



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

10 July 2014*

(Reference for a preliminary ruling — Directive 2004/38/EC — Article 16(2) — Right of permanent residence for family members of a Union citizen who are third-country nationals — Situation where spouses no longer live together — Immediate installation with other partners during a continuous period of residence of five years — Regulation (EEC) No 1612/68 — Article 10(3) — Conditions — Infringement of EU law by a Member State — Examination of the nature of the infringement at issue — Need for a reference for a preliminary ruling)

In Case C-244/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court (Ireland), made by decision of 19 April 2013, received at the Court on 30 April 2013, in the proceedings

Ewaen Fred Ogieriakhi

v

Minister for Justice and Equality,

Ireland,

Attorney General,

An Post,

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: Y. Bot,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 March 2014,

after considering the observations submitted on behalf of:

- Mr Ogieriakhi, acting in person,
- the Minister for Justice and Equality, Ireland, the Attorney General and An Post, by E. Creedon and B. Lydon, acting as Agents, and by R. Barron, SC, E. Brennan, BL, and R. Barrett, Adviser,

* Language of the case: English.

— the Greek Government, by T. Papadopoulou, acting as Agent,
— the Polish Government, by B. Majczyna, acting as Agent,
— the European Commission, by J. Enegren, C. Tufvesson and M. Wilderspin, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 14 May 2014,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns: (i) the interpretation of Article 16(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34), and of Article 10(3) 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) and (ii) the implications for its assessment (in relation to a claim for damages for infringement of EU law by the Member State concerned, as to whether the infringement relied on was obvious), of the fact that a national court has found it necessary to seek a preliminary ruling on the substantive question concerning the right to permanent residence.
- 2 The request has been made in proceedings between, on the one hand, Mr Ogieriakhi and, on the other, the Minister for Justice and Equality, Ireland, the Attorney General and An Post, concerning a claim for damages that Mr Ogieriakhi has brought against Ireland on the basis of the case-law devolving from *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428), because of an alleged failure by Ireland to fulfil its obligations concerning the transposition of Directive 2004/38 into national law.

Legal context

EU law

Directive 2004/38

- 3 According to recital 17 in the preamble to Directive 2004/38:

‘Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure.’

- 4 Article 2 of Directive 2004/38, entitled ‘Definitions’, 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 Paragraph 1 of Article 3 of that directive, which is entitled ‘Beneficiaries’, provides:

‘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 Paragraphs 1 and 2 of Article 7 of that directive, which is entitled ‘Right of residence for more than three months’, provide:

‘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 ...

...

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).’

7 Under Article 13(2) of that directive:

‘Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen’s family members who are not nationals of a Member State where:

(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or

(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen’s children; or

(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or

(d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members

not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. “Sufficient resources” shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on a personal basis.’

- 8 In Chapter IV of Directive 2004/38, entitled ‘Right of permanent residence’, Article 16, entitled ‘General rule for Union citizens and their family members’, provides:

‘1. 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. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 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.

3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.’

- 9 Article 18 of the directive provides:

‘Without prejudice to Article 17, the family members of a Union citizen to whom Articles 12(2) and 13(2) apply, who satisfy the conditions laid down therein, shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State.’

Regulation No 1612/68

- 10 Article 10 of Regulation No 1612/68 provides:

‘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.’

Irish law

11 The European Communities (Free Movement of Persons) Regulations 2006 (SI No. 656 of 2006) ('the 2006 Regulations') transpose Directive 2004/38 into Irish law.

12 Article 12 of the 2006 Regulations transposes Article 16 of that directive into Irish law.

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 Mr Ogieriakhi, a Nigerian national, arrived in Ireland in May 1998, whereupon he applied for political asylum. In May 1999, he married Ms Georges, a French national. Following his marriage, he withdrew the asylum application and obtained a residence permit for the period from 11 October 1999 to 11 October 2000. At the end of that period, he applied for renewal of his residence permit, which was granted for the period from 11 October 2000 to 11 October 2004.

14 During the period from 1999 to 2001, Mr Ogieriakhi and his wife lived together in Dublin (Ireland), at various addresses, in rented accommodation.

15 Shortly after August 2001, Ms Georges moved out of the family home to take up residence with another man. Mr Ogieriakhi then moved out of that home to reside with Ms Madden, an Irish citizen with whom he had a child, born in December 2003. It is undisputed that, as from 2002, Ms Georges played no part in the provision or the making available of housing for Mr Ogieriakhi.

16 For all but one month of the period from October 1999 to October 2004, Ms George was either working or receiving social security payments that were subject to the condition that she looked for a job. In December 2004, she left Ireland and returned to France definitively.

17 The divorce between Mr Ogieriakhi and Ms George took place in January 2009. In July of the same year, Mr Ogieriakhi married Ms Madden. Mr Ogieriakhi was subsequently granted Irish citizenship by naturalisation in 2012.

18 In September 2004, Mr Ogieriakhi applied for renewal of his residence permit. That application was refused, however, on the ground that Mr Ogieriakhi was unable to show that, during the relevant period, Ms George was exercising her rights under the EU Treaty by working or residing in Ireland, since the evidence available to the Minister for Justice and Equality indicated that she had returned to Paris (France) in December 2004 to take up employment.

19 Towards the middle of 2007, after the deadline for transposition of Directive 2004/38 into national law, Mr Ogieriakhi applied for permanent residence in Ireland on the ground that he had completed a continuous period of legal residence of five years — from 1999 to 2004 — as a result of his marriage to Ms Georges during that period.

20 That application was refused in September 2007 by the Minister for Justice and Equality, who took the view that Mr Ogieriakhi did not enjoy a right of residence in Ireland under Regulation 2006, since there was no evidence that, during the relevant period, his wife was still exercising, in Ireland, her rights under the Treaty.

21 In October 2007, Mr Ogieriakhi was dismissed from his job with An Post (the State-owned postal company) as a postal sorter on the ground that he did not have any right of residence in Ireland.

- 22 Submitting that he had acquired a right of permanent residence in Ireland, Mr Ogieriakhi contested the decision of the Minister for Justice and Equality before the High Court (Ireland) (or ‘the referring court’), which dismissed the action in January 2008 on the ground that the 2006 Regulations did not apply to residency which pre-dated their entry into force.
- 23 Mr Ogieriakhi did not immediately appeal against that judgment. However, following *Lassal* (C-162/09, EU:C:2010:592), according to which residency prior to 2006 may, in principle, be regarded as meeting the criterion of a continuous period of residence of five years, he applied to the Supreme Court for an extension of the time allowed for bringing an appeal, to enable him to lodge an appeal before that court. By decision of 18 February 2011, the Supreme Court refused that application, but noted that the Minister for Justice and Equality had agreed to review his earlier decision and that it was open to Mr Ogieriakhi to pursue such remedies as he might wish, including those based on EU law.
- 24 After reviewing his decision of September 2007, the Minister for Justice and Equality granted Mr Ogieriakhi a right of permanent residence on 7 November 2011, on the basis that he satisfied all the relevant conditions laid down in the 2006 Regulations.
- 25 Relying on the case-law flowing from *Francovich and Others* (EU:C:1991:428), Mr Ogieriakhi then brought an action for damages before the High Court in order to obtain compensation for the damage suffered as a result of an alleged failure to transpose Directive 2004/38 correctly into national law. In particular, that action is based on losses sustained by Mr Ogieriakhi because of the termination of his employment contract on 24 October 2007 on the ground that he no longer had a right of residence in Ireland.
- 26 In hearing the case, the referring court has found that, in order to succeed in the action that he has brought on the basis of the case-law laid down in *Francovich and Others* (EU:C:1991:428) on the strength of the supposedly incorrect implementation of EU law (and which also concerns the alleged misapplication of that law), Mr Ogieriakhi will have to show that, at the time of his dismissal from An Post in October 2007, he had enjoyed a right of residence for a continuous period of at least five years (in whole or in part, before or after 2006), and, moreover, that that right of residence was derived from EU law.
- 27 In those circumstances, the High Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Can it be said that the spouse of an EU national who was not at the time himself a national of a Member State has “legally resided with the Union citizen in the host Member State for a continuous period of five years” for the purposes of Article 16(2) of Directive 2004/38 ..., in circumstances where the couple had married in May 1999, where a right of residency was granted in October 1999 and where by early 2002 at the absolute latest the parties had agreed to live apart and where both spouses had commenced residing with entirely different partners by late 2002?
- (2) If the answer to Question 1 is in the affirmative and bearing in mind that the third-country national claiming a right to permanent residence pursuant to Article 16(2) [of Directive 2004/38] based on five years continuous residence prior to 2006 must also show that his or her residency was in compliance with, inter alia, the requirements of Article 10(3) of Regulation ... No 1612/68, does the fact that during the currency of that putative five-year period the EU national left the family home and the third-country national then commenced to reside with another individual in a new family home which was not supplied or provided for by the (erstwhile) EU national spouse mean that the requirements of Article 10(3) of Regulation 1612/68 are not thereby satisfied?’

- (3) If the answer to Question 1 is in the affirmative and the answer to Question 2 is in the negative, then for the purposes of assessing whether a Member State has wrongfully transposed or otherwise failed properly to apply the requirements of Article 16(2) of the 2004 Directive, is the fact that the national court hearing an action for damages for breach of EU law has found it necessary to make a reference on the substantive question of the plaintiff's entitlement to permanent residence itself a factor to which that court can have regard in determining whether the breach of EU law was an obvious one?

Consideration of the questions referred

Questions 1 and 2

- 28 By its first two questions, which should be examined together, the referring court asks, in essence, whether Article 16(2) of Directive 2004/38 must be interpreted as meaning that a third-country national who, during a continuous period of five years before the transposition date for that directive, has resided in a Member State as the spouse of a Union citizen working in that Member State, must be regarded as having acquired a right of permanent residence under that provision, even though, during that period, the spouses decided to separate and commenced residing with other partners, and the home occupied by that national was no longer provided or made available by his spouse with Union citizenship.
- 29 First of all, it should be recalled that the Court has held that, for the purposes of the acquisition of the right of permanent residence under Article 16 of Directive 2004/38, continuous periods of five years' residence completed before the transposition date for that directive, namely 30 April 2006, in accordance with earlier EU law instruments, must be taken into account (see *Lassal*, EU:C:2010:592, paragraph 40).
- 30 In that regard, it must be noted that the phrase 'earlier [than Directive 2004/38] EU law instruments', used in paragraph 40 of *Lassal* (EU:C:2010:592), must be understood as referring to the instruments which that directive codified, revised and repealed (*Alarape and Tijani*, C-529/11, EU:C:2013:290, paragraph 47).
- 31 Furthermore, the Court has also held that only periods of residence which satisfy the conditions laid down in Directive 2004/38 may be taken into consideration for the purposes of the acquisition of a right of permanent residence under that directive by the family members of a Union citizen who are not nationals of a Member State (see *Alarape and Tijani*, EU:C:2013:290, paragraph 42).
- 32 It follows that, if the five-year continuous period of residence is completed in whole or in part before the deadline for the transposition of Directive 2004/38 into national law, that period must — if it is to be possible to rely on the right of permanent residence under Article 16(2) of that directive — satisfy not only the conditions laid down in the directive but also those under the EU law in force during that period of residence.
- 33 As it is, since Regulation No 1612/68 constituted the EU legislation in force at the relevant time, it is necessary to consider, first, whether the five-year continuous period completed by Mr Ogieriakhi satisfies the conditions laid down in Directive 2004/38, and, next, if it also satisfies the conditions under Regulation No 1612/68.
- 34 In that regard it must be noted that, in considering Article 16(2) of Directive 2004/38, the Court has held that the acquisition of a right of permanent residence by family members of a Union citizen who are not nationals of a Member State is dependent, in any event, on the fact that, first, the Union citizen

himself satisfies the conditions laid down in Article 16(1) of that directive and, secondly, those family members have resided with him for the period in question (*Alarape and Tijani*, EU:C:2013:290, paragraph 34).

- 35 In the case before the referring court, it is common ground that, throughout the relevant period, Ms Georges satisfied the conditions laid down in Article 16(1) of Directive 2004/38.
- 36 To the extent that Article 16(2) of Directive 2004/38 makes acquisition of the right of permanent residence by family members of a Union citizen conditional upon having resided legally ‘with’ the latter for a continuous period of five years, the question arises whether the separation of spouses during the period concerned — given that not only is there no residing together but especially, there is no true sharing of married life together — precludes a finding that that condition is satisfied.
- 37 In that regard, it should be noted that the Court has held that the marital relationship cannot be regarded as dissolved as long as it has not been terminated by the competent authority, and that is not the case where the spouses merely live separately, even if they intend to divorce at a later date, and, consequently, the spouse does not necessarily have to live permanently with the Union citizen in order to hold a derived right of residence (*Diatta*, 267/83, EU:C:1985:67, paragraphs 20 and 22, and *Iida*, C-40/11, EU:C:2012:691, paragraph 58).
- 38 Accordingly, the fact that, during the period from 11 October 1999 to 11 October 2004, the spouses not only ceased to live together but also resided with other partners, is irrelevant for the purposes of the acquisition by Mr Ogieriakhi of a right of permanent residence under Article 16(2) of Directive 2004/38.
- 39 To the extent that the spouses remained married until January 2009 in the Member State in which Ms George exercised her right to free movement, during the above period, Mr Ogieriakhi cannot be deemed to have lost his status as spouse of a Union citizen accompanying or joining her in the host Member State, thus satisfying the criteria set out in Article 7(2) of Directive 2004/38.
- 40 That interpretation is also consistent with the need not to construe Directive 2004/38 narrowly and not to deprive its provisions of their effectiveness. In that regard, it should be noted that, if Article 16(2) of the directive were to be interpreted literally, a third-country national could be made vulnerable because of unilateral measures taken by his spouse, and that would be contrary to the spirit of that directive, of which one of the objectives is precisely — according to recital 15 thereto — to offer legal protection to family members of citizens of the Union who reside in the host Member State, in order to enable them, in certain cases and subject to certain conditions, to retain their right of residence exclusively on a personal basis.
- 41 However, to interpret Article 16(2) of Directive 2004/38 as meaning that, for the acquisition of the right of permanent residence, the obligation to reside with the Union citizen may be regarded as satisfied only in the specific case in which the spouse who resides with the Union citizen in the host Member State has not broken away from all sharing of married life together with that Union citizen does not appear to be consistent with the above-mentioned objective of that directive, particularly as regards the residency rights recognised under Articles 13 and 18 of that directive in favour of ex-spouses, subject to certain conditions, in the event of divorce.
- 42 As the Advocate General pointed out in points 49 to 53 of his Opinion, such an interpretation would mean that more favourable rules would be applied to the third-country nationals concerned in the event of divorce than in the event of separation, even though, in the latter case, that national remains within the marital relationship and accordingly continues to be a family member of a Union citizen within the meaning of Directive 2004/38.

- 43 As regards the conditions laid down in Regulation No 1612/68, one of the questions that arises is whether the condition imposed by Article 10(3) of that regulation on a worker who is a national of a Member State to have available for his family housing considered as normal for national workers in the region where he was employed is satisfied if that worker has left the family home and his spouse has gone to reside with another partner in a new home which was neither supplied nor provided for by that worker.
- 44 In that regard, it should be noted that the Court has already had occasion to clarify the scope of Article 10(3) of Regulation No 1612/68 in the light of the objective pursued by that regulation of facilitating the free movement of workers.
- 45 Accordingly, in paragraph 18 of the judgment in *Diatta* (EU:C:1985:67), the Court held that, in providing that a member of a migrant worker's family has the right to install himself with the latter, Article 10 of Regulation No 1612/68 does not require the family member in question to reside permanently with the worker; it merely requires the accommodation that the worker has available for his family to be of a kind considered normal for those purposes and, consequently, there is no implied requirement for the family to live permanently under the same roof.
- 46 Furthermore, the Court has noted that Article 10(3) of Regulation No 1612/68 must be interpreted as meaning that the requirement to have available housing regarded as normal applies solely as a condition under which each member of the worker's family is permitted to come to live with him (*Commission v Germany*, 249/86, EU:C:1989:204, paragraph 12) and, accordingly, compliance with that provision may, in any event, be assessed only with effect from the date on which the third-country national began living together with the spouse with Union citizenship in the host Member State, that is to say, in the present case, only with effect from 1999.
- 47 In the light of all the foregoing considerations, the answer to Questions 1 and 2 is that Article 16(2) of Directive 2004/38 must be interpreted as meaning that a third-country national who, during a continuous period of five years before the transposition date for that directive, has resided in a Member State as the spouse of a Union citizen working in that Member State, must be regarded as having acquired a right of permanent residence under that provision, even though, during that period, the spouses decided to separate and commenced residing with other partners, and the home occupied by that national was no longer provided or made available by his spouse with Union citizenship.

Question 3

- 48 By its third question, the referring court asks, in essence, whether the fact that, in relation to a claim for damages for infringement of EU law, a national court has found it necessary to seek a preliminary ruling on a question concerning the EU law at issue in the proceedings on the substance must be considered a decisive factor in determining whether there was an obvious infringement of that law on the part of the Member State.
- 49 First of all, it should be borne in mind that the principle of State liability for loss and damage caused to individuals as a result of infringements of EU law for which the State can be held responsible is inherent in the system of the Treaty (*Francovich and Others*, EU:C:1991:428, paragraph 35; *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 31; and *British Telecommunications*, C-392/93, EU:C:1996:131, paragraph 38).
- 50 Similarly, it should be recalled that the Court has also held that EU law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the infringement must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties (*Brasserie du pêcheur and Factortame*, EU:C:1996:79, paragraph 51).

- 51 As regards the second condition, after stating that the decisive test for finding that an infringement of EU law is sufficiently serious is whether the Member State concerned manifestly and gravely disregarded the limits of its discretion, the Court indicated the criteria that national courts — which have sole jurisdiction to find the facts in the main proceedings and to decide how to characterise the infringements of EU law at issue — may take into account, such as the degree of clarity and precision of the rule infringed (*Brasserie du pêcheur and Factortame*, EU:C:1996:79, paragraphs 55, 56 and 58).
- 52 However, the Court has consistently held that national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of, or consideration of the validity of, provisions of EU law (*Križan and Others*, C-416/10, EU:C:2013:8, paragraph 64).
- 53 In addition, as the Advocate General noted in point 62 of his Opinion, the simple act of referring a question cannot limit the freedom of the court ruling on the substance. The answer to the question whether an infringement of EU law was sufficiently serious follows not from action taken on the basis of Article 267 TFEU, but from the interpretation provided by the Court.
- 54 It should be noted that the discretion of national courts to make a reference to the Court if they consider it necessary to obtain an interpretation of a provision of EU law, even if the question raised has already been dealt with, would undoubtedly be limited if the exercise of that discretion were a decisive factor in determining whether or not there had been an obvious infringement of EU law, in order to appraise, where appropriate, the liability of the Member State concerned for infringement of EU law. Such an effect would thus compromise the system, the purpose and the characteristics of the preliminary reference procedure.
- 55 In the light of the foregoing considerations, the answer to Question 3 is that the fact that, in relation to a claim for damages for infringement of EU law, a national court has found it necessary to seek a preliminary ruling on a question concerning the EU law at issue in the proceedings on the substance must not be considered a decisive factor in determining whether there was an obvious infringement of that law on the part of the Member State.

Costs

- 56 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:

- 1. Article 16(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 must be interpreted as meaning that a third-country national who, during a continuous period of five years before the transposition date for that directive, has resided in a Member State as the spouse of a Union citizen working in that Member State, must be regarded as having acquired a right of permanent residence under that provision, even though, during that period, the spouses decided to separate and commenced residing with other partners, and the home occupied by that national was no longer provided or made available by his spouse with Union citizenship.**

2. **The fact that, in relation to a claim for damages for infringement of EU law, a national court has found it necessary to seek a preliminary ruling on a question concerning the EU law at issue in the proceedings on the substance must not be considered a decisive factor in determining whether there was an obvious infringement of that law on the part of the Member State.**

[Signatures]