Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

13 September 2016*

(Reference for a preliminary ruling — Citizenship of the Union — Articles 20 and 21 TFEU — Directive 2004/38/EC — Right of a third-country national with a criminal record to reside in a Member State — Parent having sole care of two minor children, who are Union citizens — First child possessing the nationality of the Member State of residence — Second child possessing the nationality of another Member State — National legislation precluding grant of a residence permit to the father because of his criminal record — Refusal of residence capable of resulting in the children being obliged to leave the territory of the European Union)

In Case C-165/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Supreme Court, Spain), made by decision of 20 March 2014, received at the Court on 7 April 2014, in the proceedings

Alfredo Rendón Marín

v

Administración del Estado,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen, C. Toader, D. Šváby, F. Biltgen and C. Lycourgos, Presidents of Chambers, A. Rosas (Rapporteur), E. Juhász, A. Borg Barthet, M. Safjan, M. Berger, A. Prechal and K. Jürimäe, Judges,

Advocate General: M. Szpunar,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 30 June 2015,

after considering the observations submitted on behalf of:

— Mr Rendón Marín, by I. Aránzazu Triguero Hernández and L. De Rossi, abogadas,

— the Spanish Government, by A. Rubio González and L. Banciella Rodríguez-Miñón, acting as Agents,

— the Danish Government, by C. Thorning and M. Wolff, acting as Agents,

* Language of the case: Spanish.

— the Greek Government, by T. Papadopoulou, acting as Agent,

— the French Government, by D. Colas and R. Coesme, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, and L. D'Ascia, avvocato dello Stato,

— the Netherlands Government, by M. Bulterman and B. Koopman, acting as Agents,

— the Polish Government, by B. Majczyna, K. Pawłowska and M. Pawlicka, acting as Agents,

— the United Kingdom Government, by M. Holt and J. Beeko, acting as Agents, and D. Blundell, Barrister,

— the European Commission, by I. Martínez del Peral, C. Tufvesson, F. Castillo de la Torre and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 February 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 20 TFEU.

2 The request has been made in proceedings between Alfredo Rendón Marín — a third-country national and the father of Union citizens who are minors in his sole care who have been resident in Spain since birth — and Administración del Estado (State Administration, Spain) concerning the refusal of the Director General de Inmigración del Ministerio de Trabajo e Inmigración (Director-General of Immigration of the Ministry of Labour and Immigration), on account of Mr Rendón Marín's criminal record, to grant him a residence permit on the basis of exceptional circumstances.

Legal context

EU law

3 As stated in recitals 23 and 24 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 at OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34):

'(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 [EC] 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, headed 'Definitions', states:

'For the purpose of this Directive:

1. "Union citizen" means any person having the nationality of a Member State;

2. "family member" means:

...

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

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 Directive 2004/38, headed '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.

2. 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 ...;

...

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.'

6 Article 7 of Directive 2004/38, headed 'Right of residence for more than three months', provides in paragraphs 1 and 2:

'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

...

(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).'

7 In Chapter IV of Directive 2004/38, headed 'Right of permanent residence', Article 16, itself headed 'General rule for Union citizens and their family members', provides in paragraphs 1 and 2:

'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.'

8 In Chapter VI of Directive 2004/38, which is headed 'Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health', Article 27(1) and (2) 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.'

9 Article 28 of Directive 2004/38, headed 'Protection against expulsion', 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.'

Spanish law

10 Article 31(3) of Ley Orgánica 4/2000 sobre derechos y libertades de los extranjeros en España y su integración social (Basic Law 4/2000 on the rights and freedoms of foreign nationals in Spain and their social integration) of 11 January 2000 (BOE No 10 of 12 January 2000, p. 1139) provides for the possibility of granting a temporary residence permit for exceptional reasons, without it being necessary for the third-country national first to be in possession of a visa.

11 Article 31(5) and (7) of that law provides:

'5. In order for a foreign national to be granted temporary residence, he must have no criminal record in Spain or in countries in which he has previously resided, relating to offences which exist in Spanish law, and must not have been proscribed from the territory of any State with which Spain has concluded an agreement to that effect.

...

7. In order for a temporary residence permit to be renewed, the following shall be assessed, where appropriate:

(a) any criminal record, account being taken of any pardon, conditional remission of a sentence or suspension of a custodial sentence;

(b) any failure on the foreign national's part to fulfil obligations in matters of taxation or social security.

For the purposes of such renewal, particular account shall be taken of any efforts at integration which the foreign national has made which militate in favour of renewal, such efforts to be demonstrated by means of a positive report from the autonomous community confirming the individual's attendance at the training sessions referred to in Article 2 *ter* of this law.'

12 Real Decreto 2393/2004 por el que se aprueba el Reglamento de la Ley Orgánica 4/2000 (Royal Decree 2393/2004 approving the rules for the implementation of Basic Law 4/2000) of 30 December 2004 (BOE No 6 of 7 January 2005, p. 485) provided, in paragraph 4 of its First Additional Provision:

'… the Secretary of State for Immigration and Emigration may, acting on a report from the Secretary of State for Security, issue an individual temporary residence permit where exceptional circumstances not provided for in these rules obtain.'

13 Articles 124 and 128 of Real Decreto 557/2011 por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, tras su reforma por Ley Orgánica 2/2009 (Royal Decree 557/2011 approving the rules for the implementation of Basic Law 4/2000, following its amendment by Basic Law 2/2009) of 20 April 2011 (BOE No 103 of 30 April 2011, p. 43821) provide for the possibility of applying for a temporary residence permit on the basis of exceptional circumstances on account of family ties (*arraigo familiar*), provided that the applicant does not have a criminal record in Spain or in countries in which he has previously resided, relating to offences which exist in Spanish law.

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

14 Mr Rendón Marín, a Colombian national, is the father of two minor children born in Malaga (Spain), namely a boy of Spanish nationality and a girl of Polish nationality. The children have always resided in Spain.

15 It is apparent from the documents before the Court that, by decision of the Juzgado de Primera Instancia de Málaga (Court of First Instance, Malaga, Spain) of 13 May 2009, Mr Rendón Marín was granted sole care and custody of his children. The whereabouts of the children's mother, a Polish national, are unknown. According to the order for reference, the two children are receiving appropriate care and schooling.

16 Mr Rendón Marín has a criminal record. In particular, he was sentenced in Spain to a term of nine months' imprisonment. However, he was granted a provisional two-year suspension of that sentence with effect from 13 February 2009. On the date of the order for reference, namely 20 March 2014, he was awaiting a decision on an application for mention of his criminal record to be removed from the register (*cancelación*).

17 On 18 February 2010, Mr Rendón Marín lodged an application with the Director-General of Immigration of the Ministry of Labour and Immigration for a temporary residence permit on the basis of exceptional circumstances, pursuant to paragraph 4 of the First Additional Provision of Royal Decree 2393/2004.

18 By decision of 13 July 2010, Mr Rendón Marín's application was rejected pursuant to Article 31(5) of Law 4/2000 because he had a criminal record.

19 Mr Rendón Marín's appeal against that decision was dismissed by judgment of the Audiencia Nacional (National High Court (Spain)) of 21 March 2012, whereupon he brought an appeal against that judgment before the Tribunal Supremo (Supreme Court, Spain).

20 Mr Rendón Marín based his appeal against the judgment on a single plea in law, alleging (i) misinterpretation of the judgments of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639), and of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), since the case-law resulting from those judgments should, in his submission, have led to him being granted the residence permit sought, and (ii) infringement of Article 31(3) and (7) of Law 4/2000.

21 The referring court states that, leaving aside the specific circumstances of the main proceedings, in this case, as in the cases which gave rise to the judgments of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639), and of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), the refusal in Spain to grant Mr Rendón Marín a residence permit would result in his removal from Spanish territory and, therefore, from the territory of the European Union, which the two minor children, his dependants, would leave as a consequence. That court observes, however, that, in contrast to the situations examined in the judgments of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639), and of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), the applicable national legislation lays down a prohibition on the grant of a residence permit when the applicant has a criminal record in Spain.

22 Consequently, the referring court is uncertain whether national law, which prohibits, without any possibility of derogation, the grant of a residence permit when the applicant has a criminal record in the country where the permit is applied for, even though that has the unavoidable consequence of depriving a minor, a Union citizen who is a dependant of the applicant for a residence permit, of his right to reside in the European Union, is consistent with the Court's case-law, relied on in the case, relating to Article 20 TFEU.

23 It was in those circumstances that the Tribunal Supremo (Supreme Court) decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is national legislation which excludes the possibility of granting a residence permit to the parent of a Union citizen who is a minor and a dependant of that parent on the ground that the parent has a criminal record in the country in which the application is made consistent with Article 20 TFEU, interpreted in the light of the judgments of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639), and of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), even if this results in the removal of the child from the territory of the European Union, inasmuch as the child will have to leave with its parent?'

Continuance of the dispute in the main proceedings

24 It is clear from both the wording and the scheme of Article 267 TFEU that the preliminary ruling procedure presupposes that a dispute is actually pending before the national courts in which they are called upon to give a decision which is capable of taking account of the preliminary ruling (judgment of 11 September 2008, *UGT-Rioja and Others*, C-428/06 to C-434/06, EU:C:2008:488, paragraph 39 and the case-law cited). Therefore, the Court may verify of its own motion that the dispute in the main proceedings is continuing.

25 Here, the dispute relates to the refusal to grant Mr Rendón Marín a temporary residence permit in Spain, an appeal having been brought before the Tribunal Supremo (Supreme Court) against the judgment of the Audiencia Nacional (National High Court) of 21 March 2012, which had dismissed Mr Rendón Marín's appeal against the decision rejecting his application for a residence permit.

26 It is apparent from the documents before the Court and the submissions of Mr Rendón Marín and the Spanish Government at the hearing that, after the Tribunal Supremo (Supreme Court) made the present request for a preliminary ruling, the appellant in the main proceedings lodged with the government office in Malaga two fresh applications for a temporary residence permit on grounds of exceptional circumstances, the second of which was granted.

27 At the hearing, the Spanish Government indeed stated that Mr Rendón Marín was granted a temporary residence permit on 18 February 2015 by the Subdelegación del Gobierno en Málaga (Government Office in the Province of Malaga, Spain). It is apparent from Mr Rendón Marín's oral submissions that he obtained that temporary residence permit on grounds of exceptional circumstances founded on family ties to the country of residence, under Articles 124 and 128 of Royal Decree 557/2011, as a result of the removal by the competent Spanish authority of the mention of his criminal record from the register (*cancelación*).

28 In those circumstances, the referring court was requested to inform the Court whether it still needed a reply from the Court in order to give judgment.

29 By letter of 9 March 2016, the referring court stated that the claim set out in the administrative appeal seeking a temporary residence permit had been satisfied by the decision made by the Government Office in the Province of Malaga on 18 February 2015, but that it wished to maintain its request for a preliminary ruling.

30 According to the referring court, the grant of a residence permit to Mr Rendón Marín in February 2015 does not amount to full satisfaction of the claims set out in the context of the main action. It considers that, if the administrative appeal had been upheld, the contested decision of 13 July 2010 rejecting his application for a residence permit would have been declared unlawful and the grant of the resulting residence permit would have produced effects from that date. The nullity of that decision and the grant of a residence permit as at that date could have consequences for the appellant

in the main proceedings going beyond the grant itself, such as compensation for the loss of employment contracts, of social benefits or of social security contributions or even, as the case may be, conferral of the right to acquire Spanish nationality.

31 It must thus be found that the dispute in the main proceedings is still pending before the referring court and that a reply from the Court to the question asked remains useful for deciding that dispute.

32 An answer should therefore be given in response to the request for a preliminary ruling.

Consideration of the question referred

33 In the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The Court has a duty to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court by those courts (see, inter alia, judgments of 14 October 2010, *Fuß*, C-243/09, EU:C:2010:609, paragraph 39; of 30 May 2013, *Worten*, C-342/12, EU:C:2013:355, paragraph 30; and of 19 September 2013, *Betriu Montull*, C-5/12, EU:C:2013:571, paragraph 40).

34 Consequently, even though the referring court has limited its question to the interpretation of Article 20 TFEU, that does not prevent the Court from providing it with all the elements of interpretation of EU law that may be of assistance in adjudicating in the case pending before it, whether or not the referring court has referred to them in the wording of its question. It is, in this regard, for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation in view of the subject matter of the dispute (see, inter alia, judgments of 14 October 2010, *Fuß*, C-243/09, EU:C:2010:609, paragraph 40; of 30 May 2013, *Worten*, C-342/12, EU:C:2013:355, paragraph 31; and of 19 September 2013, *Betriu Montull*, C-5/12, EU:C:2013:571, paragraph 41).

35 In the light of that case-law and given the information in the order for reference, it is appropriate to reformulate the question submitted, as meaning that the referring court asks, in essence, whether, first, Article 21 TFEU and Directive 2004/38 and, secondly, Article 20 TFEU must be interpreted as precluding national legislation which requires a third-country national to be automatically refused the grant of a permit authorising him to reside on the territory of the Member State concerned when he has a criminal record, even though he has sole responsibility for two minor children who are Union citizens and have been residing with him in that Member State since their birth, without having exercised their right of freedom of movement, and that refusal has the consequence of requiring the children to leave the territory of the European Union.

36 In this connection, it should be noted at the outset that any rights which are granted to third-country nationals by provisions of EU law on citizenship of the Union are not autonomous rights of those nationals, but rights derived from the exercise of freedom of movement and residence by a Union citizen (see, to this effect, judgments of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 35; of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraph 22; and of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 36 and the case-law cited). Thus, a derived right of residence of a third-country national exists, in principle, only when it is necessary in order to ensure that a Union citizen can exercise effectively his rights to move and reside freely in the European Union.

37 In that context, it must be examined whether a third-country national such as Mr Rendón Marín may enjoy a derived right of residence, founded either on Article 21 TFEU and Directive 2004/38 or on Article 20 TFEU, and, should that be the case, whether his criminal record is capable of justifying a limitation of that right.

Article 21 TFEU and Directive 2004/38

The existence of a derived right of residence founded on Article 21 TFEU and Directive 2004/38

38 Article 3(1) of Directive 2004/38 defines as 'beneficiaries' of the rights conferred by the directive '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'.

39 In the present instance, Mr Rendón Marín is a third-country national and the father of Union citizens who are minors in his sole care who have always resided in the same Member State, namely the Kingdom of Spain.

40 As Mr Rendón Marín's son, who is a minor, has never made use of his right of freedom of movement and has always resided in the Member State of which he is a national, that child is not covered by the concept of 'beneficiary' within the meaning of Article 3(1) of Directive 2004/38, so that that directive is not applicable to him (judgments of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, paragraph 57, and of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 42).

41 On the other hand, as the Spanish, Greek, Italian and Polish Governments and the Commission have submitted, Mr Rendón Marín's daughter, a child who is a minor of Polish nationality resident in Spain since birth, is covered by the concept of 'beneficiary' within the meaning of Article 3(1) of Directive 2004/38.

42 Indeed, the Court has pointed out that the situation, in the host Member State, of a national of another Member State who was born in the host Member State and has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation, depriving that national of the benefit, in the host Member State, of the provisions of EU law on freedom of movement and of residence (see, to this effect, judgment of 19 October 2004, *Zhu and Chen*, C-200/02, EU:C:2004:639, paragraph 19).

43 It follows that Mr Rendón Marín's daughter is entitled to rely on Article 21(1) TFEU and the measures adopted to give it effect (see, to this effect, judgment of 19 October 2004, *Zhu and Chen*, C-200/02, EU:C:2004:639, paragraph 26).

44 Accordingly, Article 21(1) TFEU and Directive 2004/38 in principle confer a right to reside in Spain on Mr Rendón Marín's daughter.

45 However, according to the Court, that right of citizens of the Union to reside in a Member State other than that of which they are a national is recognised subject to the limitations and conditions imposed by the FEU Treaty and by the measures adopted to give it effect (judgment of 19 October 2004, *Zhu and Chen*, C-200/02, EU:C:2004:639, paragraph 26). Those limitations and conditions must be applied in compliance with the limits imposed by EU law and in accordance with the general principles of EU law, in particular the principle of proportionality (see to this effect, in particular, judgments of 17 September 2002, *Baumbast and R*, C-413/99, EU:C:2002:493, paragraph 91, and of 19 October 2004, *Zhu and Chen*, C-200/02, EU:C:2004:639, paragraph 32).

46 As regards those conditions, all Union citizens have the right of residence for a period of longer than three months on the territory of a Member State other than that of which they are a national if, in particular, they have, in accordance with Article 7(1)(b) of Directive 2004/38, 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.

47 Unless Mr Rendón Marín's daughter has acquired a right of permanent residence in Spain, by virtue of Article 16(1) of Directive 2004/38, in which case her right of residence would not be subject to the conditions provided for in Chapter III of the directive, in particular those laid down in Article 7(1)(b), she can be granted a right of residence only if she fulfils the conditions prescribed in Article 7(1)(b).

48 In that regard, the Court has already held that, while the Union citizen must have sufficient resources, EU law does not, however, lay down any requirement whatsoever as to their origin, and they may be provided, inter alia, by a third-country national who is a parent of the citizens who are minors (see, to this effect, judgments of 19 October 2004, *Zhu and Chen*, C-200/02, EU:C:2004:639, paragraph 30, and of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraph 27).

49 In the present instance, it is apparent from the order for reference that Mr Rendón Marín's children are receiving appropriate care and schooling. The Spanish Government stated in addition at the hearing that, pursuant to Spanish law, Mr Rendón Marín is entitled to sickness insurance for himself and his children. Nevertheless, it is for the referring court to establish whether Mr Rendón Marín's daughter has, herself or through her father, sufficient resources and comprehensive sickness insurance cover, within the meaning of Article 7(1)(b) of Directive 2004/38.

50 As regards whether Mr Rendón Marín, a third-country national, may, as a direct ascendant of a Union citizen having a right of residence under Directive 2004/38, rely on a derived right of residence, it is clear from the case-law of the Court that the status of 'dependent' family member of a Union citizen holding a right of residence is the result of a factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence, so that, when, as in the present instance, the converse situation occurs and the holder of the right of residence is dependent on a third-country national, the third-country national cannot rely on being a 'dependent' relative in the ascending line of that right-holder, within the meaning of Directive 2004/38, with a view to having the benefit of a right of residence in the host Member State (see, to this effect, judgment of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraph 25).

51 However, a refusal to allow a parent, a third-country national, who is the carer of a minor child who is a Union citizen to reside with that child in the host Member State would deprive the child's right of residence of any useful effect, since enjoyment by a child who is a minor of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence (see judgments of 19 October 2004, *Zhu and Chen*, C-200/02, EU:C:2004:639, paragraph 45, and of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraph 28).

52 Thus, while Article 21 TFEU and Directive 2004/38 grant a right to reside in the host Member State to a minor who is a national of another Member State and who satisfies the conditions laid down in Article 7(1)(b) of that directive, the same provisions allow a parent who is that minor's primary carer to reside with him in the host Member State (judgments of 19 October 2004, *Zhu and Chen*, C-200/02, EU:C:2004:639, paragraphs 46 and 47, and of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraph 29).

53 Leaving aside the situation contemplated in paragraph 47 above, if — a matter which, as has been pointed out in paragraph 49 above, is for the referring court to establish — Mr Rendón Marín's daughter fulfils the conditions laid down in Article 7(1) of Directive 2004/38 for having a right to reside in Spain on the basis of Article 21 TFEU and of that directive, the latter have to be interpreted as precluding, in principle, Mr Rendón Marín being refused a derived right to reside on the territory of that Member State.

The effect of a criminal record on recognition of a derived right of residence, in the light of Articles 27 and 28 of Directive 2004/38

54 It should now be examined whether any derived right of residence of M. Rendón Marín may be limited by national legislation such as that at issue in the main proceedings.

55 It must be pointed out that the right of Union citizens and their family members to reside in the European Union is not unconditional but may be subject to the limitations and conditions imposed by the Treaty and by the measures adopted to give it effect (see, inter alia, judgment of 10 July 2008, *Jipa*, C-33/07, EU:C:2008:396, paragraph 21 and the case-law cited).

56 It should also be noted that, according to recital 23 of Directive 2004/38, 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. For that reason, as follows from recital 24, Directive 2004/38 establishes a system of protection against expulsion measures which is based on the degree of integration of the persons concerned in the host Member State, so that 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 (judgment of 23 November 2010, *Tsakouridis*, C-145/09, EU:C:2010:708, paragraphs 24 and 25).

57 So far as concerns the main proceedings, the limitations on the right of residence derive in particular from Article 27(1) of Directive 2004/38, which provides that Member States may restrict the right of residence of Union citizens and their family members, irrespective of nationality, on grounds, in particular, of public policy or public security (see, to this effect, judgment of 10 July 2008, *Jipa*, C-33/07, EU:C:2008:396, paragraph 22).

58 It is settled case-law that the public policy exception constitutes a derogation from the right of residence of Union citizens and their family members, which must be interpreted strictly and the scope of which cannot be determined unilaterally by the Member States (see, to this effect, judgments of 4 December 1974, *van Duyn*, 41/74, EU:C:1974:133, paragraph 18; of 27 October 1977, *Bouchereau*, 30/77, EU:C:1977:172, paragraph 33; of 29 April 2004, *Orfanopoulos and Oliveri*, C-482/01 and C-493/01, EU:C:2004:262, paragraph 65; of 27 April 2006, *Commission* v *Germany*, C-441/02, EU:C:2006:253, paragraph 34; and of 7 June 2007, *Commission* v *Netherlands*, C-50/06, EU:C:2007:325, paragraph 42).

59 As is apparent from the first subparagraph of Article 27(2) of Directive 2004/38, in order to be justified, measures restricting the right of residence of a Union citizen or a member of his family, including measures taken on grounds of public policy, must comply with the principle of proportionality and be based exclusively on the personal conduct of the individual concerned.

60 It should be added that Article 27(2) of the directive makes clear that previous criminal convictions cannot in themselves constitute grounds for taking public policy or public security measures, that the personal conduct of the individual concerned must represent a genuine and present threat affecting one of the fundamental interests of society or of the Member State concerned, and that justifications that are isolated from the particulars of the case or that rely on considerations of general prevention

cannot be accepted (see, to this effect, judgments of 10 July 2008, *Jipa*, C-33/07, EU:C:2008:396, paragraph 23 and 24, and of 23 November 2010, *Tsakouridis*, C-145/09, EU:C:2010:708, paragraph 48).

61 It follows that EU law precludes a limitation on the right of residence that is founded on grounds of a general preventive nature and ordered for the purpose of deterring other foreign nationals, in particular where that measure has been adopted automatically following a criminal conviction, without any account being taken of the personal conduct of the offender or of the danger which that person represents for the requirements of public policy (see, to this effect, judgment of 27 April 2006, *Commission* v *Germany*, C-441/02, EU:C:2006:253 paragraph 93 and the case-law cited).

62 Thus, in order to determine whether an expulsion measure is proportionate to the legitimate aim pursued, in the present instance protection of the requirements of public policy or public security, account should be taken of the criteria set out in Article 28(1) of Directive 2004/38, namely how long the individual concerned has resided on the territory of the host Member State, his age, his state of health, his family and economic situation, his social and cultural integration into the host Member State and the extent of his links with his country of origin. The degree of gravity of the offence must also be taken into consideration in the context of the principle of proportionality.

63 However, the legislation at issue in the main proceedings makes the grant of an initial residence permit automatically conditional — with no possibility of derogation — on the person concerned having no criminal record in Spain or in the countries in which he has previously resided.

64 In the present instance, the order for reference indicates that, pursuant to this legislation, the application for a temporary residence permit on the basis of exceptional circumstances which Mr Rendón Marín submitted on 18 February 2010 was rejected because he had a criminal record. The residence permit applied for was thus refused automatically, without account being taken of the specific situation of the appellant in the main proceedings, that is to say, without assessment of his personal conduct or of any present danger that he could represent for the requirements of public policy or public security.

65 As regards assessment of the circumstances that are relevant in the present instance, it is apparent from the documents before the Court that Mr Rendón Marín was convicted of an offence committed in 2005. That previous criminal conviction cannot in itself constitute grounds for refusing a residence permit. While the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and the Court has pointed out that the condition relating to the existence of a present threat must, in principle, be fulfilled at the time when the measure at issue is adopted (see, inter alia, judgment of 27 October 1977, *Bouchereau*, 30/77, EU:C:1977:172, paragraph 28), that does not seem to be the case here as the custodial sentence imposed on Mr Rendón Marín was suspended and does not appear to have been enforced.

66 As regards, moreover, the possible expulsion of Mr Rendón Marín, it is necessary, first, to take account of the fundamental rights whose observance the Court ensures, in particular the right to respect for private and family life, as laid down in Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter') (see, to this effect, judgment of 23 November 2010, *Tsakouridis*, C-145/09, EU:C:2010:708, paragraph 52) and, secondly, to observe the principle of proportionality. Article 7 of the Charter must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) thereof (see, to this effect, judgment of 23 December 2009, *Detiček*, C-403/09 PPU, EU:C:2009:810, paragraphs 53 and 54).

67 Having regard to all the foregoing considerations, Article 21 TFEU and Directive 2004/38 must be interpreted as precluding national legislation which requires a third-country national to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record where he is the parent of a minor child who is a Union citizen and who is his dependant and resides with him in the host Member State.

Article 20 TFEU

The existence of a derived right of residence pursuant to Article 20 TFEU

68 In the event that the referring court, when reviewing the conditions laid down in Article 7(1) of Directive 2004/38, comes to the conclusion that those conditions are not fulfilled and, in any event, so far as concerns Mr Rendón Marín's son, a minor, who has always resided in the Member State of which he is a national, it should be examined whether a derived right of residence for Mr Rendón Marín may, where appropriate, be founded on Article 20 TFEU.

69 It must be recalled first of all that, in accordance with the Court's settled case-law, Article 20 TFEU confers on every individual who is a national of a Member State citizenship of the Union, which is intended to be the fundamental status of nationals of the Member States (see judgment of 30 June 2016, *NA*, C-115/15, EU:C:2016:487, paragraph 70 and the case-law cited).

70 Citizenship of the Union confers on each Union citizen a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and restrictions laid down by the Treaty and the measures adopted for their implementation (see, to this effect, judgments of 7 October 2010, *Lassal*, C-162/09, EU:C:2010:592, paragraph 29, and of 16 October 2012, *Hungary* v *Slovakia*, C-364/10, EU:C:2012:630, paragraph 43).

71 As the Court held in paragraph 42 of the judgment of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status as Union citizens.

72 On the other hand, the Treaty provisions on citizenship of the Union do not confer any autonomous right on third-country nationals (judgments of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraph 66, and of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 34).

73 As has been noted in paragraph 36 above, any rights conferred on third-country nationals by the Treaty provisions on citizenship of the Union are not autonomous rights of those nationals but rights derived from those enjoyed by the Union citizen. The purpose and justification of those derived rights are based on the fact that a refusal to allow them would be such as to interfere, in particular, with the Union citizen's freedom of movement (judgments of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraphs 67 and 68, and of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 35).

74 In this connection, the Court has already held that there are very specific situations in which, despite the fact that the secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of his freedom of movement, a right of residence must nevertheless be granted to a third-country national who is a family member of his since the effectiveness of citizenship of the Union would otherwise be undermined, if, as a consequence of refusal of such a right, that citizen would be obliged in practice to leave the territory of the European Union as a whole, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status (see, to this effect, judgments of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124, paragraphs 43 and 44; of 15 November 2011, *Dereci and Others*, C-256/11,

EU:C:2011:734, paragraphs 66 and 67; of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraph 71; of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 36; and of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraph 32).

75 The above situations have the common feature that, although they are governed by legislation which falls, a priori, within the competence of the Member States, namely legislation on the right of entry and residence of third-country nationals outside the scope of provisions of secondary legislation which provide for the grant of such a right under certain conditions, they nonetheless have an intrinsic connection with the freedom of movement and residence of a Union citizen, which prevents the right of entry and residence being refused to those nationals in the Member State of residence of that citizen, in order not to interfere with that freedom (see, to this effect, judgments of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraph 72, and of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 37).

76 In the present instance, as Mr Rendón Marín's children possess the nationality of a Member State, namely Spanish and Polish nationality respectively, they enjoy the status of Union citizen (see, to this effect, judgments of 2 October 2003, *Garcia Avello*, C-148/02, EU:C:2003:539, paragraph 21, and of 19 October 2004, *Zhu and Chen*, C-200/02, EU:C:2004:639, paragraph 25).

77 Therefore, as Union citizens, Mr Rendón Marín's children have the right to move and reside freely within the territory of the European Union, and any limitation of that right falls within the scope of EU law.

78 Thus, if — a matter which is for the referring court to check — the refusal to grant residence to Mr Rendón Marín, a third-country national, to whose sole care those children have been entrusted, were to mean that he had to leave the territory of the European Union, that could result in a restriction of that right, in particular the right of residence, as the children could be compelled to go with him, and therefore to leave the territory of the European Union as a whole. Any obligation on their father to leave the territory of the European Union would thus deprive them of the genuine enjoyment of the substance of the rights which the status of Union citizen nevertheless confers upon them (see, to this effect, judgments of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, paragraph 67; of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraph 71; of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 36; and of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraph 32).

79 Several Member States which have submitted observations have contended that Mr Rendón Marín and his children could move to Poland, the Member State of which his daughter is a national. Mr Rendón Marín, for his part, stated at the hearing that he maintains no ties with the family of his daughter's mother, who, according to him, does not reside in Poland, and that neither he nor his children know the Polish language. In this regard, it is for the referring court to check whether, in the light of all the circumstances of the main proceedings, Mr Rendón Marín, as the parent who is the sole carer of his children, may in fact enjoy the derived right to go with them to Poland and reside with them there, so that a refusal of the Spanish authorities to grant him a right of residence would not result in his children being obliged to leave the territory of the European Union as a whole (see, to this effect, judgment of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraphs 34 and 35).

80 Subject to the checks referred to in paragraphs 78 and 79 above, it seems to be clear from the information before the Court that the situation at issue in the main proceedings is capable of resulting, for Mr Rendón Marin's children, in their being deprived of the genuine enjoyment of the substance of the rights which the status of Union citizen confers upon them, and that it therefore falls within the scope of EU law.

The possibility of limiting a derived right of residence flowing from Article 20 TFEU

81 Article 20 TFEU does not affect the possibility of Member States relying on an exception linked, in particular, to upholding the requirements of public policy and safeguarding public security. However, in so far as Mr Rendón Marin's situation falls within the scope of EU law, assessment of his situation must take account of the right to respect for private and family life, as laid down in Article 7 of the Charter, an article which, as has been pointed out in paragraph 66 above, must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) of the Charter.

82 Furthermore, as a justification for derogating from the right of residence of Union citizens or members of their families, the concepts of 'public policy' and 'public security' must, as has been noted in paragraph 58 above, be interpreted strictly, so that their scope cannot be determined unilaterally by the Member States without being subject to control by the EU institutions.

83 The Court has thus held that the concept of 'public policy' presupposes, in any event, the existence, in addition to the disturbance of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. As regards 'public security', it is apparent from the Court's case-law that this concept covers both the internal security of a Member State and its external security and that, consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security (see, to this effect, judgments of 23 November 2010, *Tsakouridis*, C-145/09, EU:C:2010:708, paragraphs 43 and 44, and of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraphs 65 and 66).

84 In this context, it must be held that, where refusal of the right of residence is founded on the existence of a genuine, present and sufficiently serious threat to the requirements of public policy or of public security, in view of the criminal offences committed by a third-country national who is the sole carer of children who are Union citizens, such refusal would be consistent with EU law.

85 On the other hand, that conclusion cannot be drawn automatically on the basis solely of the criminal record of the person concerned. It can result, where appropriate, only from a specific assessment by the referring court of all the current and relevant circumstances of the case, in the light of the principle of proportionality, of the child's best interests and of the fundamental rights whose observance the Court ensures.

86 That assessment must therefore take account, in particular, of the personal conduct of the individual concerned, the length and legality of his residence on the territory of the Member State concerned, the nature and gravity of the offence committed, the extent to which the person concerned is currently a danger to society, the age of the children at issue and their state of health, as well as their economic and family situation.

87 It follows that Article 20 TFEU must be interpreted as precluding national legislation which requires a third-country national who is a parent of minor children who are Union citizens in his sole care to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record, where that refusal has the consequence of requiring those children to leave the territory of the European Union.

88 In the light of all the foregoing considerations, the answer to the question referred is as follows:

— Article 21 TFEU and Directive 2004/38 must be interpreted as precluding national legislation which requires a third-country national to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record where he is the parent of a minor child who is a Union citizen and a national of a Member State other than the host Member State and who is his dependant and resides with him in the host Member State;

— Article 20 TFEU must be interpreted as precluding the same national legislation which requires a third-country national who is a parent of minor children who are Union citizens in his sole care to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record, where that refusal has the consequence of requiring those children to leave the territory of the European Union.

Costs

89 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Grand Chamber) hereby rules:

Article 21 TFEU and 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 precluding national legislation which requires a third-country national to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record where he is the parent of a minor child who is a Union citizen and a national of a Member State other than the host Member State and who is his dependant and resides with him in the host Member State.

Article 20 TFEU must be interpreted as precluding the same national legislation which requires a third-country national who is a parent of minor children who are Union citizens in his sole care to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record, where that refusal has the consequence of requiring those children to leave the territory of the European Union.

[Signatures]