



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

16 January 2014*

(Request for a preliminary ruling — Directive 2004/38/EC — Article 28(3)(a) — Protection against expulsion — Method for calculating the 10-year period — Whether periods of imprisonment are to be taken into account)

In Case C-400/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Upper Tribunal (Immigration and Asylum Chamber), London (United Kingdom), made by decision of 24 August 2012, received at the Court on 31 August 2012, in the proceedings

Secretary of State for the Home Department

v

M.G.,

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: M. Wathelet,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 June 2013,

after considering the observations submitted on behalf of:

- M.G., by R. Drabble QC, L. Hirst, Barrister, and E. Sibley,
- the United Kingdom Government, by A. Robinson, acting as Agent, assisted by R. Palmer, Barrister,
- the Estonian Government, by M. Linntam and N. Grünberg, acting as Agents,
- Ireland, by E. Creedon, acting as Agent, assisted by D. Conlan Smyth, Barrister,
- the Polish Government, by B. Majczyna and M. Szpunar, acting as Agents,
- the European Commission, by M. Wilderspin and C. Tufvesson, acting as Agents,

* Language of the case: English.

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 28(3)(a) 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 proceedings between the Secretary of State for the Home Department ('the Secretary of State') and Ms G. concerning a decision to expel her from the United Kingdom.

Legal context

European Union law

- 3 According to recitals 23 and 24 in the preamble to Directive 2004/38:
 - '(23) Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.
 - (24) Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child of 20 November 1989.'
- 4 Article 2 of Directive 2004/38, entitled 'Definitions', 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, entitled ‘Beneficiaries’, provides:

‘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 Chapter III of that directive, entitled ‘Right of residence’, comprises Articles 6 to 15. Article 6 concerns the ‘[r]ight of residence for up to three months’ and Article 7 makes provision, subject to certain conditions, for a ‘[r]ight of residence for more than three months’.

7 In Chapter IV of Directive 2004/38 (‘Right of permanent residence’), Article 16, which is 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.’

8 In Chapter VI of Directive 2004/38 (‘Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health’), Article 27, which is entitled ‘General principles’, provides:

‘1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the

residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.

4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.'

- 9 Article 28 of Directive 2004/38, entitled 'Protection against expulsion', which also falls within Chapter VI, provides:

'1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

- (a) have resided in the host Member State for the previous 10 years; or
- (b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.'

United Kingdom law

- 10 The Immigration (European Economic Area) Regulations 2006 [(the Immigration Regulations')] transpose Directive 2004/38 into national law.
- 11 Regulation 21 of the Immigration Regulations, entitled 'Decisions taken on public policy, public security and public health grounds', transposes Articles 27 and 28 of Directive 2004/38 into national law.

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

- 12 Ms G. is a Portuguese national. On 12 April 1998, she entered the United Kingdom with her husband, who is also a Portuguese national. Ms G. was employed from May 1998 to March 1999. In March 1999, she gave up work to have her first child, who was born in June 1999. Ms G. and her husband had two further children between 2001 and 2004. Ms G. was supported financially by her husband during that period of inactivity and up until the couple's separation in December 2006. Despite that separation, Ms G. and her husband are still married.

- 13 In April 2008, Ms G.'s children were placed in foster care following a report by hospital staff that injuries to one of the children were non-accidental. On 21 November 2008, a family court judge determined that Ms G. had been responsible for injuries caused to one of her children. On 27 August 2009, having been convicted on one count of cruelty and three counts of assault by beating a person under 16 years, Ms G. was sentenced to 21 months' imprisonment.
- 14 Following Ms G.'s conviction, her husband was awarded custody of the children. While she was in prison, Ms G. was granted the right to have supervised contact with her children in public. In April 2010, however, the local authorities stopped that contact and, in August 2010, made an application for contact to be suspended. On 5 July 2011, a family court judge decided to maintain the supervision order, to restrict contact to indirect contact and also to make a prohibited steps order, stating that Ms G. had yet to demonstrate that she could maintain a stable, drug-free lifestyle.
- 15 On 11 May 2010, while she was still in prison, Ms G. applied to the Secretary of State for a certificate of permanent residence in the United Kingdom. On 8 July 2010, the Secretary of State refused the application and ordered that Ms G. be deported on grounds of public policy and public security pursuant to Regulation 21 of the Immigration Regulations.
- 16 On 11 July 2010, Ms G. remained in custody despite having served her sentence, owing to the Secretary of State's decision ordering her deportation. In that decision, the Secretary of State took the view, first, that the enhanced protection against expulsion provided for in Article 28(3)(a) of Directive 2004/38 is dependent on the integration of the Union citizen into the host Member State and that such integration cannot take place while that citizen is in prison. Secondly, the Secretary of State found that Ms G. was not entitled to the intermediate level of protection against expulsion because she had not shown that she had acquired a right of permanent residence and, in any event, there were serious grounds of public policy and public security for expelling her. Thirdly, the Secretary of State found that, *a fortiori*, Ms G. was not entitled to the basic level of protection against expulsion.
- 17 Ms G. appealed to the First-tier Tribunal (Immigration and Asylum Chamber) ('the First-tier Tribunal'), which allowed the appeal on 10 January 2011, holding that Ms G. had resided in the United Kingdom for a period of over 10 years prior to the deportation order and that the Secretary of State had failed to demonstrate the existence of imperative grounds of public security. However, the First-tier Tribunal also found that, in the absence of evidence to show that her husband had been employed or that he had otherwise exercised rights conferred by the FEU Treaty, Ms G. had not proved that she had acquired a right of permanent residence for the purposes of Directive 2004/38.
- 18 The Secretary of State brought an appeal before the Upper Tribunal (Immigration and Asylum Chamber) ('the referring court') against the decision of the First-tier Tribunal. By decision notified on 13 August 2011, the referring court set aside the decision of the First-tier Tribunal on the ground that it was contrary to precedent.
- 19 In the proceedings before the referring court, the Secretary of State accepted that, in May 2003, Ms G. had acquired a right of permanent residence for the purposes of Directive 2004/38 and that she had not subsequently lost that right. However, the parties to the main proceedings continue to take different positions both as regards the method of calculating the 10-year period referred to in Article 28(3)(a) of Directive 2004/38 and as regards the assessment, in the circumstances of the case, of serious grounds of public policy or public security as referred to in Article 28(1) and (2) of that directive.
- 20 In September 2011, while the proceedings before the First-tier Tribunal and the referring court were still under way, the family court proceedings came to a close after Ms G.'s husband moved to Manchester (United Kingdom). Ms G. remained in custody until 20 March 2012.

- 21 In those circumstances, the Upper Tribunal (Immigration and Asylum Chamber), London, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
1. Does a period in prison following sentence for commission of a criminal offence by a Union citizen break the residence period in the host Member State required for that person to benefit from the highest level of protection against expulsion under Article 28(3)(a) of Directive 2004/38 ... or otherwise preclude the person relying on this level of protection?
 2. Does reference to “previous ten years” in Article 28(3)(a) [of Directive 2004/38] mean that the residence has to be continuous in order for a Union citizen to be able to benefit from the highest level of protection against expulsion?
 3. For the purposes of Article 28(3)(a), is the requisite period of 10 years during which a Union citizen must have resided in the host Member State calculated
 - (a) by counting back from the expulsion decision; or
 - (b) by counting forward from the commencement of that citizen’s residence in the host Member State?
 4. If the answer to Question 3(a) is that the 10-year period is calculated by counting backwards, does it make a difference if the person has accrued 10 years’ residence prior to such imprisonment?

Consideration of the questions referred

Questions 2 and 3

- 22 By its second and third questions, which it is appropriate to examine first, the referring court asks, in essence: (i) whether the 10-year period of residence referred to in Article 28(3)(a) of Directive 2004/38 must be calculated by counting backwards (from the decision ordering the expulsion of the person concerned) or forwards (from the commencement of that person’s residence) and (ii) whether that period must be continuous.
- 23 In that regard, it should first be noted that the Court has found that, while recitals 23 and 24 in the preamble to Directive 2004/38 certainly refer to special protection for persons who are genuinely integrated into the host Member State, especially if they were born there and have spent all their life there, the fact remains that, in view of the wording of Article 28(3) of that directive, the decisive criterion is whether the Union citizen lived in that Member State for the 10 years preceding the expulsion decision (see Case C-145/09 *Tsakouridis* [2010] ECR I-11979, paragraph 31).
- 24 It follows that, unlike the requisite period for acquiring a right of permanent residence, which begins when the person concerned commences lawful residence in the host Member State, the 10-year period of residence necessary for the grant of the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 must be calculated by counting back from the date of the decision ordering that person’s expulsion.
- 25 Secondly, the Court has also found that Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that, in order to determine whether a Union citizen resided in the host Member State for the 10 years preceding the expulsion decision – the decisive criterion for granting enhanced protection under that provision – all relevant factors must be taken into account in each individual case, in particular the duration of each period of absence from the host Member State, the cumulative

duration and the frequency of those absences, and the reasons why the person concerned left the host Member State, which may establish whether those absences involve the transfer to another Member State of the centre of the personal, family or occupational interests of the person concerned (*Tsakouridis*, paragraph 38).

- 26 Those findings were intended to explain to what extent absences from the host Member State during the period referred to in Article 28(3)(a) of Directive 2004/38 prevent the person concerned from enjoying the enhanced protection provided for in that provision and were based on the prior finding of fact that that provision makes no reference to any circumstances which are capable of interrupting the 10-year period of residence needed to acquire the right to that protection (see, to that effect, *Tsakouridis*, paragraphs 22 and 29).
- 27 Given that the decisive criterion for granting the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 is the fact that the person concerned resided in the host Member State for the 10 years preceding the expulsion decision and that absences from that State can affect whether or not such protection is granted, the period of residence referred to in that provision must, in principle, be continuous.
- 28 In the light of all of the foregoing, the answer to Questions 2 and 3 is that, on a proper construction of Article 28(3)(a) of Directive 2004/38, the 10-year period of residence referred to in that provision must, in principle, be continuous and must be calculated by counting back from the date of the decision ordering the expulsion of the person concerned.

Questions 1 and 4

- 29 By its first and fourth questions, the referring court asks, in essence, whether Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that a period of imprisonment is capable of interrupting the continuity of the period of residence for the purposes of that provision and may, as a result, affect the decision regarding the grant of the enhanced protection provided for thereunder, even where the person concerned resided in the host Member State for the 10 years prior to imprisonment.
- 30 In that regard, the Court has already found that the system of protection against expulsion measures established by Directive 2004/38 is based on the degree of integration of the persons concerned in the host Member State and that, accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be, in view of the fact that such expulsion can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the FEU Treaty, have become genuinely integrated into the host Member State (see, to that effect, *Tsakouridis*, paragraphs 24 and 25).
- 31 The Court has also found, when interpreting Article 16(2) of Directive 2004/38, that the fact that a national court has imposed a custodial sentence is an indication that the person concerned has not respected the values of the society of the host Member State, as reflected in its criminal law, and that, in consequence, the taking into consideration of periods of imprisonment for the purposes of the acquisition, by members of the family of a Union citizen who are not nationals of a Member State, of the right of permanent residence as referred to in Article 16(2) of Directive 2004/38 would clearly be contrary to the aim pursued by that directive in establishing that right of residence (Case C-378/12 *Onuekwere* [2014] ECR, paragraph 26).
- 32 Since the degree of integration of the persons concerned is a vital consideration underpinning both the right of permanent residence and the system of protection against expulsion measures established by Directive 2004/38, the reasons making it justifiable for periods of imprisonment not to be taken into

consideration for the purposes of granting a right of permanent residence or for such periods to be regarded as interrupting the continuity of the period of residence needed to acquire that right must also be borne in mind when interpreting Article 28(3)(a) of that directive.

- 33 It follows that periods of imprisonment cannot be taken into account for the purposes of granting the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 and that, in principle, such periods interrupt the continuity of the period of residence for the purposes of that provision.
- 34 As regards the continuity of the period of residence, it has been stated in paragraph 28 above that the 10-year period of residence necessary for the granting of enhanced protection as provided for in Article 28(3)(a) of Directive 2004/38 must, in principle, be continuous.
- 35 As for the question of the extent to which the non-continuous nature of the period of residence during the 10 years preceding the decision to expel the person concerned prevents him from enjoying enhanced protection, an overall assessment must be made of that person's situation on each occasion at the precise time when the question of expulsion arises (see, to that effect, *Tsakouridis*, paragraph 32).
- 36 In that regard, given that, in principle, periods of imprisonment interrupt the continuity of the period of residence for the purposes of Article 28(3)(a) of Directive 2004/38, such periods may – together with the other factors going to make up the entirety of relevant considerations in each individual case – be taken into account by the national authorities responsible for applying Article 28(3) of that directive as part of the overall assessment required for determining whether the integrating links previously forged with the host Member State have been broken, and thus for determining whether the enhanced protection provided for in that provision will be granted (see, to that effect, *Tsakouridis*, paragraph 34).
- 37 Lastly, as regards the implications of the fact that the person concerned has resided in the host Member State during the 10 years prior to imprisonment, it should be borne in mind that, even though – as has been stated in paragraphs 24 and 25 above – the 10-year period of residence necessary for the grant of the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 must be calculated by counting back from the date of the decision ordering that person's expulsion, the fact that the calculation carried out under that provision is different from the calculation for the purposes of the grant of a right of permanent residence means that the fact that the person concerned resided in the host Member State during the 10 years prior to imprisonment may be taken into consideration as part of the overall assessment referred to in paragraph 36 above.
- 38 In the light of the foregoing, the answer to Questions 1 and 4 is that Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that a period of imprisonment is, in principle, capable both of interrupting the continuity of the period of residence for the purposes of that provision and of affecting the decision regarding the grant of the enhanced protection provided for thereunder, even where the person concerned resided in the host Member State for the 10 years prior to imprisonment. However, the fact that that person resided in the host Member State for the 10 years prior to imprisonment may be taken into consideration as part of the overall assessment required in order to determine whether the integrating links previously forged with the host Member State have been broken.

Costs

- 39 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. **On a proper construction of Article 28(3)(a) 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, the 10-year period of residence referred to in that provision must, in principle, be continuous and must be calculated by counting back from the date of the decision ordering the expulsion of the person concerned.**
2. **Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that a period of imprisonment is, in principle, capable both of interrupting the continuity of the period of residence for the purposes of that provision and of affecting the decision regarding the grant of the enhanced protection provided for thereunder, even where the person concerned resided in the host Member State for the 10 years prior to imprisonment. However, the fact that that person resided in the host Member State for the 10 years prior to imprisonment may be taken into consideration as part of the overall assessment required in order to determine whether the integrating links previously forged with the host Member State have been broken.**

[Signatures]