



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
BOT  
delivered on 27 March 2012<sup>1</sup>

**Case C-83/11**

**Secretary of State for the Home Department**

**v**

**Muhammad Sazzadur Rahman, Fazly Rabby Islam, Mohibullah Rahman**

(Reference for a preliminary ruling from the Upper Tribunal (Immigration and Asylum Chamber), London (United Kingdom))

(Right of citizens of the Union to move and reside freely within the territory of a Member State — Directive 2004/38/EC — Obligation to facilitate entry and residence for ‘any other family members’ — Scope — Direct effect)

1. The present reference for a preliminary ruling provides the Court with the opportunity, for the first time, to rule on the scope of the provisions of Article 3(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.<sup>2</sup>
2. The reference has been made in a dispute between, on the one hand, Muhammad Sazzadur Rahman, Fazly Rabby Islam and Mohibullah Rahman, who are Bangladeshi nationals, and, on the other, the Secretary of State for the Home Department, following the refusal by the latter to issue to the former residence permits for the United Kingdom as dependent members of the family of a national of a Member State of the European Economic Area (EEA).

### **I – Legislative framework**

#### *A – European Union law*

1. The Charter of Fundamental Rights of the European Union
3. Article 7 of the Charter of Fundamental Rights of the European Union<sup>3</sup> provides that ‘[e]veryone has the right to respect for his or her private and family life, home and communications’.

<sup>1</sup> — Original language: French.

<sup>2</sup> — OJ 2004 L 158, p. 77, and corrigenda in OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34.

<sup>3</sup> — ‘The Charter’.

2. Directive 2004/38

4. Directive 2004/38 performs a task of codification by consolidating one regulation and nine directives in one single instrument and by integrating existing case-law. Replacing different legal regimes corresponding to membership of distinct legal categories on the basis of ability to carry on an economic activity with a single status founded on Union citizenship, Directive 2004/38 brings a new dimension to freedom of movement, which becomes a fundamental attribute attached to status as a Union citizen.

5. Directive 2004/38 recognises, in accordance with a graduated system, a right of residence for ‘family members’, who are defined in Article 2(2) thereof as the spouse or the partner with whom the Union citizen has contracted a registered partnership, which is recognised as equivalent to marriage by the legislation of the host Member State, the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner, and the dependent direct relatives in the ascending line and those of the spouse or partner.

6. Directive 2004/38 also takes account of extended family members, requiring the Member States, under certain conditions, to facilitate their entry and residence in their territory.

7. According to recital 6 in the preamble to that directive:

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

8. Article 3(2) of Directive 2004/38 provides:

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

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

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

9. Article 8(5) of Directive 2004/38 stipulates:

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

...

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

...'

10. Article 10 of the directive 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:

...

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

...'

#### B – *National law*

11. Directive 2004/38 was transposed in the United Kingdom by the Immigration (European Economic Area) Regulations 2006, as amended by the Immigration (European Economic Area) Regulations 2009.<sup>4</sup>

12. Entitled 'Family member', regulation 7 of the 2006 Regulations provides:

'(1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person –

- (a) his spouse or his civil partner;
- (b) direct descendants of his, his spouse or his civil partner who are:
  - (i) under 21; or
  - (ii) dependants of his, his spouse or his civil partner;
- (c) dependent direct relatives in his ascending line or that of his spouse or his civil partner;
- (d) a person who is to be treated as the family member of that other person under paragraph (3).

<sup>4</sup> – 'The 2006 Regulations'.

(2) A person shall not be treated under paragraph (1)(b) or (c) as the family member of a student residing in the United Kingdom after the period of three months beginning on the date on which the student is admitted to the United Kingdom unless:

- (a) in the case of paragraph [(1)](b), the person is the dependent child of the student or of his spouse or civil partner; or
- (b) the student also falls within one of the other categories of qualified persons mentioned in regulation 6(1).

(3) Subject to paragraph (4), a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions in regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked.

(4) Where the relevant EEA national is a student, the extended family member shall only be treated as the family member of that national under paragraph (3) if either the EEA family permit was issued under regulation 12(2), the registration certificate was issued under regulation 16(5) or the residence card was issued under regulation 17(4).'

13. Regulation 8 of the 2006 Regulations, entitled 'Extended family member', provides:

'(1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and –

- (a) the person is residing in an EEA State [5] in which the EEA national also resides and is dependent upon the EEA national or is a member of his household;
- (b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or
- (c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.

(3) A person satisfies the condition in this paragraph if the person is a relative of an EEA national or his spouse or his civil partner and, on serious health grounds, strictly requires the personal care of the EEA national, his spouse or his civil partner.

(4) A person satisfies the condition in this paragraph if the person is a relative of an EEA national and would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national were the EEA national a person present and settled in the United Kingdom.

5 — The Immigration (European Economic Area) (Amendment) Regulations 2011 replaced the words 'an EEA State' with the words 'a country other than the United Kingdom'. Assuming that this amendment, which was made after the reference to the Court, is immediately applicable to the pending proceedings, it does not, in my view, appear capable of calling into question the relevance of the third question asked by the Upper Tribunal (Immigration and Asylum Chamber), London (United Kingdom), since a condition of prior residence in the same State as the Union citizen remains.

(5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.

(6) In these Regulations “relevant EEA national” means, in relation to an extended family member, the EEA national who is or whose spouse or civil partner is the relative of the extended family member for the purpose of paragraph (2), (3) or (4) or the EEA national who is the partner of the extended family member for the purpose of paragraph (5).’

14. Regulation 17 of the 2006 Regulations, entitled ‘Issue of residence card’, provides:  
‘...

(4) The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if –

- (a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and
- (b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.

(5) Where the Secretary of State receives an application under paragraph (4) he shall undertake an extensive examination of the personal circumstances of the applicant and, if he refuses the application, shall give reasons justifying the refusal unless this is contrary to the interests of national security.

...’

## **II – The facts and main proceedings**

15. On 31 May 2006, Mahbur Rahman, a Bangladeshi national, married an Irish national working in the United Kingdom. Muhammad Sazzadur Rahman, Fazly Rabby Islam, and Mohibullah Rahman, respectively the brother, half-brother and nephew of Mahbur Rahman, applied for residence permits for the United Kingdom as members of the family of a national of an EEA Member State.

16. After that application had been refused by the Secretary of State for the Home Department, they appealed to the Immigration Judge, who granted their application, taking the view that they were ‘dependants’ and directed that their cases be considered for the exercise of discretion under regulation 17(4) of the 2006 Regulations. The Secretary of State for the Home Department sought reconsideration of the case by the Upper Tribunal (Immigration and Asylum Chamber), London, which has decided to stay the proceedings, stating that, whilst the case raised a factual question as to whether or not there existed a situation of dependency, it also raised legal problems the resolution of which required a clear understanding of the scope of the provisions of EU law.

## **III – The questions referred for a preliminary ruling**

17. In order to review the conformity of the United Kingdom legislation with Directive 2004/38, the Upper Tribunal (Immigration and Asylum Chamber), London, considered it necessary to refer the following questions to the Court for a preliminary ruling:

- ‘(1) Does Article 3(2) of Directive 2004/38 ... require a Member State to make legislative provision to facilitate entry to and/or residence in a Member State to the class of other family members who are not nationals of the European Union who can meet the requirements of Article 10(2) [of that directive]?’

- (2) Can such other family member referred to in Question 1 rely on the direct applicability of Article 3(2) of [that directive] ... in the event that he cannot comply with any requirements imposed by national legislative provisions?
- (3) Is the class of other family members referred to in Article 3(2) and Article 10(2) of [Directive 2004/38] ... limited to those who have resided in the same country as the Union national and his or her spouse, before the Union national came to the host State?
- (4) Must any dependency referred to in Article 3(2) of [that directive] ... on which the other family member relies to secure entry to the host State be dependency that existed shortly before the Union citizen moved to the host State?
- (5) Can a Member State impose particular requirements as to the nature or duration of dependency referred to in Article 3(2) of [that directive] ... by such other family member so as to prevent such dependency being contrived or unnecessary to enable a non-national to be admitted to or continue to reside in its territory?
- (6) Must the dependency on which the other family member relies in order to be admitted to the Member State continue for a period or indefinitely in the host State for a residence card to be issued or renewed pursuant to Article 10 of Directive 2004/38 ... and if so how should such dependency be demonstrated?

#### IV – My analysis

##### A – *Admissibility of the reference for a preliminary ruling*

18. The European Commission, without explicitly raising a plea of inadmissibility as regards the reference for a preliminary ruling, expresses certain objections as to the relevance of the first question, arguing that the United Kingdom of Great Britain and Northern Ireland has made legislative provision to facilitate entry and residence of persons whom that Member State considers to come within the scope of Article 3(2) of Directive 2004/38 and that, in the absence of an application by the respondents in the main proceedings for recognition that they have an automatic right of residence in the United Kingdom, all that is in issue before the referring court at the present stage of the proceedings is whether or not the applications must be considered for the exercise of discretion under those national provisions.

19. I wish to point out that it is clear from settled case-law that the procedure provided for by Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they require in order to decide the disputes before them.

20. In the context of that cooperation, it is for the national court alone, before which the dispute has been brought and which must assume responsibility for the subsequent decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to enable it to provide a useful answer to the questions submitted.<sup>6</sup>

6 — See Case C-310/10 *Agafitei and Others* [2011] ECR I-5989, paragraphs 25 and 27 and the case-law cited.

21. In the main proceedings in the present case, the referring court has provided the Court with a detailed outline of the factual and legal background to the dispute in the main proceedings, together with the reasons why it has taken the view that an answer to the questions referred is necessary to enable it to give its judgment.

22. It asks, in particular, about the scope *ratione personae* of Article 3(2) of Directive 2004/38 and about the latitude which that provision allows the Member States. As the German Government correctly observes, these questions would not arise if that provision did not have a binding character and did not require any legislative action on the part of the Member States. The question of the scope of Article 3(2) of Directive 2004/38 therefore appears to require consideration before any other matter.

23. The referring court has also stated that it is uncertain whether the obligation to facilitate entry and residence in accordance with national legislation should be judicially enforceable rather than be the subject of an administrative discretion.<sup>7</sup> It wishes to know, in particular, whether Article 3(2) of Directive 2004/38 precludes national legislation, such as that of the United Kingdom, which confers on the administration a margin of discretion in examining applications for entry and residence made by extended family members. Since the referring court does not appear to rule out the possibility of recognising, in the course of the proceedings, that the respondents in the main proceedings have a right of entry or residence on the basis of that directive, the interpretation of the EU law requested will have a direct impact on their situation.

24. In the light of the foregoing, far from being reversed, the presumption of relevance enjoyed by the question concerning the interpretation of EU law is reinforced by the factual and legal elements presented by the referring court, which indicate that it cannot resolve the matter of which it has been seised without knowing whether the respondents in the main proceedings can be regarded as ‘other dependent family members’ for the purposes of Article 3(2) of Directive 2004/38 and whether, as such, they can claim a derived right of residence based on EU law. The first question for that reason appears to me to be admissible, in the same way as the second to fifth questions.

25. There may, on the other hand, be doubts as the admissibility of the sixth question.

26. It is clear from the order for reference<sup>8</sup> that, by that question, the national court is in fact seeking to ascertain whether adults admitted to reside in the United Kingdom as family members who are then free to work have to remain dependent throughout the period of validity of their residence permit in order to be able to obtain an extension of stay and entitlement to permanent residence. In my view, that question is hypothetical and has no bearing on the main proceedings, since there is nothing whatsoever in the information contained in the order for reference to suggest that the respondents in the main proceedings would be in a position to apply for an extension or a renewal of their residence permits when they are no longer dependent on Mr and Mrs Rahman. It is not possible to answer the question in general and abstract terms without taking into account the reasons why they would no longer be dependent. The answer could be different depending, for example, on whether the family member has found employment in the host Member State or whether he is now being cared for by another person living in his State of origin.

27. As it is not the task of the Court to resolve, in a manner which goes beyond the scope of the specific case which the national court is required to decide, all the difficulties of interpretation which might have been raised by the provisions transposing Article 3(2) of Directive 2004/38 in the United Kingdom, the sixth question must be considered inadmissible.

7 — See, *inter alia*, paragraph 37 of the order for reference.

8 — See paragraph 41 of the order for reference.

B – *Answers to the questions*

1. Preliminary remarks

28. The questions formulated in the operative part of the order for reference touch on three distinct problems.

29. The main concern of the referring court, as is evident from the first and second questions, is to determine the scope of the facilitation obligation under Article 3(2) of Directive 2004/38. In order to provide the national court with all the guidance as to the interpretation of EU law which will be useful to it in resolving the case before it, I think that the first question should be reformulated in such a way as to comprise two limbs, the first seeking to ascertain whether Directive 2004/38 requires the Member States to take measures designed to facilitate entry and residence for persons coming within the scope of Article 3(2) of the directive and the second, if the answer to the first is affirmative, raising the issue of the nature of the measures required of the Member States.

30. The Upper Tribunal (Immigration and Asylum Chamber), London, then enquires, by its third and fourth questions, as to the scope *ratione personae* of Article 3(2)(a) of Directive 2004/38, asking whether that provision covers solely other family members who have resided in the same State as the Union citizen and were depending on him shortly before he moved to the host Member State. In so far as the national court has doubts as to the compatibility with EU law of regulation 8(2)(a) of the 2006 Regulations, which lays down a condition of residence in the same State as the Union citizen, which could frustrate the application by the respondents in the main proceedings, the third question must, in my view, be understood as seeking to ascertain whether Article 3(2) of Directive 2004/38 precludes national legislation which limits the scope of that provision to other family members alone who have resided in the same State as the Union citizen before the latter moved to the host Member State.

31. Lastly, by its fifth question, the referring court seeks clarification as to the extent of the latitude granted to the Member States by Directive 2004/38 as regards the conditions governing recognition of a right of entry and residence for other family members and, more specifically, the possibility for the Member States to make the issue or renewal of a residence permit subject to conditions as to the nature or the duration of the dependency which must exist between the applicant and the Union citizen.

32. Whilst the Court has not yet ruled on the scope of Article 3(2) of Directive 2004/38, the decisions in which it has interpreted other provisions of that directive nevertheless shed light on the reasoning that it intends to follow and therefore allow a framework to be formulated for the interpretation of that provision which may serve as guidance for the answers to the different questions.

33. Four rules of interpretation are evident from the case-law.

34. On the basis of recital 3 in the preamble to Directive 2004/38, which provides that the directive aims in particular to strengthen the right of free movement and residence of all Union citizens, the Court first of all laid down the rule that Union citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals.<sup>9</sup>

35. The Court has ruled, second, that the provisions of that directive must be given a teleological and appropriate interpretation having regard to their objective.<sup>10</sup> It should be stated in this regard that Article 3(2) of Directive 2004/38 responds to two additional concerns.

9 — See Case C-145/09 *Tsakouridis* [2010] ECR I-11979, paragraph 23 and the case-law cited.

10 — See Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraph 68.



36. The first objective of that provision is to promote the free movement of Union citizens. Thus, recital 1 in the preamble to Directive 2004/38 states that 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.<sup>11</sup> With this in mind, the right to family reunification is understood as the corollary to the right of free movement for the Union citizen, based on the principle that the latter may be dissuaded from moving from one Member State to another if he cannot be accompanied by the members of his family. Family reunification thus enjoys indirect protection by reason of the potential impairment of the effectiveness of Union citizenship.

37. According to recital 6 in the preamble to Directive 2004/38, the second objective of Article 3(2) of that directive is to promote family unity. The movement of members of the family of the Union citizen is therefore not exclusively protected as a right derived from the right of free movement enjoyed by the Union citizen, since it also enjoys protection through the right to the maintenance of family unity in a broader sense.

38. The Court has ruled, thirdly, that provisions laying down a fundamental principle such as that of the free movement of persons must be interpreted broadly and must not be deprived of their effectiveness.<sup>12</sup> On the other hand, it has adopted a rule that limitations on the freedom of movement should be interpreted strictly.<sup>13</sup>

39. Fourthly, according to firmly established case-law, the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union.<sup>14</sup> Accordingly, if the wording of a provision of Directive 2004/38 does not give any guidance as to how the terms used in that provision are to be understood and does not contain any reference to national laws as regards the meaning of those terms either, those terms must be regarded, for the purposes of application of that directive, as designating an autonomous concept of EU law which must be interpreted in a uniform manner throughout the Member States, by taking into consideration, inter alia, the context in which the terms occur and the purposes of the rules of which they form part.<sup>15</sup>

40. I shall now examine the different questions asked by the referring court in the light of these various rules of interpretation, which will serve as guidelines.

## 2. Examination of the different questions

### a) The first question

41. By its first question, the referring court is essentially seeking to ascertain whether Article 3(2) of Directive 2004/38 requires the Member States to take measures to facilitate entry and residence for other family members who are nationals of a non-member country and who can meet the requirements of Article 10(2) of that directive and, if so, what is the nature of the measures required of the Member States.

11 — See Case C-162/09 *Lassal* [2010] ECR I-9217, paragraph 29, and Case C-434/09 *McCarthy* [2011] ECR I-3375, paragraph 27.

12 — See Case C-162/09 *Lassal*, paragraph 31.

13 — See Case 139/85 *Kempf* [1986] ECR 1741, paragraph 13.

14 — See Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja* [2011] ECR I-14035, paragraph 32 and the case-law cited.

15 — *Ibid.* (paragraphs 33 and 34 and the case-law cited).

42. Although Article 3(2) of Directive 2004/38 reproduces a provision which already appeared, albeit with slightly different wording, in Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community<sup>16</sup> and in Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services,<sup>17</sup> the Court has not yet had the opportunity to provide guidance on its precise scope. Moreover, a comparative analysis of the measures transposing Article 3(2) of Directive 2004/38 into the law of the Member States reveals significant disparities,<sup>18</sup> which mean that clarification is all the more necessary.

43. Two preliminary remarks should, in my view, be made regarding the scope *ratione personae* of that provision.

44. It should be noted, first, that, whilst the question is asked in a case which concerns nationals of a non-member country, it may also arise in relation to Union citizens who, even though they hold an individual and autonomous right of residence in that capacity, claim a derived right of residence in their capacity as family members.<sup>19</sup> The question may also arise for persons who, on serious health grounds, strictly require personal care by the Union citizen and for a partner with whom the Union citizen has a durable relationship, duly attested, since entry and residence must also be facilitated for these two categories of persons.

45. It should also be borne in mind that, whilst Directive 2004/38 has undoubtedly extended the scope *ratione personae* of the right to family reunification for members of the family of the Union citizen, by including within that category, defined in Article 2(2) of the directive, the partner with whom the Union citizen has contracted a registered partnership, it is still relatively restrictive since, first, in contrast to the previous legislation, it includes only ‘direct’ relatives in the ascending line and ‘direct’ descendants and, second, it make recognition of status as a family member subject to conditions of age and dependency.

46. The judgment to be delivered, which will apply to all categories of persons coming within the scope of Article 3(2) of Directive 2004/28, will therefore have particular importance, even though it will not resolve all the difficulties raised by that provision, the scope of which is relatively uncertain. It will have practical importance, first of all, because cases in which Union citizens wish to be accompanied or joined by family members who are not included in the definition in Article 2(2) of Directive 2004/38 may be frequent. It will also have theoretical importance, as that judgment will form part of the extension of the Court’s case-law, still being developed, which is helping to construct the status of the Union citizen.

47. There are two diametrically opposed interpretations.

48. In the broad interpretation, Article 3(2) of Directive 2004/38 may be understood as requiring the Member States to take measures to establish the existence, in principle, of an individual right of entry and residence for, inter alios, other members of the family of the Union citizen who are dependants or members of his household.

16 — OJ, English Special Edition 1968 (II), p. 475. Article 10(2) of Regulation No 1612/68 provided that ‘Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes’.

17 — OJ 1973 L 172, p. 14. Article 1(2) of Directive 73/148 provided that ‘Member States shall favour the admission of any other member of the family of a national referred to in paragraph 1(a) or (b) or of the spouse of that national, which member is dependent on that national or spouse of that national or who in the country of origin was living under the same roof’.

18 — See the Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38 (COM(2008) 840 final). In that report, produced on 10 December 2008, it is stated that 13 Member States had failed to transpose Article 3(2) of the directive correctly, whilst 10 Member States had extended the automatic right to reside with the Union citizen also to this category of family members (paragraph 3.1).

19 — This could be the case, for example, for a Union citizen who does not work and who does not have sufficient resources to enjoy a right of residence under Article 7(1) of Directive 2004/38 for a period of longer than three months.

49. According to a strict interpretation, that provision may be understood as a mere invitation with no legally binding effect. On that premiss, the Member States would be encouraged only to take measures to facilitate entry and residence for other family members and would not therefore be liable to any penalty in the event of failure to act. Comparable to a wish that the Member States adopt a particular course of action, or a simple recommendation, which has no binding force,<sup>20</sup> that provision would be a fresh expression of ‘soft’ law lacking any coercive character.

50. In my view, neither of these two ‘extremist’ conceptions should be accepted.

51. Several arguments may be marshalled against the broad interpretation.

52. Account must be taken, first of all, of the actual wording of Directive 2004/38. Whilst it confers an automatic right of entry and residence on the ‘family members’ mentioned in Article 2(2), Article 3(2) thereof provides merely that each Member State must ‘facilitate’ entry and residence for extended family members. It is clear from these provisions that the European Union legislature intended to draw a distinction, within the family of the Union citizen, between the closest members, who have an actual and automatic right to enter and reside in the territory of the host Member State with the Union citizen, and the more distant family members, who do not enjoy an individual right of entry and residence under Directive 2004/38. The directive also provides that entry and residence for other family members must be facilitated by each Member State ‘in accordance with its national legislation’, from which it may be inferred that the rights of entry and residence are not derived directly from Directive 2004/38, but necessarily stem from the internal law of the Member State.

53. This distinction is corroborated by recital 6 in the preamble to Directive 2004/38, which is a crucial element for the interpretation of Article 3(2) of that directive, since it was introduced precisely in order to clarify the scope of that provision. Whilst neither the proposal presented by the Commission on 23 May 2001<sup>21</sup> nor the amended proposal which it presented on 15 April 2003<sup>22</sup> included an explanatory recital, it is evident from Common Position (EC) No 6/2004, adopted by the Council of the European Union on 5 December 2003,<sup>23</sup> that the Council added recital 6 ‘in order to clarify the notion of facilitation provided for in Article 3’. This new recital contrasts those persons who are included in the definition of family members under Article 2(2) of Directive 2004/38, who enjoy a right of entry and residence, described as ‘automatic’, with other family members, who do not enjoy such a right.

54. The strict interpretation is not convincing either.

55. It is to be inferred from the use of the verb ‘shall’ in Article 3(2) of Directive 2004/38 that that provision formally imposes an imperative obligation on the Member States, which are required to facilitate entry and residence for other family members.

56. In the minds of those who drafted it, that provision was therefore certainly conceived as a provision not in the order of wishful thinking, but, on the contrary, as a provision binding on the Member States, whatever the extent of the latitude which they are allowed.

20 — Last paragraph of Article 288 TFEU.

21 — Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2001) 257 final).

22 — Amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2003) 199 final).

23 — OJ 2004 C 54 E, p. 12.

57. A comparison of the wording of Article 3(2) of Directive 2004/38 with that of Article 4(2) and (3) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification<sup>24</sup> is revealing. Whereas under Directive 2004/38 the Member States ‘shall facilitate’ entry and residence for members of the family of the Union citizen not falling under the definition of nuclear family, under Directive 2003/86 they ‘may authorise’ the entry and residence of relatives in the ascending line, of adult unmarried children, where they are unable to provide for their needs, and of the unmarried partner of the sponsor, being a national of a non-member country.

58. I accordingly take the view that Article 3(2) of Directive 2004/38 does not merely offer the Member States a possibility, but imposes on them an actual obligation to adopt the measures necessary to facilitate entry and residence for persons coming within the scope of that provision. The substance and precise scope of that obligation still remain to be determined.

59. Whilst the Danish, Polish and United Kingdom Governments and the Commission take the view that Article 3(2) of Directive 2004/38 entails only procedural obligations, the AIRE Centre claims, in its written observations, that there is a ‘presumption of admission’, with the result that where persons in the class of ‘other family members’ are able to produce the evidence required in Article 10(2)(e) of that directive, but do not satisfy the necessary conditions under the national law of the host Member State, it would be for the national court to decide whether the national provisions are sufficient to give full effect to the presumption set out in Article 3(2) of Directive 2004/38.

60. In my view, it is difficult to deny the existence of obligations that are procedural in nature. I take the view that Directive 2004/38 requires the Member States to offer, as a minimum, the possibility for persons coming within the scope of that provision to obtain a decision on their application for entry and residence which is based on an extensive examination of their personal circumstances and, in the event of a refusal, is justified and open to judicial redress.

61. This interpretation of the scope of Article 3(2) of Directive 2004/38 is consistent with the will of the European Union legislature as revealed by recital 6 in the preamble to the directive, which states that the host Member State must conduct an examination of the applicant’s situation, having regard to various circumstances such as his relationship with the Union citizen or his financial or physical dependence on that Union citizen.

62. It would appear to be confirmed, above all, by the final subparagraph of Article 3(2) of Directive 2004/38, which expressly provides that the host Member State must ‘undertake an extensive examination of the personal circumstances and justify any denial of entry or residence to [the] people [mentioned in the first subparagraph]’.

63. By contrast, I do not share the view taken by the AIRE Centre to the effect that other family members benefit from a presumption of admission. First of all, the requirement of a dependency on the Union citizen laid down by Article 3(2)(a) of Directive 2004/38 seems to me to constitute, not a presumption, but a precondition for the applicability of that provision. Second, recognition of a presumption of admission stemming directly from that directive appears to me to be at variance with the reference to the law of the Member States for the purpose of defining the conditions for obtaining the right of entry and residence implied by the clause ‘in accordance with its national legislation’.

64. The facilitation obligation is formulated in general terms, allowing each Member State enormous latitude, the extent of which is further accentuated by the express reference to national legislation. In these circumstances, it is not possible to infer any presumption of admission. In my view, Directive

24 — OJ 2003 L 251, p. 12.

2004/38 requires only a certain degree of harmonisation by means of a measure containing only minimum requirements, which therefore allows differences to remain between Member States in relation to the conditions governing entry and residence for persons covered by Article 3(2) of that directive.

65. This does not mean that Member States have unfettered freedom to facilitate, as they wish, entry and residence for persons coming within the scope of that provision.

66. If a provision of EU law which includes an express reference to the law of the Member States cannot, in principle, be given an independent and uniform interpretation,<sup>25</sup> there should, according to the Court's case-law, be a precise examination of the exact wording of the reference made to national laws in order to circumscribe precisely the latitude accorded to the Member States.<sup>26</sup>

67. The clarification of the terms used by the European Union legislature in Article 3(2) of Directive 2004/38 in defining, albeit by exclusion, the scope *ratione personae* of the facilitation obligation involves, in my view, an independent and uniform interpretation of the notions used in that provision to define its beneficiaries, irrespective of any margin of discretion. It follows that a Member State may not reduce the scope, either directly, by deciding, for example, to exclude from the facilitation measures family members in the direct line beyond a certain degree of relationship, or even collaterals, or the partner with whom the Union citizen has a durable relationship, or indirectly, by laying down conditions which have the purpose or effect of excluding certain categories of beneficiaries. It would not seem possible, for example, to make the rights accorded to the partner with whom the citizen has a durable relationship subject to a requirement of a registered partnership or to a condition of the partnership being treated as equivalent to marriage, as appears in Article 2(2)(b) of Directive 2004/38.

68. In my view, moreover, the margin of discretion accorded to the Member States is limited in two ways.

69. First, in application of the criterion developed in *Garcia Avello*,<sup>27</sup> *Grunkin and Paul*,<sup>28</sup> and *Sayn-Wittgenstein*,<sup>29</sup> and set out in *McCarthy*,<sup>30</sup> the national measure at issue must not have the effect of unjustifiably impeding the exercise by the Union citizen of his right of free movement and residence within the territory of the Member States. It seems to me that such a serious impediment would exist if it were established that the Union citizen was forced to leave the territory of the host Member State or even, *a fortiori*, to leave the territory of the European Union altogether. In this latter situation, according to the clarifications made by the Court in *Dereci and Others*,<sup>31</sup> there would also be a denial of the genuine enjoyment of the substance of the rights attaching to citizenship of the Union, which would entail recognition of a right of residence for family members, since that notion is used by the Court not only as a connecting factor to EU law, to bring within the protective scope of EU law situations which, in the absence of any cross-border element, would normally be excluded from it, but also as a substantive rule, since the genuine enjoyment of the right of residence of the Union citizen effectively confers a right of residence on the members of his family.

70. Second, the margin of discretion enjoyed by the Member States is limited by the obligation to respect the right to private and family life, enshrined in Article 7 of the Charter, which, by virtue of the first subparagraph of Article 6(1) TEU, has acquired the same legal value as the Treaties.

25 — This proposition can be inferred, *a contrario*, from the rule of interpretation mentioned in point 39 of this Opinion.

26 — See, inter alia, Case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 53.

27 — C-148/02 [2003] ECR I-11613.

28 — C-353/06 [2008] ECR I-7639.

29 — C-208/09 [2010] ECR I-13693.

30 — Paragraphs 49 to 53 of that judgment.

31 — C-256/11 [2011] ECR I-11315, paragraph 66.

71. The Court has recognised the fundamental right to family life as forming part of the general principles of EU law. In *Metock and Others*, it stated that ‘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’.<sup>32</sup> In *Dereci and Others*, observing that Article 7 of the Charter contains rights which correspond to those guaranteed by Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950,<sup>33</sup> and that the meaning and scope of the former article are to be the same as those laid down by the latter article, as interpreted by the case-law of the European Court of Human Rights, the Court of Justice held that the referring court in that case had to examine whether the refusal of the right of residence of the applicants, who were non-member country nationals and members of the family of a Union citizen, undermined the right to respect for private and family life.<sup>34</sup>

72. The European Court of Human Rights has repeatedly ruled that Article 8 of the ECHR does not guarantee foreign nationals ‘a right to choose the most suitable place to develop family life’<sup>35</sup> and does not impose on a State ‘a general obligation to respect immigrants’ choice of the country of their matrimonial residence and to authorise family reunion in its territory’.<sup>36</sup> It has nevertheless held that that article may give rise to positive obligations inherent in effective respect for family life,<sup>37</sup> meaning that a State is required to let a person enter its territory.

73. On the basis of this interpretation, the Court of Justice has held that, while the ECHR does not guarantee the right of a foreign national to enter or to reside in a particular State, to refuse to allow a person to enter or reside in a State where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the ECHR. Such an interference will infringe the ECHR if it does not meet the requirements of Article 8(2), that is to say, unless it is ‘in accordance with the law’, motivated by one or more of the legitimate aims under that paragraph and ‘necessary in a democratic society’, that is to say ‘justified by a pressing social need’ and, in particular, proportionate to the legitimate aim pursued.<sup>38</sup>

74. The combination of the right of residence attached to Union citizenship and protection of private and family life, as implemented by EU law, may therefore effectively establish a right of residence for members of the family of the Union citizen.

75. This right need not, it seems to me, be reserved for the closest family members. Whilst Article 8 of the ECHR guarantees only the exercise of the right to respect for an ‘existing’ family life and whilst it has been held, in the specific area of entry, residence and removal of non-nationals, that the family had to be limited to the ‘core family’,<sup>39</sup> the European Court of Human Rights nevertheless generally adopts a broad conception of family life,<sup>40</sup> characterised by the presence of legal or factual elements pointing

32 — Paragraph 62.

33 — ‘ECHR’.

34 — *Dereci and Others*, paragraphs 70 to 72.

35 — See European Court of Human Rights, *Ahmut v. The Netherlands*, judgment of 28 November 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2030, § 71.

36 — See European Court of Human Rights, *Gül v. Switzerland*, judgment of 19 February 1996, *Reports of Judgments and Decisions* 1996-I, p. 174, § 38, and *Ahmut v The Netherlands*, § 67.

37 — See European Court of Human Rights, *Sen v. The Netherlands*, judgment of 21 December 2001, *Reports of Judgments and Decisions* 2001-I, § 31.

38 — Case C-109/01 *Akrich* [2003] ECR I-9607, paragraph 59 and the case-law cited.

39 — See European Court of Human Rights, *Slivenko v. Latvia*, judgment of 9 October 2003, *Reports of Judgments and Decisions* 2003-X, § 94.

40 — Under the auspices of private life, it can also protect relations which could not have been protected by virtue of the right to family life (see *Slivenko v. Latvia*, § 95).

to the existence of a close personal relationship, which makes it possible, for example, to include, under certain circumstances, ties between grandparents and grandchildren<sup>41</sup> or ties between brothers and sisters.<sup>42</sup> Even *de facto* relationships lacking any blood ties have been regarded as constituting ‘family life’.<sup>43</sup>

76. In my view, the principle of non-discrimination does not allow a definition of family with variable geometry depending on whether the members of the family of the Union citizen concerned are themselves Union citizens or nationals of a non-member country. In defining the scope of the fundamental right to private and family life, the notion of family also cannot vary according to the more or less strict definitions under the provisions of secondary law.

77. I conclude that the fundamental right to private and family life may, in principle, be relied on by all categories of persons mentioned in Article 3(2) of Directive 2004/38.

78. With regard to the situation of the respondents in the main proceedings, it has not been established, having regard solely to the facts set out in the order for reference, that the refusal by the United Kingdom authorities to issue residence permits to Mr Rahman’s brother, half-brother and nephew impairs Mrs Rahman’s private and family life. However, in my view, this question can be resolved only in each individual case, in the light of the specific circumstances of each case, and is therefore a matter for the national court, which must ascertain whether there is a disproportionate impairment of Mrs Rahman’s private and family life.

79. It follows that:

- first, Article 3(2) of Directive 2004/38 must be interpreted as requiring the Member States to adopt the measures necessary to facilitate entry and residence in their territory for all persons coming within the scope of that provision, which means that the persons concerned have the possibility to obtain a right of entry and residence following an extensive examination of their application, having regard to their personal circumstances and, in the event of a refusal, a sufficiently justified decision which is open to judicial redress. That provision does not require the Member States to recognise an automatic right of entry and residence for other family members who are nationals of a non-member country and who meet the requirements of Article 10(2)(e) of that directive; and
- second, the primary law of the European Union, in particular its provisions on Union citizenship and protection of private and family life, and Article 3(2) of Directive 2004/38 preclude a Member State from refusing a national of a non-member country who comes within the scope of that provision residence in its territory, in the case where that national wishes to reside with a member of his family who is a Union citizen, where such refusal has the effect of unjustifiably impeding the exercise of the right of the Union citizen concerned to move and reside freely within the territory of the Member States or causes a disproportionate impairment of his right to respect for private and family life, this being a matter which must be ascertained by the referring court.

b) The second question

80. By its second question, the referring court is essentially seeking to ascertain whether Article 3(2) of Directive 2004/38 may be relied on by another family member who would be unable to comply with the requirements imposed by national legislative provisions.

41 — See European Court of Human Rights, *Marckx v. Belgium*, judgment of 13 June 1979, Series A No 31, § 45.

42 — See European Court of Human Rights, *Moustaquim v. Belgium*, judgment of 18 February 1991, Series A No 193. In finding an infringement of Article 8 of the ECHR by reason of the deportation of a Moroccan national from Belgium, the Court took into consideration the fact that the person concerned had brothers and sisters in Belgium.

43 — See European Court of Human Rights, *X, Y and Z v. United Kingdom*, judgment of 22 April 1997, *Reports of Judgments and Decisions* 1997-II, § 36.

81. Without it being necessary to review in detail the firmly established principles governing the direct effect of directives, it should be borne in mind that, according to the Court's case-law, 'wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions of the directive define rights which individuals are able to assert against the State'.<sup>44</sup> The Court on occasion abandons the twofold requirement of unconditionality and precision and considers only the margin of discretion available to the Member States; in such cases, it calls on the national court to ascertain whether the national legislature has kept within the limits of its discretion set by the directive.<sup>45</sup>

82. As has been stated, Article 3(2) of Directive 2004/38, in my view, imposes a specific obligation on the Member States to provide the possibility for persons coming within the scope of that provision to obtain a right of entry and residence following a detailed examination of their application. This minimal procedural obligation has the twofold character of precision and unconditionality which is required if a provision contained in a directive is to have direct effect.

83. Despite the relatively wide latitude accorded to the Member States, in particular in determining the conditions for the grant of the rights of entry or residence, I have stated that national legislation may not limit the scope of Article 3(2) of Directive 2004/38 by directly or indirectly restricting the categories of beneficiaries. I therefore consider that individuals who would be excluded from the benefit of the provisions of domestic law transposing the facilitation obligation by reason of particular requirements which are not provided for in that directive could invoke, before the national court, the incompatibility of that legislation with Article 3(2) of Directive 2004/38.

84. With more specific regard to the situation of the respondents in the main proceedings, if it is established that they actually fall within the category of other dependent family members within the meaning of Directive 2004/38, they could challenge the refusal to examine their application which was justified on the ground that they did not reside in the same State as the Rahman couple before that couple moved to the United Kingdom.<sup>46</sup>

85. On the basis of the foregoing, I propose that the Court answer the second question to the effect that Article 3(2) of Directive 2004/38 confers on other family members who comply with the conditions laid down in that provision the right to rely on it before a national court in order, in particular, to disapply the particular requirements which would restrict its scope.

### c) The third and fourth questions

86. By its third question, the referring court essentially wishes to establish whether or not the class of other family members referred to in Article 3(2)(a) of Directive 2004/38 is limited to those who have resided in the same State as the Union national and his or her spouse, before the Union national came to the host Member State.

87. By its fourth question, the referring court asks, in essence, whether the dependency on the Union citizen or his or her spouse, required in Article 3(2)(a) of that directive, must have existed shortly before the Union citizen moved to the host Member State.

44 — Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 11. For an application of that rule to a provision of Directive 2004/38, see Case C-434/10 *Aladzhev* [2011] ECR I-11659, paragraph 32.

45 — Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 66 and the case-law cited.

46 — See the arguments outlined in response to the third question.



88. It should be noted, as a preliminary point, that, in accordance with the principle set out in point 39 of this Opinion and the interpretation of the reference to the law of the Member States suggested above, I consider that the concepts used in Article 3(2) of Directive 2004/38 to define the beneficiaries of that provision must be given an independent and uniform interpretation.

89. In so far as that provision applies to any other family members who are ‘dependants *or* [47] members of the household’ of the Union citizen, I share the Commission’s view that a distinction should be drawn between the situation of ‘dependants’ and the situation of ‘members of the household’ of the Union citizen.

90. Whilst it would seem self-evident that family members who declare themselves to be members of the household of a Union citizen must prove that they reside with the Union citizen, and thus necessarily in the same State, I take the view, conversely, that ‘dependent’ family members cannot be excluded from the scope of Article 3(2)(a) of Directive 2004/38 on the ground that they have not resided in the same State as the Union citizen whom they wish to accompany or join. This view is based on reasons relating to the wording of the provisions of the directive and its purpose, and to the case-law of the Court.

91. It should be noted that the family members for whom the Member States are required to facilitate entry and residence are defined, under Article 3(2)(a) of the directive, as those who, ‘in the country from which they have come’, are dependants or members of the household of the Union citizen having the primary right of residence. Nothing in the wording of this provision suggests that the general expression ‘country from which they have come’, which encompasses both the Member States and non-member countries, should refer only to the EU State from which the Union citizen who has exercised his free movement comes. Moreover, some language versions show that the notion of ‘country from which they have come’ necessarily refers to the family members and not to the Union citizen.<sup>48</sup>

92. Similarly, Article 10(2)(e) of Directive 2004/38, which exhaustively lists the documents which nationals of a non-member country falling within the category under Article 3(2)(a) of that directive may be required to present to the host Member State in order to obtain a residence card, provides that those documents may be issued by the relevant authority in the ‘country of origin or country from which they are arriving’, without providing for the possibility for the host Member State to require documents furnishing proof of any residence in the same State as the Union citizen.

93. This reading is confirmed by the purpose of Directive 2004/38, which seeks to facilitate the free movement of Union citizens and to maintain the unity of their families, irrespective of any considerations relating to the country of origin of the other family members or the country from which they are arriving.

94. The Court followed an identical approach in defining the notion of dependent descendants or dependent relatives in the ascending line in the measures prior to Directive 2004/38 which governed freedom of movement for employed and self-employed workers and for service providers.

95. Far from making the existence of a dependency subject to any condition relating to the prior residence of the family member and the Union citizen in the same State, the Court ruled that the status of ‘dependent’ family member is the result of a factual situation characterised by the fact that material support for that family member is provided by the Union citizen who has exercised his right of free movement or by his spouse.<sup>49</sup>

47 — Emphasis added.

48 — For example, the English version reads:

‘any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which *they* have come, are dependants or members of the household of the Union citizen ...’

49 — Case C-1/05 *Jia* [2007] ECR I-1, paragraph 35 and the case-law cited.

96. The Court has also held, with regard to Article 6 of Directive 73/148, that the need for material support must exist in the State of origin of those relatives or the State whence they came ‘at the time when they apply to join the [Union citizen]’.<sup>50</sup>

97. According to the Court, that was the necessary conclusion having regard to Article 4(3) of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families,<sup>51</sup> according to which proof of the status of dependent relative in the ascending line of a worker or his spouse within the meaning of Article 10 of Regulation No 1612/68 had to be provided by a document issued by the competent authority of the ‘State of origin or the State whence they came’, testifying that the relative concerned was dependent on the worker or his spouse.<sup>52</sup>

98. I am unable to identify any reason to adopt a different definition of the notion of ‘dependant’ for the purposes of Article 3(2)(a) of Directive 2004/38 and to make such classification contingent on a condition of residence in the same State as the Union citizen.

99. Nor does there appear to be anything to justify a requirement that the situation of dependency must have existed shortly before the Union citizen moved to the host Member State, when the relevant criterion is the time at which the application for entry and residence is made. If the dependency existed at the time of settlement in the host Member State, but has been interrupted since then, the condition laid down by Article 3(2) of Directive 2004/38 will not be satisfied. If, on the other hand, the situation of dependency arises after the Union citizen enters the host Member State, the family member may be regarded as being ‘dependent’. This could be the case, for example, for a Union citizen who, after exercising his right of free movement, is required to care for a nephew whose parents have recently died.

100. According to the principle of interpretation mentioned in point 34 of this Opinion, the rules developed in the case-law should be applied pursuant to the provisions prior to Directive 2004/38, without it being possible to infer any ground to justify the notion of ‘dependant’ being given a different assessment depending on whether the national of a non-member country concerned belongs to the category of family members mentioned in Article 3(1) of the directive or to the category of other family members mentioned in Article 3(2) of the directive.

101. It follows from the foregoing that Article 3(2)(a) of Directive 2004/38 must be interpreted to the effect that:

- it precludes national legislation which limits the scope of that provision to other family members who resided in the same State as the Union national before the Union national came to the host Member State, and
- the notion of ‘dependant’ does not imply that dependency existed shortly before the Union citizen moved to the host Member State.

#### d) The fifth question

102. By its fifth question, the referring court is essentially seeking to ascertain whether the Member States may make entry and residence for another family member subject to particular requirements as to the nature or duration of the dependency referred to in Article 3(2)(a) of Directive 2004/38.

<sup>50</sup> — Ibid. (paragraph 37).

<sup>51</sup> — OJ, English Special Edition 1968 (II), p. 485.

<sup>52</sup> — Case C-1/05 *Jia*, paragraph 38.

103. The answer to this question necessarily follows from the preceding answers.

104. For the purposes of Article 3(2)(a) of Directive 2004/38, the notion of ‘dependant’ must be given a uniform and independent definition, with the result that the facilitation obligation, interpreted to the effect that any person coming within the scope of that provision may obtain a detailed examination of his application and, in the event of a refusal, an adequately reasoned decision cannot be made subject to compliance with particular requirements as to the nature or duration of dependency.

105. By contrast, in so far as I take the view that that provision does not imply the automatic grant of a right of residence, I cannot identify any fundamental obstacle to a Member State laying down particular conditions for obtaining the right of entry and residence in order to ensure the reality, effectiveness and duration of the dependency.

106. Such conditions must, however, respect the principle of effectiveness, which presupposes that they must not be framed in such a way as to render practically impossible the exercise of the rights conferred by the EU legal order. Accordingly, the conditions laid down by the Member States cannot deprive, *de facto*, persons coming within the scope of that provision of all possibility of obtaining a right of entry and residence. For example, a national provision would be unacceptable if it provided that, in order to be able to benefit from a right of residence, a national of a non-member country had to prove that he had been dependent on the Union citizen for more than 20 years.

107. Furthermore, conditions as to the nature or duration of dependency may constitute restrictions on the admission of other family members, which the Member States are, however, required to facilitate. Consequently, in order to be permissible, they must pursue a legitimate objective, be appropriate for securing the attainment of that objective and must not go beyond what is necessary to attain it.

108. Consequently, I take the view that Article 3(2)(a) of Directive 2004/38 does not preclude national legislation which makes entry and residence for a national of a non-member country subject to conditions as to the nature or duration of dependency, provided that those conditions pursue a legitimate objective, are appropriate for securing the attainment of that objective and do not go beyond what is necessary to attain it.

## V – Conclusion

109. In the light of the foregoing, I propose that the Court reply in the following terms to the questions referred for a preliminary ruling by the Upper Tribunal (Immigration and Asylum Chamber), London:

- (1) Article 3(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC must be interpreted as requiring the Member States to adopt the necessary measures to facilitate entry and residence in their territory for all persons coming within the scope of that provision, which means that the persons concerned have the possibility to obtain a right of entry and residence following an extensive examination of their application, having regard to their personal circumstances and, in the event of a refusal, a sufficiently justified decision which is open to judicial redress procedures. That provision does not require the Member States to recognise an automatic right of entry and residence for other family members who are nationals of a non-member country and who meet the requirements of Article 10(2)(e) of Directive 2004/38.

- (2) The primary law of the European Union, in particular its provisions on Union citizenship and protection of private and family life, and Article 3(2) of Directive 2004/38 preclude a Member State from refusing a national of a non-member country who comes within the scope of that provision residence in its territory, where that national wishes to reside with a member of his family who is a Union citizen, where such refusal has the effect of unjustifiably impeding the exercise of the right of the Union citizen concerned to move and reside freely within the territory of the Member States or causes a disproportionate impairment of his right to respect for private and family life, which must be ascertained by the referring court.
- (3) Article 3(2) of Directive 2004/38 confers on other family members who comply with the conditions laid down in that provision the right to rely on it before a national court in order, in particular, to disapply the particular requirements which would restrict its scope.
- (4) Article 3(2)(a) of Directive 2004/38 must be interpreted to the effect that:
  - it precludes national legislation which limits the scope of that provision to other family members who resided in the same State as the Union national before the Union national came to the host Member State;
  - the notion of ‘dependant’ does not imply that dependency existed shortly before the Union citizen moved to the host Member State, and
  - it does not preclude national legislation which makes entry and residence for a national of a non-member country subject to conditions as to the nature or duration of dependency, provided that those conditions pursue a legitimate objective, are appropriate for securing the attainment of that objective and do not go beyond what is necessary to attain it.