Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 22 March 2021 [1]

Case C-930/19

X
v
Belgian State

(Request for a preliminary ruling from the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium))

(Reference for a preliminary ruling – Citizenship of the Union – Right to move and reside freely in the territory of the Member States – Directive 2004/38/EC – Article 13(2) – Right of residence of family members of a Union citizen – Marriage between a Union citizen and a third-country national – Retention of the right of residence by a third-country national who is the victim of domestic violence in the event of the marriage ending – Obligation to demonstrate the existence of sufficient resources – Absence of such an obligation in Directive 2003/86/EC – Validity – Charter of Fundamental Rights of the European Union – Articles 20 and 21 – Equal treatment – Discrimination based on the nationality of the sponsor)

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[1] Original language: French.

I. Introduction

1. This request for a preliminary ruling concerns the validity of Article 13(2) of Directive 2004/38/EC [2] in the light of Articles 20 and 21 of the Charter of Fundamental Rights of the European Union ('the Charter'). [3]

2. The request was made in the course of proceedings between the applicant in the main proceedings, a third-country national, who has been the victim during his marriage of acts of domestic violence perpetrated by a Union citizen from whom he is divorced, and the Belgian State concerning the retention of his right of residence in that Member State.

3. More specifically, the referring court wishes to ascertain whether Article 13(2) of Directive 2004/38 is invalid on the ground that, in the event of divorce, annulment of marriage or termination of a registered partnership, that provision makes the retention of the right of residence by a third-country national whose spouse is a Union citizen and who has been a victim of domestic violence subject to the condition, inter alia, of having sufficient resources, whereas Article 15(3) of Directive 2003/86/EC [4] does not make the retention of the right of residence by a third-country national who has benefited from the right to family reunification subject to that condition in the event of divorce or separation.

4. By giving the Court an opportunity to rule on the validity of Article 13(2) of Directive 2004/38, the present case gives it the opportunity to clarify the scope of the judgments in *Singh and Others* [5] and *NA* [6] in the context of recent developments in EU and Member State rules on the protection of victims of domestic violence.

2 Directive of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35 and OJ 2005 L 197, p. 34).

3 OJ 2016 C 202, p. 389.

4 Council Directive of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).

5 Judgment of 16 July 2015 (C-218/14, EU:C:2015:476).

6 Judgment of 30 June 2016 (C-115/15, EU:C:2016:487).

II. Legal framework

A. EU law

1. The Charter

5. Article 20 of the Charter, entitled 'Equality before the law', provides that 'everyone is equal before the law'.

6. Article 21 of the Charter, entitled 'Non-discrimination', provides, in paragraphs 1 and 2:

'1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.'

2. Directive 2004/38

7. Article 13 of Directive 2004/38, entitled 'Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership', provides, in paragraph 2:

'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

…

(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 …

…

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 as defined in Article 8(4).

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

3. Directive 2003/86

8. In accordance with Article 15(3) and (4) of Directive 2003/86:

'3. In the event of widowhood, divorce, separation, or death of first-degree relatives in the direct ascending or descending line, an autonomous residence permit may be issued, upon application, if required, to persons who have entered by virtue of family reunification. Member States shall lay down provisions ensuring the granting of an autonomous residence permit in the event of particularly difficult circumstances.

4. The conditions relating to the granting and duration of the autonomous residence permit are established by national law.'

B. Belgian law

9. It is clear from the order for reference that Article 13(2) of Directive 2004/38 has been transposed into Belgian law by Article 42c of the Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Law on access to the territory, residence, establishment and removal of foreign nationals) of 15 December 1980[7] ('the Law of 15 December 1980').

10. Article 42c(1)(4) and the third subparagraph of Article 42c of the Law of 15 December 1980, in the version applicable to the facts in the main proceedings, provides:

'§ 1. In the following cases, the Minister or a person delegated by the Minister may, within five years of the recognition of their right of residence, terminate the right of residence of the family members of a Union citizen who are not themselves Union citizens and who are residing as family members of a Union citizen:

…

4. the marriage to the Union citizen they have accompanied or joined is dissolved, the registered partnership is terminated … or they no longer live as a single household; …

…

When deciding to terminate the residence, the Minister or the person delegated by the Minister shall take account of how long the individual concerned has resided in the Kingdom, his or her age, state of health, family and economic situation, social and cultural integration into the Kingdom and the extent of links with his or her country of origin'.[8]

11. Article 42c(4)(4) and the second subparagraph of Article 42c(4) of that law provide:

'§ 4. Without prejudice to § 5, the case referred to in § 1(4) shall not apply:

4. … where this is warranted by particularly difficult circumstances, such as where the family member demonstrates having been a victim of violence in the family and acts of violence referred

7 *Moniteur belge* of 31 December 1980, p. 14584.

8 The third subparagraph of Article 42c(1) of the Law of 15 December 1980 appears to transpose Article 28 of Directive 2004/38.

to in Articles 375, 398 to 400, 402, 403 or 405 of the Criminal Code, within the marriage or registered partnership referred to in Article 40a(2)(1) or (2);

and provided that the persons concerned show that they are workers or self-employed persons in Belgium, or that they have sufficient resources as referred to in the second subparagraph of Article 40(4) so as not to become a burden on the social assistance system of the Kingdom during their period of residence and have comprehensive sickness insurance cover in Belgium, or that they are members of the family, already constituted in the Kingdom, of a person satisfying these requirements'.

12. It is clear from the order for reference that Article 15(3) of Directive 2003/86 has been transposed into Belgian law by Article 11(2) of the Law of 15 December 1980.

13. Article 11(2)(2) and the second, fourth and fifth subparagraphs of Article 11(2) of the Law of 15 December 1980 provide:

'§ 2 The Minister or a person delegated by the Minister may decide that the foreign national who has been allowed to reside in the Kingdom on the basis of Article 10 no longer has the right to reside in the Kingdom in any of the following circumstances:

…

2. The foreign national and the foreign national joining that person do not or no longer live in a real marital or family relationship;

….

The decision based on point …, 2. … may be taken only within the first five years after the residence permit has been issued or, in the cases falling under Article 12a(3) or (4), after the document certifying that the application has been made has been issued.

…

The Minister or a person delegated by the Minister may not terminate residence on the basis of [point] 2 … if the foreign national proves to have been the victim during the marriage or partnership of an act referred to in Articles 375, 398 to 400, 402, 403 or 405 of the Criminal Code. …

When deciding to terminate the residence on the basis of [point] 2 …, the Minister or a person delegated by the Minister shall take account of the nature and solidity of the person concerned's family relationships and the duration of his or her residence in the Kingdom and of the existence of family, cultural and social ties with his or her country of origin.'

III. Facts, the question referred and the procedure before the Court

14. On 26 September 2010, the applicant in the main proceedings, an Algerian national, married a French national in Algiers (Algeria). On 22 February 2012, he travelled to Belgium, with a short-stay visa, to join his wife who was residing in that Member State.

15. On 20 April 2012, the wife of the applicant in the main proceedings gave birth to their first child, a French national.

16. On 7 May 2013, the applicant in the main proceedings lodged an application for a residence card for a family member of a Union citizen as the spouse of a French national. He obtained that card on 13 December 2013 and it was valid until 3 December 2018.

17. In 2015, after almost five years of marriage and two years of living together in Belgium, the applicant in the main proceedings, who was the victim of domestic violence by his wife, was forced to leave the family home. He was first accommodated in a refuge and then, on 22 May 2015, he moved into accommodation in Tournai (Belgium). On 2 March 2015, the applicant in the main proceedings lodged a complaint relating to acts of domestic violence.

18. Following a cohabitation report, dated 30 October 2015, which concluded that the applicant in the main proceedings and his wife did not live together as his wife and their daughter had been living in France since 10 September 2015, the Belgian Government, by decision of 2 March 2016, terminated the applicant in the main proceedings' right of residence for more than three months and ordered him to leave the territory. However, that decision was annulled by a judgment of the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium) of 16 September 2016.

19. By letter of 10 March 2017, the defendant in the main proceedings requested additional information from the applicant in the main proceedings, in particular proof of his means of subsistence and sickness insurance cover. On 2 May 2017, the applicant in the main proceedings informed the defendant in the main proceedings that he was the victim of domestic violence by his wife and requested the retention of his right of residence in accordance with Article 42c(4)(1), (3) and (4) of the Law of 15 December 1980.

20. By decision of 14 December 2017, the defendant terminated the right of residence of the applicant in the main proceedings, without ordering that he leave the territory, on the ground that he had not adduced proof, inter alia, of the fact that he had his own means of subsistence. On 26 January 2018, the applicant in the main proceedings brought an action for annulment of that decision before the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings).

21. The referring court notes that Article 42c(4) of the Law of 15 December 1980, which transposed into Belgian law Article 13(2) of Directive 2004/38, provides, in the event of divorce or when the spouses no longer live together as a single household, that the retention of the right of residence by a third-country national who, during the marriage, has been the victim of domestic violence by his or her spouse who is a Union citizen is subject to certain conditions, inter alia the requirement to have sufficient resources and sickness insurance. That court also states that, in the same circumstances, Article 11(2) of the Law of 15 December 1980, which transposed into Belgian law Article 15(3) of Directive 2003/86, makes the grant of an autonomous permit to a spouse who is a third-country national who has benefited from the right to family reunification with a third-country national residing lawfully in Belgium subject only to proof of the existence of domestic violence.

22. The referring court observes that third-country nationals who are victims of domestic violence by their spouse are treated differently depending on whether they have been granted family reunification with a Union citizen or with a third-country national and that that difference in treatment stems from the provisions contained in Directives 2004/38 and 2003/86.

23. In those circumstances, the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) decided, by judgment of 13 December 2019, lodged at the Registry of the Court on 20 December 2019, to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Does Article 13(2) of [Directive 2004/38] infringe Articles 20 and 21 of the [Charter], in that it provides that divorce, annulment of marriage or termination of a registered partnership does not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where, inter alia, this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting, but only on the condition that the persons concerned 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, whereas Article 15(3) of [Directive 2003/86], which makes the same provision for the right of residence to continue, does not make its continuation subject to that condition?'

24. Written observations were submitted by the applicant in the main proceedings, the Belgian Government, and the European Parliament, the Council of the European Union and the European Commission.

25. At the hearing held on 7 December 2020, oral argument was presented to the Court on behalf of the applicant in the main proceedings, the Belgian Government and the Parliament, the Council and the Commission.

IV. Analysis

26. In the following, I shall examine, first, in the light of the argument put forward in that regard by the Belgian Government, whether the Court has jurisdiction to answer the question referred for a preliminary ruling (Section A). Taking the view that that is the case, I shall then analyse the applicability of Article 13(2) of Directive 2004/38 in order to dispel any doubt as to the admissibility of the question referred for a preliminary ruling in the present case (Section B). Finally, I shall examine the validity of that provision (Section C).

A. The jurisdiction of the Court

27. The Belgian Government submits in its written observations that the Court does not have jurisdiction to answer the question referred by the national court. In the first place, it states that the referring court's doubts as to the validity of Article 13(2) of Directive 2004/38 are not on account of a rule of EU law, but a rule of national law established by the Belgian legislature in the context of the powers conferred on it by Article 15(2) and (3) of Directive 2003/86. In the second place, the non-compliance with the conditions set out in Article 13(2) of Directive 2004/38 are

said to undermine the rules on the division of powers between the European Union and the Member States. Finally, in the third place, its states that the provisions of the Charter cannot call into question the powers of the Member States, such as those concerning the conditions for the residence of third-country nationals who do not have the status of a family member of a Union citizen.

28. I would like to point out, in that regard, that Article 19(3)(b) TEU and point (b) of the first paragraph of Article 267 TFEU provide that the Court has jurisdiction to give preliminary rulings on the interpretation and the validity of acts adopted by the EU institutions, without exception, [9] as those acts must be entirely compatible with the Treaties, the constitutional principles stemming therefrom, and the Charter. [10]

29. In the present case, the referring court considers that, in Article 13(2) of Directive 2004/38 and Article 15(3) of Directive 2003/86, in particular in situations of divorce and separation, the EU legislature has established different conditions for the retention of the right of residence by a third-country national who has been the victim of acts of violence committed by his or her spouse depending on whether the spouse is a Union citizen or a third-country national. That court considers that, in doing so, the EU legislature has introduced a difference in treatment based on the nationality of the spouse who is the sponsor, thereby infringing Articles 20 and 21 of the Charter. Taking the view that the system established by Article 13(2) of Directive 2004/38 for third-country nationals who are married to a Union citizen is less favourable than that established by Article 15(3) of Directive 2003/86 for third-country nationals who are married to another third-country national, the referring court is asking the Court to assess the validity of Article 13(2) of Directive 2004/38 in the light of Articles 20 and 21 of the Charter.

30. In those circumstances, I consider that the objections raised by the Belgian Government regarding the jurisdiction of the Court must be rejected.

B. The applicability of Article 13(2)(c) of Directive 2004/38

31. By its question, the referring court asks the Court to rule on the validity of Article 13(2)(c) of Directive 2004/38.

32. I would note at the outset that, before examining the validity of that provision, it is necessary to determine whether that question is admissible. To that end, it must be examined whether Article 13(2)(c) of that directive is applicable to the present case.

33. The Commission has doubts as to whether Article 13(2)(c) of Directive 2004/38 is applicable to a situation such as that in the main proceedings. Its doubts are based on the fact that the referring court provides no information regarding the divorce or annulment of the marriage of the applicant in the main proceedings. In that regard, the Commission considers that it is clear from the judgment in *NA* [11] that the application of Article 13(2) of that directive presupposes that the divorce or annulment of the marriage between the third-country national and the Union citizen concerned has been pronounced or that, at the very least, proceedings to that effect have been initiated before the Union citizen leaves the host Member State.

9 Judgments of 13 December 1989, *Grimaldi* (C-322/88, EU:C:1989:646, paragraph 8); of 13 June 2017, *Florescu and Others* (C-258/14, EU:C:2017:448, paragraph 30); and of 27 February 2018, *Western Sahara Campaign UK* (C-266/16, EU:C:2018:118, paragraph 44).

10 Judgment of 14 May 2019, *M and Others (Revocation of refugee status)* (C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraph 71).

11 Judgment of 30 June 2016 (C-115/15, EU:C:2016:487).

34. However, the parties to the main proceedings and the other interveners do not dispute the applicability of that provision. The same is true of the referring court, which, in the context of its question for a preliminary ruling, has based its reasoning on the applicability of that provision.

35. I will examine that question in order to dispel any possible doubt about the fact that the assessment of the validity of that provision may bear no relation to the actual facts of the main action or to its purpose.[12] I will therefore ascertain whether a person in a situation such as that of the applicant in the main proceedings falls within the scope of Article 13(2)(c) of Directive 2004/38 before examining the question referred for a preliminary ruling.

1. The need to analyse the applicability of Article 13(2)(c) of Directive 2004/38

36. As regards the conditions for applying Article 13(2) of Directive 2004/38, I recall that the Court held in its judgment in *NA*[13] that 'the application of that provision, including the right derived from Article 13(2)(c) of Directive 2004/38, is dependent on the parties concerned being divorced'. In that context, the Court ruled that where a third-country national has been the victim during her marriage of domestic violence perpetrated by a Union citizen from whom she is divorced, that Union citizen must reside in the host Member State, in accordance with Article 7(1) of Directive 2004/38, until the date of the commencement of divorce proceedings, if that third-country national is to be entitled to rely on Article 13(2)(c) of that directive.[14]

37. Thus, the decisive factor in the case at issue in the main proceedings would be the date of commencement of the divorce proceedings. In that regard, the referring court has stated, in response to a request for information sent to it by the Court, that the divorce petition was filed on 5 July 2018 and the divorce was pronounced on 24 July 2018 with effect from 2 October 2018.[15]

38. Therefore, in the present case, in accordance with the case-law deriving from the judgment in *NA*,[16] since the date of commencement of the divorce proceedings was later than the date on which the spouse of the applicant in the main proceedings left Belgium, the applicant would not fall within the scope of Article 13(2)(c) of Directive 2004/38.[17]

39. I take the view, however, that the applicant in the main proceedings does fall within the scope of that provision.

40. In the reasoning below, I will explain why I am convinced that the provision at issue in the main proceedings is applicable to the present case and why it is necessary to carry out an in-depth analysis of the scope of the case-law derived from the judgment in *NA*.[18] Moreover, that analysis will make it possible to establish the meaning of that provision before going on to examine

12 Judgment of 22 December 2010, *Gowan Comércio Internacional e Serviços* (C-77/09, EU:C:2010:803, paragraph 25). See, also, judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 50).

13 Judgment of 30 June 2016 (C-115/15, EU:C:2016:487, paragraph 48).

14 Judgment of 30 June 2016, *NA* (C-115/15, EU:C:2016:487, paragraph 50).

15 By judgment of the Tribunal de première instance de Tournai (Court of First Instance, Tournai, Belgium).

16 Judgment of 30 June 2016 (C-115/15, EU:C:2016:487).

17 In that case, the applicant in the main proceedings would not be able to rely on the retention of his derived right of residence under that provision, irrespective of whether or not he is able to show that, before acquiring the right of permanent residence, he meets the condition of having sufficient resources, established in the second subparagraph of Article 13(2) of that directive. That condition lies at the heart of the question on validity referred by the national court.

18 Judgment of 30 June 2016 (C-115/15, EU:C:2016:487).

its validity. It follows from the case-law of the Court that, under a general principle of interpretation, a European Union measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole.[19]

41. I shall therefore begin by examining the scope of the Court's case-law on Article 13(2) of Directive 2004/38. Taking that examination into account, I shall then propose an interpretation of Article 13(2)(c) of that directive which is not only consistent with the wording, context, purpose and origin of that provision, but also makes it possible to preserve the overall coherence of the EU legal system and its policy with regard to the protection of victims of acts of domestic violence.

2. The scope of the Court's case-law on the first subparagraph of Article 13(2)(a) and (c) of Directive 2004/38

42. Although the judgment in *NA*[20] is the only judgment in which the Court has interpreted Article 13(2)(c) of Directive 2004/38, it does, however, follow the logic of the judgment in *Singh and Others*.[21] My analysis will therefore focus on those two judgments.

(a) The judgment in Singh and Others

43. The case which gave rise to the judgment in *Singh and Others*[22] concerned three third-country nationals who, following marriage to Union citizens residing and working in Ireland, were granted a right of residence in that Member State, under Article 7(2) of Directive 2004/38, as spouses accompanying or joining a Union citizen in the host Member State. In all three cases, the divorce proceedings were initiated after the spouses had left Ireland.

44. By its first question, the referring court in that case asked, inter alia, whether the right of residence in Ireland of the three spouses who were third-country nationals could be retained on the basis of *Article 13(2)(a)* of Directive 2004/38. The Court reworded that question as follows: 'By its first question, the referring court asks essentially whether *Article 13(2)* of Directive 2004/38 must be interpreted as meaning that a third-country national, divorced from a Union citizen, whose marriage lasted for at least three years before the commencement of divorce proceedings, including at least one year in the host Member State, may retain a right of residence in that Member State on the basis of that provision where the divorce is preceded by the departure of the spouse who is a Union citizen from that Member State.'[23]

45. After having recalled that nationals of third countries who are family members of a Union citizen can claim a right of residence only in the host Member State in which the Union citizen resides, and not in another Member State,[24] the Court stated that, if, before the commencement of divorce proceedings, the Union citizen leaves the Member State in which his spouse who is a

19 See, inter alia, judgments of 16 September 2010, *Chatzi* (C-149/10, EU:C:2010:534, paragraph 43), and of 31 January 2013, *McDonagh* (C-12/11, EU:C:2013:43, paragraph 44).

20 Judgment of 30 June 2016 (C-115/15, EU:C:2016:487).

21 Judgment of 16 July 2015 (C-218/14, EU:C:2015:476).

22 Judgment of 16 July 2015 (C-218/14, EU:C:2015:476).

23 Judgment of 16 July 2015, *Singh and Others* (C-218/14, EU:C:2015:476, paragraph 48). Emphasis added.

24 Judgment of 16 July 2015, *Singh and Others* (C-218/14, EU:C:2015:476, paragraph 55). The Court refers here to the judgment of 8 November 2012, *Iida* (C-40/11, EU:C:2012:691) and it should be noted that the circumstances of the case which gave rise to that judgment are different from those which gave rise to the judgment in *Singh and Others* in that Mr Iida did not reside in the host Member State of his spouse, but in her Member State of origin and, consequently, he could not be granted a right of residence on the basis of Directive 2004/38.

third-country national resides for the purpose of settling in another Member State or a third country, the spouse who is a third-country national's derived right based on Article 7(2) of Directive 2004/38 comes to an end with the departure of the Union citizen and can therefore no longer be retained on the basis of Article 13(2)(a) of that directive.[25] According to the Court, in order for a third-country national to retain his right of residence on the basis of that provision, his spouse who is a Union citizen must reside in the host Member State, in accordance with Article 7(1) of Directive 2004/38, until the date of commencement of the divorce proceedings.[26] In the light of that reasoning, the Court held that *Article 13(2)* of Directive 2004/38 must be interpreted as meaning that 'a third-country national, divorced from a Union citizen, whose marriage lasted for at least three years before the commencement of divorce proceedings, including at least one year in the host Member State, cannot retain a right of residence in that Member State on the basis of that provision where the commencement of the divorce proceedings is preceded by the departure from that Member State of the spouse who is a Union citizen'.[27]

(1) Analysis of the reasoning followed in the judgment in Singh and Others

46. The answer given to the first question referred for a preliminary ruling in the judgment in *Singh and Others* is, in my view, questionable to say the least[28] for the following three reasons.

47. In the first place, on reading Article 13(2)*(a)* of Directive 2004/38, the fact remains that the EU legislature did not make the application of that provision, which allows spouses who are third-country nationals to retain their right of residence, subject to the condition that the Union citizen resides in the host Member State up to the date of commencement of the divorce proceedings. That provision refers only to the condition that 'prior to initiation of the divorce or annulment proceedings or termination of the registered partnership …, the marriage or registered partnership *has lasted* at least three years, including one year in the host Member State'.[29]

48. In the second place, it is essential to note that, although, in the case which gave rise to the judgment in *Singh and Others*, the first question referred for a preliminary ruling concerned Article 13(2)*(a)* of Directive 2004/38, the Court however reworded that question by referring to Article 13(2) of that directive.[30] Therefore, the Court's answer is not limited to the situation provided for in Article 13(2)(a) of that directive, but also concerns all of the situations provided for in *Article 13(2)*.[31]

49. It follows that the Court's answer to the question as it was reworded is based not only on the conditions laid down by the EU legislature for the purposes of applying Article 13(2)(a) of Directive 2004/38, but also on a *new condition*. In other words, by requiring that the spouse who

25 Judgment of 16 July 2015, *Singh and Others* (C-218/14, EU:C:2015:476, paragraph 62).

26 See, to that effect, judgment of 16 July 2015, *Singh and Others* (C-218/14, EU:C:2015:476, paragraph 66).

27 Judgment of 16 July 2015, *Singh and Others* (C-218/14, EU:C:2015:476, paragraph 70 and operative part). In paragraph 68 of that judgment, the Court recalled that, in such a case, national law may nevertheless grant more extensive protection to third-country nationals so as to enable them to continue to reside in the territory of the host Member State.

28 See, for a critical view of that judgment, Strumia, F., 'Divorce immediately, or leave. Rights of third country nationals and family protection in the context of EU citizens' free movement: Kuldip Singh and Others', *Common Market Law Review*, Vol. 53, No 5, 2016, pp. 1373–1393.

29 Emphasis added. I note that that provision does not specify during which year, *of the three* that the marriage must last before the initiation of the divorce or annulment proceedings, the third-country national must have resided in the host Member State.

30 Judgment of 16 July 2015, *Singh and Others* (C-218/14, EU:C:2015:476, paragraph 48). See point 44 of this Opinion.

31 This aspect is important in order to properly understand the scope of the judgment of 30 June 2016, *NA* (C-115/15, EU:C:2016:487) and the reasons why I consider that the case-law deriving from that judgment must be updated.

is a Union citizen resides in the host Member State until the date of commencement of the divorce proceedings, the Court laid down an *additional condition* to those provided for in Article 13(2)*(a)* of that directive. It is therefore by judicial decision that that condition was added when interpreting the whole of Article 13(2) of that Directive. [32]

50. In the third place, although I fully understand the logic of the reasoning followed by the Court in the judgment in *Singh and Others* [33] and I agree, in principle, with its analysis, as set out in paragraphs 50 to 57 of that judgment, I do not share the conclusion drawn from that analysis, in paragraph 67 of that judgment. The Court first stated that, in circumstances such as those at issue in the main proceedings, '*the departure* of the spouse who is a Union citizen has *already brought about the loss* of the right of residence of the spouse who is a third-country national and stays behind in the host Member State'. It then stipulated that 'the later petition for divorce cannot have the effect of reviving that right, since Article 13 of Directive 2004/38 mentions only the "retention" of an existing right of residence'. [34]

51. At this stage, it seems appropriate to note that, by following same line as Advocate General Kokott, the Court based that statement on a 'combined consideration' of Articles 12 and 13 of Directive 2004/38. [35]

52. However, I have doubts not only as to the relevance of a such a combined application of those two articles [36] but also as to the consequence of that application, namely, first, that – under Article 12 of Directive 2004/38 – the departure of the spouse who is a Union citizen may bring about the *automatic* loss of the derived right of residence of the spouse who is a third-country national and, secondly, that – under Article 13 of that directive – the departure of the spouse who is a Union citizen may have the effect of depriving the spouse who is a third-country national of the protection provided for in Article 13(2) of the directive and rendering that provision meaningless and depriving it of its practical effect.

(i) The concept of 'departure of the Union citizen from the host Member State': the combined interpretation of Articles 12 and 13 of Directive 2004/38 is irrelevant

53. As I noted in point 51 of this Opinion, the Court's statement that 'the departure of the spouse who is a Union citizen has already brought about the loss of the right of residence of the spouse who is a third-country national and stays behind in the host Member State' [37] is based on the combined interpretation of Articles 12 and 13 of Directive 2004/38. However, I consider that such an interpretation is not relevant for the following reasons.

32 That is to say, including points (a) to (d).

33 Judgment of 16 July 2015, *Singh and Others* (C-218/14, EU:C:2015:476).

34 Judgment of 16 July 2015, *Singh and Others* (C-218/14, EU:C:2015:476, paragraph 67). Emphasis added.

35 See Opinion of Advocate General Kokott in *Singh and Others* (C-218/14, EU:C:2015:306, points 25 and 26). 'According to its wording, Article 13 of that directive requires neither that the Union citizen and his spouse reside in the host Member State until the divorce proceedings are terminated, nor that the divorce proceedings be initiated and terminated in that [Member] State'. However, Advocate General Kokott then stated that '*if Articles 12 and 13 of Directive 2004/38 are considered, not each on its own, but in combination*, then, on an interpretation based strictly on its wording, Article 13 of the Directive cannot be used to justify continuation of the right of residence of the divorced third-country nationals'. Emphasis added. See, in that regard, Briddick, C., 'Combatting or enabling domestic violence? Evaluating the residence rights of migrant victims of domestic violence in Europe', *International and Comparative Law Quarterly*, Vol. 69, No 4, 2020, pp. 1013–1034, in particular p. 1021, and, by the same author, 'Secretary of State for the Home Department v NA', *Journal of Immigration Asylum and Nationality Law*, Vol. 30, No 4, 2016, pp. 368–374.

36 I will address this in more detail in the analysis of the judgment of 30 June 2016, *NA* (C-115/15, EU:C:2016:487). See points 53 to 58 of this Opinion.

37 Judgment of 16 July 2015, *Singh and Others* (C-218/14, EU:C:2015:476, paragraph 67).

54. In the first place, I would point out that Directive 2004/38 makes a clear distinction between two types of situation in which the EU legislature has provided for the retention of the right of residence by family members of a Union citizen: the departure (or the death) of a Union citizen from the host Member State, which is the subject of Article 12 of that directive, and divorce, annulment or the termination of a registered partnership, which is the subject of Article 13 of that directive.

55. First, departure within the meaning of Article 12 of Directive 2004/38 is not connected to divorce, annulment or the termination of a registered partnership. As the Commission stated in response to a question put by the Court at the hearing, the concept of 'departure', within the meaning of that provision, means a 'simple departure', that is to say an *actual departure without any intention of returning to the host Member State and which is not justified by the intention of separating, divorce, annulling the marriage or terminating a registered partnership*.

56. Secondly, Article 13 of Directive 2004/38 makes no reference to departure, but solely to divorce, annulment or the termination of a registered partnership. Therefore, if the spouse who is a Union citizen leaves the host Member State and initiates divorce proceedings in his or her Member State of origin, his or her departure is inevitably a departure for the purposes of a divorce, annulment or termination of a registered partnership.[38] Moreover, if, in the same situation, the Union citizen leaves with the minor child of the spouses without the spouses having concluded an agreement in that regard, the application of Article 12(3) of Directive 2004/38 will necessary imply that a court has awarded final custody of the child to the third-country national in connection with the separation, divorce, or the termination of the partnership, in which case the situation governed by the first subparagraph of Article 13(2)(b) of the directive would apply.

57. In the light of those considerations, the concept of 'departure' within the meaning of Article 12 of Directive 2004/38 cannot be interpreted as being equivalent to *departure for the purposes of a divorce, annulment or termination of a registered partnership* under Article 13 of that directive and must therefore be interpreted differently in the context of each of those articles since they have different objectives.

58. In the second place, as the Commission stated in response to a question put by the Court at the hearing, in view of the fact that it is clear from recital 15 of Directive 2004/38 that Article 13 of that directive is intended to '[legally safeguard] family members … in the event of … divorce, …', if departure for the purposes of a divorce was regarded as an actual departure without any intention of returning to the host Member State, for the purposes of Article 12 of that directive, this would prevent the spouse of the Union citizen from being entitled to the legal protection provided for in Article 13(2) of the directive, consisting of the retention of the derived right of residence and, therefore, it would be manifestly contrary to the purpose of the latter provision.[39]

[38] I understand a 'departure for the purposes of a divorce, annulment or termination of a registered partnership' as meaning that, immediately after leaving the host Member State, the spouse who is a Union citizen initiates proceedings for divorce, annulment of marriage or termination of a partnership in his or her Member State of origin or in another Member State (except where the law applicable to divorce, the annulment of marriage or the termination of a partnership requires that the couple have not lived together for a certain period or that they have a period for reflection before the divorce is pronounced). It may also be understood as a departure linked to the occurrence of certain facts which justify the divorce, annulment of marriage or termination of a partnership, such as, inter alia, 'having been a victim of domestic violence while the marriage or registered partnership was subsisting'. Therefore, a departure which is linked to those facts must be regarded as a departure for the purposes of a divorce, annulment or termination of a partnership.

[39] See, in that regard, Strumia, F., loc. cit., p. 1381. See, also, point 87 of this Opinion.

(ii) The loss of the derived right of residence of the spouse who is a third-country national as a consequence of the 'departure' of the Union citizen from the host Member State, within the meaning of Article 12 of Directive 2004/38

59. Does the departure of the spouse who is a Union citizen change the legal position of the spouse who is a third-country national overnight, with the immediate consequence of the automatic loss of the derived right of residence?

60. In my view, even under Article 12 of Directive 2004/38, the loss of the derived right of residence of the spouse who is a third-country national cannot be regarded as an automatic consequence of any departure of the Union citizen for the following reasons.

61. In the first place, in general, I wish to clarify that the status of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, in so far as it is obtained as a result of the marriage of a third-country national to a Union citizen exercising his or her freedom of movement in the host Member States where they reside together, *may*, in principle, be lost when the Union citizen leaves the territory of that Member State.

62. In my opinion, however, it is necessary to distinguish situations which do not meet the conditions set out in Article 12(3) of Directive 2004/38 – such as the Union citizen's actual departure from the host Member State, without any intention of returning there, which is not justified by a divorce, annulment or termination of the registered partnership, while the spouse who is a third-country national wishes to remain in the host Member State where they resided together *without being responsible for a child*[40] – from those which are *temporary in nature*, in which it must be considered that the Union citizen and his or her spouse who is a third-country national continue to be 'beneficiaries' for the purpose of Article 3(1) of Directive 2004/38. In the event that the Union citizen must return to or reside temporarily in the Member State of which he or she is a national, or travel to and reside temporarily in another Member State for duly justified reasons,[41] his or her spouse who is a third-country national and who remains in the host Member State, inter alia in order to avoid losing his or her job, or to continue studies or vocational training there, must continue to fall within the scope of a 'beneficiary', for the purposes of Article 3(1) of Directive 2004/38,[42] for the time required to find another job or finish his or her studies.

63. I note that, in any event, it follows from Article 16(3) of Directive 2004/38 that continuity of residence is not affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by an uninterrupted absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

64. In the second place, it is clear that the second, third or fourth movement of a Union citizen to another Member State falls within the scope of the right to free movement in the same way as the first movement to the host Member State concerned, even if the move is for a limited period of time. The right of Union citizens to free movement cannot be linked to the way in which the

40 This was also the case for Mr Chenchooliah in the case which gave rise to the judgment of 10 September 2019, *Chenchooliah* (C-94/18, EU:C:2019:693, paragraph 43). As is apparent from the facts set out by the referring court, that citizen 'has returned to the Member State of which he is a national, in order, in the present case, to serve a prison sentence'.

41 Inter alia, to receive duly attested medical treatment or to provide temporary care for a family member with a serious illness.

42 With regard to the retention of the residence card in the event of temporary absences, see Article 11(2) of Directive 2004/38.

spouses wish to organise their marital life by requiring them to live together in circumstances which do not justify it.[43] The economic or professional situation of the household, inter alia, may force the spouse who is a Union citizen to accept temporarily a job in another Member State.[44]

65. In the third place, to accept that the spouse who is a third-country national may *automatically lose* the derived right of residence in situations where the Union citizen exercises his or her right of free movement would not only run counter to the objectives pursued by Directive 2004/38 but would constitute an obstacle to the freedom of movement enjoyed by every Union citizen under Article 21 TFEU. Such an automatic loss could deter the spouse who is a Union citizen from exercising his or her right to free movement and lead him or her, for example, to refuse an offer of employment in another Member State.

66. Finally, in the fourth place, respect for private and family life, as recognised in Article 7 of the Charter, would militate against the automatic loss of the right of residence. To conclude that, where the Union citizen travels to and resides temporarily in another Member State for duly justified reasons, his or her spouse who is a third-country national automatically loses the derived right of residence would interfere with private and family life in conjunction with the freedom of movement of the Union citizen concerned.[45] From the perspective of Article 7 of the Charter, this could result in the right of residence of a still-married third-country national having to be maintained.[46]

67. In those circumstances, the loss of the derived right of residence of the spouse who is a third-country national *cannot be regarded as automatic in all cases and depends on the examination of the individual case*.

68. Having made those observations, let us return to the analysis of the judgment in *Singh and Others*.

(2) Restricting the scope of the judgment in Singh and Others

69. It follows from the foregoing considerations that, without wishing to call into question the Court's analysis in paragraphs 50 to 57 of the judgment in *Singh and Others*,[47] it cannot be asserted that, as is apparent from paragraph 67 of that judgment, the departure of the spouse who is a

43 See points 62 and 63 and footnote 41 of this Opinion.

44 Raising the case of spouses who live and work in different Member States, in her Opinion in *Singh and Others* (C-218/14, EU:C:2015:306, point 48), Advocate General Kokott notes that 'nonetheless, there remains *an inconsistency in the system of Directive 2004/38*. After the Union citizen's departure, his/her third-country national spouse may lose his/her right of residence in the previous host Member State if, for example, for career-related reasons, he/she does not accompany the Union citizen nor have custody of a common child, even despite an intact marriage, whereas if the marriage breaks down and he/she is able to obtain a divorce in time, the third-country national would retain his/her right of residence in the host Member State under Article 13 of Directive 2004/38.' Emphasis added.

45 In that regard, as Advocate General Bot stated in his Opinion in *Ogieriakhi* (C-244/13, EU:C:2014:323, point 42): 'To require the persons concerned to live permanently under the same roof would, in my view, constitute interference in private and family life which is contrary to Article 7 of the [Charter]. *It is not the role of public authorities to impose a concept of life together as a couple or a certain way of life on nationals of other Member States and members of their family*, especially as no such requirement exists for their own nationals' (emphasis added). Although those considerations by Advocate General Bot concern the requirement of living together in the same dwelling in connection with the interpretation of Article 10 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, it seems to me that, from the point of view of the fundamental right to respect for private and family life, they can also be applied to situations in which the spouses live apart, inter alia for professional or health reasons or similar.

46 See, to that effect, Opinion of Advocate General Kokott in *Singh and Others* (C-218/14, EU:C:2015:306, point 49).

47 Judgment of 16 July 2015 (C-218/14, EU:C:2015:476).

Union citizen from the host Member State *for the purposes of a divorce, annulment or termination of a partnership* would result in the loss of the right of residence of the spouse who is a third-country national.

70. In the first place, in the case which gave rise to the judgment in *Singh and Others*,[48] the conditions relating to the duration of the marriage or registered partnership, laid down in Article 13(2)(a) of Directive 2004/38, were satisfied. Therefore, it is clear to me that, in such a situation, that provision applies between, first, the moment when the spouses decide to legally separate, divorce by mutual consent or initiate divorce proceedings and, secondly, the moment when the divorce is pronounced, irrespective of the date of the *departure of the Union citizen for the purposes, inter alia, of divorce*. In that regard, I would point out that, in some national laws, a prior de facto separation or a period for reflection is required before the spouses are able to sign an agreement or apply for a divorce.[49]

71. Moreover, to me it seems important to note that the Court has already held that 'the marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority'. It has also clarified that 'it is not dissolved merely because the spouses live separately, even where they intend to divorce at a later date'.[50]

72. Therefore, to me, it would be paradoxical to take the view, on the one hand, that, under Article 12 of Directive 2004/38, where the spouses actually live together, the spouse who is a third-country national automatically loses his or her derived right of residence with the Union citizen's departure from the host Member State, whereas it is the marriage, inter alia, which has conferred on him or her that right of residence and, on the other hand, that, under Article 16 of that directive, where the spouses, during the continuous period of residence of five years, have decided to separate and commenced residing with other partners, the spouse who is a third-country national may acquire a right of permanent residence.[51]

73. In the second place, as regards Article 13(2)(a) of Directive 2004/38, I note that the Commission, in its commentary on Article 13(2),[52] stated that, 'for reasons of legal certainty, for a marriage to count as dissolved a decree absolute must have been granted; *in the event of de facto separation, the spouse's right of residence is not affected at all*'.[53]

48 Judgment of 16 July 2015 (C-218/14, EU:C:2015:476).

49 Inter alia, under Polish law, the grounds for divorce are that a marriage has broken down completely and *irretrievably*, those two conditions being cumulative (Article 56(1) of the Family and Guardianship Code); under French law, divorce due to irretrievable breakdown of the marriage can be applied for by one spouse provided that the couple have not been living together for two years on the date when the divorce petition is submitted, which assumes an absence of cohabitation and a desire to end the marriage; under Finnish law, divorce can be granted after a six-month cooling-off period, however no cooling-off period is required if the spouses have lived separately for at least two years before filing for divorce; under German law, pursuant to Section 1566 of the Bürgerliches Gesetzbuch (Civil Code), it is irrebuttably presumed by the court that the marriage has broken down if the spouses have lived apart for a certain time and if both spouses petition for divorce and have already lived apart for a year, or one of the spouses petitions for divorce and the other consents to divorce, and they have already lived apart for a year, or one of the spouses petitions for divorce and the other does not consent to divorce, but the spouses have already lived apart for three years. Under Section 1565(2) of the Civil Code, where the spouses have not yet lived apart for one year, the marriage may be dissolved by divorce only in a few exceptional cases, for instance if the continuation of the marriage would be unreasonable for the petitioner for reasons that lie in the person of the other spouse (for example in the case of physical abuse by the other spouse). With regard to other national legislation, see also 'Divorce', *European e-Justice Portal*, available at https://e-justice.europa.eu/content_divorce-45-en.do (last update 26 October 2020).

50 Judgments of 13 February 1985, *Diatta* (267/83, EU:C:1985:67, paragraph 20), and of 10 July 2014, *Ogieriakhi* (C-244/13, EU:C:2014:2068, paragraph 37).

51 See, to that effect, in the context of the interpretation of Article 10 of Regulation No 1612/68, judgment of 10 July 2014, *Ogieriakhi* (C-244/13, EU:C:2014:2068, paragraph 47 and operative part).

52 See 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).

53 Emphasis added.

74. In that context, as is clear from points 53 to 58 of this Opinion, it is necessary, first of all, to determine whether the departure of the spouse who is a Union citizen is a 'simple departure' (Article 12 of Directive 2004/38), that is to say an actual departure without any intention of returning to the host Member State and which is not justified by a divorce, annulment or termination of the registered partnership, or whether, on the contrary, it is a 'departure for the purposes of a divorce, annulment or termination of a partnership' (Article 13 of that directive).

75. In the light of the foregoing considerations, I am convinced that, contrary to what is stated in paragraph 67 of the judgment in *Singh and Others*,[54] the departure of the Union citizen for the purposes of a divorce, annulment or termination of a partnership does not bring about the loss of the derived right of residence of the spouse who is a third-country national if the conditions of Article 13(2) of that directive have been met. In any event, an examination, by the competent authorities, of the individual case is necessary before the loss of the derived right of residence is definitive.[55]

(b) The judgment in NA

(1) The judgment in NA, heir of the logic of the judgment in Singh and Others

76. The case which gave rise to the judgment in *NA*[56] concerned a Pakistan national married to a German national. The couple resided in the United Kingdom, where the husband had obtained the status of worker and self-employed. The wife, who was the victim of a number of acts of domestic violence – the last of which took place in October 2006 when she was over five months' pregnant – had initiated divorce proceedings in 2008 in the United Kingdom after her husband's departure from that Member State in December 2006 and had been granted sole custody of their two children.[57] Although the children held German nationality, they were born in the United Kingdom and had attended school there since 2009 and 2010.[58]

77. As regards the wife's right of residence in the United Kingdom, the Court first of all recalled that, under Article 13(2)(c) of Directive 2004/38, divorce should not entail that a Union citizen's family members who are not nationals of a Member State should lose the right of residence where this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence.[59] However, the Court, referring to the judgment in *Singh and Others*, repeated that the spouse, who is a Union citizen, of a third-country national must reside in the host Member State, in accordance with Article 7(1) of Directive 2004/38, up to the date of commencement of the divorce proceedings for that national to be able to claim the retention of his right of residence laid down in Article 13(2)(c) of that directive.[60] However, that was not so in that case. The Court therefore held that Article 13(2)(c) of Directive 2004/38 must be interpreted

54 Judgment of 16 July 2015 (C-218/14, EU:C:2015:476).

55 In view of the length of certain national procedures for legal separation, divorce, annulment or the termination of a registered partnership, it is for the national court to assess whether, for example, divorce proceedings initiated some time after the Union citizen's departure from the host Member State could be regarded as a departure for the purposes of a divorce, in accordance with Article 13(2) of Directive 2004/38. See footnote 38 of this Opinion.

56 Judgment of 30 June 2016 (C-115/15, EU:C:2016:487, paragraphs 48 and 49).

57 The referring court had explained: 'On 5 December 2006, UK Border Agency was asked to cancel NA's residence permit, on the basis that he had moved permanently to Pakistan and he requested that he be informed of the cancellation of his wife's residence card.'

58 NA had also made an application for a right of permanent residence in the United Kingdom, but that application had been rejected by the competent national authority. See, to that effect, judgment of 30 June 2016, *NA* (C-115/15, EU:C:2016:487, paragraphs 15 to 22).

59 Judgment of 30 June 2016, *NA* (C-115/15, EU:C:2016:487, paragraph 49).

60 See, to that effect, judgment of 30 June 2016, *NA* (C-115/15, EU:C:2016:487, paragraph 36).

as meaning that a third-country national, who is divorced from a Union citizen at whose hands she has been the victim of domestic violence during the marriage, cannot rely on the retention of her right of residence in the host Member State, on the basis of that provision, where the commencement of divorce proceedings post-dates the departure of the Union citizen spouse from that Member State. [61]

78. First of all, I would like to point out that, although the logic of the judgment in *Singh and Others* [62] could have been applied in the case which gave rise to the judgment in *NA* [63] to the interpretation of Article 13(2)*(c)* of Directive 2004/38, that was because the Court reworded the first question referred for a preliminary ruling in the judgment in *Singh and Others*. [64] As I have stated, [65] the general reference made by the Court to *Article 13(2)* of Directive 2004/38 [66] has allowed its interpretation of that provision to be applied to all of the situations provided for in the first subparagraph of Article 13(2) of that directive, including the additional condition that the Union citizen must reside in the host Member State up to the date of commencement of the divorce proceedings. [67]

79. However, it seems to me that that rewording was not necessary since the answer to the question as raised by the national court would have been of sufficient use to enable it to determine the case before it. [68]

80. That said, and in view of my proposal to limit the scope of the judgment in *Singh and Others*, I will now set out the reasons why I consider it is necessary to update the judgment in *NA*. [69]

(2) The need to update the judgment in NA

(i) The wording of Article 13(2)(c) of Directive 2004/38

81. With regard to the interpretation of Article 13(2)(c) of Directive 2004/38, it is clear, first, from the wording of the first subparagraph of Article 13(2) of that directive that divorce must not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State *where one of the factual situations* to which that provision refers *has taken place in the past*, namely, inter alia, where 'prior to initiation of the divorce … proceedings …, the

61 Judgment of 30 June 2016, *NA* (C-115/15, EU:C:2016:487, paragraph 51).

62 Judgment of 16 July 2015 (C-218/14, EU:C:2015:476).

63 Judgment of 30 June 2016 (C-115/15, EU:C:2016:487).

64 Judgment of 16 July 2015 (C-218/14, EU:C:2015:476).

65 See points 44, 48 and 49 of this Opinion.

66 Judgment of 16 July 2015, *Singh and Others* (C-218/14, EU:C:2015:476, paragraph 48). See point 44 of this Opinion.

67 See point 47 of this Opinion.

68 See, inter alia, judgment of 1 February 2017, *Município de Palmela* (C-144/16, EU:C:2017:76, paragraph 20 and the case-law cited).

69 This is also the view which is held widely in legal literature. See, inter alia, Gazin, F., 'Maintien d'un droit de séjour d'un ressortissant d'un État tiers avec un citoyen européen en présence d'enfants et en cas de divorce et de violence domestique commise pendant le mariage: la Cour confirme son interprétation sévère de l'article 13 de la directive 2004/38/CE verrouillant l'accès au droit de séjour à titre individuel des ressortissants de pays tiers mais accepte de reconnaître audits ressortissants un droit de séjour dérivé sur le fondement de l'article 12 du règlement (CEE) No 1612/68 et de l'article 21 TFUE', *Europe*, 2016, September Comm. Nos 8–9, pp. 28 and 29; Peers, S., 'Domestic violence and free movement of EU citizens: a shameful CJEU ruling', 2016, available at http://eulawanalysis.blogspot.com/2016/07/domestic-violence-and-free-movement-of.html; Barbou des Places, S., 'Le droit de séjour des ressortissants d'États tiers ayant la garde effective d'enfants citoyens de l'Union', *Revue critique de droit international privé*, 2017, No 1, p. 45; Oosterom-Staples, H., 'Residence rights for caring parents who are also victims of domestic violence', *European Journal of Migration and Law*, Vol. 19, No 4, 2017, pp. 396–424; and Gyeney, L., 'Sensitive issues before the European Court of Justice – The right of residence of third country spouses who became victims of domestic violence, as well as same-sex spouses in the scope of application of the free movement directive (legal analysis of the NA and Coman cases)', *Hungarian Yearbook of International Law and European Law*, 2017, No 1, pp. 211–256.

marriage … *has lasted* at least three years, including one year in the host Member State' (point (a)), *or* if this is warranted by particularly difficult circumstances, such as 'having been a victim of domestic violence while the marriage … *was subsisting*' (point (c)).[70]

82. Secondly, the wording of that provision and the use of the disjunctive conjunction 'or' after setting out each situation triggering the retention of the right of residence (points (a) to (d)) clearly indicate the EU legislature's intention to provide for alternative situations[71] in which divorce does not entail the loss of the right of residence of the spouse who is a third-country national.

83. In that regard, to me it is important to add that, in its commentary on Article 13 of the proposal that led to Directive 2004/38, the Commission explained that the conditions set out in Article 13(2)(a) and (c) of Directive 2004/38 had different objectives, namely, respectively, 'to avoid people using marriages of convenience to get round the residence entitlement rules'[72] and 'to cover, in particular, situations of domestic violence'.[73]

(ii) The purpose, context and origin of Article 13(2)(c) of Directive 2004/38

84. I note that, as is clear from the case-law of the Court, 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.[74]

85. As regards the purpose of Directive 2004/38 and, more specifically, Article 13(2)(c) thereof, it is apparent from recital 15 of that directive that that provision is intended to 'legally [safeguard family members] in the event of … divorce'. That recital expressly refers to '*due regard for family life and human dignity*', stating that, 'in certain conditions to guard against abuse, measures should … 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'.[75]

86. Therefore, would it not be paradoxical to consider that the legal protection which Article 13(2)(c) of Directive 2004/38 is intended to offer such persons, which consists of retaining their right of residence on an exclusively individual basis *where acts of violence have taken place during the marriage*, may depend solely on the decision of the Union citizen who has committed those acts of violence to leave the territory of the host Member State?

70 Emphasis added. As Advocate General Wathelet pointed out in his Opinion in *NA* (C-115/15, EU:C:2016:259, point 66), 'there is therefore, necessarily, a time delay between the domestic violence, the factor triggering the application of the provision, and the divorce'.

71 The 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, p. 150) states: 'The right granted under this provision is subject to three disjunctive conditions: (a) [duration of marriage]; *or* (b) [custody of children] *or* (c) the marriage was dissolved because of particularly difficult circumstances.' (The fulfilment of only one is sufficient to trigger the retention of the right of residence). The alternative nature of these conditions was emphasised by Advocate General Wathelet in his Opinion in *NA* (C-115/15, EU:C:2016:259, point 60).

72 See point 73 of this Opinion.

73 In that regard, the Commission stated that 'the wording in [Article 13(2)(c)] is vague and is meant to cover, in particular, situations of domestic violence', (COM(2001) 257 final, p. 150).

74 Judgments of 25 July 2008, *Metock and Others* (C-127/08, EU:C:2008:449, paragraph 84), and of 18 December 2014, *McCarthy and Others* (C-202/13, EU:C:2014:2450, paragraph 32).

75 Emphasis added.

87. In that regard, I note that, in its commentary on Article 13(2),[76] the Commission stated 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*'.

88. In fact, Article 13(2) of that directive aims to prevent such blackmail with threats of divorce. However, if it were applied in combination with Article 12 of that directive, it would allow those persons,[77] whose right of residence is dependent on a family relationship by marriage, to be open not only to *blackmail with threats of divorce*, but also *blackmail with threats of departure*.[78]

89. As I have already stated,[79] the combined interpretation of Articles 12 and 13 of Directive 2004/38 is not, in my opinion, relevant since, if 'departure for the purposes of a divorce' was regarded as a 'departure' within the meaning of Article 12 of that directive, this would prevent the Union citizen's spouse from being entitled to the legal protection provided for in Article 13(2) of that directive, consisting of the retention of his or her right of residence in the situations set out in that provision and, therefore, this would clearly be contrary to the purpose of that provision. Therefore, where a separation or divorce is preceded by domestic violence, it is clear to me that the first subparagraph of Article 13(2)(c) of Directive 2004/38 is fully applicable and, accordingly, the derived right of residence of the spouse who is a third-country national must be retained between the time when the acts of domestic violence took place and that when the divorce is pronounced.

90. In addition, I note that, on the one hand, the protection provided for in Article 12(3) of Directive 2004/38 concerns the retention, under certain conditions, of the right of residence by family members in the event of the 'departure' *in general* of the Union citizen (*actual departure without any intention of returning*) and, on the other, Article 13(2) of that directive governs *specific* situations in which the Union citizen may decide to leave the host Member State in the context of a divorce, annulment or termination of a partnership (*departure for the purposes of a divorce*). In view of the different nature of those two types of departure, it may be argued that Article 13(2)(c) of Directive 2004/38 constitutes a *lex specialis* in relation to Article 12(3) of that directive in so far as, in the two provisions, the nature of the Union citizen's departure is different. Thus, it is clear that, in the event of the departure of the spouse who is a Union citizen for the purposes of a divorce, Article 13(2)(c) of Directive 2004/38 must apply as a special provision. That provision prevails over the general rule in Article 12 of Directive 2004/38 in situations which Article 13(2)(c) of that directive is specifically intended to govern, namely, inter alia, those in which the spouse who is a Union citizen has committed acts of domestic violence and subsequently leaves the host Member State.

91. Therefore, in my view, Advocate General Wathelet was right to consider that '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 …. If that spouse leaves the host Member State before one of those

[76] See 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, p. 150). Emphasis added.

[77] Unless they have sole custody of a minor child (see Article 12(3) of Directive 2004/38).

[78] In that regard, as Advocate General Wathelet stated in his Opinion in *NA* (C-115/15, EU:C:2016:259, point 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.'

[79] See points 53 to 58 of this Opinion.

factors materialises, Article 13 cannot have the effect of enabling the right of residence to be "retained", [80] [but where] 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'. [81]

3. Interim conclusion on the applicability of Directive 2004/38

92. In the light of the foregoing considerations, I am of the opinion that it is necessary to update the judgment in *NA*, not only on the basis of the wording, context, purpose and origin of Article 13(2)(c) of Directive 2004/38, but also taking account of recent developments in EU rules on the protection of victims of crime and in particular victims of domestic violence.

93. That said, I therefore take the view that a person in a situation such as that of the applicant in the main proceedings falls within the scope of Directive 2004/38. Therefore, the request for a preliminary ruling must be declared admissible.

4. The recent developments in EU and Member State rules on the protection of victims of domestic violence: legal developments to be taken into account

94. When interpreting Article 13(2)(c) of Directive 2004/38, the legal, political and social importance of recognising the seriousness of the problem of domestic violence cannot be underestimated. To adopt the position that domestic violence should not affect the application of that provision would not be consistent with the EU legal system as a whole and would be particularly difficult to defend against EU policy with regard to the protection of victims of acts of violence in close relationships as it now stands.

95. In the first place, EU legislation has evolved with regard to recognition of the rights of and support and protection for victims of crime, including victims of domestic violence.

80 With regard to cases where the spouse leaves the host Member State before one of the situations provided for in Article 13(2) of Directive 2004/38 materialises, the temporary departure of the Union citizen does not entail the loss of the derived right of residence by the spouse who is a third-country national in the cases set out in Article 16(3) of Directive 2004/38. See, in that regard, points 61 to 63 of this Opinion.

81 See Opinion of Advocate General Wathelet in *NA* (C-115/15, EU:C:2016:259, points 61 and 62). Emphasis added.

96. In that context, it should be noted that Directive 2012/29/EU [82] has contributed to strengthening the rights of victims of crime [83] and, in respect of persons who are particularly vulnerable, [84] makes specific reference to victims of violence in close relationships. [85] Accordingly, in recital 18, that directive states, inter alia, that violence in close relationships is a serious and often hidden social problem and that victims of violence in close relationships may therefore be in need of special protection measures. [86] In particular, the first and second subparagraphs of Article 1(1) of Directive 2012/29 provide, respectively, that 'the purpose of this Directive is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings' and that '… the rights set out in this Directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status'.

97. It is true that recital 10 of Directive 2012/29 states that that directive 'does not address the conditions of the residence of victims of crime in the territory of the Member States' and that 'reporting a crime and participating in criminal proceedings do not create any rights regarding the residence status of the victim'. [87] However, I take the view that that directive cannot be completely ignored when interpreting Article 13(2)(c) of Directive 2004/38, having regard, in particular, to the overall coherence of the EU legal system and its policy with regard to the protection of victims of acts of violence in close relationships.

98. Allow me to clarify this idea.

99. Recital 57 of Directive 2012/29 states that 'victims of … violence in close relationships … tend to experience a high rate of secondary and repeat victimisation, of intimidation and of retaliation'.

82 Directive of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ 2012 L 315, p. 57). The date for the transposition of that directive was 16 November 2015 at the latest. As a reminder, that directive 'seeks to place the victim of a crime at the centre of the criminal justice system, and aims to strengthen the rights of victims of crime so that any victim can rely on the same level of rights, *irrespective of where the offence took place, their nationality or residence status*'. European Parliament resolution of 30 May 2018 on the implementation of Directive 2012/29, 2016/2328(INI). That European Parliament resolution is available at https://www.europarl.europa.eu/doceo/document/TA-8-2018-0229_EN.html. Emphasis added.

83 Article 2(1)(a)(i) of Directive 2012/29 defines 'victim' as 'a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence'.

84 Such as children (recital 14), women victims of gender-based violence (recitals 6 and 17), the disabled (recital 15), victims of terrorism (recital 16), LGBTI people or victims of trafficking in human beings (recital 17). In particular, recital 17 of Directive 2012/29 is worded as follows: 'Violence that is directed against a person because of that person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately, is understood as gender-based violence. It may result in physical, sexual, emotional or psychological harm, or economic loss, to the victim. Gender-based violence is understood to be a form of discrimination and a violation of the fundamental freedoms of the victim and includes *violence in close relationships* …' (emphasis added).

85 See recitals 17 and 18 of Directive 2012/29. See, also, Report of the European Parliament on the implementation of Directive 2012/29 …, of 14 May 2018, A8-0168/2018, p. 15, point 13: '[The European Parliament] reminds the Member States that victims in an irregular situation of residence should also have access to rights and services …, such as legal protection and psychosocial and financial support from the Member States, without fear of being deported …; encourages Member States to enact legislation that provides avenues for victims with dependent residence status to escape from situations of abuse by making it possible to obtain independent residence status …'. Available at https://www.europarl.europa.eu/doceo/document/A-8-2018-0168_EN.pdf.

86 According to recital 18 of Directive 2012/29, 'where violence is committed in a close relationship, it is committed by a person who is a current or former spouse, or partner or other family member of the victim, whether or not the offender shares or has shared the same household with the victim. Such violence could cover physical, sexual, psychological or economic violence and could result in physical, mental or emotional harm or economic loss. Violence in close relationships is a serious and often hidden social problem which could cause systematic psychological and physical trauma with severe consequences because the offender is a person whom the victim should be able to trust …' Although such violence *affects both men and women*, recital 18 states that 'women are affected disproportionately by this type of violence and the situation can be worse if the woman is dependent on the offender economically, socially or as regards *her right to residence*'. Emphasis added.

87 By contrast, Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (OJ 2004 L 261, p. 1) 'introduces a residence permit intended for victims of trafficking in human beings or, if a Member State decides to extend the scope of this Directive, to third-country nationals who have been the subject of an action to facilitate illegal immigration to whom the residence permit offers a sufficient incentive to cooperate with the competent authorities while including certain conditions to safeguard against abuse'. See recital 9 of that directive.

100. Therefore, how could Article 13(2)(c) of Directive 2004/38 [88] be interpreted in such a way as to prevent, by clearly going against the purpose of that directive, [89] the spouse of a Union citizen who is a third-country national from being entitled to the legal protection provided for in that provision, whereas Directive 2012/29 requires that Member States take 'particular care … when assessing whether such victims are at risk of such victimisation, intimidation and of retaliation' and states that 'there should be a strong presumption that those victims will benefit from special protection measures'? [90]

101. In the second place, under Article 1 of the Charter, entitled 'Human dignity', 'human dignity is inviolable. It must be respected and protected'. Moreover, although it has no legal force, the declaration on Article 8 of the FEU Treaty [91] confirms the political will of the Member States to combat all kinds of domestic violence.

102. In the third place, the Member States, at both international [92] and national level, are increasingly aware of the importance of legislating on domestic violence and violence in the family.

103. In that regard, I would point out that Article 59(1) of the Istanbul Convention [93] stipulates that 'Parties shall take the necessary legislative or other measures to ensure that victims whose residence status depends on that of the spouse or partner as recognised by internal law, in the event of the dissolution of the marriage or the relationship, are granted in the event of particularly difficult circumstances, upon application, an autonomous residence permit *irrespective of the duration of the marriage or the relationship*. The conditions relating to the granting and duration of the autonomous residence permit are established by internal law'. [94]

104. It is true that it follows from that provision that the granting of a residence permit to victims of domestic violence is not automatic and may be subject to conditions which are to be established, inter alia, by the legislatures of the Member States, in accordance with their national

88 Judgments of 25 July 2008, *Metock and Others* (C-127/08, EU:C:2008:449, paragraph 84), and of 18 December 2014, *McCarthy and Others* (C-202/13, EU:C:2014:2450, paragraph 32). See, also, point 84 of this Opinion.

89 That purpose is to provide certain legal safeguards, inter alia, to victims of violence in close relationships whose right of residence is dependent on a family relationship by marriage (or partnership) and who could therefore be open to blackmail with threats of divorce or departure. See recital 15 of Directive 2004/38; COM(2001) 257 final, p. 150; and points 82 to 88 of this Opinion.

90 See recital 57 of Directive 2012/29.

91 Declaration No 19 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 (OJ 2008 C 115, p. 345 and OJ 2012 C 326, p. 347).

92 See, inter alia, Articles 2, 3 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and the judgment of the European Court of Human Rights of 9 June 2009, *Opuz v. Turkey* (ECHR:2009:0609JUD003340102, § 132): 'The issue of domestic violence … can take various forms ranging from physical to psychological violence or verbal abuse … It is a general problem which concerns all member States and which does not always surface since it often takes place within personal relationships or closed circuits and it is not only women who are affected. The Court acknowledges that *men may also be the victims of domestic violence* and, indeed, that children, too, are often casualties of the phenomenon, whether directly or indirectly …' Emphasis added. In addition, all of the Member States have ratified the Convention on the Elimination of All Forms of Discrimination against Women, which was adopted by the United Nations General Assembly on 18 December 1979 and entered into force on 3 September 1981 (*United Nations Treaty Series*, Vol. 1249, p. 13). The European Union is not a party to that convention.

93 Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) of 11 May 2011, *Council of Europe Treaty Series*, No 210. With regard to the possible accession of the European Union to that convention, see Opinion 1/19 (*Istanbul Convention*) pending before the Court.

94 See, also, paragraph 1 et seq. of the Explanatory Report to the Istanbul Convention, *Council of Europe Treaty Series*, No 210, available at https://rm.coe.int/16800d38c9: 'Violence against women, including domestic violence, is one of the most serious forms of gender-based violations of human rights in Europe that is still shrouded in silence. *Domestic violence – against other victims such as children, men and the elderly* – is also a hidden phenomenon which affects too many families to be ignored'. Emphasis added.

law[95] or, in the event of the European Union's accession to that convention, the EU legislature. However, it is also clear from that provision that the national legislatures may not make the granting of such a residence permit subject to a condition based on *the duration of the marriage or the relationship*.

105. Article 59(3) of that convention provides that a renewable residence permit is to be issued to victims where the competent authority considers that their stay is necessary either owing to their personal situation or for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings. According to the explanatory report to the convention, that provision covers, inter alia, situations where the victim's personal circumstances are such that it would be unreasonable to compel him or her to leave the territory. That report explains that the criterion of the person's personal circumstances must be assessed on the basis of various factors, including the victim's safety, state of health, family situation, or the situation in the country of origin.[96]

106. It is clear from that brief examination of Article 59 of the Istanbul Convention that, within the framework of that convention, the power of the parties to determine the conditions for granting an autonomous residence permit comes with the duty to take into account, in the practical application of those conditions, the specific situation of the victim and to issue a residence permit when required.

107. That said, although the Istanbul Convention does not, for the time being,[97] have a direct impact on the interpretation of Article 13(2)(c) of Directive 2004/38, the same cannot be said in respect of the legal developments it entails which are bringing about political and social changes relating the protection of victims of domestic violence. In so far as Article 59(1) of that convention allows victims to obtain the necessary protection from authorities without fearing that the perpetrator will retaliate by withdrawing or threatening to withdraw residence benefits under the perpetrator's control,[98] it seems to me that it would be inconsistent, whether or not the European Union accedes to that convention,[99] to ignore the risk of 'blackmail with threats of divorce' or 'blackmail with threats of departure' when interpreting Article 13(2)(c) of Directive 2004/38. Moreover, this would prevent victims from being entitled to the protection provided for by that provision, whereas its purpose is precisely to protect the spouse who is a third-country national and who has, inter alia, been 'a victim of domestic violence while the marriage or registered partnership was subsisting', by maintaining his or her right of residence in the host Member State.

108. To conclude, the request for a preliminary ruling must be declared admissible. I shall therefore examine the issue of validity.

95 In accordance with paragraph 303 of the Explanatory Report to the Istanbul Convention: 'The drafters felt it best to let Parties establish, in accordance with internal law, the conditions relating to the granting and duration of the autonomous residence permit, following an application by the victim. This includes establishing which public authorities are competent to decide if the relationship has dissolved as a consequence of the violence endured by the victim and what evidence is to be produced by the victim. Evidence of violence may include, for example, police records, a court conviction, a barring or protection order, medical evidence, an order of divorce, social services records or reports from … NGOs, to name a few.'

96 See paragraph 307 of the Explanatory Report to the Istanbul Convention.

97 The situation could change if the European Union accedes to the convention.

98 See paragraph 304 of the Explanatory Report to the Istanbul Convention.

99 While it is true that the convention does not apply in the present case, as the European Union has not acceded to it, it may, nevertheless, serve as a source of inspiration for the interpretation of Article 13(2)(c) of Directive 2004/38.

C. The question referred for a preliminary ruling

109. By its question, the referring court asks the Court, in essence, whether Article 13(2) of Directive 2004/38 is valid in the light of Articles 20 and 21 of the Charter.

110. In particular, it is clear from the wording of the question and the explanations relating to it in the request for a preliminary ruling that the national court is asking whether that provision is invalid in so far as, in the event of divorce, annulment of marriage or termination of a registered partnership, it makes the retention of the right of residence of a third-country national who is the spouse of a Union citizen and who has been a victim of domestic violence subject to the condition, inter alia, of having sufficient resources, whereas Article 15(3) of Directive 2003/86 does not make the retention of the right of residence by a third-country national who has benefited from the right to family reunification subject to that condition in the event of divorce or separation. This would constitute an infringement of the principle of equal treatment laid down in Articles 20 and 21 of the Charter.

1. The principle of non-discrimination and Article 21 of the Charter

111. I have doubts as to the relevance of Article 21 of the Charter where, as in the present case, it must be examined whether the system established by Article 13(2) of Directive 2004/38 for third-country nationals who are married to a Union citizen is less favourable than that established by Article 15(3) of Directive 2003/86 for third-country nationals who are married to another third-country national.

112. With regard to Article 21(1) of the Charter, I would point out that there is no link between the situation at issue in the present case and the open-ended list of grounds set out in that provision.[100] I recall, as the Commission has rightly pointed out, that the second paragraph of Article 13(2) of Directive 2004/38 applies to any third-country national who is a family member of a Union citizen, without any distinction based on the grounds set out in Article 21(1) of the Charter. Therefore, since the difference in treatment established by Article 13(2) of Directive 2004/38 is based on nationality, it is clear from the wording of Article 21(1) of the Charter that that provision is irrelevant in the present case.

113. As regards Article 21(2) of the Charter, that provision corresponds, according to the explanations relating to the Charter,[101] to the first paragraph of Article 18 TFEU and must be applied in compliance with that provision of the FEU Treaty.[102] As the Court has already clarified, the first paragraph of Article 18 TFEU is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries.[103] Therefore, Article 21(2) of the Charter is also irrelevant when examining, as requested by the referring court, the lawfulness of a difference in treatment between

100 In the absence of such a link, legal literature makes reference to a 'subsidiary relationship' between Articles 20 and 21 of the Charter, see Bribosia, E., Rorive, I. and Hislaire, J., 'Article 20 – Égalité en droit', Picod, F., Rizcallah, C. and Van Drooghenbroeck, S. (eds), *Charte des droits fondamentaux de l'Union européenne. Commentaire article par article* (2nd edition), Brussels, Bruylant, 2019, p. 533: '… Article 20 could be used to verify the consistency and rationality, in the light of the objective pursued, of any difference in treatment, whatever its basis.' See, also, Bell, M., 'Article 20 – Equality before the law', Peers, S., Hervey, T., Kenner, J. and Ward, A. (eds), *The EU Charter of Fundamental Rights – A commentary*, Oxford Hart Publishing, 2014, p. 563, in particular, p. 577.

101 OJ 2007 C 303, p. 17.

102 Opinion 1/17 (*EU-Canada CET Agreement*) of 30 April 2019 (EU:C:2019:341, paragraph 168).

103 Opinion 1/17 (*EU-Canada CET Agreement*) of 30 April 2019 (EU:C:2019:341, paragraph 169), and judgment of 4 June 2009, *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344, paragraph 52).

third-country nationals who are married to a Union citizen within the framework of Directive 2004/38 and third-country nationals who are married to another third-country national who has been granted family reunification under Directive 2003/86.

114. By contrast, it must be pointed out that the scope of Article 20 of the Charter is particularly broad. That article, which provides that everyone is equal before the law, does not contain any express limitation on its scope and is therefore applicable to all situations governed by EU law, [104] including those falling within the scope of Article 13(2) of Directive 2004/38. Therefore, I consider that the validity of Article 13(2) of Directive 2004/38 must be assessed solely in the light of Article 20 of the Charter.

2. The principle of equal treatment and Article 20 of the Charter

115. According to the settled case-law of the Court, equality before the law, set out in Article 20 of the Charter, is a general principle of EU law that requires that similar situations must not be treated differently and that different situations must not be treated in the same manner unless such different treatment is objectively justified. [105] It follows from that same case-law that, for the purpose of determining whether there is an infringement of the principle of equal treatment, the situations examined must be comparable in the light of all the elements which characterise them and, in particular, in the light of the subject matter and purpose of the act which makes the distinction at issue, whilst account must be taken for that purpose of the principles and objectives of the field within which that act falls. [106] In so far as the situations are not comparable, a difference in treatment of the situations concerned does not infringe the equality before the law enshrined in Article 20 of the Charter. [107]

116. It is precisely the comparability of the situations in the present case that I shall now examine.

(a) Is the situation under Directive 2004/38 of a third-country national whose spouse is a Union citizen comparable to that under Directive 2003/86 of a third-country national whose spouse is another third-country national?

117. The present case raises the question as to whether, as far as the conditions for the retention of a derived right of residence are concerned, a third-country national who has been the victim of acts of domestic violence committed during his or her marriage by a spouse who is a Union citizen and who falls within the scope of Article 13(2)(c) of Directive 2004/38 is in a comparable situation to that of a third-country national who has been the victim of such acts committed during his or her marriage by a spouse who is a third-country national and who falls within the scope of Article 15(3) of Directive 2003/86.

104 Opinion 1/17 (*EU-Canada CET Agreement*) of 30 April 2019 (EU:C:2019:341, paragraph 171 and the case-law cited).

105 Judgments of 11 July 2006, *Franz Egenberger* (C-313/04, EU:C:2006:454, paragraph 33), and of 17 October 2013, *Schaible* (C-101/12, EU:C:2013:661, paragraph 76), and order of 26 March 2020, *Luxaviation* (C-113/19, EU:C:2020:228, paragraph 36).

106 See, inter alia, judgments of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 26); of 7 March 2017, *RPO* (C-390/15, EU:C:2017:174, paragraph 42); and of 22 January 2019, *Cresco Investigation* (C-193/17, EU:C:2019:43, paragraph 42).

107 See, inter alia, judgment of 22 May 2014, *Glatzel* (C-356/12, EU:C:2014:350, paragraph 84).

118. The applicant in the main proceedings submits, in his observations, that, in the light of the subject matter and common purpose of those two provisions, the situations referred to in the present case are comparable. The Belgian Government, the Parliament, the Council and the Commission, for their part, take the opposite view.

119. In order to assess whether those two situations are comparable, it is necessary to examine the principles and objectives of the areas covered by Directives 2004/38 and 2003/86.

(1) Citizenship of the Union and the common policy on immigration law: two different areas with distinct principles and objectives

120. I shall briefly note the differences which exist in respect of the division of powers between the European Union and the Member States, resulting from legal bases which, in the Treaties, govern the adoption of legislative acts defining, on the one hand, the status of third-country nationals and, on the other, the status of Union citizens.

121. First of all, with regard to the area of freedom, security and justice,[108] the competence of the European Union is shared with the Member States, pursuant to Article 4(2)(j) TFEU. The objectives of that competence and the manner in which it is to be exercised are set out in Title V of Part Three of the FEU Treaty. Article 67(2) TFEU provides that the European Union is to ensure the absence of internal border controls for persons and must frame a common policy on, inter alia, immigration and the control of external borders that is based on solidarity between Member States and is fair towards third-country nationals. Moreover, Article 79(1) TFEU provides that the common immigration policy is aimed at ensuring the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings. Accordingly, the ordinary legislative procedure applies to the adoption of all of the measures referred to in Article 79(2) TFEU.

122. Furthermore, EU competence in migration matters is a power to undertake harmonisation. Therefore, the pre-emptive effect on or priority of its exercise over the competence of the Member States will vary depending on the precise scope and intensity of the European Union's intervention.[109] Common rules are therefore adopted in directives[110] which the Member States are obliged to transpose although they may legislate on matters not covered by EU law, and are also free to derogate from common rules to the extent permitted by that law. Subject to these conditions, the Member States retain, in principle, their competence in the area of immigration law.

123. However, that is not the case in the area of citizenship of the Union and the free movement of persons. As regards the right to move and reside freely within the territory of all of the Member States, which Union citizens derive directly from Articles 20(2)(a) and 21(1) TFEU, the Member States' discretion in relation to immigration cannot adversely affect implementation of the provisions on citizenship of the Union or freedom of movement, even if those provisions concern

[108] In that regard, the Court has already held that 'the provisions applicable to the Schengen area expressly state that they do not affect the freedom of movement of Union citizens and their family members accompanying or joining them, as guaranteed, inter alia, by Directive 2004/38' (judgment of 18 June 2020, *Ryanair Designated Activity Company*, C-754/18, EU:C:2020:478, paragraph 40).

[109] Protocol No 25 on the exercise of shared competence (OJ 2012 C 326, p. 307), annexed to the EU and FEU Treaties, states that, 'when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area'.

[110] That is true, in particular, for Directive 2003/86.

not only the situation of citizens of the Union but also that of third-country nationals who are members of their families. The contrary would, clearly, not be compatible with the establishment of an internal market, which 'implies that the conditions of entry and residence of a Union citizen in a Member State whose nationality he does not possess are the same in all the Member States'. [111]

124. Finally, it is important to bear in mind that the legal status conferred on third-country nationals in the context of the directives resulting from the common policy on immigration law *is different from* the status of EU citizens and third-country nationals who are members of their family, *and is based on a different legal rationale*. [112] Having regard to the principle of conferral of powers, the extent of the coverage and the protection guaranteed by secondary EU law is not the same in respect of the two statuses: under EU immigration law, a third-country national does not enjoy the same rights as a Union citizen. [113] This distinction also has an impact on the legal status of family members of those two categories of person to whom that law applies, in particular under the systems established by Directives 2003/86 and 2004/38.

125. In that vein, legal writers consider that the distinction in the Treaties between Union citizens and third-country nationals is more than semantic as it reflects a 'basic constitutional cleavage at the heart of the European project' in so far as it designates a basic distinction between the rights of Union citizens and their families to free movement rights and the absence of corresponding guarantees enshrined at Treaty level for third-country nationals [114] in the context of the common policy on immigration law.

126. It is clear from those differences in the principles and objectives of the areas concerned that the situations in question, in principle, are not comparable. However, in order to complete the examination of the comparability of those situations, I must now turn to the analysis of the subject matter and the purpose of Directives 2003/86 and 2004/38 respectively.

(2) Directives 2003/86 and 2004/38: two different systems based on different purposes

(i) The system established by Directive 2003/86

127. Directive 2003/86 forms part of the task conferred on the European Union by Article 79 TFEU. [115] More specifically, that directive was adopted on the basis of Article 63(3)(a) of the EC Treaty, which, since the entry into force of the Treaty of Lisbon, is now Article 79(2)(a) TFEU, concerning common immigration policy. In accordance with Article 1 thereof, the purpose of Directive 2003/86 is to determine the conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of the Member States. [116]

111 See, to that effect, judgment of 25 July 2008, *Metock and Others* (C-127/08, EU:C:2008:449, paragraph 68).

112 See my Opinion in *Ryanair Designated Activity Company* (C-754/18, EU:C:2020:131, point 34).

113 However, it should be borne in mind that third-country nationals may, in the area of immigration law, rely on the Charter inter alia in so far as it applies within the scope of EU law. With regard to Directive 2003/86, see, inter alia, in that regard, judgment of 14 March 2019, *Y. Z. and Others (Fraud in family reunification)* (C-557/17, EU:C:2019:203, paragraph 53).

114 Thym, D., 'Legal framework for EU entry and border control policies', Hailbronner, K. and Thym, D. (eds), *EU Immigration and Asylum Law. Commentary*, 2nd edition, Munich/Oxford/Baden-Baden, C.H. Beck/Hart Publishing/Nomos, 2016, p. 272, in particular, p. 285. In the same work, see also Hailbronner, K. and Thym, D., 'Introduction: EU immigration and asylum law: constitutional framework and principles for interpretation', in particular p. 4: 'The conceptual autonomy of the area of freedom, security and justice confirms that EU immigration and asylum law does not replicate the mobility regime of Union citizens. Instead, immigration and asylum law is nowadays typified by a collection of diverse objectives laid down in the EU Treaties, which were introduced by the Treaty of Lisbon'.

115 See point 121 of this Opinion.

116 Under Article 3(3) of Directive 2003/86, the directive does not apply to members of the family of a Union citizen.

Moreover, it is apparent from recital 4 that that directive has the general objective of facilitating the integration of third-country nationals in Member States by making family life possible through reunification. [117]

128. In that context, I note, first of all, that the right to family reunification under Directive 2003/86 is subject to *strict conditions* concerning both the sponsor and his or her spouse. Thus, in the system established by that directive, the directive is to apply, in accordance with Article 3(1) thereof, where the sponsor holds a residence permit issued by a Member State for a period of validity of one year or more and has reasonable prospects of obtaining the right of permanent residence. In those circumstances, Article 4(1)(a) of Directive 2003/86 provides that the Member States are to authorise the entry and residence of the sponsor's spouse, pursuant to that directive and subject to compliance with the conditions laid down in Chapter IV and in Article 16 of that directive.

129. Secondly, as far as the *conditions that the sponsor must satisfy*, it should be noted that, when the application for family reunification is submitted, the Member State concerned may require the spouse who has submitted the application to provide evidence that the sponsor has accommodation, sickness insurance and stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. [118] In that regard, the competent authority of the Member State concerned may, inter alia, withdraw an authorisation of family reunification where the sponsor no longer has stable and regular resources which are sufficient, within the meaning of Article 7(1)(c) of Directive 2003/86. [119] In addition, the Member State may require the sponsor to have stayed lawfully in its territory for a period not exceeding two years before being joined by his or her family members [120] and to have resources which are sufficient to maintain his or her family for as long as the family resides in its territory, that is to say until the family members obtain a residence permit that is independent of that of the sponsor. [121]

130. Finally, as regards the *conditions that must be satisfied by the family members* for whom family reunification is requested, the Member State may, under Article 7(2) of Directive 2003/86, require third-country nationals to comply with integration measures, [122] in accordance with national law.

131. More specifically, with regard to Article 15 of Directive 2003/86, I note that it is clear from recital 15 of that directive that the aim of that article is to promote the integration of third-country nationals who are spouses of another third-country national in cases of breakup of marriages. In that context, Article 15(3) of that directive provides that, inter alia in the event of divorce or separation, an autonomous residence permit *may* be issued, upon application, if required, to persons who have entered by virtue of family reunification. That provision also stipulates that the Member States are to lay down provisions ensuring the granting of an autonomous residence permit in the event of particularly difficult circumstances. In that regard, it should be noted that, under Article 15(4) of Directive 2003/86, the conditions relating to the

117 Judgment of 14 March 2019, *Y. Z. and Others (Fraud in family reunification)* (C-557/17, EU:C:2019:203, paragraph 47 and the case-law cited).

118 See Article 7(1) of Directive 2003/86.

119 Judgment of 21 April 2016, *Khachab* (C-558/14, EU:C:2016:285, paragraph 38 and the case-law cited).

120 See the first paragraph of Article 8 of Directive 2003/86.

121 See Article 16(1) of Directive 2003/86. See, also, Opinion of Advocate General Mengozzi in *Khachab* (C-558/14, EU:C:2015:852, point 31).

122 With regard to the requirement to sit a civic integration exam, see judgment of 9 July 2015, *K and A* (C-153/14, EU:C:2015:453).

granting and duration of the autonomous residence permit *are established by national law*. The Court has already held that, by introducing a reference to national law in Article 15(4) of Directive 2003/86, the EU legislature indicated that it left to the discretion of each Member State the responsibility for determining the conditions under which an autonomous residence permit should be issued to a third-country national.[123] In my view, that discretion concerns the issuing of an autonomous residence permit in the situations laid down in Article 15(3) of that directive.

132. Moreover, it must be noted that Article 16(1)(b) of Directive 2003/86 authorises the Member States to reject an application for entry and residence for the purpose of family reunification, or, if appropriate, withdraw or refuse to renew a family member's residence permit '*where the sponsor and his/her family member(s) do not or no longer live in a real marital or family relationship*'.[124]

133. That said, a withdrawal or refusal to renew a residence permit cannot occur automatically. As the Court has held, it is clear from the use, in that provision, of the words 'may … withdraw' that Member States have a discretion as to that withdrawal. Moreover, in accordance with Article 17 of Directive 2003/86, the Member State concerned *must* first examine, on a case-by-case basis, the situation of the family member concerned, by making a balanced and reasonable assessment of all the interests in play.[125] Furthermore, measures for the withdrawal of a residence permit must be adopted in conformity with fundamental rights, in particular the right to respect for private and family life guaranteed by Article 7 of the Charter.[126]

134. Therefore, the Member States are required to comply with the principle of proportionality and the objectives pursued by the EU legislature.[127] That means, as the Commission has rightly pointed out, that, even where the national authorities make the granting of an autonomous permit – in the cases referred to in Article 15(3) of Directive 2003/86 – subject to substantive conditions, they must relax or even refrain from applying those conditions if, in the specific circumstances of the case, compliance with the principle of proportionality or the requirement not to compromise the objectives of Article 15 of that directive so require.[128]

135. It is clear from the foregoing considerations that the EU legislature's intention was not to guarantee third-country nationals a derived right of residence, but to guarantee them the possibility of applying for a residence permit the issue and retention of which are governed by rules which seek to lay down common rules for the exercise of the right to family reunification. In doing so, the EU legislature has ensured the harmonisation of national legislation on migration by relying on the competence conferred by Article 79 TFEU.

(ii) The system established by Directive 2004/38

136. Directive 2004/38 was adopted on the basis of Articles 12, 18, 40, 44 and 52 of the EC Treaty (now, respectively, Articles 18, 21, 46, 50 and 59 TFEU) and aims to facilitate the exercise of the primary and individual right – conferred directly on citizens of the Union by Article 21(1)

123 Judgment of 7 November 2018, *C and A* (C-257/17, EU:C:2018:876, paragraph 49).

124 Emphasis added. However, that is not the case in respect of a third-country national who is the spouse of a Union citizen. See, in that regard, judgments of 13 February 1985, *Diatta* (267/83, EU:C:1985:67, paragraph 20), and of 10 July 2014, *Ogieriakhi* (C-244/13, EU:C:2014:2068, paragraph 37). See, also, point 71 of this Opinion.

125 See, to that effect, judgment of 14 March 2019, *Y. Z. and Others (Fraud in family reunification)* (C-557/17, EU:C:2019:203, paragraph 51 and the case-law cited).

126 See judgment of 14 March 2019, *Y. Z. and Others (Fraud in family reunification)* (C-557/17, EU:C:2019:203, paragraph 53). See, also, recital 2 of Directive 2003/86.

127 See, to that effect, judgment of 7 November 2018, *C and A* (C-257/17, EU:C:2018:876, paragraph 51).

128 See recital 15 of Directive 2003/86. See, also, point 131 of this Opinion.

TFEU – to move and reside freely within the territory of the Member States, and to strengthen that right. Recital 5 of that directive states that that right should, if it is to be exercised under objective conditions of dignity, be also granted to the family members of those citizens, irrespective of nationality. [129] In particular, the derived right of residence of the spouse who is a third-country national may result merely by virtue of marriage to a Union citizen who has exercised his or her right to free movement. [130]

137. In that context, the system established by Directive 2004/38 governs the exercise of freedom of movement by a Union citizen and his or her family members from the time of their arrival in the host Member State and, where applicable, up until their departure from that Member State. The right of residence in the host Member State is therefore governed on a gradual basis by that directive and culminates in the right of permanent residence. [131] Thus, first, the right of residence for up to three months provided for in Article 6 of Directive 2004/38 is not subject to any condition or any formal requirement other than the requirement to be in possession of a valid identity card or passport. [132] Next, the right of residence for more than three months is subject to the conditions laid down in Article 7(1) of that directive. [133] Finally, provision is made for the right of permanent residence [134] in Article 16 of that directive for Union citizens and their family members who have resided legally for a continuous period of five years in the host Member State. [135]

138. In that regard, it should be noted that Article 21(1) TFEU and the provisions of Directive 2004/38 do not confer any autonomous right on third-country nationals. Any rights conferred on such nationals by provisions of EU law on Union citizenship are rights derived from the exercise by a citizen of the Union of his or her freedom of movement. [136] However, in Articles 12 and 13 of that directive, the EU legislature has provided for the retention of the right of residence by family members of a Union citizen in two different types of situation, [137] namely, respectively, the death or departure of the Union citizen and divorce, annulment of marriage or termination of a registered partnership. [138] While those situations do not affect the right of residence of the family members of

129 Judgments of 14 November 2017, *Lounes* (C-165/16, EU:C:2017:862, paragraph 31), and of 18 December 2014, *McCarthy and Others* (C-202/13, EU:C:2014:2450, paragraphs 31 and 32).

130 See Article 2(2) and Article 3(1) of Directive 2004/38.

131 See, in that regard, judgments of 21 December 2011, *Ziolkowski and Szeja* (C-424/10 and C-425/10, EU:C:2011:866, paragraph 38); of 16 January 2014, *Onuekwere* (C-378/12, EU:C:2014:13, paragraph 30); and of 17 April 2018, *B and Vomero* (C-316/16 and C-424/16, EU:C:2018:256, paragraph 51).

132 In accordance with Article 14(1) of that directive, that right is retained as long as the Union citizens and their family members do not become an unreasonable burden on the social assistance system of the host Member State.

133 In accordance with Article 14(2) of Directive 2004/38, Union citizens and their family members are to have the right of residence if they meet the conditions set out inter alia in Article 7 of that directive, which are intended to prevent them from becoming an unreasonable burden on the social assistance system of the host Member State.

134 More specifically, it is clear from Article 16(1) of Directive 2004/38 that the right of permanent residence is not subject to the conditions provided for in Chapter III of that directive.

135 However, by way of derogation from Article 16 of Directive 2004/38, a right of permanent residence in the host Member State is provided, before completion of that continuous period of five years of residence, for workers who have stopped working in the host Member State and their family members who meet the conditions set out in Article 17 of that directive.

136 Judgment of 18 December 2014, *McCarthy and Others* (C-202/13, EU:C:2014:2450, paragraph 34 and the case-law cited).

137 See points 54 to 58 of this Opinion.

138 Under Article 18 of Directive 2004/38, the family members of a Union citizen to whom Articles 12(2) and 13(2) of that directive apply, who satisfy the conditions laid down therein, are to acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State. With respect to Articles 12 and 13 of that directive, see my analysis of the applicability of Article 13(2)(c) of Directive 2004/38 in points 53 to 58 of this Opinion.

a Union citizen who are nationals of a Member State,[139] the same is not true in respect of the family members of a Union citizen who are third-country nationals, who must satisfy certain specific conditions in order to retain their derived right of residence.

139. As is clear from Article 13(2) of Directive 2004/38, specific conditions apply, inter alia in the event of divorce, in respect of the third-country national who is the spouse of the Union citizen. As I have already stated, that third-country national must, in order to retain a right of residence, fall within one of the alternative situations provided for in the first subparagraph of Article 13(2) of that directive.[140] Where he or she has not yet acquired the right of permanent residence, the EU legislature has provided for the retention of his or her right of residence in the second subparagraph of that provision exclusively on a personal basis, solely if he or she meets the conditions laid down therein, inter alia that of having sufficient resources. Those conditions are in fact equivalent to those which, in accordance with the second subparagraph of Article 13(1) of Directive 2004/38, the spouse of a Union citizen who is a national of a Member State must meet before acquiring the right of permanent residence.[141]

140. With regard to the conditions laid down in Article 13(2) of Directive 2004/38, as the Commission rightly noted in its observations, it is however possible that, in specific cases – in particular where, as a result of acts of domestic violence committed by the Union citizen against his or her spouse who is a third-country national, the application of those conditions would not enable the objectives of that provision to be met or would be contrary to the principle of proportionality – the national authorities may be required to relax, or even possibly not apply, the conditions of that provision. A degree of flexibility is therefore permitted in order to respond to situations in which the spouse, who is a third-country national and the victim of domestic violence, needs to acquire the necessary qualifications to find employment.

141. I would point out, in that regard, that, under Article 37 of Directive 2004/38, Member States may apply laws, regulations or administrative provisions which are more favourable to the persons covered by that directive. As the Commission has also stated, a national provision or administrative practice which makes it possible, in a specific case where circumstances so require, to relax or refrain from applying the conditions laid down in the second subparagraph of Article 13(2) of Directive 2004/38, in particular that of having sufficient resources, cannot be regarded as contrary to the objective of that directive. It should also be recalled that recital 15 states that the aim of that provision is to legally safeguard third-country nationals who are spouses of a Union citizen and who have been a victim of domestic violence, inter alia in the event of divorce.

139 Without prejudice to the second subparagraph of Article 12(1) of Directive 2004/38, which provides that, 'before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1)' and the second subparagraph of Article 13(1) of that directive, which provides that 'before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1)'.

140 I would point out that it is clear from my analysis of the applicability of Article 13(2)(a) of Directive 2004/38 that a person in a situation such as that of the applicant in the main proceedings falls within the scope of that directive. See points 36 to 93 of this Opinion.

141 Nevertheless, for all intents and purposes, I stress that the situation of a third-country national, spouse of a Union citizen, who has been a victim of domestic violence and who, lacking sufficient resources and health insurance, has to leave the host Member State and return to the third country is not, in principle comparable to that of a Union citizen, the spouse of a Union citizen, who has been the victim of domestic violence and who, in the same circumstances, has to leave the host Member State and return to the Member State of which he is a national. Indeed, it is undeniable that the departure of a third-country national who is a victim of domestic violence to a third country has much greater consequences as regards the severance of links with the host Member State than the departure of a Union citizen who is a victim of domestic violence to the Member State of which he or she is a national or to another Member State.

142. It follows from the foregoing that, in view of the constitutional nature of the right of Union citizens to move and reside freely in the territory of the Member States, conferred directly by the Treaties – a right which has the benefit of enhanced guarantees and is intended to become permanent under the system established by Directive 2004/38 – it is not only consistent but also legitimate that, in the event of divorce, in order to retain his or her derived right of residence, the third-country national who is the spouse of a Union citizen is subject, under the second subparagraph of Article 13(2) of that directive, to conditions that are at least equivalent to those imposed on a national of a Member State who is the spouse of a Union citizen.

143. Therefore, in the light of the differences found, first, between the systems established by Directives 2003/86 and 2004/38 – which have different legal bases and purposes which justify the different legal statuses of third-country nationals whose spouse is a Union citizen and third-country nationals whose spouse is another third-country national and, secondly, between the objectives pursued by Article 13(2) of Directive 2004/38 and those of Article 15(3) of Directive 2003/86, the view must be taken that the situations concerned are not comparable.

(b) Interim conclusion

144. It is clear from the examination of the comparability of the situations in the present case that they are manifestly different. Thus, the legal status of third-country nationals whose spouse is a Union citizen is derived from a right which is guaranteed at constitutional level by the Treaties and subject to the conditions laid down in Directive 2004/38 with which the Member States are required to comply. By contrast, the status of third-country nationals whose spouse is another third-country national is based on a power to undertake harmonisation, meaning that the Member States have a degree of discretion in respect of the conditions laid down in Directive 2003/86. Consequently, the rights derived from the systems established by those two directives are different.

145. Taking those considerations into account, it may be concluded that the two situations at issue are not comparable. Therefore, a difference in the treatment of third-country nationals who are victims of domestic violence by their spouse, depending on whether they have been granted family reunification with a Union citizen or with a third-country national, does not infringe the right to 'equality before the law', enshrined in Article 20 of the Charter, of third-country nationals in either situation.

V. Conclusion

146. Having regard to all the foregoing considerations, I propose that the Court should answer the question referred for a preliminary ruling by the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium) as follows:

Consideration of the question referred for a preliminary ruling has disclosed no factor of such a kind as to affect the validity of 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 (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35 and OJ 2005 L 197, p. 34), in the light of Articles 20 and 21 of the Charter of Fundamental Rights of the European Union.