ECLI:EU:C:2018:570

JUDGMENT OF THE COURT (Fourth Chamber)

12 July 2018 (*)

(Reference for a preliminary ruling — Citizenship of the European Union — Article 21 TFEU — Right of Union citizens to move and reside freely within the territory of the European Union — Directive 2004/38/EC — Point (b) of the first subparagraph of Article 3(2) — Partner with whom the Union citizen has a duly-attested durable relationship — Return to the Member State of which the Union citizen is a national — Application for residence authorisation — Extensive examination of the applicant's personal circumstances — Articles 15 and 31 — Effective judicial protection — Charter of Fundamental Rights of the European Union — Article 47)

In Case C-89/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom), made by decision of 20 January 2017, received at the Court on 20 February 2017, in the proceedings

Secretary of State for the Home Department

v

Rozanne Banger,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, E. Juhász, K. Jürimäe (Rapporteur) and C. Lycourgos, Judges,

Advocate General: M. Bobek,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 17 January 2018,

after considering the observations submitted on behalf of:

– Ms Banger, by A. Metzer QC, and S. Saifolahi, Barrister,

– the United Kingdom Government, by Z. Lavery, J. Kraehling, C. Crane and S. Brandon, acting as Agents, and by B. Kennelly QC,

– the Spanish Government, by V. Ester Casas, acting as Agent,

– the Austrian Government, by C. Pesendorfer, acting as Agent,

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

– the European Commission, by E. Montaguti and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 April 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation 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).

2 The request has been made in proceedings between the Secretary of State for the Home Department (United Kingdom) and Ms Rozanne Banger concerning a refusal to issue Ms Banger with a residence card.

Legal context

EU law

3 Recitals 6, 25 and 26 of Directive 2004/38 state:

‘(6) 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.

...

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

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

4 Article 2 of that directive provides:

'For the purposes of this Directive:

(1) "Union citizen" means any person having the nationality of a Member State;

(2) "family member" means:

(a) the spouse;

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

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

(3) "host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.'

5 Article 3 of Directive 2004/38 provides:

'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:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

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

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

6 Under Article 8(5)(e) and (f) of that directive:

'For the registration certificate to be issued to family members of Union citizens, who are themselves Union citizens, Member States may require the following documents to be presented:

...

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

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

7 Article 10(2)(e) and (f) of Directive 2004/38 is worded as follows:

'For the residence card to be issued, Member States shall require presentation of the following documents:

...

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

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

8 Article 15(1) of that directive states:

'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.'

9 Article 31 of Directive 2004/38 provides:

'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.

...'

United Kingdom law

10 Directive 2004/38 was transposed into United Kingdom law by the Immigration (European Economic Area) Regulations 2006 ('the 2006 Regulations'), which were applicable at the time of the relevant facts in the main proceedings. Regulation 7 of the 2006 Regulations stated:

'1. Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person:

(a) his spouse or his civil partner;

...'

11 Regulation 8 of those regulations provided:

'1. In these Regulations "extended family member" means a person who is not a family member of an EEA [European Economic Area] 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.

...'

12 Regulation 9 of those regulations provided:

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

2. The conditions are that —

(a) the United Kingdom national 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 United Kingdom national 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 United Kingdom national returned to the United Kingdom;

...’

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

13 Ms Banger is a national of South Africa. Her partner, Mr Philip Rado, is a United Kingdom national. Between 2008 and 2010, Ms Banger and Mr Rado resided together in South Africa. In May 2010, Mr Rado accepted employment in the Netherlands. He lived together with Ms Banger in the Netherlands until 2013, where she obtained a residence card in her capacity as an ‘extended family member’ of a Union citizen.

14 In 2013, Ms Banger and Mr Rado decided to move together to the United Kingdom. Ms Banger applied there for a residence card to the Secretary of State for the Home Department. That card was refused to her on the ground that she was the unmarried partner of Mr Rado and that Regulation 9 of the 2006 Regulations provided that only the spouse or civil partner of a United Kingdom national could be considered a family member of that national.

15 Ms Banger lodged an appeal before the First-tier Tribunal (United Kingdom) against the decision refusing her a residence card. That tribunal allowed her appeal. The Secretary of State for the Home Department was subsequently granted permission to appeal against the first-instance decision to the Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom) on the ground that there had been an error of law.

16 The Upper Tribunal found, first, that the only material difference between the case before it and the case which gave rise to the judgment of 7 July 1992, *Singh* (C-370/90, EU:C:1992:296) is that Ms Banger is the unmarried partner of a Union citizen, whereas in the former case Mr and Mrs Singh were married. The principles developed by the Court in that judgment could, therefore, be applied to a case such as that in question in the main proceedings. Secondly, the Upper Tribunal noted that a differently constituted chamber of that tribunal had already held that a person who had been refused a residence card as an ‘extended family member’ had no right of appeal under the 2006 Regulations.

17 In those circumstances the Upper Tribunal (Immigration and Asylum Chamber) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Do the principles contained in the [the judgment of 7 July 1992, *Singh* (C-370/90, EU:C:1992:296)], 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 [FEU] 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]?'

Consideration of the questions referred

The first and second questions

18 First of all, it must be borne in mind that as the Court has repeatedly held, even if, formally, the referring court has limited its questions to the principles set out in the judgment of 7 July 1992, *Singh* (C-370/90, EU:C:1992:296) and to Directive 2004/38, that does not prevent the Court from providing the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating in the case pending before it, whether or not the referring court has specifically referred to them in the wording of its questions (see, to that effect, judgment of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385, paragraph 22 and the case-law cited).

19 In those circumstances, having regard to the information in the request for a preliminary ruling, it must be found that, by its first and second questions, which must be examined together, the Upper Tribunal (Immigration and Asylum Chamber) asks, in essence, whether Article 21(1) TFEU must be interpreted as requiring the Member State of which a Union citizen is a national to grant or facilitate the provision of a residence authorisation to the partner with whom that Union citizen has not contracted a registered partnership ('the unregistered partner'), a third-country national with whom the Union citizen has a durable relationship that is duly attested, where the Union citizen, having exercised his right of freedom of movement to work in a second Member State, in accordance with the conditions laid down in Directive 2004/38, returns with his partner to the Member State of which he is a national in order to reside there.

20 In that regard, it must be borne in mind that under Article 21(1) TFEU, 'every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.'

21 It is the Court's established case-law that the purpose of Directive 2004/38 is 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 citizens of the Union by Article 21(1) TFEU, and that one of the objectives of that directive is to strengthen that right (judgments of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 35, and of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385, paragraph 18).

22 Article 3(1) of Directive 2004/38 provides that that directive is to 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 Article 2(2) of that directive who accompany or join them.

23 The Court has held, as regards Article 3(1) of Directive 2004/38, that it follows from a literal, contextual and teleological interpretation of the provisions of that directive that Directive 2004/38 governs only the conditions determining whether a Union citizen can enter and reside in Member States other than that of which he is a national and does not confer a derived right of residence on third-country nationals, who are family members of a Union citizen, in the Member State of which that citizen is a national (judgment of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385, paragraph 20 and the case-law cited).

24 In the present case, it is apparent from the order for reference that the main proceedings concern an application for a residence authorisation for Ms Banger, a third-country national, in the United Kingdom, the Member State of which Mr Rado is a national, and that when that application was submitted, Mr Rado and Ms Banger were neither married nor in a registered partnership, but had been living together for several years.

25 As the Advocate General observed in points 28 and 29 of his Opinion, the systematic and teleological considerations which led the Court to hold, as is apparent in the case-law cited in paragraph 23 above, that the provisions of Directive 2004/38 did not confer a derived right of residence on third-country nationals, who are family members of a Union citizen, in that citizen's Member State of origin, are equally applicable as regards the persons envisaged in point (b) of the first subparagraph of Article 3(2) of Directive 2004/38. That directive cannot, therefore, confer a right on a third-country national, who is the Union citizen's unregistered partner, in the Member State of which the Union citizen is a national, for his application for residence authorisation to be facilitated by that Member State.

26 In the present case, it follows that although Ms Banger may come within the concept of 'partner with whom the Union citizen has a durable relationship, duly attested', in point (b) of the first subparagraph of Article 3(2) of Directive 2004/38, that directive cannot, however, confer a right on Ms Banger for her application for residence authorisation to be facilitated by the United Kingdom.

27 However, the Court has acknowledged, in certain cases, that third-country nationals, family members of a Union citizen, who were not eligible on the basis of Directive 2004/38 for a derived right of residence in the Member State of which that citizen is a national, could, nevertheless, be accorded such a right on the basis of Article 21(1) TFEU (judgment of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385, paragraph 23).

28 That consideration is based upon settled case-law, according to which, in essence, if no such derived right of residence were granted to such a third-country national, a Union citizen would be discouraged from leaving the Member State of which he is a national in order to exercise his right of residence under Article 21(1) TFEU in another Member State because he is uncertain whether he will be able to continue in his Member State of origin a family life which has been created or strengthened, with that third-country national, in the host Member State, during a genuine residence (see, to that effect, judgments of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 54, and of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385, paragraph 24).

29 According to that case-law, the conditions under which that derived right of residence may be granted should not, in principle, be stricter than those provided for by Directive 2004/38 for the grant of such a right of residence to a third-country national who is a family member of a Union citizen in a case where that citizen has exercised his right of freedom of movement by becoming established in a Member State other than that of which he is a national. Even though Directive 2004/38 does not cover the return of that Union citizen to the Member State of which he is a national in order to reside there, it should be applied by analogy (see, to that effect, judgments of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraphs 50 and 61 and the case-law cited, and of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385, paragraph 25).

30 In that regard, it must be stated that point (b) of the first subparagraph of Article 3(2) of Directive 2004/38 relates specifically to the partner with whom the Union citizen has a durable relationship that is duly attested. That provision provides that the host Member State must, in accordance with its national legislation, facilitate entry and residence for that partner.

31 According to the Court's case-law, Article 3(2) of Directive 2004/38 does not require the Member States to accord a right of entry and residence to third-country nationals envisaged in that provision, but imposes an obligation on those Member States to confer a certain advantage on applications submitted by the third-country nationals envisaged in that article, compared with applications for entry and residence of other nationals of third countries (see, to that effect, judgment of 5 September 2012, *Rahman and Others*, C-83/11, EU:C:2012:519, paragraph 21).

32 As the Advocate General observed in points 46 and 47 of his Opinion, the case-law cited in paragraph 29 above is equally applicable as regards the partner with whom the Union citizen has a durable relationship that is duly attested, within the meaning of point (b) of the first subparagraph of Article 3(2) of Directive 2004/38. Consequently, a third-country national having such a relationship with a Union citizen who has exercised his right of freedom of movement and returns to the Member State of which he is national in order to reside there, must not, when that Union citizen returns to that Member State, be the subject of less favourable treatment than that provided for under that directive for a third-country national having a durable relationship that is duly attested with a Union citizen exercising his right of freedom of movement in Member States other than that of which he is a national.

33 In a situation such as that in question in the main proceedings, Directive 2004/38, including point (b) of the first subparagraph of Article 3(2) thereof, must be applied by analogy as regards the conditions in which the entry and residence of third-country nationals envisaged by that directive must be facilitated.

34 That conclusion cannot be called in question by the United Kingdom Government's argument according to which, in paragraph 63 of the judgment of 12 March 2014, *O. and B.* (C-456/12, EU:C:2014:135), the grant of a derived right of residence in the Member State of origin was confined solely to third-country nationals who are a 'family member' as defined in Article 2(2) of Directive 2004/38. As the Advocate General observed in point 35 of his Opinion, although in that judgment the Court held that a third-country national who does not have the status of a family member may not enjoy, in the host Member State, a derived right of residence under Directive 2004/38 or Article 21(1) TFEU, that judgment does not, however, exclude the obligation for that Member State to facilitate the entry and residence of such a national in accordance with Article 3(2) of that directive.

35 In the light of the foregoing considerations, the answer to the first and second questions is that Article 21(1) TFEU must be interpreted as requiring the Member State of which a Union citizen is a national to facilitate the provision of a residence authorisation to the unregistered partner, a third-country national with whom that Union citizen has a durable relationship that is duly attested, where the Union citizen, having exercised his right of freedom of movement to work in a second Member State, in accordance with the conditions laid down in Directive 2004/38, returns with his partner to the Member State of which he is a national in order to reside there.

The third question

36 By its third question, the Upper Tribunal (Immigration and Asylum Chamber) asks, in essence, whether Article 21(1) TFEU must be interpreted as meaning that a decision to refuse a residence authorisation to the third-country national and unregistered partner of a Union citizen, where that Union citizen, having exercised his right of freedom of movement to work in a second Member State, in accordance with the conditions laid down in Directive 2004/38, returns with his partner to the Member State of which he is a national in order to reside there, must be founded on an extensive examination of the applicant's personal circumstances and be justified by reasons.

37 As was pointed out in paragraph 31 above, pursuant to Article 3(2) of Directive 2004/38, applicable by analogy to a case of return such as that at issue in the main proceedings, Member States are under an obligation to confer a certain advantage on applications submitted by the third-country nationals envisaged in that article, compared with applications for entry and residence of other nationals of third countries.

38 The Court has held that, in order to meet that obligation, Member States must, in accordance with the second subparagraph of Article 3(2) of Directive 2004/38, make it possible for persons envisaged in the first subparagraph of Article 3(2) of that directive 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 (judgment of 5 September 2012, *Rahman and Others*, C-83/11, EU:C:2012:519, paragraph 22).

39 When undertaking that examination of the applicant's personal circumstances, it is incumbent upon the competent authority to take account of the various factors that may be relevant in the particular case (see, to that effect, judgment of 5 September 2012, *Rahman and Others*, C-83/11, EU:C:2012:519, paragraph 23).

40 In the light both of the absence of more specific rules in Directive 2004/38 and of the use of the words 'in accordance with its national legislation' in Article 3(2) of that directive, each Member State has a wide discretion as regards the selection of the factors to be taken into account. Nonetheless, Member States must ensure that their legislation contains criteria which are consistent with the normal meaning of the term 'facilitate' and which do not deprive that provision of its effectiveness (see, to that effect, judgment of 5 September 2012, *Rahman and Others*, C-83/11, EU:C:2012:519, paragraph 24).

41 In the light of the foregoing considerations, the answer to the third question is that Article 21(1) TFEU must be interpreted as meaning that a decision to refuse a residence authorisation to the third-country national and unregistered partner of a Union citizen, where that Union citizen, having exercised his right of freedom of movement to work in a second Member State, in accordance with the conditions laid down in Directive 2004/38, returns with his partner to the Member State of which he is a national in order to reside there, must be founded on an extensive examination of the applicant's personal circumstances and be justified by reasons.

The fourth question

42 First of all, the Court notes that it is apparent from the order for reference that a differently constituted chamber of the Upper Tribunal (Immigration and Asylum Chamber) held that the persons envisaged in Article 3(2) of Directive 2004/38 had no right of appeal under the 2006 Regulations. The fourth question must be understood in that context. The Upper Tribunal raises, therefore, not the possible absence of review by a court for those persons, but whether Directive 2004/38 requires a redress procedure whereby matters of both fact and law may be reviewed by a court.

43 In those circumstances, it must be found that, by its fourth question, the Upper Tribunal asks, in essence, whether Article 3(2) of Directive 2004/38 must be interpreted as meaning that third-country nationals envisaged in that provision must have available to them a redress procedure whereby matters of both fact and law may be reviewed by the court, in order to dispute a decision to refuse a residence authorisation taken against them.

44 According to Article 15(1) of Directive 2004/38, the procedures provided for by Articles 30 and 31 of that directive are to 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. Under Article 31(1) of that directive, the persons concerned are to 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.

45 However, those provisions do not expressly mention the persons envisaged, in particular, in point (b) of the first subparagraph of Article 3(2) of Directive 2004/38.

46 In that regard, as the Advocate General observed in point 87 of his Opinion, the concept of 'family members' is used in other provisions of Directive 2004/38 also to include the persons envisaged in Article 3(2) of that directive. In particular, Article 10 of that directive, which concerns the issuance of residence cards to 'family members of a Union citizen', mentions in paragraph 2(e) and (f) the documents to be presented, in order for that residence card to be issued, by the persons envisaged in points (a) and (b) of the first subparagraph of Article 3(2) of that directive. Similarly, Article 8(5) of Directive 2004/38, which concerns the documents to be presented for the registration certificate to be issued to 'family members' mentions, in paragraphs (e) and (f), the persons referred to in Article 3(2) of that directive.

47 In addition, according to the Court's case-law cited in paragraph 38 above, Member States must, in accordance with the second subparagraph of Article 3(2) of Directive 2004/38, make it possible for persons envisaged in the first subparagraph of Article 3(2) of that directive 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.

48 Since the provisions of Directive 2004/38 must be interpreted in a manner which complies with the requirements flowing from Article 47 of the Charter of Fundamental Rights of the European Union (see, to that effect, judgment of 4 June 2013, *ZZ*, C-300/11, EU:C:2013:363, paragraph 50), those persons must have available to them an effective judicial remedy against a decision, under that provision, permitting a review of the legality of that decision as regards matters of both fact and law in the light of EU law (see, to that effect, judgment of 17 November 2011, *Gaydarov*, C-430/10, EU:C:2011:749, paragraph 41).

49 Consequently, it must be found that the procedural safeguards provided for in Article 31(1) of Directive 2004/38 are applicable to the persons envisaged in point (b) of the first subparagraph of Article 3(2) of that directive.

50 As regards the content of those procedural safeguards, according to the Court's case-law, a person envisaged in Article 3(2) of that directive is entitled to a review by a court of whether the national legislation and its application have remained within the limits of the discretion set by that directive (judgment of 5 September 2012, *Rahman and Others*, C-83/11, EU:C:2012:519, paragraph 25).

51 As regards its review of the discretion enjoyed by the competent national authorities, the national court must ascertain in particular whether the contested decision is based on a sufficiently solid factual basis. That review must also relate to compliance with procedural safeguards, which is of fundamental importance enabling the court to ascertain whether the factual and legal elements on which the exercise of the power of assessment depends were present (see, by analogy, judgment of 4 April 2017, *Fahimian*, C-544/15, EU:C:2017:255, paragraphs 45 and 46). Those safeguards

include, in accordance with Article 3(2) of Directive 2004/38, the obligation for those authorities to undertake an extensive examination of the applicant's personal circumstances and to justify any denial of entry or residence.

52 In the light of the foregoing considerations, the answer to the fourth question is that Article 3(2) of Directive 2004/38 must be interpreted as meaning that the third-country nationals envisaged in that provision must have available to them a redress procedure in order to challenge a decision to refuse a residence authorisation taken against them, following which the national court must be able to ascertain whether the refusal decision is based on a sufficiently solid factual basis and whether the procedural safeguards were complied with. Those safeguards include the obligation for the competent national authorities to undertake an extensive examination of the applicant's personal circumstances and to justify any denial of entry or residence.

Costs

53 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 (Fourth Chamber) hereby rules:

1. **Article 21(1) TFEU must be interpreted as requiring the Member State of which a Union citizen is a national to facilitate the provision of a residence authorisation to the unregistered partner, a third-country national with whom that Union citizen has a durable relationship that is duly attested, where the Union citizen, having exercised his right of freedom of movement to work in a second Member State, in accordance with the conditions laid down in 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, returns with his partner to the Member State of which he is a national in order to reside there.**

2. **Article 21(1) TFEU must be interpreted as meaning that a decision to refuse a residence authorisation to the third-country national and unregistered partner of a Union citizen, where that Union citizen, having exercised his right of freedom of movement to work in a second Member State, in accordance with the conditions laid down in Directive 2004/38, returns with his partner to the Member State of which he is a national in order to reside there, must be founded on an extensive examination of the applicant's personal circumstances and be justified by reasons.**

3. **Article 3(2) of Directive 2004/38 must be interpreted as meaning that the third-country nationals envisaged in that provision must have available to them a redress procedure in order to challenge a decision to refuse a residence authorisation taken against them, following which the national court must be able to ascertain whether the refusal decision is based on a sufficiently solid factual basis and whether the procedural safeguards were complied with. Those safeguards include the obligation for the competent national authorities to undertake an extensive examination of the applicant's personal circumstances and to justify any denial of entry or residence.**

von Danwitz Vajda Juhász

Jürimäe Lycourgos

Delivered in open court in Luxembourg on 12 July 2018.

A. Calot Escobar T. vonDanwitz

Registrar President of the Fourth Chamber

* Language of the case: English