Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

18 December 2014*

(Citizenship of the European Union — Directive 2004/38/EC — Right of citizens of the Union and their family members to move and reside freely within the territory of a Member State — Right of entry — Third-country national who is a family member of a Union citizen and in possession of a residence card issued by a Member State — National legislation requiring an entry permit to be obtained prior to entry into national territory — Article 35 of Directive 2004/38/EC — Article 1 of the Protocol (No 20) on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland)

In Case C-202/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), made by decision of 25 January 2013, received at the Court on 17 April 2013, in the proceedings

The Queen, on the application of:

Sean Ambrose McCarthy,

Helena Patricia McCarthy Rodriguez,

Natasha Caley McCarthy Rodriguez

v

Secretary of State for the Home Department,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, R. Silva de Lapuerta, M. Ilešič, T. von Danwitz (Rapporteur), S. Rodin, K. Jürimäe, Presidents of Chambers, A. Rosas, E. Juhász, A. Arabadjiev, C. Toader, M. Safjan, D. Šváby, M. Berger and F. Biltgen, Judges,

Advocate General: M. Szpunar,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 March 2014,

* Language of the case: English.

after considering the observations submitted on behalf of:

— Mr McCarthy, Ms McCarthy Rodriguez and their child Natasha Caley McCarthy Rodriguez, by M. Henderson and D. Lemer, Barristers, instructed by K. O'Rourke, Solicitor,

— the United Kingdom Government, by S. Brighouse and J. Beeko, acting as Agents, T. Ward QC, D. Grieve QC and G. Facenna, Barrister,

— the Greek Government, by T. Papadopoulou, acting as Agent,

— the Spanish Government, by A. Rubio González, acting as Agent,

— the Polish Government, by B. Majczyna, acting as Agent,

— the Slovak Government, by B. Ricziová, acting as Agent,

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

after hearing the Opinion of the Advocate General at the sitting on 20 May 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 35 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 at OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34) and of Article 1 of the Protocol (No 20) on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland ('Protocol No 20').

2 The request has been made in proceedings brought by Mr McCarthy, Ms McCarthy Rodriguez and their child Natasha Caley McCarthy Rodriguez against the Secretary of State for the Home Department ('the Secretary of State') relating to the refusal to grant Ms McCarthy Rodriguez the right to enter the United Kingdom without a visa.

Legal context

EU law

Protocol No 20

3 Article 1 of Protocol No 20 provides:

'The United Kingdom shall be entitled, notwithstanding Articles 26 and 77 of the Treaty on the Functioning of the European Union, any other provision of that Treaty or of the Treaty on European Union, any measure adopted under those Treaties, or any international agreement concluded by the

Union or by the Union and its Member States with one or more third States, to exercise at its frontiers with other Member States such controls on persons seeking to enter the United Kingdom as it may consider necessary for the purpose:

(a) of verifying the right to enter the United Kingdom of citizens of Member States and of their dependants exercising rights conferred by Union law, as well as citizens of other States on whom such rights have been conferred by an agreement by which the United Kingdom is bound; and

(b) of determining whether or not to grant other persons permission to enter the United Kingdom.

Nothing in Articles 26 and 77 of the Treaty on the Functioning of the European Union or in any other provision of that Treaty or of the Treaty on European Union or in any measure adopted under them shall prejudice the right of the United Kingdom to adopt or exercise any such controls. References to the United Kingdom in this Article shall include territories for whose external relations the United Kingdom is responsible.'

Directive 2004/38

4 In accordance with recital 5 in the preamble to Directive 2004/38, '[t]he 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'.

5 Recital 8 in the preamble to that directive states:

'With a view to facilitating the free movement of family members who are not nationals of a Member State, those who have already obtained a residence card should be exempted from the requirement to obtain an entry visa within the meaning of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [OJ 2001 L 81, p. 1] or, where appropriate, of the applicable national legislation.'

6 Recitals 25 and 26 in its preamble state:

'(25) Procedural safeguards should also be specified in detail in order to ensure a high level of protection of the rights of Union citizens and their family members in the event of their being denied leave to enter or reside in another Member State, as well as to uphold the principle that any action taken by the authorities must be properly justified.

(26) In all events, judicial redress procedures should be available to Union citizens and their family members who have been refused leave to enter or reside in another Member State.'

7 Article 1 of Directive 2004/38, headed 'Subject', provides:

'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;

...'

8 The beneficiaries of Directive 2004/38 are defined in Article 3 as follows:

‘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.

…’

9 Article 5 of Directive 2004/38, headed ‘Right of entry’, states:

‘1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

No entry visa or equivalent formality may be imposed on Union citizens.

2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.

Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.

3. The host Member State shall not place an entry or exit stamp in the passport of family members who are not nationals of a Member State provided that they present the residence card provided for in Article 10.

4. Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence.

5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.’

10 As regards the right of residence, Articles 6 and 7(1) and (2) of Directive 2004/38 provide:

‘*Article 6*

Right of residence for up to three months

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.

Article 7

Right of residence for more than three months

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).'

11 So far as concerns issue of a residence card, Article 10 of Directive 2004/38 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:

(a) a valid passport;

(b) a document attesting to the existence of a family relationship or of a registered partnership;

(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;

(e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;

(f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.'

12 Chapter VI of Directive 2004/38, headed 'Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health', provides in Articles 27, 30 and 31:

'*Article 27*

General principles

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

...

Article 30

Notification of decisions

1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.

2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.

3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time-limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.

Article 31

Procedural safeguards

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

— where the expulsion decision is based on a previous judicial decision; or

— where the persons concerned have had previous access to judicial review; or

— where the expulsion decision is based on imperative grounds of public security under Article 28(3).

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.'

13 Article 35 of Directive 2004/38, which is in Chapter VII headed 'Final provisions', provides, in respect of the measures that the Member States may adopt in the case of abuse of rights or fraud:

'Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.'

Regulation No 539/2001

14 Recital 4 in the preamble to Regulation No 539/2001 states:

'Pursuant to Article 1 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland and the United Kingdom are not participating in the adoption of this Regulation. Consequently and without prejudice to Article 4 of the aforementioned Protocol, the provisions of this Regulation apply neither to Ireland nor to the United Kingdom.'

Regulation (EC) No 562/2006

15 Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1) provides for the absence of border control of persons crossing the internal borders between the Member States of the European Union and establishes rules governing border control of persons crossing the external borders of the Member States of the European Union.

16 As stated in recital 27 in its preamble, that regulation 'constitutes a development of provisions of the Schengen *acquis* in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis* [(OJ 2000 L 131, p. 43)]. The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application'.

United Kingdom law

17 As regards the right of entry of third-country nationals who are family members of an EU national, regulation 11(2) to (4) of the Immigration (European Economic Area) Regulations 2006 ('the 2006 Regulations') provides:

'(2) A person who is not [a European Economic Area (EEA)] national must be admitted to the United Kingdom if he is a family member of an EEA national, a family member who has retained the right of residence or a person with a permanent right of residence under regulation 15 and produces on arrival —

(a) a valid passport; and

(b) an EEA family permit, a residence card or a permanent residence card.

(3) An immigration officer may not place a stamp in the passport of a person admitted to the United Kingdom under this regulation who is not an EEA national if the person produces a residence card or permanent residence card.

(4) Before an immigration officer refuses admission to the United Kingdom to a person under this regulation because the person does not produce on arrival a document mentioned in paragraph (1) or (2), the immigration officer must give the person every reasonable opportunity to obtain the document or have it brought to him within a reasonable period of time or to prove by other means that he is—

(a) an EEA national;

(b) a family member of an EEA national with a right to accompany that national or join him in the United Kingdom; or

(c) a family member who has retained the right of residence or a person with a permanent right of residence ...'

18 As regards issue of an 'EEA family permit' referred to in regulation 11 of the 2006 Regulations, regulation 12(1), (4) and (5) provides:

'(1) An entry clearance officer must issue an EEA family permit to a person who applies for one if the person is a family member of an EEA national and—

(a) the EEA national—

(i) is residing in the UK in accordance with these Regulations; or

(ii) will be travelling to the United Kingdom within six months of the date of the application and will be an EEA national residing in the United Kingdom in accordance with these Regulations on arrival in the United Kingdom; and

(b) the family member will be accompanying the EEA national to the United Kingdom or joining him there and—

(i) is lawfully resident in an EEA State; or

(ii) would meet the requirements in the immigration rules (other than those relating to entry clearance) for leave to enter the United Kingdom as the family member of the EEA national or, in the case of direct descendants or dependent direct relatives in the ascending line of his spouse or his civil partner, as the family member of his spouse or his civil partner, were the EEA national or the spouse or civil partner a person present and settled in the United Kingdom.

…

(4) An EEA family permit issued under this regulation shall be issued free of charge and as soon as possible.

(5) But an EEA family permit shall not be issued under this regulation if the applicant or the EEA national concerned falls to be excluded from the United Kingdom on grounds of public policy, public security or public health in accordance with regulation 21.'

19 Section 40 of the Immigration and Asylum Act 1999 provides:

'Charge in respect of passenger without proper documents

(1) This section applies if an individual requiring leave to enter the United Kingdom arrives in the United Kingdom by ship or aircraft and, on being required to do so by an immigration officer, fails to produce—

(a) an immigration document which is in force and which satisfactorily establishes his identity and his nationality or citizenship, and

(b) if the individual requires a visa, a visa of the required kind.

(2) The Secretary of State may charge the owner of the ship or aircraft, in respect of the individual, the sum of [GBP 2 000].

(3) The charge shall be payable to the Secretary of State on demand.

(4) No charge shall be payable in respect of any individual who is shown by the owner to have produced the required document or documents to the owner or his employee or agent when embarking on the ship or aircraft for the voyage or flight to the United Kingdom.'

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

20 Mr McCarthy is married to Ms McCarthy Rodriguez. Natasha Caley McCarthy Rodriguez is that couple's child. The three of them have been resident in Marbella (Spain) since 2010 and travel regularly to the United Kingdom, where they have a house.

21 Mr McCarthy has British and Irish nationality. Ms McCarthy Rodriguez, a Colombian national, holds a residence card which was issued in 2010 by the Spanish authorities on the basis of Article 10 of Directive 2004/38 and expires in 2015.

22 In order to be able to enter the United Kingdom, Ms McCarthy Rodriguez is required under the United Kingdom legislation, namely regulation 11 of the 2006 Regulations, to apply beforehand for an EEA family permit. Such a family permit is valid for six months and can be renewed provided that the applicant goes in person to a United Kingdom diplomatic mission abroad and fills in a form containing

questions relating to the applicant's finances and employment. Thus, whenever Ms McCarthy Rodriguez wishes to renew the family permit she must travel from Marbella to the United Kingdom diplomatic mission in Madrid (Spain).

23 Certain airlines have denied Ms McCarthy Rodriguez permission to board flights to the United Kingdom when she has presented only her residence card and not the EEA family permit required by the United Kingdom legislation. That practice results from the guidance, laid down by the Secretary of State for carriers transporting persons to the United Kingdom, relating to the application of section 40 of the Immigration and Asylum Act 1999. The guidance is intended to encourage carriers not to transport passengers where they are third-country nationals who do not hold a residence card issued by the United Kingdom authorities or a valid travel document, such as the EEA family permit.

24 In 2012 the claimants in the main proceedings brought an action against the United Kingdom before the referring court seeking a declaration that the United Kingdom had failed to fulfil its obligation to transpose Article 5(2) of Directive 2004/38 into national law properly. Within the framework of that case Ms McCarthy Rodriguez obtained interim relief providing for the renewal of her EEA family permit upon written application without her having to attend in person the United Kingdom diplomatic mission in Madrid.

25 Before the referring court, the Secretary of State observed that the United Kingdom legislation at issue in the main proceedings is not intended to implement Article 5(2) of Directive 2004/38. She submitted that that legislation, like the lack of transposition of Article 5(2), is justified as a necessary measure under Article 35 of the directive and as a control within the meaning of Article 1 of Protocol No 20.

26 In this connection, the Secretary of State pleaded that there is a 'systemic problem' of abuse of rights and fraud by third-country nationals. The residence cards referred to in Article 10 of Directive 2004/38 are susceptible to forgery. In particular, there is no uniform format for those cards. However, according to the Secretary of State, the residence cards issued by the Federal Republic of Germany and the Republic of Estonia meet appropriate security standards, in particular those laid down by the International Civil Aviation Organisation, so that the national legislation at issue in the main proceedings should be amended so far as concerns persons holding a residence card issued by one of those two Member States.

27 After examining the evidence adduced by the Secretary of State, the referring court concluded that her concerns as to a 'systemic' abuse of rights appeared to it to be justified. According to the referring court, residence cards are ripe for exploitation in the context of illegal immigration into the United Kingdom. There is a palpable risk that a significant proportion of those engaged in the 'business of sham marriages' will use fake residence cards for the purpose of gaining illegal access to the United Kingdom. Thus, the refusal of that Member State to exempt holders of residence cards from the obligation to obtain an entry visa is sensible, necessary and objectively justified.

28 In those circumstances, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does Article 35 of [Directive 2004/38] entitle a Member State to adopt a measure of general application to refuse, terminate, or withdraw the right conferred by Article 5(2) of the directive exempting [non-EU national] family members who are holders of residence cards issued pursuant to Article 10 of the directive ("residence card holders") from visa requirements?

(2) Can Article 1 of Protocol No 20 … entitle the United Kingdom to require residence card holders to have an entry visa which must be obtained prior to arrival at the frontier?

(3) If the answer to question 1 or question 2 is yes, is the United Kingdom's approach to residence card holders in the present case justifiable, having regard to the evidence summarised in the referring court's judgment?'

Consideration of the questions referred

Questions 1 and 2

29 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 35 of Directive 2004/38 and Article 1 of Protocol No 20 must be interpreted as permitting a Member State to require, in pursuit of an objective of general prevention, family members of a Union citizen who are not nationals of a Member State and who hold a valid residence card issued under Article 10 of Directive 2004/38 by the authorities of another Member State to be in possession, pursuant to national law, of an entry permit, such as the EEA family permit, in order to be able to enter its territory.

Interpretation of Directive 2004/38

30 As the referring court has asked the question relating to the interpretation of Article 35 of Directive 2004/38 on the basis of the premiss that that directive is applicable to the dispute in the main proceedings, it should be established at the outset whether the directive confers on Ms McCarthy Rodriguez the right to enter the United Kingdom when she is coming from another Member State.

– Applicability of Directive 2004/38

31 As is apparent from settled case-law, Directive 2004/38 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 Article 21(1) TFEU and to strengthen that right (judgment in *O. and B.*, C-456/12, EU:C:2014:135, paragraph 35 and the case-law cited).

32 Having regard to the context and objectives of Directive 2004/38, the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness (judgment in *Metock and Others*, C-127/08, EU:C:2008:449, paragraph 84).

33 As regards, first, any rights of family members of a Union citizen who are not nationals of a Member State, recital 5 in the preamble to Directive 2004/38 points out that 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 dignity, be also granted to their family members, irrespective of nationality (judgment in *Metock and Others*, EU:C:2008:449, paragraph 83).

34 Whilst the provisions of Directive 2004/38 do not confer any autonomous right on family members of a Union citizen who are not nationals of a Member State, any rights conferred on them by provisions of EU law on Union citizenship are rights derived from the exercise by a Union citizen of his freedom of movement (see, to this effect, judgment in *O. and B.*, EU:C:2014:135, paragraph 36 and the case-law cited).

35 Indeed, Article 3(1) of Directive 2004/38 defines as 'beneficiaries' of the rights conferred by the directive 'all Union citizens who move to or reside in a Member State other than that of which they are a national, and … their family members as defined in point 2 of Article 2 who accompany or join them'.

36 Thus, the Court has held that not all family members of a Union citizen who are not nationals of a Member State derive rights of entry into and residence in a Member State from Directive 2004/38, but only those who are family members, within the meaning of point 2 of Article 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 (judgments in *Metock and Others*, EU:C:2008:449, paragraph 73; *Dereci and Others*, C-256/11, EU:C:2011:734, paragraph 56; *Iida*, C-40/11, EU:C:2012:691, paragraph 51; and *O. and B.*, EU:C:2014:135, paragraph 39).

37 In the case in point, it is common ground that Mr McCarthy has exercised his right of freedom of movement by becoming established in Spain. Furthermore, it is likewise common ground that his wife, Ms McCarthy Rodriguez, resides in that Member State with him and the child born of their union and that she is in possession of a valid residence card issued by the Spanish authorities under Article 10 of Directive 2004/38 that permits her to reside lawfully in Spanish territory.

38 It follows that Mr McCarthy and Ms McCarthy Rodriguez are 'beneficiaries' of that directive, within the meaning of Article 3(1) thereof.

39 So far as concerns, second, the issue whether Ms McCarthy Rodriguez derives a right of entry into the United Kingdom from Directive 2004/38 when she is coming from another Member State, it is to be noted that Article 5 of that directive governs the right of entry and conditions for entry into the territory of the Member States. As set out in Article 5(1), 'Member States shall grant Union citizens leave to enter their territory … and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport'.

40 In addition, the first subparagraph of Article 5(2) of Directive 2004/38 provides that '[f]or the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement'. As is apparent from recital 8 in the preamble to the directive, that exemption is intended to facilitate the free movement of third-country nationals who are family members of a Union citizen.

41 Article 5 of Directive 2004/38 refers to 'Member States' and does not draw a distinction on the basis of the Member State of entry, in particular in so far as it provides that possession of a valid residence card as referred to in Article 10 of the directive is to exempt family members of a Union citizen who are not nationals of a Member State from the requirement to obtain an entry visa. Thus, there is nothing at all in Article 5 indicating that the right of entry of family members of the Union citizen who are not nationals of a Member State is limited to Member States other than the Member State of origin of the Union citizen.

42 Accordingly, it must be held that, pursuant to Article 5 of Directive 2004/38, a person who is a family member of a Union citizen and is in a situation such as that of Ms McCarthy Rodriguez is not subject to the requirement to obtain a visa or an equivalent requirement in order to be able to enter the territory of that Union citizen's Member State of origin.

– Interpretation of Article 35 of Directive 2004/38

43 The national legislation at issue in the main proceedings requires any family member of a Union citizen who is not a national of a Member State to obtain an entry permit in advance. That legislation is founded on the existence of a general risk of abuse of rights or fraud, described by the Secretary of State as 'systemic', thereby excluding any specific assessment by the competent national authorities of the conduct of the person concerned himself as regards any abuse of rights or fraud.

44 That legislation requires an entry permit to be obtained prior to entry into United Kingdom territory, even where, as in the case in point, the national authorities do not consider that the family member of a Union citizen may be involved in an abuse of rights or fraud. Thus, the legislation imposes that requirement even though the authenticity of the residence card issued under Article 10 of Directive 2004/38 and the correctness of the data appearing on it are not called into question by the United Kingdom authorities. Effectively, therefore, the legislation denies family members of a Union citizen who are not nationals of a Member State — absolutely and automatically — the right conferred on them in Article 5(2) of Directive 2004/38 to enter the territory of the Member States without a visa, although they are in possession of a valid residence card, issued on the basis of Article 10 of Directive 2004/38 by the Member State of residence.

45 It is true that, in accordance with the Court's case-law, Directive 2004/38 does not deprive the Member States of all possibility of controlling the entry into their territory of family members of Union citizens. However, where the family member of a Union citizen who is not a national of a Member State derives rights of entry into and residence in the host Member State from Directive 2004/38, that State may restrict that right only in compliance with Articles 27 and 35 of the directive (see judgment in *Metock and Others*, EU:C:2008:449, paragraphs 74 and 95).

46 By virtue of Article 27 of Directive 2004/38, Member States may, where this is justified, refuse entry and residence on grounds of public policy, public security or public health. Such a refusal must be based on an individual examination of the particular case (judgment in *Metock and Others*, EU:C:2008:449, paragraph 74). Thus, justifications that are isolated from the particulars of the case in question or that rely on considerations of general prevention are not to be accepted (judgments in *Jipa*, C-33/07, EU:C:2008:396, paragraph 24, and *Aladzhov*, C-434/10, EU:C:2011:750, paragraph 42).

47 Furthermore, in accordance with Article 35 of Directive 2004/38, Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by that directive in the case of abuse of rights or fraud, such as marriages of convenience; however, any such measure must be proportionate and subject to the procedural safeguards provided for in the directive (judgment in *Metock and Others*, EU:C:2008:449, paragraph 75).

48 As regards the question whether Article 35 of Directive 2004/38 allows the Member States to adopt measures such as the measure at issue in the main proceedings, it is to be noted that the right of entry and the right of residence are conferred on Union citizens and their family members in the light of their individual position.

49 Indeed, decisions or measures adopted by the competent national authorities relating to a possible right of entry or residence, on the basis of Directive 2004/38, are intended to establish the individual position of a national of a Member State or of his family members with regard to that directive (see, to this effect, with regard to issue of a residence permit on the basis of secondary legislation, judgments in *Collins*, C-138/02, EU:C:2004:172, paragraph 40; *Commission* v *Belgium*, C-408/03, EU:C:2006:192, paragraphs 62 and 63; and *Dias*, C-325/09, EU:C:2011:498, paragraph 48).

50 Furthermore, as Article 35 of Directive 2004/38 expressly states, measures adopted on the basis of that article are subject to the procedural safeguards provided for in Articles 30 and 31 of the directive. As is clear from recital 25 in the preamble to the directive, those procedural safeguards are intended, in particular, to ensure a high level of protection of the rights of Union citizens and their family members in the event of their being denied leave to enter or reside in another Member State.

51 In the light of the fact that Directive 2004/38 confers rights on an individual basis, the redress procedures are designed to enable the person concerned to put forward circumstances and considerations relating to his individual position, so as to be able to obtain from the competent national authorities and/or courts recognition of the individual right to which he may lay claim.

52 It follows from the foregoing considerations that measures adopted by the national authorities, on the basis of Article 35 of Directive 2004/38, in order to refuse, terminate or withdraw a right conferred by that directive must be based on an individual examination of the particular case.

53 Thus, the Member States cannot refuse family members of a Union citizen who are not nationals of a Member State and who hold a valid residence card, issued under Article 10 of Directive 2004/38, the right, as provided for in Article 5(2) of the directive, to enter their territory without a visa where the competent national authorities have not carried out an individual examination of the particular case. The Member States are therefore required to recognise such a residence card for the purposes of entry into their territory without a visa, unless doubt is cast on the authenticity of that card and the correctness of the data appearing on it by concrete evidence that relates to the individual case in question and justifies the conclusion that there is an abuse of rights or fraud (see, by analogy, judgment in *Dafeki*, C-336/94, EU:C:1997:579, paragraphs 19 and 21).

54 In this connection, the Court has stated that proof of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved, and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it (judgments in *Hungary* v *Slovakia*, C-364/10, EU:C:2012:630, paragraph 58 and the case-law cited, and *O. and B.*, EU:C:2014:135, paragraph 58).

55 In the absence of an express provision in Directive 2004/38, the fact that a Member State is faced, as the United Kingdom considers itself to be, with a high number of cases of abuse of rights or fraud committed by third-country nationals resorting to sham marriages or using falsified residence cards cannot justify the adoption of a measure, such as that at issue in the main proceedings, founded on considerations of general prevention, to the exclusion of any specific assessment of the conduct of the person concerned himself.

56 Indeed, the adoption of measures pursuing an objective of general prevention in respect of widespread cases of abuse of rights or fraud would mean, as in the case in point, that the mere fact of belonging to a particular group of persons would allow the Member States to refuse to recognise a right expressly conferred by Directive 2004/38 on family members of a Union citizen who are not nationals of a Member State, although they in fact fulfil the conditions laid down by that directive. The same would be true if recognition of that right were limited to persons who are in possession of residence cards issued by certain Member States, as the United Kingdom has envisaged.

57 Such measures, being automatic in nature, would allow Member States to leave the provisions of Directive 2004/38 unapplied and would disregard the very substance of the primary and individual right of Union citizens to move and reside freely within the territory of the Member States and of the derived rights enjoyed by those citizens' family members who are not nationals of a Member State.

58 In the light of the foregoing considerations, Article 35 of Directive 2004/38 must be interpreted as not permitting a Member State to require, in pursuit of an objective of general prevention, family members of a Union citizen who are not nationals of a Member State and who hold a valid residence card, issued under Article 10 of that directive by the authorities of another Member State, to be in possession, pursuant to national law, of an entry permit, such as the EEA family permit, in order to be able to enter its territory.

Interpretation of Protocol No 20

59 It should be recalled that Article 77(1)(a) TFEU states that the European Union is to develop a policy with a view to ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders of the European Union. The abolition of internal border controls forms part

of the European Union's objective, stated in Article 26 TFEU, of establishing an area without internal frontiers in which the free movement of persons is ensured. That aspect of the absence of internal border controls was implemented by the EU legislature by adopting, on the basis of Article 62 EC (now Article 77 TFEU), Regulation No 562/2006 which seeks to build on the Schengen *acquis* (see, to this effect, judgment in *Adil*, C-278/12 PPU, EU:C:2012:508, paragraphs 48 to 50).

60 However, as the United Kingdom does not take part in the provisions of the Schengen *acquis* concerning the abolition of border controls and the movement of persons, including the common visa policy, Article 1 of Protocol No 20 provides that the United Kingdom is to be entitled to exercise at its frontiers with other Member States such controls on persons seeking to enter the United Kingdom as it may consider necessary for the purpose of verifying, in particular, the right to enter the United Kingdom of Union citizens and of their dependants exercising rights conferred by EU law and of determining whether or not to grant other persons permission to enter the United Kingdom.

61 Those controls are carried out 'at frontiers' and are intended to verify whether persons seeking to enter the United Kingdom have a right of entry under provisions of EU law or, in the absence of such a right, whether they should be granted permission to enter the United Kingdom. The controls therefore have the objective in particular of preventing the United Kingdom's borders with other Member States from being crossed unlawfully.

62 Thus, in the case of family members of a Union citizen who are not nationals of a Member State and who seek to enter the United Kingdom in reliance upon a right of entry provided for by Directive 2004/38, verification, for the purposes of Article 1 of Protocol No 20, consists, in particular, in checking whether the person concerned is in possession of the documents prescribed in Article 5 of that directive. In this regard, even though the Court has held that residence permits issued on the basis of EU law, by nature, declare and do not create rights (judgments in *Dias*, EU:C:2011:498, paragraph 49, and *O. and B.*, EU:C:2014:135, paragraph 60), the fact remains that, as has been established in paragraph 53 of the present judgment, the Member States are, in principle, required to recognise a residence card issued under Article 10 of Directive 2004/38, for the purposes of entry into their territory without a visa.

63 In accordance with its objective of preventing borders from being crossed unlawfully, verification, for the purposes of Article 1 of Protocol No 20, may include examination of the authenticity of those documents and of the correctness of the data appearing on them as well as examination of concrete evidence that justifies the conclusion that there is an abuse of rights or fraud.

64 It follows that Article 1 of Protocol No 20 authorises the United Kingdom to verify whether a person seeking to enter its territory in fact fulfils the conditions for entry, including those provided for by EU law. On the other hand, it does not permit the United Kingdom to determine the conditions for entry of persons who have a right of entry under EU law and, in particular, to impose upon them extra conditions for entry or conditions other than those provided for by EU law.

65 This is precisely the case here. By requiring an EEA family permit to be obtained in advance, the national legislation at issue in the main proceedings prescribes, for family members of a Union citizen who are not nationals of a Member State and who are in possession of a valid residence card issued under Article 10 of Directive 2004/38, a condition for entry which is additional to the conditions for entry provided for in Article 5 of the directive, and not simply verification of those conditions 'at frontiers'.

66 In the light of all the foregoing considerations, the answer to the first and second questions is that both Article 35 of Directive 2004/38 and Article 1 of Protocol No 20 must be interpreted as not permitting a Member State to require, in pursuit of an objective of general prevention, family members of a Union citizen who are not nationals of a Member State and who hold a valid residence card, issued under

Article 10 of Directive 2004/38 by the authorities of another Member State, to be in possession, pursuant to national law, of an entry permit, such as the EEA family permit, in order to be able to enter its territory.

Question 3

67 In view of the answer to the first and second questions, there is no need to reply to the third question.

Costs

68 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 (Grand Chamber) hereby rules:

Both Article 35 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 and Article 1 of the Protocol (No 20) on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland must be interpreted as not permitting a Member State to require, in pursuit of an objective of general prevention, family members of a citizen of the European Union who are not nationals of a Member State and who hold a valid residence card, issued under Article 10 of Directive 2004/38 by the authorities of another Member State, to be in possession, pursuant to national law, of an entry permit, such as the EEA (European Economic Area) family permit, in order to be able to enter its territory.

[Signatures]