Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 14 April 2016[1]

Case C-115/15

Secretary of State for the Home Department
v
NA
(Request for a preliminary ruling from the

Court of Appeal (England & Wales) (Civil Division) (United Kingdom))

(Reference for a preliminary ruling — Articles 20 TFEU and 21 TFEU — Article 13(2)(c) of Directive 2004/38/EC — Divorce — Retention of the right of residence of a third country national having custody of minor children who are nationals of another Member State of the European Union — First paragraph of Article 12 of Regulation (EEC) No 1612/68)

I – Introduction

1. The question at the heart of this case is whether a third country national who was residing in a Member State with a European Union citizen can herself, as the spouse of that citizen, continue to reside in that State when the Union citizen has permanently left the State in question and divorce proceedings have been instituted following his departure.

2. The Court has already had occasion to address this question in the case which gave rise to the judgment in *Singh and Others* (C-218/14, EU:C:2015:476). However, unlike in that first case, here, the spouse's departure and the divorce consecutive to it take place in a context of domestic violence. While Article 13(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[2] encompasses that situation, the Court has not yet had occasion to interpret that provision.

3. The presence, in the territory of the host country, of two children born of the union between a Union citizen and a third country national will also give the Court the opportunity to clarify the criteria for applying the 'deprivation of the substance of rights' test formulated in the case-law initiated by the judgment in *Ruiz Zambrano* (C-34/09, EU:C:2011:124).

1 — Original language: French.

2 — OJ 2004 L 158, p. 77, and the corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34.

II – Legal framework

A – *The FEU Treaty*

4. Article 20 TFEU states that citizenship of the Union is established and that every person holding the nationality of a Member State is to be a citizen of the Union. Pursuant to Article 20(2) TFEU, citizens of the Union are to have, inter alia, 'the right to move and reside freely within the territory of the Member States'. In accordance with the second subparagraph of Article 20(2) TFEU, that right is to be exercised 'in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder'.

5. Article 21 TFEU nonetheless states that, while every citizen of the Union is to have the right to move and reside freely within the territory of the Member States, that right is exercised 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'.

B – *Directive 2004/38*

6. According to recital 15 of Directive 2004/38, 'family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis'.

7. Article 7 of Directive 2004/38 makes provision for residence for more than three months, 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; …

…

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).

…'

8. In accordance with Article 13(2) of Directive 2004/38:

'Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:

(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or

(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or

(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or

(d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or 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 and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be defined as in Article 8(4).

Such family members shall retain their right of residence exclusively on [a] personal basis.'

9. Finally, Article 16(1) of Directive 2004/38 provides that Union citizens who have resided legally for a continuous period of five years in the host Member State are to have the right of permanent residence there. In accordance with Article 16(2), that rule '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'.

C – Regulation (EEC) No 1612/68

10. According to the first paragraph of Article 12 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community,[3] 'the children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory'.

III – The facts of the dispute in the main proceedings

11. NA is a Pakistani national. In September 2003 she married KA in Karachi (Pakistan). After moving to and residing in Germany, the latter acquired German nationality.

12. In March 2004 the couple moved to the United Kingdom and on 7 November 2005 NA was issued with a residence permit valid until 21 September 2009.

13. However, the couple's relationship deteriorated to the point that NA was the victim of a number of incidents of domestic violence. Following an assault on NA (who was more than five months pregnant at the time), KA left the matrimonial home in October 2006. In December 2006 he left the United Kingdom permanently to return to Pakistan.

3 — OJ, English Special Edition: Series I Volume 1968(II), p. 475.

14. While he was resident in the UK, KA was either a worker or self-employed. On 5 December 2006 he asked the UK authorities to cancel NA's residence permit, on the ground that he had settled permanently in Pakistan. He asked to be informed when the permit had been cancelled.

15. He claimed to have divorced NA by means of a 'talaq'[4] issued in Karachi on 13 March 2007. In September 2008 NA instituted divorce proceedings in the United Kingdom. The decree absolute was issued on 4 August 2009 and NA was granted custody of the couple's two daughters.

16. A daughter MA was born on 14 November 2005 and a daughter IA was born on 3 February 2007. They are both German nationals and have attended school in the United Kingdom since January 2009 and September 2010 respectively.

17. NA made an application for permanent residence in the United Kingdom, which was refused.

18. NA brought an action against that refusal. The court of first instance dismissed the action. However, on 22 February 2013 the court of second instance, the Upper Tribunal (Immigration and Asylum Chamber), reversed the first judgment.

19. The latter court first of all confirmed that NA did not retain her right of residence under Article 13(2) of Directive 2004/38 on the ground that, at the time of the divorce, KA was no longer exercising his Treaty rights in that Member State.

20. It found next, however, that she had a right of residence under, first, Article 20 TFEU, pursuant to the principles set out in the judgment in *Ruiz Zambrano* (C-34/09, EU:C:2011:124), and, secondly, Article 12 of Regulation No 1612/68.

21. Finally, since it was common ground that the refusal to grant NA a right of residence in the United Kingdom would force her children, MA and IA, to leave that Member State with her, since she has sole custody of them, the Upper Tribunal (Immigration and Asylum Chamber), taking the view that the anticipated removal of MA and IA from the United Kingdom would infringe their rights under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('ECHR'), upheld the action brought by NA under that provision.

22. NA brought an appeal against that judgment in so far as it concerned the refusal of a right of residence under Article 13(2) of Directive 2004/38. The UK authorities also appealed against the judgment in so far as it granted NA a right of residence under, first, Article 20 TFEU and, secondly, Article 12 of Regulation No 1612/68. The grounds of the judgment relating to Article 8 of the ECHR, on the other hand, were not contested in any way.

23. It was in those circumstances that, in two judgments given on 17 July 2014 and 25 February 2015 respectively, the Court of Appeal (England & Wales) (Civil Division) decided to stay the proceedings and to refer four questions to the Court for a preliminary ruling.

4 — A *talaq* is a form of unilateral divorce that is legal under the law of Pakistan but is not recognised in the United Kingdom.

IV – The request for a preliminary ruling and the procedure before the Court

24. By order of 25 February 2015, received at the Court on 6 March 2015, the Court of Appeal (England & Wales) (Civil Division) therefore referred the following questions to the Court for a preliminary ruling:

'(1) Must a third country national ex-spouse of a Union citizen be able to show that their former spouse was exercising Treaty rights in the host Member state at the time of their divorce in order to retain a right of residence under Article 13(2) of Directive 2004/38/EC?

(2) Does an EU citizen have an EU law right to reside in a host Member State under Articles 20 and 21 of the TFEU in circumstances where the only State within the EU in which the citizen is entitled to reside is his State of nationality, but there is a finding of fact by a competent tribunal that the removal of the citizen from the host Member State to his State of nationality would breach his rights under Article 8 of the ECHR or Article 7 of the Charter of Fundamental Rights of the EU ("the Charter")?

(3) If the EU citizen in [the second question] is a child, does the parent having sole care of that child have a derived right of residence in the host Member State if the child would have to accompany the parent on removal of the parent from the host Member State?

(4) Does a child have a right to reside in the host Member State pursuant to Article 12 of Regulation No 1612/68 (now Article 10 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p.1)) if the child's Union citizen parent, who has been employed in the host Member State, has ceased to reside in the host Member State before the child enters education in that State?'

25. Written observations have been submitted by NA, Aire Centre, the United Kingdom, Danish, Netherlands and Polish Governments, as well as by the European Commission. In addition, NA, Aire Centre, the United Kingdom Government and the Commission also presented oral argument at the hearing held on 18 February 2016.

V – Analysis

A – *The claim that the questions referred are hypothetical*

26. According to the United Kingdom Government, the second and third questions raised by the referring court are hypothetical and irrelevant to the dispute, since NA and her children have already been granted a right of residence in the United Kingdom under Article 8 ECHR. According to the Netherlands Government, that finding renders all the questions referred hypothetical.

27. In that regard, it is settled case-law that, in the context of the cooperation between the Court and the national courts provided for by Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. [5]

5 — See, to that effect, the judgment in *Trespa International* (C-248/07, EU:C:2008:607, paragraph 32).

28. In accordance with that case-law, 'questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance'. [6]

29. In the present case, it is not manifestly apparent that the issue which has prompted the questions referred is purely hypothetical.

30. After all, it is not inconceivable that the Court's answers to the various questions put to it will determine whether NA is eligible for certain social security benefits and special non-contributory benefits which she is currently denied because of the restriction of the rights conferred by a right of residence based on Article 8 ECHR. [7] A right of residence based directly on EU law would at the very least be such as to afford NA an increased level of legal certainty. [8]

31. In those circumstances, I would ask the Court to consider the questions raised by the referring court to be admissible.

B – *Preliminary observations concerning Article 16 of Directive 2004/38*

32. The referring court has confined its questions to the interpretation of Articles 20 TFEU and 21 TFEU, Article 13(2) of Directive 2004/38 and Article 12 of Regulation No 1612/68.

33. However, the Court has already had occasion to find, not least in a case concerning the right of residence of a third country national who is a direct relative in the ascending line of Union citizens who are young children, that that fact did not prevent it from providing the referring court with all the elements of interpretation of EU law which might be of assistance in adjudicating on the case before it, whether or not that court has specifically referred to them in its questions. [9]

34. In the present case, the Commission, in its written observations, raised the issue of whether NA could be granted a right of permanent residence on the basis of Article 16(2) of Directive 2004/38, with effect from March 2009.

35. In accordance with Article 7(2) of Directive 2004/38, family members of Union citizens who are not nationals of a Member State have a right of residence for more than three months where they accompany or join the Union citizen in the host Member State, provided that the Union citizen satisfies the conditions referred to in Article 7(1)(a), (b) or (c) of Directive 2004/38. [10]

36. Next, in accordance with Article 16(2) of Directive 2004/38, if the residence continues legally 'with the Union citizen in the host Member State for a continuous period of five years', the family members of that Union citizen who are not nationals of a Member State have a right of permanent residence in that host Member State.

6 — Judgment in *Wojciechowski* (C-408/14, EU:C:2015:591, paragraph 32). See also, among many, the judgments in *Pujante Rivera* (C-422/14, EU:C:2015:743, paragraph 20 and the case-law cited) and *Trespa International* (C-248/07, EU:C:2008:607, paragraph 33).

7 — See, to that effect, the written observations lodged by NA (paragraph 7).

8 — See, to that effect, the written observations lodged by Aire Centre (paragraph 3).

9 — See, to that effect, inter alia, the judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 20).

10 — That is to say that he is a worker or self-employed in the host Member State or has sufficient resources for himself and his family members not to become a burden on the social assistance system of the host Member State and comprehensive sickness insurance cover in that same State, or is in the host Member State for the principal purpose of following a course of study (provided that he fulfils the same requirements with respect to resources and sickness insurance as are set out above).

37. In the present case, it is apparent from the information in the documents before the Court that NA arrived in the United Kingdom with her spouse KA, who is a Union citizen, in March 2004. Furthermore, it is common ground that, until his departure in December 2006, KA was a worker or self-employed. Up until that date, therefore, NA could claim a right of residence on the basis of Article 7(2) of Directive 2004/38.

38. It is also established that, thereafter, NA had sole custody of her two children (one of whom was born before KA left the matrimonial home), who are Union citizens by virtue of being German nationals.

39. On the basis of the principles formulated by the Court in the judgment in *Zhu and Chen* (C-200/02, EU:C:2004:639), NA's derived right of residence therefore continued without interruption by virtue of her children.[11] According to the Court, the conditions, laid down in Directive 2004/38, under which a child who is a Union citizen enjoys a right of residence in the territory of a Member State of which he is not a national are met, provided that *someone* (not necessarily the child himself, but, in this instance, one of the child's parents) can guarantee that the child satisfies the financial requirements and other conditions that must be fulfilled in order for a Union citizen who is not in gainful employment to be eligible for a right of residence in another Member State.[12]

40. The Court has held that, in those circumstances, Article 20 TFEU and Directive 2004/38 'confer on a young minor who is a national of a Member State, is covered by appropriate sickness insurance and is in the care of a parent who is a third country national having sufficient resources for that minor not to become a burden on the public finances of the host State, a right to reside for an indefinite period in that State. *In such circumstances, those same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State*'.[13]

41. It would appear from the explanations provided by NA's representative at the hearing on 18 February 2016 that the required 'sufficient resources' are not present in this case. However, it is for the national court to determine whether those conditions were met between the point at which the husband left the United Kingdom and March 2009, when NA would have been resident in the United Kingdom for five years. If the referring court were to find that NA had 'resided legally' in the United Kingdom for a continuous period of five years, she would therefore, at that point in time, have acquired a right of permanent residence under Article 16 of Directive 2004/38.

42. It is true that, unlike in the factual situations that gave rise to the judgments in *Zhu and Chen* (C-200/02, EU:C:2004:639) and *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645), any derived right of residence enjoyed by NA would not be linked to the right of residence of one and the same Union citizen (her child). It would have come into being by virtue of her spouse's right of residence and would then have continued by virtue of that of her children.

43. In that regard, it is true that Article 16(2) of Directive 2004/38 applies to 'family members who are not nationals of a Member State and have legally resided with *the* Union citizen',[14] which might imply that the derived right relied on must emanate from the same person.

11 — Judgment in *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraphs 45 to 47). See also the judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 29).

12 — See, to that effect, inter alia, the judgments in *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraphs 28 and 30 and 41 and 47) and *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 27).

13 — Judgment in *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraph 47). My emphasis.

14 — My emphasis.

44. However, the succession over time of various factors of connection with Union citizenship — confined, moreover, within the same family unit — does not seem to me to be such in itself as to call into question the reality of legal residence for a continuous period of five years. That is the essential condition which Article 16 attaches to eligibility for a right of permanent residence.

45. Would it not be paradoxical not to require that a third country national should continue to reside,[15] let alone 'tru[ly] share [a] married life together',[16] with *the* Union citizen, but to refuse to allow the link to Union citizenship — the gateway to the right of residence — to carry on through another person, in this instance the Union citizen's child or children?

46. Consequently, a literal reading of Article 16(2) of Directive 2004/38 would seem to me to be excessively strict given that the Court has specifically held that the context and objectives of Directive 2004/38 preclude a restrictive interpretation of the provisions of that directive.[17]

47. What is more, I would add for the sake of completeness that, in the case in the main proceedings, provided that NA had sufficient resources for her elder daughter not to become a burden on the public finances of the host Member State, the five-year period also appears to me to have been met since November 2010, MA having been born on 14 November 2005.

C – *The first question referred for a preliminary ruling*

48. By its first question, the referring court asks whether a third country national who is the ex-spouse of a Union citizen must be able to show that her former spouse was exercising his Treaty rights in the host Member State at the time of their divorce in order to be able to retain a right of residence under Article 13(2) of Directive 2004/38.

49. Article 13 of Directive 2004/38 governs the retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership ('in the event of divorce').

50. To date, that provision has formed the subject of just one request for a preliminary ruling.[18] The situation in that case was that provided for in Article 13(2)(a) of Directive 2004/38. The request thus sought to determine whether a third country national who was divorced from a Union citizen and whose marriage had lasted at least three years prior to the commencement of the divorce proceedings, including at least one year in the host Member State, could retain the right of residence in that Member State, even though the spouse who was a Union citizen had left that State prior to the divorce.

51. In its judgment, the Court held that 'the right of residence of the Union citizen's spouse who is a third country national can be retained on the basis of Article 13(2)(a) of Directive 2004/38 only if the Member State in which that national resides is the "host Member State" within the meaning of Article 2(3) of Directive 2004/38 *on the date of commencement of the* [*divorce*] *proceedings*'.[19]

15 — See, to that effect, the judgments in *Diatta* (267/83, EU:C:1985:67, paragraphs 20 and 22) and *Iida* (C-40/11, EU:C:2012:691, paragraph 58).

16 — See, to that effect, the judgment in *Ogieriakhi* (C-244/13, EU:C:2014:2068, paragraphs 36, 38 and 47).

17 — See, to that effect, the judgment in *Metock and Others* (C-127/08, EU:C:2008:449, paragraph 84).

18 — Judgment in *Singh and Others* (C-218/14, EU:C:2015:476).

19 — Judgment in *Singh and Others* (C-218/14, EU:C:2015:476, paragraph 61). My emphasis.

52. In the case in the main proceedings, the Court will be called upon this time to consider the situation provided for in Article 13(2)(c) of Directive 2004/38, that is to say the possibility for a Union citizen's family members who are not nationals of a Member State to retain their right of residence in the event of divorce 'where this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence'.

53. In that situation, must the Union citizen spouse of a third country national have resided in the host Member State until the time of the decree of divorce in order for the third country national to be able to seek to retain his/her right of residence?

1. The interpretative framework arising from the judgment in *Singh and Others*

54. In the judgment in *Singh and Others* (C-218/14, EU:C:2015:476), the Court held that a petition for divorce made after the departure of the spouse who is a Union citizen cannot have the effect of *reviving* the right of residence of the spouse who is a third country national, 'since Article 13 of Directive 2004/38 mentions only the "retention" of an existing right of residence'.[20]

55. On a combined reading of Articles 12 and 13 of Directive 2004/38, the Court considered that a third country national's derived right of residence comes to an end when his/her Union citizen spouse leaves the Member State in which they reside for the purpose of settling in another Member State or a third country.[21]

56. The Court took the view, however, that the right of residence of the Union citizen's spouse, who is a third country national, can be retained on the basis of Article 13(2)(a) of Directive 2004/38 if the Member State in which that third country national resides is the 'host Member State' within the meaning of Article 2(3) of Directive 2004/38 *on the date of commencement of the* [*divorce*] *proceedings*.[22]

57. Those three paragraphs of the judgment in *Singh and Others* (C-218/14, EU:C:2015:476) provide an understanding of the logic that informs the interpretation of Article 13 of Directive 2004/38.

58. The principle is that a Union citizen's family members who are not nationals of a Member State lose their right of residence when the Union citizen to whom the right of residence is attached leaves the territory of the host Member State. However, the right of residence of family members may be retained by virtue of certain events that may arise *in the context* of proceedings relating to divorce, annulment of marriage or termination of a registered partnership.

59. As the judgment in *Singh and Others* (C-218/14, EU:C:2015:476) shows, it is not the acts of divorce, annulment of marriage or termination of a registered partnership *as such* which enable family members to retain their right of residence, but the specific situations detailed in the first subparagraph of Article 13(2) of Directive 2004/38.

60. I would observe in this regard that, even in its comments on Article 13 of the proposal that led to the adoption of Directive 2004/38, the Commission was already presenting the various situations set out as '*disjunctive* conditions',[23] that is to say conditions the fulfilment of only one of which is sufficient to trigger the retention of the right of residence.

20 — Paragraph 67.

21 — Judgment in *Singh and Others* (C-218/14, EU:C:2015:476, paragraph 62).

22 — Judgment in *Singh and Others* (C-218/14, EU:C:2015:476, paragraph 61).

23 — Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [COM(2001) 257 final, OJ 2001 C 270 E, p 150]. My emphasis.

61. Consequently, the situations provided for in the first subparagraph of Article 13(2) of Directive 2004/38 must be regarded as factors triggering the retention of the right of residence of a third country national who is the spouse of a Union citizen.

62. If that spouse leaves the host Member State before one of those factors materialises, Article 13 cannot have the effect of enabling the right of residence to be 'retained', since that right has in fact already been lost. Where, on the other hand, the departure to which Article 12(3) refers has occurred after one of the events triggering the retention of the right of residence under the first subparagraph of Article 13(2) (rather than the grant of the divorce *stricto sensu*), the subsequent departure of the Union citizen is immaterial.

2. The situation of 'particularly difficult circumstances' provided for in Article 13(2)(c) of Directive 2004/38

63. The Court has consistently held that, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part. [24]

64. The text of Article 13(2)(c) of Directive 2004/38 does not in itself provide the basis for giving a useful answer to the first question referred for a preliminary ruling.

65. Nonetheless, I would observe that, unlike the other scenarios provided for in the first subparagraph of Article 13, the factual situation triggering retention of the right of residence is defined by reference to events which have taken place wholly in the past.

66. Thus, Article 13(2)(c) of Directive 2004/38 applies to domestic violence 'while the marriage or registered partnership was subsisting'. There is therefore, necessarily, a time delay between the domestic violence, the factor triggering the application of the provision, and the divorce.

67. Furthermore, a number of factors enable us to determine the objective pursued by the EU legislature.

68. First, recital 15 of Directive 2004/38 expressly refers to the need for 'family members [to] be legally safeguarded in the event of … divorce, annulment of marriage or termination of a registered partnership'.

69. Secondly, the Commission's explanatory notes relating to the proposal that led to the adoption of Article 13 of Directive 2004/38 state that 'the purpose of this provision is to provide certain legal safeguards to people whose right of residence is dependent on a family relationship by marriage and who could therefore be open to blackmail with threats of divorce'. [25]

70. Such a risk of 'blackmail with threats of divorce' or with a refusal to grant a divorce appears to me to be particularly significant in the context of domestic violence. After all, the loss of the derived right of residence, by a spouse who is a third country national, in the event of the Union citizen's departure could be used as a means of exerting pressure to stop the divorce at a time when the circumstances are in themselves enough to wear the victim down psychologically and, in any event, to engender fear of the perpetrator of the violence.

24 — See, inter alia, the judgments in *Yaesu Europe* (C-433/08, EU:C:2009:750, paragraph 24); *Brain Products* (C-219/11, EU:C:2012:742, paragraph 13); *Koushkaki* (C-84/12, EU:C:2013:862, paragraph 34); and *Lanigan* (C-237/15 PPU, EU:C:2015:474, paragraph 35).

25 — Proposal for a Directive COM(2001) 257 final.

71. The requirement that the Union citizen spouse must actually be present in the territory of the host Member State up until the divorce, or, at the very least, until the commencement of divorce proceedings, could also undermine the application of the aforementioned Article 13(2)(c) of Directive 2004/38, given the risk of criminal penalties attaching to conduct constituting domestic violence.

72. It is not inconceivable that the perpetrator of such acts will seek to leave the territory in which those acts were committed in order to escape possible conviction, thus effectively depriving the third country national of her derived right of residence. The commencement of divorce proceedings on grounds of domestic violence might at the same time result in those acts being reported to the judicial authorities.

73. An interpretation of Article 13(2)(c) of Directive 2004/38 as requiring a third country national to show that her ex-spouse was exercising Treaty rights in the host Member State at the time of the divorce in order to be able to retain a right of residence would therefore be manifestly contrary to the objective of legal protection pursued by that provision.

74. Finally, as I recalled earlier, 'having regard to the context and objectives of Directive 2004/38, the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness'. [26]

75. An interpretation requiring a Union citizen spouse to be present in the territory of the host Member State until the commencement of divorce proceedings would not only be restrictive but would also deprive the provision of its effectiveness, which lies in converting the *derived* right of residence of a family member of a Union citizen into a personal right of residence in particular circumstances warranting protection.

76. If the fact of being a victim of an act of domestic violence was regarded by the EU legislature as a ground for converting a derived right into an individual right, the recognition of such a right cannot depend exclusively on whether the perpetrator of those acts chooses to remain in the territory of the host Member State.

3. Interim conclusion

77. Even when read in conjunction, Articles 12 and 13 of Directive 2004/38 do not support the proposition that divorce, annulment of marriage or termination of a registered partnership may, as such, be regarded as factors triggering the retention of a right of residence.

78. Those specific situations, referred to in the heading of Directive 2004/38, are no more than a framework within which one of the events mentioned in Article 13(2) may occur and thereby trigger the retention of the right of residence of a spouse who is a third country national if, and only if, the Union citizen is still present in the territory of the host Member State at that time.

79. With regard more specifically to the situation of domestic violence provided for in Article 13(2)(c) of Directive 2004/38, a teleological interpretation of that provision supports the proposition that the occurrence of domestic violence constitutes a factor triggering the retention of the right of residence of a third country national who is the spouse of a Union citizen.

80. Any other interpretation would deprive Article 13(2)(c) of Directive 2004/38 of its effectiveness, which lies in affording legal protection to the victims of acts of violence, whereas the interpretation proposed is also consistent with the wording of the contested provision.

26 — Judgment in *Metock and Others* (C-127/08, EU:C:2008:449, paragraph 84).

81. Finally, the risk of abuse mentioned in recital 15 of Directive 2004/38 is adequately mitigated by the obligation, laid down in the second subparagraph of Article 13(2), to the effect that the right of residence of the persons referred to in the first subparagraph 'shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or 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 and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements'.

82. Following that analysis, I therefore propose that the answer to the first question referred for a preliminary ruling should be that, in the event that divorce is consecutive to domestic violence, Article 13(2)(c) of Directive 2004/38 does not require that a Union citizen who is the spouse of a third country national should himself be resident in the territory of the host Member State, in accordance with Article 7(1) of that directive, at the time of the divorce in order for that third country national to be able to retain a personal right of residence under that provision.

D – *The second and third questions referred for a preliminary ruling*

83. By its second question, the referring court seeks to ascertain whether Article 20 TFEU and/or Article 21 TFEU must be interpreted as meaning that they preclude a Member State from refusing to grant a Union citizen a right of residence in its territory where a competent court or tribunal has found that his removal to the Member State of which he is a national would infringe Article 8 ECHR and Article 7 of the Charter.

84. By its third question, the referring court envisages the same situation but from the point of view of a third country national who is a parent having sole custody of a Union citizen.

85. Those questions have been dealt with jointly by all the parties who have lodged written observations, with the exception of the United Kingdom Government. I share the view that those two questions can be analysed together in the light of the Court's judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645).

86. The situation in the case that gave rise to that judgment was comparable inasmuch as it concerned children who were Union citizens and who had been born in a Member State of which they were not nationals to a father who was a Union citizen and a mother who was a third country national. In its judgment, the Court chose to consider the question primarily in the light of Article 21 TFEU, even though the referring court had relied only on Article 20 TFEU.[27]

1. What the judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645) tells us about Article 21 TFEU

87. In the judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645), the Court recalled that, in the context of a case in which a Union citizen was born in the host Member State and had not made use of the right of free movement, the expression 'have' sufficient resources, which appears in Article 7(1)(b) of Directive 2004/38 and is a condition of the legality of a period of residence lasting

27 — Judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraphs 20, 21 and 32).

more than three months, 'must be interpreted as meaning that it suffices that such resources are available to the Union citizens, and that that provision lays down no requirement whatsoever as to their origin, since they could be provided, inter alia, by a national of a non-Member State, the parent of the citizens who are minor children at issue'. [28]

88. That finding gives rise to settled case-law to the effect that, 'while Article 21 TFEU and Directive 2004/38 grant a right to reside in the host Member State to a minor child who is a national of another Member State and who satisfies the conditions of Article 7(1)(b) of that directive, the same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State'. [29]

89. After all, 'a refusal to allow a parent, whether a national of a Member State or of a third country, 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 young child 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'. [30]

90. Since the facts of the dispute in the main proceedings are similar, I see no reason to depart from that settled case-law or from the consequence that it is for the referring court to ascertain whether NA's children satisfy the conditions set out in Article 7(1) of Directive 2004/38 and have, therefore, a right of residence in the host Member State on the basis of Article 21 TFEU. [31]

91. It is therefore necessary, 'in particular, … to determine whether those children have, on their own or through their mother, sufficient resources and comprehensive sickness insurance cover, within the meaning of Article 7(1)(b) of Directive 2004/38'. [32]

92. If not, the Court held that Article 21 TFEU did not preclude the third country national from being refused a right of residence, even though that national has sole custody of young children who are Union citizens and who reside with that national in the territory of a Member State of which they are not nationals. [33]

93. To my mind, Article 7 of the Charter (and/or of Article 8 ECHR), if applied, does not have any bearing on that reasoning inasmuch as it relates specifically to the right of free movement, which is guaranteed by Article 21 TFEU 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect', such as Article 7 of Directive 2004/38. [34]

28 — Judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 27, which refers to paragraphs 28 and 30 of the judgment in *Zhu and Chen*, C-200/02, EU:C:2004:639).

29 — Judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 29, which refers to paragraphs 46 and 47 of the judgment in *Zhu and Chen*, C-200/02, EU:C:2004:639).

30 — Judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 28 and the case-law cited).

31 — See, to that effect, the judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 30 and the case-law cited).

32 — Judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 30 and the case-law cited).

33 — Judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 31 and the operative part).

34 — Advocate General Mengozzi had also considered the possibility that the provisions of the Charter might relax or even disregard the conditions laid down in Article 7(1) of Directive 2004/38 with a view to ensuring the respect for family life enshrined in Article 7 of the Charter (Opinion of Advocate General Mengozzi in *Alokpa and Moudoulou*, C-86/12, EU:C:2013:197, point 34). His conclusion was similar to my own, since he took the view that it 'nevertheless … appear[ed] difficult to envisage such a possibility, since this would mean disregarding the limits laid down by Article 21 TFEU on the right of citizens of the Union to move and reside freely within the territory of the Member States' (point 35), in which regard Advocate General Mengozzi was referring to the conditions laid down in Directive 2004/38.

2. What the judgment in *Alokpa and Moudoulou* tells us about Article 20 TFEU

94. Although Article 21 TFEU does not provide unconditional support for the right of residence of a third country national who has sole custody of minor children who are Union citizens, the Court has recognised Article 20 TFEU as having an independent scope.

95. Thus, in the judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645), the Court expressly stated that the national court was still required, on the basis of Article 20 TFEU, to 'determine whether such a right of residence may nevertheless be granted to her, exceptionally — if the effectiveness of the Union citizenship that [the] children [of a third country national who has sole custody of them] enjoy is not to be undermined — in light of the fact that, as a consequence of such a refusal, those children would find themselves obliged in practice to leave the territory of the European Union altogether, thus denying them the genuine enjoyment of the substance of the rights conferred by virtue of that status'. [35]

96. The foregoing is in fact the foundation of the case-law initiated by the judgment in *Ruiz Zambrano* (C-34/09, EU:C:2011:124), as confirmed and clarified in a number of later judgments. [36]

97. It follows from that case-law that a right of residence must be granted on the basis of Article 20 TFEU to a third country national who is the parent of a Union citizen, provided that the refusal of that right of residence would deprive that citizen of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen by forcing him to leave the territory of the European Union altogether.

98. The 'deprivation of the substance of rights' criterion has been well established since the judgment in *Dereci and Others* (C-256/11, EU:C:2011:734). [37] The question is how to assess it: must the obligation to leave the territory of the European Union be measured from a legal perspective or *in concreto*, in relation to the facts?

3. The criteria for assessing the obligation to leave the territory of the European Union altogether

99. As German nationals, NA's two children are, quite clearly, entitled to live in Germany. Consequently, if they were to leave the territory of the United Kingdom to move to Germany, their mother would have a *derived* right of residence in the latter State in accordance with the principles formulated in the judgment in *Ruiz Zambrano* (C-34/09, EU:C:2011:124). [38]

100. If that were not the case, MA and IA would be obliged to leave the territory of the European Union in order to follow their mother, in all likelihood to Pakistan, and would thereby be deprived of the genuine enjoyment of the substance of the rights conferred by virtue of their status as Union citizens.

101. The case that gave rise to the judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645) concerned a comparable situation.

35 — Judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 33).

36 — See the judgments in *McCarthy* (C-434/09, EU:C:2011:277, paragraph 47); *Dereci and Others* (C-256/11, EU:C:2011:734, paragraphs 64, 66 and 67); *Iida* (C-40/11, EU:C:2012:691, paragraph 71); *Ymeraga and Others* (C-87/12, EU:C:2013:291, paragraph 36); and *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 32). See also the analysis of the development of that case-law in the Opinion of Advocate General Szpunar in *Rendón Marín and CS* (C-165/14 and C-304/14, EU:C:2016:75).

37 — See, inter alia, Nic Shuibhne, N., '(Some of) The Kids Are All Right', *CML. Rev.*, 2012 (49), pp. 349 to 380, in particular p. 362, and Lenaerts, K., 'The concept of EU citizenship in the case law of the European Court of Justice', *ERA Forum*, 2013, pp. 569 to 583.

38 — See, to that effect, the judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraphs 34 and 35).

102. In that case, Mrs Alokpa claimed that, if the Luxembourg authorities refused to grant her a right of residence when she was residing in the territory of that Member State with her children, who were French nationals, she would be unable to move to and reside in France with them and would therefore be obliged to return to Togo.

103. According to Advocate General Mengozzi, 'consideration should therefore be given to whether the execution of such a decision would have the effect, in fact, of requiring Union citizens to leave the territory of the Union as a whole, within the meaning of the case-law in *Ruiz Zambrano* and *Dereci and Others*, thus depriving them of the [genuine] enjoyment of the substance of the rights conferred by virtue of their status'. [39]

104. In its subsequent judgment, the Court held, concurring with the assessment of Advocate General Mengozzi, that 'Mrs Alokpa, as the mother of Jarel and Eja Moudoulou and as sole carer of those children since their birth, could have the benefit of a derived right to [accompany them and] reside [with them] in France'. [40]

105. The Court concluded that, '*in principle*, the refusal by the Luxembourg authorities to grant Mrs Alokpa a right of residence cannot result in her children being obliged to leave the territory of the European Union altogether'. [41] It nonetheless pointed out, in the same paragraph, that it is for the referring court, 'however, … to determine whether, *in the light of all of the facts of the main proceedings, that is in fact the case*'. [42]

106. The latter qualification is crucial in my opinion. It is meaningful only if the assessment of the 'deprivation of the substance of rights' test is more than just a matter of law.

107. After all, the legal — that is to say, theoretical — possibility that a Union citizen's children and a third country national parent who is their sole carer may reside in the territory of the Member State of which the children are nationals has been recognised by the Court.

108. That said, the Court expressly confers on the national court the task of determining whether, 'in the light of *all of the facts* of the main proceedings', [43] the host Member State's refusal to grant a right of residence to the third country national parent might not have the consequence of obliging his children to leave the territory altogether.

109. It follows from that qualification, first, that the circumstances to be taken into account are, necessarily, factual [44] and, secondly, that they may defeat the theoretical possibility of not having to leave the territory of the European Union altogether. In other words, the principle formulated in the judgment in *Ruiz Zambrano* (C-34/09, EU:C:2011:124) could be 'reactivated' in relation to the State of which the children are nationals. [45]

110. That factual examination of the 'deprivation of the substance of rights' test is consistent with the logic that must inform our understanding of the concept of citizenship of the Union.

39 — Opinion of Advocate General Mengozzi in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:197, point 52).

40 — Judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 34).

41 — Judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 35). My emphasis.

42 — Judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 35). My emphasis.

43 — Judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 35). My emphasis.

44 — As early as in the judgment in *Dereci and Others* (C-256/11, EU:C:2011:734), the Court had left to the national court the task of determining whether the refusal to grant a right of residence to a third country national did not have the effect of depriving his family members of the genuine enjoyment of the substance of the rights conferred on them by their status as Union citizens. In response to certain criticisms from a number of legal academics in this regard, Koen Lenaerts states that the question of whether, by forcing Mr Dereci to leave Austria, his children would be obliged to follow him is 'clearly a factual question' (Lenaerts, K., 'The concept of EU citizenship in the case law of the European Court of Justice', *ERA Forum*, 2013, pp. 569 to 583, in particular p. 575, footnote 32). I can only endorse that finding.

45 — This expression is borrowed from Anne Rigaux (Rigaux, A., 'Regroupement familial', *Europe*, December 2013, comment 499).

111. As the Court has consistently held, the status of Union citizen is destined to be the *fundamental* status of nationals of the Member States. [46] It cannot therefore be an empty shell. As Advocate General Szpunar recently stated, 'to declare to nationals of the Member States that they are citizens of the Union is not merely a matter of defining rights and duties; it also creates expectations'. [47]

112. In addition, while the right to move and establish oneself is expressly cited as a right enjoyed by a Union citizen in Articles 20 TFEU and 21 TFEU, as well as in Article 45 of the Charter, that citizen cannot be denied recognition of the fact that he may have created in a Member State other than his own a genuine and lasting attachment that is more significant or substantial than his attachment to the Member State of which he is a national.

113. EU law may flesh out the concept of citizenship of the Union only on condition that it links the protection of citizenship to attachment to a place, to the fact of being settled in a territory and of being integrated not only into the administrative and economic life of the host country but also into its social and cultural life. [48]

114. In other words, the option available to a third country national and his/her Union citizen children of moving to the Member State of which those children are nationals cannot exist only in the abstract. [49]

115. In the present case, it seems to be established that NA's children, although German nationals, have no connection with that Member State, in whose territory they have never lived and whose language they do not speak. Having been born and gone to school in the United Kingdom, it is in that Member State that they have *constructed* their citizenship.

116. The Commission itself notes, in its written observations, that although, 'as German nationals', NA's daughters 'enjoy an unconditional right of residence in Germany, it is also common ground that neither they nor [their] mother can reasonably be expected to live there, and, on this basis, the domestic courts have held that they could not be removed [from the United Kingdom to Germany] without violating the ECHR'. [50]

117. I therefore take the view that, if that information were to be confirmed by the referring court, it would fall to that court to recognise MA and IA as having a right of residence in the United Kingdom on the basis of Article 20 TFEU, with NA herself, by extension, obtaining a derived right of residence. After all, refusing to grant that right to NA's children would deprive them of the genuine enjoyment of the substance of the rights conferred by their status as Union citizens. According to the judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645), Article 20 TFEU precludes such a consequence. [51]

46 — See, inter alia, the judgments in *Grzelczyk* (C-184/99, EU:C:2001:458, paragraph 31); *D'Hoop* (C-224/98, EU:C:2002:432, paragraph 28); *Baumbast and R* (C-413/99, EU:C:2002:493, paragraph 82); *Garcia Avello* (C-148/02, EU:C:2003:539, paragraph 22); *Orfanopoulos and Oliveri* (C-482/01 and C-493/01, EU:C:2004:262, paragraph 65); *Pusa* (C-224/02, EU:C:2004:273, paragraph 16); *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraph 25); *Bidar* (C-209/03, EU:C:2005:169, paragraph 31); *Commission* v *Austria* (C-147/03, EU:C:2005:427, paragraph 45); *Schempp* (C-403/03, EU:C:2005:446, paragraph 15); *Spain* v *United Kingdom* (C-145/04, EU:C:2006:543, paragraph 74); *Commission* v *Netherlands* (C-50/06, EU:C:2007:325, paragraph 32); *Huber* (C-524/06, EU:C:2008:724, paragraph 69); *Rottmann* (C-135/08, EU:C:2010:104); *Prinz and Seeberger* (C-523/11 and C-585/11, EU:C:2013:524, paragraph 24); and *Martens* (C-359/13, EU:C:2015:118, paragraph 21).

47 — Opinion of Advocate General Szpunar in *Rendón Marín and CS* (C-165/14 and C-304/14, EU:C:2016:75, point 117).

48 — See, in this regard, Azoulai, L., 'Le sujet des libertés de circuler', in Doubout, E., and Maitrot de la Motte, A., *L'unité des libertés de circulation — In varietate concordia*?, Bruylant, 2013, pp. 385 to 411, in particular p. 408.

49 — The expression is borrowed from Advocate General Szpunar (see his Opinion in *Rendón Marín and CS*, C-165/14 and C-304/14, EU:C:2016:75, footnote 109).

50 — See paragraph 36 of the Commission's written observations.

51 — See, to that effect, the judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 36 and the operative part).

4. The impact of Article 7 of the Charter and Article 8 ECHR

118. In its second question, the referring court recalls that there has been a judicial finding that the removal of Union citizens, in this instance children, from the host Member State to the Member State of which they are nationals would breach their rights under Article 8 ECHR and Article 7 of the Charter.

119. Can such a finding have any impact on the answer to be given to that question?

120. The question of the impact of Article 7 of the Charter and Article 8 ECHR on the application of Article 20 TFEU has already been put to the Court. In the judgment in *Dereci and Others* (C-256/11, EU:C:2011:734), it replied to that question by finding that 'if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by EU law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by EU law, it must undertake that examination in the light of Article 8(1) of the ECHR'. [52]

121. That conclusion is striking. In its judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645), the Court had no hesitation in ruling that 'Articles 20 and 21 TFEU must be interpreted as meaning that they do not preclude a Member State from refusing to allow a third country national to reside in its territory, where that third country national has sole responsibility for her minor children who are citizens of the European Union, and who have resided with her in that Member State since their birth, without possessing the nationality of that Member State and making use of their right to freedom of movement, in so far as those Union citizens do not satisfy the conditions set out in Directive 2004/38 or such a refusal does not deprive those citizens of [genuine] enjoyment of the substance of the rights conferred by virtue of the status of European Union citizenship …'. [53]

122. If a Treaty provision does not preclude a Member State from refusing a right of residence subject to compliance with certain conditions, it follows by definition that the situation in question falls within the scope of that provision. [54] If that were not the case, the Court would have to decline jurisdiction to answer the question referred.

123. It therefore seems to me certain that the questions linked to the application of Article 20 TFEU and the impact of citizenship of the Union on the right of residence fall within the scope of EU law. [55]

124. Consequently, if the referring court considers that the removal of a Union citizen would infringe Article 7 of the Charter (or Article 8(1) ECHR, their content being identical), that assessment must be taken into account in the application of Article 20 TFEU and in the assessment of the 'deprivation of the substance of rights' test.

52 — Paragraph 72.

53 — Paragraph 36 and the operative part of the judgment.

54 — See, to that effect, Carlier, J.-Y., 'La libre circulation des personnes dans l'Union européenne', *Journal de droit européen*, 2014, pp. 167 to 175, in particular p. 174. This was also the interpretation supported by Advocate General Sharpston in *O and Others* (C-456/12 and C-457/12, EU:C:2013:837). Thus, according to Advocate General Sharpston, 'it is necessary to look at a legal situation through the prism of the Charter if, *but only if*, a provision of EU law imposes a positive or negative obligation on the Member State (whether that obligation arises through the Treaties or EU secondary legislation)' (point 61). That is true here of Article 20 TFEU, since the latter *makes* the possibility for the Member States to refuse a right of residence *subject to* certain conditions.

55 — This is also the conclusion reached by Advocate General Szpunar in his Opinion in *Rendón Marín and CS* (C-165/14 and C-304/14, EU:C:2016:75, points 119 and 120), who says that he is 'convinced' that situations caught by the case-law initiated in the judgments in *Zhu and Chen* (C-200/02, EU:C:2004:639), *Rottmann* (C-135/08, EU:C:2010:104) and *Ruiz Zambrano* (C-34/09, EU:C:2011:124) fall within the scope of EU law. Advocate General Szpunar proceeds on the premise that Member State nationals enjoy the status of Union citizen. 'Therefore, as citizens of the Union, those children have the right to move and reside freely throughout the territory of the European Union and any restriction of that right falls within the ambit of EU law' (point 120).

125. To my mind, moreover, the inclusion of Article 7 of the Charter in the national court's reflection on the application of Article 20 TFEU is not such as to have the effect of extending the scope of EU law in a manner that would be contrary to Article 51(2) of the Charter.

126. After all, it is European citizenship as provided for in Article 20 TFEU that triggers the protection afforded by the fundamental rights (more specifically, in this instance, Article 7 of the Charter), not the other way round. [56]

5. Interim conclusion

127. In the light of the foregoing considerations, I propose that the answer to the second and third questions submitted by the referring court should be that Articles 20 TFEU and 21 TFEU must be interpreted as meaning that they preclude a Member State from denying a third country national a right of residence in its territory where that national has sole responsibility for children who are Union citizens and who have resided with him/her since their birth but who do not possess the nationality of that Member State and have not made use of their right to freedom of movement, in so far as those Union citizens satisfy the conditions laid down in Directive 2004/38 or, failing that, in so far as such a refusal deprives those citizens, in practice, of the genuine enjoyment of the substance of the rights conferred by virtue of their status as Union citizens, a matter which it falls to the referring court to determine in the light of all of the circumstances of the present case. If there has been a judicial finding that the removal of the Union citizens concerned would infringe Article 7 of the Charter or Article 8(1) ECHR, the national court must take that finding into account.

E – *The fourth question referred for a preliminary ruling*

128. By its fourth question, the referring court asks, in essence, whether Article 12 of Regulation No 1612/68 must be interpreted as meaning that a child and, in consequence, the parent having custody of that child enjoy a right of residence in the host Member State where the parent who is a Union citizen and has worked in that Member State has ceased to reside in that Member State before the child enters education there.

129. That question may be answered in the affirmative in the light of the Court's case-law.

130. According to the Court, 'the right conferred by Article 12 of Regulation No 1612/68 on the child of a migrant worker to pursue, under the best possible conditions, his education in the host Member State necessarily implies that that child has the right to be accompanied by the person who is his primary carer and, accordingly, that that person is able to reside with him in that Member State during his studies. To refuse to grant permission to remain to a parent who is the primary carer of the child exercising his right to pursue his studies in the host Member State infringes that right'. [57]

131. The children of a national of a Member State who works or has worked in the host Member State and the parent who is their primary carer can claim a right of residence in the latter State on the sole basis of the first paragraph of Article 12 of Regulation No 1612/68. [58]

56 — See, to that effect, Kochenov, D., 'The Right to Have *What* Rights? EU Citizenship in Need of Clarification', *European Law Journal*, vol. 19, 2013, pp. 502 to 516, in particular p. 511. See also the Opinion of Advocate General Sharpston in *O and Others* (C-456/12 and C-457/12, EU:C:2013:837, points 62 and 63).

57 — Judgment in *Baumbast and R* (C-413/99, EU:C:2002:493, paragraph 73). See also the judgment in *Teixeira* (C-480/08, EU:C:2010:83, paragraph 39).

58 — See, to that effect, the judgments in *Ibrahim and Secretary of State for the Home Department* (C-310/08, EU:C:2010:80, paragraph 59); *Teixeira* (C-480/08, EU:C:2010:83, paragraph 36); and *Alarape and Tijani* (C-529/11, EU:C:2013:290, paragraph 26).

132. In the judgment in *Teixeira* (C-480/08, EU:C:2010:83), the Court recalled that 'Article 12 of Regulation No 1612/68 seeks in particular to ensure that children of a worker who is a national of a Member State can, *even if he has ceased to be employed in the host Member State*, undertake and, where appropriate, complete their education in the latter Member State'. [59]

133. It has also stated that 'it is settled case-law that Article 12 of Regulation No 1612/68 requires only that the child has lived with his or her parents or either one of them in a Member State while at least one of them resided there as a worker (judgments in [*Brown* (197/86, EU:C:1988:323)], paragraph 30, and *Gaal* [(C-7/94, EU:C:1995:118)], paragraph 27)'. [60]

134. More clearly still, the Court has held that 'the child's right of residence in that State in order to attend educational courses there, in accordance with Article 12 of Regulation No 1612/68, and consequently the right of residence of the parent who is the child's primary carer, cannot therefore be subject to the condition that one of the child's parents was working as a migrant worker in the host Member State *on the date on which the child started in education*'. [61]

135. In the judgment in *Ibrahim and Secretary of State for the Home Department*, the Court further stated, in a situation in which one of the children concerned had entered education *after* the parent who was a former migrant worker had left the host Member State, that 'the right to equal treatment in respect of access to education is not limited to children of migrant workers. It also applies to children of *former* migrant workers'. [62]

136. It therefore follows indisputably from that case-law that Article 12 of Regulation No 1612/68 must be interpreted as meaning that a child and, in consequence, the parent having custody of that child, enjoy a right of residence in the host Member State where the parent who is a Union citizen and has worked in that Member State has ceased to reside in that Member State before the child enters education there.

137. That interpretation of Article 12 of Regulation No 1612/68 is, moreover, consistent with the principle that that provision 'cannot be interpreted restrictively … and must not, under any circumstances, be rendered ineffective'. [63]

138. I would add, for such purposes as may be useful, that it follows from the facts which gave rise to the judgment in *Alarape and Tijani* (C-529/11, EU:C:2013:290) that the principles recalled above also apply to third country nationals who are relatives in the ascending line of Union citizens.

VI – Conclusion

139. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Court of Appeal (England & Wales) (Civil Division) (United Kingdom) as follows:

(1) In cases where divorce is consecutive to acts of domestic violence, Article 13(2(c) 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,

59 — Judgment in *Teixeira* (C-480/08, EU:C:2010:83, paragraph 51). My emphasis. The Court refers to paragraph 69 of the judgment in *Baumbast and R* (C-413/99, EU:C:2002:493).

60 — Judgment in *Teixeira* (C-480/08, EU:C:2010:83, paragraph 52).

61 — Judgment in *Teixeira* (C-480/08, EU:C:2010:83, paragraph 74). My emphasis.

62 — Judgment in *Ibrahim and Secretary of State for the Home Department* (C-310/08, EU:C:2010:80, paragraph 39). My emphasis.

63 — Judgment in *Baumbast and R* (C-413/99, EU:C:2002:493, paragraph 7[3]).

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 does not require that a European Union citizen who is the spouse of a third country national should himself be resident in the territory of the host Member State, in accordance with Article 7(1) of that directive, at the time of the divorce in order for that third country national to be able to retain a personal right of residence under that provision.

(2) Articles 20 TFEU and 21 TFEU must be interpreted as meaning that they preclude a Member State from denying a third country national a right of residence in its territory where that national has sole responsibility for children who are Union citizens and who have resided with him/her since their birth but who do not possess the nationality of that Member State and have not made use of their right to freedom of movement, in so far as those Union citizens satisfy the conditions laid down in Directive 2004/38 or, failing that, in so far as such a refusal deprives those citizens, in practice, of the genuine enjoyment of the substance of the rights conferred by virtue of their status as Union citizens, a matter which it falls to the referring court to determine in the light of all of the circumstances of the present case. If there has been a judicial finding that the removal of the Union citizens concerned would infringe Article 7 of the Charter of Fundamental Rights of the European Union or Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, the national court must take that finding into account.

(3) Article 12 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community must be interpreted as meaning that a child and, in consequence, the parent having custody of that child enjoy a right of residence in the host Member State where the parent who is a Union citizen and has worked in that Member State has ceased to reside in that Member State before the child enters education there.