

JUDGMENT OF THE COURT (Grand Chamber)

23 February 2010 *

In Case C-310/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Court of Appeal of England and Wales, Civil Division (United Kingdom), made by decision of 21 April 2008, received at the Court on 11 July 2008, in the proceedings

London Borough of Harrow

v

Nimco Hassan Ibrahim,

Secretary of State for the Home Department,

* Language of the case: English.

THE COURT (Grand Chamber),

composed of V. Skouris, President, J.N. Cunha Rodrigues (Rapporteur), K. Lenaerts, J.-C. Bonichot and P. Lindh, Presidents of Chambers, C.W.A. Timmermans, A. Rosas, K. Schiemann, P. Küris, E. Juhász, L. Bay Larsen, T. von Danwitz and A. Arabadjiev, Judges,

Advocate General: J. Mazák,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 2 September 2009,

after considering the observations submitted on behalf of:

- London Borough of Harrow, by K. Rutledge, Barrister,
- Ms Ibrahim, by N. Rogers, Barrister, instructed by S. Morshead, Solicitor,
- the United Kingdom Government, by V. Jackson, acting as Agent, and C. Lewis QC,
- the Danish Government, by R. Holdgaard, acting as Agent,

- Ireland, by D. O'Hagan and B. O'Moore, acting as Agents, and D. Conlan Smyth, Barrister,
- the Italian Government, by I. Bruni, acting as Agent, and W. Ferrante, avvocato dello Stato,
- the Commission of the European Communities, by D. Maidani and M. Wilderspin, acting as Agents,
- the EFTA Surveillance Authority, by N. Fenger, F. Simonetti and I. Hauger, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 October 2009,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of Article 12 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968(II), p. 475), as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992 (OJ 1992 L 245, p. 1) ('Regulation No 1612/68'), and 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 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, OJ 2005 L 197, p. 34, and OJ 2007 L 204, p. 28).

- ² The reference was made in the course of proceedings between the London Borough of Harrow, on the one hand, and Ms Ibrahim and the Secretary of State for the Home Department, on the other, concerning the rejection of Ms Ibrahim's application for housing assistance.

Legal context

European Union legislation

- ³ The fifth recital in the preamble to Regulation No 1612/68 reads as follows:

‘Whereas the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment shall be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country’.

4 Article 10 of Regulation No 1612/68 provided:

‘1. The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:

(a) his spouse and their descendants who are under the age of 21 years or are dependants;

(b) dependent relatives in the ascending line of the worker and his spouse.

2. Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes.

3. For the purposes of paragraphs 1 and 2, the worker must have available for his family housing considered as normal for national workers in the region where he is employed; this provision, however, must not give rise to discrimination between national workers and workers from the other Member States.’

5 Article 11 of Regulation No 1612/68 provided:

‘Where a national of a Member State is pursuing an activity as an employed or self-employed person in the territory of another Member State, his spouse and those of the

children who are under the age of 21 years or dependent on him shall have the right to take up any activity as an employed person throughout the territory of that same State, even if they are not nationals of any Member State.'

6 Articles 10 and 11 of Regulation No 1612/68 were repealed with effect from 30 April 2006 by Article 38(1) of Directive 2004/38.

7 The first paragraph of Article 12 of Regulation No 1612/68 provides:

'The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.'

8 Recitals 3 and 16 in the preamble to Directive 2004/38 read as follows:

'(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

...

- (16) As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security.’

9 Under Article 7(1) and (2) of Directive 2004/38:

‘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).'

¹⁰ Article 12 of Directive 2004/38, 'Retention of the right of residence by family members in the event of death or departure of the Union citizen', states in paragraph 3:

'The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual

custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.’

- 11 Article 24 of that directive, ‘Equal treatment’, provides in paragraph 1:

‘Subject to such specific provisions as are expressly provided for in the [EC] Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.’

National legislation

- 12 Under regulation 6 of the Immigration (European Economic Area) Regulations 2006, a ‘qualified person’ for the purposes of those regulations is a national of a State of the European Economic Area who is in the United Kingdom as a job-seeker, worker, self-employed person, self-sufficient person or student.
- 13 In accordance with regulation 19(3)(a) of those regulations, a person may be removed from the United Kingdom if he is not, or has ceased to be, a qualified person for the purposes of the regulations.

- 14 It follows from the Housing Act 1996 and the Allocation of Housing and Homelessness (Eligibility) Regulations 2006 that a person is not eligible for housing assistance unless he has a right of residence in the United Kingdom conferred by European Union law.

The main proceedings and the questions referred for a preliminary ruling

- 15 Ms Ibrahim is a Somali national married to a Danish citizen, Mr Yusuf.
- 16 Mr Yusuf arrived in the United Kingdom in the autumn of 2002 and worked there from October 2002 to May 2003. From June 2003 to March 2004 he claimed incapacity benefit. After being declared fit to work at the end of that period, he left the United Kingdom, before returning there in December 2006.
- 17 It is common ground that, between ceasing work and leaving the United Kingdom, Mr Yusuf ceased to be a 'qualified person' within the meaning of regulation 6 of the Immigration (European Economic Area) Regulations 2006. On his return to the United Kingdom, he did not recover the status of a 'qualified person' with a right of residence under European Union law.
- 18 Ms Ibrahim arrived in the United Kingdom with the permission of the immigration authorities in February 2003 in order to join her husband.

- 19 The couple have four children, of Danish nationality, aged from one to nine. The three oldest arrived in the United Kingdom with their mother and the fourth child was born in the United Kingdom. The two eldest have attended State schools since arriving in the United Kingdom.
- 20 After her husband left the United Kingdom in 2004, Ms Ibrahim separated from him. She was never self-sufficient. She does not work and depends entirely on social assistance to cover her living expenses and housing costs. She does not have comprehensive sickness insurance cover and relies on the National Health Service.
- 21 In January 2007 Ms Ibrahim applied for housing assistance for herself and her children. By decision of 1 February 2007, the housing assessment officer of the London Borough of Harrow rejected the application. She considered that neither Ms Ibrahim nor her husband was resident in the United Kingdom under European Union law. On 29 March 2007 her decision was confirmed by the housing review officer.
- 22 Ms Ibrahim appealed against those decisions to the Clerkenwell and Shoreditch County Court, which by judgment of 18 October 2007 allowed the appeal on the ground that, as the mother of the children and their primary carer, Ms Ibrahim has a right of residence in the United Kingdom under Article 12 of Regulation No 1612/68, since they attend school and her husband is a citizen of the Union who worked in that Member State.
- 23 The London Borough of Harrow appealed against that judgment to the referring court.

In those circumstances, the Court of Appeal of England and Wales, Civil Division, decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘In circumstances where

- a non-EU national spouse and her EU national children accompanied an EU national who came to the United Kingdom,
 - the EU national was in the United Kingdom as a worker,
 - the EU national then ceased to be a worker and subsequently left the United Kingdom,
 - the EU national, the non-EU national spouse and children are not self-sufficient and are dependent upon social assistance in the United Kingdom,
 - the children commenced primary education in the United Kingdom shortly after their arrival there while the EU national was a worker:
1. do the spouse and children only enjoy a right of residence in the United Kingdom if they satisfy the conditions set out in Directive 2004/38 ...

or

2. (a) do they enjoy a right to reside derived from Article 12 of Regulation ... No 1612/68 ... as interpreted by the Court of Justice, without being required to satisfy the conditions set out in Directive 2004/38 ... and
 - (b) if so, must they have access to sufficient resources so as not to become a burden on the social assistance system of the host Member State during their proposed period of residence and have comprehensive sickness insurance cover in the host Member State?
3. If the answer to Question 1 is yes, is the position different in circumstances such as the present case where the children commenced primary education and the EU-national worker ceased working prior to the date by which Directive 2004/38 ... was to be implemented by the Member States?

Consideration of the questions referred

Questions 1 and 2

25 By its first two questions, which should be taken together, the referring court essentially asks whether, in circumstances such as those of the main proceedings, the children and the parent who is their primary carer can rely on a right of residence in the host Member State on the sole basis of Article 12 of Regulation No 1612/68 without being required to satisfy the conditions defined in Directive 2004/38, or whether they can enjoy a right of residence only if they satisfy those conditions. If the right of residence derives from Article 12 of Regulation No 1612/68 alone, the referring court further asks whether the

children and the parent who is their primary carer must have sufficient resources and comprehensive sickness insurance cover in the host Member State.

- ²⁶ Under Article 12 of Regulation No 1612/68, the children of a national of a Member State who is or has been employed in the territory of another Member State are to be admitted to the latter State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if those children are residing in its territory.
- ²⁷ Article 10 of Regulation No 1612/68 established the right of the spouse and descendants of a worker who was a national of one Member State and was employed in the territory of another Member State to install themselves with him in the latter State.
- ²⁸ It follows from Article 7(1)(b) and (d) and (2) of Directive 2004/38 that, whatever their nationality, the members of the family of a citizen of the Union who is residing in another Member State without being a worker or self-employed person there have the right to accompany or join that citizen, provided that he has sufficient resources for himself and the family members and has comprehensive sickness insurance cover in the host Member State.
- ²⁹ The Court has previously held that the children of a citizen of the Union who have installed themselves in a Member State during the exercise by their parent of rights of residence as a migrant worker in that Member State are entitled to reside there in order to attend general educational courses there, pursuant to Article 12 of Regulation No 1612/68. The fact that the parents of the children concerned have meanwhile divorced, the fact that only one parent is a citizen of the Union, and the fact that that

parent has ceased to be a migrant worker in the host Member State are irrelevant in this regard (see, to that effect, Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 63).

30 The Court has also held that, where the children enjoy, under Article 12 of Regulation No 1612/68, the right to continue their education in the host Member State although the parents who are their carers are at risk of losing their rights of residence, a refusal to allow those parents to remain in the host Member State during the period of their children's education might deprive those children of a right which has been granted to them by the legislature of the European Union (see, to that effect, *Baumbast and R*, paragraph 71).

31 After further observing, in paragraph 72 of *Baumbast and R*, that Regulation No 1612/68 must be interpreted in the light of the requirement of respect for family life laid down in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, the Court concluded, in paragraph 73 of that judgment, that the right conferred by Article 12 of that regulation on the child of a migrant worker to pursue, under the best possible conditions, his education in the host Member State necessarily implies that that child has the right to be accompanied by the person who is his primary carer and, accordingly, that that person is able to reside with him in that Member State during his studies.

32 The referring court seeks to know whether the judgment in *Baumbast and R* is based on the application of Articles 10 and 12 of Regulation No 1612/68 together or on Article 12 alone. More precisely, the court asks whether the right of residence of the children of a

national of a Member State who works or has worked in the host Member State, and that of the parent who is the primary carer of those children, derive implicitly from Article 12.

33 First, the right of the children of migrant workers to equal treatment in access to education, under Article 12 of Regulation No 1612/68, applies only to children who ‘are residing’ in the Member State in which one of their parents is or has been employed.

34 Access to education thus depends on the child first being installed in the host Member State.

35 Article 12 of Regulation No 1612/68, as interpreted by the Court in *Baumbast and R*, means that the child can, in connection with his right of access to education, have an independent right of residence. In particular, the exercise of the right of access to education was not conditional on the child retaining, throughout the period of his education, a specific right of residence under Article 10(1)(a) of that regulation, when that provision was still in force.

36 In paragraphs 21 to 24 of its judgment in Case C-7/94 *Gaal* [1995] ECR I-1031, the Court explicitly rejected the German Government’s argument that there was a close relationship between Articles 10 and 11 of Regulation No 1612/68 on the one hand and Article 12 of that regulation on the other, so that Article 12 granted the right to equal treatment in access to education in the host Member State only to children who satisfied the conditions set out in Articles 10 and 11. In paragraph 23 of *Gaal*, the Court

expressly stated that Article 12 of Regulation No 1612/68 contains no reference to Articles 10 and 11 of the regulation.

37 It would be contrary to the context of Article 12 of Regulation No 1612/68 and the aims pursued by that article to make the exercise of the right of access to education depend on the existence of a separate right of residence of the child, assessed by reference to other provisions of that regulation (see, to that effect, *Gaal*, paragraph 25).

38 It follows that, once the right of access to education derived by the child from Article 12 of that regulation has been acquired because of his being installed in the host Member State, the right of residence is retained by the child and can no longer be called into question because the conditions which were set out in Article 10 of that regulation are not satisfied.

39 Second, as is apparent from the very wording of Article 12 of Regulation No 1612/68, the right to equal treatment in respect of access to education is not limited to children of migrant workers. It applies also to children of former migrant workers.

40 The right derived by children from Article 12 of Regulation No 1612/68 is also not dependent on the right of residence of their parents in the host Member State. It is settled case-law that Article 12 requires only that the child has lived with his parents or either one of them in a Member State while at least one of them resided there as a worker (Case 197/86 *Brown* [1988] ECR 3205, paragraph 30, and *Gaal*, paragraph 27).

- 41 To accept that children of former migrant workers can continue their education in the host Member State although their parents no longer reside there is equivalent to allowing them a right of residence which is independent of that conferred on their parents, such a right being based on Article 12.
- 42 Article 12 of Regulation No 1612/68 must therefore be applied independently of the provisions of European Union law which govern the conditions of exercise of the right to reside in another Member State. That independence of Article 12 from Article 10 of that regulation formed the basis of the judgments of the Court referred to in paragraphs 29 to 31 above, and cannot but subsist in relation to the provisions of Directive 2004/38.
- 43 A contrary conclusion would be liable to compromise the aim of integrating the migrant worker's family into the host Member State, as stated in the fifth recital in the preamble to Regulation No 1612/68. According to settled case-law, for such integration to come about, the children of a worker who is a national of a Member State must have the possibility of undertaking and, where appropriate, successfully completing their education in the host Member State (see, to that effect, Joined Cases 389/87 and 390/87 *Echternach and Moritz* [1989] ECR 723, paragraph 21, and *Baumbast and R*, paragraph 69).
- 44 The London Borough of Harrow, the United Kingdom and Danish Governments and Ireland submit that Directive 2004/38, since its entry into force, constitutes the sole basis for the conditions governing the exercise of the right of residence in the Member States of citizens of the Union and members of their families, and consequently that no right of residence may now be derived from Article 12 of Regulation No 1612/68.
- 45 On this point, there is nothing to suggest that, when adopting Directive 2004/38, the European Union legislature intended to alter the scope of Article 12 of that regulation, as interpreted by the Court, so as to limit its normative content from then on to a mere right of access to education.

46 Similarly, it should be noted that, in contrast to what was done in the case of Articles 10 and 11 of Regulation No 1612/68, Directive 2004/38 did not repeal Article 12 of that regulation. Such a choice necessarily reveals the intention of the European Union legislature not to introduce restrictions of the scope of that article, as interpreted by the Court.

47 The interpretation in the preceding paragraph is confirmed by the fact that the *travaux préparatoires* to Directive 2004/38 show that it was designed to be consistent with the judgment in *Baumbast and R* (COM(2003) 199 final, p. 7).

48 If Article 12 of Regulation No 1612/68 had been limited to conferring the right to equal treatment with regard to access to education without providing for any right of residence for the children of migrant workers, it would have become superfluous with the entry into force of Directive 2004/38. Article 24(1) of that directive provides that all Union citizens residing in the territory of the host Member State are to enjoy equal treatment with the nationals of that State within the scope of the Treaty, it not being in doubt that access to education falls within the scope of European Union law (see, *inter alia*, Case 293/83 *Gravier* [1985] ECR 593, paragraph 19).

49 Moreover, according to recital 3 in the preamble to Directive 2004/38, the aim of that directive is *inter alia* to simplify and strengthen the right of free movement and residence of all Union citizens (see, to that effect, Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraph 59). The application of Article 12 of Regulation No 1612/68 and Article 7(1)(b) and (d) and (2) of Directive 2004/38 to the children of migrant workers would have the effect that the right of residence of those children in the host Member State in order to commence or continue their education would be subject to stricter conditions than those which applied to them before the entry into force of Directive 2004/38.

- 50 It follows that the children of a national of a Member State who works or has worked in the host Member State and the parent who is their primary carer can claim a right of residence in the latter State on the sole basis of Article 12 of Regulation No 1612/68, without being required to satisfy the conditions laid down in Directive 2004/38.
- 51 It remains to be determined whether the exercise of that right of residence is conditional on the persons concerned having sufficient resources and comprehensive sickness insurance cover in the host Member State.
- 52 It must be stated at the outset that there is no such condition in Article 12 of Regulation No 1612/68 and that, as the Court has already held, that article cannot be interpreted restrictively and must not, under any circumstances, be rendered ineffective (*Baumbast and R*, paragraph 74).
- 53 Nor does a requirement as to the self-sufficiency of the members of the family of a worker who is a national of a Member State and their protection in the host Member State in the case of illness follow from the case-law of the Court.
- 54 The Court, in a case where it had to rule on whether children who were resident in the Member State in which their father, a national of another Member State, had been employed before returning to his State of origin were entitled under Article 12 of Regulation No 1612/68 to State assistance intended to cover the costs of their education, the maintenance of them and their dependants and sickness insurance, held, without ruling on the economic situation of the students in question, that the status of children of a worker who is a national of a Member State within the meaning of Regulation No 1612/68 implies, in particular, that it is recognised in European Union law that such children must be eligible for study assistance from the State in order to make it possible for them to achieve integration in the society of the host Member State, that requirement applying a fortiori where the persons covered by the provisions of that

regulation are students who arrived in that State even before the age at which they had to attend school (*Echternach and Moritz*, paragraph 35).

55 In the *Baumbast and R* case Mr Baumbast, the father of the children whose right of residence in the host Member State under Article 12 of Regulation No 1612/68 was at issue, had resources which allowed him and his family not to be dependent on social assistance. None the less, the answers to the questions referred for a preliminary ruling concerning the right of residence of the children and their mother who cared for them were based not on their self-sufficiency but on the fact that the aim of Regulation No 1612/68, namely freedom of movement for workers, requires the best possible conditions for the integration of the worker's family in the host Member State and that a refusal to allow the parents caring for the children to remain in the host Member State during the period of their children's education might deprive the children of a right granted to them by the European Union legislature (*Baumbast and R*, paragraphs 50 and 71).

56 Directive 2004/38 likewise does not make the right of residence in the host Member State of children who are in education and the parent who is their primary carer depend, in certain circumstances, on their having sufficient resources and comprehensive sickness insurance cover.

57 The interpretation that the right of residence in the host Member State of children who are in education there and the parent who is their primary carer is not subject to the condition that they have sufficient resources and comprehensive sickness insurance cover is supported by Article 12(3) of Directive 2004/38, which provides that the departure or death of the citizen of the Union does not entail the loss of the right of residence of the children or the parent who has actual custody of them, irrespective of

their nationality, if the children reside in the host Member State and are enrolled at an educational establishment for the purpose of studying there, until the completion of their studies.

58 While that provision is not applicable in the main proceedings, it illustrates the particular importance which Directive 2004/38 attaches to the situation of children who are in education in the host Member State and the parents who care for them.

59 In the light of the above considerations, the answer to the first two questions is that, in circumstances such as those of the main proceedings, the children of a national of a Member State who works or has worked in the host Member State and the parent who is their primary carer can claim a right of residence in the latter State on the sole basis of Article 12 of Regulation No 1612/68, without such a right being conditional on their having sufficient resources and comprehensive sickness insurance cover in that State.

Question 3

60 In view of the answer to Questions 1 and 2, there is no need to answer Question 3.

Costs

- 61 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:

In circumstances such as those of the main proceedings, the children of a national of a Member State who works or has worked in the host Member State and the parent who is their primary carer can claim a right of residence in the latter State on the sole basis of Article 12 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992, without such a right being conditional on their having sufficient resources and comprehensive sickness insurance cover in that State.

[Signatures]