FAMILY REUNIFICATION in EU LAW

essential text, cases and materials

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With the support of the Erasmus+ Programme of the European Union

JEAN MONNET MODULE
EU|MO|MI
EU Mobility and Migration law

Università degli Studi di Torino

With the support of the
Erasmus+ Programme
of the European Union

This article was drafted with the support of the Erasmus+ Programme of the European Union, in the framework of the Jean Monnet Module "EU Mobility and Migration Law" (2019-2022 - Grant decision no. 2019-1830/001/001), www.eumomi.unito.it. The European Commission support for the production of this publication does not constitute an endorsement of the contents which reflects the views only of the Author, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

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ISBN code: 9788875902339

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PART I

The right to family reunification of EU citizens: Directive 2004/38/EC

1. Introduction

The right to family reunification is the right to accompany or join a Union citizen who has moved to a Member State other than that of his/her nationality ('the host Member State') for more than three months. Pursuant to Article 7 Directive 2004/38/EC,[1] this right applies to the Union citizen's family members, regardless of their nationality, who therefore enjoy a derived right of residence.

The right to family reunification pursues two main objectives. Firstly, it constitutes a flanking measure to free movement of persons. In fact, Union citizens would be discouraged to move and settle in another Member State in case they could not be accompanied or joined by the members of their family. As such, family reunification contributes to the static dimension of freedom of movement, as the unity of a family facilitates settling and fosters social integration in the host Member State. Secondly, from an individual perspective, it contributes to the protection of the right to family life and of the rights of the child, enshrined in Articles 7 and 24 of the Charter of fundamental rights of the EU.

2. Beneficiaries

Pursuant to its Article 3(1), Directive 2004/38/EC 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 who accompany or join them."

The notion of family members involves both Union nationals (Article 7(1) let. d) and third-country nationals (Article 7(2)), and includes the persons listed in Article 2(2):

[1] 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 (Text with EEA relevance), OJ L 158.

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. direct descendants who are under the age of 21 or are dependants and those of the spouse or partner;
d. the dependent direct relatives in the ascending line and those of the spouse or partner.

Some of these definitions require clarifications.

2.1. The spouse

The concept of spouse entails a formal marital union. The European Union has no competence to determine the scope and meaning of the notion of marriage. However, some useful elements can be derived from Directive 2004/38/EC and from the case-law of the Court of Justice.

2.1.1 Marriage of convenience

The concept of marriage of convenience (or sham marriage) regards marriages concluded for the sole purpose of enjoying the right to free movement and other connected rights and safeguards that someone would not benefit from otherwise. As such, this notion mainly refers to marriages between an EU citizen and a third-country national.

Directive 2004/38/EC addresses this situation in recital no. 28 and in Article 35. Article 35 states that the Member States enjoy discretion as to the measures and controls intended to prevent, detect and sanction marriages of convenience. At the same time, their action is not immune from the general principles of EU law and, more specifically, must comply with the principles of proportionality and non discrimination.

In the case C-480/08, *Teixeira*, Advocate General Kokott addressed the issue of marriages of convenience under Directive 2004/38/EC and clarified:
"Naturally, the principle of financial solidarity with nationals of other Member States does not require the host Member State to tolerate abuse, since it is a general legal principle of Community law that the application of a rule of Community law cannot be extended to cover abusive practices.
This principle has also been reflected in Article 35 of Directive 2004/38.
Accordingly, it remains open to the Member States to put an end to abuse of the rights contained in Article 12 of Regulation No 1612/68.
Whether or not there has been abuse must, however, be examined objectively on the basis of a comprehensive appraisal of all the circumstances of the individual case and cannot be inferred from mere recourse [to the right of access to social benefits] [….]".[2]

In 2014, the Commission issued soft Guidelines on Marriages of Convenience,[3] with a view to setting common criteria and limits which all national measures should follow. In the Guidelines, the Commission reiterates that controls at the domestic level should be carried out in the light of the principles of proportionality (e.g. no generalized checks on any marriage involving a third-country national) and non-discrimination. Furthermore, it listed some "indicative criteria" to identify sham marriages on a case by case basis:

- The couple has never met before the marriage;
- Inconsistent statements about personal details, circumstances of their meeting, or other important personal information;
- The couple does not speak a language understood by both;
- Evidence of a sum of money or gifts handed over, not being a dowry in cultures where this is common practice;
- Past history of one or both spouses of prior abuse;
- Development of family life only after the expulsion order was adopted;
- Divorce shortly after the third-country national acquires a residence permit.

[2] Opinion of Advocate General Kokott delivered on 20 October 2009, Case C-480/08, *Teixeira*, ECLI:EU:C:2009:642, para. 83.

[3] Communication from the Commission to the European Parliament and the Council. Helping national authorities fight abuses of the right to free movement: Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens, COM(2014) 604 final.

2.1.2 Same sex marriage

In the landmark *Coman* case,[4] the Court of Justice clarified that same sex spouses are covered by Article 2(2)(a) of Directive 2004/38/EC. In particular, the Court held that the term 'spouse' is gender neutral and that, as a consequence, the same-sex spouse of a Union citizen who has moved between Member States should be recoginised as 'spouse' for the purpose of granting family reunification rights under EU law.

The *Coman* Case (C-673/16)

Facts: The claimant, Mr. Coman had Romanian and US citizenship. He had been working and living in Brussels for four years. There, pursuant to Belgian law, he married Mr. Hamilton, a U.S. national. Mr. Coman wanted to come back to Romania, his home country. However, the Romanian authorities refused to grant to his husband a right to stay, as the Romanian civil code described marriage as a union between a man and a woman. Therefore, from the viewpoint of the Romanian authorities, Mr. Hamilton could not qualify as a family member for the purposes of acquiring a right to stay in Romania.

Judgment: First of all, the Court recalled that Mr. Coman's case regards a situation of **circular migration**, in which a Union national seeks for protection from EU law while returning to his/her Member State of origin after having exercised free movement rights. In principle, in these cases Directive 2004/38/EC is not applicable. In fact, the Directive only applies to Union citizens who move to a Member State other than that of their nationality. Despite this, the Court found that:

- Union citizens enjoy, by virtue of **Article 21(1) TFEU,** the right to be joined by their family members under conditions at least equivalent to those granted to them by EU law in the territory of the host Member State pursuant to Directive 2004/38/EC (para. 23). In fact, if no such derived right of residence were granted, a Union citizen would be discouraged from exercising his/her free movement rights under Article 21(1) TFEU for fear that, upon return in his/her Member State of origin, he/she could not continue the family life created or strengthened with a third-country national in the host Member State (para. 24).

- In order to ensure the full **effectiveness of Article 21(1) TFEU**, the conditions for the grant of family reunification rights to returnees must not

[4] Judgment of the Court of 5 June 2018, Case C-673/16, *Coman and Others*, ECLI:EU:C:2018:385.

be stricter than those laid down by Directive 2004/38. Therefore, the family reunification rights stemming from **Directive 2004/38** are **applicable** to returnees **by analogy** (paras. 31-33).

Against this background, the Court proceeded to interpret the notion of 'spouse' set in Article 2(2)(a) Directive 2004/38. To do so, it adopted once again an effects-based approach and held that the **refusal** of a Member State to recognise, for the purpose of the grant of family reunification rights, the same-sex marriage of a third-country national and a Union citizen which has been concluded in another Member State during the Union citizen's period of genuine residence in that State, **would impede the exercise of the right to free movement of the Union citizen** (paras. 39-40). Therefore, the Court concluded that:

- the **notion of spouse** within the meaning of Directive 2004/38/EC is **gender-neutral** and may therefore cover the **same-sex spouse** of the Union citizen concerned (para. 35);

- Member States must recognise same-sex marriages celebrated pursuant to the law of another Member State, irrespective of whether they have opened marriage to same-sex couples in their own territory. In particular such an obligation applies **"for the sole purpose of granting a residence right to a third-country national"** who is the spouse of a Union citizen having exercised his/her free movement rights. In other words, Member States remain free to establish in their national law whether or not they intend to recognise the institution of marriage between persons of the same sex, but they are obliged to recognise same-sex spouses for the sole purpose of granting family reunification rights under EU law (paras. 36-51).

With the Coman judgment, the Court reversed the discriminatory stance that it had adopted in the early 2000's in Joined Cases C-122/99 and C-125/99, *D and Kingdom of Sweden v. Council*, when it ruled that the term marriage means "a union between two persons of the opposite sex".[5] The Court's reasoning in *Coman* was largely inspired by the US Supreme Court's judgment in the case *Obergefell v. Hodges* of 2015, where it was etsablished that the 14th Amendment requires all US federate

[5] Judgment of the Court of 31 May 2001, Joined Cases C-122/99 P and C-125/99 P, *D and Kingdom of Sweden v. Council*, ECLI:EU:C:2001:304, paras. 34-39.

States to perform and recognize same-sex marriages on the same terms and conditions as marriages of opposite-sex couples.[6]

D and Kingdom of Sweden v. Council (Joined Cases C-122/99 and C-125/99)

Facts: D., an official of the European Communities of Swedish nationality working at the Council, registered a partnership with another Swedish national of the same sex in Sweden on 23 June 1995. He applied to the Council for his status as a registered partner to be treated as being equivalent to marriage for the purpose of obtaining the household allowance provided for in the Staff Regulations. However, the Council rejected the application, on the ground that the provisions of the Staff Regulations could not be construed as allowing a 'registered partnership' to be treated as being equivalent to marriage.

Judgment: According to the Court, the mere fact that, in a limited number of Member States, a registered partnership was assimilated, although incompletely, to marriage could not have the consequence that, by mere interpretation, persons whose legal status was distinct from that of marriage could be covered by the term 'married official' as used in the Staff Regulations (para. 39). First, according to the definition accepted by the Member States, the term 'marriage' meant a union between two persons of the opposite sex (para. 34). Second, even the Member States that had begun to grant legal recognition to various forms of union between partners of the same sex did not regard such unions as being comparable to marriage (paras. 35-36). Third, it was clear that, both at the time of drafting of the Staff Regulation and at the time of the ruling, the legislature expressly intended to grant entitlement to the household allowance to married couples only. It follows that only the legislature could, where appropriate, adopt measures to alter that situation, for example by amending the provisions of the Staff Regulations (paras. 37-38).

2.2 Registered partnerships

Registered partners also fall under the notion of 'family member' under Article 2(2)(b) of Directive 2004/38/EC. However, the rights of registered partners are only recognised "**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".

[6] Judgment of the Supreme Court of the United States of 26 June 2015, *Obergefell et al. v. Richard Hodges, Director, Ohio Department of Health*, No. 14–556.

This requirement is the result of a compromise reached between the institutions involved during the negotiations of the Directive. Indeed, while the European Parliament argued that the notion of 'family member' should include registered partners provided that "the legislation or practice of the host and/or home Member State treats unmarried couples and married couples in a corresponding manner",[7] the Commission took a more prudent stance for two main reasons:

- at the time, only two MSs had rules on this issue and therefore recognized unmarried couples in their domestic legislation;
- because of the stance taken by the Court of Justice in the case *D and Kingdom of Sweden v. Council*[8] analysed above.

Ultimately, the Commission's position prevailed and the Council managed to lead the negotiations towards the adoption of a less ambitious text, which now corresponds to the wording of Article 2(2)(b). In any event, as will be explained in *paragraph 3* below, the host Member State which does not recognise registered partnerships is still subject to a duty to facilitate the entry of the Union citizen's partner.

2.3 Descendants and ascendants

Descendants and ascendants may also fall under the notion of 'family member' provided that the conditions set in Article 2(2)(c) and (d) of Directive 2004/38/EC are met. In particular,

- Article 2(2)(c) protects the **direct descendants**[9] of the Union citizen or of his/her spouse/registered partner **if the host Member State recognises registered partnerships** provided they are **either under 21 years of age or dependent**;
- Article 2(2)(d) protects **dependent relatives in the ascending line**,[10] both of the main Union citizen and of her spouse/registered partner **if the host Member State recognises registered partnerships**.

[7] European Parliament legislative resolution on the proposal for a European Parliament and Council directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2001) 257 – C5-0336/2001 – 2001/0111(COD)), P5_TA(2003)0040.

[8] Judgment of the Court of 31 May 2001, Joined Cases C-122/99 P and C-125/99 P, *D and Kingdom of Sweden v. Council*, cit.

[9] The notion of descendants includes grandchildren, adopted children, children under permanent legal guardianship and the spouse's or partner's children.

[10] The notion of relatives in the ascending line includes the mother/father, grandfather/grandmother.

A few elements need clarification. First, the provision makes the recognition of family reunification rights conditional upon whether the host Member State recognises registered partnerships. It follows that children or parents of a non-registered partner, or of the registered partner in a Member State where registered partnerships are not recognised, do not fall within the personal scope of Article 2(2)(c) and (d). However, once again as will be explained in *paragraph 3* below, these individuals may still fall under Article 3(2)(a) of Directive 2004/38/EC, so that their entry needs to be facilitated by the Member States.

Second, the **notion of dependency** is of fundamental importance. Indeed, except for direct descendants under 21 years of age, only dependent direct descendants and dependent relatives in the ascending line fall under the personal scope of Article 2(2) of the Directive. In its case-law, the Court of Justice has clarified that the notion of dependence is an autonomous notion of EU law, which must be interpreted uniformly across the Union, to avoid discriminations and loopholes in the implementation of the Directive. In particular, since the *Reyes* case,[11] the Court has held that the assessment of dependency is **a matter of fact** and must be **interpreted broadly**. Therefore, it is not necessary for the right-holder or his/her spouse/partner to be legally obliged to support the descendant, nor are the reasons for such dependence relevant, as long as it exists in the country from where the applicant came from before joining the Union citizen, and that material support is provided by the main right holder or his/her spouse/partner.

[11] Judgment of the Court of 16 January 2014, Case C-423/12, *Reyes*, ECLI:EU:C:2014:16.

The Court's broad interpretation of the notion of dependency was fully shared by Advocate General
Mengozzi, in his opinion delivered in the case *Reyes*, where he held that: "It is thus apparent from the foregoing considerations that any family member who, for whatever reason, proves unable to support himself in his country of origin and in fact finds himself in such a situation of dependence that the **material support** provided by the Union citizen is **necessary for his subsistence** is to be considered to be a dependant for the purpose of Article 2(2)(c) of Directive 2004/38. Such a situation must really exist and **may be proved by any means**. The applicant may thus provide the authorities of the host Member State with both subjective evidence connected with his own economic and social situation and any other relevant evidence that may illustrate, in a manner helpful to those authorities, the objective background to the application. At all events, the authorities of the host Member State have a duty to ensure that the effectiveness of the rights indirectly conferred on the members of the nuclear family by Directive 2004/38 is maintained and that access to the territory of the Union is not made excessively difficult by, in particular, placing too heavy a burden of proof on applicants." (para. 61).

The *Reyes* case (C-423/12)

Facts: Ms. Reyes, a national of the Philippines, was left at the care of her grandmother, as her mother moved to Germany in order to work and be able to support her family in the Philippines. It appears that the mother, who obtained German citizenship, kept constant contact with her family and supported them economically by sending them money on a monthly basis and by paying for her tuition fees. Eventually, her mother moved to Sweden to marry a Norwegian national living in Sweden (i.e. EEA citizen having exercised his free movement rights, hence residing in a Member State other than that of his nationality. Note that Directive 2004/38/EC has been incorporated into the EEA Agreement, therefore it is applicable to citizens of Iceland, Liechtenstein and Norway and their family members). Since the marriage, both Ms. Reyes and her mother had depended on the Norwegian citizen's resources, because her mother stopped working as soon as she moved to Sweden. Ms. Reyes applied to the Swedish immigration authorities for a residence permit on the grounds that she was a dependent family member of an EEA citizen who had exercised his free movement rights. However, the immigration authorities rejected her application, arguing that Ms. Reyes had not presented sufficient proof that the money which was transferred to her by her mother and her stepfather had been used to supply her basic needs.

Judgment: The Court was asked to clarify

- whether Member States can **require** a direct descendant who is older than 21 years **to have tried, without success, to obtain employment in the country of origin** in order to be regarded as dependent and thus come within the definition of a family member under Article 2(2)(c) of Directive 2004/38; and

- whether, in interpreting the term 'dependant', any significance should be attached to the fact that the **family member is**, due to the personal circumstances such as age, education and health, **deemed to be well placed to obtain employment in the host Member State and in addition intends to start work in the host member State**, which would mean that the conditions of dependence would no longer be met.

In the judgment, the Court held that:

- the dependent status is the result of a factual situation characterised by the fact that material support for the family member is provided by the Union citizen having exercised his/her right of free movement or by his/her spouse. To verify the existence of such dependence, the host Member State must assess whether the family member is not in a position to support himself/herself, either in the family member's State of origin or in the State whence he/she came at the time when he/she applied to join the Union citizen (paras. 21-23). For example, the fact that the Union citizen or his/her spouse is sending a sum of money to the family member, necessary for the latter to support himself or herself, is sufficient evidence that s/he is in a real situation of dependence (para. 24).

- the family member cannot be required to prove that s/he has searched for a job or has tried to acquire support from the country of origin in order to be regarded as a 'dependant', as this would excessively undermine the scope of family reunification (paras. 25-28).

- any prospects **of obtaining work in the host Member State**, which would result in the family member no longer being dependent on the Union citizen, **cannot affect the interpretation of the condition of being a 'dependant'**. In fact, a different approach would in practice discourage family members from looking for employment in the host Member State and this would contradict Article 23 of the Directive, which clearly provides family members with a right to employment and self-employment (paras. 29-33).

One last notion that needs clarification is the **notion of direct descendant**. In the case C-129/18, *SM*, the Court of Justice held that the notion of direct descendant is an autonomous notion of EU law and presupposes the existence of any parent-child relationship, whether biological or legal.[12] Beyond these clarifications provided by the Court, the Member States are free to set their criteria to fine grain the scope of the notion. Quite a varied set of national approaches and practices apply.[13]

The *SM* case (C-129/18)

Facts: Mr and Mrs M., two French nationals, become guardians of SM, a child abandoned by her biological parents at birth, under the Algerian *kafala* system. In so doing, pursuant to Algerian law, they acquired parental responsibility over her. Mr and Mrs M moved to the United Kingdom and applied for a residence permit for SM as their adopted child. However, immigration authorities rejected their application on the grounds that guardianship under the Algerian *kafala* system is not recognised as an adoption under United Kingdom law.

Judgment: The Court clarified that the notion of 'direct descendant' referred to in Article 2(2)(c) of Directive 2004/38/EC is an autonomous notion of EU law which is to be interpreted uniformly and broadly as covering **'any parent-child relationship, whether biological or legal** (paras. 50-54). While such a notion may include adopted children, it does not extend to children placed under a legal guardianship system such as Algerian *kafala*, insofar as the latter does not entail a parent-child relationship (paras. 55-56). In any event, such children may still fall under the notion of 'other family members' referred to in **Article 3(2)(a) of the Directive**, for which entry needs to be facilitated (paras. 57-59). Although Member States enjoy wider discretion in setting the conditions of entry for such family members, when doing so they must act in compliance with the right to respect for private and family life and with the best interests of the child, enshrined in Articles 7 and 24(2) of the Charter (paras. 64-67). In particular, if it is established "that the child and its guardian, who is a citizen of the Union, are called to lead a **genuine family life** and that that **child is dependent on its guardian**, the requirements relating to the fundamental right to respect for family life, combined with the obligation to take account of the best interests of the child, demand, in principle, that that child be granted a

[12] Judgment of the Court of 26 March 2019, Case C-129/18, *SM*, ECLI:EU:C:2019:248, paras. 50-54.

[13] For a thorough analysis of national legislation and practice on Directive 2004/38/EC see Shaw, J. and Nic Shuibhne, N. (2014). *General Report: Union Citizenship: Development, Impact and Challenges* in Neergaard, U., Jacqueson, C. and Holst-Christensen, C. (eds), *Union Citizenship: Development, Impact and Challenges. The XXVI FIDE Congress in Copenhagen, 2014 Congress Publications Vol. 2*. Available at https://www.pure.ed.ac.uk/ws/portalfiles/portal/15442767/Topic_2_on_Union_Citizenship_Edit.pdf.

right of entry and residence in order to enable it to live with its guardian in his or her host Member State" (para. 71).

3. Duty to facilitate reunification

Article 3(2) of Directive 2004/38/EC imposes upon the Member States the duty of facilitating family reunification for other family members, namely:

> a. any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
> b. the partner with whom the Union citizen has a durable relationship, duly attested.

The scope and meaning of the notions of **"facilitate"** and **"dependant"** for the purposes of Article 3(2) have been clarified by the Court of Justice. In particular, in the cases *Rahman*[14] and *Banger*,[15] the Court has underlined that Member States have a duty confer **a certain advantage** to family members covered by Article 3(2) of the Directive, which translates into a duty to undertake an **extensive examination of their personal circumstances** and a **duty to provide reasons for denial**. Moreover, they enjoy a **broader margin of discretion** in determining the criteria to be taken into account in determining dependency, provided that they do **not deprive family reunification of its effectiveness** and as long as applicants have a **right to judicial review** of the decision.

The *Rahman* case (C-83/11)

Facts: Mahbur Rahman, a Bangladeshi national, married an Irish national working in the United Kingdom. Following the marriage, his brother, his half-

[14] Judgment of the Court of 5 September 2012, Case C-83/11, *Rahman and Others*, ECLI:EU:C:2012:519.

[15] Judgment of the Court of 12 Jul 2018, Case C-89/17, *Banger*, ECLI:EU:C:2018:570.

brother and his nephew applied for EEA family permits in order to obtain the right to reside in the United Kingdom as his and Mrs Rahman's dependants. However, British authorities rejected their request, on grounds that they had not been able to demonstrate the relationship of dependence.

Judgment: The Court of Justice stated that:

- Article 3(2) Directive 2004/38/EC imposes an obligation on the Member States to **confer a certain advantage**, compared with applications for entry and residence of other nationals of third States, on applications submitted by persons who have a relationship of particular dependence with a Union citizen (para. 21);

- each Member State has a **wide discretion** as regards the selection of the factors to be taken into account, provided that the **effectiveness** of Article 3(2) is not affected (paras. 24 and 36-39). Moreover, every applicant is entitled to a **judicial review** in the event of refusal (para. 25);

- the situation of dependence must exist **in the country from which the family member concerned comes**, at the very least at the time when he applies to join the Union citizen (para. 33).

The *Banger* case (C-89/17)

Facts: Ms Banger, a national of South Africa, and her partner Mr Rado, a United Kingdom national, had been living together in the Netherlands, where Mr Rado accepted employment and Ms Banger obtained a residence card in her capacity as an 'extended family member' of a Union citizen. They decided to move back to the United Kingdom, where Ms Banger applied for a residence permit. However, the permit was refused on the ground that only the spouse or civil partner of a United Kingdom national could be considered a family member of that national for the purposes of family reunification.

Judgment: Similarly to the *Coman* judgment illustrated above, this was a case of **circular migration**, in which a Union national seeked for protection from EU law while returning to his/her Member State of origin after having exercised free movement rights. In principle, in these cases Directive 2004/38 is not applicable. In fact, the Directive only applies to Union citizens who move to a Member State other than that of their nationality. Despite this, the Court built on its reasoning in the *Coman* judgment and found that, in order to ensure the effectiveness of Article 21(1) TFEU, the conditions for the grant of family reunification rights to returnees should not be stricter than those set in Directive

2004/38, which is applicable by analogy (paras. 27-30). It follows that, when a Union citizen returns to his home State after having exercised his residence rights in another Member State under the conditions provided by Directive 2004/38, then the home State must 'facilitate' the provision of authorisation for the unregistered partner and the safeguards in **Article 3(2) apply by analogy** (paras. 33-35). As for the specific requirements stemming from the duty to facilitate reunification, the Court of Justice clarified that, in compliance with Article 47 of the Charter, family members under Article 3(2) of the Directive must benefit from **judicial remedy** against denial of family reunification on the part of the national authorities. In particular, judicial review must cover the respect of appropriate **procedural guarantees** and the **substance of the decision** (e.g. grounds, evaluation of the personal situations, assessment criteria, etc.) (paras. 43-52).

4. The conditions for enjoying the right to family reunification

A series of conditions must be complied with for the purposes of enjoying the right to family reunification under Directive 2004/38/EC. First, the right to family reunification under the Directive only applies in the host Member State, namely in a Member State other than that of nationality of the Union citizen concerned. Thus, a transboundary element is in principle always required, although throughout the years the Court of Justice has identified two complementary ways of pursuing family reunification in the absence of a transboundary element: 1) recourse to Union citizenship under Article 20 TFEU and 2) recourse to the right of free movement conferred on Union citizens under Article 21(1) TFEU. Second, in order to benefit from the right to family reunification, Union citizens must be either economically active or economically independent. Lastly, some requirements concerning the entry of the family member and the timing of the establishment of the family link may apply. The following sections will address each of these issues individually.

4.1. The transboundary element

As provided for in Article 3(1) of Directive 2004/38/EC, the right to family reunification applies to Union citizens who have moved to a **Member State other than that of which they are a national for more than three months**. If follows from the

foregoing that, in principle, a **transboundary element** is required. More specifically, family reunification takes place only in the host Member State, which shall be understood as a Member State other than that of nationality of the Union citizen concerned. This was made clear by the Court of Justice in case C-40/11, *Iida*:

> "The right of a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement to install himself with that Union citizen pursuant to Directive 2004/38 can be relied on only in the host Member State in which that citizen resides".[16]

As for the specific case of **persons who were naturalised in the host Member State while retaining the first Member State's nationality**, in case C-165/16, *Lounes*, the Court of Justice has clarified that such persons still fall under the scope of Directive 2004/38/EC and that, as a consequence, their family members may still obtain a derived right of residence by virtue of EU law, rather than having to satisfy the more restrictive conditions imposed by domestic law.

The *Lounes* case (C-165/16)

Facts: Ms Ormazabal, a Spanish national, moved to the United Kingdom and became a naturalised British citizen, while retaining her Spanish nationality. She married Mr Lounes, an Algerian national who entered the UK on a 6 month visitor visa and overstayed illegally. Since then, the couple had resided in the UK. Mr Lounes applied for a residence permit as a family member of an EU citizen, but British authorities rejected his application. In their view, since her naturalisation as British citizen, Ms Ormazabal no longer fell under the personal scope of Directive 2004/38/EC and therefore her husband could no longer obtain a derived right of residence under the Directive.

Judgment: The Court confirmed that, in circumstances such as those in the main proceedings, Directive 2004/38/EC is not applicable. Indeed, since she acquired British citizenship, Ms Ormazabal had ceased to fall within the definition of a "beneficiary" within the meaning of Article 3(1) of Directive

[16] Judgment of the Court of 8 November 2012, Case C-40/11, *Iida*, ECLI:EU:C:2012:691, para. 64. In relation to the similar provisions of the instruments of European Union law prior to Directive 2004/38, see judgment of the Court of 11 December 2007, Case C-291/05 *Eind*, ECLI:EU:C:2007:771, para. 24.

2004/38, because she had not been residing in a “Member State other than that of which [she is] a national” (para. 41).

However, according to the Court, her situation could not be treated in the same way as a purely domestic situation merely because she had acquired the nationality of the host Member State in addition to her nationality of origin, otherwise the effectiveness of Article 21(1) TFEU would be undermined (paras. 49-53). Indeed, it would be **contrary to the underlying logic of gradual integration** that informs Article 21(1) TFEU to hold that Union citizens who have exercised their freedom of movement under that provision must forego the right to family life in the host Member State purely because they have sought, by becoming naturalised in that Member State, to become more deeply integrated in the society of that State (paras. 58-59). Therefore the Court concluded that the family member of a mobile Union citizen does not lose the derived right of residence under Article 21(1) TFEU simply because the EU citizen has become naturalised in the host State. Conversely such a family member shall enjoy a derived right of residence under conditions at least equivalent to those guaranteed by Directive 2004/38/EC, which applies by analogy (paras. 60-62).

In the absence of a transboundary element, two complementary ways of pursuing family reunification exist: 1) recourse to Union citizenship under Article 20 TFEU and 2) recourse to the right of free movement conferred on Union citizens under Article 21(1) TFEU. Recourse to these two paths is based on the assumption that, even in circumstances involving a Member State national who has never exercised rights of movement or who has exercised such rights but has returned to his Member State of nationality, Union citizenship and the right of Union citizens to move freely on the territory of the Member States may still confer some degree of protection in respect of the right to family reunification. The concrete implications of these two provisions, and the relevant case-law of the Court of Justice will be analysed in the following subparagraphs. As will be seen, recourse to these two alternative ways of ensuring the right to family reunification is geared towards ensuring the effectiveness of Union citizenship and the rights that stem from it.

4.1.1 Article 20 TFEU as an autonomous source of protection of the right to family reunification

Article 20 TFEU establishes Union citizenship, which is intended to be **the fundamental status of nationals of the Member States**.[17] In a series of cases, the Court of Justice has held that this provision may become a **direct source of family reunification rights** when a transboundary element is lacking. In particular, according to the Court, Article 20 TFEU imposes limits on the extent to which Member States might expel a family member of a Union citizen, if to do so risks forcing the Union citizen to leave the EU territory, thus depriving him/her of the "genuine enjoyment of the substance of the rights conferred by virtue of their [EU citizenship] status".[18]

This line of reasoning was first developed in the *Zambrano* case and was subsequently fine-tuned in *Dereci* and *Rendòn Marin*. In particular, in the post-*Zambrano* case-law, the Court has pointed out that Article 20 TFEU only applies in **exceptional circumstances**, where the Union citizen would have 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**.[19] Moreover, the Court has underlined that the derived right of residence under Article 20 TFEU is **not absolute**, since Member States may refuse to grant it in certain specific circumstances, provided that compliance with the principle of proportionality, with the right to respect for private and family life and with the child's best interests is ensured.[20]

The *Zambrano* case (C-34/09)

Facts: Mr and Mrs Zambrano were Colombian nationals and two of their three children held Belgian citizenship. However, the two children had never left Belgium; therefore they had never exercised the right of free movement they enjoy by virtue of Article 21(1) TFEU.

[17] See judgment of the court of 20 September 2001, Case C-184/99 *Grzelczyk*, ECLI:EU:C:2001:458, para. 31. See also judgment of the Court of 17 September 2002, Case C-413/99 *Baumbast and R*, ECLI:EU:C:2002:493, para. 82; judgment of the Court of 2 October 2003, Case C-148/02, *Garcia Avello*, ECLI:EU:C:2003:539, para. 22; judgment of the Court of 19 October 2004, Case C-200/02, *Zhu and Chen*, ECLI:EU:C:2004:639, para. 25 and judgment of the Court of 2 March 2010, Case C-135/08, *Rottmann*, ECLI:EU:C:2010:104, para. 43.

[18] Judgment of the Court of 8 March 2011, Case C-34/09, *Ruiz Zambrano*, EU:C:2011:124, para. 42.

[19] Judgment of the Court of 15 November 2011, Case C-256/11, *Dereci and Others*, ECLI:EU:C:2011:734, para. 66. See also judgment of the Court of 13 September 2016, Case C 165/14, *Rendón Marín*, ECLI:EU:C:2016:675, paras. 74 and 78.

[20] Judgment of the Court of 13 September 2016, Case C 165/14, *Rendón Marín*, cit., paras. 81 ff. See also judgment of the Court of 27 February 2020, Case C-836/18, *RH*, ECLI:EU:C:2020:119, paras. 43 ff.

Mr Zambrano and his wife had tried to have their situation regularised for many years, but they had always been unsuccessful and risked being expelled from Belgium. They first applied for asylum in Belgium, claiming that they could not go back to Colombia due to the civil war, but their application was rejected. Then, they applied to have their situation legalised, but once again the application was rejected. Following the birth of their second and third children, who acquired Belgian nationality, they tried to take up residence in Belgium in their capacity as ascendants to Belgian nationals. However, their applications were once again rejected on ground that they had disregarded the laws of their country of origin by not registering their child with the diplomatic or consular authorities. In the meantime, Mr Zambrano's employment contract was also temporarily suspended on economic grounds, which led him to lodge an application for an unemployment benefit, which was rejected. In the course of the inquiries in the action brought against that decision, the Office des Étrangers (Aliens' Office) confirmed that "the applicant and his wife cannot pursue any employment, but no expulsion measure can be taken against them because their application for legalising their situation is still under consideration". Mr Zambrano decided to challenge the decision of the Employment Tribunal, which submitted a preliminary ruling to the Court of Justice, asking it to clarify whether the provisions of the TFEU on European Union citizenship are to be interpreted as meaning that they

- confer on a third-country national, upon whom his minor children, who are European Union citizens and have never left the territory of the Member State of which they are nationals, are dependent, a right of residence in the Member State of which they are nationals and in which they reside,

- and also exempt him from having to obtain a work permit in that Member State.

Judgment: The Court recalled that, according to its settled case-law, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (paras. 40-41). According to it, the 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 also a refusal to grant such a person a work permit, had such an effect. In fact, such a refusal would lead to a situation where the **children would have to leave the territory of the Union** in order to accompany their parents, thus depriving the children of the **substance of the rights conferred on them by virtue of their status as citizens of the Union** (paras. 42-44). Therefore the Court concludes that

"Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third-country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third-country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen" (para. 45).

The *Dereci* case (C-256/11)

Facts: Five third-country nationals seeked to obtain a residence permit in Austria to live with their family members, who were Austrian nationals who had never exercised their right to free movement. Among them is Mr Dereci, a Turkish national who **entered** Austria **illegally** and married an Austrian national, with whom he had three minor children, who were holding Austrian nationality. Austrian authorities rejected the applications for a residence permit submitted by the claimants, who decided to challenge the decision. The referring Court decided to stay the proceedings and to submit a preliminary ruling to the Court of Justice, asking it to clarify whether, in circumstances such as those in the main proceedings, the indications given in *Zambrano* should be applied. In particular, the referring Court noted that, unlike the situation in *Zambrano*, in the case pending before it there appeared to be no risk that, in case of refusal of the residence permit, the Union citizens concerned would be deprived of their means of subsistence.

Judgment: The Court clarified that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of the European Union citizen status which it mentioned in *Zambrano* 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**" (para. 66). Moreover, the Court stated that "the mere fact that it might appear desirable to a national of a Member State to keep his family together 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" (para. 68).

The *Rendòn Marin* case (C 165/14)

Facts: Mr Rendòn Marin, a Colombian father of two children holding EU citizenship, failed to obtain a residence permit in Spain due to his **criminal record**. His children, who held Spanish and Polish nationality respectively, had never left Spain. Mr Rendòn Marin challenged the measure by referring to *Zambrano*: he had sole care and custody of the children and in his view, the refusal to grant him a residence permit would result in his removal from

Spanish territory and, therefore, from the territory of the European Union, which the two minor children, his dependants, would leave as a consequence. However, unlike in *Zambrano*, an additional element occurs: Spanish national law laid down a **prohibition on the grant of a residence permit when the applicant has a criminal record in Spain**.

Judgment: The Court built on its reasoning in the *Dereci* case and reiterated that Article 20 TFEU only applies in **exceptional circumstances** in which the Union citizen has 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 (paras. 74-75). According to the Court, in the present case Article 20 TFEU was capable of conferring a derived right of residence to Mr Rendòn Marin, insofar as he was the sole carer of the children and, as a consequence, a refusal would force Mr Rendòn Marin and his children to leave the territory of the Union, thus depriving them of the genuine enjoyment of the substance of the rights which the status of Union citizen confers upon them (paras. 76-80).

As for the possibility to limit the right of residence in view of the criminal offences committed by a third-country national who is the sole carer of children who are Union citizens, the Court underlined that the existence of a criminal record cannot justify in itself the refusal. On the contrary, the refusal must be based on a thorough assessment of the circumstance of the case, in the light of the principle of **proportionality**, of the **right to respect for private and family life**, laid down in Article 7 of the Charter, read in conjunction with the obligation to take into consideration the **child's best interests**, recognised in Article 24(2) thereof (paras.81-85). In particular, such assessment must take account of the personal conduct of the individual concerned, the length and legality of his residence on the territory of the Member State concerned, the nature and gravity of the offence committed, the extent to which the person concerned is currently a danger to society, the age of the children at issue and their state of health, as well as their economic and family situation (para. 86).

As clarified in the more recent case C-82/16, *K.A. and Others,* the *Zambrano* case-law only applies when there exists, between the third-country national and the Union citizen who is a family member, a **relationship of dependency** of such a nature that it would lead to the Union citizen being compelled to accompany the third-country national concerned and to leave the territory of the European Union as a whole.[21] In principle, the relation of dependency is presumed in circumstances such as those in *Zambrano*, namely if the third-country national is the sole carer of a minor child. Moreover, as clarified in the case C-451/19 and C-532/19, S*ubdelegación del Gobierno*

[21] Judgment of 8 May 2018, Case C-82/16, *K.A.*, EU:C:2018:308, para. 52.

en Toledo v XU and QP, there is a **rebuttable presumption that there is a relationship of dependency** between a minor child who is a Union citizen and his/her third-country national parent **in case that minor child lives with both of his parents**, who therefore **share the legal, emotional and financial responsibility** over such a child.[22] In all other cases involving minor children, a derived right of residence may still be granted in the best interests of the child concerned and having regard of all the specific circumstances of the case, including the age of the child, the child's physical and emotional development, the extent of his emotional ties to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium.[23] Conversely, in the case of **adults**, **dependency** for the purposes of establishing a derived right to reside through Article 20 TFEU "is conceivable **only in exceptional cases**, where, having regard to all the relevant circumstances, there could be no form of separation of the individual concerned from the member of his family on whom he is dependent".[24]

The *K.A.* case (C-82/16)

Facts: The claimants were third-country nationals subject to a decision of deportation accompanied by an entry ban. They applied unsuccessfully for a residence permit in Belgium as family members of Belgian citizens who had not exercised their right of free movement. In fact, Belgian law required that, before applying for family reunification, a person subject to an entry ban ought to leave the country and preliminarily ask for the removal of the entry ban. It also prevented the assessment on the merits of applications for residence permits submitted by claimants subject to an entry ban.

Judgment: The Court clarified that Member State authorities cannot refuse to examine an application for family reunification solely on the ground that the third-country national is the subject of a ban on entering that Member State. Conversely, Member State authorities have a duty to examine that application and to assess whether there exists, between the third-country national and Union citizen concerned, a relationship of dependency of such a nature that a derived right of residence must, as a general rule, be accorded to that third-country national, under Article 20 TFEU. In such circumstances, the Member

[22] Judgment of the Court of 5 May 2022, Joined Cases C-451/19 and C-532/19, *Subdelegación del Gobierno en Toledo*, ECLI:EU:C:2022:354, para. 69.

[23] Judgment of 8 May 2018, Case C-82/16, *K.A.*, cit., para. 72. See also judgment of 10 May 2017, Case C-133/15, *Chavez-Vilchez and Others,* EU:C:2017:354, para. 71.

[24] Judgment of the Court of 8 May 2018, Case C-82/16, *K.A*, cit., para. 65.

State concerned must withdraw or, at the least, suspend the return decision and the entry ban to which that third-country national is subject (para. 57).

However, the Court specified that a relationship of dependence between two adult members of the same family capable of giving rise to a derived right of residence under Article 20 TFEU exists only in exceptional cases, where, having regard to all the relevant circumstances, there could be no form of separation of the individual concerned from the member of his family on whom he is dependent (para. 65). On the contrary, if the EU citizen is a minor, all relevant circumstances must be assessed in the light of the respect of the right to family life and the best interest of the child. In principle, the relation of dependency is presumed if the third-country national is the sole carer of the child. In other cases, the national authorities must assess whether legal, financial, or emotional dependency exists between the child and his/her third-country national family member (paras. 70-75).

Finally, the Court stated that the time when the relationship of dependency came into being (whether it was before or after the imposition of the entry ban), the nature of the entry ban (whether it is final or not), as well as the reasons for the entry ban are immaterial. Indeed, Member States must always carry out an individual assessment of the case at issue, with a view to assessing whether the conditions for the grant of a derived right of residence under Article 20 TFEU are met (paras. 77-97).

The *Subdelegación del Gobierno en Toledo v XU and QP* case (C-451/19 and C-532/19)

Facts: The preliminary ruling originated from two cases which were joined by the referring Court.

- The first case concerned XU, a Venezuelan national who was living with his mother, also of Venezuelan nationality and who had sole custody of him, in Spain. Eventually, her mother married a Spanish national who had never exercised his free movement right and had a child with him, holding Spanish nationality. XU's stepfather made an application for XU to receive a temporary residence card as a family member of a Union citizen. However, the competent authorities rejected his application on the ground that XU's stepfather had not established that he had sufficient resources for himself and for the members of his family.

- The second case concerned QP, a Peruvian national married to a Spanish national who had never exercised her free movement right and who had a daughter, holding Spanish nationality, with her. QP submitted

an application for a residence card as a family member of a Union citizen. However, the competent authorities rejected his application on the ground that he had a criminal record in Spain and his wife did not have sufficient financial resources for herself and her family members.

Judgment: The Court was asked to determine

- first, whether Article 20 TFEU must be interpreted as meaning that a **relationship of dependency** capable of justifying the grant of a derived right of residence under that article to a third-country national family member of a static Union citizen exists **where the spouses are required to live together** under the law of the Member State of which the Union citizen is a national and in which that marriage was entered into;

- second, whether the practice of the Spanish State of automatically refusing the grant of a right of residence to the third-country national family member of a static Union citizen on the ground that he/she does not have sufficient resources, **without having examined specifically and individually whether there exists a relationship of dependency** between that Union citizen and the third-country national concerned, is in line with Article 20 TFEU.

The Court began by addressing the second question and held that, in principle, EU law did not preclude legislation of a Member State under which family reunification is subject to a condition of sufficient resources (para. 43). However, according to it, the systematic imposition of that condition, without having regard to the specific circumstances of the case, was liable to disregard the very specific situations in which, following the *Zambrano* case-law, a derived right of residence may be granted to the third-country national family member of a static Union citizen (paras. 44-45). Against this background, the Court held that when there exists, between the third-country national and the Union citizen who is a family member, a **relationship of dependency** of such a nature that it would lead to the Union citizen being compelled to accompany the third-country national concerned and to leave the territory of the European Union as a whole, Article 20 TFEU precludes a Member State from providing for an exception to the derived right of residence which that third-country national has under that article, on the sole ground that that Union citizen does not have sufficient resources (paras. 46-50). As to the possibility of refusing the grant of the derived right of residence on the grounds of public policy or public security, the Court recalled its reasoning in *Rendòn Marin* and held that, although restrictions on such grounds are permissible, the criminal record of the person concerned does not suffice in itself (para. 52). Conversely, Member States authorities must carry out a specific assessment of all the relevant

circumstances of the case, in the light of the principle of proportionality and of the fundamental rights enshrined in the Charter (para. 53).

As for the first question, the Court noted that the obligation of the spouses to live together established by the law of a Member State is not in itself enough to establish a relationship of dependence (para. 60). Indeed, such an obligation is not enforceable by judicial means (para. 61) and, in any event, international law establishes an absolute right to reside in one's own country, so that a Member State cannot lawfully require one of its nationals to leave its territory, in order, to comply with the obligations arising out of marriage law, without infringing such a principle of international law (para. 59). This being said, the Court still deemed it necessary to determine whether Article 20 TFEU must be interpreted as meaning that a relationship of dependency may exist where a third-country national and his/her spouse, who is a static Union citizen, are the parent of a minor Union citizen who has also never exercised his/her free movement right (para.64). In this respect, the Court reiterated that, as previously established in *K.A.*, Member States must take into account all relevant circumstances of the specific case, such as the question of who has custody of the child and whether that child is legally, financially or emotionally dependent on the third-country national parent, having also due regard of the right to family life and the best interest of the child (paras. 65-67).Yet, the Court went one step further than in its previous case-law and established that, where the **Union citizen minor lives with both parents on a stable basis** and where **both parents share the legal, emotional and financial responsibility** in relation to that child on a daily basis, there is a **rebuttable presumption that there is a relationship of dependency** between that Union citizen minor and his or her parent who is a third-country national, irrespective of the fact that the other parent has, as a national of the Member State in which that family is established, an unconditional right to remain in the territory of that Member State (para. 69. See also paras. 80-85).

4.1.2 Article 21(1) TFEU as an autonomous source of protection of the right to family reunification

Article 21(1) TFEU confers on all Union citizens the right to move and reside freely within the territory of the Member States subject to, *inter alia*, the limitations and conditions laid down in the Treaties. In the *Surinder Singh* case of 1992,[25] the Court of Justice recognised for the first that this provision may become a **direct source of family reunification rights for circular migrants**, namely Union citizens who return to their country of origin after having moved to another Member State and settled there for some time. The judgment has given rise to the so-called "*Surinder Singh* exception",

[25] Judgment of the Court of 7 July 1992, Case C-370/90, *Surinder Singh*, ECLI:EU:C:1992:296.

whereby EU returnees enjoy, by virtue of Article 21(1) TFUE, the same right to be accompanied by their family members when returning home after having exercised their Treaty rights as those conferred by **Directive 2004/38/EC**, which therefore **applies by analogy**.

The *Singh* case (C-370/90)

Facts: Ms Sigh, a British national, exercised her free movement right to work in Germany taking her husband, an Indian national, with her. After two years in Germany the couple returned to the UK in order to open a business. There, Mr Sigh was granted limited leave to remain on the basis of national immigration rules as the husband of a British national. However, when a provisional decree of divorce (decree nisi of divorce) was pronounced against Mr Sigh, his leave to remain in the United Kingdom was withdrawn.

Judgment: According to the Court, a European citizen might be deterred from leaving his country of origin in order to work in another EU country if, on returning to his home country, his spouse and children were not also permitted to enter and reside in the citizen's country of origin, under conditions at least equivalent to those granted to them in the territory of another Member State (paras. 19-20). Therefore, an EU citizen who has gone to another Member State in order to work there and returns to his home country has the right to be accompanied by his/her spouse and children whatever their nationality under the same conditions as are laid down by (what is now) Directive 2004/38/EC (para. 23).

The fact that a **provisional decree of divorce** was pronounced was irrelevant according to the Court, insofar as it was a decree which was not such as to affect the respondent's status as a spouse.[26] Moreover, the fact that the marriage was later dissolved by a decree of absolute of divorce was also not relevant to the question referred for a preliminary ruling, which concerned the basis of the right of residence of the person concerned during the period before the date of that decree (para. 12).

Once again, the rationale behind the establishment of the "*Surinder Singh* exception" is geared towards ensuring the effectiveness of the rights stemming from Union citizenship. Indeed, a Union citizen would be discouraged from exercising his/her

[26] For more clarification on this point see judgment of the Court of 10 July 2014, case C-244/13, *Ogieriakhi*, ECLI:EU:C:2014:2068, para. 37 analysed in *section 4.2* below, where the Court held that the marital relationship cannot be regarded as dissolved as long as it has not been terminated by the competent authority, and that is not the case where the spouses merely live separately, even if they intend to divorce at a later date, and, consequently, the spouse does not necessarily have to live permanently with the Union citizen in order to hold a derived right of residence.

free movement rights under Article 21(1) TFEU for fear that, upon return to his/her Member State of origin, he/she could not continue the family life created or strengthened with a third-country national in the host Member State. However, some conditions in order to derive family reunification rights from Article 21(1) TFEU may apply. In particular, in the *O. and B.* case, the Court has stated that Article 21(1) TFEU can only be relied on "where the residence of the Union citizen in the host Member State has been sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State".[27] In particular, such a **genuine period of residence** can only exist when the Union citizen has settled in another Member State for more than three months, (in accordance with Article 7 of Directive 2004/38/EC) or has even acquired a permanent residence right there, pursuant to Article 16 of the Directive.

The *O. and B.* case (C-456/12)

Facts: Mr O. and Mr B. were third-country nationals who married EU citizens. They stayed in the host State with their spouses on a discontinuous basis, visiting them during the holidays or weekends. When their spouses returned to their member States of nationality, Mr O and Mr B. applied for a residence permit, but their applications were rejected.

Judgment: The Court upheld its reasoning in the *Singh* judgment and recalled that Article 21(1) TFEU constitutes an autonomous source of protection of the right to family reunification for circular migrants upon return to their Member State of nationality. Indeed, a refusal to allow a derived right of residence to a third-country national, who is a family member of a Union citizen having exercised his/her freedom of movement upon return in his/her MS of nationality, would be such as to interfere with and undermine the effectiveness of the Union citizen's freedom of movement (paras. 44-50). However, the Court clarified that such interference only arises if the previous residence in the host State was "sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State" (para. 51). That is only the case for medium-term residence under Article 7 Directive 2004/38 and permanent residence under Article 16. By contrast, short-term residence under Article 6, even when aggregated, does not give rise to such a residence right (paras. 52-56).

Since the case of 1992, the "*Surinder Singh* exception" has been applied by the Court

[27] Judgment of the Court of 12 March 2014, Case C-456/12, *O. and B.*, ECLI:EU:C:2014:135, para. 51. See also paras. 52-56.

- to the same sex spouse of a returning Union citizen in *Coman*, to impose an obligation on the home State to recognise same sex marriages for the sole purpose of family reunification, even if national law does not recognize such unions (see *Section 2.1.2. Same sex marriage*);
- to the unmarried partner of a returning Union citizen in *Banger*, to impose a duty on the home State to 'facilitate' the provision of authorisation for the unregistered partner (see *Section 3 Duty to facilitate reunification*).

More recently, the Court of Justice has referred to Article 21(1) TFUE to recognise, for the very first time, family reunification rights in respect of **rainbow families**. In particular, in the case C-490/20, *V.M.A.*, the Court has held that all Member States are required to recognise the parent-child relationship established in another Member State between a child and her parents who are a same-sex couple, for the sole purpose of permitting such a child to exercise without impediment, with each of her two parents, her right to move and reside freely within the territory of the Member States as guaranteed in Article 21(1) TFEU.[28] Further clarifications on this point may soon be provided by the Court of Justice in case C-2/21, *Rzecznik Praw Obywatelskich*,[29] which is currently pending and raises similar legal issues. Indeed, the case concerns the refusal on the part of Polish authorities to transcribe the birth certificate of the child of a same sex couple released by Spanish authorities on the ground that Polish law does not provide for parenthood of same-sex couples. Moreover, significant steps forward in the recognition of same sex parenting may be made with the adoption of the Regulation on the recognition of parenthood between Member States,[30] which the Commission has proposed as part of its *LGBTIQ Equality Strategy 2020-2025*.[31]

The *V.M.A.* case (C-490/20)

Facts: V.M.A., a Bulgarian national and K.D.K., a United Kingdom national, were married in Gibraltar in 2018 and had lived in Spain since 2015. In December 2019, they had a daughter, S.D.K.A., who was born and resided with both of them in Spain. V.M.A. applied to the Sofia municipality for a birth certificate for her daughter, insofar as such certificate was necessary for the issuance of a Bulgarian identity document. However, Bulgarian authorities

[28] Judgment of the Court of 14 December 2021, Case C-490/20, *V.M.A.*, ECLI:EU:C:2021:1008, paras. 48-49.

[29] Case C-2/21, *Rzecznik Praw Obywatelskich* lodged on 4 January 2021, currently pending.

[30] European Commission (2021). *Cross-border family situations - recognition of parenthood*.

[31] European Commission (2020). *LGBTIQ Equality Strategy 2020-2025*.

rejected her application, since national law did not permit marriage between two persons of the same sex.

V.M.A. brought an action against the refusal decision before the Administrative Court of the City of Sofia, which decided to stay the proceedings and to refer a preliminary ruling to the Court of Justice. In this respect, the referring Court clarified that the refusal of the competent authorities to issue the birth certificate had no legal effect on the Bulgarian nationality of the child concerned. In fact, pursuant to Bulgarian national law, S.D.K.A. had Bulgarian nationality notwithstanding the fact that she did not have a birth certificate issued by Bulgarian authorities (para. 25). However, the Court had doubts as to whether the refusal to issue such a certificate might infringe Articles 20 and 21 TFEU and Articles 7 (the right to respect for private and family life), 24 (the child's best interests) and 45 (freedom of movement and of residence) of the Charter. Additionally the referring Court was wondering whether the refusal might be justified by Article 4(2) TEU, providing that the EU is to respect the national identities of its Member States, insofar as the issuance of a birth certificate mentioning two female individuals as the child's parents could have, in its view, an adverse effect on public policy and on the national identity of the Republic of Bulgaria, which does not recognise parenthood of two persons of the same sex.

Judgment: First of all, the Court stated that, in order to enable their nationals to exercise the right of free movement, Article 4(3) of Directive 2004/38/EC requires Member States, acting in accordance with their laws, to issue to their own nationals an identity card or passport stating their nationality (para. 43). Therefore, since S.D.K.A. is a Bulgarian national, pursuant to such provision the Bulgarian authorities must issue her an identity card or a passport stating her nationality and her surname as it appears on the birth certificate drawn up by the Spanish authorities (para. 44). In particular, the Court clarified that such an obligation applies regardless of whether a new birth certificate was issued by the Bulgarian authorities (para. 45).

Second, the Court recalled that, pursuant to its settled case-law, the rights which nationals of Member States enjoy under Article 21(1) TFEU include the right to lead a normal family life, together with their family members, both in their host Member State and in the Member State of which they are nationals when they return to the territory of that Member State (para. 47). Therefore, the Court concluded that all Member States must recongise the parent-child relationship established in another Member State between a child and her parents who are a same-sex couple, for the sole purpose of permitting such a child to exercise without impediment, with each of her two parents, her right to move and reside freely within the territory of the Member States as guaranteed in Article 21(1) TFEU (paras. 48-49).

Third, the Court disputed that such an obligation undermined the national identity or posed a threat to the public policy of the Member States. Indeed, the Court recalled its reasoning in *Coman* and stated that the obligation applies for the sole purpose of ensuring the effectiveness of the right of free movement that Union citizens derive from EU law. In other words, Member States remain free to establish in their national law whether or not they intend to recognise parenthood of persons of the same sex, but they are obliged to recognise the parent-child relationship established in another Member State between a child and her parents who are a same-sex couple for the sole purpose of granting family reunification rights under EU law (para. 57). Moreover, the Court recalled that denying in such circumstances the recognition of the parent child relationship would run counter to the right to respect for private and family life and disregard the child's best interests enshrined in Articles 7 and 24 of the Charter respectively (paras. 58-65).

Lastly, the Court stated that, even if it appeared that the child S.D.K.A. did not have Bulgarian nationality, the child and her UK mother must still be regarded by all Member States as being the spouse and direct descendant within the meaning of Article 2(2)(a) and (c) of Directive 2004/38/EC, and, therefore, as being V.M.A.'s family members (para. 67).

4.2. The requirement of being economically active or economically independent

A further requirement that Union citizens must comply with in order to enjoy the right to family reunification under Directive 2004/38/EC is to be either economically active or economically independent. However, such a requirement only applies **for periods of stay of longer than three months and up to five years**.

Indeed, pursuant to Article 6 Directive 2004/38/EC, Union citizens and their family members have a right to move to any Member State for up to three months without formalities or specific requirements other than holding a valid passport and not becoming an unreasonable burden on the social assistance of the host Member State in case of Union citizens that are economically inactive.[32] However, beyond the first three months, some conditions apply. In particular, pursuant to **Article 7 Directive 2004/38/EC**, Union citizens and their family members have the right to reside in the host Member State provided that the Union citizen is

[32] See on this point Article 14(1) of Directive 2004/38/EC.

- either **economically active** (employed or self-employed)
- or **economically independent**, namely if he/she disposes of **sufficient resources** not to become a burden on the social assistance system of the host Member State and has comprehensive sickness insurance cover in the host Member State.

In a series of cases regarding minor children whose parent/carer is not a Union citizen, the requirement of having sufficient resources set in Article 7 of the Directive has been progressively softened by the Court of Justice. In particular, in the case C-200/02, *Zhu and Cheng*, the Court has held that the sufficient resources required by Article 7(1)(b) Directive 2004/38/EC can be provided by a third party, such as the parent or primary carer of the child.[33] Moreover, in the more recent case C-93/18, *Bajratari*, the Court has underlined that the origin of such resources, whether they have been obtained through regular or irregular work, is irrelevant.[34]

The *Zhu and Cheng* case (C-200/02)

Facts: A Chinese woman decided to give birth to her daughter Catherine in Ireland in order to allow her to acquire Irish nationality and thereafter secure for her child and for herself a long-term right to reside in the United Kingdom. Indeed, Irish nationals do not as a general rule have to obtain a permit to enter and reside in the United Kingdom. However, when Catherine's mother applied for a residence permit, UK authorities rejected her application.

Judgment: The Court recalled that, under Article 1(1) of Directive 90/364, corresponding to Article 7 of Directive 2004/38/EC which repealed it, all Union citizens shall have a right of residence on the territory of the host Member State for a period longer than three months (i) if 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 and (ii) if they have comprehensive sickness insurance cover in the host Member State. According to the Court, the origin of such resources is irrelevant, insofar as the provision lays down no requirement whatsoever on that matter (para. 30). To provide otherwise would pose, according to the Court, a disproportionate interference with the exercise of the fundamental right of freedom of movement and of residence set in Article 18 EC, now corresponding to Article 21(1) TFEU (para. 33). Therefore, insofar as Catherine

[33] Judgment of the Court of 19 October 2004, Case C-200/02, *Zhu and Chen*, EU:C:2004:639, para. 45.

[34] Judgment of the Court of 2 October 2019, Case C-93/18, *Bajratari*, EU:C:2019:809, paras. 33-34. See also para. 42.

has sickness insurance and sufficient resources through her mother, she fully enjoyed a right of residence in the UK under the Directive (para. 41).

As for her mother, the Court noted that she could not enjoy a derived right of residence by virtue of the Directive, insofar as she was not dependent on her daughter. Conversely, her position was exactly the opposite: Catherine was fully dependent on her mother and not vice versa. Nonetheless, the Court noted that Catherine's mother might still enjoy a derived right of residence by virtue of Article 18 EC, corresponding to now Article 21(1) TFUE. In fact, according to the Court, a refusal to grant a right of residence to the parent, whether an EU national or not, who is the carer of a child possessing EU citizenship, and enjoying sufficient resources and health insurance, "would deprive the child's right of residence of any useful effect" (para. 45).

The *Bajratari* case (C-93/18)

Facts: Mrs Bajratari, an Albanian national, was denied a residence permit as the mother of children of Irish nationality who were all born and had always lived in Northern Ireland. According to the immigration authorities, her children did not satisfy the condition of sufficient resources under Directive 2004/38/EC, since they could only rely on their Albanian father's income from unlawful work performed without a residence card and a work permit.

Judgment: The Court reiterated that Article 7 of Directive 2004738/EC merely requires that the Union citizens have sufficient resources at their disposal to prevent them from becoming an unreasonable burden on the social assistance system of the host Member State during their period of residence, without establishing any other conditions as regards the origin of those resources (para. 34). To provide otherwise would constitute, according to the Court, a disproportionate interference with the exercise of the Union citizen minor's fundamental rights of free movement and of residence under Article 21 TFEU (para. 42). Moreover, the requirement of criteria pertaining to the origin of the resources would go manifestly beyond what is necessary in order to protect the public finances of the host Member State. Indeed, although the risk of loss of resources is greater if the work is unlawful, a presumption of insufficient resources in circumstances such as those in the main proceedings would constitute a disproportionate obstacle to the EU citizens' right to move. Indeed, it appears that for the previous 10 years Mr Bajratari had always paid taxes and social security and his children have never received social assistance (para. 46).

After five years of legal and continuous residence in the host Member State, Article 16(1) of Directive 2004/38/EC entitles Union citizens to the right of permanent

residence, which is not subject to any condition. Third-country national family members that "have **legally resided with the Union citizen in the host Member State for a continuous period of five years**" are also entitled to the **right of permanent residence** pursuant to **Article 16(2) of the Directive**. The meaning of the requirement of residence with the Union citizen in the host Member State has been clarified in case C-244/13, *Ogieriakhi*. In this judgment, the Court held that Article 16(2) does not require the third-country national spouse to have lived permanently with the Union citizen during the five years in order to hold a derived right of residence.[35] As for the requirement of legal residence for a continuous period of five years, in case C-378/12, *Onuekwere*, the Court stated that a third-country family member's periods of imprisonment in the host Member State cannot be taken into consideration for his acquisition of the right of permanent residence under Article 16(2) Directive 2004/38/EC and interrupt the continuity of residence.[36]

The *Ogieriakhi* case (C-244/13)

Facts: Mr Ogieriakhi, a Nigerian national, married Ms Georges, a French national. Following the marriage they lived in Ireland. However, after a couple of years they separated and both moved in with other partners. Mr Ogieriakhi applied for a permanent residence permit in Ireland on the ground that he had completed a continuous period of legal residence of five years - from 1999 to 2004 - in Ireland as a result of his marriage to Ms Georges. However, the competent authorities rejected his application.

Judgment: The Court recalled that, according to its settled case-law, the marital relationship cannot be regarded as dissolved as long as it has not been terminated by the competent authority, and that is not the case where the spouses merely live separately, even if they intend to divorce at a later date, and, consequently, the spouse does not necessarily have to live permanently with the Union citizen in order to hold a derived right of residence (para. 37). Therefore, in its view, the fact that Mr Ogieriakhi and Ms Georges not only ceased to live together but also resided with other partners, was irrelevant for the purposes of the acquisition by Mr Ogieriakhi of a right of permanent residence under Article 16(2) of Directive 2004/38/ (para. 38). To provide otherwise would render the third-country national vulnerable to his spouse's unilateral decisions and "would be contrary to the spirit of that directive" (para. 40). Therefore the Court concluded that a third-country national who has resided in a Member State as the spouse of a Union citizen for a continuous period of five years must be regarded as having acquired a right of permanent

[35] Judgment of the Court of 10 July 2014, Case C-244/13, *Ogieriakhi*, ECLI:EU:C:2014:2068, paras. 37-40.

[36] Judgment of the Court of 16 January 2014, Case C-378/12, *Onuekwere*, ECLI:EU:C:2014:13, paras. 28-32.

residence under Article 16(2) of the Directive even if, during the five years, the spouses have decided to separate and commenced residing with other partners.

The *Onuekwere* case (C-378/12)

Facts: Mr Onuekwere, a Nigerian national, married an Irish national. Following the marriage they lived in the United Kingdom, where they had two children. Mr Onuekwere applied for a permanent residence permit in the UK on the ground that he had completed a continuous period of legal residence of five years in the country as a result of his marriage to his wife. However, UK authorities rejected his application because, even though he had lawfully resided in the UK for about nine years, because he had spent about three years in prison.

Judgment: The Court held that periods of imprisonment cannot be taken into account for the acquisition of the right of permanent residence under Article 16(2) Directive 2004/38 and interrupt the continuity of residence. This conclusion was based

- on the consideration that Article 16 requires the third-country family member to reside “with the Union citizen” (para. 23) and

- on the fact that the integration objective which lies behind the acquisition of the right of permanent residence laid down in Article 16 is based not only on territorial and time factors, but also on qualitative elements, relating to the level of integration in the host Member State. The imposition of a prison sentence shows the non-compliance by the convicted with the host State’s values expressed in its criminal law and thus undermines the link of integration tying him to that State (para. 26)

4.3. The lawfulness of requirements pertaining to the entry and residence of the family member and the timing of the establishment of the family link

The Court of Justice has also been required to state whether the previous lawful entry and residence of the family member constitute a pre-condition for enjoying the right to family reunification. In this regard, the Court firstly answered in the affirmative in case C-109/01, *Akrich*.

Para. 50 In order to benefit in a situation such as that at issue in the main proceedings from the rights provided for in Article 10 of Regulation No 1612/68, the national of a non-Member State, who is the spouse of a citizen of the Union, must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated.
Para. 51 That interpretation is consistent with the structure of the Community provisions seeking to secure freedom of movement for workers within the Community, whose exercise must not penalise the migrant worker and his family.

However, some years later in case C-127/08, *Metock*,[37] the Court famously **reversed its position** and upheld a more generous stance on the scope of family reunification. Moreover, in the same judgment the court clarified that the **moment in which the family relationship is established** is not relevant to the enjoyment of the right to family reunification. Therefore, family reunification applies also in the event the family link is established after the Union national has exercised the freedom of movement or after the family member has entered the territory of the host Member State.

The *Metock* case (C-127/08)

Facts: Ms Ngo Ikeng, born a national of Cameroon, acquired United Kingdom nationality. She had resided and worked in Ireland since late 2006. Mr Metock and Ms Ngo Ikeng met in Cameroon in 1994 and had been in a relationship since then. They had two children and got married in Ireland on 12 October 2006. On 6 November 2006 Mr Metock applied for a residence card as the spouse of a Union citizen working and residing in Ireland. The application was refused, on the ground that Mr Metock did not satisfy the condition of prior lawful residence in another Member State required by EU law, as interpreted by the Court of Justice in *Akrich*.

Judgment: The Court of Justice clarified that **no provision of Directive 2004/38/EC** makes the application of the directive conditional on family members of a Union citizen having previously resided in a Member State. In fact, such a requirement would run counter to the ultimate aim of the Directive, namely ensuring the effectiveness of the primary and individual right to move

[37] Judgment of the Court of 25 July 2008, Case C-127/08, *Metock and Others*, ECLI:EU:C:2008:449.

and reside freely within the territory of the Member States that is conferred directly on Union citizens by the Treaty. Therefore, Directive 2004/38 precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality, to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive (paras. 48-80). Moreover, the Court held that Directive 2004/38/EC confers a derived right of residence to family members of Union citizens residing in a MS other than that of their nationality, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State (paras. 81-99).

5. The (derivative) rights of family members

Directive 2004/38/EC grants the family members of mobile Union citizens a series of rights which seek to ensure the **effectiveness** of the right of free movement of the Union citizen and to allow the family to become **integrated** into the society of the host Member State. Similarly to the right of residence that such family members enjoy under the Directive, these rights are not autonomous rights of those nationals, but **rights derived** from the exercise of freedom of movement by their family member who is a Union citizen. Moreover, as will be seen, different conditions may apply, depending on whether the family member is a Union citizen or a third-country national, economically active or economically inactive.

This section briefly analyses the derivative rights of family members. Since this topic encroaches upon other aspects of free movement law, the analysis is kept to the founding elements, to provide the reader with an overview of the relevant legal regime.

5.1. The right to exit and entry

Pursuant to Article 4(1) and (2) of Directive 2004/38/EC, the third-country national family members of EU citizens have the **right to leave** the territory of a Member State to travel to another Member State provided that they hold a **valid passport**, without requirements of exit visa or equivalent formality.

Furthermore, pursuant to Article 5(1) and (2) of the Directive, they have a **right to enter** the territory of a Member State, on condition that they hold, in addition to their valid passport, an **entry visa** or a **valid residence card**, unless the requirement to possess an entry visa is waived under Regulation (EU) 2018/1806[38] or national law. Holders of a permanent residence card are also exempted from the requirement to obtain an entry visa, even though they are not mentioned by Article 5 of Directive 2004/38/EC.[39] Moreover, the fact that a residence card or permanent residence card is issued by a non-Schengen State is irrelevant, as Directive 2004/38 does not distinguish on the basis of Schengen membership.[40] Finally, third-country spouses of EU citizens shall also have "the right to enter the territory of the Member States or to obtain a visa for that purpose".[41]

5.2. Protection against expulsion

As noted in *Section 4.2* above, Directive 2004/38/EC grants family members of mobile Union citizens a derived right of residence in the host Member State provided that certain conditions, which vary depending on the length of stay, are met:

[38] Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 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 L 303.

[39] Judgment of the Court of 18 June 2020, Case C-754/18, *Ryanair*, EU:C:2020:478, paras. 25-47.

[40] Ibidem.

[41] Judgment of the Court of 31 January 2006, Case C-503/03, *Commission v Spain*, EU:C:2006:74, para. 42.

- for periods of residence of **up to three months**, no formalities or specific requirements apply, other than holding a valid passport and not becoming an unreasonable burden on the social assistance of the host Member State in case of Union citizens that are economically inactive (Article 6 of the Directive);
- for periods of residence **from over three months and up to five years**, the Union citizen must be economically active or economically independent (Article 7 of the Directive);
- **after five years of legal and continuous residence in the host Member State with the Union citizen**, Union citizens and their family members acquire a **right of permanent residence**, which is not subject to any further condition such as being economically active or economically independent (Article 16 of the Directive).

In principle, the family member could lose his/her right to reside and be subject to an expulsion decision if the Union citizen no longer meets the conditions listed above. Indeed, pursuant to Article 14 of the Directive, the **absence of a right to reside** is a **ground for expulsion**. However, the **expulsion powers** of the host Member State are **expressly limited** by the Directive. This is particularly evident in at least two circumstances, which will be analysed below.

5.2.1. The retention of the right of residence in the event of family breakdown, death of the Union citizen or departure of the Union citizen from the host Member State

Directive 2004/38/EC provides for the retention of the family member's right of residence in the event of the Union citizen's death or departure from the host Member State and in the event of family breakdown, namely in case of divorce, annulment or termination of marriage or termination of registered partnership.

Pursuant to Article 12(1) of the Directive, in the event of **death or departure of a Union citizen**, family members that are *Union citizens* and that have not yet acquired permanent residence status may retain a right of residence provided that they meet the conditions of Article 7(1). Conversely, under Article 12(2) of the Directive, family members that are *third-country nationals* and that have not yet acquired the permanent residence status shall retain their right of residence "exclusively on a personal basis" provided that

- they have been residing in the host Member State as family members for at least one year before the Union citizen's death and
- as long as they satisfy conditions equivalent to those of Article 7(1)(a), (b) or (d).

If these conditions are not met, third-country national family members can in principle be expelled, although the procedural guarantees set in Article 15 of the Directive must be complied with.[42]

Article 12(3) of the Directive also provides for some additional protection to children and the parent who has actual custody of the children, regardless of their nationality. The latter shall retain a right of residence if and as long as the children are enrolled at an educational establishment of the host Member State and reside there.

As for **divorce, annulment or termination of marriage or termination of registered partnership**, Article 13(1) of the Directive provides that family members *that are Union citizens* will retain the right to reside in such circumstances provided that they meet the conditions of Article 7(1)(a)-(d) thereof. Family members that are *third-country nationals* may also retain a right to reside provided that

- they meet conditions equivalent to Article 7(1)(a), (b) or (d),
- and are in one of the following situations: (a) the marriage or registered partnership lasted three years or more, including one year in the host State; or (b) the third-country national has custody of the Union citizen's children; or (c) the retention of the right to reside is warranted by particularly difficult circumstances, such as domestic violence; or (d) the third-country national has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.

5.2.2. The limits to expulsion on grounds of public policy, public security or public health

The derived right of residence of family members of mobile Union citizens may also be restricted on grounds of public policy, public security or public health. However, as provided for in Article 27(2) of the Directive, restrictions based on such grounds shall comply with the **principle of proportionality** and be based exclusively on the **personal conduct** of the individual concerned, which should represent "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society".

[42] Judgment of the Court of 10 September 2019, Case C-94/18, *Chenchooliah*, EU:C:2019:693, paras. 66 and 78-89.

Article 28 of the Directive also introduces three different levels of protection against expulsion on grounds of public policy, public security or public health depending on the **degree of integration** of the individual concerned in the host Member State, so that the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. In particular, pursuant to Article 28(1), Union citizens and their family members, regardless of their nationality, benefit from consideration of their **circumstances** (e.g. how long they have resided on its territory, social and cultural integration into the host Member State, age, state of health, family and economic situation and the extent of links with the country of origin) when an expulsion decision on grounds of public policy or public security is contemplated. Moreover, under Article 28(2), they may only be expelled for **serious grounds of public policy or public security if they have gained a right of permanent residence** on the territory of the host Member State. However, pursuant to Article 28(3), only Union citizens and not their third-country national family members may benefit from the highest degree of protection against expulsion: if Union citizens are minors and expulsion is not in their best interest, or if they have resided in the host State for ten years, expulsion can only be based on "imperative grounds of public security".

5.3. The right to work

Article 23 of Directive 2004/38/EC establishes the **right to work** of family members of Union citizens. In particular, pursuant to such provision

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

As clarified in case C-131/85, *Gül*, the right to work covers **all types of employment**, and entails a right to equal treatment that extends to **access to regulated professions** and **recognition of qualifications and diplomas**.[43] It follows

[43] Judgment of the Court of 7 May 1986, Case C-131/85, *Gül*, EU:C:1986:200.

that the right to work cannot be made conditional upon possession of a work permit.[44] Moreover, there is no requirement as to the distance between the family member's place of activity and the migrant worker's place of residence.[45] However, it shall be recalled that the right to work **only** applies to the **Member State where the EU citizen is residing**, and not to any other Member State.[46]

5.4. The right to equal treatment

Pursuant to Article 24 of Directive 2004/38/EC, EU citizens and their third-country national family members have the **right to be treated equally** to nationals of the host Member States. However, as clarified in *Dano*, such right will **only** apply if the **residence in the territory of the host Member State complies with the conditions of Directive 2004/38**.[47] Indeed, the right to equal treatment is **not absolute**, but may be subject to exceptions which vary depending on whether the EU citizen is economically active or economically inactive, in which case stricter conditions will apply. Conversely, **economically active EU citizens and their family members** enjoy a **privileged position**, as they benefit from more specific and extensive equality rights under the conditions set in Regulation (EU) 492/2011 on the freedom of movement for workers.[48] Extensive case-law on the scope and substance of the right to equal treatment exists. In general we may summarise the conditions for enjoying the right to equal treatment under Directive 2004/38/EC as follows:

- for periods of residence of **up to three months**, Article 24(2) of the Directive expressly authorises Member States to deny **social assistance** to **economically inactive EU citizens or jobseekers and their family members**. Member States can also deny economically inactive EU citizens and their family members "**maintenance aid for studies, including vocational training, consisting of student grants or student loans**" until they acquire the right of permanent residence. However, Article 24(2) expressly states that such derogation does not apply to workers, self-employed persons, and their family members;

[44] Judgment of 27 October 2005, Case C- 165/05, *Commission v Luxembourg (work permit)*, EU:C:2005:661 (Judgement available only in French).

[45] Judgment of the Court of 13 February 1985, Case C-267/83, *Diatta*, EU:C:1985:67, para. 19.

[46] Judgment of the Court of 30 March 2006, Case C-10/05, *Mattern and Cikotic,* ECLI:EU:C:2006:220.

[47] Judgment of the Court 11 November 2014, Case C-333/13, *Dano*, EU:C:2014:2358, para. 69.

[48] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union Text with EEA relevance, OJ L 141.

- for periods of residence of **up to five years**, social assistance may only be granted to economically inactive EU citizens and their family members if they comply with the conditions listed in **Article 7** of the Directive. In particular, while economically inactive EU citizen must have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State and a comprehensive sickness insurance cover in the host Member State, no further conditions apply in respect of economically active EU citizens and their family members;
- after five years of legal and continuous residence, EU citizens who have acquired the **right of permanent residence** under Article 16 of Directive 2004/38 are entitled to **virtually full material equality and equal access** for themselves and their families to social benefits as nationals of the host state, regardless of their lack of resources or health insurance. In fact, as stated in Recital 18 of the Directive, once obtained, the right of permanent residence is not to be subject to any conditions, with the aim of it being a genuine vehicle for integration into the society of that State.

PART II

The right to family reunification of third-country nationals: Directive 2003/86/EC

1. Introduction

The right to family reunification applies also to third-country nationals. In particular Directive 2003/86/EC[49] sets out the conditions and the common criteria for the enjoyment of the right to family reunification of **third-country nationals residing lawfully in the territory of the Member States** and of their **family members**.

The Directive pursues three main goals:

- ensuring a **fair treatment** of third-country nationals residing lawfully in the territory of the Union *vis-à-vis* EU citizens;[50]
- establishing a more **vigorous EU integration policy** for third-country nationals residing lawfully in the territory of the Union, for the benefit of the whole European society;[51]
- protecting the fundamental **right to private and family life** and the **rights of the child**, enshrined in Articles 7 and 24 of the Charter of Fundamental Rights of the EU.[52]

2. Beneficiaries

Directive 2003/86/EC applies on condition that the the applicants for family reunification are third-country nationals. In particular, the Directive distinguishes between the third-country national 'sponsor' and the third-country national 'family member' who joins the sponsor to preserve the family unit, irrespective of whether the family relationship arose before or after the sponsor's entry. The following sections will provide a thorough definition of the notions of 'sponsor' and of 'family member'.

2.1 The sponsor

Pursuant to Article 2 (c) of the Directive, a 'sponsor' is any person

- who is a third-country national, hence who is not an EU citizen;

[49] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251.

[50] Recital no. 3 of Directive 2003/86/EC.

[51] Recital no. 4 of Directive 2003/86/EC.

[52] Recitals no. 2 and 6 of Directive 2003/86/EC.

- who is residing lawfully in a Member State and
- who applies or whose family members apply for family reunification.

This implies that, as clarified in Article 3(2), the Directive expressly excludes from the notion of 'sponsor' EU citizens, who are already entitled to family reunification subject to the conditions set in Directive 2004/38/EC. Beneficiaries of temporary or subsidiary protection, as well as asylum applicants are also excluded from the scope of the Directive. In particular, the Directive shall not apply where the sponsor is

- **applying** for recognition of **refugee** status whose application has **not yet** given rise to a **final decision**;
- **authorised** to reside in a Member State on the basis of **temporary protection** or **applying** for authorisation to reside on that basis and **awaiting a decision on his status**;
- **authorised** to reside in a Member State on the basis of a **subsidiary form of protection** in accordance with international OBLIGATIONS, national legislation or the practice of the Member States or **applying** for authorisation to reside on that basis and **awaiting a decision on his status**.

Conversely, refugees fall under the scope of the Directive and, as will be explained in paragraph 6 below, they generally benefit from more favourable conditions for family reunification than regular applicants. It shall also be noted that the Directive does not include any specific references to other forms of protection under national law such as humanitarian protection. Therefore, in such circumstances, reunification should not be precluded, provided that the conditions set in the Directive are met.

2.2. Family members

Article 4(1) of Directive 2003/86/EC imposes upon the Member States to authorise family reunification for the sponsor's spouse and the minor children of the sponsor or spouse, including adopted children and children under custody, without leaving them any margin of appreciation.[53] Conversely, for other categories of family members listed in Article 4(2) and (3) of the Directive, Member States retain wider discretion and may decide whether or not to grant family reunification rights.

[53] This was first clarified in judgment of the Court of 27 June 2006, Case C-540/03, *European Parliament v Council of the European Union*, ECLI:EU:C:2006:429, para. 60.

2.2.1. The spouse

Directive 2003/86/EC binds the Member States to grant the sponsor's **spouse** the right to family reunification, irrespective of the moment when the family link was established.[54] As noted in the section devoted to Directive 2004/38/EC, the European Union has no competence to determine the scope and meaning of the notion of marriage. Nonetheless, the Directive contains a series of provisions which seek to guide the Member States when granting family reunification rights to the sponsor's spouse.

First, Article 4(5) of the Directive provides that, in case of **polygamous marriage**, reunification shall be allowed for only one spouse. Second, Article 16(2) of the Directive allows Member States to reject applications and to withdraw or refuse the renewal of resident permits in case of **marriages of convenience** or where **false or misleading information or documents** were presented. In particular, as clarified in case C-557/17, *Y.Z. and Others*,[55] a residence permit may in principle be withdrawn even if the family member was unaware of the fraud, provided that Member States carry out an individual assessment of the situation of the family members concerned and act in conformity with the fundamental right to respect for private and family life guaranteed by Article 7 of the Charter.

The *Y.Z. and Others* case (C-557/17)

Facts: Y.Z., a Chinese national, was granted an ordinary fixed-term residence permit in the Netherlands. His wife and minor son, also of Chinese nationality, were granted a residence permit as his family members in compliance with Directive 2003/86/EC. However, when it was discovered that the employment allegedly undertaken by Y.Z. was fictitious, their residence permits were withdrawn on the ground that they had been acquired fraudulently.

Judgment: The Court was asked to clarify, *inter alia*, whether Article 16(2)(a) of Directive 2003/86/EC must be interpreted as precluding the withdrawal of a residence permit granted for the purpose of family reunification in case the acquisition of that residence permit was based on fraudulent information, but the family member was unaware of that.

[54] This was clarified in judgment of the Court of 4 March 2010, Case C-578/08, *Chakroun*, ECLI:EU:C:2010:117, paras. 59 ff., where the Court pointed out, as it did for family reunification under Directive 2004/38, that Directive 2003/86 applies regardless of any distinction as to the moment where the family link was established.

[55] Judgment of the Court of 14 March 2019, Case C-557/17, *Y.Z. and Others*, ECLI:EU:C:2019:203.

The Court first clarified that the wording of Article 16(2)(a) of Directive 2003/86/EC does not require that the family member concerned knew of the fraud (para. 43). Conversely, it is a priori sufficient that the sponsor's residence on the territory of the Union was found to be illegal, owing to the fact that the residence permit was acquired fraudulently, for the sponsor's residence permits and that of his/her family members to be withdrawn (paras. 47-50). However, withdrawal of a residence permit under Article 16(2)(a) of the Directive cannot occur automatically, but must be subject to a case-by-case analysis of the situation of the family member concerned (paras. 51-52). In particular, Member States' authorities should take into account the nature and solidity of that person's family relationships, the duration of residence on their territory and, as regards in particular the withdrawal of a right of residence, the existence of family, cultural or social ties of the person concerned with his/her country of origin (para. 54). Finally, Member States must act in compliance with the **right to respect for private and family life** guaranteed by Article 7 of the Charter (para. 53).

Finally, in order to prevent forced marriages, Article 4(5) of the Directive grants Member States the possibility to require the sponsor and his/her spouse to be of a **minimum age** of up to 21 years before the spouse may be granted the right to family reunification. In this respect, in case C-338/13, *Marjan Noorzia*,[56] the Court of Justice held that the minimum age of 21 is in compliance with the principle of proportionality, insofar as it ensures that the spouse has acquired sufficient maturity, not only to refuse to enter into a forced marriage, but also to choose voluntarily to move to a different country for the purposes of family reunification.

The *Marjan Noorzia* case (C-338/13)

Facts: Marjan Noorzia, an Afghan national, applied for a residence permit for the purpose of family reunification with her spouse, an Afghan national lawfully residing in Austria. However, Austrian authorities rejected her application on the ground that her spouse had not reached the minimum age of 21 provided by national law when the application was lodged. Ms Noorzia appealed the decision of the Austrian authorities arguing that, by the time her application was being processed, her husband had reached the age of 21. The referring Court decided to stay the proceeding and to ask to Court of Justice whether a national law which requires the sponsor and his/her spouse to have reached the age of 21 by the date on which the application for family reunification is

[56] Judgment of the Court of 17 July 2014, Case C-338/13, *Marjan Noorzia*, ECLI:EU:C:2014:2092.

submitted, rather than by the date on which the decision on the application is made, is consistent with Article 4(5) of Directive 2003/86/EC.

Judgment: The Court clarified that the Directive leaves Member States a **margin of discretion** in deciding whether the minimum age requirement must be met at the time of the application or at the time of the decision on the application for family reunification, provided that such requirement does not impair the **effectiveness of EU law** (para. 14). Against this background, the Court concluded that taking the date when the application for family reunification is lodged as the point of reference to determine whether the minimum age condition is satisfied is consistent with the **principles of equal treatment and legal certainty** (para. 17) and ensures that the success of the application depends principally on **circumstances attributable to the applicant** and not to the administration, such as the length of time taken considering the application (para. 18). As for the lawfulness of the requirement that the **age of 21** must be reached when the application for family reunification is lodged, the Court held that such a requirement does not prevent the exercise of the right to family reunification or render it excessively difficult, insofar as at such age persons are presumed to have acquired **sufficient maturity**, so that it would be more difficult to influence them to contract forced marriage and accept family reunification (paras. 15-16).

2.2.2. Minor children

Directive 2003/86/EC also binds Member States to grant family reunification to **minor children** pursuant to Article 4(1)(b)-(d) thereof. This includes minor children

- **adopted** by the sponsor or by the sponsor's spouse in accordance with a decision taken by the competent authorities in the Member State, or
- under **custody** of the sponsor/spouse, provided that the children are **dependent** on the sponsor/spouse. In case of shared custody, family reunification may be granted if the other party sharing custody has given his or her prior agreement.

"the **date** which should be referred to for the purpose of determining whether an unmarried third-country national […] is a minor child, within the meaning of [Art. 4(1)], is that of the **submission of the application for entry and residence for the purpose of family reunification for minor children**, and not that of the decision on that application by the competent authorities of that Member State, as the case may be, after an action brought against a decision rejecting such an application".

Article 4(1), second subparagraph clarifies that in order to be considered as minor children under the Directive, the children must be **below the age of majority set by the law of the Member State** concerned and must not be married.[57] In this respect, in Joined Cases C-133/19, C-136/19 and C-137/19, *BMM, BS and BM*, the Court of Justice has clarified that

> "the date which should be referred to for the purpose of determining whether an unmarried third-country national […] is a minor child, within the meaning of [Art. 4(1)], is that of the submission of the application for entry and residence for the purpose of family reunification for minor children, and not that of the decision on that application by the competent authorities of that Member State, as the case may be, after an action brought against a decision rejecting such an application".

In principle, the Directive allows restricting family reunification of minor children in two cases, provided that they were already part of the Member State's national legislation on the date of implementation of the Directive:

1. children over 12 years arriving independently of the rest of their families may have to prove that they meet the integration conditions required under national legislation (Article 4(1), third indent);
2. Member States may require that applications concerning family reunification of children must be submitted before the age of 15 (Article 4(6)).

However, none of the Member States have implemented these restrictions, which therefore have to be considered *a contrario* as an express prohibition to impose such conditions to minors.

2.2.3. Other family members

As previously noted, Directive 2003/86/EC only obliges Member States to grant the right to family reunification to the sponsor's spouse and to the sponsor's minor children, provided that the conditions listed in the previous paragraphs are complied

[57] Note that while the age at which children are to be considered as 'minor' for the purposes of Directive 2003/86/EC is left to be defined by the Member States, Article 2(f) of the Directive provides a definition of 'unaccompanied minor' as "third country nationals or stateless persons below the age of 18, who arrive on the territory of the Member States unaccompanied by an adult responsible by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they entered the territory of the Member States".

with. Conversely, when it comes to other categories of family members, the Directive leaves Member States free to choose whether to grant such a right to them.. In particular, pursuant to Article 4(2) and (3) of the Directive, Member States may also authorise the entry of

- **first degree dependent ascendants** in the direct line of the sponsor or the spouse, where they do not enjoy **proper family support** in the country of origin;
- adult unmarried children who are objectively unable to provide for their own needs on account of their state of health;
- the unmarried **partner** with whom the sponsor is in a **duly attested stable long-term relationship** or the **registered partner** and his/her unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of their state of health.

As for the notion of **'dependency'**, in case C-519/18, *TB*,[58] the Court of Justice has clarified that it shall have the same meaning and scope as that identified in its case-law on Directive 2004/38/EC.[59] It follows that the status of dependent family member shall be

> "the result of a **factual situation** characterised by the fact that material support for the family member is provided by the holder of the right of residence". In particular, in order to determine the existence of such dependence, the Member State must assess, on a case-by-case basis, "whether, having regard to his or her financial and social conditions, the family member **is not in a position to support himself or herself**".

[58] Judgment of the Court of 12 December 2019, Case C-519/18, *TB*, ECLI:EU:C:2019:1070, paras. 44-49.

[59] See, *inter alia*, judgment of the Court of 19 October 2004, Case C-200/02, *Zhu and Chen*, EU:C:2004:639, para. 43; Judgment of the Court of 5 September 2012, Case C-83/11, *Rahman and Others*, ECLI:EU:C:2012:519, para. 23 ff.; judgment of the Court of 16 January 2014, Case C-423/12, *Reyes*, EU:C:2014:16, paras. 20-30; and judgment of the Court of 13 September 2016, Case C-165/14, *Rendón Marín*, EU:C:2016:675, para. 50.

3. The conditions for enjoying the right to family reunification and the limits to Member States' discretion

Directive 2003/86/EC introduces a series of conditions that must be complied with in order to benefit from the right to family reunification. In particular, we may distinguish between the general conditions set in Article 3(1) of the Directive and the optional conditions provided for in Articles 7-8 thereof, which Member States may decide to introduce.

Before analysing each of these conditions in greater detail, it shall be underlined on a general note that the Member States' discretion in assessing whether the conditions for enjoying the right to family reunification are complied with is limited. Indeed, the recognition and facilitation of family reunification is the main focus of Directive 2003/86/EC and shall in any event be considered as the rule.[60] It follows that the limits to the rights provided by the Directive should in principle be interpreted narrowly and in line with the general principles of EU law (proportionality, necessity, non-discrimination, etc.), as well as with the fundamental rights enshrined in the Charter, particularly the right to private and family life and the best interest of the child.[61] Furthermore, the Member States should not use their discretion in a manner which would undermine the objective of the Directive and verify compliance with the conditions set therein on the basis of an individualised assessment, as provided for in Article 17 of the Directive. Finally, under Article 18 of the Directive, Member States must set up appropriate judicial remedies against the competent authorities' decisions.

3.1. General conditions

Pursuant to Article 3(1) of Directive 2003/86/EC, third-country nationals are eligible as sponsors for family reunification on condition that they

- hold a residence permit issued by a Member State for a period of validity of one year or more
- and have reasonable prospects of obtaining the right of permanent residence.

[60] Judgment of the Court of 4 March 2010, Case C-578/08, *Chakroun*, ECLI:EU:C:2010:117, para. 57.

[61] Judgment of the Court of 27 June 2006, Case C-540/03, *European Parliament v Council*, cit., especially para. 38.

However, the Directive leaves the Member States free to adopt more favourable provisions. For instance, Bulgaria, Hungary, the Netherlands and Slovakia have not transposed the criterion of reasonable prospects of obtaining the right of permanent residence.[62]

As clarified in Article 2(e) of the Directive, 'residence permit' means any authorisation issued by the authorities of a Member State allowing a third-country national to stay legally in its territory, in accordance with the provisions of Article 1(2)(a) of Council Regulation No 1030/2002.[63] As for the condition of having reasonable prospects of obtaining the right of permanent residence, in principle Member States enjoy a wide margin of discretion. For instance, it is for them to determine what kind of residence permits they accept as sufficient to consider that there are reasonable prospects.[64] However, the European Commission has clarified that compliance with such a condition must in any event be examined on a case-by-case basis, taking into account the individual circumstances of the person concerned.[65] In particular, the test of reasonable prospects shall entail a **mere prognosis of the likelihood** of meeting the criteria for long term residence.[66] Conversely, it is not necessary that the individual fulfils all the conditions needed to obtain permanent residence at the moment of assessment.[67]

3.2. Optional requirements

In addition to the general conditions described in the previous paragraph, Member States may introduce some optional requirements for the purposes of granting the right to family reunification to third-country nationals. These are

- the requirement that the sponsor has **accommodation**, **sickness insurance**, and **stable and regular resources** (Article 7(1)(a)-(c) of the Directive);
- compliance with **integration measures** (Article 7(2) of the Directive);

[62] European Commission (2019). Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC on the right to family reunification (COM/2019/162 final), p. 2.

[63] Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals, OJ L 157.

[64] European Commission (2014). Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification, (COM(2014) 210 final), p. 4.

[65] Ibidem.

[66] Ibidem.

[67] Ibidem.

- the introduction of a **waiting period** before a sponsor may be joined by his/her family members (Article 8 of the Directive).

3.2.1. Accommodation, sickness insurance, and stable and regular resources

Pursuant to Art. 7(1) of Directive 2003/86/EC, Member States may require the applicants to provide evidence that the sponsor has

- an **accommodation** regarded as normal for a comparable family in the same region in compliance with health and safety standards (Article 7(1)(a));
- a **sickness insurance** for himself/herself and his/her family in respect of all risks covered in the Member State where he/she resides (Article 7(1)(b));
- **stable and regular resources** enabling him/her to provide for his/her needs and his/her family members without recourse to the **social assistance system** of the Member State concerned (Article 7(1)(c)). In particular, in order to evaluate these resources, Member States may make reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members.

The concrete implications of these optional requirements have been subject to a copious jurisprudence of the Court of Justice, which has sought to strike a fair balance between the Member States' discretion and the need to ensure the effectiveness of the right to family reunification. In particular, in Case C-578/08, *Chakroun*,[68] the Court of Justice has clarified that a sponsor who has stable and regular resources that are sufficient for himself/herself and his/her family members shall be entitled to family reunification under Directive 2003/86/EC even if, given the level of such resources, he/she is entitled to claim special assistance in order to meet exceptional, individually determined, essential living costs or income support measures. Furthermore, in the *O. & S.* case,[69] the Court has stressed that the resources requirement must be applied in the light of the right to family life and of the best interest of the child, enshrined in Article 7 and 24 of the Charter respectively, and that such requirement must in any event be applied restrictively, insofar as it constitutes a derogation to right to family reunification, which shall be the general rule. Finally, in case C-558/14, *Khachab*, the Court has focused on the reasonable period in relation to which the resources requirement must

[68] Judgment of the Court of 4 March 2010, Case C-578/08, *Chakroun*, cit.

[69] Judgment of the Court of 6 December 2012, Joined Cases C-356/11 and C-357/11, *O. & S.,* ECLI:EU:C:2012:776.

be assessed and held that Member States may carry out a prospective financial resources assessment based on preceding income patterns of the sponsor.

The *Chakroun* case (C-578/08)

Facts: Mr Chakroun, a Moroccan national, was granted a residence permit for an indefinite period in the Netherlands. Moreover, since 2005 he had been the recipient of unemployment benefits granted by Dutch authorities. His wife, Mrs Chakroun, applied to the Netherlands Embassy in Rabat for a provisional residence permit in order to live with her husband. However, her application was rejected on the ground that Mr Chakroun's unemployment benefits were below the required minimum income of **120 percent of the minimum wage**. In particular, her application was rejected insofar as Mr Chakroun, despite having provided evidence of having stable and regular resources to meet general subsistence costs, was nevertheless entitled, due to the level of such resources, to claim special assistance granted by local authorities.

Judgment: The Court was asked to clarify whether Article 7(1)(c) of Directive 2003/86/EC must be interpreted as precluding Member States' legislation which allows the competent authorities to reject an application for family reunification to a sponsor who has proved that he has **stable and regular resources** but who, given the level of his resources, will nevertheless be entitled to claim special assistance to meet exceptional, individually determined, essential living expenses, tax refunds granted by local authorities on the basis of his income, or income-support measures in the context of local-authority minimum-income policies. Furthermore, the Court was asked to determine whether, in applying the income requirement provided for in Article 7(1)(c) of the Directive, any distinction as to **the moment where the family link was established** may be introduced.

The Court began by recalling that, pursuant to Article 7(1)(c) of Directive 2003/86/EC, Member States may require, as a condition for the grant of the right to family reunification, evidence that the sponsor has stable and regular resources sufficient to maintain himself and the members of his family without recourse to the social assistance system of the Member State concerned (para. 43). To that end, they may evaluate those resources by reference to their nature and regularity and may take into account the **level of minimum national wages and pensions**, as well as the number of family members (*Ibidem*). However, insofar as authorisation of **family reunification shall be the general rule**, Article 7(1)(c) of the Directive must be interpreted **strictly** and must not, in any event, undermine the effectiveness of the right to family reunification (para. 43). Furthermore, Member States must act in compliance with the **right to private and family life** enshrined in Article 7 of the Charter (para. 44) and must always carry out an **individual assessment** of the

personal situation of the applicant and of his/her family members (para. 48). In particular, it is **the resources of the sponsor** that are the subject of the individual examination of applications for reunification required by that Directive, not the resources of the third-country national for whom a right of residence is sought on the basis of family reunification (para. 47).

Against this background, the Court stressed that the concept of **"social assistance"** in Article 7(1)(c) of the Directive is an **autonomous notion of EU law** and must be interpreted as referring to **assistance granted by the public authorities**, whether at national, regional or local level, which **compensates for a lack of stable, regular and sufficient resources**, and not as referring to assistance which enables exceptional or unforeseen needs to be addressed (para. 49). According to the Court, it follows from the foregoing that to use as a reference amount a level of income equivalent to 120% of the minimum income of a worker aged 23, above which amount special assistance cannot, in principle, be claimed, does not appear to meet the objective of determining whether an individual has stable and regular resources which are sufficient for his own maintenance (para. 49). Therefore, the Court concluded that the amount of income to be taken into consideration in the examination of Mrs Chakroun's application should be **the minimum wage set by Dutch law** and not 120% thereof (paras. 51-52).

As for the timing of the establishment of the family link, the Court held that Directive 2003/86/EC applies **regardless of whether the family relationship arose before or after the sponsor entered the territory of the host Member State**. To this end, it referred to the text of the Directive, as well as to its *travaux préparatoires* (paras. 59-62). Moreover, the Court cites its case-law on Directive 2004/38/EC, particularly the case *Metock and Others*,[70] and recalled that, to provide otherwise, would undermine the effectiveness of the right to family reunification, thus running counter to the objective of the Directive (paras. 63-64).

The *O. & S.* case (Joines Cases C-356/11 and C-357/11)

Facts: The preliminary ruling originated from two cases, which were joined by the referring court.

- The first case concerned Ms S, a national of Ghana who was granted a permanent residence permit to live in Finland. There, she married a Finnish national with whom she had a child. The child had Finnish nationality and had always lived in Finland. Ms S subsequently divorced and acquired sole custody of the child. A few years later, she married Mr

[70] Judgment of the Court of 25 July 2008, Case C-127/08, *Metock and Others*, cit.

O, a national of Côte d'Ivoire, with whom she had a second child, holding Ghanaian nationality. Mr O. applied for a residence permit on the basis of the marriage, but the competent authorities rejected his application, on the ground that he did not have secure means of subsistence in Finland.

- As for the second case, it concerned Ms. L, a national of Algeria, who had a child holding dual Finnish and Algerian nationality from a previous marriage. Ms. L married again with Mr. M, a national of Algeria, with whom she had a child of Algerian nationality. Mr M. applied for a residence permit; however, his application was also rejected on the ground that he **did not have a secure means of subsistence**.

Judgment: The Court was asked to clarify, inter alia, the correct implementation of the requirement of having stable and sufficient resources set in Article 7(1)(c) of Directive 2003/86/EC. First of all, the Court recalled that, in circumstances such as those in the main proceedings, the applicability of Directive 2003/86/EC cannot be excluded solely because one of the parents of a minor third-country national is also the parent of a Union citizen, born of a previous marriage (para. 69). Indeed, Ms S and Ms L were third-country nationals residing lawfully in a Member State and seeking to benefit from family reunification, thus falling under the notion of 'sponsor' within the meaning of Article 2(c) of Directive 2003/86/EC. Moreover, the children they had with their spouses were themselves third country nationals, and did not therefore have the status of citizens of the Union conferred by Article 20 TFEU (paras. 63-68).

As for the requirement of having "stable and regular resources", the Court reiterated that Article 7(1)(c) of Directive 2003/86/EC must be interpreted strictly, with a view to ensuring the effectiveness of the right to family reunification (para. 74). Furthermore, such provision must be interpreted and applied in a manner consistent with the **fundamental rights set out in Articles 7 and 24 of the Charter**, namely the right to respect for private and family life and the best interest of the child (paras. 75-80). Thus, the Court concluded that, when implementing Directive 2003/86 and examining applications for family reunification, the competent national authorities must make a **balanced and reasonable assessment of all the interests in play**, taking particular account of the interests of the children concerned (para. 81).

The *Khachab* case (C-558/14)

Facts: Mr Khachab, a third country national residing in Spain, held a long-term residence permit in that Member State. He applied to the Spanish authorities for a temporary residence permit for his spouse, Ms Aghadar, on grounds of family reunification. However, his application was rejected because he had **not provided evidence that he had resources sufficient to maintain his family**

once reunited. In particular, the national competent authorities rejected his application on the basis of a prospective assessment of the likelihood of his resources being retained in the year following the date of submission of the application, taking into account the pattern of his income in the six months preceding that date.

Judgment: The Court of Justice was asked to clarify whether Article 7(1)(c) of Directive 2003/86/EC is to be interpreted as allowing the competent authorities of a Member State to reject an application for family reunification on the basis of a prospective assessment of whether the sponsor's resources will be retained beyond the date of submission of the application for family reunification. In other words, the Court was asked to clarify whether Directive 2003/86/EC allows the competent authorities of the Member States to assess **whether the condition relating to the sponsor's stable and regular resources will continue to be met beyond the date of submission of that application**.

The Court began by recalling the principles set in its previous case-law in respect of the requirement of 'stable and regular resources'. In particular, it underlined that, since authorisation of family reunification is the general rule, the faculty provided for in Article 7(1)(c) of Directive 2003/86 must be interpreted strictly and must not be used in a manner which would undermine the objective of that directive and the effectiveness thereof (para. 25). Furthermore, it reiterated that, when implementing such provision, Member States must act in compliance with the right to private and family life set in Article 7 of the Charter (para. 27).

Subsequently, the Court moved onto the assessment of the question submitted for preliminary ruling and held that **the requirement of having 'stable and regular resources'** set in Article 7(1)(c) of Directive 2003/86/EC **necessarily implies a prospective assessment of the sponsor's resources** by the competent national authorities (para. 40). According to the Court, this stemmed from three main elements:

- first, the **wording of Article 7(1)(c)** of the Directive, particularly the use of the words 'stable' and 'regular', which conveys the idea that the sponsor's resources must have a certain degree of permanence and continuity (para. 32);

- second, **Article 3(1)** of the Directive restricting the personal scope of the Directive to sponsors who have "reasonable prospects of obtaining the right of permanent residence" and **Article 16(1)(a)** of the Directive enabling Member States to withdraw a family member's residence permit

where the sponsor no longer has stable and regular resources which are sufficient (paras. 34-38).

- third, **the objective of Article 7(1)(c)** of the Directive, which is to assess whether the family were likely to become a burden on the social assistance system during their period of residence.

Moreover, the Court clarified that a prospective assessment is also required, by analogy, when determining compliance with the conditions relating to possessing 'accommodation regarded as normal' and 'sickness insurance' laid down in Article 7(1)(a) and (b) (para. 33).

Finally, as for the **content of the Spanish legislation**, the Court found that making the authorisation of family reunification conditional upon the likelihood of the sponsor's resources being retained in the year following the date of submission of the application for reunification, taking account of the sponsor's income in the six months preceding that date, is **in compliance with the principle of proportionality**. Indeed, the one-year period corresponded to the minimum period of validity of the residence permit which the sponsor must have under Article 3(1) of Directive 2003/86/EC in order to be able to apply for family reunification (para. 45). Additionally, the Spanish legislation underlined that family reunification applications could only be refused under Spanish law if it is determined 'beyond doubt' that the sponsor would be unable to retain sufficient resources (para. 46). Moreover, considering a period of six months prior to the submission of the application as the time frame on which the prospective assessment of the sponsor's resources may be based was not capable, according to the Court, to undermine the objective of Directive 2003/87/EC (para. 47).

3.2.2. Integration measures

Pursuant to Article 7(2) of Directive 2003/86/EC, Member States may also require the applicants of family reunification to comply with **integration measures**. For instance, they may require participation in language or integration courses and ask the applicants to take an exam on the content of such courses.[71] Integration measures may also take the form of reporting to an integration centre, signing a declaration of integration or an integration contract prescribing civic training and language training.[72]

[71] European Commission (2019). *Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC*, cit., p. 7-8.

[72] *Ibidem*.

As for the point in time when integration measures may be imposed, a significant difference exists in the case of refugees. Indeed, whereas in case of **regular applicants** integration measures can be imposed **prior to or after entry** into the territory of the host Member State,[73] in the case of **refugees** and/or family members of refugees the integration measures may **only** be applied **once the persons concerned have been granted family reunification,** as provided for in Article 7(2), second subparagraph of Directive 2003/86/EC. In its case-law, the Court of Justice has made it clear that integration measures must contribute to facilitating family reunification and must not, on the contrary, be used as a means to limit it. In particular, in the *K and A* case,[74] the Court held that integration measures, such as the requirement to pass a civic integration examination, must be aimed not at filtering those persons who will be able to exercise their right to family reunification, but at **facilitating the integration** of such persons within the Member States. Moreover, when imposing integration measures, Member States must comply with the principle of **proportionality** and always take into consideration the **specific individual circumstances** of the applicants. In the same judgment, the Court also underlined that **integration requirements cannot be absolute**, meaning that a failure to pass a test cannot automatically prevent the enjoyment of the right to family reunification, especially where the migrants have made every effort to achieve this objective.

The *K and A* case (C-153/14)

Facts: K, an Azerbaijani national, and A, a Nigerian national, submitted an application for a temporary residence permit on grounds of family reunification in order to reside in the Netherlands with their third-country national spouses, who were lawfully residing in that Member State. For that purpose, they both submitted a medical certificate stating that they could not take the civic integration examination required by Dutch Law due to health problems. However, the Dutch authorities rejected their applications on the ground that health problems did not justify dispensation from the requirement to pass the civic integration examination.

Judgment: First of all, the Court recalled that Directive 2003/86/EC enables Member States to require third-country nationals to comply with integration measures (paras. 44-49). However, since authorisation of family reunification is

[73] As clarified in case C-257/17, *C* and *A*, at para. 56, Article 7(2) of Directive 2003/86 allows a Member State to require third country nationals to comply with integration measures, without limiting those conditions to the period preceding their entry into the Member State.

[74] Judgment of the Court of 9 July 2015, Case C-153/14, *K and A* , ECLI:EU:C:2015:453.

the general rule, such integration measures must be primarily aimed at facilitating the integration of the sponsor's family members and must not go beyond what is necessary to achieve such aim (paras. 50-52).

As to the specificities of the Dutch legislation, the Court accepted that the requirement of passing a civic integration examination could be imposed under the Directive, insofar as it ensured that the applicants concerned acquired basic knowledge both of the language of the Member State concerned and of its society, two undeniably useful elements for establishing connections with the host Member State and facilitate integration there (paras. 53-55). However, the Court stressed that such requirements must be proportionate and must not make the exercise of the right to family reunification impossible or excessively difficult (para. 56). That would be the case if, for example, the requirement would lead to a systematic prevention of family reunification where an applicant had failed the test but had demonstrated willingness to pass the exam and made every effort to do so (*Ibidem*). Moreover, the Court stressed that integration requirements must be applied taking into account the personal circumstances of the applicant concerned, meaning that applicants may be dispensed from from the requirement to pass an examination such as the one at issue in the main proceedings when, due to those circumstances, they are unable to take or pass that examination (paras. 57-63).

Finally, the Court noted that applicants may legitimately be asked to bear the costs of the civic integration examination, provided that, in accordance with the principle of proportionality, the level at which those costs are determined does not aim, nor have the effect of, making family reunification impossible or excessively difficult (para. 64-70).

Integration measures may also be imposed as a condition for the grant of an autonomous residence permit for family members under Article 15 of the Directive. Indeed, pursuant to such a provision, not later than after five years of residence and provided that the family member has not been granted a residence permit for reasons other than family reunification, the family members of the sponsor shall be entitled to an autonomous residence permit independent of that of the sponsor. However, as the Court of Justice clarified in case C-257/17, C and A,[75] even in this context integration requirements must not be used as a means to hinder family reunification and must be applied in compliance with the principle of proportionality.

[75] Judgment of the Court of 7 November 2018, Case C-257/17, *C and A*, ECLI:EU:C:2018:876.

The *C and A* case (C-257/17)

Facts: C and A, two third-country nationals, held a residence permit to live with their respective spouses of Dutch nationality in the Netherlands. They applied to Dutch authorities to obtain an extended residence permit. However, their applications were rejected on the ground that they had not proved that they had passed, were not subject to or were exempted from the civic integration requirement provided by national law.

Judgment: The Court primarily addressed the admissibility of the preliminary ruling, given that, in principle, Directive 2003/86/EC did not apply to C and A. because their spouses were EU citizens. Despite this, the Court found that it had jurisdiction, since Dutch law expressly stated that Directive 2003/86/EC was directly and unconditionally applicable to the family members of Dutch nationals and, in accordance with the settled case-law, the Court has jurisdiction to give a preliminary ruling on questions concerning provisions of EU law which have been rendered applicable by domestic law (paras. 28-44).

Moving onto the substance of the question submitted for preliminary ruling, the Court was asked to clarify whether Article 15 of Directive 2003/86/EC, which Dutch law expressly made applicable in circumstances such those in the main proceedings, precludes national legislation which permits an application for an autonomous residence permit lodged by a third-country national who has resided over five years in a Member State by virtue of family reunification to be rejected on the ground that he/she has not shown that he has passed a civic integration test on the language and society of that Member State. The Court answered in the negative, noting that the such possibility stems from Article 15(4) of the Directive, which expressly leaves the Member States the discretion to set the conditions under which an autonomous residence permit may be granted (paras. 45-50). Nevertheless, the Court underlined that the grant of an autonomous permit under Article 15 of the Directive must be the general rule and, as a consequence, the possibility of Member States to introduce integration conditions must not render the grant of such a permit excessively difficult (paras. 51-52). In particular, the Court recalled its judgment in the K and A case and reiterated that the integration conditions must be applied in compliance with the principle of proportionality and having due regard to the individual circumstances of the person concerned, such as the age, level of education, economic situation or health (paras. 59-65). Thus, individuals may be exempted from taking an integration test if their personal circumstances demonstrate their inability to pass such a test (para. 64). Likewise, persons who have failed to pass the test should not automatically be denied an autonomous residence permit if they have demonstrated their willingness to pass the examination and have made every effort to achieve that objective (para. 63).

3.2.3. Waiting period

Article 8 of Directive 2003/86/EC additionally sets out the possibility for the Member States

- to require the sponsor to have **stayed lawfully in their territory for a period not exceeding two years**, before having his/her family members join him/her and
- to provide for a **waiting period of up to three years** for the issue of a residence permit, in cases where their previous legislation on family reunification required the need to take into account **reception capacities**.

At present, the option under the second point mentioned above has only been transposed by Austria and Croatia, whereas the first has been transposed by most Member States .[76] As for the concrete implications of this optional condition, in Case C-540/03, *European Parliament v Council*,[77] the Court of Justice has clarified that the **purpose** is of Article 8 of the Directive is to enable MSs to **make sure that family reunification will take place in favourable conditions**, after the sponsor has been residing in the host country for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration. In any event, the Court stressed that duration of residence in the MS is only one of the factors that the Member State must take into account when considering an application and that a waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors, while having due regard to the best interests of minor children.

European Parliament v Council (Case C-540/03)

Facts: The European Parliament sought the annulment of a series of provisions of Directive 2004/86/EC, arguing that they did not respect respect fundamental rights, such as the right to family life and the right to non-discrimination.In particular, the Parliament sought annulment of

- the final subparagraph of Article 4(1) of the Directive, making it possible for Member States to verify whether a child aged over 12 who arrives independently from the rest of his/her family meets a condition for integration;

[76] European Commission (2019). Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC, cit., p. 9.

[77] Judgment of the Court of 27 June 2006, Case C-540/03, *European Parliament v Council*, cit.

- Article 4(6), enabling Member States to only admit applications submitted by children aged under 15 and

- Article 8 of the Directive, introducing the possibility to impose a waiting period of up to three years before the family members may be issued a residence permit.

Judgment: The Court of Justice dismissed the European Parliament's action, finding that all of the contested provisions respected the fundamental rights enshrined in the Charter. Indeed, according to it, the contested provisions afford the Member States **a margin of discretion sufficiently wide** to enable them to apply the Directive's rules in a manner consistent with the requirements flowing from the protection of fundamental rights. Furthermore, the Directive itself provides that the Directive shall be applied having regard to the best interests of minor children, as provided for in Article 5 of thereof, and on the basis of an individual assessment taking into account a number of factors, such as the person's family relations, as it follows from Article 17.

As far as **Article 8** of the Directive is concerned, the Court expressly stated that such provision cannot be regarded as having the effect of precluding family reunification insofar as it seeks, on the contrary, to **make sure that family reunification will take place in favourable conditions**, after the sponsor has been residing in the host State for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration (para. 98). Furthermore, the Court stressed that duration of residence in the Member State as well as he Member State's reception capacity are only **one of the factors** to be taken into account when considering an application and reiterated that both requirements cannot be imposed without taking into account the particular circumstances of specific case and the best interests of minor children (paras. 99-101). Lastly, the Court recalled that the implementation of the Directive is in any event subject to review by the national courts, which are obliged to make preliminary references if they encounter difficulties in interpreting it (para. 106).

4. Restrictions to the right to family reunification

Directive 2003/86/EC grants the Member States the possibility to introduce restrictions to the right to family reunification in two specific circumstances, described in Articles 6 and 16 thereof. First, Article 6 of Directive 2003/86/EC enables Member States to reject an application, or to withdraw or refuse to renew a family member's

residence permit on grounds of public policy, public security or public health. Some indications as to the meaning of the notions of public policy and public security are given in Recital 14 of the Directive, which states that "the notion of public policy may cover a conviction for committing a serious crime", noting further that "the notion of public policy and public security covers also cases in which a third country national belongs to an association which supports terrorism, supports such an association or has extremist aspirations". However, the Directive remains silent as to the notion of public health. More broadly, besides the indications provided in Recital 14, the definition of these notions is largely left to the discretion of the Member States, subject to the relevant case-law of the European Court for Human Rights and of the Court of Justice. In this respect, in Joined Cases C-381/18 and C-382/18, *G.S. and V.G.*,[78] the Court was asked for the first time to interpret the public order clause set in Article 6 of the Directive and stressed that any national decision based on such a clause must be based on an individual conduct, comply with the principle of proportionality, and require the availability of appropriate judicial remedies. Furthermore, the Court emphasised that the threshold of seriousness required is lower compared to Directive 2004/38/EC.

The *G.S. and V.G.* case (Joined Cases C-381/18 and C-382/18)

Facts: The preliminary ruling originated from two cases, which were joined by the referring court:

- the first case concerned G.S., a third-country national, who was granted residence permit in the Netherlands as the 'partner' of a sponsor. When he applied for the renewal of such residence permit, his application was rejected on grounds of public policy insofar as had been sentenced in Switzerland to a term of imprisonment of four years and three months for participation in drug trafficking;

- the second case concerned V.G., a third-country national who was resident, in part lawfully, in the Netherlands. His wife, a Netherlands national, applied for the grant of a residence permit to V.G. under the legislation on family reunification. However, the competent authorities rejected the application on grounds of public policy, insofar as he had been sentenced four times to a fine or community service for shoplifting and driving while intoxicated. In particular, the competent authorities believed that, even if V.G.'s wife was an EU citizen, Directive 2003/86/EC applied by analogy, insofar as Netherlands law provided

[78] Judgment of the Court of 12 December 2019, Joined Cases C-381/18 and C-382/18, *G.S. and V.G.,* ECLI:EU:C:2019:1072.

that, in circumstances such as those at issue in the main proceedings, the provisions of said Directive applied directly and unconditionally.

Judgment: First of all, the Court focused on the admissibility of the preliminary ruling, particularly in the light of the fact that in principle Directive 2003/86/EC did not apply to V.G., because his wife was an EU citizen. In this respect, the Court found that it had **jurisdiction** to rule on the matter because, on the basis of its consistent case-law, an interpretation of provisions of EU law in situations not falling within their scope may still be provided by the Court "where such provisions have been made directly and unconditionally applicable to such situations by national law, in order to ensure that those situations and situations falling within the scope of those provisions are treated in the same way" (para. 43).

Moving onto the substance of the questions submitted for preliminary ruling, the Court was asked to clarify whether Article 6(1) and (2) of Directive 2003/86/EC must be interpreted as enabling Member States to reject applications or to refuse to renew residence permits on grounds of family reunification on the basis of a criminal conviction imposed during a previous stay on the territory of the Member State concerned, or where a sentence sufficiently severe in comparison with the duration of the stay has been imposed on the applicant (para. 49). To answer these questions the Court referred to the wording of Article 6, to its context and origin, as well as to the objectives pursued by Directive 2003/86/Ec (para. 55). By doing so, it concluded, first, that Article 6 of the Directive, unlike Article 27(2) of Directive 2004/38/EC, does not require the personal conduct of the individual concerned to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society in order for that individual to be capable of being regarded as a threat to public policy (paras. 56-58). Thus, the **threshold of seriousness** of the conduct in respect of third-country nationals is lower if compared to EU citizens. Second, the Court reiterated that Article 6 should not be used in a manner which would undermine the objective and effectiveness of the directive and always be based on the **individual conduct** of the person concerned (paras. 62-63). Lastly, any national decision based on that provision must in any event comply with the principle of **proportionality**, **avoid automatisms** and requires the availability of **appropriate judicial remedies** (paras. 64-68).

Finally, Article 16 of Directive 2003/86/EC allows Member States to reject an application, or to withdraw or refuse to renew a family member's residence permit where the conditions set in the Directive are no longer complied with and in case of abuse or fraud of the rights conferred by the Directive. As clarified in case C-557/17, Y.Z. and Others analysed above, withdrawal is in principle permissible even if the

family member was unaware of the fraud, provided that Member States carry out an individual assessment of the situation of the family members concerned and take into account the right to respect for private and family life guaranteed by Article 7 of the Charter. Moreover, where there is reason to suspect that there is fraud or a marriage, partnership or adoption of convenience, Article 16(4) of the Directive expressly enables Member States to conduct specific checks and inspections.

5. The (derivative) rights of family members

Similarly to the family members of Union citizens, the family members of the third-country national sponsor also enjoy a series of **rights derived from those of the sponsor**. Moreover, as mentioned in *paragraph 3.2.2.* above, after a certain period of time the sponsor's family members may obtain an autonomous residence permit, provided that certain conditions are met. This section will briefly analyse these rights.

5.1 The right to entry and visa facilitation

Pursuant to Article 13(1) of Directive 2003/86/EC, Member States shall authorise the **entry** of the family members of the sponsor as soon as the application for family reunification has been accepted and grant them every facility for obtaining the requisite **visas**. In particular, as noted in the European Commission's Report on the implementation of Directive 2003/86/EC, facilitation towards obtaining the requisite visa is **mandatory** for Member States.[79]

5.2 The right of residence

The third-country national family members of the sponsor also enjoy a right of residence in the Member State concerned. In principle, similarly to what occurs in the case of family members of mobile EU citizens, the right of residence which family members enjoy is derivative in nature. In particular, it is derived from that of the

[79] European Commission (2019). Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC, cit., p. 12.

sponsor and is specifically geared towards assisting the sponsor's integration in the Member State concerned.[80] As for its duration, Article 13(2) of the Directive states that Member States must grant family members a first residence permit of at least one year's duration, which shall be renewable. Additionally, Article 13(3) provides that the duration of the right of residence should not in principle go beyond the date of expiry of the residence permit held by the sponsor, a further proof of the generally derivative nature of the residence right of family members under the Directive.

However, in order to promote the integration of family members,[81] Article 15 of the Directive introduces the possibility to grant family members an autonomous residence permit. In particular, such a permit may be granted not later than after five years of residence in the Member State and provided that the family members concerned have not been granted a residence permit for reasons other than family reunification. Besides these general conditions, the specific conditions relating to the granting and duration of the autonomous residence permit are to be established by national law, as provided for in Article 15(4) of the Directive. Moreover, the Directive leaves the Member States free to subject the grant of such a right to further conditions, such as the requirement of passing an integration test as explained in *paragraph 3.2.2*, provided that such conditions do not go beyond what is necessary to attain the objective of facilitating the integration of those third country nationals.[82]

5.3 Protection against expulsion

Pursuant to Article 16 of Directive 2003/86/EC, Member States may reject, withdraw or refuse to renew a family member's residence permit if the conditions laid out in the Directive are not or no longer satisfied. However, Article 15(3) of the the Directive provides for some degree of protection against expulsion in two circumstance:

- in the event of **widowhood**, **divorce**, **separation**, or **death** of first-degree relatives in the direct ascending or descending line and

[80] Judgment of the Court of 14 March 2019, Case C-557/17, *Y.Z. and Others*, cit., para. 47.

[81] See Recital 15 of the Directive.

[82] Judgment of the Court of 7 November 2018, Case C-257/17, *C and A*, cit. See also judgment of the Court of 7 November 2018, Case C-484/17, *K*, ECLI:EU:C:2018:878.

- in the event of **particularly difficult circumstances**, such as in case of domestic violence.[83]

In such circumstances, Member States are given the option to issue the family member concerned an **autonomous residence permit**, although the conditions for the grant of such a permit remain fully subject to **national law**, as explained in the previous section.

5.4 Access to education and employment

Pursuant to Article 14 of Directive 2003/86/EC, the third-country national family members of the sponsor shall also enjoy **equal treatment with the sponsor** in the context of access to **education**, **employment**, **vocational guidance**, initial and further **training** and **retraining**. However, the Directive gives Member States the possibility to introduce two restriction:

- they may decide, according to national law, the conditions under which family members shall exercise an employed or self-employed activity (Article 14(2) of the Directive) and
- they may restrict access to employment or self-employment activity by first-degree relatives in the direct ascending line or adult unmarried children to whom Article 4(2) applies (Article 14(3))

However, as reported by the Commission, few Member States have applied either of these options: the option set out in Article 14(2) has only been adopted by Belgium, Bulgaria, Cyprus, Greece, Luxembourg and Malta, while only Slovakia has adopted the option under Article 14(3).[84]

[83] Domestic violence is cited as an example of a particularly difficult situation giving rise to an autonomous residence permit under the Directive in point 5(3) of the Communication from the Commission to the Council and the European Parliament of 3 April 2014 on guidance for the application of Directive 2003/86/EC (COM(2014) 210 final). For a thorough analysis of the protection granted by Directive 2003/86/EC to victims of domestic violence compared to Directive 2004/38/EC see judgment of the Court of 2 September 2021, Case C-930/19, *X v État Belge*, ECLI:EU:C:2021:657, especially paras. 83-91.

[84] European Commission (2019). Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC on the right to family reunification, cit., p. 14.

6. Family reunification of refugees

As previously noted, Directive 2003/86/EC contains a series of provisions which specifically apply to refugees. These provisions are contained in Chapter V and establish more favourable conditions for family reunification than in case of regular applicants. As it follows from Recital 8 and as established in the Court of Justice's consistent case-law, the rationale for introducing more favourable conditions is dictated by the particular situation of refugees, who have been forced to flee their country and prevented from leading a normal family life there.[85] However, it should be noted that Chapter V also contains some exceptions to these more favourable conditions. The following sections will briefly lay out the special regime applying to refugees.

6.1 The more favourable conditions applying to refugees

Three more favourable conditions applying to family reunification of refugees are introduced by Directive 2003/86/EC:

- First, Article 10(2) of the Directive broadens the definition of family members, by providing that Member States may authorise family reunification of other family members not referred to in Article 4, if they are dependent on the refugee.[86] However, as clarified in case C-519/18, TB, each Member State enjoys wide discretion in the definition of the nature of the relationship of dependence which enables a refugee's family members to enjoy a right to family reunification pursuant to Article 10(2), although such discretion must not be exercised in a manner which would undermine the objective and effectiveness of the Directive.[87] Moreover, Article 10(1) and (3) of the Directive introduce more favourable provisions in respect of children of refugees or when unaccompanied minors are involved.[88]
- Second, Article 11(2) of the Directive obliges Member States to take into account other evidence of the family relationship when official documents are lacking. In this respect, in case C-635/17, *E.*, the Court of Justice stated that the lack of official documentary evidence of the family relationship and the potential implausibility of the explanations

[85] See, inter alia, judgment of the Court of 7 November 2018, C-380/17, *K and B*, ECLI:EU:C:2018:877, para. 53 and judgment of the Court of 13 March 2019, C-635/17, *E.*, ECLI:EU:C:2019:192, para. 66.

[86] As noted in paragraph 2.2.3. above, the notion of dependence shall have the same meaning and scope as that identified in the Court of Justice's case-law on Directive 2004/38/EC.

[87] Judgment of the Court of 12 December 2019, Case C-519/18, *TB*, cit., paras. 57-62.

[88] For a thorough analysis of the application of Directive 2003/86/EC in respect of unaccompanied minors who are granted refugee status, see judgment of the Court of 12 April 2018, Case C-550/16, *A and S*, ECLI:EU:C:2018:248.

provided in that regard cannot constitute the sole ground for rejection of the family reunification application, insofar as such an approach would run counter to the main purpose of the Directive which is the facilitation of family reunion.[89] Additionally, the Court underlined that Member States should assess each situation on a case-by-case basis, taking into account all the relevant elements of the specific case and ensure that the requirements in respect of probative value and plausibility of the evidence are always proportionate.[90]

- Finally, Article 12(1), first subparagraph, and Article 12(2) of the Directive prohibit Member States from requiring the refugee and/or his/her family members to provide evidence that the refugee fulfils the optional requirements set out in Articles 7 and 8. However, as explained in paragraph 3.2.2. above and as it follows from Article 7(2), second subparagraph of the Directive, integration measures may be applied once the refugee concerned has been granted family reunification.

6.2 Exceptions to the more favourable conditions applying to refugees

Chapter V of Directive 2003/86/EC introduces the possibility for the Member States to disapply the more favourable conditions applying to refugees contained therein, provided that certain conditions are met. Three exceptions are introduced:

- First, Article 9(2) of the Directive enables Member States to confine the application of the more favourable provisions contained in Chapter V to refugees whose family relationships predate their entry.
- Second, Article 12(1), second subparagraph, states that the provisions of Chapter V may not be applied if family reunification is possible in a third-country with which the sponsor and/or his/her family member has special links. However, the Commission has clarified that the third country in question must be a safe country for the sponsor and his/her family members and that, in any event, the burden of proof on the possibility of family reunification lies on the MS, not the applicant.[91]
- Finally, the third subparagraph of Article 12(1) of the Directive grants the Member States the possibility to limit the application of Chapter V to applications made within three months of the granting of refugee status. However, as clarified in case C-380/17, K and B, this provision cannot apply to situations in which particular circumstances render the late submission of the application objectively excusable.

[89] Judgment of the Court of 13 March 2019, Case C-635/17, *E.*, cit.

[90] *Ibidem*.

[91] European Commission (2014). Communication from the *Commission to the European Parliament and the Council on guidance for application of Directive* 2003/86/EC on the right to family reunification, COM/2014/0210 final, p. 23.

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