



## Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

12 March 2014\*

(Directive 2004/38/EC — Article 21(1) TFEU — Right to move and reside freely within the territory of the Member States — Beneficiaries — Right of residence of a third-country national who is a family member of a Union citizen in the Member State of which that citizen is a national — Return of the Union citizen to that Member State after short periods of residence spent in another Member State)

In Case C-456/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Netherlands), made by decision of 5 October 2012, received at the Court on 10 October 2012, in the proceedings

**O.**

v

**Minister voor Immigratie, Integratie en Asiel,**

and

**Minister voor Immigratie, Integratie en Asiel**

v

**B.,**

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts (Rapporteur), Vice-President, R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen, A. Borg Barthet and C.G. Fernlund, Presidents of Chambers, G. Arestis, J. Malenovský, E. Levits, A. Ó Caoimh, D. Šváby, M. Berger, A. Prechal and E. Jarašiūnas, Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 June 2013,

after considering the observations submitted on behalf of:

— Mr O., by J. Canales and J. van Bennekom, advocaten,

— Mr B., by C. Chen, F. Verbaas and M. van Zantvoort, advocaten,

\* Language of the case: Dutch.

- the Netherlands Government, by M. de Ree, C. Schillemans and C. Wissels, acting as Agents,
- the Belgian Government, by T. Materne and C. Pochet, acting as Agents,
- the Czech Government, by M. Smolek and J. Vlácil, acting as Agents,
- the Danish Government, by V. Pasternak Jørgensen and M. Wolff, acting as Agents,
- the German Government, by T. Henze and A. Wiedmann, acting as Agents,
- the Estonian Government, by M. Linntam and N. Grünberg, acting as Agents,
- the Polish Government, by K. Pawłowska, M. Szpunar, B. Majczyna and M. Arciszewski, acting as Agents,
- the United Kingdom Government, by L. Christie, acting as Agent, and by G. Facenna, Barrister,
- the European Commission, by C. Tufvesson and G. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 December 2013,

gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda at OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34), and Article 21(1) TFEU.
- 2 The request has been made in proceedings between Mr O. and the Minister voor Immigratie, Integratie en Asiel (Minister for Immigration, Integration and Asylum) ('the Minister'), on the one hand, and between the Minister and Mr B., on the other, concerning the decisions refusing to grant them a certificate of lawful residence as a family member of a European Union citizen in the Netherlands.

### **Legal context**

#### *Directive 2004/38*

- 3 Article 1 of Directive 2004/38, which is entitled 'Subject', provides:

'This Directive lays down:

- (a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

...'

4 Under the heading ‘Definitions’, Article 2 of that directive provides:

‘For the purposes of this Directive:

1. “Union citizen” means any person having the nationality of a Member State;
2. “family member” means:
  - (a) the spouse;
  - ...
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 that directive, which is entitled ‘Beneficiaries’, provides in paragraph 1 thereof:

‘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 [Article 2(2)] who accompany or join them.’

6 Article 6 of Directive 2004/38 states:

‘1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months ...

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.’

7 Article 7(1) and (2) of that directive 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).'

8 Article 10(1) of that directive provides:

‘The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called “Residence card of a family member of a Union citizen” no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.’

9 Under Article 16(1), first sentence, of Directive 2004/38, ‘Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there’. Article 16(2) provides that ‘[p]aragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years’.

*Netherlands law*

10 The Law on Foreign Nationals (Vreemdelingenwet) of 23 November 2000 (Stb. 2000, No 495) and the Decree on Foreign Nationals of 2000 (Vreemdelingenbesluit 2000, Stb. 2000, No 497) implemented Directive 2004/38 into Netherlands law.

11 Article 1 of the Law on Foreign Nationals provides:

‘Within the meaning of the present Law and of the provisions adopted on the basis thereof:

...

(e) Community nationals shall mean:

1. nationals of the Member States of the European Union who, under the Treaty establishing the European Community, have the right to enter and reside on the territory of another Member State;
2. the family members of those persons referred to in paragraph 1 who are nationals of a third State and who, on the basis of a decision taken in application of the EC Treaty, are entitled to enter and reside on the territory of a Member State;

...’

12 Article 8 of that law provides:

‘Foreign nationals are not lawfully resident in the Netherlands:

...

(e) as Community nationals, except where their residence in the Netherlands is based on a rule adopted under the EC Treaty or the Treaty on the European Economic Area;

...’

- 13 Under Article 9(1) of that law, the Minister is required to provide the foreign national who is lawfully resident on the territory of the Netherlands on the basis of Union law with a document or written statement evidencing the lawful residence ('the residence document').

### **The disputes in the main proceedings and the questions referred for a preliminary ruling**

#### *Mr O.'s situation*

- 14 In 2006, Mr O., a Nigerian national, married a Netherlands national ('sponsor O'). Mr O. stated that from 2007 to April 2010 he lived in Spain. According to the documents submitted by the Spanish municipality of Malaga, Mr O. and sponsor O have been registered at the same address in that municipality since 7 August 2009. Mr O. also submitted a residence document, valid until 20 September 2014, from which it appears that he resided in Spain as a family member of a Union citizen.
- 15 According to sponsor O, she resided for two months with Mr O. in Spain between 2007 and April 2010 but she returned to the Netherlands because she could not find work in Spain. During that time, however, sponsor O regularly spent time with Mr O. in the form of holidays in Spain.
- 16 Since 1 July 2010, Mr O. has been registered in the Netherlands Personal Records Database as residing at the same address as sponsor O.
- 17 By decision of 15 November 2010, the Minister rejected Mr O.'s request for the residence document referred to in Article 9(1) of the Law on Foreign Nationals. By decision of 21 March 2011, the Minister rejected Mr O.'s objection to that decision as unfounded.
- 18 By judgment of 7 July 2011, the Rechtbank 's-Gravenhage (District Court, The Hague) rejected the action brought by Mr O. against the decision of 21 March 2011 as unfounded.
- 19 Mr O. lodged an appeal against that judgment before the referring court.

#### *Mr B.'s situation*

- 20 Mr B., a Moroccan national, stated that from December 2002 he had lived for several years in the Netherlands with his partner ('sponsor B') who has Netherlands nationality.
- 21 By decision of 14 October 2005, the Minister declared Mr B. to be undesirable within the territory of the Netherlands as a result of a prison sentence of two months for using a false passport. Mr B. then moved to Retie (Belgium) and lived in an apartment rented by sponsor B from October 2005 to May 2007. Sponsor B stated that, during that period, she resided there every weekend.
- 22 In April 2007, Mr B. returned to Morocco because he was denied residence in Belgium on the basis of the decision of 14 October 2005.
- 23 On 31 July 2007, Mr B. and sponsor B were married. On 30 December 2008, Mr B. applied to have his declaration of undesirability lifted. By decision of 16 March 2009, the Minister lifted that declaration.
- 24 In June 2009, Mr B. moved to the Netherlands to reside there with sponsor B.
- 25 By decision of 30 October 2009, the Staatssecretaris van Justitie (State Secretary for Justice) rejected Mr B.'s application for a residence document. By decision of 19 March 2010, the Minister held Mr B.'s challenge to the decision rejecting his application to be unfounded.

26 By judgment of 11 November 2010, the Rechtbank 's-Gravenhage upheld the action brought by Mr B. against the decision of 19 March 2010, annulled that decision and ordered the Minister to adopt a new decision taking into account the considerations set out in that judgment.

27 The Minister lodged an appeal against that judgment before the referring court.

*The questions referred for a preliminary ruling*

28 As Mr O. and Mr B. were family members of Union citizens, within the meaning of Article 2(2) of Directive 2004/38, on the dates on which the decisions rejecting their respective applications for a residence document were taken, the referring court is unsure, first of all, whether that directive grants them a right of residence in the Member State of which those citizens are nationals.

29 According to the referring court, it is conceivable that the term 'move to' within the meaning of Article 3(1) of Directive 2004/38 means travelling to and from, without moving to, a Member State other than the Member State of which those citizens are nationals. Likewise, it is conceivable that the term 'join them' within the meaning of Article 3(1) of that directive could be construed to mean joining the Union citizens in the Member State of which they are nationals. However, the referring court states that other provisions of that directive, in particular Article 6(1) and Article 7(1) and (2), seem to rule out such an interpretation, in so far as they expressly mention 'another Member State' and 'the host Member State' as the Member State to which the right of residence applies. The judgment in Case C-434/09 *McCarthy* [2011] ECR I-3375 confirms that Articles 6 and 7 govern the legal situation of a Union citizen in a Member State of which he is not a national.

30 Next, the referring court points out that it is apparent from Case C-370/90 *Singh* [1992] ECR I-4265 and Case C-291/05 *Eind* [2007] ECR I-10719 that when a national of a Member State who has availed himself or herself of the right to freedom of movement returns to his or her State of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Union law if the Union citizen chose to enter and reside in another Member State. However, the referring court expresses doubts as to whether that case-law may be applied to situations such as those at issue in the main proceedings. It states in that regard that, unlike in the cases which gave rise to the judgments in *Singh* and *Eind*, the Union citizens in question in the main proceedings resided in the host Member State not as workers but as Union citizens pursuant to Article 21(1) TFEU, and as recipients of services within the meaning of Article 56 TFEU.

31 Lastly, if the case-law in *Singh* and *Eind* were to apply to situations such as those at issue in the main proceedings, the referring court asks to what extent it is a requirement that the residence of the Union citizen in a Member State other than that of which he is a national must have been of a certain minimum duration if, after the return of the Union citizen to the Member State of which he is a national, the member of his family who is a third-country national wishes to gain a right of residence in that Member State. In the case concerning Mr B. the referring court is also uncertain whether Mr B.'s right of residence in the Netherlands under Directive 2004/38 is affected by the fact that he only joined sponsor B in the Member State of which she is a national more than two years after her return to that Member State.

32 In those circumstances the Raad van State decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling, the first three of which are formulated in the same terms in the cases of Mr O. and Mr B., with only the fourth question specific to the case of Mr B.:

(1) Should Directive 2004/38 ..., as regards the conditions governing the right of residence of members of the family of a Union citizen who have third-country nationality, be applied by analogy, as in the judgments of the Court of Justice of the European Communities in [*Singh* and

in *Eind*], where a Union citizen returns to the Member State of which he is a national after having resided in another Member State in the context of Article 21(1) [TFEU], and as the recipient of services within the meaning of Article 56 [TFEU]?

- (2) [If the first question is answered in the affirmative], is there a requirement that the residence of the Union citizen in another Member State must have been of a certain minimum duration if, after the return of the Union citizen to the Member State of which he is a national, the member of his family who is a third-country national wishes to gain a right of residence in that Member State?
- (3) [If the second question is answered in the affirmative], can that requirement then also be met if there was no question of continuous residence, but rather of a certain frequency of residence, such as during weekly residence at weekends or during regular visits?
- (4) As a result of the time which elapsed between the return of the Union citizen to the Member State of which he is a national and the arrival of the family member from a third country in that Member State, in circumstances such as those of the ... case [concerning Mr B.], has there been a lapse of possible entitlement of the family member with third-country nationality to a right of residence derived from Union law?

### Consideration of the questions referred

#### *The first, second and third questions*

- 33 By its first, second and third questions, which should be examined together, the referring court asks, in essence, whether Directive 2004/38 and Article 21(1) TFEU must be interpreted as precluding a Member State from refusing a right of residence to a third-country national who is the family member of a Union citizen holding the nationality of that Member State, following the return of that citizen to that Member State, in circumstances where that citizen, before his return, had exercised his right of freedom of movement under Article 21(1) TFEU by residing in another Member State with the family member in question, solely by virtue of his being a Union citizen, and, if that question is answered in the affirmative, what are the conditions under which such a right of residence is granted?
- 34 In that regard, it should be borne in mind that under Article 21(1) TFEU, '[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'.
- 35 The Court has already had occasion to point out that Directive 2004/38 aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by Article 21(1) TFEU and that it aims in particular to strengthen that right (see, to that effect, Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraphs 59 and 82; Case C-162/09 *Lassal* [2010] ECR I-9217, paragraph 30; and *McCarthy*, paragraph 28).
- 36 Article 21(1) TFEU and Directive 2004/38 do not confer any autonomous right on third-country nationals (see, to that effect, Case C-40/11 *Iida* [2012] ECR, paragraph 66, and Case C-87/12 *Ymeraga and Ymeraga-Tafarshiku* [2013] ECR, paragraph 34). Any rights conferred on third-country nationals by provisions of EU law on Union citizenship are rights derived from the exercise of freedom of movement by a Union citizen (see *Iida*, paragraph 67; *Ymeraga and Ymeraga-Tafarshiku*, paragraph 35; and Case C-86/12 *Alokpa and Others* [2013] ECR, paragraph 22).

- 37 It follows from a literal, systematic and teleological interpretation of Directive 2004/38 that it does not establish a derived right of residence for third-country nationals who are family members of a Union citizen in the Member State of which that citizen is a national.
- 38 Article 3(1) of Directive 2004/38, defines the ‘beneficiaries’ of the rights conferred by it as ‘all Union citizens who move to or reside in a Member State other than that of which they are a national, and ... their family members as defined in [Article 2(2)] who accompany or join them’.
- 39 Accordingly, Directive 2004/38 establishes a derived right of residence for third-country nationals who are family members of a Union citizen, within the meaning of Article 2(2) of that directive, only where that citizen has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national (see, to that effect, *Metock and Others*, paragraph 73; Case C-256/11 *Dereci and Others* [2011] ECR I-11315, paragraph 56; *Iida*, paragraph 51; and Joined Cases C-356/11 and C-357/11 *O. and Others* [2012] ECR, paragraph 41).
- 40 Other provisions of Directive 2004/38, in particular Article 6, Article 7(1) and (2) and Article 16(1) and (2), refer to the right of residence of a Union citizen and to the derived right of residence conferred on the family members of that citizen either in ‘another Member State’ or in ‘the host Member State’ and thus confirm that a third-country national who is a family member of a Union citizen cannot invoke, on the basis of that directive, a derived right of residence in the Member State of which that citizen is a national (see *McCarthy*, paragraph 37, and *Iida*, paragraph 64).
- 41 As regards the teleological interpretation of Directive 2004/38, it should be borne in mind that whilst it is true that Directive 2004/38 aims to facilitate and strengthen the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on each citizen of the Union, the fact remains that the subject of the directive concerns, as is apparent from Article 1(a), the conditions governing the exercise of that right (*McCarthy*, paragraph 33).
- 42 Since, under a principle of international law, a State cannot refuse its own nationals the right to enter its territory and remain there, Directive 2004/38 is intended only to govern the conditions of entry and residence of a Union citizen in a Member State other than the Member State of which he is a national (see *McCarthy*, paragraph 29).
- 43 In those circumstances and having regard to what is said in paragraph 36 above, Directive 2004/38 is therefore also not intended to confer a derived right of residence on third-country nationals who are family members of a Union citizen residing in the Member State of which the latter is a national.
- 44 Since third-country nationals in situations such as those of Mr O. and Mr B. are not entitled, on the basis of Directive 2004/38, to a derived right of residence in the Member State of which their sponsors are nationals, it must be examined whether a derived right of residence may, in some circumstances, be based on Article 21(1) TFEU.
- 45 In that regard, it should be borne in mind that the purpose and justification of that derived right of residence is based on the fact that a refusal to allow such a right would be such as to interfere with the Union citizen’s freedom of movement by discouraging him from exercising his rights of entry into and residence in the host Member State (see *Iida*, paragraph 68; *Ymeraga and Ymeraga-Tafarshiku*, paragraph 35; and *Alokpa and Others*, paragraph 22).
- 46 The Court has accordingly held that where a Union citizen has resided with a family member who is a third-country national in a Member State other than the Member State of which he is a national for a period exceeding two and a half years and one and half years respectively, and was employed there, that third-country national must, when the Union citizen returns to the Member State of which he is a national, be entitled, under Union law, to a derived right of residence in the latter State (see *Singh*,



paragraph 25, and *Eind*, paragraph 45). If that third-country national did not have such a right, a worker who is a Union citizen could be discouraged from leaving the Member State of which he is a national in order to pursue gainful employment in another Member State simply because of the prospect for that worker of not being able to continue, on returning to his Member State of origin, a way of family life which may have come into being in the host Member State as a result of marriage or family reunification (see *Eind*, paragraphs 35 and 36, and *Iida*, paragraph 70).

- 47 Therefore, an obstacle to leaving the Member State of which the worker is a national, as mentioned in *Singh* and *Eind*, is created by the refusal to confer, when that worker returns to his Member State of origin, a derived right of residence on the family members of that worker who are third-country nationals, where that worker resided with his family members in the host Member State pursuant to, and in conformity with, Union law.
- 48 It is therefore necessary to determine whether the case-law resulting from *Singh* and *Eind* is capable of being applied generally to family members of Union citizens who, having availed themselves of the rights conferred on them by Article 21(1) TFEU, resided in a Member State other than that of which they are nationals, before returning to the Member State of origin.
- 49 That is indeed the case. The grant, when a Union citizen returns to the Member State of which he is a national, of a derived right of residence to a third-country national who is a family member of that Union citizen and with whom that citizen has resided, solely by virtue of his being a Union citizen, pursuant to and in conformity with Union law in the host Member State, seeks to remove the same type of obstacle on leaving the Member State of origin as that referred to in paragraph 47 above, by guaranteeing that that citizen will be able, in his Member State of origin, to continue the family life which he created or strengthened in the host Member State.
- 50 So far as concerns the conditions for granting, when a Union citizen returns to the Member State of which he is a national, a derived right of residence, based on Article 21(1) TFEU, to a third-country national who is a family member of that Union citizen with whom that citizen has resided, solely by virtue of his being a Union citizen, in the host Member State, those conditions should not, in principle, be more strict than those provided for by Directive 2004/38 for the grant of such a right of residence to a third-country national who is a family member of a Union citizen in a case where that citizen has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national. Even though Directive 2004/38 does not cover such a return, it should be applied by analogy to the conditions for the residence of a Union citizen in a Member State other than that of which he is a national, given that in both cases it is the Union citizen who is the sponsor for the grant of a derived right of residence to a third-country national who is a member of his family.
- 51 An obstacle such as that referred to in paragraph 47 above will arise only where the residence of the Union citizen in the host Member State has been sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State. Article 21(1) TFEU does not therefore require that every residence in the host Member State by a Union citizen accompanied by a family member who is a third-country national necessarily confers a derived right of residence on that family member in the Member State of which that citizen is a national upon the citizen's return to that Member State.
- 52 In that regard, it should be observed that a Union citizen who exercises his rights under Article 6(1) of Directive 2004/38 does not intend to settle in the host Member State in a way which would be such as to create or strengthen family life in that Member State. Accordingly, the refusal to confer, when that citizen returns to his Member State of origin, a derived right of residence on members of his family who are third-country nationals will not deter such a citizen from exercising his rights under Article 6.

- 53 On the other hand, an obstacle such as that referred to in paragraph 47 above may be created where the Union citizen intends to exercise his rights under Article 7(1) of Directive 2004/38. Residence in the host Member State pursuant to and in conformity with the conditions set out in Article 7(1) of that directive is, in principle, evidence of settling there and therefore of the Union citizen's genuine residence in the host Member State and goes hand in hand with creating and strengthening family life in that Member State.
- 54 Where, during the genuine residence of the Union citizen in the host Member State, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) of Directive 2004/38, family life is created or strengthened in that Member State, the effectiveness of the rights conferred on the Union citizen by Article 21(1) TFEU requires that the citizen's family life in the host Member State may continue on returning to the Member State of which he is a national, through the grant of a derived right of residence to the family member who is a third-country national. If no such derived right of residence were granted, that Union citizen could be discouraged from leaving the Member State of which he is a national in order to exercise his right of residence under Article 21(1) TFEU in another Member State because he is uncertain whether he will be able to continue in his Member State of origin a family life with his immediate family members which has been created or strengthened in the host Member State (see, to that effect, *Eind*, paragraphs 35 and 36, and *Iida*, paragraph 70).
- 55 *A fortiori*, the effectiveness of Article 21(1) TFEU requires that the Union citizen may continue, on returning to the Member State of which he is a national, the family life which he led in the host Member State, if he and the family member concerned who is a third-country national have been granted a permanent right of residence in the host Member State pursuant to Article 16(1) and (2) of Directive 2004/38 respectively.
- 56 Accordingly, it is genuine residence in the host Member State of the Union citizen and of the family member who is a third-country national, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of Directive 2004/38 respectively, which creates, on the Union citizen's return to his Member State of origin, a derived right of residence, on the basis of Article 21(1) TFEU, for the third-country national with whom that citizen lived as a family in the host Member State.
- 57 It is for the referring court to determine whether sponsor O and sponsor B, who are both Union citizens, settled and, therefore, genuinely resided in the host Member State and whether, on account of living as a family during that period of genuine residence, Mr O. and Mr B. enjoyed a derived right of residence in the host Member State pursuant to and in conformity with Article 7(2) or Article 16(2) of Directive 2004/38.
- 58 It should be added that the scope of Union law cannot be extended to cover abuses (see, to that effect, Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, paragraph 51, and Case C-303/08 *Bozkurt* [2010] ECR I-13445, paragraph 47). Proof of such an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved, and, secondly, a subjective element consisting in the intention to obtain an advantage from the European Union rules by artificially creating the conditions laid down for obtaining it (Case C-364/10 *Hungary v Slovakia* [2012] ECR, paragraph 58).
- 59 As regards the question whether the cumulative effect of various short periods of residence in the host Member State may create a derived right of residence for a family member of a Union citizen who is a third-country national on the citizen's return to the Member State of which he is a national, it should be borne in mind that only a period of residence satisfying the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of Directive 2004/38 will give rise to such a right of residence. In that regard,

short periods of residence such as weekends or holidays spent in a Member State other than that of which the citizen in question is a national, even when considered together, fall within the scope of Article 6 of Directive 2004/38 and do not satisfy those conditions.

- 60 So far as concerns Mr O., who, according to the order for reference, holds a residence card as a family member of a Union citizen pursuant to Article 10 of Directive 2004/38, it should be borne in mind that Union law does not require the authorities of the Member State of which the Union citizen in question is a national to grant a derived right of residence to a third-country national who is a member of that citizen's family because of the mere fact that, in the host Member State, that third-country national held a valid residence permit (see *Eind*, paragraph 26). A residence card issued on the basis of Article 10 of Directive 2004/38 has a declaratory, as opposed to a constitutive, character (see Case C-325/09 *Dias* [2011] ECR I-6387, paragraph 49).
- 61 In the light of all the foregoing considerations, the answer to the first, second and third questions is that Article 21(1) TFEU must be interpreted as meaning that where a Union citizen has created or strengthened a family life with a third-country national during genuine residence, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of Directive 2004/38, in a Member State other than that of which he is a national, the provisions of that directive apply by analogy where that Union citizen returns, with the family member in question, to his Member State of origin. Therefore, the conditions for granting a derived right of residence to a third-country national who is a family member of that Union citizen, in the latter's Member State of origin, should not, in principle, be more strict than those provided for by that directive for the grant of a derived right of residence to a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national.

#### *The fourth question*

- 62 As is apparent from paragraphs 21 to 23 above, Mr B. acquired the status of family member, within the meaning of Article 2(2) of Directive 2004/38, of a Union citizen after sponsor B's residence in the host Member State.
- 63 A third-country national, who has not had, at least during part of his residence in the host Member State, the status of family member, within the meaning of Article 2(2) of Directive 2004/38, is not entitled to a derived right of residence in that Member State pursuant to Article 7(2) or Article 16(2) of Directive 2004/38. Accordingly, that third-country national is also unable to rely on Article 21(1) TFEU for the grant of a derived right of residence on the return of the Union citizen in question to the Member State of which he is a national.
- 64 There is therefore no need to answer the fourth question.

#### **Costs**

- 65 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 (Grand Chamber) hereby rules:

**Article 21(1) TFEU must be interpreted as meaning that where a Union citizen has created or strengthened a family life with a third-country national during genuine residence, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (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, in a Member State other than that of which he is a national, the provisions of that directive apply by analogy where that Union citizen returns, with the family member in question, to his Member State of origin. Therefore, the conditions for granting a derived right of residence to a third-country national who is a family member of that Union citizen, in the latter's Member State of origin, should not, in principle, be more strict than those provided for by that directive for the grant of a derived right of residence to a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national.**

[Signatures]