JUDGMENT OF THE COURT (Grand Chamber)

15 November 2011 [1]

In Case C-256/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Austria), made by decision of 5 May 2011, received at the Court on 25 May 2011, in the proceedings

Murat Dereci,

Vishaka Heiml,

Alban Kokollari,

Izunna Emmanuel Maduike,

Dragica Stevic

1Language of the case: German.

v

Bundesministerium für Inneres,

THE COURT (Grand Chamber),

composed of V. Skouris, President, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, J. Malenovský, U. Lõhmus, Presidents of Chambers, R. Silva de Lapuerta (Rapporteur), M. Ilešič and E. Levits, Judges,

Advocate General: P. Mengozzi,
Registrar: K. Malacek, Administrator,

having regard to the order of the President of the Court of 9 September 2011 applying an accelerated procedure to the reference for a preliminary ruling under Article 23a of the Statute of the Court of Justice of the European Union and the first paragraph of Article 104a of the Rules of Procedure of the Court,

having regard to the written procedure and further to the hearing on 27 September 2011,

after considering the observations submitted on behalf of:

— M. Dereci, by H. Blum, Rechtsanwalt,

— the Austrian Government, by G. Hesse, acting as Agent,

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

— the German Government, by T. Henze and N. Graf Vitzthum, acting as Agents,

— Ireland, by D. O'Hagan, acting as Agent, assisted by P. McCann, BL,

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

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

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

— the United Kingdom Government, by S. Hathaway and S. Ossowski, acting as Agents, assisted by K. Beal, barrister,

— the European Commission, by D. Maidani and C. Tufvesson and by B.-R. Killmann, acting as Agents,

after hearing the Advocate General,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of European Union law provisions on citizenship of the Union, and Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association set up by the Agreement establishing an Association between the European Economic Community and Turkey, signed in Ankara on 12 September 1963 by Turkey, on the one hand, and by Member States of the EEC and the Community, on the other, and concluded, approved and confirmed on behalf of the Community by Council Decision No 64/732/EEC of 23 December 1963 (OJ 1964, 217, p. 3685) ('Decision No 1/80' and 'the Association Agreement' respectively), and the Additional Protocol, signed in Brussels on 23 November 1970 and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1972 L 293, p. 1) ('the Additional Protocol').

2 The reference has been made in proceedings between Mr Dereci, Mrs Heiml, Mr Kokollari, Mr Maduike and Mrs Stevic, on the one hand, and the Bundesministerium für Inneres (Ministry of Home Affairs), on the other, concerning the latter's rejection of the application for residence authorisations by the applicants in the main proceedings, coupled with, in four of the disputes in the main proceedings, an expulsion order and individual removal orders from Austria.

Legal context

International Law

3 Under the heading 'Right to respect for private and family life', Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, ('ECHR') provides:

'(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

European UnionLaw

Association Agreement

4 The Association Agreement is intended, in the words of Article 2(1), 'to promote the continuous and balanced strengthening of trade and economic relations between the parties, while taking full account of the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and the living conditions of the Turkish people'. Under Article 12 of the Association Agreement, 'the Contracting Parties agree to be guided by Articles [39 EC], [40 EC] and [41 EC] for the purpose of progressively securing freedom of movement for workers between them' and, under Article 13 of that agreement, those parties 'agree to be guided by Articles [43 EC] to [46 EC] and [48 EC] for the purpose of abolishing restrictions on freedom of establishment between them'.

Decision No 1/80

5 Article 13 of Decision No 1/80 states:

'The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories.'

Additional Protocol

6 According to Article 62 thereof, the Additional Protocol and its Annexes form an integral part of the Association Agreement.

7 Article 41(1) of the Additional Protocol provides:

'The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.'

Directive 2003/86/EC

8 Article 1 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12) states:

'The purpose of this Directive is to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.'

9 According to Article 3(3) of that directive:

'This Directive shall not apply to members of the family of a Union citizen.'

Directive 2004/38/EC

10 Under the heading 'General provisions', Chapter I 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) consists of Articles 1 to 3.

11 Article 1 of that directive, which is entitled '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;

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

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

12 Under the heading 'Definitions', Article 2 of that directive states:

'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.'

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

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.'

National law

14 The Federal Law on establishment and residence in Austria (Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich, BGBl. I, 100/2005, 'NAG'), makes a distinction, in its provisions on establishment and residence in Austria, between rights derived from European Union law, on the one hand, and those derived from Austrian law, on the other.

15 Under the heading 'General conditions for obtaining a residence permit', Paragraph 11 of the NAG provides:

'...

(2) A residence permit may be issued to an alien only if

1. the residence of the alien is not contrary to the public interest;

2. the alien can provide evidence of a legal right to accommodation considered usual for a family of comparable size;

3. the alien has comprehensive sickness insurance cover valid in Austria;

4. the residence of the alien is not liable to entail a financial burden for the public authorities in Austria;

…

(3) a residence permit may be issued despite a ground for refusal under subparagraph 1(3), (5) or (6) or where the conditions under subparagraph 2(1) to (6) are not met if required by respect for private and family life within the meaning of Article 8 of the [ECHR]. Private and family life within the meaning of Article 8 of the [ECHR] shall be assessed in the light, in particular, of:

1. the nature and duration of residence so far and the question of the lawfulness or otherwise of the residence so far of the third country national;

2. the actual existence of family life;

3. whether the private life is worthy of protection;

4. the degree of integration;

5. the links of the third country national with his own country;

6. the absence of a criminal record;

7. breaches of public policy, in particular in the area of the law on asylum, on border policing and on immigration;

8. whether the private and family life of the third country national arose at the time the persons concerned became aware of the uncertain status of their residence;

(4) the residence of an alien is contrary to the public interest (subparagraph 2(1)) where

1. his residence would compromise public policy or public security

…

(5) The residence of an alien does not entail a financial burden for the public authorities in Austria (subparagraph 2(4)) where the alien has a fixed and regular income of his own which allows him to live without seeking social security benefits from the public authorities and the amount of which corresponds to the scales laid down by Paragraph 293 of the General law on social security (Allgemeines Sozialversicherungsgesetz) …'

16 Paragraph 21 of the NAG, entitled 'Procedure applicable to initial applications', provides:

'(1) the initial application must be made abroad, before entering Austrian territory, to the competent local diplomatic services. The applicant is required to remain abroad until a decision has been made on his application.

(2) By way of derogation from subparagraph 1, the following persons are authorised to submit their application in Austria:

1. Family members of Austrians, EEA nationals and Swiss nationals, residing permanently in Austria who have not exercised the right of residence of more than three months conferred on them by Community law or by the [Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed in Luxembourg on 21 June 1999 (OJ 2002 L 114, p. 6)], following lawful entry and during their lawful residence;

...

(3) By way of derogation from subparagraph 1, the authorities may accept, on submission of a reasoned request, the lodging of an application in Austria if there are no grounds for refusal under Paragraph 11(1)(1), (2) or (4), and if it is established that it is impossible for the alien to leave Austria in order to submit his application or if this cannot reasonably be required of him:

...

2. in order to respect private and family life within the meaning of Article 8 of the ECHR (Paragraph 11(3)).

...

(6) An application submitted in Austria under subparagraph 2(1) and (4) to (6), subparagraph 3 and subparagraph 5, does not confer any right to remain in Austria beyond the authorised residence without a visa or with a visa. Nor does it preclude the adoption and implementation of measures for the registration of aliens and therefore can have no suspensory effect on aliens' registration procedures.'

17 Paragraph 47 of the NAG provides:

'(1) Persons seeking to reunite their family within the meaning of subparagraphs 2 to 4 are Austrians or EEC or Swiss nationals residing permanently in Austria who have not exercised their right of residence of more than three months conferred on them by Community law or the [agreement mentioned in Paragraph 21(2)].

(2) Third country nationals who are family members of a person seeking to reunite their family within the meaning of subparagraph 1 shall be issued with a "residence permit for family members in the strict sense" if they fulfil the conditions of part 1. If the conditions of part 1 are met, that residence permit shall be renewed for the first time after 12 months and thereafter every 24 months.

(3) Other family members of a person seeking to reunite a family within the meaning of subparagraph 1 may be issued on request with a residence authorisation for other family members' if they fulfil the conditions of part 1 and

1. they are relatives in the direct ascending line of the person seeking family reunification, his spouse or registered partner, provided that they are actually maintained by that person;

2. they are partners of that person who can demonstrate the existence of a permanent relationship in their country of origin and are actually being maintained; or

3. they are other family members,

   (a) who have already been maintained in their country of origin by the person seeking family reunification;

   (b) who have already lived in their country of origin under the same roof as the person seeking family reunification or

(c) who suffer from serious health problems such that the person seeking family reunification is required to take care of them personally.

…'

18 The NAG considers only spouses, registered partners and unmarried minor children to be 'family members in the strict sense' and spouses and registered partners must additionally be over 21 at the time of the application. Other members of the family, in particular parents and adult children, are considered to be 'other family members'.

19 According to Paragraph 57 of the NAG, third country nationals who are family members of an Austrian citizen are given the status granted to family members of a citizen of a Member State other than the Republic of Austria where that Austrian citizen has exercised in such a Member State or in Switzerland a right of residence of more than three months and has returned to Austria at the end of that period of residence. Other than in that situation, such nationals must meet the same conditions as those imposed on other third country nationals who have moved to Austria, that is to say the conditions laid down in Paragraph 47 of the NAG.

20 The NAG repealed, with effect from 1 January 2006, the Federal Law on the entry, residence and establishment of aliens (Bundesgesetz über die Einreise, den Aufenthalt und die Niederlassung von Fremden, BGBl. I, 75/1997, 'the 1997 Law'). Under Paragraph 49 of the 1997 Law:

'(1) The family members of Austrian nationals pursuant to Paragraph 47(3), who are nationals of a third country, enjoy freedom of establishment; they are covered, save as otherwise provided below, by the provisions applicable to nationals of third countries

enjoying a favourable regime under section 1. Such aliens may submit in Austria an application for an initial residence authorisation. The residence authorisations issued to them on the first two occasions shall be valid for one year each.

(2) Such third country nationals shall be issued on request with a residence authorisation of unlimited duration if the conditions for the issue of a residence permit (Paragraph 8(1)) are fulfilled and if the aliens

1. have been married for two years at least to an Austrian citizen and live with that citizen under the same roof in Austria;

…'

21 The 1997 Law also repealed the Law on Residence (Aufenthaltsgesetz, BGBl. 466/1992) and the Law on Aliens (Fremdengesetz, BGBl. 838/1992), which were in force at the time of the accession of the Republic of Austria to the European Union on 1 January 1995.

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

22 It is apparent from the order for reference that the applicants in the main proceedings are all third-country nationals who wish to live with their family members, who are

European Union citizens resident in Austria and who are nationals of that Member State. It should also be noted that the Union citizens concerned have never exercised their right to free movement and that they are not maintained by the applicants in the main proceedings.

23 By contrast, it must be observed that the facts giving rise to the dispute differ as regards, inter alia, whether the entry into Austria of the applicants in the main proceedings was lawful or unlawful, their current place of residence as well as the nature of their family relationship with the Union citizen concerned and whether they are maintained by that Union citizen.

24 For instance, Mr Dereci, who is a Turkish national, entered Austria illegally and married an Austrian national by whom he had three children who are also Austrian nationals and who are still minors. Mr Dereci currently resides with his family in Austria. Mr Maduike, a Nigerian national, also entered Austria illegally and married an Austrian national with whom he currently resides in Austria.

25 By contrast, Mrs Heiml, a Sri Lankan national, married an Austrian national before entering Austria legally where she currently lives with her husband, despite the subsequent expiry of her residence permit.

26 Mr Kokollari, who entered Austria legally at the age of two with his parents who possessed Yugoslav nationality at the time, is 29 years old and states that he is maintained by his mother who is now an Austrian national. He currently resides in Austria. Mrs Stevic, a Serbian national, is 52 years old and has applied for family reunification

with her father who has resided in Austria for many years and who obtained Austrian nationality in 2007. She has regularly received monthly support from her father and she claims that he would continue to support her if she resided in Austria. Mrs Stevic currently resides in Serbia with her husband and their three adult children.

27 All of the applicants in the main proceedings had their applications for residence permits in Austria rejected. In addition, Mrs Heiml, Mr Dereci, Mr Kokollaria and Mr Maduike have all been subject to expulsion orders and individual removal orders from Austria.

28 The applications were rejected by the Bundesministerium für Inneres, inter alia, on one or more of the following grounds: the existence of procedural defects in the application; failure to comply with the obligation to remain abroad whilst awaiting the decision on the application on account of either irregular entry into Austria or regular entry followed by an extended stay beyond that which was originally permitted; lack of sufficient resources; or a breach of public policy.

29 In all of the disputes in the main proceedings, the Bundesministerium für Inneres refused to apply, in respect of the applicants in the main proceedings, a similar regime to that provided for in Directive 2004/38 for the family members of a Union citizen, on the ground that the Union citizen concerned has not exercised his right of free movement. Similarly, that authority refused to grant the applicants a right of residence pursuant to Article 8 of the ECHR on the ground, in particular, that their residence status in Austria had to be considered to be uncertain from the start of their private and family life.

30 The referring court has before it the rejection of the appeals brought by the applicants in the main proceedings against the decisions of the Bundesministerium für Inneres. The referring court considers that the question arises whether the indications given by the Court in its judgment of 8 March 2011 in *Ruiz Zambrano* (C-34/09 *Ruiz Zambrano* [2011] ECR I-1177) may be applied to one or more of the disputes in the main proceedings.

31 In that regard, the referring court notes that, as in the circumstances at issue in *Ruiz Zambrano*, the third-country nationals and their family members who are Union citizens who possess Austrian nationality and who have not exercised their right of free movement wish, primarily, to live together.

32 However, unlike the situation in *Ruiz Zambrano*, there is no risk here that the Union citizens concerned may be deprived of their means of subsistence.

33 The referring court therefore asks whether the refusal of the Bundesministerium für Inneres to grant the applicants in the main proceedings a right of residence may be interpreted as leading, for their family members who are Union citizens, to a denial of the genuine enjoyment of the substance of the rights conferred on them by virtue of their status as citizens of the Union.

34 In the event that that question is answered in the negative, the referring court points out that Mr Dereci is contemplating not only reunification with his family in Austria but also the pursuit of employed or self-employed activities. In so far as the provisions of the 1997 Law were more favourable than those of the NAG, the referring court asks whether Article 13 of Decision No 1/80 and Article 41 of the Additional Protocol

must be interpreted as meaning that, in a situation such as that of Mr Dereci, the more favourable provisions of the 1997 Law are applicable.

35 In those circumstances the Verwaltungsgerichtshof decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:'

'(1) (a) Is Article 20 TFEU to be interpreted as precluding a Member State from refusing to grant to a national of a non-member country – whose spouse and minor children are Union citizens – residence in the Member State of residence of the spouse and children, who are nationals of that Member State, even in the case where those Union citizens are not dependent on the national of a non-member country for their subsistence? (*Dereci* case)

(b) Is Article 20 TFEU to be interpreted as precluding a Member State from refusing to grant to a national of a non-member country – whose spouse is a Union citizen – residence in the Member State of residence of that spouse, who is a national of that Member State, even in the case where that Union citizen is not dependent on the national of a non-member country for his or her subsistence? (*Heiml* and *Maduike* cases)

(c) Is Article 20 TFEU to be interpreted as precluding a Member State from refusing to grant to a national of a non-member country – who has reached the age of majority and whose mother is a Union citizen – residence in the Member State of residence of the mother, who is a national of that Member State, even in the case where it is not the Union citizen who is dependent on the national of a non-member country for her subsistence but rather that national of a non-member country who is dependent on the Union citizen for his subsistence? (*Kokollari* case)

(d) Is Article 20 TFEU to be interpreted as precluding a Member State from refusing to grant to a national of a non-member country – who has reached the age of majority and whose father is a Union citizen – residence in the Member State of residence of the father, who is a national of that Member State, even in the case where it is not the Union citizen who is dependent on the national of a non-member country for his subsistence but rather the national of a non-member country who receives subsistence support from the Union citizen? (*Stevic* case)

(2) If any of the questions under 1 is to be answered in the affirmative:

Does the obligation on the Member States under Article 20 TFEU to grant residence to nationals of non-member countries relate to a right of residence which follows directly from European Union law, or is it sufficient that the Member State grants the right of residence to the national of a non-member country on the basis of its law establishing such a right?

(3) (a) If, according to the answer to Question 2, a right of residence exists by virtue of European Union law:

Under what conditions, exceptionally, does the right of residence which follows from European Union law not exist, or under what conditions may the national of a non-member country be deprived of the right of residence?

(b) If, according to the answer to Question 2, it should be sufficient for the national of a non-member country to be granted the right of residence on the basis of the law of the Member State concerned which establishes such a right:

Under what conditions may the national of a non-member country be denied the right of residence, notwithstanding an obligation in principle on the Member State to enable that person to acquire residence?

(4) In the event that Article 20 TFEU does not prevent a national of a non-member country, as in the situation of Mr Dereci, from being denied residence in the Member State:

Does Article 13 of Decision No 1/80 of 19 September 1980 …, or Article 41 of the Additional Protocol…, which, according to Article 62 thereof, forms an integral part of the [Association] Agreement …, preclude, in a case such as that of Mr Dereci, the subjection of the initial entry of a Turkish national to stricter national rules than those which previously applied to the initial entry of Turkish nationals, even though those national provisions which had facilitated the initial entry did not enter into force until after the date on which the aforementioned provisions concerning the association with Turkey entered into force in the Member State in question?'

36 By order of the President of the Court of 9 September 2011, the accelerated procedure is to be applied to this reference for a preliminary ruling pursuant to under Article 23a of the Statute of the Court of Justice of the European Union and the first paragraph of Article 104a of the Rules of Procedure of the Court.

Consideration of the questions referred

The first question

37 The first question must be understood as seeking to determine, in essence, whether European Union law and, in particular, the provisions concerning citizenship of the

Union, must be interpreted as precluding a Member State from refusing to grant residence within its territory to a third country national, although that third country national wishes to reside with a family member who is a European Union citizen, resident in that Member State and a national of that Member State, who has never exercised his right to free movement and who is not maintained by that third country national.

Observations submitted to the Court

38 The Austrian, Danish, German, Irish, Netherlands, Polish and United Kingdom Governments and the European Commission consider that the provisions of European Union law concerning citizenship of the Union do not preclude a Member State from refusing to grant a right of residence to a third country national in situations such as those in the main proceedings.

39 According to those governments and to the Commission, firstly, Directive 2004/38 does not apply to the disputes in the main proceedings, given that the Union citizens concerned have not exercised their right to free movement and, secondly, the provisions of the TFEU concerning citizenship of the Union do not apply either in so far as the disputes concern purely internal situations that possess no connecting factors to European Union law.

40 In essence, they consider that the principles laid down in *Ruiz Zambrano* apply to very exceptional situations in which the application of a national measure would lead to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of the status of citizen of the Union. In this case, the events which gave rise to the disputes in the main proceedings differ substantially from those which gave rise to the aforementioned judgment in so far as the Union citizens concerned were not at

risk of having to leave the territory of the Union and thus of being denied the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. Similarly, according to the Commission, neither is there a barrier to the exercise of the right conferred on Union citizens to freedom of movement and residence within the territory of the Member States.

41 Mr Dereci, on the other hand, considers that European Union law must be interpreted as precluding a Member State from refusing to grant residence within its territory to a third country national, although that national wishes to reside with his wife and three children who are European Union citizens resident in that Member State and who are nationals of that Member State.

42 According to Mr Dereci, the question whether there is a cross-border situation or not is irrelevant. In that regard, Article 20 TFEU should be interpreted as meaning that the question to be taken into consideration is whether the Union citizen is denied the genuine enjoyment of the substance of the rights conferred by virtue of his status. This is the case for Mr Dereci's children in so far as they are maintained by him, and the effectiveness of that maintenance is likely to be compromised if they were subject to expulsion from Austria.

43 Lastly, the Greek Government considers that developments in the case-law of the Court impose an obligation to be guided, by analogy, by the provisions of European Union law, in particular by the provisions of Directive 2004/38, and therefore to grant residence to the applicants in the main proceedings, provided the following conditions are satisfied. First of all, the situation of the Union citizens who have not exercised their right to free movement should be similar to that of those who have exercised that same right, which would mean, in this case, that a national and his family members must satisfy the conditions laid down by that directive. Second, the national

measures should entail a significant infringement of the right of free movement and residence. Third, national law should not provide at least equivalent protection to the party concerned.

The Court's reply

— Applicability of Directives 2003/86 and 2004/38

44 It should be noted at the outset that the applicants in the main proceedings are all third country nationals who have applied for the right of residence in a Member State in order to live with their family members who are European Union citizens and who have not exercised their right to free movement within the territory of the Member States.

45 In order to answer the first question, as reformulated by the Court, it is necessary to analyse at the outset whether Directives 2003/86 and 2004/38 are applicable to the applicants in the main proceedings.

46 So far as concerns, first of all, Directive 2003/86, it must be stated that, under Article 1, its purpose is to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.

47 However, in accordance with Article 3(3) of Directive 2003/86, that directive is not to apply to members of the family of a Union citizen.

48 In so far as the disputes in the main proceedings concern Union citizens who reside in a Member State and their family members who are third country nationals who wish to enter and to reside in that Member State for the purposes of living as a family with those citizens, it must be held that Directive 2006/38 is not applicable to the applicants in the main proceedings.

49 Furthermore, as the Commission has correctly observed, although the proposal for a Council Directive on the right to family reunification ((2000/C 116 E/15), COM(1999)638 final - 1999/0258 (CNS)), submitted by the Commission on 11 January 2000 (OJ C 116 E, p. 66), included within its scope Union citizens who have not exercised their right to free movement, that inclusion was deleted in the course of the legislative process leading to Directive 2003/86.

50 Second, the Court has already had occasion to point out that 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 the Treaty and that it aims in particular to strengthen that right (see Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraphs 82 and 59, and Case C-434/09 *McCarthy* [2011] ECR I-3375, paragraph 28).

51 As is apparent from paragraphs 24 to 26 of the present judgment, Mrs Heiml, Mr Dereci and Mr Maduike, as spouses of Union citizens, fall within the definition of 'family member' in point 2 of Article 2 of Directive 2004/38. Similarly, Mr Kokollari

and Mrs Stevic, as direct descendants over the age of 21 of Union citizens, are covered by that definition provided that the requirement of being dependent on those citizens is satisfied, pursuant to point 2(c) of Article 2 of that Directive.

52 However, as the referring court observed, Directive 2004/38 does not apply in situations such as those at issue in the main proceedings.

53 Indeed, as provided for in Article 3(1) of Directive 2004/38, that directive applies 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 of the directive who accompany them or join them in that Member State (see *Ruiz Zambrano*, paragraph 39).

54 The Court has already had occasion to state that, in accordance with a literal, teleological and contextual interpretation of that provision, a Union citizen, who has never exercised his right of free movement and has always resided in a Member State of which he is a national, is not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, so that that directive is not applicable to him (*McCarthy*, paragraphs 31 and 39).

55 Similarly, it has been held that, in so far as a Union citizen is not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, their family member is not covered by that concept either, given that the rights conferred by that directive on the family members of a beneficiary of that directive are not autonomous rights of those family members, but derived rights, acquired through their status as members of the beneficiary's family (see, so far as concerns spouses, *McCarthy*, paragraph 42, and the case-law cited).

56 Indeed, 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 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 (*Metock and Others*, paragraph 73).

57 In the present case, as the Union citizens concerned have never exercised their right to free movement and have always resided in a Member State of which they are nationals, it must be held that they are not covered by the concept 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, so that that directive is neither applicable to them nor to their family members.

58 It follows that Directives 2003/86 and 2004/38 are not applicable to third country nationals who apply for the right of residence in order to join their European Union citizen family members who have never exercised their right to free movement and who have always resided in the Member State of which they are nationals.

— Applicability of the Treaty provisions concerning citizenship of the Union

59 Notwithstanding the inapplicability to the disputes in the main proceedings of Directives 2003/86 and 2004/38, it is necessary to consider whether the Union citizens concerned by those disputes may rely on the provisions of the Treaty concerning citizenship of the Union.

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

61 However, the situation of a Union citizen who, like each of the citizens who are family members of the applicants in the main proceedings, has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation (see Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 22, and *McCarthy*, paragraph 46).

62 Indeed, the Court has stated several times that citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see *Ruiz Zambrano*, paragraph 41, and the case-law cited).

63 As nationals of a Member State, family members of the applicants in the main proceedings enjoy the status of Union citizens under Article 20(1) TFEU and may therefore rely on the rights pertaining to that status, including against their Member State of origin (see *McCarthy*, paragraph 48).

64 On this basis, the Court has held that Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status (see *Ruiz Zambrano*, paragraph 42).

65 Indeed, in the case leading to that judgment, the question arose as to whether a refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside and a refusal to grant such a person a work permit have such an effect. The Court considered in particular that such a refusal would lead to a situation where those children, who are citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union (see *Ruiz Zambrano*, paragraphs 43 and 44).

66 It follows that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.

67 That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.

68 Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.

69 That finding is, admittedly, without prejudice to the question whether, on the basis of other criteria, inter alia, by virtue of the right to the protection of family life, a right of residence cannot be refused. However, that question must be tackled in the framework of the provisions on the protection of fundamental rights which are applicable in each case.

— The right to respect for private and family life

70 As a preliminary point, it must be observed that in so far as Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), concerning respect for private and family life, contains rights which correspond to rights guaranteed by Article 8(1) of the ECHR, the meaning and scope of Article 7 of the Charter are to be the same as those laid down by Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights (Case C-400/10 PPU *McB.* [2010] ECR I-8965, paragraph 53).

71 However, it must be borne in mind that the provisions of the Charter are, according to Article 51(1) thereof, addressed to the Member States only when they are implementing European Union law. Under Article 51(2), the Charter 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 upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it (*McB.*, paragraph 51, see also Joined Cases C-483/09 and C-1/10 *Gueye and Salmerón Sánchez* [2011] ECR I-8263, paragraph 69).

72 Thus, in the present case, if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR.

73 All the Member States are, after all, parties to the ECHR which enshrines the right to respect for private and family life in Article 8.

74 In the light of the foregoing observations the answer to the first question is that European Union law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the referring court to verify.

The second and third questions

75 Since the second and third questions were raised only in the event of the first question being answered in the negative, there is no need to provide an answer.

The fourth question

76 By its fourth question, the referring court is asking, essentially, whether Article 13 of Decision No 1/80 or Article 41(1) of the Additional Protocol must be interpreted as meaning that they preclude a Member State from subjecting the initial entry of a Turkish national to stricter national rules than those which previously applied to such entry, even though those previous national rules, which had relaxed the initial entry regime, did not enter into force until after those articles were given effect in the Member State in question, following its accession to the Union.

Observations submitted to the Court

77 The Austrian, German and United Kingdom Governments consider that neither Article 13 of Decision No 1/80 nor Article 41(1) of the Additional Protocol preclude stricter national rules than those which existed on the entry into force of those provisions from being applied to Turkish nationals wishing to pursue employed or self-employed activities in a Member State, given that those provisions apply only to Turkish nationals whose position was lawful in the host Member State and do not cover situations such as that of Mr Dereci, who entered and has always resided unlawfully in Austria.

78 On the other hand, the Netherlands Government and the Commission consider that such provisions preclude the introduction into the national legislation of the Member States of any new restriction on the exercise of freedom of movement for workers and freedom of establishment, including those relating to the conditions of substance or procedure as regards the initial entry into the territory of the Member States.

79 Mr Dereci observes that he entered Austria on the basis of an application for asylum and that he had withdrawn that application because of his marriage to an Austrian national. That marriage, under the law in force at the time, gave him a right of establishment. Moreover, from 1 July 2002 to 30 June 2003, he worked as a salaried employee and, subsequently, from 1 October 2003 to 31 August 2008, he was self-employed, having taken over his brother's hairdressing salon.

Reply of the Court

80 As a preliminary point, it must be observed that the fourth question relates to Article 13 of Decision No 1/80 and to Article 41(1) of the Additional Protocol without making any distinction between them.

81 Although those two provisions have the same meaning, each of them has been given a very specific scope, with the result that they cannot be applied concurrently (Joined Cases C-317/01 and C-369/01 *Abatay and Others* [2003] ECR I-12301, paragraph 86).

82 In that connection, it must be observed that, according to the referring court, Mr Dereci married an Austrian national on 24 July 2003 and subsequently, on 24 June 2004, submitted an initial application for a residence authorisation under the 1997 law. Moreover, Mr Dereci states that it was at that time that he took over his brother's hairdressing salon.

83 It follows that Mr Dereci's situation concerns freedom of establishment and is thus covered by Article 41(1) of the Additional Protocol.

84 Moreover, it must be borne in mind that the Law on Residence and the Law on Aliens, mentioned in paragraph 21 of the present judgment, were the provisions applicable to the conditions for the exercise of freedom of establishment of Turkish nationals in Austria, at the time of the accession of that Member State to the European Union on 1 January 1995 and, therefore, of the entry into force of the Additional Protocol in that Member State.

85 Although the 1997 Law repealed those laws, it was in turn repealed by the NAG as of 1 January 2006, and the latter legislation constituted, according to the referring court, a stricter approach compared with the 1997 Law, as regards the conditions for the exercise of freedom of establishment by Turkish nationals.

86 Accordingly, the fourth question must be understood as seeking to know whether Article 41(1) of the Additional Protocol must be interpreted as meaning that the enactment of new legislation more restrictive than the previous legislation, which, for its part, had relaxed earlier legislation concerning the conditions for the exercise of the freedom of establishment of Turkish nationals at the time of the entry into force of that protocol in the Member State concerned must be considered to be a 'new restriction' within the meaning of that provision.

87 In that regard, it must be recalled that Article 41(1) of the Additional Protocol has direct effect in the Member States, so that the rights which it confers on the Turkish nationals to whom it applies may be relied on before the national courts to prevent the application of inconsistent rules of national law. That provision lays down, in terms which are clear, precise and unconditional, an unequivocal 'standstill' clause, which contains an obligation entered into by the contracting parties which amounts in law to a duty not to act (see Case C-16/05 *Tum and Dari* [2007] ECR I-7415, paragraph 46, and the case-aw cited).

88 According to consistent case-law, even if the 'standstill' clause set out in Article 41(1) of the Additional Protocol is not, in itself, capable of conferring on Turkish nationals – on the basis of European Union legislation alone – a right of establishment or, as a corollary, a right of residence, nor a right to freedom to provide services or to enter the territory of a Member State, the fact remains that such a clause prohibits generally the introduction of any new measures having the object or effect of making the exercise by a Turkish national of those economic freedoms on the territory of that Member State subject to stricter conditions than those which applied to him at the time when the Additional Protocol entered into force with regard to the Member State concerned (see Case C-228/06 *Soysal and Savatli* [2009] ECR I-1031, paragraph 47, and the case-law cited).

89 A standstill clause, such as that embodied in Article 41(1) of the Additional Protocol, does not operate in the same way as a substantive rule by rendering inapplicable the relevant substantive law which it replaces, but as a quasi-procedural rule which specifies, *ratione temporis*, the provisions of a Member State's legislation that must be referred to for the purposes of assessing the position of a Turkish national who wishes to exercise freedom of establishment in a Member State (*Tum and Dari*, paragraph 55, and Case C-186/10 *Oguz* [2011] ECR I-6957, paragraph 28).

90 In that regard, Article 41(1) of the Additional Protocol is intended to create conditions conducive to the progressive establishment of freedom of establishment by way of an absolute prohibition on national authorities from creating any new obstacle to the exercise of that freedom by making more stringent the conditions which exist at a given time, so as not to render more difficult the gradual securing of that freedom between the Member States and the Republic of Turkey. That provision thus appears to be the necessary corollary to Article 13 of the Association Agreement, and constitutes the indispensable precondition for achieving the progressive abolition of national restrictions on freedom of establishment (*Tum and Dari*, paragraph 61, and the case-law cited).

91 Accordingly, even if, initially, with a view to the progressive implementation of that freedom, existing national restrictions as regards establishment may be retained, it is important to ensure that no new obstacle is introduced in order not to further obstruct the gradual implementation of such freedom of establishment (*Tum and Dari*, paragraph 61, and the case-law cited).

92 The Court has already had occasion to find, as regards a national provision concerning the granting of a residence permit to Turkish nationals that it is necessary to ensure that the Member States do not depart from the objective pursued by reversing measures which they have adopted in favour of the free movement of Turkish workers subsequent to the entry into force of Decision No 1/80 within their territory (Joined Cases C-300/09 and C-301/09 *Toprak and Oguz* [2010] ECR I-12845, paragraph 55).

93 Moreover, the Court has held that Article 13 of Decision No 1/80 must be interpreted as meaning that a tightening of a provision which provided for a relaxation of the provision applicable to the conditions for the exercise of the freedom of movement of Turkish workers at the time of the entry into force of Decision No 1/80 in the Member State concerned, constitutes a 'new restriction', even where that tightening does not make those conditions more stringent than those under the provision applicable at the time of the entry into force of Decision No 1/80 in that Member State (see, to that effect, *Toprak and Oguz*, paragraph 62).

94 Having regard to the convergence in the interpretation of both Article 41(1) of the Additional Protocol and Article 13 of Decision No 1/80 as regards the objective pursued, it must be held that the scope of the standstill obligation in Article 13 extends by analogy to any new obstacle to the exercise of freedom of establishment, freedom to provide services or freedom of movement for workers which makes more stringent the conditions which exist at a given time (see, to that effect, *Toprak and Oguz*, paragraph 54), so that it is necessary to ensure that the Member States do not depart from

the objective pursued by the standstill clauses by reversing measures which they have adopted in favour of the free movement of Turkish workers subsequent to the entry into force of Decision No 1/80 or the Additional Protocol within their territory.

95 In the present case, it is not disputed that, with the entry into force of the NAG on 1 January 2006, the conditions for the exercise of freedom of establishment for Turkish nationals in Mr Dereci's position worsened.

96 According to Paragraph 21 of the NAG, third country nationals, including Turkish nationals in Mr Dereci's position, must, as a general rule, submit their application for residence from outside Austrian territory and are required to remain outside that territory until a decision has been made on their application.

97 On the other hand, pursuant to Paragraph 49 of the 1997 Law, Turkish nationals in Mr Dereci's position, as family members of Austrian nationals, enjoyed freedom of establishment and could submit an application for an initial establishment permit in Austria.

98 In those circumstances, it must be held that, by worsening the conditions for the exercise of freedom of establishment by Turkish nationals compared with the conditions applicable to them previously under the provisions adopted since the entry into force of the Additional Protocol, the NAG constitutes a 'new restriction' within the meaning of Article 41(1) of that protocol.

99 Finally, as regards the argument relied on by the Austrian, German and United Kingdom Governments, according to which Mr Dereci was in an 'unlawful position' and could not therefore benefit from the application of Article 41(1) of the Additional Protocol, suffice it to note that, according to the order for reference, while it is true

that Mr Dereci entered Austrian territory illegally in November 2001, the fact remains that, at the time he lodged his application for establishment, he had, under the national legislation in force at the time, a right of establishment by reason of his marriage to an Austrian national, and he was entitled to submit an application to that effect in Austria, which, moreover, he did. According to the referring court, it was only the entry into force of the NAG which caused his initially lawful residence to become subsequently unlawful, which led to the rejection of his application for a residence authorisation.

100 It follows that his position cannot be classed as unlawful, given that that unlawfulness arose following the application of the provision which constitutes a new restriction.

101 In the light of the foregoing observations, the answer to the fourth question is that Article 41(1) of the Additional Protocol must be interpreted as meaning that the enactment of new legislation more restrictive than the previous legislation, which, for its part, relaxed earlier legislation concerning the conditions for the exercise of the freedom of establishment of Turkish nationals at the time of the entry into force of that protocol in the Member State concerned must be considered to be a 'new restriction' within the meaning of that provision.

Costs

102 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 (Grand Chamber) hereby rules:

1. **European Union law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the referring court to verify.**

2. **Article 41(1) of the Additional Protocol, signed in Brussels on 23 November 1970 and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972, must be interpreted as meaning that the enactment of new legislation more restrictive that the previous legislation, which, for its part, relaxed earlier legislation concerning the conditions for the exercise of the freedom of establishment of Turkish nationals at the time of the entry into force of that protocol in the Member State concerned must be considered to be a 'new restriction' within the meaning of that provision.**

[Signatures]