

Case C-434/09

Shirley McCarthy

v

Secretary of State for the Home Department

(Reference for a preliminary
ruling from the Supreme Court of the United Kingdom,
formerly the House of Lords)

(Freedom of movement for persons — Article 21 TFEU — Directive 2004/38/EC —
'Beneficiary' — Article 3(1) — National who has never made use of his right of free
movement and has always resided in the Member State of his nationality — Effect of
being a national of another Member State — Purely internal situation)

Opinion of Advocate General Kokott delivered on 25 November 2010 I - 3378
Judgment of the Court (Third Chamber), 5 May 2011 I - 3393

Summary of the Judgment

1. *Citizenship of the European Union — Right to move and reside freely in the territory of the Member States — Directive 2004/38 — Beneficiary — Meaning (European Parliament and Council Directive 2004/38, Art. 3(1))*

2. *Citizenship of the European Union — Treaty provisions — Not applicable in a situation purely internal to a Member State — Citizen of the Union who has never made use of his right of free movement, having always resided in the Member State of his nationality and possessing the nationality of another Member State*

(Art. 21 TFEU)

1. Article 3(1) of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States must be interpreted as meaning that that directive is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

who enjoys an unconditional right of residence due to the fact that he resides in the Member State of which he is a national. Third, it is apparent from that directive, taken as a whole, that the residence to which it refers is linked to the exercise of the freedom of movement for persons.

First, according to that provision of Directive 2004/38, all Union citizens who 'move to' or reside in a Member State 'other' than that of which they are a national are beneficiaries of that directive. Second, since the residence of a person residing in the Member State of which he is a national cannot be made subject to conditions, Directive 2004/38, concerning the conditions governing the exercise of the right to move and reside freely within the territory of the Member States, cannot apply to a Union citizen

Hence, a citizen in the situation described above is not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, so that that directive is not applicable to him. That finding cannot be influenced by the fact that the citizen concerned is also a national of a Member State other than that where he resides. Indeed, the fact that a Union citizen is a national of more than one Member State does not mean

that he has made use of his right of freedom of movement.

on the rights pertaining to that status, including against his Member State of origin, in particular the right conferred by Article 21 TFEU to move and reside freely within the territory of the Member States.

(see paras 32, 34-35, 39-41, 57, operative part 1)

2. Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States.

However, the failure, by the authorities of the Member State of which a citizen has nationality and residence, to take into account the nationality of another Member State which that citizen also holds, when deciding on an application for a right of residence under European Union law brought by that citizen, does not mean that measures have been applied that have the effect of depriving the interested party of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States. Accordingly, in such a context, the factor that a national possesses, in addition to the nationality of the Member State where he resides, the nationality of another Member State is not sufficient, in itself, for a finding that the situation of the person concerned is covered by Article 21 TFEU, as that situation has no factor linking it with any of the situations governed by Union law and the situation is confined in all relevant respects within a single Member State.

The situation of a Union citizen who has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation. As a national of at least one Member State, a person enjoys the status of a Union citizen under Article 20(1) TFEU and may therefore rely

(see paras 46, 48-49, 54-55, 57, operative part 2)