



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

16 January 2014*

(Request for a preliminary ruling — Directive 2004/38/EC — Article 16(2) and (3) — Right of permanent residence of third-country nationals who are family members of a Union citizen — Taking into consideration of periods of imprisonment of those nationals)

In Case C-378/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Upper Tribunal (Immigration and Asylum Chamber), London (United Kingdom), made by decision of 11 July 2012, received at the Court on 3 August 2012, in the proceedings

Nnamdi Onuekwere

v

Secretary of State for the Home Department,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, J.L. da Cruz Vilaça, G. Arestis, J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: Y. Bot,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 27 June 2013,

after considering the observations submitted on behalf of:

- Mr Onuekwere, by M. Henderson and C. Meredith, Barristers, and by D. Furner, Solicitor,
- the United Kingdom Government, by S. Brighthouse and H. Walker, acting as Agents, and by R. Palmer, Barrister,
- the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,
- the German Government, by T. Henze and J. Möller, acting as Agents,
- Ireland, by E. Creedon, acting as Agent,
- the Italian Government, by G. Palmieri, acting as Agent, and by G. Palatiello, avvocato dello Stato,

* Language of the case: English.

— the Polish Government, by B. Majczyna and M. Szpunar, acting as Agents,
— the European Commission, by M. Wilderspin and C. Tufvesson, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 3 October 2013,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 16(2) and (3) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).
- 2 The request has been made in the context of proceedings between Mr Onuekwere and the Secretary of State for the Home Department ('the Secretary of State'), concerning a decision refusing Mr Onuekwere the benefit of a permanent residence card as a family member of a Union citizen.

Legal context

Union law

- 3 Pursuant to recitals 17 and 18 in the preamble to Directive 2004/38:
 - '(17) 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.
 - (18) In order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions.'
- 4 Under the heading 'Definitions', Article 2 of Directive 2004/38 states:

'For the purposes of this Directive:

 - (1) "Union citizen" means any person having the nationality of a Member State;
 - (2) "Family member" means:
 - (a) the spouse;
 - ...

(3) “Host Member State” means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence’.

5 Article 3 of that directive, which is entitled ‘Beneficiaries’, provides in paragraph 1:

‘This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.’

6 Article 7 of that directive, entitled ‘Right of residence for more than three months’, is worded as follows:

‘1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c)

— are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

— have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

...

4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.’

7 Under Chapter IV, headed ‘Right of permanent residence’, Article 16 of Directive 2004/38, entitled ‘General rule for Union citizens and their family members’, provides:

‘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. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.'

United Kingdom law

- 8 The Immigration (European Economic Area) Regulations 2006 implement the provisions of Directive 2004/38 in the law of the United Kingdom.
- 9 Under the heading 'Permanent right of residence', Article 15 of those regulations transposes Article 16 of Directive 2004/38.

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 10 Mr Onuekwere is a Nigerian national. On 2 December 1999, he married an Irish national exercising her right of freedom of movement and residence in the United Kingdom. He had two children with her. On 5 September 2000, he obtained, as a family member of a Union citizen, a residence permit valid for five years in the United Kingdom.
- 11 On 26 June 2000, Mr Onuekwere was sentenced to a term of imprisonment of nine months, which was suspended for two years. That conviction did not give rise to actual imprisonment of the person concerned.
- 12 On 16 September 2004, Mr Onuekwere was convicted again for an offence committed in 2003. Although the prison sentence handed down was for two years and six months, Mr Onuekwere was released on 16 November 2005. However, by a decision of 18 November 2005, the Secretary of State ordered the expulsion of Mr Onuekwere from the United Kingdom. That decision was annulled on the ground that Mr Onuekwere was the spouse of a Union citizen exercising rights conferred by the EC Treaty.
- 13 During January 2008, Mr Onuekwere was imprisoned again for another offence. On 8 May 2008, he was sentenced to two years and three months of imprisonment. Mr Onuekwere was released on 6 February 2009, but the Secretary of State again ordered his expulsion from the United Kingdom. However, on 29 June 2010, the Upper Tribunal (Immigration and Asylum Chamber), London, annulled the Secretary of State's decision ordering that expulsion. While stating that the right of permanent residence within the meaning of Article 16 of Directive 2004/38 had been acquired only by Mr Onuekwere's wife, that tribunal held that the factors particular to Mr Onuekwere's circumstances prevailed over the public interest in his expulsion on grounds of public policy.
- 14 Mr Onuekwere subsequently submitted a request for a permanent residence card, which the Secretary of State dismissed by a decision of 24 September 2010. Whilst the First-tier Tribunal (Immigration and Asylum Chamber) held that Mr Onuekwere had a right of residence, that tribunal nevertheless confirmed that he had no right of permanent residence. Mr Onuekwere brought an action before the referring tribunal.

- 15 That tribunal observes that, if the periods of imprisonment of Mr Onuekwere, lasting three years and three months in total, are excluded from the calculation of the duration of Mr Onuekwere's residence in the United Kingdom, that residence, although interrupted by those periods, is of a duration exceeding five years. By contrast, if those periods must be taken into consideration, Mr Onuekwere's residence in the United Kingdom would be of a duration of nine years and three months at the date of the decision at issue in the main proceedings and of a duration of more than ten years at the date of submission of the request for a preliminary ruling.
- 16 It was against that background that the Upper Tribunal (Immigration and Asylum Chamber), London, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- '(1) In what circumstances, if any, will a period of imprisonment constitute legal residence for the purposes of the acquisition of a permanent right of residence under Article 16 of [Directive 2004/38]?
- (2) If a period of imprisonment does not qualify as legal residence, is a person who has served a period of imprisonment permitted to aggregate periods of residence before and after his imprisonment for the purposes of calculating the period of five years needed to establish a permanent right of residence under [Directive 2004/38]?'

The questions referred

The first question

- 17 By its first question the referring tribunal asks, in essence, whether Article 16(2) of Directive 2004/38 must be interpreted as meaning that periods of imprisonment in the host Member State of a third-country national, who is a family member of a Union citizen who has acquired the right of permanent residence in that Member State during those periods, may be taken into consideration for the purposes of the acquisition by that national of a right of permanent residence for the purposes of that provision.
- 18 As a preliminary point, it must be observed that, in accordance with Article 16(2) of Directive 2004/38, the acquisition of a right of permanent residence by family members of a Union citizen who are not nationals of a Member State is dependent, in any event, on the fact that, first, the Union citizen himself satisfies the conditions laid down in Article 16(1) of that directive and, secondly, that those family members have resided with him for the period in question (see Case C-529/11 *Alarape and Tijani* [2013] ECR, paragraph 34).
- 19 In that regard, the requirement for family members of a Union citizen who are not nationals of a Member State to reside with that citizen in the host Member State for the period concerned implies that those family members necessarily and concurrently have a right of residence under Article 7(2) of Directive 2004/38 as family members accompanying or joining that citizen, in such a way that only the periods of residence of those family members which satisfy the condition laid down in Article 7(2) of that directive may be taken into consideration (see *Alarape and Tijani*, paragraphs 36 and 37).
- 20 According to Mr Onuekwere, since, at the time of the acquisition of the right of permanent residence by his wife, the latter had satisfied the conditions set out in Article 7(1)(a), (b) or (c) of Directive 2004/38 for a continuous period of five years, he in turn had satisfied the condition laid down in Article 7(2) of that directive for that same period of his residence in the host Member State. That

period ought accordingly to be taken into consideration for the purposes of his acquisition of the right of permanent residence within the meaning of Article 16(2) of that directive, notwithstanding the fact that he was imprisoned for part of that period.

- 21 As all the Member States which submitted observations and the European Commission point out, that argument cannot be accepted.
- 22 As is clear from the very terms and the purpose of Article 16(2) of Directive 2004/38, periods of imprisonment cannot be taken into consideration for the purposes of the acquisition of a right of permanent residence for the purposes of that provision.
- 23 First, as was noted in paragraph 18 of the present judgment, the acquisition, in accordance with Article 16(2) of Directive 2004/38, of the right of permanent residence of family members of a Union citizen who are not nationals of a Member State is dependent, in any event, not only on the fact that the Union citizen himself satisfies the conditions laid down in Article 16(1) of that directive, but also on the fact that those family members have resided legally and continuously ‘with’ that citizen for the period in question, the word ‘with’ reinforcing the condition that those family members must accompany or join that same citizen.
- 24 Secondly, it must be recalled that, as recital 17 in the preamble to Directive 2004/38 states, the right of permanent residence is a key element in promoting social cohesion and was provided for by that directive in order to strengthen the feeling of Union citizenship. The EU legislature accordingly made the acquisition of the right of permanent residence pursuant to Article 16(1) of Directive 2004/38 subject to the integration of the citizen of the Union in the host Member State (see Case C-162/09 *Lassal* [2010] ECR I-9217, paragraphs 32 and 37).
- 25 Such integration, which is a precondition of the acquisition of the right of permanent residence laid down in Article 16(1) of Directive 2004/38 is based not only on territorial and temporal factors but also on qualitative elements, relating to the level of integration in the host Member State (see Case C-325/09 *Dias* [2011] ECR I-6387, paragraph 64), to such an extent that the undermining of the link of integration between the person concerned and the host Member State justifies the loss of the right of permanent residence even outside the circumstances mentioned in Article 16(4) of Directive 2004/38 (see, to that effect, *Dias*, paragraphs 59, 63 and 65).
- 26 The imposition of a prison sentence by the national court is such as to show the non-compliance by the person concerned with the values expressed by the society of the host Member State in its criminal law, with the result that the taking into consideration of periods of imprisonment for the purposes of the acquisition by family members of a Union citizen who are not nationals of a Member State of the right of permanent residence for the purposes of Article 16(2) of Directive 2004/38 would clearly be contrary to the aim pursued by that directive in establishing that right of residence.
- 27 In view of all the foregoing considerations, the answer to the first question is that Article 16(2) of Directive 2004/38 must be interpreted as meaning that the periods of imprisonment in the host Member State of a third-country national, who is a family member of a Union citizen who has acquired the right of permanent residence in that Member State during those periods, cannot be taken into consideration of the context of the acquisition by that national of the right of permanent residence for the purposes of that provision.

The second question

- 28 By its second question the referring tribunal asks, in essence, whether Article 16(2) and (3) of Directive 2004/38 must be interpreted as meaning that continuity of residence is interrupted by periods of imprisonment in the host Member State of a third-country national who is a family member of a Union citizen who has acquired the right of permanent residence in that Member State during those periods.
- 29 In that regard, it should be pointed out that, as was noted in paragraph 18 of the present judgment, under Article 16(2) of Directive 2004/38, the acquisition of a right of permanent residence by family members of a Union citizen who are not nationals of a Member State is dependent, amongst other conditions, on the fact that those family members have legally resided with that citizen for a continuous period of five years.
- 30 That condition of continuity of legal residence satisfies the integration requirement which is a precondition of the acquisition of the right of permanent residence, noted in paragraphs 24 and 25 of the present judgment, and the overall context of Directive 2004/38, which introduced a gradual system as regards the right of residence in the host Member State, which reproduces, in essence, the stages and conditions set out in the various instruments of European Union law and case-law preceding the directive and culminates in the right of permanent residence (see Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja* [2011] ECR I-14051, paragraph 38, and *Alarape and Tijani*, paragraph 46).
- 31 As was noted in paragraph 26 of the present judgment, the imposition of a prison sentence by a national court is such as to show the non-compliance by the person concerned with the values expressed by the society of the host Member State in its criminal law, with the result that the taking into consideration of periods of imprisonment for the purposes of the acquisition by family members of a Union citizen who are not nationals of a Member State of the right of permanent residence for the purposes of Article 16(2) of Directive 2004/38 would clearly be contrary to the aim pursued by that directive in establishing that right of residence.
- 32 It follows that the answer to the second question is that Article 16(2) and (3) of Directive 2004/38 must be interpreted as meaning that continuity of residence is interrupted by periods of imprisonment in the host Member State of a third-country national who is a family member of a Union citizen who has acquired the right of permanent residence in that Member State during those periods.

Costs

- 33 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Article 16(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 meaning that the periods of imprisonment in the host Member State of a third-country national, who is a family member of a Union citizen who has acquired the right of**

permanent residence in that Member State during those periods, cannot be taken into consideration in the context of the acquisition by that national of the right of permanent residence for the purposes of that provision.

- 2. Article 16(2) and (3) of Directive 2004/38 must be interpreted as meaning that the continuity of residence is interrupted by periods of imprisonment in the host Member State of a third-country national who is a family member of a Union citizen who has acquired the right of permanent residence in that Member State during those periods.**

[Signatures]