



## Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

10 October 2013\*

(Citizenship of the Union — Articles 20 TFEU and 21 TFEU — Directive 2004/38/EC — Right of residence of a third-country national who is a direct relative in the ascending line of Union citizens who are minor children — Union citizens born in a Member State other than that of which they are nationals and who have not made use of their right of freedom of movement — Fundamental rights)

In Case C-86/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour administrative (Luxembourg), made by decision of 16 February 2012, received at the Court on 20 February 2012, in the proceedings

**Adzo Domenyo Alokpa,**

**Jarel Moudoulou,**

**Eja Moudoulou**

v

**Ministre du Travail, de l'Emploi et de l'Immigration,**

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, J.L. da Cruz Vilaça, G. Arestis, J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: P. Mengozzi,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 17 January 2013,

after considering the observations submitted on behalf of:

- Mrs Alokpa and her sons Jarel and Eja Moudoulou, by A. Fatholahzadeh and S. Freyermuth, avocats,
- the Luxembourg Government, by P. Frantzen and C. Schiltz, acting as Agents, and by L. Maniewski, avocate,
- the Belgian Government, by T. Materne and C. Pochet, acting as Agents,

\* Language of the case: French.

- the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,
- the German Government, by T. Henze and N. Graf Vitzthum, and by A. Wiedmann, acting as Agents,
- the Greek Government, by T. Papadopoulou, acting as Agent,
- the Lithuanian Government, by D. Kriauciūnas and V. Balčiūnaitė, acting as Agents,
- the Netherlands Government, by M. Bulterman and C. Wissels, acting as Agents,
- the Polish Government, by B. Majczyna and M. Szpunar, acting as Agents,
- the European Commission, by D. Maidani and C. Tufvesson, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 March 2013,

gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Articles 20 TFEU and 21 TFEU, and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).
- 2 The request was made in proceedings between Mrs Alokpa, her sons Jarel and Eja Moudoulou, and the *Ministre du Travail, de l'Emploi et de l'Immigration* (the Minister for Labour, Employment and Immigration) ('the Minister') concerning the Minister's decision refusing to grant Mrs Alokpa a right of residence in Luxembourg and ordering her to leave that Member State.

### **Legal context**

#### *European Union law*

Directives 2003/86/EC and 2003/109/EC

- 3 According to Article 1 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12), and Article 1(a) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44), the purpose of those directives is to determine, respectively, the conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of the Member States, and the terms for conferring and withdrawing long-term resident status granted by a Member State in relation to third-country nationals legally residing in its territory, and the rights pertaining thereto.

Directive 2004/38/EC

4 Under the heading ‘Definitions’, Article 2 of Directive 2004/38 states:

‘For the purpose of this Directive:

(1) “Union citizen” means any person having the nationality of a Member State;

(2) “family member” means:

...

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

(3) “host Member State” means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.’

5 Article 3 of Directive 2004/38, which is entitled ‘Beneficiaries’, provides in paragraph 1:

‘This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.’

6 Article 7 of that directive, entitled ‘Right of residence for more than three months’, is worded as follows:

‘(1) All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c)

— are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

— have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, 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; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

(2) The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

...’

*Luxembourg law*

7 The Law of 29 August 2008 on the freedom of movement of persons and on immigration (*Mémorial A* 2008, p. 2024, ‘the Law on freedom of movement’) is intended to transpose Directives 2003/86 and 2004/38 into Luxembourg law.

8 Under Article 6 of that law:

‘(1) Union citizens shall have the right of residence in the territory for a period of longer than three months provided they satisfy one of the following conditions:

1. they work in an employed or self-employed capacity;
2. they have sufficient resources for themselves and their family members as defined in Article 12 not to become a burden on the social assistance system and have sickness insurance cover;
3. they are enrolled at a private or public establishment, accredited by the Grand-Duchy of Luxembourg in accordance with the legislative provisions and rules in force, for the principal purpose of following a course of study or, within that context, vocational training, while guaranteeing that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system and have sickness insurance cover.

(2) A Grand-Ducal Regulation shall specify the resources required at points 2 and 3 of paragraph (1) above, and the manner in which proof of those resources is to be furnished.

...’

9 Article 12 of that law provides:

‘(1) “Family member” means:

...

(d) the dependent direct relatives in the ascending line of the Union citizen and the dependent direct relatives in the ascending line of the spouse or partner as defined in point (b).

(2) The Minister may authorise any other family members, irrespective of their nationality, not falling under the definition in paragraph 1, to reside in the territory, provided they satisfy one of the following conditions:

1. in the country from which they have come, they were dependants or members of the household of the Union citizen having the primary right of residence;
2. serious health grounds strictly require the personal care of the family member by the Union citizen.

The application for entry or residence of family members referred to in the preceding subparagraph shall be subject to a detailed examination of their personal circumstances.

...’

10 Under Article 103 of that law:

‘Before taking a decision refusing residence, withdrawing or refusing to renew a residence permit or an expulsion decision regarding a third-country national, the Minister shall take account of considerations such as how long the individual concerned has resided in Luxembourg, his/her age, state of health, family and economic situation, social and cultural integration into the country and the extent of his/her links with the country of origin, except where his/her presence constitutes a threat to public policy or public security.

No expulsion decision, other than on imperative grounds of public security, may be taken in respect of a minor who is not accompanied by a legal representative, unless expulsion is in his/her best interests.’

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

- 11 On 21 November 2006, Mrs Alokpa, a citizen of Togo, applied to the Luxembourg authorities for international protection for the purposes of the Law of 5 May 2006 on the right of asylum and complimentary forms of protection (*Mémorial* A 2006, p. 1402). That application was, however, rejected by those authorities and their decision was confirmed by the Luxembourg courts.
- 12 Subsequently, Mrs Alokpa applied to those authorities for discretionary leave to remain. Although, initially, that application was rejected, it was reconsidered and such discretionary leave was granted to Mrs Alokpa until 31 December 2008, as a result of the fact that she had given birth to twins on 17 August 2008, in Luxembourg, and that the latter required care due to their premature birth.
- 13 Mrs Alokpa’s children were recognised, when the birth certificates were drawn up, by Mr Moudoulou, a French national. They are French nationals and were issued with French passports and national identity cards on 15 May and 4 June 2009 respectively.
- 14 In the meantime, an application for extension of her discretionary leave to remain made by Mrs Alokpa was rejected by the Luxembourg authorities, who, however, granted Mrs Alokpa a suspension of removal valid until 5 June 2010, which was not subsequently extended.
- 15 On 6 May 2010, Mrs Alokpa applied for a residence permit in accordance with the Law on free movement. In response to a request for further information from the Minister, Mrs Alokpa stated that she was unable to settle with her children in France, or reside with their father on the ground that she had no relations with the latter and that those children required follow-up medical treatment in Luxembourg as a result of their premature birth. By decision of 14 October 2010, the minister rejected that application.
- 16 According to that decision, first, since the right of residence of a Union citizen’s family members is restricted to dependent relatives in the direct ascending line, Mrs Alokpa does not satisfy that condition. Secondly, Mrs Alokpa’s children also fail to satisfy the conditions set out in Article 6(1) of the Law on free movement. Furthermore, that decision held that those children’s follow-up medical treatment could easily be provided in France and that Mrs Alokpa also failed to satisfy the necessary conditions for eligibility for another category of residence permit referred to in that law.
- 17 Mrs Alokpa brought, in her own name and in that of her two children, an action for annulment of the decision of the Minister before the Tribunal administratif (Luxembourg) (Administrative Court, Luxembourg). By judgment of 21 September 2011, that court dismissed the action as unfounded. By application lodged on 31 October 2011, Mrs Alokpa brought an appeal against that judgment before the referring court.

- 18 That court held that it is not disputed that Mrs Alokpa's children never enjoyed a family life with their father, who limited himself to declaring their birth and to enabling the issue of the French identity documents relating to them. Likewise, that court held that Mrs Alokpa and her children have in fact led a common family life in a hostel, following the children's extended stay in maternity care, and that the latter have not genuinely exercised their right to free movement.
- 19 In those circumstances, the Cour administrative decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 20 TFEU – if necessary, read in conjunction with Articles 20, 21, 24, 33 and 34 of the Charter of Fundamental Rights [of the European Union], or with one or more of those provisions read separately or in conjunction – to be interpreted as precluding a Member State from refusing a third-country national, with sole responsibility for his or her minor children who are citizens of the European Union, residence in the Member State of residence of the children, where they have been living with that person since birth, without having that nationality, while refusing the third-country national a residence permit, or even a work permit?

Are such decisions to be regarded as being in the nature of decisions depriving those children, in their country of residence, in which they have lived since birth, of effective enjoyment of the substance of the rights attaching to the status of citizen of the European Union also in the situation where their other direct ascendant, with whom they have never shared family life, is resident in another Member State of the European Union, of which that person is a national?

#### **The question referred for a preliminary ruling**

- 20 At the outset, it should be noted that, even though, formally, the referring court has limited its questions to the interpretation of Article 20 TFEU, such a situation does not prevent the Court from providing the referring court with all the elements of interpretation of European Union law which may be of assistance in adjudicating on the case before it, whether or not that court has specifically referred to them in the questions (see, to that effect, Case C-434/09 *McCarthy* [2011] ECR I-3375, paragraph 24 and the case-law cited).
- 21 Therefore, question referred by the national court must be construed as seeking to ascertain, in essence, whether, in a situation such as that at issue in the main proceedings, Articles 20 TFEU and 21 TFEU must be interpreted as meaning that they preclude a Member State from refusing to allow a third-country national to reside in its territory, where that third-country national has sole responsibility for her minor children who are citizens of the European Union, and who have resided with her in that Member State since their birth, without possessing the nationality of that Member State and having made use of their right to freedom of movement.
- 22 In that regard, it should be recalled that any rights conferred on third-country nationals by the Treaty provisions on Union citizenship are not autonomous rights of those nationals but rights derived from the exercise of freedom of movement by a Union citizen. The purpose and justification of those derived rights, in particular rights of entry and residence of family members of a Union citizen, are based on the fact that a refusal to allow them would be such as to interfere with freedom of movement by discouraging that citizen from exercising his rights of entry into and residence in the host Member State (see, to that effect, Case C-87/12 *Ymeraga and Ymeraga-Tafarshiku* [2013] ECR, paragraph 35 and the case-law cited).
- 23 Likewise, it must be pointed out that there are situations characterised by the fact that, although they are governed by legislation which falls *a priori* within the competence of the Member States, namely legislation on the right of entry and stay of third-country nationals outside the scope of provisions of secondary legislation which, under certain conditions, provide for the attribution of such a right, they

none the less have an intrinsic connection with the freedom of movement of a Union citizen, which prevents the right of entry and residence being refused to those nationals in the Member State of residence of that citizen, in order not to interfere with that freedom (see *Ymeraga and Ymeraga-Tafarshiku*, paragraph 37).

- 24 In this case, it must be observed, in the first place, that Mrs Alokpa cannot be regarded as a beneficiary of Directive 2004/38, within the meaning of Article 3(1) thereof.
- 25 It is clear from the case-law of the Court that the status of ‘dependent’ family member of a Union citizen holding a right of residence is the result of a factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence, so that, when the converse situation occurs and the holder of the right of residence is dependent on a third-country national, the third-country national cannot rely on being a ‘dependent’ relative in the ascending line of that right-holder, within the meaning of Directive 2004/38, with a view to having the benefit of a right of residence in the host Member State (Case C-40/11 *Iida* [2012] ECR, paragraph 55).
- 26 In the present case, it is the holders of the right of residence, namely, Mrs Alokpa’s two sons, who are effectively dependant on her, so that she cannot rely on being a relative in the ascending line dependant on them, within the meaning of Directive 2004/38.
- 27 However, in the context of a case such as that at issue in the main proceedings, in which a Union citizen was born in the host Member State and had not made use of the right to free movement, the Court has held that the expression ‘have’ sufficient resources in a provision similar to Article 7(1)(b) of Directive 2004/38 must be interpreted as meaning that it suffices that such resources are available to the Union citizens, and that that provision lays down no requirement whatsoever as to their origin, since they could be provided, inter alia, by a national of a non-Member State, the parent of the citizens who are minor children at issue (see, to that effect, concerning European Union law instruments pre-dating that directive, Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraphs 28 and 30).
- 28 Consequently, it has been held that a refusal to allow a parent, whether a national of a Member State or of a third country, who is the carer of a minor child who is a Union citizen to reside with that child in the host Member State would deprive the child’s right of residence of any useful effect, since enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence (see *Zhu and Chen*, paragraph 45, and *Iida*, paragraph 69).
- 29 Thus, while Article 21 TFEU and Directive 2004/38 grant a right to reside in the host Member State to a minor child who is a national of another Member State and who satisfies the conditions of Article 7(1)(b) of that directive, the same provisions allow a parent who is that minor’s primary carer to reside with the child in the host Member State (see, to that effect, *Zhu and Chen*, paragraphs 46 and 47).
- 30 In the present case, it is for the referring court to ascertain whether Mrs Alokpa’s children satisfy the conditions set out in Article 7(1) of Directive 2004/38 and have, therefore, the right to reside in a host Member State on the basis of Article 21 TFEU. In particular, that court must determine whether those children have, on their own or through their mother, sufficient resources and comprehensive sickness insurance cover, within the meaning of Article 7(1)(b) of Directive 2004/38.
- 31 If the conditions set out in Article 7(1) of Directive 2004/38 are not satisfied, Article 21 TFEU must be interpreted as meaning that it does not preclude Mrs Alokpa from being refused a right of residence in Luxembourg.

- 32 Concerning, in the second place, Article 20 TFEU, the Court has held that there are very specific situations in which, despite the fact that the secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of his freedom of movement, a right of residence cannot, exceptionally, without undermining the effectiveness of the Union citizenship that citizen enjoys, be refused to a third-country national who is a family member of his if, as a consequence of refusal, that citizen would be obliged in practice to leave the territory of the European Union altogether, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of the status of citizen of the European Union (see *Iida*, paragraph 71, and *Ymeraga and Ymeraga-Tafarshiku*, paragraph 36).
- 33 Therefore, if the referring court holds that Article 21 TFEU does not preclude Mrs Alokpa from being refused a right of residence in Luxembourg, that court must still determine whether such a right of residence may nevertheless be granted to her, exceptionally – if the effectiveness of the Union citizenship that her children enjoy is not to be undermined – in light of the fact that, as a consequence of such a refusal, those children would find themselves obliged in practice to leave the territory of the European Union altogether, thus denying them the genuine enjoyment of the substance of the rights conferred by virtue of that status.
- 34 In that regard, as the Advocate-General stated in points 55 and 56 of his Opinion, Mrs Alokpa, as the mother of Jarel and Eja Moudoulou and as sole carer of those children since their birth, could have the benefit of a derived right to reside in France.
- 35 It follows that, in principle, the refusal by the Luxembourg authorities to grant Mrs Alokpa a right of residence cannot result in her children being obliged to leave the territory of the European Union altogether. It is, however, for the referring court to determine whether, in the light of all of the facts of the main proceedings, that is in fact the case.
- 36 In the light of all of the foregoing considerations, the answer to the question referred is that, in a situation such as that at issue in the main proceedings, Articles 20 TFEU and 21 TFEU must be interpreted as meaning that they do not preclude a Member State from refusing to allow a third-country national to reside in its territory, where that third-country national has sole responsibility for her minor children who are citizens of the European Union, and who have resided with her in that Member State since their birth, without possessing the nationality of that Member State and making use of their right to freedom of movement, in so far as those Union citizens do not satisfy the conditions set out in Directive 2004/38 or such a refusal does not deprive those citizens of effective enjoyment of the substance of the rights conferred by virtue of the status of European Union citizenship, a matter which is to be determined by the referring court.

### Costs

- 37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

**In a situation such as that at issue in the main proceedings, Articles 20 TFEU and 21 TFEU must be interpreted as meaning that they do not preclude a Member State from refusing to allow a third-country national to reside in its territory, where that third-country national has sole responsibility for her minor children who are citizens of the European Union, and who have resided with her in that Member State since their birth, without possessing the nationality of that Member State and making use of their right to freedom of movement, in so far as those Union citizens do not satisfy the conditions set out in Directive 2004/38/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, or such a refusal does not deprive those citizens of effective enjoyment of the substance of the rights conferred by virtue of the status of European Union citizenship, a matter which is to be determined by the referring court.**

[Signatures]