Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 27 April 2023 [1]

Case C-491/21

WA
v
Direcția pentru Evidența Persoanelor și Administrarea Bazelor de Date din Ministerul Afacerilor Interne

(Request for a preliminary ruling from the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania))

(Reference for a preliminary ruling – Citizenship of the Union – Article 21 TFEU – Right to move and reside freely within the territory of the Member States – Directive 2004/38/EC – Article 4 – Condition governing the issuance of an identity card – Domicile in the Member State issuing the document – Refusal of the authorities of that Member State to issue an identity card to one of its nationals, domiciled in another Member State – Equal treatment – Restriction – Justification)

I. Introduction

1. As Advocate General Jacobs wrote in his Opinion in *Pusa*, 'subject to the limits set out in Article [21 TFEU] itself, no unjustified burden may be imposed on any citizen of the European Union seeking to exercise the right to freedom of movement or residence'. [2]

2. In the present case, the Court has been requested by the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania) to give a preliminary ruling on the interpretation, first, of Article 26(2) and Article 21(1) TFEU and of Article 20, Article 21(1) and Article 45(1) of the Charter of Fundamental Rights of the European Union ('the Charter') and, second, of Articles 4 to 6 of Directive 2004/38/EC. [3]

3. The request has been made in proceedings between WA, the applicant in the main proceedings, a Romanian national who carries out his professional activities in both France and Romania, and the Direcția pentru Evidența Persoanelor și Administrarea Bazelor de Date din Ministerul Afacerilor Interne (Directorate responsible for maintaining the register of persons

[1] Original language: French.

[2] C-224/02, EU:C:2003:634, point 22.

[3] Directive 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 for managing the databases of the Ministry of the Interior, Romania) ('the Directorate for Personal Records'), concerning the latter's refusal to issue an identity card to the applicant in the main proceedings on the ground that he has established his domicile in another Member State.

II. Legal context

A. European Union law

4. In addition to certain provisions of primary law, namely Article 21(1) TFEU and Article 20(2), Article 21(1) and Article 45(1) of the Charter, Article 4(3), Article 5(1) and (4) and Article 6(1) of Directive 2004/38 are relevant in the present case.

B. Romanian law

5. The Ordonanța de urgență a Guvernului nr. 97/2005 privind evidența, domiciliul, reședința și actele de identitate ale cetățenilor români (Government Emergency Ordinance No 97/2005 concerning the registration, domicile, residence and identity documents of Romanian nationals, as subsequently amended and supplemented [4] ('the OUG No 97/2005'), provides, in Article 12:

'(1) From the age of [14] years, Romanian nationals shall be issued with identity documents.

…

(3) For the purposes of this Emergency Ordinance, "identity document" shall mean: a valid identity card, simple identity card, electronic identity card, temporary identity card and identity booklet.'

6. Article 13 of the OUG No 97/2005 provides:

'(1) The identity document shall serve as proof of the identity, the Romanian nationality, the address of domicile and, where appropriate, the address of residence.

(2) In accordance with [Legea nr. 248/2005 privind regimul liberei circulații a cetățenilor români în străinătate (Law No 248/2005 on the conditions for the free movement of Romanian nationals abroad) [5]] as subsequently amended and supplemented ["the Law on the conditions for free movement"], the identity card and the electronic identity card shall constitute a travel document in the Member States of the European Union.

(3) The electronic identity card shall allow its holder to authenticate himself or herself in the information systems of the Ministry of the Interior and in the information systems of other public or private institutions and also to use the electronic signature, on the conditions provided for by law.'

[4] *Monitorul Oficial al României*, Part I, No 719, 12 October 2011.

[5] *Monitorul Oficial al României*, Part I, No 682, 29 July 2005.

7. Article 15(3) of the OUG No 97/2005 states:

'An application for the issue of a new identity document shall be accompanied only by documents which, in accordance with the law, serve as proof of the domicile of the person concerned and, where appropriate, his or her residence, save where:

(a) there have been any changes to the data relating to the name and forename, date of birth, civil status and Romanian nationality, in which case the applicant shall be required to submit the documents certifying those changes;

(b) the applicant is the holder of a temporary identity card or an identity bulletin, in which case the applicant shall be required to submit all the documents referred to in paragraph 2.'

8. Article 20(1)(c) of the OUG No 97/2005 provides:

'A temporary identity card shall be issued in the following cases:

… to Romanian citizens domiciled abroad who are temporarily resident in Romania.'

9. Article 28(1) of the OUG No 97/2005 provides:

'(1) Proof of the address of domicile may be given by:

(a) acts concluded in accordance with the conditions of validity laid down by the Romanian law in force, as regards the public document certifying the right to occupy a dwelling;

(b) a written declaration of the host, whether a natural or a legal person, serving as proof of accommodation, together with one of the documents referred to in (a) or, where appropriate, in (d);

(c) the solemn declaration of the applicant, together with the inspection report of the police officer, certifying the existence of a building used as a dwelling and the fact that the applicant is actually resident at the address declared, for a natural person who is unable to produce the documents referred to in (a) and (b);

(d) the document issued by the local public administration certifying that the applicant or, where appropriate, the person providing him or her with accommodation is entered on the [Registrul agricol (agricultural register)] as the owner of a building used as a dwelling;

(e) the identity document of one of the parents or of his or her legal representative or of the document relating to the exercise of parental authority together, where appropriate, with one of the documents referred to in (a) to (d), in the case of minors applying to be issued with an identity document.'

10. Articles 6 and 6^1 of the Law on the conditions for free movement state:

'Article 6

(1) The types of travel documents on the basis of which Romanian nationals may travel abroad are the following:

(a) diplomatic passport;

(b) service passport;

(c) electronic diplomatic passport;

(d) electronic service passport;

(e) simple passport;

(f) electronic simple passport;

(g) temporary simple passport;

(h) travel document.

Article 6[1]

(1) For the purposes of this Law, a valid identity card, simple identity card and electronic identity card shall constitute a travel document on the basis of which Romanian nationals may travel to the Member States of the European Union and also to third States which recognise them as travel documents.

…'

11. Article 17[1](1)(d) and (2)(b) of that law provides:

'(1) A temporary simple passport shall be issued to Romanian nationals who satisfy the conditions laid down by this Law and whose right to travel abroad has not been suspended, in the following cases:

…

(d) where the holder has submitted a simple passport or an electronic simple passport for the purpose of obtaining a visa and declares that he or she has to travel abroad as a matter of urgency;

…

(2) A simple temporary passport shall be issued:

…

(b) in the situations referred to in paragraph 1(b) to (g), within not more than three working days from the date on which the application is made;

…'

12. Article 34(1), (2) and (6) of that law provides:

‘(1) A Romanian citizen who has established his or her residence abroad may apply to be issued with an electronic simple passport or a temporary simple passport indicating his or her country of domicile, when he or she is in one of the following situations:

(a) he or she has acquired a right to reside for at least one year or, depending on the case, his or her right to reside within the territory of that State has been repeatedly renewed in the course of one year;

(b) he or she has acquired a right to reside within the territory of that State for the purposes of family regrouping with a person having his or her domicile within the territory of that State;

(c) he or she has acquired a right to reside in the long term or, where appropriate, a permanent right to reside within the territory of that State;

(d) he or she has acquired the nationality of that State;

(e) he or she has acquired a right to work or is enrolled in a private or public establishment with the principal aim of pursuing studies there, including occupational training.

(2) A Romanian citizen holding a certificate of registration or a document confirming his or her residence in a Member State of the European Union or of the European Economic Area, or in the Swiss Confederation, issued by the competent authorities of a Member State of the European Union or of the European Economic Area, or of the Swiss Confederation, may apply for an electronic simple passport or a temporary simple passport indicating that State as the country of domicile.

…

(6) A Romanian national who has established his or her domicile abroad shall be required, where he or she is issued with an electronic simple passport or a temporary simple passport mentioning the country of domicile, to surrender the identity document certifying the existence of a domicile in Romania issued by the Romanian authorities.’

III. The dispute in the main proceedings, the question referred for a preliminary ruling and the procedure before the Court

13. The applicant in the main proceedings is a lawyer of Romanian nationality who carries out his professional activities in both France and Romania and who since 2014 has been domiciled in France.

14. The Romanian authorities issued a simple electronic passport to him stating that he is domiciled in France. Since his private life and his professional life take place both in France and in Romania, he also declares his residence in Romania each year and receives a temporary identity card. However, that category of card is not a document that allows him to travel abroad.

15. On 17 September 2017, the applicant in the main proceedings applied to the Directorate for Personal Records to be issued with an identity card or an electronic identity card. His application was rejected on the ground that he had not established his domicile in Romania.

16. On 18 December 2017, the applicant in the main proceedings lodged an administrative contentious appeal before the Curtea de Apel București (Court of Appeal, Bucharest, Romania) seeking an order requiring the Directorate for Personal Records to issue him with the desired document.

17. On 28 March 2018, that court dismissed the appeal as unfounded, on the ground that the decision of the Directorate for Personal Records refusing his application was justified under Romanian law, which provides that identity cards are to be issued only to Romanian nationals domiciled in Romania. It considered that Romanian law was not contrary to EU law, in so far as Directive 2004/38 does not impose an obligation on Member States to issue identity cards to their own nationals. In addition, it considered that the applicant in the main proceedings had not suffered discrimination, since the Romanian authorities issued him with a simple passport, which constitutes a travel document allowing him to travel abroad.

18. Being of the view that the decision of the Curtea de Apel București (Court of Appeal, Bucharest) infringed a number of provisions of the FEU Treaty, the Charter and Directive 2004/38, the applicant in the main proceedings lodged an appeal in cassation before the referring court, the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice).

19. The referring court expresses doubts as to the conformity with EU law of the refusal to issue an identity card to the applicant in the main proceedings in the circumstances of the main proceedings.

20. In that regard, the referring court observes that while the purpose of Directive 2004/38 is to harmonise the conditions required by Member States to enter the territory of another Member State, the national legislation at issue applies a restrictive interpretation of Article 4(3) of that directive, which provides that Member States are to issue to their own nationals identity cards or passports in accordance with their laws. In addition, the criterion of domicile may constitute discriminatory treatment, which, in order to be justified under EU law, must be based on objective criteria independent of the nationality of the persons concerned and proportionate to the legitimate objective pursued by national law. Last, in the present case the Directorate for Personal Records did not state which objective public-interest consideration might justify the difference in treatment and the refusal to grant Romanian nationals domiciled in another Member State of the European Union the right to have a national identity card. The referring court states that it has not identified such justification.

21. In those circumstances the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 26(2) TFEU, [Article 20, Article 21(1) and Article 45(1)] of the [Charter] and Articles 4 [to] 6 of Directive [2004/38] be interpreted as precluding national legislation which does not permit the issue of an identity card – which may serve as a travel document within the European Union – to a national of a Member State on the ground that he has established his domicile in a different Member State?'

22. Written observations have been submitted by the applicant in the main proceedings, the Romanian Government and the European Commission. Those parties took part in the hearing on 8 February 2023.

IV. Analysis

23. By its question for a preliminary ruling, the referring court asks, in essence, whether Article 26(2) TFEU, Article 20, Article 21(1) and Article 45(1) of the Charter and Articles 4 to 6 of Directive 2004/38 must be interpreted as precluding legislation of a Member State under which a citizen of the European Union, a national of that Member State who has exercised his or her right to freedom of movement and freedom to reside in another Member State, is refused an identity card serving as a travel document within the European Union, on the sole ground that he or she has established his or her domicile within the territory of that other Member State.

24. The applicant in the main proceedings and the Commission are of the view that the national legislation at issue constitutes unequal treatment which affects the right to freedom of movement and residence within the European Union of Romanian nationals domiciled in another Member State. The Romanian Government, on the other hand, claims that the Member States have a discretion as regards the issuing of identity cards and that the legislation at issue does not constitute a restriction on those nationals' right to freedom of movement and freedom of residence.

25. In this Opinion, I shall make a number of preliminary observations aimed at summarising the facts, making reference to the relevant legislation at issue, and at clarifying the applicable provisions of EU law, before addressing the problem raised by the question referred for a preliminary ruling in the light of those provisions.

A. Preliminary observations

26. According to the facts as described by the referring court, the present case concerns a Romanian national, domiciled in France since 2014, who practises as a lawyer in both France and Romania.[6] The Romanian authorities issued him with a simple electronic passport stating that he is domiciled in France and a temporary identity card.[7] That identity card, which is not a travel document, is issued to Romanian nationals domiciled in another Member State who are temporarily resident in Romania, and must be renewed every year. The applicant in the main proceedings made an application to the Directorate for Personal Records to be issued with an identity card (simple or electronic) constituting a travel document allowing him to travel to France, but his application was rejected. He lodged an appeal against that decision before the Curtea de Apel București (Court of Appeal, Bucharest), which was dismissed as unfounded, essentially on the ground that the Romanian legislation is not contrary to EU law.

6 The applicant in the main proceedings stated at the hearing that, in addition to practising as a lawyer, he teaches in a French university.

7 The Romanian Government states, in answer to a question put by the Court at the hearing, that the 'provisional identity card' does not include all the security features of an identity card, within the meaning of Article 2(a) and Article 3 of Regulation (EU) 2019/1157 of the European Parliament and of the Council of 20 June 2019 on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement (OJ 2019 L 188, p. 67).

27. In that regard, the referring court states that, in accordance with Romanian law, all Romanian nationals, irrespective of their place of domicile, are entitled to be issued with a passport. [8] It also explains that, under Romanian law, Romanian nationals domiciled in Romania are entitled, from the age of 14 years, to be issued with either a simple identity card or an electronic identity card that serves as a travel document. [9] Romanian nationals domiciled in another Member State, on the other hand, are not entitled to obtain those identity documents. [10] In that regard, the referring court states that when such nationals are issued with a passport mentioning the Member State of domicile, they are required to surrender the identity document serving as a travel document and certifying the existence of a domicile in Romania. [11] However, if they are temporarily resident in that Member State, they are issued with a temporary identity card which does not serve as a travel document. [12]

28. It is clear that the situation at issue in the main proceedings comes within the scope of EU law, and in particular of the rules governing the exercise of freedom of movement and residence.

29. In that regard, I recall, first, that Article 20 TFEU confers on every person holding the nationality of a Member State the status of citizen of the European Union. [13] In the present case, the applicant in the main proceedings has Romanian nationality and therefore enjoys the status of citizen of the European Union, which, as the Court has observed on numerous occasions, is 'destined to be the fundamental status of nationals of the Member States'. [14] As a citizen of the European Union who has exercised his freedom to move and reside in a Member State other than his Member State of origin, he can rely on the rights pertaining to that status, in particular the rights provided for in Article 21(1) TFEU, 'including, where appropriate, against his … Member State of origin'. [15]

30. Second, I also recall that Article 21(1) TFEU confers on the applicant in the main proceedings the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. In particular, such limitations and conditions are those laid down in Directive 2004/38, Article 1 of which states that the purpose of that directive is, inter alia, to determine the conditions governing the exercise of that right and the limits placed on it.

31. Last, I note that although the question for a preliminary ruling refers to Article 26(2) TFEU and to Article 20 and Article 21(1) of the Charter, the outcome of the dispute in the main proceedings does not require the Court to refer specifically to those provisions.

8 See Article 6(1)(f) and (g) and Article 34(1) and (2) of the Law on the conditions for free movement.

9 See Article 12(1) and (2) of the OUG No 97/2005, and also Article 6[1](1) of the Law on the conditions for free movement.

10 The Commission stated in its written observations that Article 14(2) of the OUG No 97/2005 provides that only Romanian nationals *domiciled in Romania* and *temporarily* residing abroad may apply for an identity card to be issued to them.

11 See Article 34(6) of the Law on the conditions for free movement.

12 See Article 20(1)(c) of the OUG No 97/2005. It is apparent from the documents produced by the applicant in the main proceedings pursuant to Article 62(1) of the Rules of Procedure of the Court of Justice that the temporary identity card contains the *address of the place of temporary residence* in Romania of its holder.

13 See, in particular, judgments of 11 July 2002, *D'Hoop* (C-224/98, EU:C:2002:432, paragraph 27), and of 9 June 2022, *Préfet du Gers and Institut national de la statistique et des études économiques* (C-673/20, EU:C:2022:449, paragraph 49 and the case-law cited).

14 Judgments of 20 September 2001, *Grzelczyk* (C-184/99, EU:C:2001:458, paragraph 31), and of 1 August 2022, *Familienkasse Niedersachsen-Bremen* (C-411/20, EU:C:2022:602, paragraph 28).

15 Judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'* (C-490/20, EU:C:2021:1008, paragraph 42 and the case-law cited).

32. As regards Article 45 of the Charter, to which the question also refers, it should be borne in mind that that article guarantees, in paragraph 1, the right of every citizen of the European Union to move and reside freely within the territory of the Member States, a right which, according to the Explanations relating to the Charter of Fundamental Rights, [16] corresponds to the right guaranteed in Article 20(2)(a) TFEU and, pursuant to the Article 20(2)(b) TFEU and Article 52(2) of the Charter, is to be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder. [17]

33. Therefore, it is sufficient, to my mind, to refer to the relevant provisions of Directive 2004/38 and to Article 21 TFEU in order to answer the question submitted by the referring court. [18]

B. The interpretation of Article 4(3) of Directive 2004/38 and the existence of a difference in treatment capable of restricting the right of free movement and residence

34. It seems helpful to recall, in the first place, that, in order to allow their nationals to exercise the right to move and reside freely within the European Union, Article 4(3) of Directive 2004/38 requires Member States, acting in accordance with their laws, to issue to their own nationals an identity card or passport stating their nationality. [19] In that regard, the Court has already held that Member States are required, under that provision, to issue to their own nationals, or to renew, an identity card or a passport. [20]

35. I must observe, in the second place, that it is clear from the wording of Article 4(3) of Directive 2004/38 and, in particular, from the EU legislature's choice of the disjunctive conjunction 'or', that, in the context of their obligation to issue a travel document to their own nationals, that provision leaves to the Member States the choice of the type of travel document, namely an identity card *or* a passport.

36. However, it should be pointed out that it follows from recitals 1 to 4 and 11 of Directive 2004/38 that its aim is, above all, to facilitate and strengthen the exercise of the primary and individual right to move and reside freely within the territory of the Member States, which is conferred directly on citizens of the European Union by the Treaty. [21] In that regard, the Court

[16] OJ 2007 C 303, p. 29.

[17] Judgment of 21 June 2022, *Ligue des droits humains* (C-817/19, EU:C:2022:491, paragraph 275). It should also be borne in mind that it follows from the case-law that a national measure which is likely to obstruct the exercise of the free movement of persons can be justified only where that measure is compatible with the fundamental rights guaranteed by the Charter, the observance of which is ensured by the Court. Accordingly, as the Commission has rightly emphasised, any restriction of the rights laid down in Article 21(1) TFEU would necessarily constitute an infringement of Article 45(1) of the Charter, since, as I have already observed, the right of every national of the European Union to move and reside freely within the territory of the Member States, laid down in the Charter, reflects the right conferred by Article 21(1) TFEU. See, in particular, judgments of 18 June 1991, *ERT* (C-260/89, EU:C:1991:254, paragraph 43); of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'* (C-490/20, EU:C:2021:1008, paragraph 58); and of 21 June 2022, *Ligue des droits humains* (C-817/19, EU:C:2022:491, paragraphs 275 and 281); and also order of 24 June 2022, *Rzecznik Praw Obywatelskich* (C-2/21, EU:C:2022:502, paragraph 46).

[18] See also footnote 27 to this Opinion.

[19] Judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'* (C-490/20, EU:C:2021:1008, paragraph 43). Article 4(3) of Directive 2004/38 provides that 'Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality'.

[20] See, to that effect, judgment of 6 October 2021, *A (Crossing of borders in a pleasure boat)* (C-35/20, EU:C:2021:813, paragraph 53).

[21] Judgments of 25 July 2008, *Metock and Others* (C-127/08, EU:C:2008:449, paragraph 82), and of 19 September 2013, *Brey* (C-140/12, EU:C:2013:565, paragraph 71).

has consistently held that, in view of the context of that directive and the objectives that it pursues, its provisions cannot be interpreted restrictively and must not in any event be deprived of their practical effect. [22]

37. Furthermore, although, as EU law currently stands, the Member States are competent for issuing identity cards, it should nonetheless be borne in mind that they must exercise that competence in accordance with EU law and, in particular, with the Treaty provisions governing the freedom to move and reside within the territory of the Member States as conferred by Article 21(1) TFEU on every citizen of the European Union. [23]

38. In the present case, as is apparent from the order for reference, the issue that underlies the question referred for a preliminary ruling concerns the difference in treatment established by the Romanian legislation at issue between Romanian nationals domiciled in Romania and Romanian nationals domiciled in another Member State. That legislation provides that Romanian nationals domiciled in Romania are to be entitled to obtain two documents valid for travel within the European Union, namely *an identity card and a passport*, whereas Romanian nationals domiciled in another Member State are to be entitled to obtain only a single travel document, namely *a passport*. [24]

39. It therefore falls to be determined whether that difference in treatment is compatible with the provisions of EU law that govern the freedom of movement and residence of persons and, in particular, with Directive 2004/38.

40. It is true, admittedly, that, as I have already explained, Article 4(3) of Directive 2004/38 does not require Member States to issue two identity documents serving as travel documents to their nationals, namely an identity card *and* a passport. On the contrary, that provision allows Member States to choose to issue their nationals with an identity card *or* a passport. However, that provision, read in the light of Article 21 TFEU, does not allow Member States, when making *that choice*, to treat their nationals less favourably because they have exercised their right to move and reside freely within the European Union. In other words, the legitimate choice of Member States concerning the national scheme for issuing travel documents to their nationals, as provided for in Article 4(3) of Directive 2004/38, cannot lead, as in the present case, to the introduction of unequal treatment consisting in issuing to Romanian nationals domiciled in another Member State a single travel document, namely a passport.

41. As the Commission has rightly observed, Romanian nationals who reside in other Member States and wish to benefit from both their passport and their identity card (simple or electronic) must have their domicile in Romania. It is apparent from the order for reference that proof of that domicile is provided, inter alia, by a deed of ownership, a lease or confirmation of lodging. That means that such nationals must not only be either owners, or tenants, or occupiers as persons accommodated in a dwelling in Romania, but they must also have a dwelling which is necessary in order to exercise their right to free movement and residence in another Member

[22] Judgments of 11 December 2007, *Eind* (C-291/05, EU:C:2007:771, paragraph 43); of 25 July 2008, *Metock and Others* (C-127/08, EU:C:2008:449, paragraph 84); of 7 October 2010, *Lassal* (C-162/09, EU:C:2010:592, paragraph 31); of 18 December 2014, *McCarthy and Others* (C-202/13, EU:C:2014:2450, paragraph 32); of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 39); and of 11 April 2019, *Tarola* (C-483/17, EU:C:2019:309, paragraph 38).

[23] See, in particular, to that effect, judgments of 26 October 2006, *Tas-Hagen and Tas* (C-192/05, EU:C:2006:676, paragraph 22); of 22 May 2008, *Nerkowska* (C-499/06, EU:C:2008:300, paragraph 24); and of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraphs 35 to 38). See also judgment of 6 October 2021, *A (Crossing of borders in a pleasure boat)* (C-35/20, EU:C:2021:813, paragraph 53).

[24] I point out, as the Commission noted in response to a question put by the Court at the hearing, that from the point of view of the right of free movement and residence, the two situations are comparable.

State. That requirement clearly entails less favourable treatment owing to the exercise of that right. Romanian nationals who have exercised their right to freedom of movement must thus retain a domicile in Romania in order to benefit from both travel documents, while those who have not exercised that right and whose domicile is in Romania may benefit from both documents without having to satisfy other conditions.

42. It therefore seems to me that, as such, that difference in treatment may be capable of depriving Article 4(3) of Directive 2004/38 of its practical effect.

43. I recall, moreover, first, that Article 4(1) of that directive provides that 'without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport … shall have the right to leave the territory of a Member State to travel to another Member State'. Second, Article 5(1) of Directive 2004/38 provides that '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'.

44. It thus appears that the obligation to carry an identity card or a passport does not condition either the right to leave or the right to enter but *is a formality aimed at standardising and thus facilitating the identity checks* which, in the cases defined by Regulation (EC) No 562/2006,[25] may be carried out.[26] The fact that a citizen of the European Union may travel with only his or her identity card therefore constitutes an opportunity for that citizen, who therefore does not need to carry a passport. Therefore, the difference in treatment introduced by the legislation at issue is capable of depriving both Article 4(1) and Article 5(1) of Directive 2004/38 of their practical effect.

45. That being so, I consider that, in so far as the legislation at issue in the main proceedings allows the national authorities to choose whether to issue an identity card serving as a travel document to Romanian nationals depending on whether they have established their domicile in another Member State and therefore on whether they have exercised their right to freedom of movement and residence, it is worth assessing whether there is a restriction on freedom of movement within the meaning of Article 21(1) TFEU.

C. The existence of a restriction on freedom of movement of citizens of the European Union within the meaning of Article 21(1) TFEU

46. It follows from the preceding points that the legislation at issue in the main proceedings introduces a difference in treatment capable of affecting the right of Romanian nationals domiciled in another Member State to move and reside in the European Union within the meaning of Article 21(1) TFEU.

[25] 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), as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 182, p. 1).

[26] See, to that effect, judgment of 6 October 2021, *A (Crossing of borders in a pleasure boat)* (C-35/20, EU:C:2021:813, paragraph 73).

47. In that regard, I recall, in the first place, that, according to the Court's settled case-law, national legislation which places certain of the nationals of the Member State concerned at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State is a restriction on the freedoms conferred by Article 21(1) TFEU on every citizen of the European Union. [27]

48. I must observe, in the second place, that the Court has repeatedly held that the opportunities offered by the Treaty in relation to freedom of movement and residence cannot be fully effective if a national of a Member State can be deterred from availing himself or herself of them by obstacles raised to his or her residence in the host Member State by legislation of his or her State of origin penalising the fact that he or she has exercised them. [28]

49. I am of the view that the unequal treatment introduced by the legislation at issue constitutes a restriction on the freedom of movement and residence of Romanian nationals domiciled in another Member State. [29]

50. In the first place, I must emphasise that, in refusing to issue an identity card serving as a travel document on the sole ground that the applicant in the main proceedings has established his domicile in another Member State, namely France, that legislation is capable of deterring Romanian nationals in a situation like that of the applicant in the main proceedings from exercising their freedom to move and reside within the European Union.

51. As I have already stated, the problem does not have its origin in the fact that a Member State issues to its own nationals either a passport or an identity card. Such a choice is quite simply legitimate. The problem lies in the fact that, in making such a choice, a Member State introduces a difference in treatment which, as in the present case, affects the right to freedom of movement and residence of citizens of the European Union.

52. In the second place, I must observe that, contrary to the Romanian Government's assertion, even if Romanian nationals domiciled in another Member State have a passport, it is more difficult for them to exercise their freedom of movement.

53. In that regard, the referring court states that for a period of 12 days the applicant in the main proceedings was unable to travel to France since he did not have an identity card serving as a travel document as his passport was at the embassy of a third State in Bucharest for the purpose of obtaining a visa. According to that court, in such a case a Romanian national domiciled in Romania could have travelled to another Member State using his or her identity card. The referring court explains that the applicant in the main proceedings did not have that opportunity since his application to be issued with an identity card had been rejected by the Directorate for Personal Records.

54. The Romanian Government asserts that, in a situation in which a Romanian national submits his or her passport to the embassy of a third State for the purpose of obtaining a visa to enter that third State, a temporary passport is issued to him or her within three working days following the

[27] Judgments of 8 June 2017, *Freitag* (C-541/15, EU:C:2017:432, paragraph 35 and the case-law cited), and of 19 November 2020, *ZW* (C-454/19, EU:C:2020:947, paragraph 30 and the case-law cited). See, to that effect, concerning Article 45(1) of the Charter, judgment of 21 June 2022, *Ligue des droits humains* (C-817/19, EU:C:2022:491, paragraph 277).

[28] See judgments of 29 April 2004, *Pusa* (C-224/02, EU:C:2004:273, paragraph 19); of 26 October 2006, *Tas-Hagen and Tas* (C-192/05, EU:C:2006:676, paragraph 30); of 22 May 2008, *Nerkowska* (C-499/06, EU:C:2008:300, paragraph 32); and of 14 October 2010, *van Delft and Others* (C-345/09, EU:C:2010:610, paragraph 97).

[29] See points 38 and 41 of this Opinion.

date on which application for such a passport is made. According to the Romanian Government, such a document is designed to ensure that, in circumstances such as those of the main proceedings, Romanian nationals are able, without consideration of their domicile, to exercise rapidly and without hindrance their right to freedom of movement. The applicant in the main proceedings maintained at the hearing, however, that, in a busy period, a Romanian national must wait for one month to make an appointment and be able to submit his or her application for a temporary passport.

55. That, to my mind, demonstrates the weighty administrative burdens of which procedures for issuing identity cards and/or passports entail for citizens of the European Union, such as the applicant in the main proceedings, creating obstacles to their right to move and to reside freely within the European Union.

56. In the third place, I share the Commission's view that citizens of the European Union who exercise their right to freedom of movement and residence generally have interests in different Member States and thus display a certain degree of mobility within the European Union.

57. Last, in the fourth place, as Advocate General Jacobs has emphasised, 'it is … clear that freedom of movement entails more than simply the abolition of restrictions on a person's right to enter, reside in or leave a Member State. Such freedom cannot be assured unless all measures of any kind which impose an unjustified burden on those exercising it are also abolished. Whatever the context in which it may arise – including leaving or returning to the home Member State, or residing or moving elsewhere within the Union – no such burden may be imposed'. [30]

58. It therefore remains for me to determine whether the restriction on the free movement of Romanian nationals domiciled in another Member State, within the meaning of Article 21(1) TFEU, created by the legislation at issue may be justified under EU law.

1. The justification for the restriction

59. According to the Court's settled case-law, a restriction on the right to freedom of movement for persons, which, as in the main proceedings, is independent of the nationality of the persons concerned, may be justified if it is based on objective public-interest considerations and if it is proportionate to a legitimate objective pursued by national law. [31] It also follows from the Court's case-law that a measure is proportionate when, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to attain that objective. [32]

60. Is there an objective public-interest consideration in the present case capable of justifying the restriction on the freedom of movement and residence of the persons concerned?

61. The referring court states that it has not identified the objective public-interest consideration that might justify the difference in treatment and the fact that Romanian nationals domiciled in another Member State of the European Union are denied the right to have a national identity card serving as a travel document.

[30] Opinion of Advocate General Jacobs in *Pusa* (C-224/02, EU:C:2003:634, point 21).

[31] Judgment of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 41 and the case-law cited).

[32] Judgments of 18 July 2006, *De Cuyper* (C-406/04, EU:C:2006:491, paragraph 42); of 26 October 2006, *Tas-Hagen and Tas* (C-192/05, EU:C:2006:676, paragraph 35); and of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 41).

62. In its written observations and at the hearing, the Romanian Government justified its refusal to issue such an identity card to Romanian nationals domiciled in another Member State, essentially, by the fact that it is impossible to indicate on the identity card the domicile outside Romania of those nationals. It claimed, first of all, that, under Article 91(1) of the Romanian Civil Code, proof of domicile and residence is provided by the information on the identity card, the *primary* function of which is therefore to prove that essential element of the Romanian national's identity, so that he or she may exercise his or her rights and fulfil his or her obligations (notably in civil or administrative matters), while it also has the *subsidiary* function of constituting, in application of Directive 2004/38, one of the documents that permit the exercise of the right to freedom of movement. The referring court emphasises, next, that the indication of the address of the domicile on the identity card is therefore capable of making identification more efficient and preventing the excessive processing of the personal data of Romanian nationals. It states, last, that, even where the address of the domicile of a Romanian national in another Member State is mentioned on the identity card, the national authorities cannot assume responsibility for certifying its accuracy, since, apart from the fact that they lack competence in that respect, they do not have the means to verify that address without such verification becoming a disproportionate, or indeed impossible, administrative burden.

63. I must say that I find it difficult to consider that such justification amounts to an objective public-interest consideration, for the following reasons.

64. In the first place, as regards the probative value of the address stated on the identity card, although I can understand that such information is 'useful' for the administrative authorities, I find it difficult to see the link between that justification and the refusal to issue an identity card to Romanian nationals domiciled in another Member State.

65. In the second place, as regards the fact that the indication of the address on the identity card may make the identification and checking of the domicile of Romanian nationals by the administration more efficient, that does not however constitute an objective public-interest consideration capable of justifying a restriction on a fundamental freedom of EU law. I recall, in that regard, that, according to the Court's settled case-law, considerations of an administrative nature cannot justify derogation by a Member State from the rules of EU law, particularly where the derogation in question amounts to preventing or restricting the exercise of one of the fundamental freedoms guaranteed by the Treaty. [33]

66. It is for those reasons that I consider that the Romanian legislation at issue in the main proceedings constitutes a restriction on the freedom to move and reside within the European Union of Romanian nationals domiciled in another Member State which cannot be justified either by the probative value of the address stated on the identity card or by the efficiency of the identification and checking of that address by the competent administration.

67. In case the Court should nonetheless consider that the justification put forward by the Romanian Government allows such a restriction to be justified, I shall consider, briefly, whether the legislation at issue complies with the principle of proportionality.

[33] See, in particular, judgments of 3 February 1983, *van Luipen* (29/82, EU:C:1983:25, paragraph 12); of 26 January 1999, *Terhoeve* (C-18/95, EU:C:1999:22, paragraph 45); and of 21 July 2011, *Commission* v *Portugal* (C-518/09, not published, EU:C:2011:501, paragraph 66).

2. Does the legislation at issue comply with the principle of proportionality?

68. As I have observed, in order for it to be proportionate, the legislation at issue must be appropriate for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain that objective. [34]

(a) Appropriateness

69. I consider that the refusal to issue an identity card capable of serving as a travel document to Romanian nationals domiciled in another Member State is not appropriate for securing the attainment of the objective pursued. The fact that the national authorities refuse to issue such an identity card without requiring those nationals to maintain a domicile in Romania is not an appropriate measure for the purpose of ensuring the probative value of the address stated on the identity card and the efficiency of the checking of the identification of the domicile of those nationals by the Romanian administration.

70. In particular, an individual may have moved without applying for a new identity card or, quite simply, may no longer be temporarily or permanently resident at the domicile indicated on the identity card. It seems to me that the national authorities have other more appropriate means of checking domicile or residence, such as the issuing by the Romanian authorities of confirmation of domicile or registration or of a certificate of residence, on the basis of the databases relating to the population by the Romanian authorities.

71. As regards the checks carried out by the administration in order to ascertain whether a person actually lives at a particular address, the applicant in the main proceedings emphasised at the hearing the absence in practice of such a systematic verification by the Romanian authorities, a matter which it is for the referring court to verify.

72. It follows, in my view, that the legislation at issue does not coherently and systematically guarantee the objective pursued and, consequently, is not appropriate for ensuring the attainment of that objective.

(b) Necessity

73. It seems difficult to me to maintain that it is necessary, in order to make the identification of the address in Romania of a Romanian national domiciled in another Member State more efficient, to issue identity cards capable of serving as travel documents only to nationals domiciled in Romania.

74. As the Commission submitted at the hearing, it would be perfectly possible for Romania to maintain its system, namely to require an indication on the identity card of the address in Romania for nationals domiciled in that Member State, without refusing to issue identity cards serving as travel documents for Romanian nationals domiciled in another Member State.

[34] See point 59 of this Opinion. I note that Article 3(8) of Regulation 2019/1157 provides that 'when necessary and proportionate to the aim to be achieved, Member States may enter such details and observations for national use as may be required in accordance with national law. The efficiency of minimum security standards and the cross-border compatibility of identity cards shall not be diminished as a result'.

75. Consequently, such a refusal by the Romanian authorities is not necessary in order to attain the objective pursued by the Romanian Government.

V. Conclusion

76. Having regard to all of the foregoing considerations, I propose that the Court answer the question for a preliminary ruling referred by the Înalta Curte de Casație şi Justiție (High Court of Cassation and Justice, Romania) as follows:

Article 21(1) TFEU and Article 4(3) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

must be interpreted as meaning that they preclude legislation of a Member State under which a citizen of the European Union, a national of that Member State who has exercised his or her right to freedom of movement and freedom to reside in another Member State, is refused the issuance of an identity card serving as a travel document within the European Union, on the sole ground that that national has established his or her domicile within the territory of that other Member State.