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OPINION OF ADVOCATE GENERAL

BOBEK

delivered on 10 April 2018(1)

Case C-89/17

Secretary of State for the Home Department

v

Rozanne Banger

(Request for a preliminary ruling from the Upper Tribunal (Immigration and Asylum Chamber) London (United Kingdom))

(Reference for a preliminary ruling — Citizenship of the Union — Article 21 TFEU — Return of a Union citizen to the Member State of which that citizen is a national after having exercised free movement rights in another Member State — Right of residence of a third-country national who is a member of the extended family of a Union citizen — Application by analogy of Directive 2004/38/EC — Article 3(2)(b) — Obligation to facilitate, in accordance with national legislation, entry and residence for the partner with whom the Union citizen has a durable relationship — Right of appeal — Scope of judicial review — Article 47 of the Charter of Fundamental Rights of the European Union)

I. Introduction

1. Ms Rozanne Banger is from South Africa. Her partner Mr Philip Rado is a United Kingdom national. They lived together in the Netherlands, where Ms Banger was issued a residence card as an unmarried partner of a Union citizen.

2. In the Netherlands Ms Banger was granted a residence card pursuant to Article 3(2) of Directive 2004/38/EC. (2) That provision states that the *host* Member State shall *facilitate* entry and residence, in accordance with national law, of other persons not included in Article 2(2) of the directive as family members. That includes the partner with whom the Union citizen has proved to have a durable relationship.

3. The couple later decided to move to the United Kingdom. The competent authorities there rejected Ms Banger's residence card application on the ground that she was not married to her partner.

4. There is also a regime in the United Kingdom which aims at transposing Article 3(2) of Directive 2004/38. However, that Member State is the *home* Member State of Mr Rado. Ms Banger could not therefore benefit from that regime because it only applies to 'extended family members' of Union citizens *from other Member States*, and not 'extended family members' of nationals of the United Kingdom who return to that Member State after having exercised their residence rights in another Member State.

5. It is in that context that the Upper Tribunal (Immigration and Asylum Chamber), London, United Kingdom refers questions about essentially two issues to this Court.

6. First, are Member States obliged to *issue* a residence authorisation, or to *facilitate* the residence of an unmarried partner of a Union citizen who accompanies a Union citizen on his return to his home Member State? If yes, the referring court enquires whether the basis for such an obligation lies in Directive 2004/38, or in the principles established by the Court in the judgment in *Singh.* (3)

7. Second, the referring court wishes to ascertain the scope of judicial protection required under EU law for situations covered by Article 3(2) of the directive in the particular context of the law of England and Wales, which, depending on the type of claim in question, provides for different avenues of judicial protection: an appeal procedure and judicial review. On the facts of the present case, where the complaint is brought by an 'extended family member', judicial review is the only available route for a legal challenge.

II. **Legal framework**

A. **EU law**

8. According to recital 6 of Directive 2004/38:

'In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.'

9. Article 2 of that directive contains the following definitions:

'1. "Union citizen" means any person having the nationality of a Member State;

2. “Family member” means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

…

3. “Host Member State” means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.’

10. Article 3 of the directive states:

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

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

…

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

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

11. According to Article 15(1) of the directive, the ‘procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health’.

12. Article 31 of the directive reads as follows:

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

...

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

...’

B. United Kingdom law

13. The Immigration (European Economic Area) Regulations 2006 [SI 2006/1003] ('the EEA Regulations'), transpose Directive 2004/38.

14. Regulation 8 contains provisions regarding 'extended family members':

'(1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).

…

(5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.

(6) In these Regulations "relevant EEA national" means, in relation to an extended family member, the EEA national who is or whose spouse or civil partner is the relative of the extended family member for the purpose of paragraph (2), (3) or (4) or the EEA national who is the partner of the extended family member for the purpose of paragraph (5).'

15. Regulation 9, apparently applicable at the material time, set out the following rules with regard to family members of United Kingdom nationals:

'(1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member of a British citizen as if the British citizen were an EEA national.

(2) The conditions are that—

(a) the British citizen is residing in an EEA State as a worker or self-employed person or was so residing before returning to the United Kingdom; and

(b) if the family member of the British citizen is his spouse or civil partner, the parties are living together in the EEA State or had entered into the marriage or civil partnership and were living together in that State before the British citizen returned to the United Kingdom.

…'

III. **Facts, procedure and the questions referred**

16. Ms Banger is a national of South Africa. Her partner, Mr Rado, is a United Kingdom national. From 2008 to 2010, they lived together in South Africa. In May 2010, they moved to the Netherlands, where Mr Rado accepted a job position. Ms Banger was granted a residence card by the Netherlands authorities as an extended family member of a Union citizen on the basis of the national provisions transposing Article 3(2) of Directive 2004/38.

17. In 2013, the couple decided to move to the United Kingdom. Ms Banger's application for a residence card in the United Kingdom was refused by the Secretary of State for the Home Department ('the Secretary of State') on the grounds that she was not married to Mr Rado. That decision was based on Regulation 9 of the EEA Regulations, which provides for the rights of family members of United Kingdom nationals who return to that Member State after having exercised free movement rights. According to the decision issued by the Secretary of State on the basis of that

provision, to qualify as a family member of a British citizen, the applicant must either be the spouse or civil partner of a British citizen. (4)

18. Ms Banger challenged that decision before the First-tier Tribunal. That tribunal held that Ms Banger, as the non-EU partner of a British citizen having exercised his free movement rights and returning to his Member State of origin, enjoyed the benefits arising under the '*Singh*' ruling. (5)

19. The Secretary of State was granted permission to appeal to the Upper Tribunal (the referring court) on the ground that the First-tier Tribunal had allegedly erred in law. The referring court underscores the relevance of the findings of the judgment in *Singh* (6) for the purposes of the main proceedings. It states that the only difference in the present case is that Ms Banger and Mr Rado were unmarried, whereas Mr and Mrs Singh were married. Even though applying the principles emanating from that case to the present situation would involve a 'relatively short step', the referring court raises doubts as to the legal basis for such an extension. It also underlines the specificity of Article 3(2) of Directive 2004/38: persons covered by it cannot lay claim to a right of residence. Moreover the provision creates a clear margin of discretion for the Member States, so the pertinent legislation may differ from one Member State to another.

20. In those circumstances, the Upper Tribunal decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Do the principles contained in the decision in [*Singh*, C-370/90] operate so as to require a Member State to issue or, alternatively, facilitate the provision of a residence authorisation to the non-Union unmarried partner of an EU citizen who, having exercised his Treaty right of freedom of movement to work in a second Member State, returns with such partner to the Member State of his nationality?

(2) Alternatively, is there a requirement to issue or, alternatively, facilitate the provision of such residence authorisation by virtue of [Directive 2004/38]?

(3) Where a decision to refuse a residence authorisation is not founded on an extensive examination of the personal circumstances of the Applicant and is not justified by adequate or sufficient reasons is such decision unlawful as being in breach of Article 3(2) of [Directive 2004/38]?

(4) Is a rule of national law which precludes an appeal to a court or tribunal against a decision of the executive refusing to issue a residence card to a person claiming to be an extended family member compatible with [Directive 2004/38]?'

21. Written submissions have been made by Ms Banger, the Governments of Spain, Austria, Poland and the United Kingdom, and the European Commission. Ms Banger, the Governments of Spain and the United Kingdom, and the European Commission presented oral argument at the hearing held on 17 January 2018.

IV. **Assessment**

22. This Opinion is structured as follows. I will address the first three preliminary questions jointly as they all concern, in one way or another, the legal basis and content of the obligations of Member States regarding the entry and residence of unmarried partners of 'returning' Union

citizens (A). Then I will examine the fourth question, concerning the scope of judicial review required with regard to ‘extended family members’, (7) to which Article 3(2) refers (B).

A. Questions 1 to 3: ‘extended family members’ of ‘returning Union citizens’

23. By its first question, the referring court wishes to know whether the principles set out in the judgment in *Singh* (8)require a Member State to *issue* a residence authorisation to, or to *facilitate* the residence of unmarried partners of ‘returning’ Union citizens. The second question asks whether, in the alternative, such an obligation to either issue a residence authorisation or facilitate residence emanates directly from Directive 2004/38.

24. These questions have two layers. They are first concerned with the *legal basis* of the entitlements that partners of ‘returning’ Union citizens in a durable relationship derive from EU law. Second, they already implicitly enquire about the *content* of those entitlements: whether there is an obligation to issue such an authorisation or merely to facilitate it. The latter issue is then brought fully to the fore in the third preliminary question. That question asks specifically whether it is unlawful under Article 3(2) of Directive 2004/38 to adopt a refusal decision which is not based on an extensive examination of the personal circumstances of the applicant, and which is not justified by adequate or sufficient reasons.

25. In my view, these layers are clearly intertwined. Basis determines content, which in turn implies a certain level of justification of a decision. I therefore think that the first three questions are best addressed jointly.

26. In this section, therefore, I first examine the legal basis of the rights that unmarried partners of ‘returning’ Union citizens derive from EU law. For that purpose, I will assess whether an application by analogy of the rules of Directive 2004/38 to EU citizens ‘returning’ to their country of nationality as developed by the case-law of the Court can be extended to Article 3(2)(b) of the directive (1). Second, I will consider the interpretation of that provision, which introduces the notion of ‘facilitation’ of entry and residence of unmarried partners (2). Third, I will examine the implications of those findings for the present case (3).

1. Returning citizens

27. Directive 2004/38 contains a specific provision — Article 3(2)(b) — regarding the situation of persons with whom a Union citizen has a durable relationship. This provision is not, however, applicable to the present caseper se. The provisions of the directive regarding entry and residence rights do not apply to circumstances in which a Union citizen or the members of his family invoke those provisions against the *Member State of nationality* of the Union citizen. (9)

28. The same ought also to be logically valid with regard to Article 3(2) of Directive 2004/38, concerning ‘extended family members’.

29. Admittedly, Article 3(2) of Directive 2004/38, unlike Article 3(1) thereof, does not explicitly refer to extended family members *accompanying* the Union citizen or *joining* him in another Member State. Yet, Article 3(2), as confirmed by recital 6 of the directive, clearly refers to the obligations of the ‘*host* Member State’. Moreover, the same systematic and teleological considerations which led the Court to find that Directive 2004/38 is not applicable to third-country national family members of Union citizens in that citizen’s home Member State (10) also apply with regard to ‘extended family members’.

30. The fact that Article 3(2) of Directive 2004/38 is not per se applicable in a case such as the present one does not however render that provision entirely irrelevant. Case-law of the Court has established on the basis of rules of primary law that various instruments of secondary law on free movement may be applicable *by analogy*, under certain circumstances, to situations concerning Union citizens who return to their Member State of nationality after having exercised their free movement rights. (11)

31. The logic on which that line of case-law of the Court has been built is one of deterrence. According to the judgment in *Singh,* 'a national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State'. (12) Free movement rights could not be fully effective if a Union citizen 'may be deterred from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse'. (13) In the judgment in *Eind*, the Court added that such a deterrent effect may also simply derive 'from the prospect ... of not being able, on returning to his Member State of origin, to continue living together with close relatives, a way of life which may have come into being in the host Member State as a result of marriage or family reunification'. (14)

32. On this basis, the Court has held that Article 21(1) TFEU implies that the conditions of secondary law regarding the rights of entry and residence of family members, in particular those contained in Directive 2004/38, are applicable by analogy to family members of 'returning Union citizens' against the Member State of nationality of the Union citizen. In *O. and B.*,the Court has further clarifiedthat this case-law is applicable where the Union citizen has created or strengthened his family life with a third-country national during a genuine residence in a Member State other than that of which he is a national. (15)

33. In the present case, the United Kingdom Government has argued that the principles that emanate from the case-law outlined above concern exclusively the *rights* of entry and residence under Directive 2004/38. According to Article 3(1) of the directive, those rights are only enjoyed by the family members who fall under the list in Article 2(2) of the directive, but not by 'extended family members' under Article 3(2). Therefore, an application by analogy based on the dissuasive effect of the denial of residence rights for family members on the exercise of free movement rights by Union citizens would not be justified in the present case, which concerns an unmarried partner, who, according to Article 3(2) is not entitled to such a residence right.

34. I do not agree.

35. First, it is indeed true that more recent case-law of the Court regarding the residence rights of third-country national family members of 'returning Union citizens' has been concerned with the status of those who are 'family members' under Article 2 of Directive 2004/38. (16) I do not think that this fact should be turned around and interpreted as an intention to limit that case-law solely to 'family members'. An equally plausible explanation (indeed, from my point of view, a much more plausible explanation) is that those cases referred solely to family members because, quite simply, they only concerned family members.

36. That is especially true because, second, the overall logic underlying an application by analogy of the directive to 'family members' also applies fully to 'extended family members'. As the Commission rightly pointed out, this is particularly the case with regard to the unmarried partner

of a Union citizen who has resided lawfully, in accordance with Union law, in the host Member State. (17)

37. The logic of dissuasion or deterrence was built on the premiss that the Union citizen will be discouraged from moving, as those personally *close* to him will be barred from joining him. It ought to be acknowledged that social perceptions are changing and that there is a range of forms of cohabitation today. Thus, the potential to deter might in reality be stronger with regard to a partner under Article 3(2)(b) of Directive 2004/38 than it is perhaps with regard to some of the categories listed in Article 2(2) thereof. I am certainly not suggesting that that will always be the case. I am simply suggesting that with regard to who is effectively 'close' to a person, formal box-based generalisations are hardly appropriate. (18)

38. It might be added that recital 6 of Directive 2004/38 confirms that 'the unity of the family in a broader sense' is the objective which is pursued by Article 3(2) of the directive. (19) Thus, in this sense it is equally suitable to strengthen or create 'broader' family ties in the host Member State during the genuine residence of the Union citizen, and may indeed give rise to the same type of considerations based on dissuasion.

39. That being said, I must admit that there is one element of the dissuasion/deterrence logic, which was used to justify an application by analogy of Directive 2004/38 to Union citizens returning to their home Member States, which is not entirely convincing. In a nutshell, deterrence implies knowledge. It is rather difficult to be deterred from a certain course of action by something that I do not know exists at the time when the decision is taken or the future existence of which is at best rather uncertain.

40. On the one hand, such dissuasive effect may exist where the (extended) family member already enjoys a status in the Member State of nationality of the Union citizen before moving abroad. Free movement may prove a risky endeavour where a third-country national family member had already been awarded an immigration status in the Member State of origin of the Union citizen. That status could be lost by accompanying the Union citizen to another Member State. Even though EU law guarantees rights of residence in the second (or subsequent) host Member State, the prospect of not enjoying those rights upon return to the Member State of origin can reasonably be said to play a dissuasive role in the personal assessment of the factors to consider in the decision to exercise free movement. (20)

41. On the other hand, I have much more intellectual difficulty in contemplating any such discernible dissuasive effect on the decision to leave the home Member State in order to exercise free movement where the Union citizen had not yet established any family life. Could it really reasonably be suggested that, for example, a recent university graduate, who is perhaps considering a move to another Member State, will be influenced in his decision-making in that regard by thinking that perhaps in that Member State (or second or third Member State), he might meet the love of his life, and that later, assuming that the love of his life was indeed for life, perhaps he might like to return to his home Member State with that person permanently, but on realising that on his return that person would not be granted a right of residence, a discovery made after a careful and detailed study of the national immigration rules in his home Member State, which might perhaps still be applicable in the near or distant future, he is then deterred from even exercising his free movement rights at all, and simply stays at home?

42. Leaving aside scenarios in which the finding of one's true love abroad *is* the driving force to exercise one's free movement rights, the remote and hypothetical nature of such events and their (im)plausibility as a genuine basis for any normal person's life choices do not perhaps form the

most solid foundation for application by analogy (meaning an effective extension of the applicability beyond its clear wording) of Directive 2004/38 to returning Union citizens.

43. I would therefore suggest that the Court place greater emphasis on an alternative justification for an application by analogy of the conditions of Directive 2004/38 to 'returning' Union citizens and members of their (extended) family: not necessarily that one is likely to be *ex ante* discouraged from moving, but rather that one cannot be *ex post* effectively penalised for doing so. (21)

44. The case-law of the Court has already acknowledged in the context of the prohibition of discrimination that the exercise of free movement shall not entail an *ex post disadvantage* for Union citizens. (22) In my view, such a disadvantage arises in cases where, even though 'returning' citizens are subject to the same regulatory regime as nationals who have never exercised free movement, national rules do not acknowledge family ties created or strengthened in another Member State. (23)

45. Objectively different situations cannot and should not be treated the same. Otherwise, the danger (this time around neither remote nor hypothetical) is that free movement would result in the granting of a one-way ticket. It would lead to the perpetuation of expatriation. This sits uncomfortably with the right to move and reside *freelywithin the European Union*. (24)

46. In short, albeit perhaps with some refinement, the considerations that led the Court to an application by analogy of the rights of entry and residence of family members under Article 2(2) of Directive 2004/38 to Union citizens returning to their Member State of origin are equally applicable to 'extended family members' under Article 3(2) of the directive.

47. As a result, it must be concluded, in line with the submissions of the Spanish, Austrian, and Polish Governments, as well as those of the Commission, that a third-country national, the partner of a Union citizen in a durable relationship — who has exercised his right of freedom of movement — must, upon the return of the Union citizen to his home Member State, not receive treatment less favourable than that which the directive lays down for extended family members of Union citizens exercising their freedom of movement in other Member States.

2. **Article 3(2) of Directive 2004/38 'facilitation' of entry and residence of 'extended family members'**

48. The first and second preliminary questions ask the Court whether the requirements imposed by EU law require Member States to *issue* or alternatively to *facilitate* the provision of a residence authorisation to the unmarried partner of a returning Union citizen.

49. As the Commission and all the governments which have submitted observations to the Court have correctly contended, an application by analogy of the principles emanating from the judgment in *Singh* (25) entails that unmarried partners of 'returning EU citizens' shall be entitled to access the *facilitation* regime provided for in Article 3(2) of Directive 2004/38.

50. Ms Banger does not contradict that understanding, at least not directly. Her argument is more nuanced: while remaining within the obligation of facilitation contained in Article 3(2) of the directive, she submits that the refusal to issue her a residence card was not based on an extensive examination of her personal circumstances and was not justified by adequate or sufficient reasons, as required by that provision.

51. The Court has already clarified the content of the specific ‘facilitation regime’ of Article 3(2) of the directive applicable to extended family members, in *Rahman*. (26) That judgment emphasised three dimensions of that regime: the absence of an automatic right of entry and residence (i); the obligation to enact a facilitation regime according to national law for which Member States enjoy a margin of discretion (ii); and the fact that that discretion is not unlimited (iii).

52. First, Article 3(2) of Directive 2004/38 does not confer a *right* of entry or residence on extended family members. There is a distinction made between family members as defined in Article 2(2) of the directive, who have a right of entry and residence, and those mentioned in Article 3(2), whose entry and residence ‘has only to be facilitated’. (27) Hence, Directive 2004/38 does not oblige Member States to grant every application for entry or residence under Article 3(2). (28) Moreover, and in contrast to the rights to which EU citizens and the members of their families are entitled, Article 3(2)‘is not sufficiently precise to enable an applicant for entry or residence to rely directly on that provision in order to invoke *criteria* which should in his view be applied when assessing his application’. (29)

53. Second, as opposed to a right of residence, the material content of the obligation of facilitation provided for in Article 3(2) of Directive 2004/38 has been defined as the obligation of Member States to ensure that their legislation contains criteria which enable extended family members to obtain a decision on their residence application. That decision should be based on an extensive examination of their personal circumstances and, if the application is refused, it should be justified. (30)

54. As confirmed by recital 6 of Directive 2004/38, the situation of ‘extended family members’ should be examined by the host Member State ‘*on the basis of its own national legislation*, in order to decide whether entry and residence *could be granted* to such persons’. This means that, in the absence of more specific rules in the directive, and in the light of the words ‘in accordance with its national legislation’, Member States have a wide discretion in the *selection of the factors* to be taken into account for the application of their obligations under Article 3(2). (31) This discretion necessarily entails that Member States can define the *specific* conditions and criteria for the application of this provision in their national legislation and the factors to be taken into account.

55. It is also clear that that margin of discretion necessarily means that those conditions, criteria and factors may *differ* from one Member State to another, as Member States may fulfil their obligations to transpose this provision in different ways. (32)

56. Third, the discretion conferred by Article 3(2) of Directive 2004/38 is not unfettered. This provision contains the specific limits that circumscribe the latitude enjoyed by Member States: the pertinent national rules should be consistent with the notion of ‘facilitation’ and comply with the requirements of extensive examination of personal circumstances and justification in case an application is refused.

57. The first limit follows from the wording of the provision and the concept of ‘facilitation’. Indeed, the words ‘shall facilitate’ indicate that Article 3(2) ‘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 ...’. (33) Therefore, ‘the host Member State must ensure that its legislation contains criteria which are consistent with the normal meaning of the term “facilitate” ...’. (34) As a corollary of the obligation of facilitation, the Court has recalled that the national provisions adopted shall not deprive Article 3(2) of its effectiveness. (35)

58. Put simply, there is quite some latitude for the Member States, both regarding the substantive criteria and the procedural conditions, while 'facilitating'. Nonetheless, the bottom line is that 'extended family members' must be better off than the *general* category of third-country nationals. (36)

59. The second limit stems from the last sentence of Article 3(2) of Directive 2004/38. That provision imposes on Member States a double obligation: to undertake 'an extensive examination of the personal circumstances' and to 'justify any denial of entry or residence to these people'. Therefore, Member States must make it possible 'to obtain a decision on their application that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons'. (37) The extensive examination means, according to recital 6, taking into account various relevant factors, such as the relationship with the Union citizen or any other circumstances, such as financial or physical dependence on the Union citizen. (38)

60. As a consequence, it follows from the wording of Article 3(2) of Directive 2004/38, as interpreted by this Court in the judgment in *Rahman* and outlined in this section, that that provision does not entail any automatic residence right. Hence, the application by analogy of that provision to situations in which an extended family member accompanies a 'returning Union citizen' back to his Member State of origin equally cannot lead to any automatic right of residence. The applicability by analogy of Article 3(2) of the directive can only reach as far as Article 3(2) itself could have reached, if it were applicable in itself — but not beyond that point. Indeed, as the case-law of the Court has already confirmed, the 'application by analogy' of secondary free movement law to family members of 'returning' Union citizens does not amount to an automatic recognition of the residence rights enjoyed in the second Member State: the application by analogy of the provisions of secondary law remains subject to the conditions provided for therein. (39)

3. **The present case**

61. In the circumstances of the present case, the primary law foundations for an application by analogy of the pertinent provisions of Directive 2004/38 may be found in Article 45 TFEU (if, as it appears, the referring Court confirms that Mr Rado was exercising his right to free movement as a worker in the Netherlands) or, on a subsidiary basis, in Article 21(1) TFEU.

62. According to that application by analogy, an unmarried partner with whom the Union citizen has a durable relationship and with whom a Union citizen has created or strengthened family ties in another Member State while exercising his free movement rights, is entitled to have her application examined pursuant to the requirements of Article 3(2) of Directive 2004/38, upon the return of the Union citizen to his Member State of origin.

63. In the present case, it seems that Ms Banger was granted a residence card in the Netherlands on the basis of Article 3(2) of Directive 2004/38. She lived together with Mr Rado as an extended family member while Mr Rado was exercising his residence rights in that Member State. It appears that this allowed them to enjoy and strengthen their family life.

64. In those circumstances, a combined interpretation of the TFEU (Article 21(1) or Article 45 TFEU) and Article 3(2) of Directive 2004/38 entitles Ms Banger to have her application examined extensively, and to be provided with reasons justifying any denial of entry or residence on the basis of the results of that examination. This examination shall cover, in particular, her specific personal circumstances, including her relationship with the Union citizen.

65. It appears, from the elements provided in the order for reference and from the submissions to this Court, that the sole reason for rejection of her application for a residence card was that Ms Banger and Mr Rado were not married at the time that the application was made. If that is indeed the case, this is insufficient to fulfil the requirement to provide justification based on an extensive examination of the personal circumstances of extended family members under Article 3(2)(b), which covers persons who are *not married*, but in a durable relationship with the Union citizen.

66. On its wording, 'extensive examination of the personal circumstances' shall reasonably include ascertaining the nature of the relationship with the returning Union citizen. This would then logically also include taking into account for evidentiary purposes that by the issuing of a residence card by another Member State, a durable relationship had already been acknowledged and duly attested.

67. I wish to stress that that fact, in and of itself, may not however necessarily lead to the right of residence in the Union citizen's Member State of origin being granted (or, for that matter, in any other Member State to which the couple may decide to move). Again, as (for that precise reason quite extensively) discussed in general in the previous section, the obligation to *facilitate* does not mean the obligation to automatically *issue*. The fact that, within limits, Member States are entitled to set their own specific criteria in this area logically means that there is neither a 'mutual recognition obligation' of the residence authorisations issued by other Member States, nor for that matter an obligation to provide at least the same or better treatment than in the preceding host Member State(s).

68. In my view, neither the *ex ante* dissuasion/deterrence, nor the *ex post* penalisation logic should be pushed so far as to effectively mean that any and all successive Member States to which a Union citizen decides to move should provide at least the same or better treatment than the preceding Member State(s). That would indeed reach far beyond any application by analogy and the notion of facilitation.

4. **Interim conclusion**

69. As a result, I propose that the first three questions posed by the referring court be answered as follows:

– Article 21(1) and Article 45 TFEU must be interpreted as meaning that, where a Union citizen has created or strengthened his family life during the exercise of residence rights in another Member State, the facilitation regime provided for in Article 3(2) of Directive 2004/38 is applicable by analogy to the partner with whom the Union citizen has a durable relationship upon the return of the Union citizen to his Member State of origin. As a result, that Member State must facilitate, within the meaning of Article 3(2) of the directive, in accordance with its national legislation, the entry and residence of the partner with whom the Union citizen has a duly attested durable relationship.

– When a Union citizen returns to his Member State of origin after having exercised his residence rights in another Member State where he has created or strengthened his family life with a partner with whom he has a duly attested durable relationship, Article 21(1) and Article 45 TFEU require that, when deciding on the entry and residence of that partner, the Member State of origin of the Union citizen undertakes an extensive examination of their personal circumstances and justify any refusal of entry or residence, pursuant to Article 3(2) of Directive 2004/38.

B. **Question 4: right to an effective remedy**

70. By its fourth question, the referring court seeks to ascertain whether a rule of national law which precludes an appeal to a court or tribunal against a decision of the executive refusing to issue a residence card to a person claiming to be an extended family member of a Union citizen is compatible with Directive 2004/38.

71. The order for reference suggests that this question is motivated by the fact that a differently constituted chamber of the Upper Tribunal decided that an applicant who is refused a residence card as an 'extended family member' does not have a right of appeal to the competent tribunal under Regulation 26 of the EEA Immigration Regulations. (40) This is because the decision taken by the Secretary of State using her discretion not to issue a residence card to an extended family member is not considered to be a decision on 'a person's entitlement to be issued with … a residence card'. (41) The referring court explains that, if that was correctly decided, the judgment in *Sala* would imply that the applicant would have no right to pursue her appeal in the main proceedings. Judicial review would then be the only available potential remedy. (42)

72. From the submissions made by the interested parties to this Court (the order for reference being very concise in this regard), it follows that under the law of England and Wales, the default system for challenging acts of administrative authorities is the system of 'judicial review'. In specific areas or contexts, statutory rights of appeal have been created through legislation. (43) The latter is also true in the case of the rights of family members of Union citizens. As the United Kingdom Government has clarified, under the law of England and Wales, 'family members' covered by Article 2(2) of Directive 2004/38 have a right of appeal to the First-tier Tribunal (and subsequently, to the Upper Tribunal). However, in the light of the judgment in *Sala*, persons covered by Article 3(2) of the directive do not have access to that appeal system. They have a right to challenge a decision refusing a residence card by way of judicial review in the High Court of England and Wales (Administrative Court).

73. The fourth question of the referring court therefore has to be understood in the light of that particular national legal context. Seen from that perspective, the main issue underlying the fourth question of the referring court is not whether there is a *total* lack of judicial protection available to extended family members but, rather, whether the system of judicial review complies with the requirements of EU law or whether access to the system of appeals is necessary.

74. The United Kingdom Government and Ms Banger hold opposite views in this regard.

75. Ms Banger contends that the remedy of judicial review cannot be deemed to be an effective remedy for the purposes of Directive 2004/38 and of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). Judicial review is not a satisfactory means of reviewing a decision refusing to grant a residence card. It is not concerned with the decision itself, but with the decision-making process. Ms Banger further explained at the hearing the differences between the system of appeals and that of judicial review concerning the conditions of access to both systems, the costs, the scope of the review and the nature of the remedies that can be awarded. She contended that a challenge under judicial review is only based on the legality of a decision and that there are limited grounds for review. In her view, judicial review in the present case can only be successfully based on the ground of unreasonableness, so that the scope of the challenge is reduced and does not cover factual elements.

76. Conversely, the United Kingdom Government submits that the judicial review system fully complies with the requirements of EU law. EU law does not require Member States to provide a

particular statutory right of appeal. Nor does it require them to provide a full review on the merits of decisions in which the court or tribunal may substitute its assessment for that of the original decision-maker. At the hearing, the United Kingdom Government agreed with the Commission's submissions that EU law requires a full review of the decision, including consideration of the facts and proportionality. (44)That government maintained that judicial review fully complies with those standards, as it allows for an examination not only of the legal basis of the decision, but also factual errors and proportionality. (45)

77. I dwelt on the explanation of the background of the referring court's fourth question and the position of the interested parties in quite some detail for one reason: to demonstrate why I do not think that the Court should answer the question as it is posed. Three reasons for that course of action stand out.

78. First, it is not the task of this Court to undertake an examination of the different features of the diverse systems of judicial protection in national law. (46) That would require a detailed examination and evaluation of national law, which is a task for national courts.

79. Second, it is even less the task of this Court to carry out such an examination with regard to a rather complex and evolving field of law - which is the nature of judicial review in English law - (47) and then effectively be called upon to arbitrate between the various national actors that may not agree themselves on what the current standards are.

80. Third, the preliminary ruling procedure is always tied to a specific dispute in the main proceedings before a national court. Within such a framework, a *concrete* procedural or substantive provision of national law might indeed be *indirectly* examined. However, this Court cannot provide for abstract advisory opinions on the (un)suitability of whole areas of law or systems of judicial protection in general, (48) which would, in order to be carried out, involve discussing anything and everything from standing, to costs, time limits, the scope of review, remedies that can be awarded, or means of appeal.

81. However, what this Court could provide and in the spirit of cooperation perhaps should provide, in order to assist the national court with regard to the issues raised by the fourth question, is clarification on the obligations and requirements under EU law with regard to an effective remedy in the context of an application by analogy of Article 3(2) of Directive 2004/38. (49)

82. With this aim in mind, in this section, I will first examine the procedural safeguards embedded in the directive itself (1), and then turn to the general requirements emanating from Article 47 of the Charter (and from the principles of effectiveness and equivalence) (2). Finally, I will examine the implications of the fundamental right to an effective remedy with regard to the specific context of Article 3(2) of the directive (3).

1. **Judicial protection pursuant to Articles 15 and 31 of Directive 2004/38**

83. Directive 2004/38 contains specific provisions concerning judicial protection of free movement rights. Those relevant for the present case are contained in its Articles 15 and 31. The latter provisions find their historical predecessors in the procedural safeguards of Directive 64/221/EEC, which expressly allowed for limitations to judicial protection, including limiting appeals to the legal validity of decisions. (50) Eventually, those much debated limitations (51) have been superseded by Directive 2004/38. The latter expressly recognises a right of access to judicial redress of issues of law and facts both with regard to decisions imposed by reasons of public order and public security, and by any other restrictions to the rights of movement and residence.

84. In points 23 to 47 of this Opinion, I suggested that the facilitation regime of Article 3(2) of Directive 2004/38 is to be applied by analogy to extended family members of returning Union citizens. It has also been suggested that that application by analogy means exactly that: the application of the content of the directive, but not the creation of any new rights.

85. The specific problem that such a 'renvoi' back to the directive poses in the present case is that Article 3(2) of the directive itself does not set out the specific procedural guarantees that shall accompany the implementation of that provision. It is thus not entirely clear what those judicial guarantees would be if Article 3(2) were per se applicable to an extended family member in a host Member State.

86. The key question thus becomes the personal scope of Article 15 of Directive 2004/38. According to the Commission and the United Kingdom Government, Article 15 of the directive is, in general, not applicable to situations covered by Article 3(2) of that directive. That is because Article 15 only refers to Union citizens and their 'family members'. The latter notion, which is legally defined in Article 2(2) of the directive, does not include extended family members.

87. I accept the value of that textual argument. The natural conclusion that should normally follow from that statement is nonetheless somewhat qualified by the systematic consideration that the notion of 'family members' does not appear to be used consistently in subsequent provisions of Directive 2004/38. (52)

88. There is, however, quite a strong argument in favour of a broader scope of Article 15 of Directive 2004/38. That provision states that procedural safeguards shall apply 'to all decisions restricting free movement of Union citizens and their family members'. Thus, although it could be said that extended family members are not covered by the notion of 'family members' contained in that provision, a refusal of a residence card to those persons could in fact be rather easily classed as a 'restriction' to free movement rights of the *Union citizen* himself, who is clearly covered.

89. Perhaps it is not a front runner for a 'humanist case-law award', but it has long been recognised by this Court that the derived right of residence of family members of Union citizens is *instrumental* in ensuring the free movement rights of the Union citizens themselves. (53) As further argued in points 36-38of this Opinion, the facilitation regime contained in Article 3(2) of the directive responds to the same dynamic of buttressing the free movement rights of Union citizens. Within such logic of indirect limitation and impediment, considering the refusal to allow an extended family member to join the returning Union citizen as a decision effectively 'restricting free movement of a Union citizen' appears to me as the smallest leap of faith.

90. Be that as it may, the practical implications of the applicability of Article 15 of Directive 2004/38 are somehow limited in the circumstances of the present case. As I will argue in the following section of this Opinion, those submitting applications under Article 3(2) of the directive are entitled, in any case, to the procedural guarantees deriving from Article 47 of the Charter, which reflect the general principle of EU law of effective judicial protection.

2. **Effective judicial protection on the basis of Article 47 of the Charter**

91. Ever since the judgment in *Heylens*, (54) it has been clear that the principle of effective judicial protection requires that, even in the absence of specific secondary law provisions establishing procedural safeguards, there must be a remedy of a judicial nature against any decisions of national authorities refusing the rights granted by EU law. This obligation also flows from Article 4(3) TEU and Article 19(1) TEU. (55)

92. Such a judicial remedy must be available not only in the case of a right of entry granted by EU law. Recently, the Court has confirmed the need to guarantee review by a court in accordance with Article 47 of the Charter and the principle of effectiveness in the judgment in *El Hassani,* a case concerning the refusal of a Schengen visa. That is a field where national authorities have a broad discretion regarding the applicable conditions and evaluation of the relevant facts. (56) In addition, in my opinion, there is *no right* to be granted a visa. However, the fact that the law does not provide for any substantive right to a certain outcome does not mean that the applicant does not have the right to have his application fairly and properly processed, and, if need be, in that regard, a right to judicial protection. (57)

93. It is therefore undisputed that in the present case, even assuming that Article 15 of Directive 2004/38 were not applicable to the persons covered by Article 3(2) of that directive, access to *judicial* redress emanates from the joint operation of Article 3(2) of the directive and Article 47 of the Charter. None of the interested parties which submitted observations has argued that access to courts should not be the rule in cases of refusal of residence cards to extended family members. The contentious issue is, rather, the scope and intensity of the judicial scrutiny required.

94. The inapplicability of Article 15 of Directive 2004/38 with regard to Article 3(2) thereof would mean that there are no specific rules determining the scope of judicial scrutiny. It is established case-law that in the absence of such specific requirements, those elements must be determined by the system of organisation of the courts of each Member State. (58) That procedural autonomy of the Member States encounters however two limits: the principles of equivalence and effectiveness. (59)

95. Moreover, it is also undisputed that the present case concerns a situation in which a Member State is implementing EU law in the sense of Article 51(1) of the Charter. Thus, the standard of protection provided by Article 47 must be respected. (60)

(a) Equivalence

96. The principle of equivalence requires that the rules concerning actions with regard to infringements of EU law apply without distinction (or are not less favourable) than the rules governing comparable domestic actions. (61)

97. Nothing in the information that has been presented to this Court indicates that this principle has been infringed. This case concerns the difference in the system of judicial protection available to one group of persons (extended family members) as opposed to another group of persons who derive their rights from EU law (family members *stricto sensu*). Such a comparison falls outside the scope of the principle of equivalence, since both groups of persons stem from EU law. (62)

98. However, Ms Banger has contended at the hearing that excluding the right to appeal for partners in a durable relationship (as extended family members) of Union citizens establishes a different treatment when compared with partners of British citizens in a durable relationship, presumably those who did not exercise their free movement rights. As this argument was not further developed, it is not possible for this Court to ascertain the national claims with regard to which the compliance with the principle of equivalence could be examined. It thus remains for the referring court to ascertain whether the claims against a refusal of residence cards for extended family members (both under the directive and with regard to its application by analogy to extended family members of ‘returning citizens’) do not receive a less favourable treatment than other similar claims under domestic law.

(b) **Effectiveness**

99. Following the Treaty of Lisbon, effectiveness of judicial protection has emerged under two headings: effectiveness as one of the dual requirements under the heading of procedural autonomy of the Member States, and effectiveness qua a fundamental right to an effective judicial remedy under Article 47 of the Charter.

100. It is still open to debate how exactly those two 'effectivenesses' relate to one another. (63) For all practical purposes, however, I fail to see what in fact Article 47 of Charter would add, in the realm of *judicial* remedies, to what was not (or rather could not have been, if such a question ever arose) part of the principle of effectiveness. That is certainly the case if the latter were understood as not only preventing the *impossibility* of enforcing an EU law claim, but also rendering it *excessively difficult*. It might be recalled that both of them were naturally applicable only within the scope of EU law and in relation to an actual EU law based claim.

101. Be that as it may, it would appear that since the entry into force of the Charter, Article 47 has been developing in a more robust manner. (64)Reviewing the case-law of the Court, it would indeed appear that Article 47 of the Charter currently sets a higher standard than the principle of effectiveness. How far that stems from the text of Article 47 of the Charter itself and how far that fact is the natural and simple consequence of the newer, post-Lisbon case-law focusing on and being developed on the basis of that article, can safely be left to scholarly discussion. The salient elements of the case-law can be summarised as follows.

102. In the context of the principle of effectiveness as a limit to the procedural autonomy of the Member States, the Court has held that it is not required that, in all circumstances, courts be able to *substitute* the decision on the merits and facts. (65) The case-law of the Court also shows that judicial review that is limited with regard to the assessment of certain questions of fact does not always make it impossible in practice or excessively difficult to exercise the rights conferred by EU law. (66) What matters is that national judicial review procedures 'enable the court or tribunal hearing an application for annulment of such a decision to apply effectively the relevant principles and rules of EU law when reviewing the lawfulness of the decision'. (67) The scope and intensity of judicial review required by the principle of effectiveness depends on the content and nature of the relevant principles and rules of EU law implemented through the national decision challenged. (68)

103. The obligation to carry out a more comprehensive review, including a review of the facts and the merits of a decision, becomes more prominent under the requirements of Article 47 of the Charter if such an examination is relevant, having due regard to the circumstances of the case at issue. Indeed, concerning the right of *access to a court*, the Court has held that 'for a "tribunal" to be able to determine a dispute concerning rights and obligations arising under EU law in accordance with Article 47 of the Charter, [that tribunal] must have power to consider *all the questions of fact and law that are relevant to the case before it*'. (69) In the context of the review of administrative action, the Court has also held that the requirement of impartiality laid down in the second paragraph of Article 47 entails that 'a decision of an administrative authority that does not itself satisfy the conditions of independence and impartiality must be subject to subsequent control by a judicial body that must, in particular, have jurisdiction to consider *all the relevant issues*'. (70)

104. Compliance with the right to effective judicial protection must, therefore, be examined in relation to the specific context and the relevant circumstances of a case, 'including the nature of the act at issue, the context in which it was adopted and the legal rules governing the matter in question'. (71) As a result, having in mind the specific EU law rules and the specific nature of the rights and interests at issue, the Court has insisted on the need for a thorough review of decisions

covering both the facts and the law, in particular where the instruments at issue already contained certain harmonised procedural standards. (72)

105. Finally, further general inspiration (73) might be drawn from the case-law of the ECtHR interpreting Articles 6 and 13 ECHR. According to the case-law of the ECtHR with regard to Article 6 ECHR, the sufficiency of the judicial review available to an applicant is assessed with regard to the powers of the judicial body in question and to factors such as: '(a) the subject matter of the decision appealed against, in particular, whether or not it concerned a specialised issue requiring professional knowledge or experience and whether it involved the exercise of administrative discretion and if, so, to what extent; (b) the manner in which that decision was arrived at, in particular, the procedural guarantees available in the proceedings before the adjudicatory body; and (c) the content of the dispute, including the desired and actual grounds of appeal'. (74)

106. It is perhaps worth stressing that, considering these factors, the ECtHR has declared on several occasions that the judicial review available under English law was sufficient. (75) However, the ECtHR has found violations of Article 6(1) ECHR where the reviewing court was precluded from determining the *central issue in dispute* or where the domestic courts considered themselves bound by the prior findings of administrative bodies which were decisive for the outcome of the cases before them, without examining the issues independently. (76)

107. Two (interrelated) points are worth highlighting in lieu of a conclusion: first, the best possible generalisation as to the scope and depth of the review emerging from the case-law is rather laconic: it depends on several factors. It depends on the particular nature of the EU law based rights and entitlements as set by the applicable EU law rules at issue, analysed in a given context related to the subject matter of the dispute. Second, the more harmonised the (procedural) standards in EU law itself, the more thorough the review likely to be required at the national level. Conversely, as in many other areas of EU law, the less explicit the provisions of EU law on the matter, the greater the leeway given to the Member States in shaping the way judicial protection is provided.

3. **Effective judicial protection and Article 3(2) of Directive 2004/38**

108. What then are the specific entitlements granted by the applicable EU law provisions at issue in the present case? As stated in *Rahman*, Article 3(2) of the directive grants Member States a wide discretion. (77) That discretion is not however unfettered. The Commission has rightly pointed out that such a discretion concerns the selection of factors and conditions adopted by Member States in compliance with their duty to adopt national provisions to provide a facilitated regime of entry and residence for extended family members. That discretion also extends to the specific assessment of the relevant facts in order to determine whether those conditions are met.

109. However, discretion is not code for 'black box'. According to the case-law of this Court, even where the competent authorities have discretion, judicial review must address whether the decision is based on a sufficiently solid factual basis and whether it complies with the procedural guarantees. (78) In order to determine whether the limits of the discretion set by the directive have been respected, national courts must be able to review all the procedural aspects as well as the material elements of the decision, including its factual basis. (79)

110. Again, the judgment in *Rahman* has already provided solid guidance in this regard: an applicant under Article 3(2) 'is entitled to a judicial review of whether the national legislation and its application have remained within the limits of the discretion set by [the] directive'. (80) Indeed, although the directive leaves a considerable margin of discretion, it must be possible for national

courts to check the compatibility of a national decision with the obligations established in Article 3(2) of the directive.

111. The elements that must be available for judicial scrutiny flowing from Article 3(2) of the directive are, beyond the requirement of facilitation, essentially threefold: that the decision to be reviewed must be the result of an *extensive examination* (i), which then logically must be reflected in the reasons given for potentially *justifying any denial of entry or residence* (ii). Furthermore, that examination must be done on the basis of *personal circumstances*, which includes the relationship with the Union citizen and the situation of dependence (iii).

112. All those elements must be reviewable by a court or tribunal. A national court must have the competence to proceed, if it deems necessary, to the verification of the key relevant facts serving as the basis of the administrative decision. (81) It must be possible to gauge whether the reasons adduced by the administration duly correspond to the criteria established by national law, within the limits imposed by Directive 2004/38. It must also be possible to ascertain the sufficiency and adequacy of the justification. In particular, it must be possible to assess whether the specific personal circumstances relevant to the pertinent criteria have been duly examined.

113. Conversely, as long as all those elements can be reviewed and any administrative decision breaching those requirements can be annulled, an effective remedy under Article 47 of the Charter does not require, in my opinion, the reviewing court or tribunal to have the competence to examine new evidence. Nor does it require it to establish facts not presented before the administrative authority, or to have the power to immediately substitute the administrative decision with its own judgment.

114. It is for the referring court, which alone has jurisdiction to interpret national law, to determine whether and to what extent the system of judicial review in the main proceedings satisfies those requirements.

4. **Interim conclusion**

115. In the light of the foregoing considerations, it is my view that the answer to the fourth preliminary question should be that Article 3(2) of Directive 2004/38 must be interpreted as requiring effective judicial review of decisions denying entry or residence to extended family members, in line with Article 47 of the Charter. It is for the competent national court to ascertain whether the system of judicial review available under national law complies with that requirement.

V. **Conclusion**

116. In the light of the foregoing, I propose that the Court reply to the questions raised by the Upper Tribunal (Immigration and Asylum Chamber), London (United Kingdom) as follows:

– Article 21(1) and Article 45 TFEU must be interpreted as meaning that, where a Union citizen has created or strengthened his family life during the exercise of residence rights in another Member State, the facilitation regime provided for in Article 3(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC is applicable by analogy to the partner with whom the Union citizen has a durable relationship upon the return of the Union citizen to his Member State of origin. As a result, that Member State must facilitate, within

the meaning of Article 3(2) of the directive, in accordance with its national legislation, the entry and residence of the partner with whom the Union citizen has a duly attested durable relationship.

– When a Union citizen returns to his Member State of origin after having exercised his residence rights in another Member State where he has created or strengthened his family life with a partner, with whom he has a duly attested durable relationship, Article 21(1) and Article 45 TFEU require that, when deciding on the entry and residence of that partner, the Member State of origin of the Union citizen undertakes an extensive examination of their personal circumstances and justifies any refusal of entry or residence, pursuant to Article 3(2) of Directive 2004/38.

– Article 3(2) of Directive 2004/38 must be interpreted as requiring effective judicial review of decisions denying entry or residence to extended family members, in line with Article 47 of the Charter of Fundamental Rights of the European Union. It is for the competent national court to ascertain whether the system of judicial review available under national law complies with that requirement.

1 Original language: English.

2 Directive of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77) (‘Directive 2004/38’).

3 Judgment of 7 July 1992(C-370/90, EU:C:1992:296). See also judgments of 11 December 2007,Eind(C-291/05, EU:C:2007:771), and of 12 March 2014, O. and B. (C-456/12, EU:C:2014:135).

4 It is apparent from the submissions of Ms Banger that she married her partner in the United Kingdom on 27 September 2014, after the couple had left the Netherlands. However, this fact was *not taken into account* by the Secretary of State, since Regulation 9(2)(b) of the EEA Regulations, concerning the rights of family members of British citizens, requires that spouses are ‘living together in the EEA State or had entered into the marriage ... and were living together in the EEA State *before the British citizen returned* to the United Kingdom’. Emphasis added.

5 According to which, when Union citizens return to their Member State of nationality after having exercised a right of residence in another Member State, their family members must enjoy at least the same rights as would be granted to them under EU law in another Member State. Judgment of 7 July 1992, Singh(C-370/90, EU:C:1992:296).

6 Judgment of 7 July 1992(C-370/90, EU:C:1992:296).

7 The notion of ‘extended family members’ covers both subcategories contained in Article 3(2) of Directive 2004/38, namely ‘other family members’ of Article 3(2)(a) and ‘the partner with whom the Union citizen has a durable relationship, duly attested’ under Article 3(2)(b).

8 Judgment of 7 July 1992(C-370/90, EU:C:1992:296).

9 Judgment of 12 March 2014, O. and B. (C-456/12, EU:C:2014:135, paragraph 37). See also judgments of 8 November 2012, Iida(C-40/11, EU:C:2012:691, paragraph 61 et seq.); of 10 May 2017, Chavez-Vilchez and OthersChavez-Vilchez and OthersChavez-Vilchez and Others (C-133/15, EU:C:2017:354, paragraph 53); and of 14 November 2017, Lounes(C-165/16, EU:C:2017:862, paragraph 33).

10 Judgments of 12 March 2014, O. and B. (C-456/12, EU:C:2014:135, paragraphs 39 to 43), and of 14 November 2017, Lounes(C-165/16, EU:C:2017:862, paragraphs 33 to 37).

11 The Court has relied on different provisions of primary law to extend by analogy the application of different secondary law instruments to ‘returning nationals’. See, with regard to Article 52 of the EEC Treaty and Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14), judgment of 7 July 1992, Singh(C-370/90, EU:C:1992:296, paragraph 25). With regard to Article 39 EC and Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 II, p. 475), see judgment of 11 December 2007, Eind (C-291/05, EU:C:2007:771, paragraphs 32 and 45). Article 21(1) TFEU has served as the basis for the application by analogy of Directive 2004/38 in the judgment of 12 March 2014, O. and B. (C-456/12, EU:C:2014:135, paragraph 61).

12 Judgment of 7 July 1992(C-370/90, EU:C:1992:296, paragraph 19).

13 Judgment of 7 July 1992, Singh(C-370/90, EU:C:1992:296, paragraph 23).

14 Judgment of 11 December 2007(C-291/05, EU:C:2007:771, paragraph 36). See also judgments of 8 November 2012, Iida (C-40/11, EU:C:2012:691, paragraph 70), and of 12 March 2014, O. and B.O. and B. (C-456/12, EU:C:2014:135, paragraph 46).

15 Judgment of 12 March 2014 (C-456/12, EU:C:2014:135, paragraph 61).

16 For example, in the judgment of 7 July 1992, Singh (C-370/90, EU:C:1992:296), the Court spoke about ‘a spouse and children’ (paragraph 20). The judgment of 11 December 2007, Eind (C-291/05, EU:C:2007:771) concerned the child of an EU citizen. The judgment of 12 March 2014, O. and B.O. and B. (C-456/12, EU:C:2014:135) concerned married couples.

17 See, by way of analogy, judgment of 12 March 2014, O. and B. (C-456/12, EU:C:2014:135, paragraph 47).

18 It might be added that an evolution of the notion of ‘family life’, acknowledging and taking on board de facto ties, is also present in the case-law of the European Court of Human Rights (‘the ECtHR’). Notwithstanding the issue of the specific obligations ensuing from the existence of family life in the particular migration context, the ECtHR has declared that the notion of ‘family’ under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (‘ECHR’) ‘is not confined to marriage-based relationships and may encompass other de facto “family” ties where the parties are living together out of wedlock’, in situations where children were born out of wedlock. See judgment of the ECtHR of 24 June 2010, *Schalk and Kopf v. Austria* (CE:ECHR:2010:0624JUD003014104, § 91). At § 94, the ECtHR further confirmed that same-sex unmarried couples living in stable de facto partnerships were covered by the concept of family life.

19 A similar ‘facilitation’ requirement was provided for in Article 10(2) of Regulation No 1612/68 and in Article 1(2) of Directive 73/148.

20 Opinion of Advocate General Tesauro in Singh (C-370/90, EU:C:1992:229, point 8).

21 That justification was already foreseen in the Opinion of Advocate General Tesauro inSingh (C-370/90, EU:C:1992:229, points 7 and 8).

22 See, for example, judgment of 11 July 2002, D’Hoop (C-224/98, EU:C:2002:432, paragraph 31); of 29 April 2004, Pusa (C-224/02, EU:C:2004:273, paragraph 19); of 18 July 2006,

De CuyperDe Cuyper (C-406/04, EU:C:2006:491, paragraph 39); or of 11 September 2007, Schwarz and Gootjes-SchwarzSchwarz and Gootjes-SchwarzSchwarz and Gootjes-Schwarz (C-76/05, EU:C:2007:492, paragraph 88).

23 Indeed, the reality of free movement gives rise to different situations than those of 'static citizens', which must not be treated in the same way. See, to that effect, judgment of 2 October 2003, Garcia AvelloGarcia Avello (C-148/02, EU:C:2003:539, paragraph 31 et seq.).

24 See, in this regard, Opinion of Advocate General Sharpston in *O and Others* (C-456/12 and C-457/12, EU:C:2013:837, point 89).

25 Judgment of 7 July 1992 (C-370/90, EU:C:1992:296).

26 Judgment of 5 September 2012, Rahman and Others (C-83/11, EU:C:2012:519).

27 Judgment of 5 September 2012, Rahman and Others (C-83/11, EU:C:2012:519, paragraph 19).

28 Judgment of 5 September 2012, Rahman and Others (C-83/11, EU:C:2012:519, paragraph 18). See also Opinion of Advocate General Wathelet in Coman and OthersComan and Others (C-673/16, EU:C:2018:2, points 94 to 96).

29 Judgment of 5 September 2012, Rahman and Others (C-83/11, EU:C:2012:519, paragraph 25). Emphasis added.

30 Judgment of 5 September 2012, Rahman and Others (C-83/11, EU:C:2012:519, paragraph 22).

31 Judgment of 5 September 2012, Rahman and Others (C-83/11, EU:C:2012:519, paragraph 24).

32 See, in this regard, Opinion of Advocate General Bot in Rahman and Others (C-83/11, EU:C:2012:174, point 64).

33 Judgment of 5 September 2012, Rahman and Others (C-83/11, EU:C:2012:519, paragraph 21).

34 Judgment of 5 September 2012, Rahman and Others (C-83/11, EU:C:2012:519, paragraph 24).

35 Judgment of 5 September 2012, Rahman and Others (C-83/11, EU:C:2012:519, paragraph 24).

36 While of course acknowledging that certain third-country nationals (non-family members of Union citizens) may enjoy *rights* of entry and residence, for example, on the basis of the right to family life. See Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12). The reference in the judgment of 5 September 2012, Rahman and Others (C-83/11, EU:C:2012:519, paragraph 21) is thus to be understood as referring to the *general* category of third-country nationals who *do not enjoy* any such entry and residence rights. See, on this debate, Guild, E., Peers, S., and Tomkin, J., *The EU Citizenship Directive. A Commentary*, Oxford University Press, Oxford, 2014, p. 74, footnote 203.

37 Judgment of 5 September 2012, Rahman and Others (C-83/11, EU:C:2012:519, paragraph 22).

38 See also judgment of 5 September 2012, Rahman and Others (C-83/11, EU:C:2012:519, paragraph 23).

39 Judgment of 11 December 2007, Eind (C-291/05, EU:C:2007:771, paragraph 39). See also Opinion of Advocate General Mengozzi in Eind (C-291/05, EU:C:2007:407, paragraphs 38 and 39).

40 *Sala* (EFM's: Right of Appeal) [2016] UKUT 411 (IAC).

41 *Sala* (EFM's: Right of Appeal) [2016] UKUT 411 (IAC), paragraph 84.

42 *Sala* (EFM's: Right of Appeal) [2016] UKUT 411 (IAC) explicitly states, in its paragraph 23, that 'in *Rahman* the Court made clear that a full merits-based appeal was not required by [Directive 2004/38]; only a judicial review to ensure that the decision-maker has "remained within the limits of the discretion set by [the] Directive"'. It appears however that the Court of Appeal formed a different legal opinion in the recent judgment of 9 November 2017 in *Khan v Secretary of State for the Home Department & Anor* [2017] EWCA Civ 1755. At the hearing, the United Kingdom Government insisted that that judgment has no bearing on the present proceedings since that decision concerned the interpretation of national law, which is no longer in force.

43 See, generally, for example, Sir Clive Lewis, *Judicial Remedies in Public Law*, 5th ed., Sweet & Maxwell, 2015, or Supperstone, M., Goudie, J., Walker, P., and Fenwick, H., *Judicial Review*, 5th ed., LexisNexis, United Kingdom, 2014.

44 The United Kingdom Government cites in this connection the judgments of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461), and of 8 December 2011, *KME Germany and Others* v *Commission* (C-272/09 P, EU:C:2011:810).

45 The United Kingdom Government referred in this regard in particular to the judgment of Court of Appeal of England and Wales in *T-Mobile (UK) Ltd v Office of Communications* [2009] 1 WLR 1565, and to the judgment of the Supreme Court in *R (on the application of Kiarie) v Secretary of State for the Home Department* and *R (on the application of Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42.

46 See, similarly, Opinion of Advocate General Ruiz-Jarabo Colomer in Joined CasesShingara and RadiomShingara and RadiomShingara and Radiom (C-65/95 and C-111/95, EU:C:1996:451, point 60).

47 As noted by Advocate General Sharpston in her Opinion in East Sussex County Council (C-71/14, EU:C:2015:234, point 84).

48 For a similar recent situation, concerning the issue of whether or not the designation of civil rather than administrative courts as competent for the enforcement of debts owed to the European Union complies with the principle of effectiveness, see my Opinion in Dimos ZagoriouDimos ZagoriouDimos Zagoriou (C-217/16, EU:C:2017:385, points 28 and 60 to 63).

49 Again similar to the Opinion of Advocate General Sharpston in East Sussex County Council (C-71/14, EU:C:2015:234, point 84).

50 Council Directive of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117), in particular its Article 9.

51 It was argued that those limitations were not in line with the principle of effective judicial protection. See Opinion of Advocate General Ruiz-Jarabo Colomer in Joined CasesShingara and RadiomShingara and RadiomShingara and Radiom (C-65/95 and C-111/95, EU:C:1996:451, point 70 et seq.). See, on the interpretation of the relevant provisions, judgments of 25 July 2002, MRAX (C-459/99, EU:C:2002:461), and of 2 June 2005, Dörr and ÜnalDörr and ÜnalDörr and Ünal (C-136/03, EU:C:2005:340).

52 The persons covered by Article 3(2) of Directive 2004/38 are in fact also referred to under the notion of 'family members' in other provisions of the directive. For example, Article 10(2), which regulates the issuance of residence cards of family members, refers in points (e) and (f) to the documents that Member States shall require with regard to the persons covered by Article 3(2); Article 7(4) derogates from the general requirements for the right of residence of family members in the ascending line for students, referring back to the rule of Article 3(2) (without suggesting that those persons would stop being considered 'family members' for the purposes of the procedural safeguards applicable to them); Article 8(5) refers to the documents to be presented for the registration certificate to be issued to 'family members', including in points (e) and (f) a mention of persons covered by Article 3(2). Pointing at the variable use of the notion of 'family members' in connection with Article 3(2), see Guild, E., Peers, S., and Tomkin, J., *The EU Citizenship Directive. A Commentary*,Oxford University Press, Oxford, 2014, p. 80.

53 See, for example, judgments of 12 March 2014, S. and G. (C-457/12, EU:C:2014:136, paragraph 41 and the case-law cited), and of 14 November 2017, Lounes (C-165/16, EU:C:2017:862, paragraphs 32, 47 and 48 and the case-law cited).

54 Judgment of 15 October 1987, Heylens and OthersHeylens and Others (222/86, EU:C:1987:442, paragraph 14). See also, for example, judgments of 3 December 1992, Oleificio Borelli v CommissionOleificio Borelli v CommissionOleificio Borelli v CommissionOleificio Borelli v Commission (C-97/91, EU:C:1992:491, paragraphs 14 and 15), or of 19 September 2006, Wilson (C-506/04, EU:C:2006:587, paragraphs 46 and 47).

55 Judgment of 14 September 2017, The Trustees of the BT Pension Scheme (C-628/15, EU:C:2017:687, paragraph 47).

56 Judgment of 13 December 2017 (C-403/16, EU:C:2017:960, paragraphs 36 to 41).

57 See my Opinion in El HassaniEl Hassani (C-403/16, EU:C:2017:659, points 103 to 106).

58 See, for example, judgments of 5 March 1980, Pecastaing (98/79, EU:C:1980:69, paragraph 11), and of 17 June 1997, *Shingara and Radiom* (C-65/95 and C-111/95, EU:C:1997:300, paragraph 24).

59 See, for example, judgment of 6 October 2015, East Sussex County Council (C-71/14, EU:C:2015:656, paragraph 52 and the case-law cited).

60 See judgments of 26 February 2013, Åkerberg FranssonÅkerberg FranssonÅkerberg Fransson (C-617/10, EU:C:2013:105, paragraph 29), and of 26 February 2013, Melloni (C-399/11, EU:C:2013:107, paragraph 60).

61 See, to that effect, judgment of 17 March 2016, Bensada BenallalBensada BenallalBensada Benallal (C-161/15, EU:C:2016:175, paragraph 29 and the case-law cited).

62 See judgment of 20 October 2016, *Danqua* (C-429/15, EU:C:2016:789, paragraph 32).

63 See, for example, for an earlier argument, Prechal S., and Widdershoven, R., ‘Redefining the Relationship between “Rewe-effectiveness” and Effective Judicial Protection’, *Review of European Administrative Law*, Vol. 4, 2011, pp. 31 to 50, p. 46.

64 See, in this regard, Opinion of Advocate General Kokott in Puškár (C-73/16, EU:C:2017:253, point 49 et seq.), and Opinion of Advocate General Campos Sánchez-Bordona in Connexxion Taxi ServicesConnexxion Taxi Services (C-171/15, EU:C:2016:506, point 65 et seq.).

65 In particular, and similar to the review of EU acts by EU Courts, where an authority is called upon to make complex assessments, therefore enjoying wide discretion. See judgment of 21 January 1999, Upjohn (C-120/97, EU:C:1999:14, paragraphs 34 and 35).

66 See, judgment of 6 October 2015, East Sussex County Council (C-71/14, EU:C:2015:656, paragraph 58), where the referring tribunal had underlined the very limited scope for reviewing the relevant factual conclusions reached by the administrative authority.

67 Judgment of 6 October 2015, East Sussex County Council (C-71/14, EU:C:2015:656, paragraph 58). See also judgments of 21 January 1999, Upjohn (C-120/97, EU:C:1999:14, paragraphs 30, 35 and 36), and of 9 June 2005, HLH Warenvertrieb and OrthicaHLH Warenvertrieb and OrthicaHLH Warenvertrieb and OrthicaHLH Warenvertrieb and Orthica (C-211/03, C-299/03 and C-316/03 to C-318/03, EU:C:2005:370, paragraphs 75 to 79).

68 See, to that effect, considering insufficient, in the field of public procurement, a judicial review limited to arbitrariness, judgments of 11 December 2014, Croce Amica One ItaliaCroce Amica One ItaliaCroce Amica One Italia (C-440/13, EU:C:2014:2435, paragraphs 40 to 45), and of 18 June 2002, HI (C-92/00, EU:C:2002:379, paragraphs 59 to 64). See, in this same field, regarding judicial review based on reasonableness, Opinion of Advocate General Campos Sánchez-Bordona in Connexxion Taxi ServicesConnexxion Taxi Services (C-171/15, EU:C:2016:506, point 65 et seq.).

69 Judgment of 6 November 2012, Otis and Others (C-199/11, EU:C:2012:684, paragraph 49). Emphasis added. See also, judgment of 17 December 2015, Imtech Marine Belgium (C-300/14, EU:C:2015:825, paragraph 38).

70 Judgment of 16 May 2017, Berlioz Investment Fund (C-682/15, EU:C:2017:373, paragraph 55). Emphasis added.

71 See, for example, judgment of 18 July 2013, Commission and Others v KadiCommission and Others v KadiCommission and Others v KadiCommission and Others v Kadi(C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 102); of 9 February 2017, M (C-560/14, EU:C:2017:101, paragraph 33); or of 26 July 2017, Sacko (C-348/16, EU:C:2017:591, paragraph 41).

72 See, for example, in the field of asylum, judgment of 28 July 2011, Samba DioufSamba Diouf (C-69/10, EU:C:2011:524, paragraphs 56, 57 and 61). Further, see for example, Reneman, M., *EU Asylum Procedures and the Right to an Effective Remedy*, Hart Publishing, Oxford, 2014.

73 Indeed just inspiration, because the scope of Article 47 of the Charter would appear to be broader than Article 6(1) ECHR (limited to the determination of civil rights and obligations or of criminal charges) and Article 13 ECHR (limited to rights and freedoms under the Convention).

74 Judgment of the ECtHR of 21 July 2011, *Sigma Rado Television Ltd. v. Cyprus* (CE:ECHR:2011:0721JUD003218104, § 154 and the case-law cited).

75 See, for example, judgments of the ECtHR of 22 November 1995, *Bryan v. the United Kingdom* (CE:ECHR:1995:1122JUD001917891, §§ 44 to 47); of 27 October 2009, *Crompton v. the United Kingdom* (CE:ECHR:2009:1027JUD004250905, §§ 78 and 79); and of 20 October 2015, *Fazia Ali v. United Kingdom* (CE:ECHR:2015:1020JUD004037810, § 79 et seq.). With regard to Article 13 ECHR, see judgments of 7 July 1989, *Soering v. the United Kingdom* (CE:ECHR:1989:0707JUD001403888, §§ 121 and 124), and of 30 October 1991, *Vilvarajah and Others v. the United Kingdom* (CE:ECHR:1991:1030JUD001316387, §§ 122 to 127).

76 Judgments of the ECtHR of 28 May 2002 *Kingsley v. the United Kingdom* (CE:ECHR:2002:0528JUD003560597, §§ 32 to 34), and of 14 November 2006, *Tsfayo v. the United Kingdom* (CE:ECHR:2006:1114JUD006086000, §§ 46 to 49). With regard to Article 13 ECHR, see judgments of 27 September 1999, *Smith and Grady v. the United Kingdom* (CE:ECHR:1999:0927JUD003398596, §§ 135 to 139), and of 8 July 2003, *Hatton and Others v. the United Kingdom* (CE:ECHR:2003:0708JUD003602297, §§ 140 to 142).

77 See above, points 53 to 55 of this Opinion.

78 See, to that effect, judgment of 4 April 2017, Fahimian (C-544/15, EU:C:2017:255, paragraphs 45 and 46).

79 In this regard see, Opinion of Advocate General Szpunar in Fahimian (C-544/15, EU:C:2016:908, point 78).

80 Judgments of 7 September 2004, Waddenvereniging and Vogelbeschermingsvereniging (C127/02, EU:C:2004:482,Waddenvereniging and Vogelbeschermingsvereniging (C127/02, EU:C:2004:482,Waddenvereniging and Vogelbeschermingsvereniging (C127/02, EU:C:2004:482,Waddenvereniging and Vogelbeschermingsvereniging (C127/02, EU:C:2004:482,Waddenvereniging and Vogelbeschermingsvereniging (C127/02, EU:C:2004:482, paragraph 66); of 26 May 2011, *Stichting Natuur en Milieu and Others* (C-165/09 to C-167/09, EU:C:2011:348, paragraphs 100 to 103); and of 5 September 2012, Rahman and Others (C-83/11, EU:C:2012:519, paragraph 25), referring to the judgment of 24 October 1996, Kraaijeveld and Others (C72/95, EU:C:1996:404, judgment of 24 October 1996, Kraaijeveld and Others (C72/95, EU:C:1996:404, judgment of 24 October 1996, Kraaijeveld and Others (C72/95, EU:C:1996:404, judgment of 24 October 1996, Kraaijeveld and Others (C72/95, EU:C:1996:404, judgment of 24 October 1996, Kraaijeveld and Others (C72/95, EU:C:1996:404, paragraph 56).

81 I wish to stress that this simply means that elements of facts ascertained by the administrative authority cannot be *entirely* excluded from judicial scrutiny. The heading, in terms of permissible pleas in law under national systems of administrative justice, under which such an element falls and at what level it will be evaluated (such as incorrect assessment of facts, manifest error of assessment, distortion of evidence) is again a matter for national law. For a comparative analysis of various national review systems, see, for example, Schwarze, J., *Droit administratif européen*, 2nd edition, Bruylant 2009, pp. 274 to 311.