Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

8 November 2012*

(Articles 20 TFEU and 21 TFEU — Charter of Fundamental Rights of the European Union — Article 51 — Directive 2003/109/EC — Third-country nationals — Right of residence in a Member State — Directive 2004/38/EC — Third-country nationals who are family members of Union citizens — Third-country national neither accompanying nor joining a Union citizen in the host Member State and remaining in the citizen's Member State of origin — Right of residence of a third-country national in the Member State of origin of a citizen residing in another Member State — Citizenship of the Union — Fundamental rights)

In Case C-40/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof Baden-Württemberg (Germany), made by decision of 20 January 2011, received at the Court on 28 January 2011, in the proceedings

Yoshikazu Iida

v

Stadt Ulm,

THE COURT (Third Chamber),

composed of R. Silva de Lapuerta (Rapporteur), acting as President of the Third Chamber, K. Lenaerts, E. Juhász, T. von Danwitz and D. Šváby, Judges,

Advocate General: V. Trstenjak,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 22 March 2012,

after considering the observations submitted on behalf of:

— Mr Y. Iida, by T. Oberhäuser and W. Weh, Rechtsanwälte,

— the German Government, by T. Henze and A. Wiedmann, acting as Agents,

— the Belgian Government, by L. Van den Broeck and C. Pochet, acting as Agents,

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

* Language of the case: German.

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

— the Italian Government, by G. Palmieri, acting as Agent, and L. D'Ascia, avvocato dello Stato,

— the Netherlands Government, by C. Wissels, K. Bulterman and J. Langer, acting as Agents,

— the Polish Government, by M. Szpunar, acting as Agent,

— the United Kingdom Government, by S. Hathaway, and subsequently by A. Robinson, acting as Agents, and R. Palmer, barrister,

— the European Commission, by C. Tufvesson and H. Krämer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 May 2012,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the provisions of European Union law on the right of residence in a Member State of third-country nationals and on citizenship of the Union.

2 The reference has been made in proceedings between Mr Iida and Stadt Ulm (City of Ulm) concerning its refusal to grant him a right of residence in Germany on the basis 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) and to issue him a residence card on that basis.

Legal context

European Union law

Directive 2003/109/EC

3 Under the heading 'Subject matter', Article 1(a) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2003 L 16, p. 44) provides:

'This Directive determines:

(a) the terms for conferring and withdrawing long-term resident status granted by a Member State in relation to third-country nationals legally residing in its territory, and the rights pertaining thereto …'

4 In accordance with Article 3(1) and (2) of Directive 2003/109, 'Scope':

'1. This Directive applies to third-country nationals residing legally in the territory of a Member State.

2. This Directive does not apply to third-country nationals who:

(a) reside in order to pursue studies or vocational training;

(b) are authorised to reside in a Member State on the basis of temporary protection or have applied for authorisation to reside on that basis and are awaiting a decision on their status;

(c) are authorised to reside in a Member State on the basis of a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States or have applied for authorisation to reside on that basis and are awaiting a decision on their status;

(d) are refugees or have applied for recognition as refugees and whose application has not yet given rise to a final decision;

(e) reside solely on temporary grounds such as au pair or seasonal worker, or as workers posted by a service provider for the purposes of cross-border provision of services, or as cross-border providers of services or in cases where their residence permit has been formally limited;

(f) enjoy a legal status governed by the Vienna Convention on Diplomatic Relations of 1961, the Vienna Convention on Consular Relations of 1963, the Convention of 1969 on Special Missions or the Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character of 1975.'

5 Article 4(1) of that directive provides:

'Member States shall grant long-term resident status to third-country nationals who have resided legally and continuously within [their] territory for five years immediately prior to the submission of the relevant application.'

6 Article 5 of that directive, 'Conditions for acquiring long-term resident status', provides:

'1. Member States shall require third-country nationals to provide evidence that they have, for themselves and for dependent family members:

(a) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum wages and pensions prior to the application for long-term resident status;

(b) sickness insurance in respect of all risks normally covered for [its] own nationals in the Member State concerned.

2. Member States may require third-country nationals to comply with integration conditions, in accordance with national law.'

7 Under the heading ‘Acquisition of long-term resident status’, Article 7(1) and (3) of the directive provides:

‘1. To acquire long-term resident status, the third-country national concerned shall lodge an application with the competent authorities of the Member State in which he/she resides. The application shall be accompanied by documentary evidence to be determined by national law that he/she meets the conditions set out in Articles 4 and 5 as well as, if required, by a valid travel document or its certified copy.

The evidence referred to in the first subparagraph may also include documentation with regard to appropriate accommodation.

…

3. If the conditions provided for by Articles 4 and 5 are met, and the person does not represent a threat within the meaning of Article 6, the Member State concerned shall grant the third-country national concerned long-term resident status.’

8 Under the heading ‘Long-term resident’s EC residence permit’, Article 8(1) and (2) of the directive provides:

‘1. The status as long-term resident shall be permanent, subject to Article 9.

2. Member States shall issue a long-term resident’s EC residence permit to long-term residents. The permit shall be valid at least for five years; it shall, upon application if required, be automatically renewable on expiry.’

Directive 2004/38

9 Chapter I of Directive 2004/38, ‘General provisions’, comprises Articles 1 to 3.

10 Article 2 of Directive 2004/38, ‘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.’

11 Article 3 of the directive, ‘Beneficiaries’, provides:

‘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.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.’

12 Chapter III of the directive, ‘Right of residence’, concerns the conditions of exercise of the right of Union citizens and their family members to reside in the territory of the Member States. The chapter contains inter alia Articles 6, 7 and 10.

13 Article 6 of the directive 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 …

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.’

14 Article 7 of the directive provides:

‘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 …

….

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 …’

15 Article 10 of the directive, ‘Issue of residence cards’, provides:

‘1. The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called “Residence card of a family member of a Union citizen” no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.

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

…

(c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;

(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;

…'

German law

16 Paragraph 7, 'Residence permit', of the Law on residence, economic activity and integration of foreigners in national territory (Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet, 'the AufenthG') states:

'1. The residence permit is a residence certificate for a determined period. It is issued for the purposes of residence mentioned in the following sections. In justified cases a residence permit may also be issued for a purpose of residence not provided for by this law.

2. The residence permit is to be subject to a time-limit having regard to the intended purpose of residence. If an essential condition for issue, extension or determination of the period of validity ceases to apply, the period may also be subsequently shortened.'

17 In accordance with Paragraph 18, 'Employment', of the AufenthG:

'1. The admission of foreign employees depends on the requirements of the German economy, having regard to conditions on the labour market and the need to combat unemployment effectively. International treaties are not affected.

2. A foreigner may be issued a residence certificate for the purpose of employment if the Federal Employment Agency (Bundesagentur für Arbeit) has granted approval in accordance with Paragraph 39 or if it is laid down by regulation under Paragraph 42 or by an international agreement that the employment is permitted without approval by the Federal Employment Agency. Restrictions in connection with the grant of approval by the Federal Employment Agency are to be included in the residence certificate.

3. A residence permit for the purpose of employment in accordance with subparagraph 2 which does not require a vocational qualification may be issued only if this is laid down by an international agreement or if the grant of approval for a residence permit in respect of that employment is permitted on the basis of a regulation under Paragraph 42.

4. A residence certificate for the purpose of employment in accordance with subparagraph 2 which requires a vocational qualification may be issued only for employment in an occupational group which has been authorised by regulation under Paragraph 42. In a justified individual case, a residence permit may be issued for the purpose of employment where there is a public interest in the employment, in particular a regional, economic or labour market interest.

5. A residence certificate in accordance with subparagraph 2 and Paragraph 19 may be issued only if a specific job offer exists.'

18 Paragraph 39(2) to (4) of the AufenthG, 'Approval of employment of foreigners', states:

'2. The Federal Employment Agency may approve the issue of a residence permit for the purpose of employment in accordance with Paragraph 18 if

(1) (a) the employment of foreigners does not produce adverse effects on the labour market, in particular with regard to the employment structure, the regions and the sectors of the economy, and

(b) German workers, foreigners who are legally equated with German workers as regards taking up employment, or other foreigners who are entitled to preferential access to the labour market under European Union law are not available for the employment, or

(2) it has established, through investigations in accordance with point 1(a) and (b) of the first sentence, for individual occupational groups or for individual sectors of the economy, that filling the vacancies with foreign applicants is justifiable in terms of labour market policy and integration policy,

and the foreigner is not employed on less favourable conditions of employment than comparable German workers. German workers and foreigners equated with them are also be deemed to be available for employment if they can only be placed with assistance from the Federal Employment Agency. An employer who intends to employ a foreigner who requires approval for that purpose must provide the Federal Employment Agency with information on pay, working hours and other conditions of employment.

…

4. The approval may determine the duration and the occupational activity and restrict the employment to specific establishments or areas.'

19 Under the heading 'Family reunion to join Germans', the first sentence of Paragraph 28(1) of the AufenthG provides:

'A residence permit is to be issued to the foreign

(1) spouse of a German,

(2) unmarried minor child of a German,

(3) parent of an unmarried minor German for the purpose of care of the child,

if the German has his habitual residence in the national territory.'

20 Under the heading 'Autonomous right of residence of spouses', Paragraph 31(1) and (2) of the AufenthG provides:

'1. In cases where marital cohabitation has ceased, the spouse's residence permit is extended by one year as an autonomous right of residence not dependant on the purpose of family reunion, if

(1) marital cohabitation has lawfully existed in national territory for at least two years, or

(2) the foreigner has died while marital cohabitation in national territory existed,

and the foreigner was until then in possession of a residence permit, establishment permit or EC long-term residence permit, unless he was not able to apply for an extension in due time for reasons beyond his control. …

2. The requirement under point 1 of the first sentence of subparagraph 1 for marital cohabitation to have existed lawfully for two years in national territory is to be waived where it is necessary, in order to avoid particular hardship, to allow the spouse to continue to reside, unless an extension of the foreigner's residence permit is excluded. …'

21 Paragraph 9a of the AufenthG, 'Long-term resident's EC residence permit', provides in subparagraphs 1 and 2:

'1. The long-term resident's EC residence permit is a residence certificate for an unlimited period. The second and third sentences of Paragraph 9(1) apply by analogy. Unless otherwise provided in this law, the long-term resident's EC residence permit is equivalent to the establishment permit.

2. A foreigner is to be issued a long-term resident's EC residence permit in accordance with Article 2(b) of Directive [2003/109] if

(1) he has been resident in national territory with a residence certificate for five years,

(2) his subsistence and that of his dependents whom he is obliged to maintain is guaranteed by a stable and regular income,

(3) he possesses an adequate knowledge of the German language,

(4) he possesses a basic knowledge of the legal and social system and conditions of life in national territory,

(5) reasons of public security or public policy, having regard to the severity or the nature of the breach of public security or public policy or the danger emanating from the foreigner having regard to the duration of his residence to date and the existence of ties in national territory, do not preclude this, and

(6) he possesses sufficient living space for himself and the family members living with him as a family.'

22 Paragraph 5(1) and (2) of the Law on general freedom of movement of Union citizens (Gesetz über die allgemeine Freizügigkeit von Unionsbürgern) of 30 July 2004 ('the FreizügG/EU') provides:

'1. Union citizens entitled to freedom of movement and their family members who are nationals of a Member State of the European Union are immediately issued ex officio with a certificate of their right of residence.

2. Family members entitled to freedom of movement who are not Union citizens are issued ex officio, within six months after they have provided the necessary information, with a residence card of a family member of a Union citizen, which is to be valid for five years. The family member is immediately issued with a certificate showing that the necessary information has been provided.'

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

23 In 1998 Mr Iida, a national of Japan, married Ms N.-I, a national of Germany, in the United States. Their daughter Mia was born on 27 August 2004 in the United States, and has German, American and Japanese nationality.

24 In December 2005 the family moved to Germany. In January 2006 Mr Iida obtained a residence permit for family reunion in accordance with Paragraph 28 of the AufenthG. Since February 2006 he has worked full-time in Ulm under a contract of employment for an unlimited period, and currently receives gross monthly pay of EUR 4 850. Because of his working hours, he was released from the obligation under national law to follow an integration course.

25 In summer 2007 Mr Iida's spouse started full-time work in Vienna. At first the spouses maintained the marriage between Ulm and Vienna, but since January 2008 they have been permanently separated, although they have not divorced. Both spouses jointly hold and exercise parental responsibility for their daughter, even though the mother and daughter have since March 2008 been habitually resident in Vienna, where the daughter attends school.

26 Mr Iida regularly visits his daughter in Vienna for one weekend a month, and she spends most of her holidays with her father in Ulm. They have also undertaken journeys together. According to the information provided by Mr Iida to the referring court, the relationship between father and daughter is excellent.

27 Following the departure of his daughter and his spouse, the autonomous right of residence provided for in Paragraph 31 of the AufenthG could not apply to Mr Iida, because the marital cohabitation of the spouses had not existed in Germany for at least two years and an exemption from that condition had not been sought.

28 However, because of his employment in Ulm, Mr Iida obtained a residence permit, which, in accordance with Paragraph 18 of the AufenthG, was on 18 November 2010 extended to 2 November 2012, subsequent extension being discretionary.

29 On 30 May 2008 Mr Iida asked the City of Ulm to issue him a 'residence card of a family member of a Union citizen' as provided for in Paragraph 5 of the FreizügG/EU. His application was rejected on the ground that he had no claim to such a card under European Union law, first by the City of Ulm and the Regierungspräsidium Tübingen (Administrative District Office, Tübingen) and then by judgment of the Verwaltungsgericht Sigmaringen (Administrative Court, Sigmaringen).

30 On 6 May 2010 Mr Iida appealed against that court's judgment to the Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg).

31 Mr Iida also applied for a long-term resident's residence permit under Paragraph 9a of the AufenthG, but he later withdrew the application.

32 In that context, the Verwaltungsgerichtshof Baden-Württemberg decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. On Articles 2, 3 and 7 of [Directive 2004/38]:

(a) Does "family member" include, in particular in the light of Articles 7 and 24 of the [Charter of Fundamental Rights ("the Charter")] and Article 8 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950,

"the ECHR")], on an extended interpretation of Article 2(2)(d) of Directive 2004/38, a parent who is a third-country national, has parental responsibility for a child who is a Union citizen entitled to freedom of movement, and is not maintained by that child?

(b) If so, does Directive 2004/38 apply to that parent, in particular in the light of Articles 7 and 24 of the Charter and Article 8 of the ECHR, on an extended interpretation of Article 3(1) of the directive, even where there is no "accompanying" or "joining" with respect to the Member State of origin of the child who is a Union citizen and has moved away?

(c) If so, does it follow that that parent, in particular in the light of Articles 7 and 24 of the Charter and Article 8 of the ECHR, has a right of residence for more than three months in the Member State of origin of the child who is a Union citizen, on an extended interpretation of Article 7(2) of Directive 2004/38, at least as long as parental responsibility subsists and is actually exercised?

2. On Article 6(1) TEU in conjunction with the Charter:

(a) (i) Is the Charter applicable pursuant to the second alternative of the first sentence of Article 51(1) of the Charter simply where the subject-matter of the dispute depends on a national law (or part of a law) which inter alia – but not only – transposed directives?

(ii) If not, is the Charter applicable pursuant to the second alternative of the first sentence of Article 51(1) of the Charter simply because the claimant is possibly entitled to a right of residence under Union law and could accordingly, under the first sentence of Paragraph 5(2) of the FreizügG/EU, claim a residence card for a family member of a Union citizen which has its legal basis in the first sentence of Article 10(1) of [Directive 2004/38]?

(iii) If not, is the Charter applicable pursuant to the second alternative of the first sentence of Article 51(1) of the Charter, in accordance with the case-law deriving from Case C-260/89 *ERT* [1991] ECR I-2925, paragraphs 41 to 45, where a Member State restricts the right of residence of the father who is a third-country national with parental responsibility for a Union citizen who is a minor and resides predominantly with her mother in another Member State of the Union because of the mother's employment?

(b) (i) If the Charter is applicable, can a right of residence under European Union law for the father who is a third-country national be derived directly from Article 24(3) of the Charter, at least as long as he has and actually exercises parental responsibility for his child who is a Union citizen, even if the child resides predominantly in another Member State of the Union?

(ii) If not, does it follow from the freedom of movement of the child who is a Union citizen under Article 45(1) of the Charter, possibly in conjunction with Article 24(3) of the Charter, that the father who is a third-country national has a right of residence under European Union law, at least as long as he has and actually exercises parental responsibility for his child who is a Union citizen, so that in particular the freedom of movement of the child who is a Union citizen is not deprived of all practical effect?

3. On Article 6(3) TEU in conjunction with the general principles of European Union law:

(a) Can the "unwritten" fundamental rights of the European Union developed in the Court's case-law from Case 29/69 *Stauder* [1969] ECR 419, paragraph 7, up to, for example, Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 75, be applied in full even if the Charter is not applicable

in the specific case; in other words, do the fundamental rights which continue to apply as general principles of Union law under Article 6(3) TEU stand autonomously and independently alongside the new fundamental rights laid down in the Charter in accordance with Article 6(1) TEU?

(b) If so, can a right of residence under European Union law for the purpose of the effective exercise of parental responsibility be inferred from the general principles of Union law, in particular in the light of the right to respect for family life under Article 8 of the ECHR, for a father, who is a third-country national, of a Union citizen who is a minor and resides predominantly in another EU Member State with her mother on account of the latter's occupation?

4. On Article 21(1) TFEU in conjunction with Article 8 of the ECHR:

If Article 6(1) or (3) TEU does not lead to a right of residence under European Union law for the claimant, can, in accordance with Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraphs 45 to 47, a right of residence under European Union law for the purpose of the effective exercise of parental responsibility be inferred, under Article 21(1) TFEU, possibly in the light of Article 8 of the ECHR, from the freedom of movement enjoyed by a Union citizen who is a minor and resides predominantly in another EU Member State with her mother on account of the latter's occupation, for the father, who is a third-country national, in the Member State of origin of the child who is a Union citizen?

5. On Article 10 of [Directive 2004/38]:

If a right of residence under European Union law is taken to exist, is a parent who is a third-country national in the claimant's situation entitled to the issue of a "residence card for a family member of a Union citizen", possibly in accordance with the first sentence of Article 10(1) of the directive?'

33 Those questions, according to the referring court, may be summarised in the single following question:

'Does European Union law give a parent who has parental responsibility and is a third-country national, for the purpose of maintaining regular personal relations and direct parental contact, a right to remain in the Member State of origin of his child who is a Union citizen, to be documented by a "residence card of a family member of a Union citizen", if the child moves from there to another Member State in exercise of the right of freedom of movement?'

Consideration of the question referred

34 To answer the question put by the referring court, it should first be ascertained whether a person in a situation such as that of the claimant in the main proceedings can benefit from the provisions of secondary law which, under certain conditions, provide for a residence permit to be granted in a Member State to a third-country national.

35 Should that not be the case, it would then have to be ascertained whether a person in a situation such as that of the claimant in the main proceedings can base a right of residence directly on the provisions of the FEU Treaty concerning citizenship of the Union.

Interpretation of Directive 2003/109

36 In accordance with Article 3(1) of Directive 2003/109, the directive applies to third-country nationals residing legally in the territory of a Member State. Unlike Directive 2004/38 (see Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja* [2011] ECR I-14035, paragraphs 46 and 47), Directive

2003/109 does not lay down the conditions which the residence of those nationals must satisfy for them to be regarded as legally resident in the territory of a Member State. It follows that those conditions are governed by national law alone.

37 In accordance with Article 4(1) of Directive 2003/109, Member States are to grant long-term resident status to those nationals who, in accordance with their national law, have resided legally and continuously within their territory for five years immediately prior to the submission of the relevant application. However, under Article 3(2) of Directive 2003/109, the directive does not apply to certain types of residence.

38 Under Article 5 of Directive 2003/109, to acquire long-term resident status a third-country national must provide evidence that he has, for himself and for dependent family members, stable and regular resources which are sufficient to maintain himself and the members of his family without recourse to the social assistance system of the Member State concerned, and sickness insurance in respect of all risks normally covered for its own nationals in the Member State concerned. Member States may also require third-country nationals to comply with integration conditions in accordance with their national law.

39 Under Article 7(3) of Directive 2003/109, if the above conditions provided for by Articles 4 and 5 of the directive are met and the person does not represent a threat within the meaning of Article 6 of the directive, the Member State concerned is to grant the third-country national concerned long-term resident status.

40 In the present case, as stated in paragraph 24 above, the claimant in the main proceedings, who is a third-country national, commenced legal residence in Germany in January 2006 by virtue of a residence permit for family reunion issued under Paragraph 28 of the AufenthG. Moreover, on the basis of the contract of employment for an unlimited period signed in February 2006, he was subsequently able to obtain a residence permit under Paragraph 18 of the AufenthG valid until 2 November 2012, despite the fact that he could not obtain the autonomous right of residence under Paragraph 31 of the AufenthG because of the interruption of marital cohabitation.

41 It is thus apparent from the documents in the case that the claimant in the main proceedings does not fall within any of the cases mentioned in Article 3(2) of Directive 2003/109, and that he has resided legally and continuously in German territory for five years.

42 Moreover, because of his employment, Mr Iida is prima facie able to provide evidence that he has stable and regular resources which are sufficient to maintain himself and sickness insurance in respect of all risks normally covered for its own nationals in Germany.

43 Nor is there anything in the case-file to show that Mr Iida may represent a threat to public policy or public security within the meaning of Article 6 of Directive 2003/109.

44 With regard, finally, to the conditions of integration provided for in Paragraph 9a(2), points 3 and 4, of the AufenthG, while the level of Mr Iida's knowledge of the German language, or of the legal and social system and conditions of life in national territory, has not been shown, it remains the case that the German Government stated at the hearing that because of the university degree held by Mr Iida he is subject, under the relevant national law, to reduced requirements as regards integration. Furthermore, according to the documents in the case-file, because of his working hours Mr Iida was released from the obligation to follow an integration course.

45 It follows that, in principle, a third-country national in the situation of the claimant in the main proceedings may be granted the status of long-term resident within the meaning of Directive 2003/109.

46 However, as stated in paragraph 31 above, Mr Iida withdrew his application for a long-term resident's residence permit under Paragraph 9a of the AufenthG.

47 In accordance with Article 7(1) of Directive 2003/109, in order to acquire long-term resident status, the third-country national concerned must lodge an application with the competent authorities of the Member State in which he resides. Similarly, in accordance with Article 4(1) of the directive, the Member States are to grant long-term resident status with account being taken of the years immediately prior to the submission of the relevant application.

48 In so far, then, as Mr Iida voluntarily withdrew his application for the status of long-term resident in accordance with Directive 2003/109, he cannot be granted a residence permit on the basis of the provisions of that directive.

Interpretation of Directive 2004/38

49 Paragraph 1 of Article 3, 'Beneficiaries', of Directive 2004/38 provides that the directive is to apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in Article 2(2) who accompany or join them.

50 Under Article 2(2)(a) and (d) of Directive 2004/38, the persons to be regarded as a 'family member' of a Union citizen for the purposes of that directive are the spouse and the dependent direct relatives in the ascending line and those of the spouse or partner as defined in Article 2(2)(b).

51 Thus not all third-country nationals derive rights of entry into and residence in a Member State from Directive 2004/38, but only those who are a 'family member' within the meaning of Article 2(2) of that directive of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national (Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraph 73, and Case C-256/11 *Dereci and Others* [2011] ECR I-11315, paragraph 56).

52 In the dispute in the main proceedings, both the spouse and the daughter of Mr Iida are beneficiaries of Directive 2004/38, in that they moved to and reside in a Member State other than that of which they are nationals, namely Austria.

53 As regards the possible status of 'family member' within the meaning of Article 2(2) of Directive 2004/38 of the claimant in the main proceedings, a distinction must be drawn between his links with his daughter and his links with his spouse.

54 In the first place, as regards the relationship between the claimant in the main proceedings and his daughter, it is apparent from Article 2(2)(d) of Directive 2004/38 that a direct relative in the ascending line of the Union citizen concerned must be 'dependent' on that citizen in order to be regarded as a 'family member' within the meaning of that provision.

55 According to the case-law of the Court, the status of 'dependent' family member of a Union citizen holding a right of residence is the result of a factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence, so that, when the converse situation occurs and the holder of the right of residence is dependant on a third-country national, the third-country national cannot rely on being a 'dependent' relative in the ascending line of that right-holder, within the meaning of Directive 2004/38, with a view to having the benefit of a right of residence in the host Member State (see, in relation to the similar provisions of the instruments of European Union law prior to Directive 2004/38, *Zhu and Chen*, paragraphs 43 and 44 and the case-law cited).

56 It follows that the claimant in the main proceedings cannot be regarded as a 'family member' of his daughter within the meaning of Article 2(2) of Directive 2004/38.

57 In the second place, as regards the relationship between the claimant in the main proceedings and his spouse, it should be observed that, to be regarded as a 'family member' within the meaning of Article 2(2)(a) of Directive 2004/38 of a Union citizen who has exercised his right to freedom of movement, that provision does not require the person concerned to satisfy any conditions other than that of being a spouse.

58 The Court has previously had occasion to rule, in connection with the instruments of European Union law prior to Directive 2004/38, that the marital relationship cannot be regarded as dissolved as long as it has not been terminated by the competent authority, and that is not the case where the spouses merely live separately, even if they intend to divorce at a later date, so that the spouse does not necessarily have to live permanently with the Union citizen in order to hold a derived right of residence (see Case 267/83 *Diatta* [1985] ECR 567, paragraphs 20 and 22).

59 That interpretation of a similar provision to Article 2(2)(a) of Directive 2004/38, one which moreover required the family of the Union citizen concerned to have normal housing, must apply *a fortiori* in connection with Article 2(2)(a), which does not impose that requirement.

60 In the present case, the marriage of Mr and Mrs Iida has not been dissolved by the competent authority, so that Mr Iida may be regarded as a family member of his spouse within the meaning of that provision of Directive 2004/38.

61 However, while he may be regarded as a 'family member' of his spouse within the meaning of Article 2(2)(a) of Directive 2004/38, he cannot be classified as a 'beneficiary' of that directive, as Article 3(1) of the directive requires that the family member of the Union citizen moving to or residing in a Member State other than that of which he is a national should accompany or join him.

62 The same requirement of accompanying or joining the Union citizen is furthermore repeated in Articles 6(2) and 7(2) of Directive 2004/38 in connection with the extension of the citizen's right of residence to his family members who are not nationals of a Member State, and also in Article 10(2)(c) in connection with the issue of the residence card provided for by that directive.

63 That requirement moreover corresponds to the purpose of the derived rights of entry and residence provided for by Directive 2004/38 for family members of Union citizens, as otherwise the fact of its being impossible for the Union citizen to be accompanied or joined by his family in the host Member State would be such as to interfere with his freedom of movement by discouraging him from exercising his rights of entry into and residence in that Member State (see, to that effect, *Metock and Others*, paragraph 63).

64 It thus follows that the right of a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement to install himself with that Union citizen pursuant to Directive 2004/38 can be relied on only in the host Member State in which that citizen resides (see, to that effect, in relation to the similar provisions of the instruments of European Union law prior to Directive 2004/38, Case C-291/05 *Eind* [2007] ECR I-10719, paragraph 24).

65 Consequently, since Mr Iida neither accompanied nor joined in the host Member State the member of his family who is a Union citizen who exercised her right of freedom of movement, he cannot be granted a right of residence on the basis of Directive 2004/38.

Interpretation of Articles 20 TFEU and 21 TFEU

66 First of all, the Treaty provisions on citizenship of the Union do not confer any autonomous right on third-country nationals.

67 Like the rights conferred by Directive 2004/38 on third-country nationals who are family members of a Union citizen who is a beneficiary of that directive, any rights conferred on third-country nationals by the Treaty provisions on Union citizenship are not autonomous rights of those nationals but rights derived from the exercise of freedom of movement by a Union citizen (see, to that effect, Case C-434/09 *McCarthy* [2011] ECR I-3375, paragraph 42, and *Dereci and Others*, paragraph 55).

68 As stated in paragraph 63 above, the purpose and justification of those derived rights are based on the fact that a refusal to allow them would be such as to interfere with the Union citizen's freedom of movement by discouraging him from exercising his rights of entry into and residence in the host Member State.

69 Thus it has been held that a refusal to allow the parent, whether a national of a Member State or of a third country, who is the carer of a minor child who is a Union citizen to reside with that child in the host Member State would deprive the child's right of residence of any useful effect, since enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence (*Zhu and Chen*, paragraph 45).

70 Similarly, it has been held that, when a worker returns to the Member State of which he is a national after being gainfully employed in another Member State, a third-country national who is a member of his family has a right of residence in the Member State of which the worker is a national, even where that worker does not carry on any effective and genuine economic activities. If the third-country national did not have such a right, the worker who is a Union citizen could be discouraged from leaving the Member State of which he is a national in order to pursue gainful employment in another Member State simply because of the prospect for that worker of not being able, on returning to his Member State of origin, to continue living together with close relatives, a way of life which may have come into being in the host Member State as a result of marriage or family reunification (*Eind*, paragraphs 45, 35 and 36).

71 Finally, there are also very specific situations in which, despite the fact that the secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of his freedom of movement, a right of residence exceptionally cannot, without undermining the effectiveness of the Union citizenship that citizen enjoys, be refused to a third-country national who is a family member of his if, as a consequence of refusal, that citizen would be obliged in practice to leave the territory of the European Union altogether, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status (see *Dereci and Others*, paragraphs 67, 66 and 64).

72 The common element in the above situations is that, although they are governed by legislation which falls a priori within the competence of the Member States, namely legislation on the right of entry and stay of third-country nationals outside the scope of Directives 2003/109 and 2004/38, they none the less have an intrinsic connection with the freedom of movement of a Union citizen which prevents the right of entry and residence from being refused to those nationals in the Member State of residence of that citizen, in order not to interfere with that freedom.

73 As regards cases such as that at issue in the main proceedings, first, it must be observed that the claimant, who is a third-country national, is not seeking a right of residence in the host Member State in which his spouse and his daughter, who are Union citizens, reside, but in Germany, their Member State of origin.

74 Next, it is common ground that that the claimant has always resided in that Member State in accordance with national law, without the absence of a right of residence under European Union law having discouraged his daughter or his spouse from exercising their right of freedom of movement by moving to Austria.

75 Finally, as may be seen from paragraphs 28 and 40 to 45 above, the claimant in the main proceedings has a right of residence under national law until 2 November 2012, which is prima facie renewable, according to the German Government, and can in principle be granted the status of long-term resident within the meaning of Directive 2003/109.

76 In those circumstances, it cannot validly be argued that the decision at issue in the main proceedings is liable to deny Mr Iida's spouse or daughter the genuine enjoyment of the substance of the rights associated with their status of Union citizen or to impede the exercise of their right to move and reside freely within the territory of the Member States (see *McCarthy*, paragraph 49).

77 It must be recalled that the purely hypothetical prospect of exercising the right of freedom of movement does not establish a sufficient connection with European Union law to justify the application of that law's provisions (see Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 16). The same applies to purely hypothetical prospects of that right being obstructed.

78 As to the fundamental rights mentioned by the referring court, in particular the right to respect for private and family life and the rights of the child, laid down in Articles 7 and 24 of the Charter respectively, it must be borne in mind that, in accordance with Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing European Union law. Under Article 51(2) of the Charter, it does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Accordingly, the Court is called on to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it (see *Dereci and Others*, paragraph 71).

79 To determine whether the German authorities' refusal to grant Mr Iida a 'residence card of a family member of a Union citizen' falls within the implementation of European Union law within the meaning of Article 51 of the Charter, it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it (see Case C-309/96 *Annibaldi* [1997] ECR I-7493, paragraphs 21 to 23).

80 While Paragraph 5 of the FreizügG/EU, which provides for the issue of a 'residence card of a family member of a Union citizen', is indeed intended to implement European Union law, it is none the less the case that the situation of the claimant in the main proceedings is not governed by European Union law, since he does not satisfy the conditions for the grant of that card in accordance with Article 10 of Directive 2004/38. Moreover, in the absence of an application by him for the status of long-term resident in accordance with Directive 2003/109, his situation shows no connection with European Union law.

81 In those circumstances, the German authorities' refusal to grant Mr Iida a 'residence card of a family member of a Union citizen' does not fall within the implementation of European Union law within the meaning of Article 51 of the Charter, so that its conformity with fundamental rights cannot be examined by reference to the rights established by the Charter.

82 In the light of the foregoing, the answer to the referring court's question is that, outside the situations governed by Directive 2004/38 and where there is no other connection with the provisions on citizenship of European Union law, a third-country national cannot claim a right of residence derived from a Union citizen.

Costs

83 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:

Outside the situations governed by 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 and where there is no other connection with the provisions on citizenship of European Union law, a third-country national cannot claim a right of residence derived from a Union citizen.

[Signatures]