Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

16 January 2014*

(Request for a preliminary ruling — Directive 2004/38/EC — Right of citizens of the Union and their family members to move and reside freely within the territory of the Member States — Right of residence in a Member State of a third-country national who is a direct descendant of a person having the right of residence in that Member State — Concept of 'dependant')

In Case C-423/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Kammarrätten i Stockholm – Migrationsöverdomstolen (Sweden), made by decision of 12 September 2012, received at the Court on 17 September 2012, in the proceedings

Flora May Reyes

v

Migrationsverket,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as Judge of the Fourth Chamber, M. Safjan, J. Malenovský and A. Prechal (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 4 September 2013,

after considering the observations submitted on behalf of:

— Ms Reyes, by S. Hansson, advokat, and T. Fraenkel,

— the Swedish Government, by A. Falk and H. Karlsson, acting as Agents,

— the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

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

— the United Kingdom Government, by J. Beeko, acting as Agent, assisted by G. Facenna, barrister,

— the European Commission, by C. Tufvesson and M. Wilderspin, acting as Agents,

* Language of the case: Swedish.

after hearing the Opinion of the Advocate General at the sitting on 6 November 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(2)(c) 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 Ms Reyes, who is a Philippines citizen, and the Migrationsverket (Immigration Board) concerning the rejection of her application for a residence permit in Sweden.

Legal context

European Union law

3 Recital 5 in the preamble to Directive 2004/38 states:

‘The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. ...’

4 According to recital 28 in the preamble to that directive:

‘To guard against abuse of rights or fraud, … Member States should have the possibility to adopt the necessary measures’.

5 Article 2 of that directive, entitled ‘Definitions’, provides:

‘For the purpose of this Directive:

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

2. “family member” means:

…

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner …’.

6 Article 7 of Directive 2004/38, ‘Right of residence for more than three months’, 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:

…

(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; …

…

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 … (b) …

…'

7 Article 23 of Directive 2004/38, entitled 'Related rights', provides:

'Irrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self-employment there.'

Swedish law

8 Amendments made to the Aliens Act (2005 :716) (utlänningslagen (2005:716)) and to the Aliens Regulation (2006:97) (utlänningsförordningen (2006:97)), which entered into force on 30 April 2006, sought to transpose Directive 2004/38 into Swedish law. The national provisions correspond in essence to the provisions of the directive.

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

9 Ms Reyes, who was born in 1987 and is a Philippines citizen, was left in the care of her maternal grandmother when she was three years old, with her two sisters, because their mother had moved to Germany to work to be able to support her family resident in the Philippines. Ms Reyes' mother obtained German citizenship.

10 Ms Reyes was brought up by her maternal grandmother for her entire childhood and adolescence. Before travelling to Sweden, she lived for four years in Manila (Philippines) with her older sister (now deceased). She studied for two years at high school and four years at college when she was 17 to 23 years old. After having undertaken training involving work experience, she qualified as a nursing assistant. After her exams, she helped her sister to look after her sister's children. Ms Reyes' mother remained in close contact with her family in the Philippines throughout that time by sending money each month to support them and pay for their studies and visiting them each year. Ms Reyes has never held a job and nor has she applied for any allowances from the Philippines social security authorities.

11 In December 2009, the mother of Ms Reyes moved to Sweden to live with a Norwegian man who lived in that Member State. She married that Norwegian citizen in the summer of 2011. Since 2009, Ms Reyes' stepfather, who has resources in the form of a retirement pension, has regularly sent money to Ms Reyes and other members of his wife's family living in the Philippines. Since she moved to Sweden, Ms Reyes' mother has not worked and also lives on her husband's retirement pension.

12 On 13 March 2011, Ms Reyes entered the Schengen area. She applied for a residence permit in Sweden on 29 March 2011 as a family member of her mother and her Norwegian cohabiting partner, on whom she claimed that she was dependent.

13 On 11 May 2011, the Migrationsverket rejected Ms Reyes' application since she had not proved that the money which was indisputably transferred to her by her mother and her partner had been used to supply her basic needs in the form of board and lodging and access to healthcare in the Philippines. Nor had she shown how her home country's social insurance and security system could cover a citizen in her situation. However, she did show that she held qualifications from her country of origin and that she had also carried out work experience there. Furthermore, the applicant in the main proceedings had been economically dependent on her grandmother throughout her childhood and adolescence. In consequence, the Migrationsverket took the view that she had failed to prove economic dependence as regards her family members in Sweden.

14 Ms Reyes appealed against the decision of the Migrationverket to the Förvaltningsrätten i Göteborg, migrationsdomstolen (Gothenburg Administrative Court, Immigration Court), which dismissed the appeal. The court did not dispute that basic needs of the applicant in the main proceedings were met by her mother and her stepfather. Ms Reyes' social situation could not, however, be regarded as being such that she could not, without material support from her mother and her stepfather, support herself in her country of origin. In its assessment, the court found that Ms Reyes was young, had studied and lived in Manila, had a higher education diploma and had relatives still living in the Philippines. The mere fact that Ms Reyes' mother and stepfather had taken it upon themselves to support her did not, in the view of the court, establish that there was a relationship of dependence which could confer on Ms Reyes a right of residence in Sweden.

15 Ms Reyes has appealed against the judgment of the Förvaltningsrätten i Göteborg – migrationsdomstolen before the Kammarrätten i Stockholm – Migrationsöverdomstolen (Administrative Court of Appeal for Immigration matters, Stockholm). She claims that, despite her studies, she has not found work in the Philippines, where unemployment is endemic. In her submission, her mother and stepfather would not have sent such large amounts so regularly if they were not essential to ensure that the family could survive in their country of origin.

16 The referring court notes that the parties to the main proceedings have different views on the interpretation of the expression 'are dependants' in Article 2(2)(c) of Directive 2004/38. In that regard, referring to the judgments in Case 316/85 *Lebon* [1987] ECR 2811 and Case C-1/05 *Jia* [2007] ECR I-1, it asks whether, in the assessment of whether a person is in a position to provide for his own basic needs, account may also be taken of whether it is possible for the person in question to do so by way of paid work.

17 In addition, the referring court is doubtful as to the effect which Ms Reyes' intention to work in the host Member State may have on her being assessed as a 'dependent family member' within the meaning of the directive. In the view of that court, carrying out paid work would result in the right of residence on the basis of the ground claimed ceasing to exist since, once earned income was received, the situation of dependence would cease to exist.

18 In those circumstances, the Kammarrätten i Stockholm – Migrationsöverdomstolen decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Can Article 2(2)(c) of Directive 2004/38 be interpreted as meaning that a Member State, on certain conditions, can require a direct descendant who is 21 years old or older – in order to be regarded as dependent and thus come within the definition of a family member under Article 2(2)(c) of Directive 2004/38 – to have tried to obtain employment or help with supporting himself from the authorities of his country of origin and/or otherwise to support himself, but that that has not been possible?

2. In interpreting the term "dependant" in Article 2(2)(c) of Directive 2004/38, does any significance attach to the fact that a family member – due to personal circumstances such as age, education and health – is deemed to be well placed to obtain employment and in addition intends to start work in the Member State, which would mean that the conditions for him to be regarded as a relative who is a dependant under the provision are no longer met?'

Consideration of the questions referred

The first question

19 By its first question, the referring court asks, in essence, whether Article 2(2)(c) of Directive 2004/38 is to be interpreted as permitting a Member State to require, in circumstances such as those in question in the main proceedings, that, in order to be regarded as being dependent and thus to come within the definition of 'family member' set out in that provision, a direct descendant who is 21 years old or older must show that he has tried without success to find employment or to obtain subsistence support from the authorities of the country of origin and/or otherwise tried to support himself.

20 In that regard, it must be noted that, in order for a direct descendant, who is 21 years old or older, of a Union citizen to be regarded as being a 'dependant' of that citizen within the meaning of Article 2(2)(c) of Directive 2004/38, the existence of a situation of real dependence must be established (see, to that effect, *Jia*, paragraph 42).

21 That dependent status is the result of a factual situation characterised by the fact that material support for that family member is provided by the Union citizen who has exercised his right of free movement or by his spouse (see, to that effect, *Jia*, paragraph 35).

22 In order to determine the existence of such dependence, the host Member State must assess whether, having regard to his financial and social conditions, the direct descendant, who is 21 years old or older, of a Union citizen, is not in a position to support himself. The need for material support must exist in the State of origin of that descendant or the State whence he came at the time when he applies to join that citizen (see, to that effect, *Jia*, paragraph 37).

23 However, there is no need to determine the reasons for that dependence or therefore for the recourse to that support. That interpretation is dictated in particular by the principle according to which the provisions, such as Directive 2004/38, establishing the free movement of Union citizens, which constitute one of the foundations of the European Union, must be construed broadly (see, to that effect, *Jia*, paragraph 36 and the case-law cited).

24 The fact that, in circumstances such as those in question in the main proceedings, a Union citizen regularly, for a significant period, pays a sum of money to that descendant, necessary in order for him to support himself in the State of origin, is such as to show that the descendant is in a real situation of dependence vis-à-vis that citizen.

25 In those circumstances, that descendant cannot be required, in addition, to establish that he has tried without success to find work or obtain subsistence support from the authorities of his country of origin and/or otherwise tried to support himself.

26 The requirement for such additional evidence, which is not easy to provide in practice, as the Advocate General noted in point 60 of his Opinion, is likely to make it excessively difficult for that descendant to obtain the right of residence in the host Member State, while the facts described in paragraph 24 of this judgment already show that a real dependence exists. Accordingly, that requirement is likely to deprive Articles 2(2)(c) and 7 of Directive 2004/38 of their proper effect.

27 Furthermore, it is not excluded that that requirement obliges that descendant to take more complicated steps, such as trying to obtain various certificates stating that he has not found any work or obtained any social allowance, than that of obtaining a document of the competent authority of the State of origin or the State from which the applicant came attesting to the existence of a situation of dependence. The Court has already held that such a document cannot constitute a condition for the issue of a residence permit (*Jia*, paragraph 42).

28 Accordingly, the answer to the first question is therefore that Article 2(2)(c) of Directive 2004/38 must be interpreted as meaning that a Member State cannot require a direct descendant who is 21 years old or older, in circumstances such as those in the main proceedings, in order to be regarded as dependent and thus come within the definition of a family member under Article 2(2)(c) of that provision, to have tried unsuccessfully to obtain employment or to obtain subsistence support from the authorities of his country of origin and/or otherwise to support himself.

The second question

29 By its second question, the referring court asks, in essence, whether, in interpreting the term 'dependant' in Article 2(2)(c) of Directive 2004/38, any significance attaches to the fact that a family member – due to personal circumstances such as age, education and health – is deemed to be well placed to obtain employment and in addition intends to start work in the Member State, which would mean that the conditions for him to be regarded as a relative who is a dependant under the provision are no longer met.

30 In that regard, it must be noted that the situation of dependence must exist, in the country from which the family member concerned comes, at the time when he applies to join the Union citizen on whom he is dependent (see, to that effect, *Jia*, paragraph 37, and Case C-83/11 *Rahman* [2012] ECR, paragraph 33).

31 It follows that, as, in essence, has been stated by all the parties which have submitted observations to the Court, any prospects of obtaining work in the host Member State which would enable, if necessary, a direct descendant, who is 21 years old or older, of a Union citizen no longer to be dependent on that citizen once he has the right of residence are not such as to affect the interpretation of the condition of being a 'dependant' referred to in Article 2(2)(c) of Directive 2004/38.

32 Furthermore, as the European Commission has rightly pointed out, the opposite solution would, in practice, prohibit that descendant from looking for employment in the host Member State and would accordingly infringe Article 23 of that directive, which expressly authorises such a descendant, if he has the right of residence, to take up employment or self-employment (see, by analogy, *Lebon*, paragraph 20).

33 In consequence, the answer to the second question is that Article 2(2)(c) of Directive 2004/38 must be interpreted as meaning that the fact that a relative – due to personal circumstances such as age, education and health – is deemed to be well placed to obtain employment and in addition intends to start work in the Member State does not affect the interpretation of the requirement in that provision that he be a 'dependant'.

Costs

34 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Fourth Chamber) hereby rules:

1. **Article 2(2)(c) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, must be interpreted as meaning that a Member State cannot require a direct descendant who is 21 years old or older, in circumstances such as those in the main proceedings, in order to be regarded as dependent and thus come within the definition of a family member under Article 2(2)(c) of that provision, to have tried unsuccessfully to obtain employment or to obtain subsistence support from the authorities of his country of origin and/or otherwise to support himself.**

2. **Article 2(2)(c) of Directive 2004/38 must be interpreted as meaning that the fact that a relative – due to personal circumstances such as age, education and health – is deemed to be well placed to obtain employment and in addition intends to start work in the Member State does not affect the interpretation of the requirement in that provision that he be a 'dependant'.**

[Signatures]