Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 10 March 2022 [1]

Case C-22/21

SRS,
AA
v
Minister for Justice and Equality

(Request for a preliminary ruling
from the Supreme Court (Ireland))

(Reference for a preliminary ruling – Right to move and reside freely within the territory of the Member States – Beneficiaries – Other family members – Family member who is a member of the household of a Union citizen – First cousin, a third-country national, who lives with a Union citizen – Dependence – Conditions – Examination by the national authorities – Criteria – Discretion – Limits)

I. Introduction

1. SRS was born in 1978 and is originally from Pakistan. He had lived with his family in the United Kingdom since 1997. In 2013, he obtained UK nationality. AA, a Pakistani national born in 1986, is his first cousin. After attending university in Pakistan, AA continued his studies in 2010 in the United Kingdom. At that time he held a study visa which expired on 28 December 2014. Throughout his residence in the United Kingdom, AA lived in London with SRS as well as the latter's parents and other members of his family in a house owned by SRS's brother. SRS paid rent to that brother. On 11 February 2014, SRS and AA entered into a one-year tenancy agreement with that brother.

2. In January 2015, SRS moved to Ireland for work reasons. In March 2015, he was joined in Ireland by AA, who has lived with him since then. On 24 June 2015, whilst he was residing without a visa in Ireland, AA applied to the Irish authorities to be issued with a residence card as a family member of a Union citizen under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 ('the 2006 Irish Regulations'), [2] which transposed into Irish law 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

[1] Original language: French.

[2] S.I. No 656/2006.

and 93/96/EEC.[3] Regulation 7 of the 2006 Irish Regulations provided that a 'permitted family member' of a Union citizen who has been resident in Ireland for not less than three months could apply for a residence card.

3. Regulation 2(1) of the 2006 Irish Regulations defined 'permitted family members' of a Union citizen as 'any family member, irrespective of his or her nationality, who is not a qualifying family member of the Union citizen, and who, in his or her country of origin, habitual residence or previous residence (a) is a dependent of the Union citizen, (b) is a member of the household of the Union citizen, (c) on the basis of serious health grounds strictly requires the personal care of the Union citizen'.

4. Thus, AA did not claim to fall within the category of family members of a Union citizen who are covered by Article 2(2) of Directive 2004/38.[4] AA did, however, claim to be a dependant of SRS and, in any event, a member of SRS's household.

5. Under Article 3(2)(a) of Directive 2004/38, 'without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons: any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen'.

6. On 21 December 2015, the Minister for Justice and Equality (Ireland) refused AA's application, taking the view, in essence, that AA had not provided sufficient evidence that he was a dependant of SRS or that he was a member of SRS's household. The Minister considered, inter alia, that the actual period of cohabitation of SRS and AA in the United Kingdom since SRS acquired citizenship of the EU was less than two years, that SRS's parents, his brother and his sister shared the same address in London and that, even if it were established that AA lived at that address, that was not sufficient to regard him as a member of SRS's household. As for AA's financial dependence on SRS, such dependence was insufficiently documented in the Minister's opinion.

7. After furnishing additional evidence, SRS and AA sought a review of the decision of the Minister for Justice and Equality. On 21 December 2016, the Minister confirmed his decision of 21 December 2015 on the same grounds and took the view that, even though they resided at the same address in the United Kingdom, it had not been established that SRS was in fact the 'head of the household' when AA lived with him in London, as required by Article 3(2)(a) of Directive 2004/38.

8. AA and SRS brought an action for annulment against that decision before the High Court (Ireland). SRS once again detailed before that court the financial support provided to his first cousin during the period that they lived together in London and stated that he was the only employed person in his household given the advanced age of his parents and his brother's extended stay in Pakistan. In a judgment of 25 July 2018, the High Court dismissed the

[3] OJ 2004 L 158, p. 77.

[4] Within the meaning of that provision, the spouse or registered partner of the Union citizen, the direct descendants who are under the age of 21 or are dependants of the Union citizen and those of his or her spouse or registered partner and, finally, the dependent direct relatives in the ascending line and those of his or her spouse or registered partner are to be regarded as 'family members' of a Union citizen. Those family members are 'qualifying' family members within the meaning of the Irish regulations.

application brought by SRS and AA because AA could not be regarded as being a dependant of SRS or a member of a household of which SRS is the head, whilst acknowledging that the latter concept was vague and not defined anywhere.

9. AA and SRS lodged an appeal before the Court of Appeal (Ireland), claiming that the court of first instance had adopted an overly restrictive interpretation of the concept of a 'family member who is a member of the household' of a Union citizen. However, in a judgment of 19 December 2019, the Court of Appeal, whilst again noting the difficulties in interpreting that concept, found that merely cohabiting at the same address could not be deemed sufficient to regard AA and SRS as members of the same household of which SRS was the head. It stated that, for a family member to be regarded as a member of the household of a Union citizen, he or she had to be an integral part of the family unit and remain so for the foreseeable or reasonably foreseeable future. In addition, he or she had to live with the Union citizen not just for reasons of convenience but also for reasons of emotional and social connection.

10. Having once again been unsuccessful, AA and SRS then decided to make a final appeal to the referring court, leave for which was granted on 20 July 2020, specifically concerning the question of the definition of the concept of a 'family member who is a member of the household' of a Union citizen and whether there must be a requirement that that Union citizen is actually the head of that household. [5]

11. As regards the condition of being a member of the household of which the Union citizen is the head, the Minister for Justice and Equality continues to argue that the mere cohabitation of the family member, perhaps combined with financial support provided by the Union citizen, is not enough to regard the family member thus accommodated and supported as a member of the Union citizen's household. The Minister observes that AA's residence on the territory of the European Union was restricted to his studies and that the tenancy agreement concluded with SRS's brother to occupy the latter's house was also limited. There is therefore no evidence to suggest that the joint living arrangements were to continue beyond AA's studies. In addition, Article 3(2)(a) of Directive 2004/38 must be interpreted bearing in mind the effect of any decision to refuse a residence permit on the actual exercise of the freedom of movement enjoyed by the Union citizen. Moreover, it is established that SRS moved to Ireland without AA. A degree of interpretative consistency must also be ensured so that, when interpreting Article 3(2) of Directive 2004/38, the end result cannot be a situation that is ultimately more favourable to the family members covered by that provision – who, in principle, enjoy lesser protection under that directive – as compared with those members of the nuclear family covered by Article 2(2) of the directive.

12. For their part, AA and SRS claim that there are differences between the language versions of Article 3(2) of Directive 2004/38 and that the English-language version contains an additional condition related to the status as 'head' of the household which is absent from the majority of the other language versions. Furthermore, they continue to point to the close relationship between them that began in their early youth whilst they were both still living in Pakistan and to close family ties which should be enough for AA to be recognised as a 'family member' of SRS within the meaning of that provision, without a further requirement to establish that SRS is the head of the household.

[5] The question of whether AA is to be regarded as a 'dependant' within the meaning of the first situation covered by Article 3(2)(a) of Directive 2004/38 was not discussed before the referring court (see paragraph 21 of the request for a preliminary ruling).

13. The referring court, in turn, doubts whether it is possible to adopt a universal definition of the concept of a 'family member who is a member of the household' of a Union citizen. It acknowledges that use of the concept of the 'head of the household' allows a distinction to be drawn between merely houseshare or flatshare arrangements and, for example, the closer circumstances of family life, but concedes, at the same time, that this is a difficult concept to define. Furthermore, all of the language versions of Article 3(2)(a) of Directive 2004/38 do not appear to contain such a reference. The referring court therefore asks about the proper meaning of that concept in a context in which the situation of the family members covered by Article 2(2) of Directive 2004/38 must also be borne in mind. Lastly, it mentions the objective pursued by Directive 2004/38 and asks how that objective could usefully shed light on the interpretation of Article 3(2) of that directive. Moreover, in the event that a universal definition is impossible, the referring court proposes a series of criteria which could be taken as a basis by national courts in order to arrive at a uniform interpretation of that concept. Those criteria include, in particular, the length of time spent in the household and the purpose of that household. In any case, it is of the view that some clarification is required at EU level.

14. It is in those circumstances that the Supreme Court decided to stay the proceedings and, by order for reference received at the Registry of the Court of Justice on 14 January 2021, to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Can the term member of the household of an EU citizen, as used in Article 3 of Directive [2004/38], be defined so as to be of universal application throughout the EU and if so what is that definition?

(2) If that term cannot be defined, by what criteria are judges to look at evidence so that national courts may decide according to a settled list of factors who is or who is not a member of the household of an EU citizen for the purpose of freedom of movement?'

15. Written observations were submitted before the Court by SRS and AA, the Minister for Justice and Equality, the Czech, Danish, Netherlands and Norwegian Governments and the European Commission.

II. Analysis

A. Preliminary observations

16. Before proceeding to examine the two questions referred to the Court for a preliminary ruling, I must clarify two points in relation to the dispute in the main proceedings.

17. In the first place, I note that the Union citizen who wishes to continue certain joint living arrangements with his first cousin is a UK national. However, since the facts occurred prior to the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union, once the Court has given its preliminary ruling the referring court will have to assess the legality of the decision taken by the Minister for Justice and Equality and determine the compatibility with EU law of the assessments made in that decision in concluding that, at the time of his entry into Ireland in 2015, AA was not a member of SRS's household within the meaning of Article 3(2)(a) of Directive 2004/38. Thus, AA will have to be regarded as one of the 'persons falling under points (a) and (b) of Article 3(2) of Directive [2004/38] who have applied

for facilitation of entry and residence before the end of the transition period'.[6] In that case, and if the Irish authorities were to decide to facilitate retroactively AA's residence for the period from 2015 to 2020, I note that AA would retain his right of residence, even after the expiry of the transition period pursuant to Article 10(3) of the Withdrawal Agreement.[7]

18. In the second place, the applicants in the main proceedings have claimed that the national authorities, in their assessment of AA's individual circumstances in the light of Article 3(2)(a) of Directive 2004/38, consciously disregarded the period of time for which SRS and AA lived together before SRS acquired citizenship of the EU. Those parties infer from this that, when processing the applications for residence made by members of their family, construed in the broad sense, under Directive 2004/38, naturalised EU citizens are thus in a less favourable position as compared with that of persons who became EU citizens at birth. For his part, the defendant claims that a plea relating to the question of the earlier period of cohabitation and the determination of the starting point of that cohabitation was not raised before the national courts involved in the challenges brought against the decision of 21 December 2015. As the Commission has noted, that point of dispute between the parties to the main proceedings raises the question whether the family life led prior to the acquisition of citizenship of the EU may or must be taken into consideration. It must however be observed that that question has not been put to the Court, as interesting as it might be.[8] The considerations that will follow are therefore concerned exclusively with the two questions referred to the Court for a preliminary ruling, and those questions cannot be interpreted as a confirmation or refutation of that national decision-making practice under which the family life of the Union citizen and of his or her family member, in the broad sense, who applies for a residence permit is taken into consideration only with effect from the point at which citizenship of the EU is acquired.

B. Consideration of the questions referred

19. By its two questions referred to the Court for a preliminary ruling, which in my view should be considered jointly, the referring court essentially asks the Court to clarify whether the concept of 'any other family members … who … are … members of the household of the Union citizen having the primary right of residence', within the meaning of Article 3(2)(a) of Directive 2004/38, can be defined such that it is 'of universal application' and, if not, to provide it with the criteria for determining whether a family member is to be regarded as a 'member of the household' of the Union citizen within the meaning of that provision.

1. A universal definition of family members who are members of the household of a Union citizen is impossible

20. With regard to the possibility of a universally applicable definition of the concept of 'family members … who … are … members of the household of the Union citizen', aside from the fact that what is deemed universal may, in any event, quickly prove to be entirely relative, such a definition appears to me to be neither feasible nor desirable. The wording of the first

6 Article 10(3) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2019 C 384I, p. 1; 'the Withdrawal Agreement').

7 Read in conjunction with Article 10(2) of that agreement.

8 The defendant in the main proceedings even disputes that that is one of the grounds for the Minister's refusal of the application (see paragraph 44 of the observations of the defendant in the main proceedings). For the sake of completeness, it must however be noted that the summary of the grounds of the refusal decision concerning AA contained in paragraph 6 of the request for a preliminary ruling does include, in point 2 thereof, a reference to the national rule under which 'what is to be assessed is the living arrangements of the Union citizen since that person became a Union citizen, wheresoever this occurred'.

subparagraph of Article 3(2) of Directive 2004/38 is much more open-ended – not to say imprecise – than that of Article 2 of that directive which, in paragraph 2 thereof, defines the members of the 'nuclear' family of Union citizens. That lack of precision can be explained by the fact that the family members covered by Article 3(2) of Directive 2004/38 are a residual category of family members whose entry and residence has only to be facilitated by the Member States. Since the obligations incumbent upon Member States in respect of such family members are less weighty than with regard to members of the nuclear family, [9] the definition of that first category of family members need not be as precise as that laid down for the second. That is true, in my opinion, of all the situations covered by Article 3(2)(a) of Directive 2004/38. That ambiguity left in the scope of the concept of 'family members who are members of the household of the Union citizen' may be a virtue, since it allows for some flexibility in its definition. Any attempt to provide a universal definition of as fluid a concept – both sociologically and culturally – as that of 'family members … who … are … members of the household of the Union citizen' could not only prove risky but also, as the defendant in the main proceedings observed, run counter to the objective pursued by Directive 2004/38 given the inability to capture the entire multidimensional and multifaceted reality of the various forms which family life, in the broad sense, may take.

21. The concept of a 'family member who is a member of the household of a Union citizen' cannot therefore, in my view, be given a universal definition.

22. Some of the parties who participated in the written procedure before the Court have interpreted the first question referred for a preliminary ruling as meaning that the referring court was seeking to ascertain whether the concept of 'family members who are members of the household of a Union citizen' is an autonomous concept of EU law. That is not my understanding of the first question referred for a preliminary ruling, the wording of which is, moreover, quite clear. In addition, if it were to be understood as those parties suggest, that first question would prove to be more delicate than it seems at first sight, even though its resolution does not appear to me to be necessary to assist the referring court in settling the dispute pending before it.

23. I will therefore simply make the point that the Court has repeatedly held that 'the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union'. [10]

24. In its written observations, the Kingdom of Denmark argues that the first subparagraph of Article 3(2) of Directive 2004/38 contains an express reference to national law and that, furthermore, the Court has already acknowledged that Member States enjoy broad discretion when they are required to assess whether an individual situation subject to their examination comes under one of the situations covered by that provision. [11] The Commission takes the opposite view, stating that the reference to national law in Article 3(2) of that directive concerns only the circumstances in which a Member State must facilitate the entry and residence of persons falling within the scope of that provision, and not the actual definition of those persons.

[9] See, for example, judgment of 5 September 2012, *Rahman and Others* (C-83/11, EU:C:2012:519; 'judgment in *Rahman and Others*'; paragraphs 18, 19 and 21).

[10] See judgment of 21 December 2011, *Ziolkowski and Szeja* (C-424/10 and C-425/10, EU:C:2011:866, paragraph 32 and the case-law cited). See, in the same vein, judgment of 26 March 2019, *SM (Child placed under Algerian kafala)* (C-129/18, EU:C:2019:248; 'judgment in *SM (Child placed under Algerian kafala)*'; paragraph 50).

[11] The Kingdom of Denmark bases its assessment in particular on the case-law arising from the judgments in *Rahman and Others* and *SM (Child placed under Algerian kafala)*.

25. In the light of the case-law of the Court devoted to that provision, the picture appears mixed, in particular in view of the prominent role attributed by that provision to the assessment of the Member States, a role to which I will turn my attention again shortly.[12] Indeed, one difficulty clearly arises on reading the judgment in *Rahman and Others*, in which the Court held that 'it is incumbent upon the competent authority, when undertaking that examination of the [personal circumstances of an applicant for a residence permit on the basis of Article 3(2)(a) of Directive 2004/38], to take account of the various factors that may be relevant in the particular case, such as the extent of economic or physical dependence and the degree of relationship between the family member and the Union citizen whom he wishes to accompany or join'.[13] The Court goes on to add that, 'in the light both of *the absence of more specific rules* in Directive 2004/38 and *the use of the words "in accordance with national legislation*" in Article 3(2) of the directive, each Member State has a *wide discretion* as regards the *selection of the factors* to be taken into account. None the less, the host Member State must ensure that its legislation contains criteria which are consistent with the normal meaning of the term "facilitate" *and of the words relating to the dependence used in Article 3(2)*, and which do not deprive that provision of its effectiveness'.[14]

26. The foregoing stands in stark contrast from, for example, the findings contained in the judgment in *SM (Child placed under Algerian kafala)* in relation to Article 2(2)(c) of Directive 2004/38, according to which that provision 'makes no express reference to the law of the Member States',[15] thus paving the way for a uniform interpretation of the autonomous concept of EU law that it contains.[16] Nevertheless, it is also true that that judgment reproduced only part of paragraph 24 of the judgment in *Rahman and Others*, omitting the reference to the words relating to dependence.[17]

27. Be that as it may, and as I have previously stated, the question of whether the concept of 'family members … who … are … members of the household of the Union citizen', within the meaning of Article 3(2)(a) of Directive 2004/38, is an autonomous concept of EU law does not appear to me to be the question put by the referring court, and nor does it seem to me to be decisive for the purposes of the answer the Court will have to give to the second question submitted to it.[18] After all, in particular in its judgments in *Rahman and Others* and *SM (Child placed under Algerian kafala)*, the Court, without taking a view on whether the concepts contained in Article 3(2)(a) of Directive 2004/38 were autonomous concepts of EU law, was able to provide useful guidance to the national courts which had referred matters to it by clarifying the *normal* meaning of the provisions the interpretation of which had been sought.

12 I have already had occasion to point to that prominence attributed to the assessment of the Member States: see my Opinion in *Bevándorlási és Menekültügyi Hivatal (Family reunification – Sister of a refugee)* (C-519/18, EU:C:2019:681, points 57 to 62). See, in addition, point 31 of this Opinion.

13 Judgment in *Rahman and Others* (paragraph 23). It is appropriate to note that the Court was asked in this case to clarify the interpretation of the first situation covered by Article 3(2)(a) of Directive 2004/38 and that no mention is made of the fact that that situation concerns an independent concept of EU law. Conversely, in a different context but still in relation to the concept of being a 'dependant', see judgment of 12 December 2019, *Bevándorlási és Menekültügyi Hivatal (Family reunification – Sister of a refugee)* (C-519/18, EU:C:2019:1070, paragraphs 44 and 45).

14 Judgment in *Rahman and Others* (paragraph 24). Emphasis added.

15 Judgment in *SM (Child placed under Algerian kafala)* (paragraph 50).

16 Judgment in *SM (Child placed under Algerian kafala)* (paragraph 50 et seq.).

17 It is also interesting to note that, in the arguments devoted, in the judgment in *SM (Child placed under Algerian kafala)*, to Article 3(2)(a) of Directive 2004/38, the Court did not specify to which situation provided for in that provision the circumstances in the main proceedings could be linked (see, in particular, paragraphs 58 and 59 of that judgment).

18 A further conceivable option would be to recognise the autonomous nature of the concept in question whilst continuing to afford – as appears inevitable in the light of the nature of Article 3(2)(a) of Directive 2004/38 – broad discretion to the Member States when determining the particular requirements in order for the eligibility criterion laid down in general terms in the provision in question to be deemed to be satisfied.

2. A family member who is a member of the household of a Union citizen as the third situation of dependence referred to in Article 3(2)(a) of Directive 2004/38

28. Having concluded that it is impossible to provide a universal definition, and even assuming that the concept in question is not an autonomous concept of EU law, the Court is nevertheless not discharged from its duty to assist the referring court and to clarify what is to be understood by 'family members … who … are … members of the household of the Union citizen', within the meaning of Article 3(2)(a) of Directive 2004/38. To that end, it is necessary to consider briefly and in more general terms the system established by that directive.

(a) The scope of the obligation incumbent upon the Member States under Article 3(2)(a) of Directive 2004/38

29. The aim of Directive 2004/38 is to 'facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States, which is conferred directly on citizens of the Union by Article 21(1) TFEU, and … one of the objectives of that directive is to strengthen that right … In view of those objectives, the provisions of Directive 2004/38 … must be construed broadly'.[19] That system, which also seeks to facilitate family reunification between the Union citizen and his or her family members, is based, as I have previously mentioned, on a fundamental dichotomy.

30. Family members within a Union citizen's inner circle, as defined in Article 2(2) of Directive 2004/38, are automatically granted a right of entry into and residence in that citizen's host Member State. The entry and residence of 'other' family members – those covered by the first subparagraph of Article 3(2) of Directive 2004/38 – has only to be facilitated by that Member State.[20]

31. It follows from that mere obligation to 'facilitate' the entry and residence of those 'other' family members that Directive 2004/38 does not therefore oblige Member States to grant every application for entry or residence submitted by persons who show that they are family members within the meaning of the first subparagraph of Article 3(2) of that directive.[21] An interpretation to that effect is, moreover, supported by recital 6 of Directive 2004/38,[22] from which it follows that the objective of the provision is to maintain the unity of the family in a broader sense.[23] The Court has clarified the obligations incumbent on host Member States when examining an application for entry or residence on the basis of Article 3(2)(a) of Directive 2004/38. Although there is no obligation to accord a right of entry or residence to such members of the extended family, 'the fact remains … that [Article 3(2)(a) of Directive 2004/38] imposes an obligation on the Member States to confer a certain advantage, compared with applications for entry and

[19] Judgment in *SM (Child placed under Algerian kafala)* (paragraph 53 and the case-law cited). The judgment of 12 December 2019, *Bevándorlási és Menekültügyi Hivatal (Family reunification – Sister of a refugee)* (C-519/18, EU:C:2019:1070, paragraph 49), appears, for its part, to emphasise the objective of seeking 'to ensure or encourage, within the host Member State, the family reunification of the nationals of other Member States or of third countries lawfully residing there'. See, with regard to the limits on the broad interpretation of Directive 2004/38, judgment in *SM (Child placed under Algerian kafala)* (paragraph 55).

[20] See judgment in *Rahman and Others* (paragraph 19).

[21] See judgment in *Rahman and Others* (paragraph 18).

[22] Under which, 'in order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen'.

[23] See judgment in *Rahman and Others* (paragraph 32). See also judgment in *SM (Child placed under Algerian kafala)* (paragraph 60).

residence of other nationals of third States, on applications submitted by persons who have a relationship of *particular dependence* with a Union citizen'.[24] That advantage lies essentially in the obligation on Member States to 'make it possible … to obtain a decision on their application that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons'.[25] The Court states that the Member States are required to 'take account of the various factors that may be relevant in the particular case, such as the extent of economic or physical dependence and the degree of relationship between the family member and the Union citizen'.[26] Otherwise, the lack of precision of Directive 2004/38 combined with the reference to national legislation leads to the finding that a 'wide discretion'[27] exists as regards the selection of the factors to be taken into account. That wide discretion must, however, be exercised subject to two limits: consistency with the normal meaning of the term 'facilitate' and of the words relating to dependence used in Article 3(2)(a) of Directive 2004/38, on the one hand, and preservation of the effectiveness of that provision, on the other.[28] In the exercise of that discretion, the Member States may inter alia lay down 'in their legislation particular requirements as to the nature and duration of dependence, in order in particular to satisfy themselves that the situation of dependence is genuine and stable and has not been brought about with the sole objective of obtaining entry into and residence in the host Member State'.[29] Finally, that discretion must be exercised 'in the light of and in line with the provisions of the Charter of Fundamental Rights of the European Union'.[30]

32. Whilst the scope of the obligations incumbent on the Member States under Article 3(2)(a) of Directive 2004/38 has thus been clarified by the Court, the actual concept of a 'family member who is a member of the household of a Union citizen' within the meaning of that provision has not yet been interpreted.

(b) A literal interpretation necessarily supplemented by a contextual and teleological analysis

33. The referring court made clear that one of the difficulties raised by Article 3(2)(a) of Directive 2004/38 relates to the differences between the various language versions available. In particular, the English-language version ('members of the household of the Union citizen') suggests, as does

[24] Judgment in *Rahman and Others* (paragraph 21). Emphasis added. See also judgment in *SM (Child placed under Algerian kafala)* (paragraph 61).

[25] Judgment in *Rahman and Others* (paragraph 22). See also judgment in *SM (Child placed under Algerian kafala)* (paragraph 62). This was apparent not least from the second subparagraph of Article 3(2) of Directive 2004/38.

[26] Judgment in *Rahman and Others* (paragraph 23). The Court would clarify shortly thereafter that the situation of dependence, which takes the form of close and stable family ties on account of specific factual circumstances, such as economic dependence, being a member of the household or serious health grounds, must exist in the country from which the family member concerned comes at the time when he or she applies to join the Union citizen on whom he or she is dependent (see judgment in *Rahman and Others* (paragraphs 32 and 33)).

[27] Judgment in *Rahman and Others* (paragraph 24). See also judgment in *SM (Child placed under Algerian kafala)* (paragraph 63).

[28] Judgment in *Rahman and Others* (paragraph 24). See also judgment in *SM (Child placed under Algerian kafala)* (paragraph 63).

[29] Judgment in *Rahman and Others* (paragraph 38).

[30] Judgment in *SM (Child placed under Algerian kafala)* (paragraph 64). Accordingly, the hand of the national authorities responsible for deciding on an application for entry or residence submitted by an 'other family member' for the purposes of Article 3(2)(a) of Directive 2004/38 will be guided with a little more direction from the Court, which expects, in particular in cases where Article 24 of the Charter of Fundamental Rights is relevant, that those authorities make 'a balanced and reasonable assessment of all the current and relevant circumstances of the case, taking account of all the interests in play and, in particular, of the best interests of the child concerned' (judgment in *SM (Child placed under Algerian kafala)* (paragraph 68)). The Court would proceed to clarify the criteria to be assessed and the risk assessment to be made. The Member States' discretion was narrowed significantly when the Court concluded that if, on completion of such an analysis, it appears that the family members in question, including therefore a child, are called to lead a genuine family life and that the child is dependent on its guardians, who are citizens of the EU, then 'the requirements relating to the fundamental right to respect for family life, combined with the obligation to take account of the best interests of the child, *demand, in principle*, that that child be granted a right of entry and residence as one of the other family members of the citizens of the Union for the purposes of Article 3(2)(a) of Directive 2004/38' (judgment in *SM (Child placed under Algerian kafala)* (paragraph 71), emphasis added).

the French-language version, that the Union citizen and the other family member are, as a minimum requirement, members of the same household. According to the referring court, that fact led the Irish authorities to interpret that condition to the effect that the Union citizen must be the *head* of the household to which the other family member also belongs. Conversely, for example, in the Italian-language version ('convive'), it appears to be sufficient for the two persons simply to live together.[31] It is therefore clear from a quick and non-exhaustive comparison of certain language versions that not all of them contain that more stringent requirement as regards a shared 'household' with the Union citizen, as some of them seem merely to require that the persons live in the same place.

34. Although there are clearly disparities between the language versions, I am already of the view that the condition laid down in Article 3(2)(a) of Directive 2004/38 cannot be interpreted, as the Irish authorities do, as meaning that the Union citizen concerned must necessarily be the head of the household. Aside from the fact that that role of 'head of the household' appears to me to exemplify a particularly dated and entirely old-fashioned family hierarchy, since that role is generally a domain for men, viewed as the immovable epicentre of patriarchal conjugal and family models,[32] requiring the other family member to be a member of the household of the Union citizen, a household of which the Union citizen is moreover the head, amounts to adding a supplementary condition that is not provided for in the directive, not even, in my view, in the English-language version thereof.[33]

35. Furthermore, I would point out that it is apparent from well-established case-law of the Court that the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all EU languages. Where there is a divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to its context and the objectives pursued by the rules of which it is part.[34]

36. At this stage of my analysis, it follows, in any event, from the wording of Article 3(2)(a) of Directive 2004/38 that a family member who is a member of the household of a Union citizen can at least be defined in negative terms: he or she is clearly not a family member within the Union citizen's inner circle for the purposes of Article 2(2) of Directive 2004/38; in addition, nor is he or she a dependant in merely material terms (a condition linked to material and financial dependence), suffering from a serious health condition or the long-term, non-registered partner of the citizen. That literal analysis also demonstrates that the common thread in the three situations referred to in Article 3(2)(a) of Directive 2004/38 is the existence of a form of dependence,[35] whether it be material ('a dependant') or physical ('on serious health grounds'). A family member who 'is a member of the household' of the Union citizen is therefore in a

[31] This also seems to be the case with the Spanish- ('viva con el ciudadano'), German- ('oder der mit ihm im Herkunftsland in häuslicher Gemeinschaft gelebt hat'), Dutch- ('inwonen') and Portuguese- ('com este viva em comunhão de habitação') language versions.

[32] See, for example, for the use of the concept of the 'head of the household' in statistics and the difficulties raised by such a concept, De Saint Pol, T., Deney, A. and Monso, O., 'Ménage et chef de ménage : deux notions bien ancrées', *Travail, genre et sociétés*, 2004, vol. 1, No 11, pp. 63-78.

[33] In my opinion, the expression 'household of the Union citizen' may very well mean merely that the Union citizen is a member of the household. In addition, as the applicant in the main proceedings observed, the 'head of the family' is often deemed to be the person who provides material support to those around him or her. However, the situation of a 'family member who is a member of the household' of the Union citizen is quite a different matter from that of a family member who is 'a dependant' of that citizen.

[34] See, from amongst a wealth of case-law, judgments of 3 April 2008, *Endendijk* (C-187/07, EU:C:2008:197, paragraph 22 et seq.); of 18 September 2019, *VIPA* (C-222/18, EU:C:2019:751, paragraph 37 and the case-law cited); and of 25 February 2021, *Bartosch Airport Supply Services* (C-772/19, EU:C:2021:141, paragraph 26).

[35] As confirmed by paragraph 21 of the judgment in *Rahman and Others*.

situation of 'particular dependence' [36] vis-à-vis the Union citizen, as is confirmed by an analysis of the case-law of the Court, [37] but a form of dependence that is therefore neither purely material nor simply human and which remains to be defined.

37. In its normal meaning, which is what must be sought in accordance with the case-law, [38] a household usually refers to a couple who live together and form a domestic unit. From an etymological standpoint, the term 'ménage', in French, is related to the Latin word *mansio* meaning home. [39] Based on that definition, the reference to that concept of a 'household', in particular in the English- and French-language versions of Article 3(2)(a) of Directive 2004/38, is not so far removed from the language versions that simply require that the persons live together, in the purely geographic sense of the word, whilst nevertheless introducing an additional nuance relating to the domestic unit, which may not necessarily exist where people simply live together under the same roof. The argument put forward by the applicant in the main proceedings that simply sharing a dwelling is sufficient for the family member in question to be regarded as 'a member of the household' of the Union citizen can be definitively ruled out on the basis of an analysis of the wording of Article 3(2)(a) of Directive 2004/38, supplemented by a contextual and systematic interpretation of that directive. [40] Sharing the same accommodation is, admittedly, a necessary condition, but it is not enough in order for a person to be able to claim that he or she falls within the scope of the second situation covered by Article 3(2)(a) of Directive 2004/38.

38. Although the normal meaning of the term 'household' refers to the concept of a 'couple' and of a 'domestic unit', it seems to me, however, that, viewed in the context of Directive 2004/38, that definition must necessarily be expanded since the persons who make up the couple are, in principle, already covered by Article 2(2) of Directive 2004/38. The 'household' must therefore be understood more broadly here, and rather in the sense of a 'home'. [41] The members of that home contribute to its domestic life in different ways.

39. A household or a home are concepts which entail, besides a purely pragmatic intention to make joint living arrangements and to be involved in those arrangements, a *sense* of belonging, a particular *affection* which binds the people who make up that household or home. It is, for example, that sense and that affection which allows a mere houseshare or flatshare arrangement to be distinguished from being a genuine member of a household or a home.

40. It follows from the foregoing that, in order to be a member of the household of the Union citizen, there must, by definition, be a family relationship between the other family member and that citizen with whom the family member lives. In addition, there must be a strong emotional bond [42] between the two over the course of a non-negligible period of cohabitation arranged for

36 Judgment in *Rahman and Others* (paragraph 21).

37 See judgment in *Rahman and Others* (paragraphs 36, 38 and 39).

38 See, inter alia, judgment in *Rahman and Others* (paragraph 24).

39 Source: Larousse online dictionary (www.larousse.fr/dictionnaires/francais/ménage/50418).

40 It is true that the earlier acts that were codified by Directive 2004/38 do not appear to contain that reference to a 'household', but rather referred to the requirement that the persons 'live under the same roof' (see, for example, Article 10 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475) or Article 1(2) of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14)). The applicant in the main proceedings infers from that fact that Directive 2004/38, recital 3 of which states that it intends 'to simplify and strengthen the right of free movement and residence of all Union citizens', cannot be interpreted more restrictively as compared with the situation under the law before that directive entered into force.

41 The concept of a 'home' better reflects, in my view, that notion of an extended family gathered under the same roof.

42 It may not be possible, in my view, to assume that a family relationship necessarily entails affection between two members of the same family, without any further verification, unless a particularly generous interpretation of Article 3(2)(a) of Directive 2004/38 is adopted.

reasons other than simple convenience. That emotional bond must, in my view, be of such strength that if the family member concerned were no longer to be a member of the household of the Union citizen, that citizen would be personally affected,[43] such that the situation may be described as one of reciprocal dependence on an emotional level.

41. It will thus be for the national authorities to assess the durable nature of the relationship, by assessing, in particular but not exclusively, the length of time spent living together, as well as the strength of the sense of family as expressed in joint living arrangements which exhibit the characteristics of family life.[44] An overall assessment must be made of the entire lifestyle of the purported extended family structure on a case-by-case basis, taking into account the circumstances specific to each situation based on all the relevant facts.

42. However, the intentions of the family member concerned are not, in my view, relevant facts. First, it is always difficult to prove what the future will bring. Second, such intentions may be subject to change and nothing can really prevent them from changing. Finally, this is not consistent with case-law.[45]

43. Accordingly, it follows, in my view, from the foregoing considerations that Article 3(2)(a) of Directive 2004/38 must be interpreted as referring to a situation in which members of the extended family have close and stable family ties with the Union citizen concerned on account of specific factual circumstances linked to their membership of the same household as that Union citizen. That membership is demonstrated by stable joint living arrangements in the same accommodation, guided by a desire to live together and exhibiting the characteristics of family life. It is for the national authorities to conduct an extensive, case-by-case examination of each individual situation, taking into account the various factors that may be relevant such as the degree of relationship, the length of time spent living together, the closeness of the relationship and the strength of the emotional bond. Member States may, in the exercise of their discretion, lay down particular requirements as to the demonstration of membership of the Union citizen's household in order to ascertain the reality and durability of the factual situation submitted for examination by their authorities, once provided, first, that those requirements remain consistent with the normal meaning of the verb 'facilitate' and of the words 'is a member of the household of the Union citizen' and, second, do not deprive Article 3(2)(a) of Directive 2004/38 of its effectiveness.

[43] On account of the fundamental dichotomy mentioned in point 29 of this Opinion, I am not convinced that it must be shown that, if the entry or residence of the 'other family member' of the Union citizen is refused, that citizen will opt not to exercise his or her freedom of movement. Such a condition would also entail a particularly restrictive interpretation of Article 3(2)(a) of Directive 2004/38.

[44] I am thinking, for example, of the situation of a Union citizen who has lost his or her parents and perhaps been entrusted to the care of an aunt and uncle. Such joint living arrangements may continue until adulthood, despite the fact that that uncle and aunt cannot be regarded as dependants of the Union citizen if they are materially independent. However, in the light of their involvement, in particular their emotional involvement, such 'other' family members should be regarded as being members of the household within the meaning of Article 3(2)(a) of Directive 2004/38. I am also thinking of the situation of a direct descendant of the citizen of the EU who is over the age of 21 and economically independent but who is thus at the start of his or her professional life and continues to live with his or her parents.

[45] I note that, according to paragraph 33 of the judgment in *Rahman and Others*, 'the situation of dependence must exist, in the country from which the family member concerned comes, at the time when he applies to join the Union citizen on whom he is dependent' (see also judgment of 16 January 2014, *Reyes*, C-423/12, EU:C:2014:16, paragraph 30).

III. Conclusion

44. In the light of all the foregoing considerations, I propose that the questions referred for a preliminary ruling by the Supreme Court (Ireland) be answered as follows:

Article 3(2)(a) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC is to be interpreted as referring to a situation in which members of the extended family have close and stable family ties with the Union citizen concerned on account of specific factual circumstances linked to their membership of the same household as that Union citizen. That membership is demonstrated by stable joint living arrangements in the same accommodation, guided by a desire to live together and exhibiting the characteristics of family life.

It is for the national authorities to conduct an extensive, case-by-case examination of each individual situation, taking into account the various factors that may be relevant such as the degree of relationship, the length of time spent living together, the closeness of the relationship and the strength of the emotional bond.

Member States may, in the exercise of their discretion, lay down particular requirements as to the demonstration of membership of the Union citizen's household in order to ascertain the reality and durability of the factual situation submitted for examination by their authorities, once provided, first, that those requirements remain consistent with the normal meaning of the verb 'facilitate' and of the words 'is a member of the household of the Union citizen' and, second, do not deprive Article 3(2)(a) of Directive 2004/38 of its effectiveness.