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Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

2 September 2021 (*)

(Reference for a preliminary ruling – Directive 2004/38/EC – Article 13(2) – Right of residence of family members of a Union citizen – Marriage between a Union citizen and a third-country national – Retention, in the event of divorce, of the right of residence by a third-country national who is the victim of acts of domestic violence committed by his or her spouse – Requirement to demonstrate the existence of sufficient resources – No such requirement in Directive 2003/86/EC – Validity – Charter of Fundamental Rights of the European Union – Articles 20 and 21 – Equal treatment – Difference in treatment based on whether the sponsor is a Union citizen or a third-country national – Non-comparability of situations)

In Case C-930/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium), made by decision of 13 December 2019, received at the Court on 20 December 2019, in the proceedings

X

v

Belgian State,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta (Rapporteur), Vice-President, J.-C. Bonichot, A. Prechal, M. Vilaras, N. Piçarra and A. Kumin, Presidents of Chambers, M. Safjan, D. Šváby, S. Rodin, K. Jürimäe, P.G. Xuereb, L.S. Rossi, I. Jarukaitis and J. Passer, Judges,

Advocate General: M. Szpunar,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 7 December 2020,

after considering the observations submitted on behalf of:

- X, by J. Wolsey and E. Didi, *avocats*,
- the Belgian Government, by L. Van den Broeck, M. Jacobs, and C. Pochet, acting as Agents, and by E. Derriks, K. de Haes and G. van Witzenburg, *avocats*,
- the European Parliament, by D. Warin and R. van de Westelaken, acting as Agents,
- the Council of the European Union, by S. Boelaert and R. Meyer, acting as Agents,
- the European Commission, by C. Cattabriga and E. Montaguti, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 March 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the validity of Article 13(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 (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35 and OJ 2005 L 197, p. 34), in the light of Articles 20 and 21 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between X and the Belgian State concerning the retention of his right of residence on the Belgian territory.

Legal context

European Union law

Directive 2004/38

3 According to recitals 1 to 3, 5, 10 and 15 of Directive 2004/38:

'(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the [FEU] Treaty and to the measures adopted to give it effect.

(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the [FEU] Treaty.

(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

...

(5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. ...

...

(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.

...

(15) Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.'

4 Under the heading 'Subject', Article 1 of Directive 2004/38 provides:

'This Directive lays down:

- (a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;
- (b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;
- (c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.'

5 Article 7 of that directive, headed 'Right of residence for more than three months', provides, in paragraphs 1 and 2 thereof:

'1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

- (a) are workers or self-employed persons in the host Member State; or
- (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
- (c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).’

6 Article 13 of the directive, entitled ‘Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership’, is worded as follows:

‘1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen’s marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen’s family members who are not nationals of a Member State where:

(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; ...

...

(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; ...

...

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. “Sufficient resources” shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on a personal basis.’

7 Under the heading ‘More favourable national provisions’, Article 37 of that directive provides:

‘The provisions of this Directive shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive.’

Directive 2003/86/EC

8 Recitals 3, 4, 6 and 15 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12) state:

‘(3) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, acknowledged the need for harmonisation of national legislation on the conditions for admission and residence of third-country nationals. In this context, it has in particular stated that the European Union should ensure fair treatment of third-country nationals residing lawfully on the territory of the Member States and that a more vigorous integration policy should aim at granting them rights and obligations comparable to those of citizens of the European Union. ...

(4) Family reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third-country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental [European] Community objective stated in the [EC] Treaty.

...

(6) To protect the family and establish or preserve family life, the material conditions for exercising the right to family reunification should be determined on the basis of common criteria.

...

(15) The integration of family members should be promoted. For that purpose, they should be granted a status independent of that of the sponsor, in particular in cases of breakup of marriages and partnerships, and access to education, employment and vocational training on the same terms as the person with whom they are reunited, under the relevant conditions.’

9 Article 15 of that directive provides:

‘ ...

3. In the event of widowhood, divorce, separation, or death of first-degree relatives in the direct ascending or descending line, an autonomous residence permit may be issued, upon application, if required, to persons who have entered by virtue of family reunification. Member States shall lay down provisions ensuring the granting of an autonomous residence permit in the event of particularly difficult circumstances.

4. The conditions relating to the granting and duration of the autonomous residence permit are established by national law.’

Belgian law

10 Article 42c(1) and (4) of the loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Law on access to the territory, residence, establishment and removal of foreign nationals) of 15 December 1980 (*Moniteur belge* of 31 December 1980, p. 14584), in the version applicable to the dispute in the main proceedings ('the Law of 15 December 1980'), which is intended to transpose Article 13(2) of Directive 2004/38 into Belgian law, provides that the Minister who has competence over access to the territory, residence, establishment and removal of foreign nationals ('the Minister'), or a person delegated by the Minister, may, within five years of the recognition of their right of residence, terminate the right of residence of the family members of a Union citizen who are not themselves Union citizens and who are residing as family members of that Union citizen, where the marriage to the Union citizen whom they have accompanied or joined is dissolved or they no longer live as a single household, unless the family member concerned demonstrates that there is a particularly difficult circumstance, such as having been a victim of acts of domestic violence while the marriage or registered partnership was subsisting, provided that the person concerned shows that he or she is a worker or self-employed person in Belgium or that he or she has sufficient resources not to become a burden on the Belgian social assistance system during his or her period of residence and has comprehensive sickness insurance cover in Belgium, or that he or she is a member of the family, already constituted in that Member State, of a person satisfying those requirements.

11 Article 11(2) of the Law of 15 December 1980, which is intended to transpose Article 15(3) of Directive 2003/86 into Belgian law, provides that the Minister or a person delegated by the Minister may terminate, within five years – depending on the circumstances – of the issue of a residence permit or the issue of a document certifying that the application for a residence permit has been made, the right of residence of the family members of a third-country national, authorised or admitted to reside, where he or she does not live, or no longer lives, in a real marital or family relationship, unless the family member concerned proves that he or she has been a victim of domestic violence during the marriage or partnership.

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

12 The applicant in the main proceedings, X, an Algerian national, married a French national on 26 September 2010 in Algiers (Algeria) before travelling to Belgium on 22 February 2012 with a short-stay visa in order to join his wife, who resided in the territory of that Member State.

13 On 20 April 2012, a daughter was born from the union between the applicant in the main proceedings and his wife. That daughter, like her mother, has French nationality.

14 On 7 May 2013, the applicant in the main proceedings submitted an application for a residence card of a family member of a Union citizen, as the spouse of a French national, and such a residence card was issued to him on 13 December of that same year, that card being valid until 3 December 2018.

15 After almost five years of marriage, including two years of living together in Belgium, the applicant in the main proceedings was forced to leave the matrimonial home because of acts of domestic violence which he suffered at the hands of his wife. He first moved to a 'refuge' before finding accommodation in Tournai (Belgium), where he established his residence on 22 May 2015. A complaint was also lodged by the applicant in the main proceedings on 2 March 2015 in respect of the acts of domestic violence of which he had been the victim.

16 Following a cohabitation report drawn up on 30 October 2015 concluding that the applicant in the main proceedings and his wife did not live together, since his wife and their daughter had

been living in France since 10 September 2015, the Belgian State, by decision of 2 March 2016, terminated the right of residence of the applicant in the main proceedings and ordered him to leave the territory of Belgium. That decision was, however, annulled by a judgment of the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium) of 16 September 2016.

17 By letter of 10 March 2017, the Belgian State requested additional information from the applicant in the main proceedings, including proof of his means of subsistence and of his having comprehensive sickness insurance cover. On 2 May 2017, the applicant in the main proceedings informed the Belgian State that he was the victim of acts of domestic violence committed by his wife and requested the retention of his right of residence in the territory of that Member State, pursuant to Article 42c(4)(4) of the Law of 15 December 1980.

18 By decision of 14 December 2017, the Belgian State terminated the applicant's right of residence on the ground that, although he was in a difficult situation, he had not adduced evidence that he had sufficient resources to support himself. That decision did not, however, order him to leave the Belgian territory. On 26 January 2018, the applicant in the main proceedings brought an action against that decision before the referring court, the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings).

19 That court notes that, in the event of divorce or when the spouses no longer live together as a single household, Article 42c(4) of the Law of 15 December 1980, which transposes Article 13(2) of Directive 2004/38 into Belgian law, makes the retention of the right of residence by a third-country national who has been the victim of acts of domestic violence committed by his or her spouse who is a Union citizen subject to certain conditions, including, *inter alia*, the requirement to have sufficient resources and comprehensive sickness insurance cover, whereas, in the same circumstances, Article 11(2) of the Law of 15 December 1980, which transposed Article 15(3) of Directive 2003/86 into Belgian law, makes the grant of an autonomous residence permit to a third-country national who has benefited from the right to family reunification with a third-country national residing lawfully in Belgium subject only to proof of the existence of acts of domestic violence.

20 Thus, the referring court observes that third-country nationals who are victims of acts of domestic violence committed by their spouses are treated differently depending on whether they have been granted family reunification with a Union citizen or with a third-country national and that difference in treatment stems from the abovementioned provisions of Directives 2004/38 and 2003/86.

21 In those circumstances, the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does Article 13(2) of [Directive 2004/38] infringe Articles 20 and 21 of the [Charter], in that it provides that divorce, annulment of marriage or termination of a registered partnership does not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where, *inter alia*, this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting, but only on the condition that the persons concerned show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that

they are members of the family, already constituted in the host Member State, of a person satisfying these requirements, whereas Article 15(3) of [Directive 2003/86], which makes the same provision for the right of residence to continue, does not make its continuation subject to that condition?’

22 By letter of 9 September 2020, received at the Court Registry on 17 September 2020, in response to the request for information which the Court had sent to the referring court on 14 August 2020, the referring court stated that the applicant in the main proceedings had filed a divorce petition on 5 July 2018 and the divorce of the person concerned and his wife had been pronounced on 24 July 2018.

The jurisdiction of the Court

23 The Belgian Government submits that the Court does not have jurisdiction to answer the question referred, on the grounds that, first, the referring court expresses doubts as to the validity of Article 13(2) of Directive 2004/38 in the light not of a rule of EU law but of a rule of law established by the national legislature in the context of the power conferred on it by Article 15(2) and (3) of Directive 2003/86, second, failure to comply with the conditions laid down in Article 13(2) of Directive 2004/38 undermines the rules on the division of powers between the Union and the Member States, and, third, the provisions of the Charter cannot result in alteration of the powers of the Union and, therefore, in encroachment on the powers which, as EU law currently stands, belong to the Member States, such as those relating to the conditions of residence of third-country nationals who do not satisfy the condition of being family members of a Union citizen.

24 In that regard, it follows from Article 19(3)(b) TEU and point (b) of the first paragraph of Article 267 TFEU that the Court has jurisdiction to give preliminary rulings on the interpretation and the validity of acts adopted by the EU institutions, without exception, as those acts must be entirely compatible with the Treaties, the constitutional principles stemming therefrom, and the Charter (judgment of 14 May 2019, *M and Others (Revocation of refugee status)*, C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraph 71 and the case-law cited).

25 In the present case, taking the view that, as regards the conditions for the retention, inter alia, in the event of divorce, of the right of residence by third-country nationals who have been the victims of acts of domestic violence committed by their spouses, the regime laid down in Article 13(2) of Directive 2004/38 concerning third-country nationals whose spouses are Union citizens is less favourable than that laid down in Article 15(3) of Directive 2003/86 as regards third-country nationals whose spouses are also third-country nationals, the referring court asks the Court of Justice to rule on the validity of Article 13(2) of Directive 2004/38, in the light of Articles 20 and 21 of the Charter, which enshrine the principle of equal treatment and of non-discrimination.

26 In those circumstances, the Court has jurisdiction to answer the question referred.

Consideration of the question referred

27 By its question, the referring court asks, in essence, whether Article 13(2) of Directive 2004/38 is valid in the light of Articles 20 and 21 of the Charter.

28 In particular, the referring court seeks to ascertain whether by making, in the event of divorce, the retention of the right of residence by third-country nationals who have been the victims of acts of domestic violence committed by their spouses who are Union citizens subject to the conditions laid down in the second subparagraph of Article 13(2) of Directive 2004/38, including, in particular, the condition relating to the sufficiency of resources, whereas Article 15(3) of Directive 2003/86

does not impose such conditions for the purpose of granting, in the same circumstances, an autonomous residence permit to third-country nationals who have been the victims of acts of violence committed by their spouses who are also third-country nationals, the EU legislature has introduced a difference in treatment between those two categories of third-country nationals who have been the victims of acts of domestic violence, to the detriment of the first category, in breach of Articles 20 and 21 of the Charter.

29 As a preliminary point, it should be noted that, without formally pleading the inadmissibility of the question referred for a preliminary ruling by the referring court, the European Commission, in its written observations, and the European Parliament, in its oral observations, have expressed doubts as to the applicability of point (c) of the first subparagraph of Article 13(2) of Directive 2004/38 in circumstances such as those in the main proceedings.

30 Those doubts are based on the judgment of 30 June 2016, *NA* (C-115/15, EU:C:2016:487, paragraph 51), in which the Court held that that provision must be interpreted as meaning that a third-country national who is divorced from a Union citizen at whose hands he or she has been the victim of acts of domestic violence during the marriage, cannot rely on the retention of his or her right of residence in the host Member State, on the basis of that provision, where the commencement of divorce proceedings post-dates the departure of the Union citizen spouse from that Member State.

31 As has been pointed out in paragraphs 16 and 22 of the present judgment, whereas the applicant in the main proceedings was the victim, during his marriage, of acts of domestic violence committed by his ex-wife, a Union citizen, which it is for the referring court to verify, the latter has been resident, with their daughter, in France since 10 September 2015. The divorce proceedings were not commenced until almost three years after their departure from Belgium, that is to say, on 5 July 2018, and resulted in the divorce being granted on 24 July 2018.

32 It is in that context that the scope of point (c) of the first subparagraph of Article 13(2) of Directive 2004/38 must be determined before the validity of the second subparagraph of Article 13(2) of that directive is assessed in the light of the grounds mentioned by the referring court.

33 In that regard, it is apparent, first, from the wording employed both in the heading and in the text of Article 13(2) of Directive 2004/38, that provision is made for the right of residence, to which, on the basis of that provision, a Union citizen's family members who do not have the nationality of a Member State are entitled, to be retained, in particular, in the event of divorce and that, as a consequence, when the conditions laid down in that provision are satisfied, divorce does not entail the loss of such a right of residence (judgment of 30 June 2016, *NA*, C-115/15, EU:C:2016:487, paragraph 40).

34 Second, as regards the context of that provision, Article 13(2) of Directive 2004/38 constitutes a derogation from the principle that that directive confers rights of entry into and residence in a Member State not on all third-country nationals, but solely on those who are a 'family member', within the meaning of point 2 of Article 2 of that directive, of a Union citizen who has exercised his or her right of free movement by settling in a Member State other than the Member State of which he or she is a national, that principle being established in the Court's settled case-law (judgment of 30 June 2016, *NA*, C-115/15, EU:C:2016:487, paragraph 41 and the case-law cited).

35 Article 13(2) of Directive 2004/38 covers the exceptional cases where divorce does not mean the loss of the right of residence of the third-country nationals concerned, under Directive 2004/38,

when, following their divorce, those third-country nationals no longer satisfy the conditions laid down in Article 7(2) of that directive, and in particular, the condition of being a ‘family member’ of a Union citizen, within the meaning of Article 2(2)(a) of that directive (judgment of 30 June 2016, *NA*, C-115/15, EU:C:2016:487, paragraph 42).

36 Last, as regards the aims of Article 13(2) of Directive 2004/38, that provision corresponds to the objective, stated in recital 15 of that directive, of providing legal safeguards for family members in the event of divorce, annulment of marriage or termination of a registered partnership, taking measures in that respect to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis (judgment of 30 June 2016, *NA*, C-115/15, EU:C:2016:487, paragraph 45).

37 In that regard, it is apparent from the history of Directive 2004/38 and, more particularly, from the explanatory memorandum of 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 (final)), that, under EU law prior to Directive 2004/38, the divorced spouse could be deprived of the right of residence in the host Member State (judgment of 30 June 2016, *NA*, C-115/15, EU:C:2016:487, paragraph 46).

38 In that context, that proposal for a directive states that the purpose of the envisaged provision, now Article 13(2) of Directive 2004/38, was to offer certain legal safeguards to third-country nationals whose right of residence was dependent on a family relationship by marriage and who could therefore be open to blackmail accompanied by threats of divorce, and that safeguards were necessary only in the event of final divorce, since, in the event of de facto separation, the right of residence of a spouse who is a third-country national is not at all affected (judgment of 30 June 2016, *NA*, C-115/15, EU:C:2016:487, paragraph 47).

39 So long as the marriage lasts, the spouse who is a third-country national retains his or her status as a family member of the Union citizen, as defined in point 2 of Article 2 of Directive 2004/38, and on that basis enjoys a derived right of residence in the host Member State or, as the case may be, in the Member State of which the Union citizen is a national (see judgment of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 61).

40 It follows from the foregoing that it is apparent from the wording, the context and objectives of Article 13(2) of Directive 2004/38 that the application of that provision, including the right derived from point (c) of the first subparagraph of Article 13(2) of Directive 2004/38, is dependent on the parties concerned being divorced (judgment of 30 June 2016, *NA*, C-115/15, EU:C:2016:487, paragraph 48).

41 In paragraph 62 of the judgment of 16 July 2015, *Singh and Others* (C-218/14, EU:C:2015:476), the Court held that, where, before the commencement of the divorce proceedings, the Union citizen leaves the Member State in which his or her spouse resides, in order to settle in another Member State or in a third country, the derived right of residence of the third-country national, on the basis of Article 7(2) of Directive 2004/38, has come to an end with the departure of the Union citizen and can no longer be retained on the basis of point (a) of the first subparagraph of Article 13(2) of that directive.

42 However, in the situation provided for in point (c) of the first subparagraph of Article 13(2) of Directive 2004/38, the requirement that the divorce proceedings be initiated before the departure of that Union citizen from the host Member State in order for the third-country national who has been the victim of acts of domestic violence committed by his or her spouse who is a Union citizen

to retain the right of residence could provide that Union citizen with a means of exerting pressure which would clearly be contrary to the objective of ensuring the protection of the victim of such acts and thereby open, as the Advocate General stated in points 87 and 88 of his Opinion, that victim to blackmail accompanied by threats of divorce or departure.

43 Therefore, contrary to what was held in paragraph 51 of the judgment of 30 June 2016, *NA* (C-115/15, EU:C:2016:487), it must be held that, in order to retain the right of residence on the basis of point (c) of the first subparagraph of Article 13(2) of Directive 2004/38, divorce proceedings may be initiated after the departure of the EU citizen from the host Member State. However, in order to ensure legal certainty, a third-country national – who has been the victim of acts of domestic violence committed by his or her spouse who is a Union citizen and in relation to whom divorce proceedings have not been initiated before the departure of that spouse from the host Member State – can rely on the retention of his or her right of residence under that provision only in so far as those proceedings are initiated within a reasonable period following such departure.

44 It is important to leave the third-country national concerned, who is the spouse of a Union citizen, sufficient time to choose between the two options offered to him or her by Directive 2004/38 in order to retain a right of residence under that directive which are either the commencement of divorce proceedings for the purpose of enjoying a personal right of residence under point (c) of the first subparagraph of Article 13(2) of that directive, or his or her establishment in the Member State in which the Union citizen resides in order to retain his or her derived right of residence. It must be added in that regard that the spouse does not necessarily have to live permanently with the Union citizen in order to hold a derived right of residence (judgments of 13 February 1985, *Diatta*, 267/83, EU:C:1985:67, paragraphs 20 and 22, and of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraph 58).

45 In the present case, as has been pointed out in paragraph 31 of this judgment, the applicant in the main proceedings did not join his wife in her Member State of origin. He initiated divorce proceedings on 5 July 2018, that is, almost three years after the departure of his wife and their daughter from the host Member State, which does not appear to represent a reasonable period.

46 However, and in any event, it is apparent from the order for reference that, under the national legislation intended to transpose Article 13(2) of Directive 2004/38, a third-country national who is in the situation of the applicant in the main proceedings benefits from the retention of his or her right of residence, subject to compliance with the requirement laid down in the second subparagraph of that article.

47 In those circumstances, it is not obvious that the question referred, in so far as it concerns the validity of Article 13(2) of Directive 2004/38, bears no relation to the actual facts of the main action or its purpose.

48 Therefore, the question referred is admissible.

Validity of Article 13(2) of Directive 2004/38

49 It is necessary to ascertain at the outset whether Articles 20 and 21 of the Charter are relevant when examining, as the referring court asks, whether Article 13(2) of Directive 2004/38 may lead to discrimination against third-country nationals who are victims of acts of domestic violence and whose spouses are Union citizens, compared with those whose spouses are also third-country nationals.

50 As regards, in the first place, Article 21 of the Charter, since the difference in treatment which Article 13(2) of Directive 2004/38 establishes is based on the nationality of the spouse who committed acts of domestic violence, it must be noted that Article 21(2) of the Charter, which provides that ‘within the scope of application of the Treaties and without prejudice to any special provisions, any discrimination on grounds of nationality shall be prohibited’, corresponds, according to the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), to the first paragraph of Article 18 TFEU and must be applied in accordance with that latter provision.

51 As the Court has held, the first paragraph of Article 18 TFEU concerns situations coming within the scope of EU law in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely on the basis of his or her nationality and is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of third countries (judgment of 4 June 2009, *Vatsouras and Koupatantze*, C-22/08 and C-23/08, EU:C:2009:344, paragraph 52).

52 Therefore, that provision is also not intended to apply in the event of a possible difference in treatment between two categories of third-country nationals, such as the two categories of victims of acts of domestic violence referred to in Article 13(2) of Directive 2004/38 and Article 15(3) of Directive 2003/86, respectively.

53 It follows that Article 21 of the Charter is irrelevant for the purposes of the examination of validity requested by the referring court.

54 As far as concerns, in the second place, Article 20 of the Charter, that article, which provides that ‘everyone is equal before the law’, does not contain any express limitation on its scope and is therefore applicable to all situations governed by EU law, such as those falling within the scope of Directives 2004/38 and 2003/86 (see, to that effect, Opinion 1/17 (*EU-Canada CET Agreement*) of 30 April 2019, EU:C:2019:341, paragraph 171 and the case-law cited).

55 Accordingly, Article 20 of the Charter is relevant for the purposes of the examination of validity requested by the referring court.

56 In those circumstances, the validity of Article 13(2) of Directive 2004/38 must be assessed in the light of Article 20 of the Charter only.

57 As is apparent from the settled case-law of the Court, equality before the law, set out in Article 20 of the Charter, is a general principle of EU law which requires that comparable situations should not be treated differently and that different situations should not be treated in the same way, unless such different treatment is objectively justified (judgment of 17 October 2013, *Schaible*, C-101/12, EU:C:2013:661, paragraph 76 and the case-law cited).

58 The requirement that situations must be comparable, for the purpose of determining whether there is a breach of the principle of equal treatment, must be assessed in the light of all the elements that characterise them and, in particular, in the light of the subject matter and purpose of the act that makes the distinction in question, while the principles and objectives of the field to which the act relates must also be taken into account. If the situations are not comparable, a difference in the treatment of the situations concerned is not in breach of equality before the law as enshrined in Article 20 of the Charter (Opinion 1/17 (*EU-Canada CET Agreement*) of 30 April 2019, EU:C:2019:341, paragraph 177 and the case-law cited).

59 In the present case, the referring court raises the question of the validity of Article 13(2) of Directive 2004/38, in that it establishes a regime different from that provided for in Article 15(3) of Directive 2003/86, whereas, in its view, both apply to identical situations.

60 As regards, in the first place, the regime laid down in Article 13(2) of Directive 2004/38, the first subparagraph of Article 13(2) of that directive provides that divorce does not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State, *inter alia*, where this is warranted by particularly difficult circumstances, such as having been the victim of acts of domestic violence while the marriage was subsisting. As stated in the third subparagraph of Article 13(2) of that directive, those family members retain their right of residence exclusively on a personal basis.

61 The benefit of retaining the right of residence of those family members, before acquiring a right of permanent residence, is, however, subject to the conditions set out in the second subparagraph of Article 13(2) of Directive 2004/38, namely that the person concerned shows either that he or she is a worker or that he or she has sufficient resources for himself or herself and for his or her family members not to become a burden on the social assistance system of the host Member State during their period of residence and that they are covered by a comprehensive sickness insurance in that host Member State, or that he or she is a member of the family, already constituted in the host Member State, of a person satisfying those requirements.

62 It should be noted that those conditions correspond to those set out in Article 7(1)(a), (b) and (d) of Directive 2004/38, which Union citizens themselves are required to satisfy in order to enjoy a temporary right of residence, of a duration of more than three months, in the territory of the host Member State.

63 Finally, it is apparent from recital 10 of that directive that the same conditions are intended, *inter alia*, to prevent those persons from becoming an unreasonable burden on the social assistance system of the host Member State.

64 As regards, in the second place, the regime established in Article 15(3) of Directive 2003/86, it is apparent from that provision that, in the event of divorce, an autonomous residence permit may be issued, upon application, if required, to persons who have entered by virtue of family reunification and that Member States are to lay down provisions ensuring the granting of an autonomous residence permit in the event of 'particularly difficult circumstances'. In that regard, 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 (COM(2014) 210 final) cites cases of domestic violence as an example of 'particularly difficult circumstances'.

65 Article 15(4) of that directive states, for its part, that the conditions relating to the granting and duration of that autonomous residence permit are established by national law.

66 It is thus apparent that Article 13(2) of Directive 2004/38 and Article 15(3) of Directive 2003/86 establish different regimes and conditions.

67 It is therefore necessary to determine whether third-country nationals who are spouses of Union citizens, have been the victims of acts of domestic violence committed by their spouses, and fall within the scope of Article 13(2) of Directive 2004/38, on the one hand, and third-country nationals who are spouses of third-country nationals, have been the victims of acts of domestic violence committed by their spouses, and fall within the scope of Article 15(3) of Directive

2003/86, on the other, are in a comparable situation so far as concerns the retention of their right of residence in a Member State, in the light of all the elements which characterise the two situations.

The objectives of Article 13(2) of Directive 2004/38 and Article 15(3) of Directive 2003/86

68 As regards the objective pursued by point (c) of the first subparagraph of Article 13(2) of Directive 2004/38, as has been stated in paragraphs 36 to 38 of this judgment, that provision seeks to protect, in the event of divorce, annulment of marriage or termination of a registered partnership, a third-country national who suffered acts of domestic violence at the hands of his or her spouse or partner, who is a Union citizen, while the marriage or registered partnership was subsisting by granting him or her a right of residence on a personal basis in the host Member State.

69 Directive 2003/86 shares that same objective of protecting family members who are victims of domestic violence, since it provides in Article 15(3) that, in the case of, inter alia, divorce or separation, an autonomous residence permit may be issued to persons who have entered by virtue of family reunification and that Member States are to lay down provisions ensuring the granting of that residence permit in the event of particularly difficult circumstances.

70 Accordingly, point (c) of the first subparagraph of Article 13(2) of Directive 2004/38 and Article 15(3) of Directive 2003/86 share the objective of ensuring protection for family members who are victims of domestic violence. However, as is apparent from the case-law referred to in paragraph 58 of the present judgment, the comparability of the situations must be assessed in the light of all the elements which characterise them.

The fields covered by Directives 2004/38 and 2003/86

71 As regards the fields covered by Directives 2004/38 and 2003/86, it should be noted that Directive 2004/38 was adopted on the basis of Articles 12, 18, 40, 44 and 52 EC, now Articles 18, 21, 46, 50 and 59 TFEU, respectively, that is to say, in the field of the free movement of persons, and thus falls within the European Union's objective, referred to in Article 3 TEU, of establishing an internal market, which includes an area without internal borders in which that fundamental freedom is guaranteed in accordance with the provisions of the FEU Treaty.

72 It must be noted that it is apparent from recitals 1 and 2 of Directive 2004/38 that citizenship of the Union confers on each Union citizen a primary and individual right to move and to reside freely within the territory of the Member States, subject to the limitations and restrictions laid down by the Treaties and the measures adopted to give them effect, freedom of movement for persons being, moreover, one of the fundamental freedoms of the internal market, as affirmed in Article 45 of the Charter (judgment of 22 June 2021, *Ordre des barreaux francophones et germanophone and Others (Preventive measures for removal)*, C-718/19, EU:C:2021:505, paragraph 54 and the case-law cited).

73 The right to move and reside freely within the territory of the Member States is also conferred on family members of Union citizens, irrespective of their nationality.

74 In that context, it must be borne in mind that the rights which third-country nationals derive from the provisions of EU law on citizenship of the Union are not autonomous rights of those nationals, but rights derived from the exercise of freedom of movement and residence by a Union citizen. The purpose and justification of those derived rights are based on the fact that a refusal to allow such rights would be liable to interfere with the Union citizen's freedom of movement by discouraging him or her from exercising his or her rights of entry into and residence in the host

Member State (judgment of 16 July 2015, *Singh and Others*, C-218/14, EU:C:2015:476, paragraph 50 and the case-law cited).

75 As regards Directive 2003/86, the latter was adopted on the basis of Article 63(3)(a) EC, now Article 79 TFEU, that is to say, on the basis of the common immigration policy of the European Union, a policy which seeks to ensure, at all stages, efficient management of migration flows, fair treatment of third-country nationals residing legally in the territory of the Member States, and prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

76 In that regard, as the Advocate General stated in point 122 of his Opinion, EU competence in migration matters is a power to undertake harmonisation. Common rules are therefore adopted by means of directives, such as Directive 2003/86, which the Member States are obliged to transpose into their domestic law, although they may legislate on matters not covered by EU law and derogate from the common rules to the extent permitted by that law.

The subject matter of Directives 2004/38 and 2003/86

77 As regards the subject matter of Directives 2004/38 and 2003/86, it should be noted that, in accordance with Article 1 of Directive 2004/38, that directive concerns the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members, the right of permanent residence, in the territory of the Member States, of Union citizens and their family members, and the limits placed on those rights on grounds of public policy, public security or public health.

78 As is apparent from the very wording of Articles 20 and 21 TFEU, the right of Union citizens and their family members to move and reside freely within the territory of the Member States is not unconditional but subject to the limits and conditions laid down by the FEU Treaty and by the measures adopted to give it effect (judgment of 22 June 2021, *Ordre des barreaux francophones et germanophone and Others (Preventive measures for removal)*, C-718/19, EU:C:2021:505, paragraph 45 and the case-law cited). Therefore, the EU legislature, in accordance with those articles of the FEU Treaty, has regulated those limits and conditions by means of Directive 2004/38.

79 As regards Directive 2003/86, the purpose of that directive, in accordance with Article 1 thereof, read in conjunction with recital 6 thereof, is to determine, according to common criteria, the material conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of the Member States.

80 Thus, by Directive 2003/86, the EU legislature intended to ensure the approximation of national laws relating to the conditions of admission and residence of third-country nationals, as is apparent from recital 3 of that directive.

The objectives of Directives 2004/38 and 2003/86

81 As regards the objectives of Directives 2004/38 and 2003/86, it should be noted that, as is apparent from recitals 3 and 4 of Directive 2004/38, that latter directive aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States which is conferred directly on Union citizens by Article 21(1) TFEU and to strengthen that fundamental right (judgment of 2 October 2019, *Bajratari*, C-93/18, EU:C:2019:809, paragraph 47 and the case-law cited).

82 It is true that, in order to pursue the objective of facilitating the exercise of the fundamental right of every Union citizen to move and to reside freely, the objectives of protecting that Union citizen's family life and the integration of his or her family in the host Member State must also be pursued. Thus, Article 3(1) of Directive 2004/38 confers a right of residence on the family members of that citizen. Similarly, it has been held that conditions favourable to the integration in the host Member State of the family members of Union citizens contribute to the attainment of the objective of freedom of movement (see, to that effect, judgments of 17 April 1986, *Reed*, 59/85, EU:C:1986:157, paragraph 28, and of 6 October 2020, *Jobcenter Krefeld*, C-181/19, EU:C:2020:794, paragraph 51). However, those objectives of protection and integration are secondary to the primary objective of that directive, which is to promote the freedom of movement of Union citizens.

83 As regards Directive 2003/86, that directive has the general objective of facilitating the integration of third-country nationals in Member States by making family life possible through reunification, as is apparent from recital 4 thereof (judgment of 21 April 2016, *Khachab*, C-558/14, EU:C:2016:285, paragraph 26 and the case-law cited).

The discretion conferred on the Member States in the context of the application of the conditions laid down in Directives 2004/38 and 2003/86

84 As regards the discretion which the Member States are recognised as having in connection with the application of Directive 2004/38, that discretion is limited, without prejudice to the implementation of Article 37 thereof (see, to that effect, judgment of 15 July 2021, *The Department for Communities in Northern Ireland*, C-709/20, EU:C:2021:602, paragraph 83).

85 By contrast, the discretion conferred on the Member States under Directive 2003/86 is broad as regards, specifically, the conditions for granting, on the basis of Article 15(3) of that directive, an autonomous residence permit, in the event of divorce, to a third-country national who entered the territory of the Member State concerned on the basis of family reunification and who has been the victim of acts of domestic violence committed during the marriage by the sponsor.

86 While it is true that that provision requires the Member States to adopt provisions ensuring, in such a case, the granting of such a residence permit to the third-country national concerned, the fact remains that, as stated in paragraph 65 of this judgment, Article 15(4) of that directive stipulates that the conditions applicable to the granting and duration of that autonomous residence permit are established by national law.

87 Thus, by making a reference to national law in Article 15(4) of Directive 2003/86, the EU legislature indicated that it wished to leave to the discretion of each Member State the responsibility for determining the conditions under which an autonomous residence permit should be issued, in the event of divorce, to a third-country national who had entered its territory on the basis of family reunification and had been the victim of acts of domestic violence committed during the marriage by his or her spouse (see, to that effect, judgment of 7 November 2018, *C and A*, C-257/17, EU:C:2018:876, paragraph 49 and the case-law cited).

88 In any event, the discretion conferred on the Member States must not be used by them in a manner which would undermine the objective of that directive and the effectiveness thereof or which would infringe the principle of proportionality (see, to that effect, judgment of 9 July 2015, *K and A*, C-153/14, EU:C:2015:453, paragraphs 50 and 51 and the case-law cited).

89 It follows from the foregoing that, notwithstanding the fact that point (c) of the first subparagraph of Article 13(2) of Directive 2004/38 and Article 15(3) of Directive 2003/86 share the objective of ensuring protection for family members who are victims of domestic violence, the regimes introduced by those directives relate to different fields, the principles, subject matters and objectives of which are also different. In addition, the beneficiaries of Directive 2004/38 enjoy a different status and rights of a different kind to those upon which the beneficiaries of Directive 2003/86 may rely, and the discretion which the Member States are recognised as having to apply the conditions laid down in those directives is not the same. It is, in particular, a choice made by the Belgian authorities in connection with the exercise of the broad discretion conferred on them by Article 15(4) of Directive 2003/86 which has led to the difference in treatment complained of by the applicant in the main proceedings.

90 It must therefore be held that, as regards the retention of their right of residence on the territory of the Member State concerned, third-country nationals who are spouses of Union citizens, have been the victims of acts of domestic violence committed by their spouses, and fall within the scope of Directive 2004/38, on the one hand, and third-country nationals who are spouses of other third-country nationals, have been the victims of acts of domestic violence committed by their spouses, and fall within the scope of Directive 2003/86, on the other, are not in a comparable situation for the purposes of the possible application of the principle of equal treatment, observance of which is ensured by European Union law and, in particular, by Article 20 of the Charter.

91 In the light of all the foregoing considerations, it must be held that the consideration of the question referred by the national court has disclosed no factor of a kind such as to affect the validity of Article 13(2) of Directive 2004/38, in the light of Article 20 of the Charter.

Costs

92 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

The consideration of the question referred by the national court has disclosed no factor of a kind such as to affect the validity of Article 13(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, in the light of Article 20 of the Charter of Fundamental Rights of the European Union.

[Signatures]

* Language of the case: French.