JUDGMENT OF THE COURT (Third Chamber)

5 May 2011 *

In Case C-434/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Supreme Court of the United Kingdom, formerly the House of Lords (United Kingdom), made by decision of 5 May 2009, received at the Court on 5 November 2009, in the proceedings

Shirley McCarthy

v

Secretary of State for the Home Department,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, R. Silva de Lapuerta (Rapporteur), E. Juhász and J. Malenovský, Judges,

* Language of the case: English.

Advocate General: J. Kokott,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 October 2010,

after considering the observations submitted on behalf of:

— Mrs McCarthy, by S. Cox, Barrister, and K. Lewis, Solicitor,

— the United Kingdom Government, by S. Ossowski, acting as Agent, and by T. Ward, Barrister,

— the Danish Government, by C. Vang, acting as Agent,

— the Estonian Government, by M. Linntam, acting as Agent,

— Ireland, by D. O'Hagan and D. Conlan Smyth, acting as Agents, and by B. Lennon, Barrister,

— the Netherlands Government, by C. Wissels and M. de Ree, acting as Agents,

— the European Commission, by D. Maidani and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 November 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 3(1) and Article 16 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 corrigendum OJ 2004 L 229, p. 35).

2 The reference was made in the course of proceedings between Mrs McCarthy and the Secretary of State for the Home Department ('the Secretary of State') concerning an application for a residence permit made by Mrs McCarthy.

Legal context

European Union law

3 According to recitals 1 to 3 in the preamble to Directive 2004/38:

'(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.

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

4 Chapter I of Directive 2004/38, entitled 'General provisions', comprises Articles 1 to 3 of the directive.

5 Article 1, 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;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.'

6 Article 2 of Directive 2004/38, entitled 'Definitions', provides:

'For the purposes of this Directive:

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

2. "family member" means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

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.'

7 Article 3 of Directive 2004/38, entitled 'Beneficiaries', provides in paragraph 1:

'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.'

8 Chapter III of that directive, entitled 'Right of residence', comprises Articles 6 to 15 of the directive.

9 Article 6 provides:

'1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.'

10 Article 7 of Directive 2004/38 states:

'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).

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

…

4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.'

11 Under Chapter IV, headed 'Right of permanent residence', Article 16 of Directive 2004/38, entitled 'General rule for Union citizens and their family members', provides:

'1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

...

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

12 Chapter V of that directive, entitled 'Provisions common to the right of residence and the right of permanent residence', includes Article 22 which, under the heading 'Territorial scope', provides:

'The right of residence and the right of permanent residence shall cover the whole territory of the host Member State. Member States may impose territorial restrictions on the right of residence and the right of permanent residence only where the same restrictions apply to their own nationals.'

National law

13 Under the United Kingdom Immigration Rules, nationals of third countries who do not have leave to remain in the United Kingdom thereunder also do not meet the requirements to be granted leave to remain under those Rules as the spouse of a person settled in the United Kingdom.

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

14 Mrs McCarthy, a national of the United Kingdom, is also an Irish national. She was born and has always lived in the United Kingdom, and has never argued that she is or has been a worker, self-employed person or self-sufficient person. She is in receipt of State benefits.

15 On 15 November 2002, Mrs McCarthy married a Jamaican national who lacks leave to remain in the United Kingdom under the Immigration Rules of that Member State.

16 Following her marriage, Mrs McCarthy applied for an Irish passport for the first time and obtained it.

17 On 23 July 2004, Mrs McCarthy and her husband applied to the Secretary of State for a residence permit and residence document under European Union law as, respectively, a Union citizen and the spouse of a Union citizen. The Secretary of State refused their applications on the ground that Mrs McCarthy was not 'a qualified person' (essentially, a worker, self-employed person or self-sufficient person) and, accordingly, that Mr McCarthy was not the spouse of 'a qualified person'.

18 Mrs McCarthy appealed against the decision that had been made in relation to her by the Secretary of State before the Asylum and Immigration Tribunal ('the Tribunal'), which dismissed the appeal on 17 October 2006. The High Court of Justice of England and Wales ordered the Tribunal to reconsider the appeal, and on 16 August 2007 the Tribunal upheld the decision to dismiss it.

19 The appeal brought by Mrs McCarthy against the decision of the Tribunal was dismissed by the Court of Appeal (Civil Division) (England and Wales). Mrs McCarthy brought an appeal against the decision of that court before the referring court.

20 For his part, Mr McCarthy did not appeal against the decision of the Secretary of State in relation to him, but nevertheless made a further application which was also refused. Mr McCarthy then appealed against that second decision to the Tribunal, which adjourned the appeal to await the final outcome of Mrs McCarthy's appeal.

21 In that context, the Supreme Court of the United Kingdom decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is a person of dual Irish and United Kingdom nationality who has resided in the United Kingdom for her entire life a "beneficiary" within the meaning of Article 3 of Directive 2004/38 …?

2. Has such a person "resided legally" within the host Member State for the purpose of Article 16 of [that] directive in circumstances where she was unable to satisfy the requirements of Article 7 of [that directive]?'

Consideration of the questions referred

22 As is apparent from paragraphs 14 to 19 of this judgment, the main proceedings concern an application for a right of residence under European Union law brought by Mrs McCarthy, a Union citizen, to a Member State of which she is a national and where she has always resided.

23 That application is in fact intended to confer on Mr McCarthy, a national of a third country, a right of residence under Directive 2004/38, as a member of Mrs McCarthy's family, given that a comparable right of residence does not arise under the Immigration Rules of the United Kingdom.

The first question

24 At the outset, it should be noted that, even though, formally, the national court has limited its questions to the interpretation of Articles 3(1) and 16 of Directive 2004/38, such a situation does not prevent the Court from providing the national court with all the elements of interpretation of European Union law which may be of assistance in adjudicating on the case before it, whether or not that court has specifically referred to them in the questions (see Case C-251/06 *ING. AUER* [2007] ECR I-9689, paragraph 38 and the case-law cited).

25 There is no indication in the order for reference, in the case-file or in the observations submitted to the Court that Mrs McCarthy has ever exercised her right of free movement within the territory of the Member States, either individually or as a family member of a Union citizen who has exercised such a right. Likewise, Mrs McCarthy is applying for a right of residence under European Union law even though she does not argue that she is or has been a worker, self-employed person or self-sufficient person.

26 Thus, the first question from the national court must be understood as asking, in essence, whether Article 3(1) of Directive 2004/38 or Article 21 TFEU is applicable to the situation of a Union citizen who has never exercised his right of free movement,

who has always resided in a Member State of which he is a national and who is also a national of another Member State.

Preliminary observations

27 As a preliminary point, it should be observed that citizenship of the Union confers on each Union citizen a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and restrictions laid down by the Treaties and the measures adopted for their implementation, freedom of movement for persons being, moreover, one of the fundamental freedoms of the internal market, which was also reaffirmed in Article 45 of the Charter of Fundamental Rights of the European Union (Case C-162/09 *Lassal* [2010] ECR I-9217, paragraph 29).

28 With regard to Directive 2004/38, the Court has already had occasion to point out that it 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 the Treaty and that it aims in particular to strengthen that right (see Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraphs 82 and 59, and *Lassal*, paragraph 30).

29 Likewise, the Court has also held that a principle of international law, reaffirmed in Article 3 of Protocol No 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, that European Union law cannot be assumed to disregard in the context of relations between Member States, precludes a Member State from refusing its own nationals the right to enter its territory and remain there for any reason (see Case 41/74 *van Duyn* [1974] ECR 1337, paragraph 22, and Case C-257/99 *Barkoci and Malik* [2001] ECR I-6557,

paragraph 81); that principle also precludes that Member State from expelling its own nationals from its territory or refusing their right to reside in that territory or making such right conditional (see Cases C-370/90 *Singh* [1992] ECR I-4265, paragraph 22 and C-291/05 *Eind* [2007] ECR I-10719, paragraph 31).

The applicability of Directive 2004/38

30 The first part of the first question, as reformulated by the Court, concerns whether Article 3(1) of Directive 2004/38 is to be interpreted as meaning that that directive applies to a citizen in a situation such as that of Mrs McCarthy, who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

31 A literal, teleological and contextual interpretation of that provision leads to a negative reply to that question.

32 First, according to Article 3(1) of Directive 2004/38, all Union citizens who 'move to' or reside in a Member State 'other' than that of which they are a national are beneficiaries of that directive.

33 Secondly, whilst it is true that, as stated in paragraph 28 of this judgment, Directive 2004/38 aims to facilitate and strengthen 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 each citizen of the Union, the fact remains that the subject of the directive concerns, as is apparent from Article 1(a), the conditions governing the exercise of that right.

34 Since, as stated in paragraph 29 of this judgment, the residence of a person residing in the Member State of which he is a national cannot be made subject to conditions, Directive 2004/38, concerning the conditions governing the exercise of the right to move and reside freely within the territory of the Member States, cannot apply to a Union citizen who enjoys an unconditional right of residence due to the fact that he resides in the Member State of which he is a national.

35 Thirdly, it is apparent from Directive 2004/38, taken as a whole, that the residence to which it refers is linked to the exercise of the freedom of movement for persons.

36 Thus, first of all, Article 1(a) of that directive defines its subject by reference to the exercise of 'the' right 'of free movement and residence' within the territory of the Member States by Union citizens. Such a relationship between residence and free movement is also apparent both from the title of that directive and from the majority of its recitals, the second of which refers, moreover, exclusively to the free movement of persons.

37 Furthermore, the rights of residence referred to in Directive 2004/38, namely both the right of residence under Articles 6 and 7 and the permanent right of residence under Article 16, refer to the residence of a Union citizen either in 'another Member State' or in 'the host Member State' and therefore govern the legal situation of a Union citizen in a Member State of which he is not a national.

38 Lastly, although, as stated in paragraph 32 of this judgment, Article 3(1) of Directive 2004/38 designates as 'beneficiaries' of that directive all Union citizens who move to 'or' reside in a Member State, it is apparent from Article 22 that the territorial scope of the right of residence and the right of permanent residence referred to in that directive covers the whole territory of 'the host Member State', the latter being defined in Article 2(3) as the Member State to which a Union citizen 'moves' in order to exercise 'his/her' right of free movement and residence within the territory of the Member States.

39 Hence, in circumstances such as those of the main proceedings, in so far as the Union citizen concerned has never exercised his right of free movement and has always resided in a Member State of which he is a national, that citizen is not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, so that that directive is not applicable to him.

40 That finding cannot be influenced by the fact that the citizen concerned is also a national of a Member State other than that where he resides.

41 Indeed, the fact that a Union citizen is a national of more than one Member State does not mean that he has made use of his right of freedom of movement.

42 Lastly, it should also be noted that, since a Union citizen such as Mrs McCarthy is not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, her spouse is not covered by that concept either, given that the rights conferred by that directive on the family members of a beneficiary of that directive are not autonomous rights of those family members, but derived rights, acquired through their status as members of the beneficiary's family (see, in relation to instruments

of European Union law prior to Directive 2004/38, Case C-243/91 *Taghavi* [1992] ECR I-4401, paragraph 7, and *Eind*, paragraph 23).

43 It follows that Article 3(1) of Directive 2004/38 is to be interpreted as meaning that that directive is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

The applicability of Article 21 TFEU

44 The second part of this question, as reformulated by the Court, concerns whether Article 21 TFEU is applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

45 In that regard, it is settled case-law that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to situations which have no factor linking them with any of the situations governed by European Union law and which are confined in all relevant respects within a single Member State (see, to that effect, Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 33, and *Metock and Others*, paragraph 77).

46 On this point, it must be observed, however, that the situation of a Union citizen who, like Mrs McCarthy, has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation (see Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 22).

47 Indeed, the Court has stated several times that citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177, paragraph 41 and case-law cited). Furthermore, the Court has held that Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status (see *Ruiz Zambrano*, paragraph 42).

48 As a national of at least one Member State, a person such as Mrs McCarthy enjoys the status of a Union citizen under Article 20(1) TFEU and may therefore rely on the rights pertaining to that status, including against his Member State of origin, in particular the right conferred by Article 21 TFEU to move and reside freely within the territory of the Member States (see Case C-33/07 *Jipa* [2008] ECR I-5157, paragraph 17 and case-law cited).

49 However, no element of the situation of Mrs McCarthy, as described by the national court, indicates that the national measure at issue in the main proceedings has the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU. Indeed, the failure by the authorities of the United Kingdom to take into account the Irish nationality of Mrs McCarthy for the purposes of granting her a right of residence in the United Kingdom in no way affects her in her right to

move and reside freely within the territory of the Member States, or any other right conferred on her by virtue of her status as a Union citizen.

50 In that regard, by contrast with the case of *Ruiz Zambrano*, the national measure at issue in the main proceedings in the present case does not have the effect of obliging Mrs McCarthy to leave the territory of the European Union. Indeed, as is clear from paragraph 29 of the present judgment, Mrs McCarthy enjoys, under a principle of international law, an unconditional right of residence in the United Kingdom since she is a national of the United Kingdom.

51 The case in the main proceedings also differs from Case C-148/02 *García Avello* [2003] ECR I-11613. In that judgment, the Court held that the application of the law of one Member State to nationals of that Member State who were also nationals of another Member State had the effect that those Union citizens had different surnames under the two legal systems concerned, and that that situation was liable to cause serious inconvenience for them at both professional and private levels resulting from, inter alia, difficulties in benefiting, in one Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname recognised in the other Member State of which they are also nationals.

52 As the Court noted in Case C-353/06 *Grunkin and Paul* [2008] ECR I-7639, in circumstances such as those examined in *Garcia Avello*, what mattered was not whether the discrepancy in surnames was the result of the dual nationality of the persons concerned, but the fact that that discrepancy was liable to cause serious inconvenience for the Union citizens concerned that constituted an obstacle to freedom of movement that could be justified only if it was based on objective considerations and

was proportionate to the legitimate aim pursued (see, to that effect, *Grunkin et Paul*, paragraphs 23, 24 and 29).

53 Thus, in *Ruiz Zambrano* and *García Avello*, the national measure at issue had the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status or of impeding the exercise of their right of free movement and residence within the territory of the Member States.

54 As stated in paragraph 49 of the present judgment, in the context of the main proceedings in this case, the fact that Mrs McCarthy, in addition to being a national of the United Kingdom, is also a national of Ireland does not mean that a Member State has applied measures that have the effect of depriving her of the genuine enjoyment of the substance of the rights conferred by virtue of her status as a Union citizen or of impeding the exercise of her right of free movement and residence within the territory of the Member States. Accordingly, in such a context, such a factor is not sufficient, in itself, for a finding that the situation of the person concerned is covered by Article 21 TFEU.

55 In those circumstances, the situation of a person such as Mrs McCarthy has no factor linking it with any of the situations governed by European Union law and the situation is confined in all relevant respects within a single Member State.

56 It follows that Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of

impeding the exercise of his right of free movement and residence within the territory of the Member States.

57 In the light of the foregoing, the answer to the first question is as follows:

— Article 3(1) of Directive 2004/38 must be interpreted as meaning that that directive is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

— Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States.

The second question

58 In view of the answer to the first question referred by the national court, there is no need to answer the second question.

Costs

59 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:

1. **Article 3(1) 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 that directive is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.**

2. **Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of**

his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States.

[Signatures]