



Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 20 May 2014¹

Case C-202/13

**Sean Ambrose McCarthy
Helena Patricia McCarthy Rodriguez
Natasha Caley McCarthy Rodriguez**

v

Secretary of State for the Home Department

(Request for a preliminary ruling from the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) United Kingdom)

(Right of entry and of short-term residence — Third-country national, member of the family of a Union national, in possession of a residence card issued by a Member State — National legislation making entry to the national territory subject to the prior obtaining of an entry permit)

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¹ — Original language: French

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I – Introduction

1. A Member State has implemented and maintains in force a measure of general application under which third-country nationals, members of the family of a citizen of the Union, who wish to enter that Member State are required to be in possession of an entry visa issued by that State.

2. The present case marks the first occasion on which the Court has been requested to give a preliminary ruling on the interpretation, first, of Article 35 of Directive 2004/38/EC² and, secondly, of Article 1 of Protocol No 20 annexed to the Treaty on the Functioning of the European Union (‘the FEU Treaty’).³

3. In order to answer that question, the Court is required, in particular, to rule on the applicability of Directive 2004/38 to a third-country national, residing with her spouse and her daughter, Union citizens, in a Member State other than that of which the latter are nationals, who wishes to accompany them on short trips to the Member State of which they are nationals. Although a question closely related to this one has already been dealt with by the Court in its recent judgment in *O. and B.*,⁴ the solution adopted in that judgment does not seem satisfactory in the light of the circumstances of the present case. I shall therefore propose a more general solution that will make it possible to ensure consistency between the scope of the FEU Treaty and that of Directive 2004/38.

II – Legal framework

A – EU law

1. The Treaty on the Functioning of the European Union

4. Article 20(1) TFEU establishes EU citizenship and provides that ‘[e]very person holding the nationality of a Member State’ is an EU citizen. In accordance with Article 20(2)(a), EU citizens have ‘the right to move and reside freely within the territory of the Member States’.

5. Article 21(1) TFEU adds that that right is ‘subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect’.

2 — 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).

3 — Protocol on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland.

4 — C-456/12, EU:C:2014:135.

2. Protocol No 20

6. Article 1 of Protocol No 20 provides:

‘The United Kingdom shall be entitled, notwithstanding Articles 26 and 77 of the Treaty on the Functioning of the European Union, any other provision of that Treaty or of the Treaty on European Union, any measure adopted under those Treaties, or any international agreement concluded by the Union or by the Union and its Member States with one or more third States, to exercise at its frontiers with other Member States such controls on persons seeking to enter the United Kingdom as it may consider necessary for the purpose:

- (a) of verifying the right to enter the United Kingdom of citizens of Member States and of their dependants exercising rights conferred by Union law, as well as citizens of other States on whom such rights have been conferred by an agreement by which the United Kingdom is bound; and
- (b) of determining whether or not to grant other persons permission to enter the United Kingdom.

Nothing in Articles 26 and 77 of the Treaty on the Functioning of the European Union or in any other provision of that Treaty or of the Treaty on European Union or in any measure adopted under them shall prejudice the right of the United Kingdom to adopt or exercise any such controls. References to the United Kingdom in this Article shall include territories for whose external relations the United Kingdom is responsible.’

3. Directive 2004/38

7. It is apparent from recital 5 in the preamble to that directive that ‘[t]he right of all European Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, also be granted to their family members, irrespective of nationality’.

8. In accordance with recital 28 to Directive 2004/38, ‘[t]o guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures’.

9. As regards the scope *ratione personae* of Directive 2004/38, Article 3(1), 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.’

10. As regards the right of entry of Union nationals and family members who are third-country nationals, Article 5(1) and (2) of Directive 2004/38 provides:

‘1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

No entry visa or equivalent formality may be imposed on Union citizens.

2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.

Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.'

11. As regards the right of residence of, and the issue of residence cards to, family members of a Union national who are third-country nationals, Article 10 of that directive provides:

'1. 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.

2. For the residence card to be issued, Member States shall require presentation of the following documents:

- (a) a valid passport;
- (b) a document attesting to the existence of a family relationship or of a registered partnership;
- (c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;
- (d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;
- (e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;
- (f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.'

12. In accordance with Article 11 of Directive 2004/38, the residence card issued on the basis of Article 10 is, in principle, to be valid for five years. Articles 12 to 15 lay down rules on the retention and the loss of the right of residence of family members of the EU citizen.

13. As regards the adoption of measures to prevent any abuse of the rights conferred by Directive 2004/38, Article 35 provides:

'Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.'

4. Regulation (EC) No 539/2001

14. Recital 4 in the preamble to Regulation (EC) No 539/2001⁵ states that, '[p]ursuant to Article 1 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, Ireland and the United Kingdom are not participating in the adoption of this Regulation. Consequently and without prejudice to Article 4 of the aforementioned Protocol, the provisions of this Regulation apply neither to Ireland nor to the United Kingdom.'

5. Regulation (EC) No 562/2006

15. Regulation (EC) No 562/2006⁶ provides for there to be no border control of persons crossing the internal borders between the Member States of the European Union and establishes rules governing border control of persons crossing the external borders of the Member States of the European Union. According to recital 27 in the preamble thereto, that regulation 'constitutes a development of provisions of the Schengen *acquis* in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis*... The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application'.

B – *National law*

16. As concerns the right of entry of third-country nationals who are family members of a Union national, regulation 11, paragraphs 2 to 4, of the Immigration (European Economic Area) Regulations 2006/1003 ('the Immigration Regulations') provides:

'(2) A person who is not an EEA national must be admitted to the United Kingdom if he is a family member of an EEA national, a family member who has retained the right of residence or a person with a permanent right of residence under regulation 15 and produces on arrival —

(a) a valid passport; and

(b) an EEA family permit, a residence card or a permanent residence card.

(3) An immigration officer may not place a stamp in the passport of a person admitted to the United Kingdom under this regulation who is not an EEA national if the person produces a residence card or permanent residence card.

(4) Before an immigration officer refuses admission to the United Kingdom to a person under this regulation because the person does not produce on arrival a document mentioned in paragraph (1) or (2), the immigration officer must give the person every reasonable opportunity to obtain the document or have it brought to him within a reasonable period of time or to prove by other means that he is —

(a) an EEA national;

5 — Council Regulation (EC) of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2001 L 81, p. 1).

6 — Regulation of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1).

- (b) a family member of an EEA national with a right to accompany that national or join him in the United Kingdom; or
- (c) a family member who has retained the right of residence or a person with a permanent right of residence ...'

17. As regards the issue of an EEA family permit referred to in regulation 11 of the Immigration Regulations, regulation 12, paragraphs 1, 4 and 5 of those regulations provides:

'(1) An entry clearance officer must issue an EEA family permit to a person who applies for one if the person is a family member of an EEA national and —

- (a) the EEA national:
 - (i) is residing in the UK in accordance with these Regulations; or
 - (ii) will be travelling to the United Kingdom within six months of the date of the application and will be an EEA national residing in the United Kingdom in accordance with these Regulations on arrival in the United Kingdom; and
 - (b) the family member will be accompanying the EEA national to the United Kingdom or joining the EEA national there and —
 - (i) is lawfully resident in an EEA State; or
 - (ii) would meet the requirements in the immigration rules (other than those relating to entry clearance) for leave to enter the United Kingdom as the family member of the EEA national or, in the case of direct descendants or dependent direct relatives in the ascending line of his spouse or his civil partner, as the family member of his spouse or his civil partner, were the EEA national or the spouse or civil partner a person present and settled in the United Kingdom.
- (4) An EEA family permit issued under this regulation shall be issued free of charge and as soon as possible.
- (5) But an EEA family permit shall not be issued under this regulation if the applicant or the EEA national concerned falls to be excluded from the United Kingdom on grounds of public policy, public security or public health in accordance with regulation 21.'

III – The facts giving rise to the main proceedings

18. Mr Sean Ambrose McCarthy has dual British and Irish nationality.⁷ He is married to a Colombian national and the couple have a daughter.

⁷ — In using the expression 'British nationality', I am employing, here and below, the words of the order for reference.

19. According to the information provided by the claimants' representatives at the hearing before the Court, Mr McCarthy has the status of a 'British subject with a right of abode in the United Kingdom'.⁸ He has this status because he was born in Ireland before the entry into force of the British Nationality Act 1948.⁹

20. In addition, it is also apparent from the observations submitted at the hearing that Mr McCarthy has lived in Ireland for 52 years, while he has lived in the United Kingdom for only six years, between 1967 and 1973.

21. As regards his daughter, her dual British and Irish nationality is the consequence of both her father's status and the fact that she was born in the United Kingdom, although she has never been resident in that Member State.

22. Ms Helena Patricia McCarthy Rodriguez is the holder of an EU family member's residence card issued by the Spanish authorities on the basis of Article 10 of Directive 2004/38.¹⁰

23. The claimants in the main proceedings have since May 2010 lived in Spain, where they own a house. They also own a house in the United Kingdom, to which they regularly travel.

24. According to the provisions of national immigration law, in order to be able to travel to the United Kingdom a holder of a residence card must apply for an entry permit ('the EEA family permit'), valid for six months. This family permit may be renewed, provided that the holder personally attends a United Kingdom diplomatic mission abroad and completes a form containing details of the applicant's finances and employment.

25. In Spain, as the seat of the United Kingdom diplomatic mission is in Madrid, Ms McCarthy is required to travel from Marbella, where the family live, to Madrid whenever she wishes to renew her family permit in order to travel to the United Kingdom with her family. She has been denied permission to board flights to the United Kingdom when she has presented only her residence card and not the family permit.

26. As is apparent in the order for reference, the Secretary of State for the Home Department¹¹ ('the Secretary of State') has issued instructions to carriers to discourage them from transporting passengers who are third-country nationals and who are not in possession of a residence permit issued by the United Kingdom authorities or travel documents such as a valid EEA family permit.¹²

27. On 6 January 2012, the claimants in the main proceedings issued proceedings before the referring court against the United Kingdom of Great Britain and Northern Ireland, seeking a declaration that the latter had failed to fulfil its obligation properly to transpose into its legal order Article 5(2) of Directive 2004/38. They claimed that the United Kingdom's failure properly to transpose that provision, and the issuing of instructions to carriers, constituted a serious breach of their rights of freedom of movement.

8 — This footnote does not concern the English version.

9 — An Act to make provision for British nationality and for citizenship of the United Kingdom and Colonies and for purposes connected with the matters aforesaid, 30 July 1948. However, under the New Declaration of the United Kingdom of 1 January 1983 on the definition of the term 'nationals' (OJ 1983 C 23, p. 1), the term 'nationals' must be understood as referring not only to British citizens *stricto sensu*, but also to British subjects who have the right of abode in the United Kingdom and are therefore exempt from United Kingdom immigration control, as in the case of Mr McCarthy (the 1983 declaration was made on the entry into force, on 1 January 1983, of the British Nationality Act 1981).

10 — It is apparent from the documents before the Court that this residence card will expire on 25 April 2015.

11 — This footnote does not concern the English version.

12 — Under section 40 of the Immigration and Asylum Act 1999, a carrier who fails to meet that requirement is required to pay a 'charge'.

28. In that regard, as stated in the order for reference, the European Commission sent the United Kingdom a letter of formal notice under Article 258 TFEU on 22 June 2011, in which it concluded that there had been a failure properly to transpose Article 5(2) of Directive 2004/38. The United Kingdom replied on 22 September 2011. The Commission sent the United Kingdom a reasoned opinion to the same effect on 26 April 2012, to which the United Kingdom replied on 24 July 2012.

29. It is also stated in the order for reference that the claimants in the main proceedings argued, in particular, that the conditions of the family permit arrangements applied to holders of residence cards caused expense and inconvenience for the family.¹³

30. By consent of the parties to the main proceedings, Ms McCarthy obtained, before the referring court, interim relief in the form of measures whereby she is able to secure the renewal of her family permit upon written application by post to the diplomatic mission in Madrid without being required to attend in person.

31. For her part, the Secretary of State maintained that the Immigration Regulations did not implement Article 5(2) of Directive 2004/38 and that they were justified as a ‘necessary measure’ under Article 35 of that directive, and also as a ‘control’ within the meaning of Article 1 of Protocol No 20. She claimed that it was necessary to take into account the absence of a uniform model applicable to the residence cards referred to in Article 10 of Directive 2004/38. In particular, those cards are not translated into English and are susceptible to forgery.¹⁴ The Secretary of State further claimed that ‘there is a systemic problem of abuse of rights and fraud by third-country nationals’¹⁵ and adduced evidence to that effect before the referring court.¹⁶

32. After examining that evidence, the referring court concluded that it shared the Secretary of State’s concerns as to an abuse of rights.

IV – The questions referred and the procedure before the Court

33. It was in those circumstances that the referring court, by order of 25 January 2013, received at the Court Registry on 17 April 2013, decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘(1) Does Article 35 of [Directive 2004/38] entitle a Member State to adopt a measure of general application to refuse, terminate, or withdraw the right conferred by Article 2 of [that] directive exempting non-national EU family members who are holders of residence cards issued pursuant to Article 10 of [that] directive from visa requirements?
- (2) Can Article 1 of Protocol No. 20 on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland entitle the United Kingdom to require residence card holders to have an entry visa which must be obtained prior to arrival at the frontier?

13 — They refer, in that regard, to the procedure for renewing the ‘family permit’, under which they are required to travel to and stay in Madrid.

14 — It is apparent from the order for reference that the Secretary of State refers, in particular, to an analysis carried out by the United Kingdom Border Agency in 2011 of the residence cards issued by other Member States by reference to the minimum security standards agreed by the International Civil Aviation Organisation for machine-readable travel documents.

15 — This expression, and also ‘systemic abuse’, are used in the order for reference to refer to the abuse by third-country nationals of the right of freedom of movement and in particular the right of entry enjoyed by family members who are not EEA nationals in order to circumvent national immigration controls.

16 — It should be noted, in that regard, that the residence cards issued by the Federal Republic of Germany and the Republic of Estonia generally satisfy the appropriate security standards, in particular those set by the International Civil Aviation Organisation, so that it is proposed to amend the Immigration Regulations for persons in possession of a residence card issued by one of those two Member States.

(3) If the answer to question 1 or question 2 is yes, is the United Kingdom's approach to residence card holders in the present case justifiable, having regard to the evidence summarised in the referring court's judgment?

34. Written observations have been submitted by the claimants in the main proceedings, the Hellenic Republic, the Kingdom of Spain, the Republic of Poland, the Slovak Republic, the United Kingdom and the Commission.

35. The claimants in the main proceedings, the Hellenic Republic, the Kingdom of Spain, the United Kingdom and the Commission also submitted oral observations at the hearing on 4 March 2014.

V – Analysis

36. The request for a preliminary ruling seeks, in essence, to ascertain whether Article 35 of Directive 2004/38 and Protocol No 20 allow the United Kingdom to adopt measures, such as those at issue in the main proceedings, which generally make the right of entry to the United Kingdom of third-country nationals who have a residence card as a family member of a citizen of the Union subject to the prior issue of an entry visa.

37. I shall examine below, first of all, whether a person in a situation such as Ms McCarthy's may benefit from the provisions of secondary legislation which, on certain conditions, exempt the members of the family of a Union citizen who are not nationals of a Member State from the obligation to obtain an entry visa. If the answer to that question is in the affirmative, I shall then consider whether the United Kingdom is entitled, on the basis of Article 35 of Directive 2004/38, to impose on third-country nationals who are family members of a Union citizen and have a residence card within the meaning of Article 10 of that directive, issued by another Member State, the obligation to have a 'family permit' in order to be able to enter the United Kingdom. Finally, I shall discuss the same question, but this time by reference to Protocol No 20.

A – *The applicability of Directive 2004/38*

38. It should be made clear at the outset that the parties and the interveners, with the exception of the United Kingdom, have not disputed the applicability of Directive 2004/38, either in their written observations or in their oral submissions at the hearing.¹⁷ And, even though the United Kingdom did indeed dispute in detail the applicability of the directive during the hearing, it none the less applies that directive in the present case. Nor does the referring court raise that question: it has also based its reasoning on the applicability of the directive. None the less, I consider that the question of its applicability merits examination.

¹⁷ — As regards the Republic of Poland, it merely raised the question of the applicability of that directive to the present case.

1. Preliminary observations and particular features of the case

39. When it introduced citizenship of the Union in 1992,¹⁸ the Treaty of Maastricht marked the end of a long evolution.¹⁹ A long road was travelled between the ‘citizen’s Europe’,²⁰ discussed in the 1970s and 1980s, and the present citizenship of the Union, the guiding principle being, in particular, the rights of freedom of movement and freedom of residence in the territory of the Member States. Today citizenship of the Union represents the status of all citizens, whether economically active²¹ or not.²² Its introduction into the Treaties therefore conferred legitimacy on the process of European integration by reinforcing the participation of citizens.

40. Since then, citizens of the Union who move within the territory of the Member States not only integrate the movements central to their daily life, but also see therein a central element of the way in which they perceive themselves as citizens of the Union. All the rights and obligations that are granted to and imposed on Union citizens, and the members of their family too, facilitate, in particular, their movement, their residence, their access to studies, their search for employment or their work. Their citizenship is therefore an essential element of their European identity.²³

41. In the situation at issue in the main proceedings, Ms McCarthy, a third-country national, sought a right of entry to the Member State of which her spouse and her daughter are nationals, namely: the United Kingdom, in order to accompany them there, in particular on short trips.

42. Furthermore, the claimants in the main proceedings are established in a Member State other than that of which Mr McCarthy is a national, namely: in Spain, and the Spanish authorities have issued a residence card to Ms McCarthy on the basis of Article 10 of Directive 2004/38.

43. The trips at issue are therefore short trips to the Member State of which Mr McCarthy and his daughter, Union citizens who have made use of their right of freedom of movement, are nationals.

44. It should be noted at this point that it was stated at the hearing, as is apparent from points 19 to 21 of this Opinion, that Mr McCarthy’s and his daughter’s dual British and Irish nationality is the result of particular historical circumstances.

18 — It should be noted that the former Article 17(1) of the EC Treaty provided that ‘Citizenship of the Union shall complement and not replace national citizenship’. That sentence, which had been added by the Treaty of Amsterdam (OJ 1997 C 340, p. 1), was amended by the Treaty of Lisbon, Article 20(1) of which provides that citizenship ‘shall be additional to and not replace national citizenship’. See also Article 9 of the EU Treaty. For an analysis of that amendment, see H. De Waele, ‘EU citizenship: Revisiting its Meaning, Place and Potential’, *European Journal of Migration and Law*, 12 (2010), p. 319 to 336, p. 320.

19 — For an historical account of the construction of European citizenship, see S. O’Leary, *The evolving Concept of Community Citizenship, From the Free Movement of Persons to Union Citizenship*, The Hague, London, Boston (Kluwer), 1996, p. 4, and M. Carabot Benlolo, *Les fondements juridiques de la citoyenneté européenne*, Bruylant, 2007, p. 1.

20 — See the Tindemans Report of 29 December 1975, *Bulletin of the European Communities*, Supplement 1/76, and the Report from the ad hoc Committee on a People’s Europe, *Bulletin of the European Communities*, No 3/1985.

21 — See Articles 26 TFEU, 45 TFEU, 49 TFEU and 56 TFEU. The rights enjoyed by employed persons, self-employed persons or service-providers precede the introduction of citizenship of the Union and are an aspect of the internal market.

22 — Article 21 TFEU.

23 — A survey carried out in 2010 showed that almost nine out of 10 citizens knew that they had the right to free movement. See the Commission’s EU Citizenship Report 2010, ‘Dismantling the obstacles to EU citizens’ rights’ (COM(2010) 603 final, p. 16). Citizenship of the Union is virtually synonymous with freedom of movement. See Proposal of 11 August 2011 for a Decision of the European Parliament and of the Council on the European Year of Citizens (2013) (COM(2011) 489 final, p. 1).

45. However, as Union law now stands, the question whether a person does or does not have the nationality of a particular Member State depends solely on the content of the national law of the Member State concerned.²⁴ In that regard, the Court has asserted that ‘it is for each Member State, having due regard to international law, to lay down the conditions for the acquisition and loss of nationality’.²⁵

46. Consequently, by virtue of the 1983 declaration,²⁶ and for the purposes of EU law, Mr McCarthy and his daughter are British nationals.²⁷

2. Analysis of the derived right of residence in the recent case-law of the Court

47. In order to determine whether a derived right of residence may be based on Directive 2004/38, it is appropriate to begin with Article 3 of that directive. In that regard, the Court, in its case-law, has given the provisions of that directive a literal, systematic and teleological interpretation, which it confirmed in its very recent judgment in *O. and B.*²⁸

48. In its reasoning, the Court emphasised, first, that while Article 21 TFEU provides that every citizen of the Union is to have the right to move and reside freely within the territory of the Member States, that right is not absolute, but is to be exercised, according to that article, ‘subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect’.²⁹ The Court observed, secondly, with respect to Directive 2004/38, that that directive 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.³⁰

49. Thus, the Court indicated that neither Article 21(1) TFEU nor the provisions of Directive 2004/38 confer any autonomous right on third-country nationals. Any rights conferred on third-country nationals by the Treaty provisions on Union citizenship are not rights specific to those nationals but rights derived from the exercise of freedom of movement by a Union citizen.³¹

50. In that regard, the Court stated that it follows from a literal, systematic and teleological interpretation of Directive 2004/38 that that directive 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.³² More specifically, the scope *ratione personae* of Directive 2004/38 is determined by Article 3(1), which provides that the directive is to apply to 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.³³

24 — See, in particular, Declaration No 2 on nationality of a Member State, annexed by the Member States to the Final Act of the Treaty on European Union (OJ 1992 C 191, p. 98), and Article 3 of the European Convention on Nationality, which was adopted by the Council of Europe on 6 November 1997 and entered into force on 1 March 2000. The Kingdom of Spain and the United Kingdom have not signed or ratified that Convention.

25 — See, in particular, Cases C-369/90 *Micheletti and Others* EU:C:1992:295, paragraph 10; C-192/99 *Kaur* EU:C:2001:106, paragraph 19; and C-200/02 *Zhu and Chen* EU:C:2004:639, paragraph 37.

26 — See footnote 9.

27 — It should be observed at this point that the Court has considered that freedom of movement for persons, freedom of establishment and freedom to provide services would not be fully realised if a Member State were entitled to refuse to grant the benefit of the provisions of EU law to those of its nationals who are established in another Member State of which they are also a national and who take advantage of the facilities offered by EU law to pursue their activities in the territory of the first State by way of the provision of services. See Case 282/86 *Gullung* EU:C:1988:15, paragraph 12.

28 — EU:C:2014:135.

29 — *Ibid.* (paragraph 34).

30 — *Ibid.* (paragraph 35).

31 — *Ibid.* (paragraph 36).

32 — *Ibid.* (paragraph 37).

33 — Emphasis added.

51. Consequently, on the Court's interpretation, only a beneficiary within the meaning of Article 3 of Directive 2004/38 may derive rights of freedom of movement and of residence under that directive. Such a beneficiary may be a Union citizen or a family member, as defined in Article 2(2).³⁴

52. When applied to the present case, that means that the situation of Ms McCarthy, as the spouse of a Union citizen, comes within the concept of 'family member' referred to in Article 2(2)(a) of Directive 2004/38.³⁵ However, as the Polish Government has noted in its written submissions, Mr McCarthy and his daughter 'move to' the Member State of which they are nationals and not, as provided for in Article 3 of Directive 2004/38, to a Member State other than that of which they are nationals. In other words, it appears, in principle, that the conditions for the application of Article 3(1) of Directive 2004/38 cannot be satisfied where the Union citizen moves to the Member State of which he is a national.

53. According to the Court's consistent case-law, the reasonableness, at least, of such an interpretation is confirmed by the fact that other provisions of Directive 2004/38, in particular Articles 6, 7(1) and (2) and 16(1) and (2), refer to the *right of residence*³⁶ of a Union citizen and to the derived right of residence of his family members, either in 'another Member State' or in 'the host Member State'. Consequently, it follows from that case-law that a third-country national, a family member of a Union citizen, cannot, in principle, rely, on the basis of that directive, on a derived right of residence in the Member State of which that citizen is a national.³⁷

54. Thus, as regards the purpose of the derived rights of entry and residence for which Directive 2004/38 provides in the case of family members of Union citizens, the Court observes that that directive is intended to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States.³⁸ However, the Court makes clear that the subject of the directive concerns, as is apparent from Article 1(a), the conditions governing the exercise of that right.³⁹ In that regard, still according to the Court's case-law, given that, by virtue of a principle of international law,⁴⁰ a State may not refuse its own nationals the right to enter its territory and to remain there, Directive 2004/38 governs only the conditions of entry and residence of a Union citizen in Member States other than that of which he is a national.⁴¹

55. Are we therefore to conclude that Directive 2004/38 does not apply in situations such as that in the main proceedings?

56. I am not convinced that that is the case. I think, on the contrary, that the scope of Directive 2004/38 must be given a broader interpretation, in such a way that it is not deprived of its practical effect.

34 — See, in particular, the Opinion of Advocate General Sharpston in *O. and B.* EU:C:2014:135, paragraph 68.

35 — See Case C-40/11 *Iida* EU:C:2012:691, paragraph 57.

36 — My emphasis.

37 — *O. and B.*, EU:C:2014:135, paragraph 40.

38 — See Cases C-127/08 *Metock and Others* EU:C:2008:449, paragraphs 59 and 82; C-434/09 *McCarthy* EU:C:2011:277, paragraph 28; and C-256/11 *Dereci and Others* EU:C:2011:734, paragraph 50.

39 — See *McCarthy* EU:C:2011:277, paragraph 33, and *O. and B.* EU:C:2014:135, paragraph 41.

40 — This principle has been codified, in writing, in Article 3 of Protocol No 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, of 16 September 1963, which provides that '[n]o one shall be deprived of the right to enter the territory of the State of which he is a national'. I note, however, that the United Kingdom has not ratified that protocol. The protocol entered into force on 2 May 1968.

41 — *McCarthy* EU:C:2011:277, paragraph 29, and *O. and B.* EU:C:2014:135, paragraphs 41 and 42.

57. Thus, in order to be able to determine whether, in the situation described at points 41 to 43 of this Opinion, Ms McCarthy may be relieved of the obligation to obtain an entry visa as a member of the family of a Union citizen, it seems necessary to ask the following question: would Directive 2004/38, interpreted in the light of Article 21 TFEU, enable such a right to be based on the prior or simultaneous exercise of Mr McCarthy's freedom of movement?

58. In order to answer that question, it must first of all be observed that, on the basis of the Treaties, the Court has recognised two types of right of residence for family members in the State of which the Union citizen is a national.⁴² The first relates to the right of family reunification granted to the citizen following the prior or simultaneous exercise of freedom of movement, and based on the prohibition of obstacles.⁴³ The second flows from the practical effect of Article 20 TFEU and aims to prevent citizens being deprived of the enjoyment of the substance of rights conferred on them by citizenship of the Union.⁴⁴

59. In the context of this Opinion, only the first type of right of residence referred to above needs to be analysed. In my view, that first type concerns two kinds of situation, which will be analysed below. The first concerns the situation of a citizen who 'has exercised' his right of freedom of movement and travels to the Member State of which he is a national (prior exercise) and the second the situation of a citizen who 'exercises' his right of freedom of movement when he travels to that Member State (simultaneous exercise).

3. Applicability of Directive 2004/38 in a case in which the Union citizen, who has made genuine and prior use of his freedom of movement, travels to the Member State of which he is a national

60. It is appropriate to adopt a broad interpretation of Directive 2004/38 that will enable it to be applied to Union citizens and to third-country national family members who travel to the Member State of which those citizens are nationals. To my mind such an interpretation is justified not only in the light of the role played by citizenship as Union law currently stands, as is apparent from the observations set out at points 39 and 40 of this Opinion, but also in the light of the relevant case-law of the Court.

a) Teleological justification for a broader interpretation of Directive 2004/38

61. The status of citizen of the Union is 'destined to be the fundamental status of nationals of the Member States'.⁴⁵ Accordingly, by travelling from one Member State to another, including the State of which they are nationals, those citizens are merely exercising the rights of freedom of movement and of residence conferred by EU law.

62. In today's European Union, a citizen's origins may lie in a Member State of which he is not a national⁴⁶ or he may be a national of one (or of several) Member State(s) in which he has never lived.⁴⁷ He may also have several nationalities, or indeed live in two or more Member States, while retaining genuine links, both occupational and personal, with all those States.

42 — See G. Gastaldi, 'Citoyenneté de l'Union et libre circulation: du critère économique au statut unique', *Dossiers de droit européen*, 28, 2013, p. 127.

43 — See Cases C-370/90 *Singh* EU:C:1992:296; C-60/00 *Carpenter* EU:C:2002:434; and C-291/05 *Eind* EU:C:2007:771.

44 — See Case C-34/09 *Ruiz Zambrano* EU:C:2011:124.

45 — See Case C-184/99 *Grzelczyk* EU:C:2001:458. That case-law has been upheld in numerous subsequent judgments of the Court, see in particular Case C-524/06 *Huber* EU:C:2008:724.

46 — That is the case, in particular, of citizens of the Union whose parents each have different nationality but who have the nationality of only one of those two Member States.

47 — That is also the case of citizens of the Union whose parents each have different nationality where the child is born in a Member State other than those of which the parents are nationals.

i) No coincidence between the Member State in which a citizen of the Union has his origins and the State of which he is a national

63. It does not seem to me to be consistent with the modern reality of the European Union to regard the country in which a Union citizen has his origins and the country of which he is a national as the same Member State.

64. In that regard, let me illustrate the situation of many Union citizens at the beginning of the 21st century by giving two examples.

65. Let us take, first of all, the case of a French-German couple, F and A. They have lived in the United Kingdom for 25 years. Their son, FA, was born in London and has dual German and French nationality. For several years the son has lived in Berlin, where, after completing a course of training in the hotel and catering business, he has had various jobs. On the other hand, he has spent only very short periods in France, in particular on a number of summer holidays. FA is married to an Argentine national. They have a child, a citizen of the Union, and have been established in Lyons for one year.

66. In that hypothetical situation, was FA to be regarded, when he became established in Lyons, as having returned to France (one of the Member States of which he is a national), although he had never lived there? An affirmative reply would be based on the erroneous idea that FA left France at a given time in his life in order to travel to another Member State.

67. Let us take, next, a second example, that of a Lithuanian-Polish couple, L and P. They have lived in Lithuania for 30 years and have a daughter, LP, who, as she was born in Vilnius, has Lithuanian nationality and therefore cannot have Polish nationality.⁴⁸ During her years of university studies, LP has lived in several Member States, Poland included, where she met her husband, a Chilean national. The couple recently became established in Krakow.

68. In the light of these two examples, am I to consider automatically, without asking myself any questions, that there is always correspondence between the Member State in which a Union citizen has his origins and the State of which he is a national? In FA's case, in spite of having dual French and German nationality, he had never lived in France before becoming established in Lyons. None the less, there can be little doubt that that Member State is one of the countries in which FA has his origins.

69. In LP's case, on the other hand, there can be no doubt that she originates from two Member States. Not only is one of her parents Polish and the other Lithuanian, but she is fluent in both languages and has studied in both of those Member States. However, LP does not have Polish nationality.

70. Consequently, the countries of which FA is a national and those in which he has his origins coincide, whereas that does not apply in the case of LP.

71. To my mind, those two examples reflect the reality of a not insignificant proportion of Union citizens. I now come back to Directive 2004/38.

72. In that regard, if the rights of freedom of movement and of residence are, in principle, granted only to citizens of the Union or to family members who travel to a Member State of which they are not nationals, would it not be paradoxical, to say the least, that LP may rely on Directive 2004/38, but that FA may not?

48 — Lithuanian law does not allow dual nationality.

73. In those circumstances, would Union citizenship not seem to be partly a victim of its own success?

ii) The different directions in which citizens of the Union travel

74. Thus, Directive 2004/38 starts from the hypothesis that, in order to travel within the European Union, a Union citizen would always go from the Member State of which he is a national to another Member State, whereas that is not always the case, as illustrated by the two examples given above. Nor, to my mind, would it be more in keeping with the present reality of Union citizenship to draw up an exhaustive list of the different directions in which Union citizens travel within the European Union.⁴⁹ The EU legislature did not, it seems to me, mean to introduce a limited number of hypothetical examples of movement (*numerus clausus*), in such a way that movement between the host Member State and the Member State of which a Union citizen is a national would be precluded. As I have explained at point 62 of this Opinion, it is difficult to identify all the types of movement that a Union citizen may undertake. Accordingly, I do not think that it would be relevant to interpret Article 3(1) of Directive 2004/38 as meaning that the legislature introduced a limited number of hypothetical examples of movement (*numerus clausus*) and thus excluded from the scope of the directive the cases referred to at points 64 to 73 of this Opinion.

75. In the present case, such an interpretation would lead to the paradoxical result which, at the very least, gives me pause for thought, that Ms McCarthy could accompany her husband when he travels to all the Member States apart from the State of which he is a national! In other words, the right of freedom of movement of a Union citizen who is accompanied by third-country national family members would be reduced in proportion to the number of nationalities which he has! In addition, can we accept an interpretation of Directive 2004/38 that would allow the family members of a Union citizen to be treated differently depending on the Member State to which they travel?

76. In the light of the foregoing considerations, I am convinced that Directive 2004/38 must be interpreted in a way that better reflects the reality of Union citizens if we wish to maintain its practical effect. In order to arrive at such an interpretation, I shall first of all address, very briefly, the relevant case-law of the Court in relation to the derived right of residence.

b) Brief reminder of the relevant case-law on the derived right of residence

77. As I observed at point 58 of this Opinion, the right to be accompanied by a third-country national family member is granted, according to the Court's case-law, to a Union citizen, whether active⁵⁰ or non-active,⁵¹ who returns to the Member State of which he is a national after exercising his freedom of movement (prior exercise) in another Member State in which he resided with that family member. In that regard, let me mention, very briefly, the result which the Court reached in *Singh*⁵² and *Eind*.⁵³

78. In *Singh*,⁵⁴ the Court considered that a citizen who returned to the Member State of which he was a national in order to pursue an activity as a self-employed person, after having worked as an employed person for a time in another Member State, derived from the Treaties and from secondary legislation the right to be accompanied by his spouse, a third-country national, on the same conditions as those

49 — See, *contra*, Opinion of Advocate General Sharpston in *O. and B.* EU:C:2013:837, point 77.

50 — See *Singh* EU:C:1992:296.

51 — See *Eind* EU:C:2007:771.

52 — EU:C:1992:296.

53 — EU:C:2007:771.

54 — EU:C:1992:296.

provided for in the secondary legislation.⁵⁵ Otherwise he might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person in another Member State.⁵⁶ As regards the legal basis of that judgment, I would point out that the operative part of *Singh* reads as follows: ‘Article 52 of the [EEC] Treaty and Council Directive 73/148 ..., properly construed, require a Member State to grant leave to enter and reside in its territory to the spouse, of whatever nationality, of a national of that State who has gone, with that spouse, to another Member State in order to work there as an employed person ... and returns to establish himself ... in the State of which he ... is a national ...’.⁵⁷ However, the Court appears to have applied Directive 73/148 only by analogy, as it expressly did subsequently in *Eind*⁵⁸ and *O. and B.*⁵⁹

79. In *Eind*,⁶⁰ the Court considered that a national of a Member State who had brought his daughter from a third country when he was working in another Member State was entitled to be accompanied by her when he returned, as a non-active person, to the Member State of which he was a national. The Court considered the deterrent effect that would derive simply from the prospect of not being able, on returning to the Member State of which he was a national, to continue living together with the members of his family. Thus, the reasoning in *Eind*⁶¹ is based on the provisions of the Treaty and also on the provisions of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ English Special Edition 1968(II), p. 475). In that regard, the Court ruled that ‘the right of the migrant worker to return and reside in the Member State of which he is a national, after being gainfully employed in another Member State, is conferred by Community law, to the extent necessary to ensure the useful effect of the right to free movement for workers under Article 39 EC and the provisions adopted to give effect to that right, such as those laid down in Regulation No 1612/68. That interpretation is substantiated by the introduction of the status of citizen of the Union, which is intended to be the fundamental status of nationals of the Member States.’⁶² However, the Court clearly stated that Regulation No 1612/68 applied ‘by analogy’.⁶³

80. More recently, in *O. and B.*, the Court considered that Article 21(1) TFEU must be interpreted as meaning that Directive 2004/38 applies *by analogy*⁶⁴ where a Union citizen has created or strengthened a family life with a third-country national during genuine residence, pursuant to and in accordance with the conditions set out in Article 7(1) and (2) or Article 16(1) and (2) of Directive 2004/38, in a Member State other than that of which he is a national and returns, with the family member in question, to the Member State of which he is a national.⁶⁵

81. First, it follows from that case-law of the Court that the right of residence of a Union citizen and of his third-country national family members in the Member State of which he is a national following the ‘prior’ exercise of the right of freedom of movement is accepted, on the basis not only of primary law but also of secondary legislation. In other words, the Court accepts that right of residence when the Union citizen in question definitively returns to his Member State of origin after a period of residence in another State.

55 — Derived rights of residence have been accepted by the Court on the basis of Article 52 of the EEC Treaty (now Article 49 TFEU) and Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14), which was repealed and replaced by Directive 2004/38.

56 — See *Singh* EU:C:1992:296, paragraphs 19 and 20.

57 — *Ibid.* (paragraph 21).

58 — EU:C:2007:771.

59 — EU:C:2014:135.

60 — EU:C:2007:771.

61 — *Ibid.*

62 — *Ibid.* (paragraph 32).

63 — *Ibid.* (operative part).

64 — Emphasis added.

65 — *O. and B.* (EU:C:2014:135, paragraph 61 and operative part).

82. Secondly, it follows from that case-law that the Court based its reasoning in those judgments on the Treaty rather than on secondary legislation. However, although I agree with the result at which the Court arrived, I am sceptical about the reasoning which it followed. In those judgments, the Court interpreted the Treaty in the light of secondary legislation, in particular Directive 2004/38.⁶⁶ In that respect, let me at least express some doubt about such an interpretation, in the light of the principle of the hierarchy of primary law and secondary legislation. To my mind, it is secondary legislation that ought to be interpreted in the light of the Treaties, and not vice versa. Would there not otherwise be reason to fear that an act or a practice of the institutions or the Member State would lead to a revision of the Treaties outside the procedures prescribed for that purpose?

83. I therefore think that a less restrictive interpretation of Directive 2004/38 would be more appropriate and would clearly have the effect of ensuring consistency between the scope of the Treaty and that of the directive.

c) Interim conclusion

84. I am of the view that this case is a privileged occasion for the Court to examine the question of the applicability of Directive 2004/38 following the prior exercise of freedom of movement by a Union citizen who travels to the Member State of which he is a national accompanied by a family member who is a third-country national.

85. I consider it necessary, first of all, to give a more consistent interpretation of that directive by reference to the system of sources of EU law and also to the role now played in the Union by Union citizenship. Such an interpretation would avoid in particular, as is apparent from point 75 of this Opinion, illogical results, such as the fact that Ms McCarthy is entitled to accompany her husband when he travels to all the Member States apart from that of which he is a national.

86. Next, the present case provides an opportunity to develop the Court's case-law on the right of a Union citizen to be accompanied in his travels by a third-country national family member, in order better to reflect the reality of movements of Union citizens in today's European Union, where the concept of 'country of origin' is becoming blurred. From that perspective, *O. and B.*⁶⁷ represents a first step in that direction, for the Court ruled in favour of the application by analogy of Directive 2004/38. Yet it is scarcely difficult to imagine that the application by analogy of that directive in its entirety would present many disadvantages.

87. Last, the Court has not taken account of other situations which will doubtless arise in the future, in particular those of Union citizens who have never lived in the Member State of which they are a national. The Court could therefore take this opportunity to make clear that Directive 2004/38 applies to the family members of a Union citizen irrespective of the Member State of destination.

88. On the basis of all the foregoing considerations, I propose that the Court should rule that Directive 2004/38 applies to third-country nationals who are family members of a Union citizen, within the meaning of Article 2(2) of that directive, where, following the prior exercise of the right of freedom of movement by the Union citizen and after he has genuinely resided in another Member State, the citizen and his family members travel to the Member State of which that citizen is a national.

⁶⁶ — Ibid.

⁶⁷ — Ibid.

4. Applicability of Directive 2004/38 when the Union citizen, who makes effective use of his freedom of movement by remaining in the host State, simultaneously exercises it by travelling to the Member State of which he is a national: the case of the right of entry and of short-term residence

89. I have suggested that the Court should extend the scope of Directive 2004/38 to the derived right of residence conferred on a Union citizen who, after having first exercised his freedom of movement, travels to the Member State of which he is a national accompanied by the third-country national family members. In case the Court should not follow that reasoning, I shall also analyse below the applicability of that directive when the Union citizen simultaneously exercises his freedom of movement by travelling to the Member State of which he is a national, from the sole perspective of the right of entry and of short-term residence.

90. In that regard, it should be observed at the outset that the right of entry is guaranteed for all citizens in Article 21 TFEU. Article 5(1) of Directive 2004/38 sets out the conditions for the application of that right, the sole basis for which is possession of Union citizenship. The right of entry is thus closely linked to the right of residence for up to three months provided for in Article 6 of that directive.

a) The exercise of freedom of movement in the host Member State simultaneously with residence in the Member State of which the Union citizen is a national

91. According to the Court's case-law, a Union citizen who, while residing in the Member State of which he is a national with a family member who is a third-country national, simultaneously exercises his freedom of movement in another Member State, benefits from the right of family reunification in respect of that member of his family in the Member State of which he is a national. That is, in particular, the case in *Carpenter*.⁶⁸

92. That judgment concerns a provider of services, established in the Member State of which he is a national, who provided services to recipients residing in other Member States. The Court held that the refusal to authorise the residence of his spouse 'would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom'.⁶⁹ Thus, on the basis of Article 49 of the EC Treaty (now Article 56 TFEU), the Court concluded that the Member State of which Mr Carpenter was a national could not refuse his spouse's right of residence in application of the Treaties, especially as the decision to deport her constituted an interference with the exercise by Mr Carpenter of his right to respect for his family life.⁷⁰

93. In a similar vein, more recently, the Court considered in *S. and G.* that Article 45 TFEU confers on a third-country national who is a member of the family of a Union citizen a derived right of residence in the Member State of which that citizen is a national, when the citizen resides in that Member State but regularly travels to another Member State as a worker within the meaning of that provision, as the refusal to grant such a right of residence discourages the worker from effectively exercising his rights under Article 45 TFEU.⁷¹

94. It follows from those judgments that, in the event of the simultaneous use of freedom of movement, in particular for regular travel which does not entail the establishment of a Union citizen in another Member State, the Court has accepted, principally in the light of primary law, the derived right of residence of the third-country nationals who are members of the family of a Union citizen.

68 — EU:C:2002:434.

69 — Ibid. (paragraph 39).

70 — Ibid. (paragraph 41).

71 — See Case C-457/12 *S and Minister voor Immigratie, Integratie en Asiel* EU:C:2014:136, paragraph 46 and operative part.

b) The exercise of freedom of movement following genuine residence in the host Member State, carried out simultaneously with the exercise of the right of entry and of short-term residence in the Member State of which the Union citizen is a national

95. As a preliminary point, it should be observed that, when a Union citizen has not made use of his right to freedom of movement,⁷² or failing the other conditions required by Article 3(1) of Directive 2004/38, the Court, in its case-law, has not granted the derived right of residence to third-country national family members, either in the context of the directive or in the light of the Treaty.

96. I find it interesting to note, in that regard, that it was precisely in the context of that case-law that the Court upheld the requirement that the conditions for the application of Article 3(1) of Directive 2004/38 be satisfied where a Union citizen travels to the Member State of which he is a national.⁷³ The Court held that not all third-country nationals derive rights of entry into and residence in a Member State from Directive 2004/38, but only those who are ‘family members’, within the meaning of Article 2(2) of that directive, 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.⁷⁴

97. None the less, I question the relevance of transposing that case-law to situations such as that in the main proceedings. In particular, my doubts relate to the exclusion from the scope of Directive 2004/38 of a Union citizen who has exercised his right of freedom of movement in another Member State simultaneously with his travels to the Member State of which he is a national, and of the third-country national family members who accompany him.

98. Unlike in the present case, the Union citizens concerned, in particular, in *McCarthy*,⁷⁵ *Dereci and Others*,⁷⁶ *O and Others*,⁷⁷ *Ymeraga and Ymeraga Tafarshiku*⁷⁸ or *Iida*⁷⁹ either (i) had never exercised their right of freedom of movement, having always resided in the Member State of which they were nationals, or (ii) had not been either joined or accompanied when they travelled to another Member State by the third-country national family member. In those cases, the Union citizens concerned therefore did not satisfy the conditions laid down in Article 3(1) of Directive 2004/38.

99. The facts in the main proceedings may also be distinguished from those giving rise to the recent judgments in *O. and B.* and also *S. and G.*,⁸⁰ because the Union citizens residing in the Member State of which they are nationals either (i) resided in the host Member State not as workers but as Union citizens for the purposes of Article 21(1) TFEU or as recipients of services within the meaning of Article 56 TFEU⁸¹ or (ii) crossed the border to travel to another Member State as workers for an employer established in another Member State or as workers who, in the context of their work for an employer established in the Member State of which they were nationals, regularly travelled to another Member State. In other words, as, moreover, was the case in *Carpenter*, in those judgments the Union citizen had not established himself in the host Member State.

72 — Which is not the case here.

73 — See, in particular, *McCarthy* EU:C:2011:277; *Dereci and Others* EU:C:2011:734; *O. and Others* (C-356/11 and C-357/11, EU:C:2012:776); and *Ymeraga and Ymeraga Tafarshiku* (C-87/12, EU:C:2013:291).

74 — See *Dereci and Others* (EU:C:2011:734, paragraph 56); *Iida* (EU:C:2012:691, paragraph 51); *O and Others* (EU:C:2012:776, paragraph 41); and *O. and B.* (EU:C:2014:135, paragraph 39).

75 — EU:C:2011:277, paragraphs 31 and 39.

76 — EU:C:2011:734, paragraph 54.

77 — EU:C:2012:776, paragraph 42.

78 — EU:C:2013:291, paragraph 30.

79 — EU:C:2012:691, paragraph 65.

80 — EU:C:2014:135 and EU:C:2014:136.

81 — These citizens did not establish themselves in another Member State, as Mr McCarthy did.

100. In that regard, it should be borne in mind that, in the present case, Mr McCarthy and his daughter exercised their right of freedom of movement in that they ‘established themselves in a Member State other than the Member State of which they are nationals’, namely in Spain. Ms McCarthy accompanied them in the latter Member State, where she therefore obtained a residence card within the meaning of Article 10 of Directive 2004/38. The fact that the claimants in the main proceedings are ‘currently’ resident in Spain is evidence of their having established themselves there and, consequently, of the genuineness of their residence. That genuineness of their residence is, according to a recent decision of the Court, a relevant factor for considering that Directive 2004/38 is applicable,⁸² even though it was applied only by analogy.

101. Simultaneously with that genuine residence in Spain as a family member of a Union citizen, Ms McCarthy wished to exercise her derived right of entry and short-term residence in order to accompany her family to the United Kingdom. I am therefore of the view that, in this case, there can be little doubt as to the applicability of Directive 2004/38.

102. That interpretation is supported by the wording of Article 3(1) of Directive 2004/38, which lays down two conditions: (a) that the Union citizen travels to or resides in a Member State other than that of which he is a national; and (b) that the third-country national family member accompanies or joins him.

103. To my mind, there are therefore certain cumulative conditions that must be satisfied at the time when the right of entry and of short-term residence is requested by the family members of the Union citizen concerned. Consequently, since Mr McCarthy and his daughter are lawfully resident in Spain with Ms McCarthy at the time of their short-term journey to the United Kingdom, I consider that the case is covered by that directive. Mr McCarthy ‘resides’ in another Member State, namely Spain, at the time when he relies on the rights thus granted by the directive in order to ‘travel’ to the United Kingdom.

104. Since freedom of movement for persons is one of the foundations of the Union, any derogations from that fundamental freedom must be interpreted strictly.⁸³ In the light of the context and the aims pursued by Directive 2004/38 and also of the fundamental freedom of movement and residence recognised in Article 21(1) TFEU, the provisions of that directive cannot be interpreted restrictively and may not, at all events, be deprived of their practical effect.⁸⁴

c) Interim conclusion

105. In case the Court should not follow my first proposal,⁸⁵ and since Article 5 of Directive 2004/38 provides only for the right of entry, which is closely linked to short-term residence (residence of up to three months),⁸⁶ I propose that the Court should apply Directive 2004/38, at the very least, to Union citizens and to third-country national family members genuinely exercising their freedom of movement by residing in another Member State while simultaneously making short trips to the Member State of which the citizens concerned are nationals. In that case, the Court would exclude

82 — See *O. and B.* (EU:C:2014:135, paragraph 53).

83 — See, by analogy, Case 139/85 *Kempf* EU:C:1986:223, paragraph 13, and Case C-33/07 *Jipa* EU:C:2008:396, paragraph 23. See also the Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38 (COM(2009) 313 final, p. 3 (‘the guidelines’)).

84 — *Metock and Others* EU:C:2008:449, paragraph 84.

85 — See subsection 3 of section A of this Opinion.

86 — It should be observed at this point that, apart from the conditions laid down in Article 5 of Directive 2004/38, Member States may not impose any other requirement on the entry of citizens, such as an entry visa. See Case C-357/98 *Yiadom* EU:C:2000:604, paragraph 23. See also Barnard, C., *The Substantive Law of the EU. The Four Freedoms*, Oxford (Oxford University Press), 2010, p. 424.

from the scope of that directive only situations in which, following the prior exercise of the right of freedom of movement by a Union citizen, that citizen travels with the third-country national family members to the Member State of which he is a national for the purpose of residence other than short-term residence.

B – Identification of measures that can be adopted on the basis of Article 35 of Directive 2004/38

106. The first and third questions, which should be examined together, relate to whether, and on what conditions, Article 35 of Directive 2004/38 allows a Member State which considers that it is faced with a ‘systemic abuse of rights’ when residence cards within the meaning of Article 10 of that directive are issued, to adopt a measure such as the measure at issue in the main proceedings. That measure is of general application and precautionary and does not depend on a prior finding of an abuse of rights in a specific case.

107. In order to answer those questions, I shall begin by briefly considering the concept of abuse of rights in the relevant case-law of the Court. I shall then consider, in the light of that case-law, how Article 35 of Directive 2004/38 should be interpreted in the light, in particular, of the arguments put forward by the United Kingdom Government.

1. The concept of abuse of rights in the relevant case-law of the Court

108. I would observe at the outset that the concept of abuse of rights is one that is known in most Member States. For example, the standard definition of abuse of rights, according to French legal theory, reads as follows: ‘improper use of a legal prerogative; action whereby the holder of a right, a power or a function, in exercising that right, power or function, oversteps the bounds of the rules governing its lawful use’.⁸⁷ Thus, it should be observed that the function of that concept assumes that the person committing the abuse is the holder of a right.⁸⁸

109. The definition in German legal theory is as follows: ‘exercise of a personal right which formally satisfies the requirements of a law but which, in the light of the particular circumstances, is contrary to good faith’.⁸⁹

110. In Polish law, any act or omission by the holder of a right which, although formally corresponding to the use of that right, is exercised in a way that is contrary to the rules of social co-existence or to its socio-economic purpose, cannot be regarded as the exercise of the right in question and is not protected by the law.⁹⁰

111. As regards EU law, since that concept appears only sporadically in secondary legislation,⁹¹ it is necessary, in order to examine it, to refer to the case-law of the Court, which sees it, first, as a principle of national law, in a situation where a legal person relies on EU law ‘with the sole aim of avoiding the application of national law’,⁹² and, secondly, as a principle of EU law, in a situation where a legal person ‘makes fraudulent or improper use of a right conferred on him by EU law’.⁹³

87 — G. Cornu, *Vocabulaire juridique*, Paris PUF, Eighth Edition, June 2009.

88 — D. Simon and A. Rigaux, ‘La technique de consécration d’un nouveau principe général du droit communautaire: l’exemple de l’abus de droit’, *Mélanges en hommage à Guy Isaac : 50 ans de droit communautaire*, Vol. 2 (2004), pp. 559 to 587, p. 563.

89 — ‘Die Ausübung eines subjektiven Rechts ist missbräuchlich, wenn sie zwar formell dem Gesetz entspricht, die Geltendmachung jedoch wegen der besonderen Umstände des Einzelfalls treuwidrig ist’. See Creifelds, *Rechtswörterbuch*, 20th Edition, Munich, 2011, p. 977.

90 — See Article 5 of the Polish Civil Code and P. Machnikowski, *Kodeks cywilny — komentarz*, E. Gniewek (ed.), Warsaw 2006, p. 14.

91 — As, in particular, in Article 35 of Directive 2004/38.

92 — As thus stated, this concept includes purely artificial arrangements or fraud on the competence of EU law, that is to say, abuse which may render EU law applicable by artificially creating a connection with EU law, Lagondet, F., *loc. cit.*, p. 8.

93 — D. Simon and A. Rigaux, *loc. cit.*, p. 564. See also D. Waelbroeck, ‘La notion d’abus de droit dans l’ordre juridique communautaire’, *Mélanges en hommage à Jean Victor Louis*, Vol. I (2003), pp. 565 to 616, p. 597.

112. It follows from the Court's case-law that the concept of abuse of rights is an autonomous concept of EU law, according to which '[a] finding of abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the [EU] rules, the purpose of those rules has not been achieved. It requires, secondly, a subjective element consisting in the intention to obtain an advantage from the [EU] rules by creating artificially the conditions laid down for obtaining it'.⁹⁴

113. For the purposes of the directive, the Commission considers that abuse of rights is 'an artificial conduct entered into solely with the purpose of obtaining the right of free movement and residence under Community law which, albeit formally observing of the conditions laid down by Community rules, does not comply with the purpose of those rules'.⁹⁵

114. The Court has also made clear that it is for the national court to establish the existence of those two objective and subjective elements, evidence of which must be adduced in accordance with the rules of national law, *provided that the effectiveness of [EU] law is not thereby undermined*.⁹⁶ It has also observed that the application of domestic rules on abuse of rights must not prejudice the full effect and uniform application of the EU provisions in the Member States and, in particular, it is not open to national courts, when assessing the exercise of a right arising from an EU provision, to alter the scope of that provision or to compromise the objectives pursued by it.⁹⁷

115. In that regard, it seems to me that there can be little doubt that the United Kingdom has not adduced evidence of an abuse of rights, for no element, either objective or subjective, can be identified in the present case. However, it appears to me to be more appropriate to examine in greater detail the position which I have just put forward when analysing Article 35 of Directive 2004/38 in the light of the case-law of the Court and by reference to the arguments put forward by the United Kingdom.

2. The interpretation of Article 35 of Directive 2004/38 in the light of the case-law of the Court

116. Article 35 of Directive 2004/38 allows Member States, in the case of abuse of rights or fraud, such as marriages of convenience, to adopt the necessary measures to refuse, terminate or withdraw any right conferred by that directive.

117. In that regard, the question arises of the type of measures that Member States are entitled to adopt in order to protect against abuse of rights on the basis of that article: can they adopt only individual measures or also measures that are of general application and precautionary?

118. In order to answer that question, it is necessary to read Article 35 in the light of the case-law of the Court referred to at points 112 and 114 above, according to which, in order to determine whether there is an abuse of rights within the meaning of that article, it is necessary to undertake a two-stage examination in order to ascertain whether those objective and subjective elements are present.⁹⁸

119. Before embarking on such an examination, it is appropriate to ascertain the purpose of Article 5(2) of Directive 2004/38.

94 — *Emsland-Stärke* (C-110/99, EU:C:2000:695, paragraphs 52 and 53).

95 — See COM(2009) 313 final, p. 15.

96 — Emphasis added. *Emsland-Stärke* (EU:C:2000:695, paragraphs 52 to 54) and, more recently, *Hungary v Slovakia* (C-364/10, EU:C:2012:630, paragraph 58).

97 — *Pafitis and Others* (C-441/93, EU:C:1996:92, paragraph 68) and *Kefalas and Others* (C-367/96, EU:C:1998:222, paragraph 22).

98 — See Opinion of Advocate General Sharpston in *Bozkurt* (C-303/08, EU:C:2010:413, point 67).

120. In that regard, it is apparent on reading recital 5 in the preamble to that directive that '[t]he right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, also be granted to their family members, irrespective of nationality ...'.

121. As regards, first, the combination of objective circumstances from which it is apparent that, in spite of formal compliance with the conditions laid down in Directive 2004/38, the objective of Article 5(2) is not achieved, the United Kingdom authorities have, quite simply, failed to fulfil their obligation to examine them. I observe that the Court has consistently held that the examination of the conduct impugned in the context of an abuse of rights must be carried out *in concreto*.⁹⁹ Thus, as is apparent from most of the written observations submitted to the Court, Article 35 of Directive 2004/38 requires that an abuse of rights be established in a specific case before the holder of a residence card, within the meaning of Article 10 of that directive, may be denied the right conferred by Article 5 to enter without a visa.

122. I therefore have no hesitation in asserting that, in this case, the objective element of the abuse of rights alleged by the Secretary of State is wanting, for the purpose of Article 5(2) of Directive 2004/38 has in my view been achieved. The exercise by the claimants in the main proceedings of their right of freedom of movement resulted *de facto* in their becoming established in a Member State, namely Spain, with the intention of living there together and while wishing to travel to the United Kingdom for short periods of residence. In other words, their compliance with that provision is not merely formal. The trips made by the claimants in the main proceedings are not artificial but genuine. Those trips correspond to a lawful use of their right of freedom of movement, since they did not seek to avoid the United Kingdom regulations or to make fraudulent and improper use of the rights conferred by that directive, which the United Kingdom does not dispute.

123. As regards, secondly, the subjective element, consisting in the intention to obtain an advantage resulting from Directive 2004/38, it too is clearly wanting; the United Kingdom authorities did not rely on the individual conduct of the claimants in the main proceedings in order to suspend the application of Article 5(2) of Directive 2004/38.

124. On the contrary, whether in their written submissions or at the hearing, the United Kingdom authorities have not disputed either the genuineness of Mr and Ms McCarthy's marriage or the fact that they have a genuine family life in Spain. In that regard, a marriage may be characterised as a marriage of convenience for the purposes of Directive 2004/38 only where it is contracted 'for the sole purpose of enjoying the right of free movement and residence under that directive that someone would not have otherwise'.¹⁰⁰

125. I would point out, next, that the measures referred to in Article 35 of Directive 2004/38 are subject to Articles 30 and 31 of that directive. Thus, as is apparent from most of the observations submitted to the Court, a measure of general application would deprive the procedural guarantees provided for in those articles of their substance. Consequently, the measures referred to in Article 35 are individual measures that do not warrant the systematic suspension of the rights conferred by that directive. On the contrary, the systematic suspension of those rights does not allow either the national court or this Court to ascertain whether the conditions that led the United Kingdom authorities to disregard that right in the present case have in fact been met.

99 — See *Kefalas and Others* (EU:C:1998:222, paragraph 28) and *Diamantis* (C-373/97, EU:C:2000:150, paragraph 34).

100 — See COM(2009) 313 final, p. 16.

126. According to the guidelines, the system of Directive 2004/38 properly rests on individual decisions and the national authorities must pay due attention to all the circumstances of the individual case. More specifically, they must assess the conduct of persons concerned in the light of the objectives pursued by Community law and act on the basis of objective evidence.¹⁰¹

127. As the Commission correctly states in its guidelines, when interpreting the notion of abuse in the context of Directive 2004/38, due attention must be given to the status of the EU citizen. In accordance with the principle of the supremacy of EU law, the assessment of whether EU law has been abused must be made in the framework of EU law, and not with regard to national migration laws. The directive does not prevent Member States from investigating individual cases where there is a well-founded suspicion of abuse. However, EU law prohibits systematic checks. Furthermore, measures taken by Member States to fight against marriages of convenience must not be such as to deter EU citizens and their family members from making use of their right to free movement or unduly encroach on their legitimate rights. They must not undermine the effectiveness of EU law or discriminate on grounds of nationality.¹⁰²

128. Last, it seems to me that there can be little doubt that, in assessing Ms McCarthy's right of entry, which derives from Article 5(2) of Directive 2004/38, the United Kingdom altered the scope of that provision and undermined the objectives it pursues. In that regard, the United Kingdom claims that an abuse of rights may be resolved by simply disregarding the provision forming the subject-matter of a possible abuse of rights, which, to my mind, is contrary to the very concept of abuse of rights and compromises the objectives pursued by Directive 2004/38.

3. The objections put forward by the United Kingdom

129. Unlike the other parties and interveners who submitted observations, the United Kingdom claimed, in its written submissions and also at the hearing, that it was currently faced with a significant number of instances of abuse of the right of entry of third-country national family members, in order to circumvent the immigration and border controls. It characterised that situation as a 'systemic abuse of rights'.

130. In the United Kingdom's submission, if it accepted that all residence cards allegedly issued pursuant to Article 10 of the directive exempt third-country nationals from any visa control, those cards would make it easier to enter its territory. In that regard, the United Kingdom Government claims that it has adduced evidence of the existence of systemic abuse of rights.

131. Although the use of the adjective 'systemic' does not seem to me to be compatible with the concept of abuse of rights in the context of EU law, it is none the less appropriate to consider whether the evidence adduced by the United Kingdom satisfies the conditions required by that concept.

132. The documents submitted by the United Kingdom as evidence relate, in particular, to a study carried out in 2011 by the border control service of that Member State, which is stated to have identified 1494 'attempts' to use false documents obtained fraudulently by sham marriages or forged documents.¹⁰³ In particular, the United Kingdom was faced with the use of forged documents or

101 — See COM(2009) 313 final, point 4.3. See also *Metock and Others* EU:C:2008:449, paragraphs 74 and 75.

102 — COM(2009) 313 final, p. 16.

103 — It should be noted that the United Kingdom characterises as abuse of rights two entirely different situations, sham marriages and the use of forged documents. The concept of abuse of rights applies only to the former.

documents obtained fraudulently by means of marriages of convenience or forged documents.¹⁰⁴ An analysis by a United Kingdom authority of the residence cards issued by the other Member States showed that those issued by 12 Member States did not satisfy the minimum security standards set by the International Civil Aviation Authority for EU travel documents. In addition, fraud and abuse of rights have been recognised as a serious problem by the Member States.¹⁰⁵ The lack of uniform minimum standards for the residence cards referred to in Article 10 and the resulting risk of abuse in order to circumvent immigration controls are of particular concern for the United Kingdom.

133. It is clear that the evidence adduced by the United Kingdom cannot be regarded as specific evidence linked with the individual conduct of the claimants in the main proceedings. That evidence does not satisfy the objective and subjective conditions required for the purpose of establishing the existence of an abuse of rights in a specific case, as described at points 121 to 127 of this Opinion. In that regard, I would point out that it has not been disputed that the conduct of the claimants in the main proceedings does not constitute an abuse of rights within the meaning of EU law.

134. It should also be borne in mind that a general presumption of fraud is not sufficient to justify a measure that compromises the objectives of the FEU Treaty.¹⁰⁶ The assessment of abusive conduct is in principle a matter for the national courts, but their assessment must not in any circumstances jeopardise the uniformity and effectiveness of EU law.¹⁰⁷

135. Furthermore, as regards failure to comply with the minimum security standards set by the International Civil Aviation Authority, to which the United Kingdom refers, the representative of the Kingdom of Spain emphasised at the hearing that the residence cards issued by the Spanish authorities to members of the family of Union citizens satisfied the standards of that organisation.

136. In any event, as regards any non-compliance by the security standards implemented by the Kingdom of Spain on its territory, I would emphasise that any failure on the part of a Member State to comply with Directive 2004/38 does not constitute an abuse of rights and is therefore not covered by Article 35 of that directive.¹⁰⁸

137. As regards the family permit, I consider that it amounts quite simply to a requirement to have a visa, which is contrary not only to Article 5(2) of Directive 2004/38 but also to the objectives and the system of that directive. Admittedly, the residence card issued pursuant to Article 10 of that directive is of a declaratory nature and does not create a right, for it merely certifies that a right already exists. However, it may be asserted that, provided that the third-country national member of the family of the Union citizen satisfies the conditions that allow him to benefit from the right of freedom of movement, that card must be accepted by the Member States.¹⁰⁹

104 — According to a Commission document, following a request by the Council, it asked Member States to provide information on abuse of free movement by marriages of convenience. Twelve Member States provided statistics on 'identified' cases. According to that document, the United Kingdom rejected, based on concerns about the authenticity of marriages, 176 applications for EEA family permits (out of 256 cases where abuse was suspected and which represent approximately 2% of the applications received in that period). See the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 25 November 2013 on 'Free movement of EU citizens and their families: Five actions to make a difference' (COM(2013) 837 final, p. 9).

105 — In April 2012 the Council approved a document setting out measures to be taken, entitled 'EU Action on Migratory Pressures — A Strategic Response', one of the strategic priority areas of which is '[s]afeguarding and protecting free movement by prevention of abuse by third country nationals'.

106 — See *Commission v Belgium*, C-577/10 (EU:C:2012:814, paragraph 53 and the case-law cited).

107 — D. Simon and A. Rigaux, *Le système juridique communautaire*, 3rd Edition, 2001, p. 582.

108 — I would observe in that regard that, under Articles 258 TFEU and 259 TFEU, where a Member State has failed to fulfil its obligations under the Treaties, it is for the Commission or another Member State to bring an action before the Court for a declaration that that Member State has failed to fulfil its obligations.

109 — See, to that effect, Case C-325/09 *Dias* EU:C:2011:498, paragraph 54.

138. Last, I believe that authorising a Member State not to take account of the residence card issued by another Member State would be contrary to the principle of mutual recognition. It should be observed that, according to the case-law of the Court, exercise of the rights arising from freedom of movement is not possible without production of documents relative to personal status, which are generally issued by the worker's State of origin. It follows that the administrative and judicial authorities of a Member State must accept certificates and analogous documents relative to personal status issued by the competent authorities of the other Member States, unless their accuracy is seriously undermined by concrete evidence relating to the individual case in question.¹¹⁰

139. In that regard, to accept that the United Kingdom should implement measures of general application would be tantamount to allowing a Member State to circumvent the right of freedom of movement and would have the consequence that other Member States could also adopt such measures and unilaterally suspend the application of the directive.

140. I am therefore of the view that the evidence adduced by the United Kingdom is not sufficient to support its assertion of a systemic abuse of rights.

141. For all of those reasons, I believe that the answer to the first and third questions should be that Article 35 of Directive 2004/38 does not entitle a Member State to adopt a measure of general application consisting in withdrawing from members of the family of a Union citizen in possession of a valid residence card issued by another Member State the right to be exempt from the obligation to obtain a visa, when that measure is precautionary and is not based on a prior finding of an abuse of rights in a specific case.

C – Protocol No 20

142. By its second question, the referring court asks the Court, in essence, whether Article 1 of Protocol No 20 allows the United Kingdom to require third-country nationals with a residence card as members of the family of a Union citizen, issued in accordance with Directive 2004/38, to be in possession of an entry visa that must be obtained before they arrive at the border.

143. It should be observed at the outset that the legal value of the protocols is not in any doubt. According to Article 51 TEU, '[t]he Protocols and Annexes to the Treaties shall form an integral part thereof'. Thus, in the hierarchy of norms, the protocols undoubtedly take precedence over EU secondary law.

144. More specifically, Protocol No 20 constitutes a derogation from the obligations imposed on the United Kingdom and Ireland under Articles 26 TFEU and 77 TFEU, based on their intention to exclude themselves from the implementation of Title V of Part Three of the FEU Treaty, on the area of freedom, security and justice.¹¹¹ However, as the Commission has expressly observed, that protocol is not intended to confer special privileges on the United Kingdom, but was adopted in order to take account of that Member State's desire to maintain border controls with most Member States and also the existing 'Common Travel Area' between the United Kingdom and Ireland.¹¹²

¹¹⁰ — See, to that effect, Case C-336/94 *Dafeki* EU:C:1997:579, paragraph 19.

¹¹¹ — This intention is also expressed with respect to the Schengen *acquis* integrated into the framework of the European Union. See Protocol No 19 on the Schengen *acquis* integrated into the framework of the European Union.

¹¹² — On the changes made by the Treaty of Lisbon to the position of the United Kingdom and Ireland vis-à-vis the area of freedom, security and justice, see, in particular, C. Chevallier-Govers, 'Le traité de Lisbonne et la différenciation dans l'espace de liberté, de sécurité et de justice', *Le traité de Lisbonne. Reconfiguration ou déconstitutionnalisation de l'Union européenne?*, Bruylant, 2009, p. 271 et seq.

145. In that regard, according to Article 2 thereof, Protocol No 20 allows those two Member States to continue to conclude between them arrangements relating to the freedom of movement of persons between their territories ('the Common Travel Area'), while fully respecting the rights of persons referred to in Article 1, first paragraph, point (a) of that protocol. If the United Kingdom decided that it would no longer rely on its special power not to participate in the freedom, security and justice area, Ireland would decide likewise, for the only reason for its position is that it is linked to the United Kingdom by that common travel area.¹¹³

146. Furthermore, Article 3 provides that the other Member States are to be entitled to exercise at their frontiers or at any point of entry into their territories such controls on persons seeking to enter their territories from the United Kingdom or from Ireland.

147. To my mind, Article 1 of Protocol No 20 should be interpreted in the light of those considerations.

148. First of all, it is 'only' at its frontiers that the United Kingdom is permitted by that article to exercise such controls as it may consider necessary for the purpose of verifying the right to enter its territory of citizens of Member States or their dependents exercising rights conferred by Union law.

149. Admittedly, neither the FEU Treaty nor Protocol No 20 provides a definition of 'border control'. However, point 9 of Article 2 of Regulation No 562/2006 provides that border control is to mean 'the activity carried out at a border, in accordance with and for the purposes of this Regulation, in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance'. Clearly, therefore, in the present case the obligation to obtain a family permit does not constitute a border control, given in particular that the family permit must be applied for before travelling, at the United Kingdom's diplomatic representations in the Member States.

150. Next, there is no doubt that Directive 2004/38 continues to apply, as is clear from Article 1(a) of Protocol No 20, which refers to citizens of Member States or their dependents exercising 'rights conferred by Union law'. Thus, it is in the light of Article 5(2) of that directive, which defines the documents allowing members of the family of a citizen of the Union to enter the territory of the Member States, that their rights of entry must be evaluated.

151. Last, pursuant to Article 1(a) of Protocol No 20, border controls include, in particular, the examination of the documents that permit verification of the right of the persons concerned to enter the territory of the United Kingdom. However, that verification does not entitle the United Kingdom to refuse unilaterally to allow citizens of the Union and members of their families with a residence card to enter its territory on the basis of Article 10 of Directive 2004/38 by requiring generally that they obtain and present at its borders an additional document for which EU law makes no provision.

152. I therefore propose that the answer to the second question referred to the Court should be that Article 1 of Protocol No 20 does not entitle the United Kingdom to require third-country nationals holding a residence card as family members of a Union citizen, issued in accordance with Article 10 of Directive 2004/38, to have an entry visa that must be obtained before arriving at the frontier.

113 — See A.G. Toth, *The legal effects of the protocols relating to the United Kingdom, Ireland and Denmark*, in *The European Union after Amsterdam. A legal analysis*, [Kluwer Law International] 1998, pp. 227 to 252, p. 233, and C. Guillard, *L'intégration différenciée dans l'Union européenne*, Thesis, Bruylant, 2006, p. 466.

VI – Conclusion

153. In the light of all of the foregoing considerations, I propose that the Court answer the questions referred by the High Court of Justice (England & Wales), Queen’s Bench Division (Administrative Court) (United Kingdom) as follows:

- 1) Article 35 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 does not entitle a Member State to adopt a measure of general application consisting in withdrawing from members of the family of a Union citizen in possession of a valid residence card issued by another Member State the right to be exempt from the obligation to obtain a visa, when that measure is precautionary and is not based on a prior finding of an abuse of rights in a specific case.
- 2) Article 1 of Protocol No 20 on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland does not entitle the United Kingdom to require third-country nationals holding a residence card as family members of a Union citizen, issued in accordance with Article 10 of Directive 2004/38, to have an entry visa that must be obtained before arriving at the frontier.