the Member States cannot in any way restrict the right of residence of their own nationals, [58] they are entitled to permit residence of foreign nationals on their national territory subject to certain conditions only. This also applies to residence of Union citizens from other Member States, although the limits imposed by EU law are to be observed. [59]

56. If a Union citizen in Mrs McCarthy's position, who has never exercised her right of free movement, were to be allowed to rely on Directive 2004/38, that would ultimately result in 'cherry-picking': [60] the Union citizen could then enjoy the advantages of Directive 2004/38 as regards family unification in respect of her spouse without meeting the

55 — Case C-456/02 *Trojani* [2004] ECR I-7573, in particular paragraphs 36 and 37; similarly, Case C-85/96 *Martínez Sala* [1998] ECR I-2691, in particular paragraphs 14 and 15 and paragraphs 60 and 61, although the latter case seems rather to involve *de facto* toleration of the Union citizen's residence.

56 — *Martínez Sala* (cited in footnote 55), paragraphs 64 and 65, and *Trojani* (cited in footnote 55), paragraph 39.

57 — See my observations on the first question referred (in particular points 27 and 28 above).

58 — See point 20 and footnote 10 above.

59 — See in particular Articles 7, 8 and 27 to 33 of Directive 2004/38.

60 — The expressions '*à la carte* approach' and 'the best of both worlds' used by Ireland at the hearing before the Court are on the same lines.

objectives of the directive — namely to give effect to and facilitate free movement — and without being subject to any of the directive's conditions, for example the requirement of economic self-sufficiency under Article 7 (1) of the directive. As several of the governments which have participated in the proceedings have rightly pointed out, that does not accord with the spirit and purpose of the provisions of EU law on free movement and the right of residence.

57. The referring court's second question would therefore have to be answered as follows:

Legality of residence, which under Article 16(1) of Directive 2004/38 is a precondition for acquisition of a right of permanent residence, can result from EU law or from the host Member State's domestic law on foreign nationals.

If, however, a Union citizen is a national of the host Member State and if he has always resided there only on the basis of his nationality without exercising his right of free movement, 'legal residence' for the purposes of Article 16(1) of Directive 2004/38 is not involved.

C — *Final remarks*

58. Under the solution proposed by me, a Union citizen in Mrs McCarthy's position cannot rely on EU law in order to obtain for him or herself and his or her family members a right of residence in the Member State in which that Union citizen has always lived and of which he or she is a national.

59. However, as the Court has already pointed out in *Metock*, [61] all the Member States are parties to the ECHR. [62] Even if no right of a foreign national to enter or to reside in a particular country is as such guaranteed by the ECHR, it can amount to interference with the right to respect for family life under Article 8 (1) of the ECHR if a person is refused entry into or residence in a country where close members of his family are living. [63]

61 — Cited in footnote 15, paragraph 79.

62 — European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (*ETS* No 5).

63 — See for example the judgments of the European Court of Human Rights in *Moustaquim v. Belgium*, 18 February 1991, § 36, Series A no. 193; *Boultif v. Switzerland*, no. 54273/00, § 39, ECHR 2001-IX; and *Radovanovic v. Austria*, no. 42703/98, § 30, 22 April 2004. The Court of Justice has for its part acknowledged for the European Union that the right to live with one's close family results in obligations for the Member States; these obligations may be negative, when a Member State is required not to deport a person, or positive, when it is required to let a person enter and reside in its territory (Case C-540/03 *Parliament* v *Council* (family reunification) [2006] ECR I-5769, paragraph 52).

60. In those circumstances, it cannot be entirely ruled out that the United Kingdom might be obliged, by virtue of being a party to the ECHR, to grant Mr McCarthy a right of residence as the spouse of a British national living in England. This is not, however, a question of EU law, but only a question of the United Kingdom's obligation under the ECHR, the assessment of which falls exclusively within the jurisdiction of the national courts and, as the case may be, the European Court of Human Rights.

VI — Conclusion

61. In light of the foregoing considerations, I suggest that the Court should answer the request for a preliminary ruling as follows:

Where a Union citizen is a national of two Member States of the European Union but has always lived in only one of those two States, she cannot claim a right of residence under Directive 2004/38/EC in that State.