



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

27 June 2018*

(Reference for a preliminary ruling — Citizenship of the Union — Article 21(1) TFEU — Directive 2004/38/EC — Right to move and reside freely within the territory of the Member States — Right of residence of a third-country national who is a family member of a Union citizen in the Member State of which that citizen is a national — Entry by that family member into the territory of the Member State in question subsequent to the return of the Union citizen to that Member State)

In Case C-230/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Østre Landsret (High Court of Eastern Denmark), made by decision of 21 April 2017, received at the Court on 2 May 2017, in the proceedings

Erdem Deha Altiner,

Isabel Hanna Ravn

v

Udlændingestyrelsen,

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský, M. Safjan, D. Šváby and M. Vilaras (Rapporteur), Judges,

Advocate General: N. Wahl,

Registrar: Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 7 March 2018,

after considering the observations submitted on behalf of

- Mr Deha Altiner and Ms Ravn by E.O.R. Khawaja, advokat,
- the Danish Government, by M.S. Wolff and by J. Nymann-Lindegren and C. Thorning, acting as Agents, assisted by R. Holdgaard, advokat,
- the Belgian Government, by C. Pochet, L. Van den Broeck and M. Jacobs, acting as Agents,
- Ireland, by A. Joyce and L. Williams, acting as Agents,

* Language of the case: Danish.

- the Norwegian Government, by I.S. Jansen, acting as Agent, assisted by K.B. Moen, advokat,
- the European Commission, by E. Montaguti and M. Wilderspin, acting as Agents, assisted by H. Peytz, advokat,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 21 TFEU and of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).
- 2 The request has been made in proceedings between Mr Erdem Deha Altiner ('the son') and Ms Isabel Hanna Ravn ('Ms Ravn'), on the one hand, and the Udlændingestyrelsen (Immigration Office, Denmark), on the other, concerning a decision adopted on 3 June 2016 ('the decision of 3 June 2016'), confirming the previous decision of the Statsforvaltningen (Regional State Administration, Denmark), which had rejected the son's request for a residence permit in Denmark, as a family member of Ms Ravn, a Union citizen.

Legal context

Directive 2004/38

- 3 Article 1 of Directive 2004/38, entitled 'Subject', states:

'This Directive lays down:

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

...'

- 4 Under the heading 'Definitions', Article 2 of that directive provides:

'For the purposes of this Directive:

1. "Union citizen" means any person having the nationality of a Member State;

2. "family member" means:

- (a) the spouse

...

- (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse

...

...

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

5 Article 3 of that directive, which is entitled ‘Beneficiaries’, provides in paragraph 1 thereof:

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

6 Article 7(1) and (2) of Directive 2004/38 is worded as follows:

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

- (a) are workers or self-employed persons in the host Member State; or
- (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
- (c)
 - are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
 - have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or
- (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

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

Danish law

7 Under Article 13 of bekendtgørelse nr. 474 om ophold i Danmark for udlændinge, der er omfattet af Den Europæiske Unions regler (Order No. 474 on the right of residence for aliens covered by EU rules) of 12 May 2011:

‘In so far as provided under EU law, family members of a Danish national shall have a right of residence in Denmark beyond the three months permitted under Paragraph 2(1) and (2) of the Law on aliens.’

- 8 The EU-orientering nr. 1/14, Orientering til Statsforvaltningen om behandling af ansøgninger om familiesammenføring efter EU-retten, hvor referencen dansk statsborger (Guideline No 1/14 of the State administration on the processing of applications for family reunification under Union law where the reference person is a Danish citizen) of 10 December 2014 ('Guideline No 1/14') was adopted by the Immigration Office.
- 9 Paragraph 4.1.5 of that guideline which is entitled 'Temporal connection between a Danish national's return to Denmark and application for family reunification under EU law' provides as follows:

'There is no requirement that the non-Danish family member enter into Denmark at the same time as the Danish national.

If the family member of a Danish national who has exercised his or her right of free movement in another EU country applies for family reunification under the EU rules only at a point in time subsequent to that of the Danish national's return to Denmark, a specific determination must be made as to whether the family member's application is submitted as a natural consequence of the Danish national's return to Denmark.

In that determination, emphasis must be placed on the time elapsed between the Danish national's return and the application, including whether the family member, for particular reasons relating to work or education, has postponed submitting the application, and also the extent of that lapse of time. For example, a delay in submitting an application may be due to the fact that the applicant has completed previously-begun studies, which *inter alia* may be documented by producing diplomas, etc. Particular health issues, including serious illness of the applicant or his or her family members, may also be reasons for a delay.

However, a delay of several months cannot be justified on grounds of a general wish to continue in employment or live with family.

By contrast, where there are specific employment-related considerations, including fulfilment of contractual obligations, that have led to the submission of the application being postponed by several months, the application will generally be regarded as being submitted as a natural consequence of the Danish national's return. This can be documented using an employment contract stating, for example, that the person in question is involved in a specific construction project.

...

In cases where the family member entered Denmark at the same time as, or as a natural consequence of, the Danish national's return to Denmark, but only submits an application for family reunification under the EU rules at a later point in time, there is no requirement that the application be submitted as a natural consequence of the Danish national's return, if the person otherwise fulfils the conditions in order to obtain family reunification with the Danish national under the EU rules.

It is a condition that the family member enters Denmark in order to pursue family life with the Danish national, and that the family member also would have been able to obtain family reunification with the Danish national under the EU rules if the person in question had submitted the application at the time of entry into Denmark. It is a further condition that the applicant has fulfilled those conditions throughout the period leading up to the submission of the application.

In the assessment of such cases, it is thus decisive that the family member has fulfilled the conditions for obtaining family reunification with the Danish national under the EU rules throughout the period, but has simply not submitted an application. In such cases, the family member has a right of residence in Denmark under the EU rules, irrespective of whether the person only subsequently applied for a proper residence card.

In cases where the application is not submitted in connection with entry into Denmark, the applicant must demonstrate that the entry occurred at the same time as or as a natural consequence of the Danish national's return to Denmark, and that the applicant has fulfilled the conditions for obtaining family reunification with the Danish national under the EU rules throughout the period, including that the person has lived together with the Danish national in Denmark. This can, for example, be documented with travel documents, documents showing a change in registered address, rent receipts, etc.'

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

- 10 The son was born on 2 September 2004 in Turkey and is a Turkish national. Metin Altiner ('the father') moved to Denmark on 17 July 2008, was divorced from the mother and re-married, on 26 October 2010, Ms Ravn, a Danish citizen, who at the time was resident in Denmark. The judgment pronouncing the divorce of the parents awarded parental authority over the son to his mother, a Turkish national, and he thus lived with her in Turkey.
- 11 Ms Ravn and the father resided in Sweden from 1 December 2012 to 24 October 2014. During the periods between 1 August 2013 and 9 September 2013 and between 8 July 2014 and 2 September 2014, the son went to Sweden with a visa valid throughout the Schengen area and stayed with them.
- 12 On 24 October 2014, Ms Ravn and the father returned to Denmark where they still reside. On 25 June 2015, the son entered Denmark with a visa valid throughout the Schengen area until 30 September 2015.
- 13 After receiving, on 15 July 2015, the written consent of his mother, the son applied two days later for a residence permit from the administration of the Danish State as a family member of his father's wife, Ms Ravn.
- 14 By decision of 9 March 2016, the regional authorities of the Danish State refused that application on the ground that it was not a natural consequence of the return of Ms Ravn to Denmark. It is apparent from the file submitted to the Court that, in its rejection decision, those authorities stated that they did not take a position on the question of whether the stay of the son in Sweden had enabled him to create or strengthen his family life with Ms Ravn in that Member State. This rejection was the subject of a complaint to the Office of Immigration, rejected by the decision of 3 June 2016.
- 15 In that decision, the Immigration Office indicates that the son did not enter Denmark together with Ms Ravn and that his application for a residence permit is not a natural consequence of the return of Ms Ravn to Denmark. According to that office, the derived right of residence in Denmark for a third-country national who is a member of the family of a Danish national returning to Denmark after residing in another Member State, is time-barred if the family member does not enter into Danish territory or does not submit an application for a residence permit in Denmark as a natural consequence of the Danish citizen's return.
- 16 On 15 June 2016, the son and Ms Ravn brought proceedings against the decision of 3 June 2016 before Københavns Byret (District Court, Copenhagen) which, by order of 18 October 2016, referred the case to the Østre Landsret, before which it is currently pending.
- 17 That court states that the parties disagree on the compatibility with Union law of the condition laid down by Danish legislation, according to which the right of residence of a third-country national, who is a member of the family of a Danish national returning to Denmark after having exercised his or her right of free movement, is subject to the condition that the entry into Danish territory of that family

member, or the submission by that family member of an application for a residence permit, are ‘the natural consequence’ of the return of the Danish citizen in question. The claimants in the main proceedings argue that that condition is contrary to EU law, in particular Article 21 TFEU.

- 18 In those circumstances, the Østre Landsret (High Court of Eastern Denmark) decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

‘Does Article 21 of the Treaty on the Functioning of the European Union, read in conjunction and by analogy with the Free Movement Directive, preclude a Member State from refusing to grant a derived right of residence to a third-country national who is a family member of a Union citizen who is a national of that Member State and who has returned to that Member State after having exercised his or her right of free movement, where the family member does not enter the Member State’s territory or submit an application for a right of residence as a natural consequence of the Union citizen’s return?’

The question referred

Admissibility

- 19 As a preliminary point, it should be noted that, in their observations submitted to the Court, the Belgian and Norwegian Governments, referring to the relatively short duration of the stays of the son in Sweden, expressed doubts as to whether it can be considered that he had genuine residence in that Member State such as to allow the creation or strengthening of family life between himself and the Union citizen in question, namely Ms Ravn, such as would afford him a derived right of residence in Denmark on the basis of Union law. The Norwegian Government considers that, in those circumstances, the question referred might be considered purely hypothetical.
- 20 It is true that it is the genuine residence of the Union citizen and of the family member who is a third-country national in the host Member State which creates, on the return of that Union citizen to the Member State of which he is a national, a derived right of residence on the basis of Article 21(1) TFEU for the third-country national with whom that citizen lived as a family in the host Member State.
- 21 In the present case, it is apparent from the information supplied by the referring court, summarised in paragraphs 13 to 15 of this judgment, that the son’s application for a residence permit on the basis of EU law was ultimately refused by the Immigration Office on the ground not that the son’s stay in Sweden had not enabled him to create or strengthen his family life with his father and Ms Ravn, but that his entry into Danish territory and the submission of his application for a residence permit were neither concomitant with the return to Denmark of Ms Ravn nor a natural consequence of that return, as required by Guideline No 1/14.
- 22 According to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, in particular, judgment of 6 September 2016, *Petruhhin*, C-182/15, EU:C:2016:630, paragraphs 19 and 20).

- 23 In those circumstances, and without prejudice to the possibility, for the referring court, if necessary, to verify the factual premisses of the administrative act challenged before it, it cannot be held that the question, which concerns, in essence, the compatibility with EU law of national legislation such as Guideline No 1/14, has no connection with the subject-matter of the main proceedings or that the problem is hypothetical.
- 24 The request for a preliminary ruling is therefore admissible.

Substance

- 25 By its question, the referring court asks, in essence, whether Article 21 TFEU must be interpreted as precluding legislation of a Member State which does not provide for the grant of a derived right of residence under Union law to a third-country national who is a family member of a Union citizen who is a national of that Member State and who returns there after having exercised his right of freedom of movement, when the family member of the Union citizen concerned has not entered its territory or has not applied for a residence permit ‘as a natural consequence’ of the return to that Member State of the Union citizen in question.
- 26 In that regard, it should be recalled, at the outset, that the Court has held that, where during the genuine residence of a Union citizen in a Member State other than the Member State of which he is a national, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) of Directive 2004/38, family life is created or strengthened in that Member State, the effectiveness of the rights conferred on the Union citizen by Article 21(1) TFEU requires that the citizen’s family life in the host Member State may continue on returning to the Member State of which he is a national, through the grant of a derived right of residence to the family member who is a third-country national. If no such derived right of residence were granted, that Union citizen could be discouraged from leaving the Member State of which he is a national in order to exercise his right of residence under Article 21(1) TFEU in another Member State because he is uncertain whether he will be able to continue in his Member State of origin a family life with his immediate family members which has been created or strengthened in the host Member State (judgments of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 54, and of 5 June 2018, *Coman and Others*, C-673/16 EU:C:2018:385, paragraph 24).
- 27 Moreover, it is clear from the case-law that the conditions for granting, when a Union citizen returns to the Member State of which he is a national, a derived right of residence, based on Article 21(1) TFEU, to a third-country national who is a family member of that Union citizen with whom that citizen has resided, solely by virtue of his being a Union citizen, in the host Member State, should not, in principle, be more strict than those provided for by Directive 2004/38 for the grant of such a right of residence to a third-country national who is a family member of a Union citizen in a case where that citizen has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national. Even though Directive 2004/38 does not cover such a return, it should be applied by analogy to the conditions for the residence of a Union citizen in a Member State other than that of which he is a national, given that in both cases it is the Union citizen who is the sponsor for the grant of a derived right of residence to a third-country national who is a member of his family (judgment of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 50).
- 28 However, it should be borne in mind that the derived right of residence, recognised under Article 7(2) of Directive 2004/38, to family members of a citizen of the Union who is established within the territory of a Member State other than that of which he is a national, is not subject to the condition that they be on the territory of that Member State within a certain period after the entry of that Union citizen.

- 29 Under that provision, in such a situation, a derived right of residence is granted to family members of a citizen of the Union not only when they ‘accompany’ the Union citizen to a Member State other than that of which he or she is a citizen, but also where they ‘join’ that citizen in that Member State.
- 30 However, it must be noted that any right of residence in an EU Member State of a third-country national derives from the exercise of freedom of movement by a Union citizen (see, to that effect, judgment of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 36 and the case-law cited).
- 31 As the grant of a derived right of residence on the basis of Article 21(1) TFEU aims to allow the continuation, in the Member State of which the Union citizen concerned is a national, of the family life which has been created or strengthened with a family member who is a third-country national in the host Member State, the competent authorities of the Member State of which the Union citizen has the nationality are entitled to verify, before granting such a right of residence, that such a family life between the Union citizen and the third-country national who is a member of his family had not been interrupted before the entry of the third country national into the Member State of which the Union citizen in question is a national.
- 32 For the purposes of such verification, the Member State concerned may take into account, as an indication, that the third-country national, who is a family member of one of its own citizens, entered its territory a significant period of time after that citizen’s return to that territory.
- 33 However, it cannot be ruled out that a family life, created or strengthened between a Union citizen and a member of his or her family who is a third-country national, during their stay, pursuant to and in conformity with Union law, in the host Member State, might continue despite the fact that that citizen has returned to the Member State of which he is a national without being accompanied by the family member in question, who may have been obliged, for reasons relating to his personal situation, profession or education, to delay his arrival in the Member State of origin of the Union citizen in question.
- 34 Accordingly, the fact that the submission of the application for a residence permit was not ‘a natural consequence’ of the return of the Union citizen is a relevant factor which, although not decisive in itself, may, in the context of an overall assessment, lead the Member State of origin of the Union citizen in question to conclude that there is no link between the application and the exercise by that citizen of his freedom of movement and, consequently, to refuse to issue such a residence permit.
- 35 In the light of all the foregoing considerations, the answer to the question referred is that Article 21(1) TFEU must be interpreted as not precluding legislation of a Member State which does not provide for the grant of a derived right of residence in another Member State, under Union law, to a third-country national family member of a Union citizen who is a national of that Member State and who returns there after having resided, pursuant to and in conformity with Union law, in another Member State, when the family member of the Union citizen concerned has not entered the territory of the Member State of origin of the Union citizen or has not applied for a residence permit as a ‘natural consequence’ of the return to that Member State of the Union citizen in question, provided that such rules require, in the context of an overall assessment, that other relevant factors also be taken into account, in particular factors capable of showing that, in spite of the time which elapsed between the return of the Union citizen to that Member State and the entry of the family member who is a third-country national, in the same Member State, the family life created and strengthened in the host Member State has not ended, so as to justify the granting to the family member in question of a derived right of residence; it is for the referring court to verify whether this is the case.

Costs

- ³⁶ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

In the light of all the foregoing considerations, the answer to the question referred is that Article 21(1) TFEU must be interpreted as not precluding legislation of a Member State which does not provide for the grant of a derived right of residence in another Member State, under Union law, to a third-country national family member of a Union citizen who is a national of that Member State and who returns there after having resided, pursuant to and in conformity with Union law, in another Member State, when the family member of the Union citizen concerned has not entered the territory of the Member State of origin of the Union citizen or has not applied for a residence permit as a ‘natural consequence’ of the return to that Member State of the Union citizen in question, provided that such rules require, in the context of an overall assessment, that other relevant factors also be taken into account, in particular factors capable of showing that, in spite of the time which elapsed between the return of the Union citizen to that Member State and the entry of the family member who is a third-country national, in the same Member State, the family life created and strengthened in the host Member State has not ended, so as to justify the granting to the family member in question of a derived right of residence; it is for the referring court to verify whether this is the case.

[Signatures]